

# **UNRWA's Role in Protecting Palestine Refugees**

**Working Paper No. 9**

December 2004

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This Paper was prepared for the BADIL Expert Forum, "Closing the Gaps: From Protection to Durable Solutions for Palestinian Refugees," 5-8 March 2004, al-Ahram Centre for Strategic and Political Studies, Cairo, Egypt.

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ISSN: 1728-1660

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## Introduction

Refugees are no different from other persons in their entitlement to protection against violations of their basic human rights. Where there is no state authority to provide this critical function, the intervention of the international community becomes essential. In the wake of the massive refugee problem following World War One (WWI), the international community, through the League of Nations, entrusted the task of protecting refugees to the International Committee of the Red Cross (ICRC).<sup>1</sup> The massive political upheaval occasioned during and after World War Two (WWII), including an unprecedented refugee crisis, necessitated the creation of new global institutions, foremost of which was the United Nations. While the new UN System began deliberating immediately about creating a global refugee protection regime, it was not until 1949 that such a regime took root through the establishment of the Office of the United Nations High Commissioner for Refugees (UNHCR).<sup>2</sup>

During this period, the United Nations was deeply engaged with the Arab-Israeli conflict in Mandate Palestine and the consequent creation of the Palestinian refugee problem. In the absence of the soon-to-be-formed UNHCR, and in recognition of its own role in the Palestine problem, the UN General Assembly established a series of *ad hoc* bodies charged with, *inter alia*, the task of providing relief and assistance as well as the facilitation of durable solutions to the problem. Among these were the United Nations Mediator for Palestine,<sup>3</sup> the United Nations Relief for Palestine Refugees (UNRPR),<sup>4</sup> the United Nations Conciliation Commission for Palestine (UNCCP),<sup>5</sup> including its Economic Survey Mission (ESM), and, finally, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).<sup>6</sup>

Due to a number of political considerations, the assistance and durable solutions mandate for Palestine refugees remained with these *ad hoc* institutions, and the Palestine refugees were specifically excluded from the global protection regime administered by UNHCR, particularly under the 1951 Convention Relating to the Status of Refugees.<sup>7</sup> Of all of the *ad hoc* bodies mentioned above, only UNRWA continues to operate today, providing essential relief and humanitarian assistance, with a very limited level of protection,<sup>8</sup> to the Palestine refugees. The lack of an explicit protection mandate for the Palestine refugees supported by UNRWA has received only periodic attention from the international community, e.g. in the aftermath of notable crises, and often for only limited periods of time or scope.<sup>9</sup> At no point since 1948, has the international community attempted to incorporate the Palestine refugees into the global refugee protection regime. Rather, the *ad hoc* approach continued to apply a weaker standard of protection, at best, to the Palestine refugees as compared to other refugees.

This “protection gap” has been the subject of considerable debate among influential academics and refugee advocacy groups. At the center of the debate has been the apparent double standard regarding the protection regime available for refugees world-wide and that afforded the Palestine refugees. Over 70 percent of all Palestinian refugees reside in

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<sup>1</sup> Gilbert Jaeger, “On the History of International Protection of Refugees”, *International Review of the Red Cross*, No. 843 (2001), pp. 727-737.

<sup>2</sup> UNGAR 319(IV), 3 December 1949.

<sup>3</sup> UNGAR 186(D-2), 14 May 1948.

<sup>4</sup> UNGAR 212(III), 19 November 1948.

<sup>5</sup> UNGAR 194(III), 11 December 1948.

<sup>6</sup> UNGAR 302(IV), 8 December 1949.

<sup>7</sup> 189 UNTS 150, 28 July 1951 (entry into force 22 April 1954). [hereinafter “1951 Convention”].

<sup>8</sup> See text accompanying *infra* notes 76-88.

<sup>9</sup> See text accompanying *infra* notes 76-88.

UNRWA's area of operations, protection for a majority of whom has been the responsibility of occupying Powers at various historical periods. More often than not, particularly in the context of Israel's prolonged 36-year occupation of the West Bank and Gaza Strip, the principal protection vulnerabilities of the refugees relate to the need to be protected from the excesses of the occupying Power.

## **Background**

### The creation of the Palestinian refugee problem

This paper does not deal with the historical origins of the Arab-Israeli dispute. Insofar as the exodus of refugees from Mandate Palestine is concerned, the United Nations Mediator for Palestine, Count Folke Bernadotte, commented on the issue in a Progress Report dated 16 September 1948 in which he informed the Secretary-General for transmission to members of the United Nations of the following:

As a result of the hostilities in Palestine, an alarming number of persons have been displaced from their homes. Arabs form the vast majority of refugees in Palestine and the neighbouring countries...It is, however, undeniable that no settlement can be just and complete if recognition is not accorded to the right of the Arab refugee to return to the home from which he has been dislodged by the hazards and strategy of the armed conflict between Arabs and Jews in Palestine. The majority of these refugees have come from territory which, under the Assembly resolution of 29 November [UNGAR 181 (II)], was to be included in the Jewish State. The exodus of Palestinian Arabs resulted from panic created by fighting in their communities, by rumours concerning real or alleged acts of terrorism, or expulsion. It would be an offence against the principles of elemental justice if these innocent victims of the conflict were denied the right to return to their homes while Jewish immigrants flow into Palestine, and, indeed, at least offer the threat of permanent replacement of the Arab refugees who have been rooted in the land for centuries...There have been numerous reports from reliable sources of large-scale looting, pillaging and plundering, and of instances of destruction of villages without apparent military necessity.<sup>10</sup>

Elsewhere in the Progress Report, refuting charges that the flight of the Palestinian Arab refugees had been incited by Arab leaders, Bernadotte noted that "as a result of the conflict in Palestine, almost the whole of the Arab population fled or was expelled from the area under Jewish occupation."<sup>11</sup> The refugee problem was compounded by two acts taken unilaterally by the Provisional Government of the State of Israel: (1) a war-time decision to refuse repatriation of Arab refugees;<sup>12</sup> and (2) the destruction of the vast majority of the villages from which the refugees had been expelled and/or fled, and the settlement of Jewish immigrants in Arab properties left standing.<sup>13</sup>

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<sup>10</sup> "Progress Report of the UN Mediator for Palestine", GAOR 3<sup>rd</sup> Sess. Supp. 11, UN Doc. A/648, at Pt. 1, V, paras. 2, 6 and 7 [hereinafter "Progress Report"].

<sup>11</sup> As quoted in "The Origins and Evolution of the Palestine Problem," 1917-1988, UN New York, 1990.

<sup>12</sup> L. Takkenberg, *The Status of Palestinian Refugees in International Law*. Oxford: Clarendon Press, 1998, at 16.

<sup>13</sup> *Id.* at 17.

## The creation of a special international regime for Palestine Refugees

In reaching specific conclusions to provide a “reasonable, equitable and workable basis for settlement,” of the refugee problem, Count Bernadotte recommended in the Progress Report the establishment of “a Palestine conciliation commission...for a limited period...responsible to the United Nations, and act[ing] under its authority.”<sup>14</sup> Thus spawned the creation of what would evolve into a special *ad hoc* regime applicable to the Palestine refugees. Regarding the Arab refugees, Bernadotte’s specific conclusions were as follows:

The right of the Arab refugees to return to their homes in Jewish-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...<sup>15</sup>

The UN General Assembly, vide resolution 194(III) of 11 December 1948, established the UNCCP to assume as necessary the functions of the UN Mediator on Palestine and the United Nations Truce Commission.<sup>16</sup> The General Assembly instructed the UNCCP to “take steps to assist the governments and authorities concerned to achieve a final settlement of all questions outstanding between them.”<sup>17</sup> While the Assembly commented on outstanding questions such as the status of the holy places and Jerusalem, access to transportation and communication facilities, etc., on the issue of refugees it resolved that those:

wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which under principals of international law or in equity should be made good by the governments or authorities responsible.<sup>18</sup>

The General Assembly had thus asked the UNCCP to address the Palestine refugee problem in the overall context of a final settlement of outstanding questions because the Government of the State of Israel was opposed to a blanket return of the refugees, and insisted that even a return “on purely humanitarian grounds in disregard [of the] military, political [and] economic aspects might even aggravate [the] problem.”<sup>19</sup> The General Assembly also instructed the UNCCP to “facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation,” and authorized it to “appoint such subsidiary bodies” in order to discharge this function.<sup>20</sup>

Though UNGAR 194 (III) does not specifically refer to the “protection” of the Palestine refugees, such a mandate was explicitly stated by the General Assembly in its resolution 394 (V) of 14 December 1950 while considering the progress report of the UNCCP. It directed the UNCCP to “establish an office which, under the direction of the commission, shall...continue consultations with the parties concerned regarding measures for the *protection* of the rights,

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<sup>14</sup> Progress Report, *supra* note 10 at Pt. 1, VIII, para. 4.

<sup>15</sup> *Id.*

<sup>16</sup> UNGAR 194 (III) 11 Dec. 1948.

<sup>17</sup> *Id.* at para. 6.

<sup>18</sup> *Id.* at para. 11.

<sup>19</sup> Cablegram dated 1 August 1948 from the United Nations Mediator to the Secretary-General Concerning Arab Refugees, UN Department of Public Information, Press Release PAL/236, 5 August 1948.

<sup>20</sup> *Id.* at paras. 11-12.

property and interests of the refugees” [emphasis added].<sup>21</sup> It also called upon “the governments concerned to undertake measures to ensure that refugees, whether repatriated or resettled, will be treated without any discrimination either in law or in fact.”<sup>22</sup>

In August 1948, Israel submitted its proposals to the UNCCP on the refugee problem, stating that “the solution of the refugee problem was to be sought primarily in resettlement in Arab territories,” and that it was prepared to accept the return of very limited numbers of refugees subject to Israel maintaining a right to resettle them in locations of its choosing.<sup>23</sup> The Arab delegations conveyed to the UNCCP that “the solution of the refugee problem should be sought in the repatriation of the refugees in Israeli controlled territory and in the resettlement of those not repatriated in Arab countries or in the zone of Palestine not under Israeli control.”<sup>24</sup> Shortly thereafter, the UNCCP established the Economic Survey Mission (ESM) to “examine the economic situation of the countries” affected by the conflict, and recommend to the commission an integrated programme to, *inter alia*:

facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation pursuant to the provisions of paragraph 11 of the General Assembly’s resolution of 11 December 1948, in order to reintegrate the refugees into the economic life of the area on a self-sustaining basis within a minimum period of time.<sup>25</sup>

Based on the first interim report of the ESM, the General Assembly, in resolution 302 (IV) of 8 December 1949, recognized that “without prejudice to the provisions of paragraph 11 of General Assembly resolution 194 (III) of 11 December 1948, continued assistance for the relief of the Palestine refugees is necessary to prevent conditions of starvation and distress among them and to further conditions of peace and stability.” It established UNRWA “to carry out in collaboration with local governments the direct relief and works programmes as recommended by the Economic Survey Mission.”<sup>26</sup> However, in resolution 393 (V) of 2 December 1950 the General Assembly considered that “without prejudice to the provisions of General Assembly resolution 194 (III) of 11 December 1948, the reintegration of the refugees into the economic life of the Near East, either by repatriation or resettlement, is essential in

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<sup>21</sup> UNGAR 394 (V) 14 Dec. 1950, A/RES/394 (V), para. 2.

<sup>22</sup> *Id.* at para. 3.

<sup>23</sup> United Nations Conciliation Commission for Palestine, Fourth Progress Report, 22 September 1949, A/992 at para. 17.

<sup>24</sup> *Id.* at para. 12.

<sup>25</sup> *Id.* at Annex I. Among other things, the UNCCP recommended that the ESM, in collaboration with the governments concerned:

...(b)...examine proposals submitted by the governments concerned for economic development and settlement projects requiring outside assistance which would make possible absorption of the refugees into the economy of the area on a self-sustained basis in a minimum time with a minimum expenditure; (c) examine other economic projects which can, with outside assistance, provide temporary employment for the refugees...;...(e) estimate the number of refugees who cannot be supported directly or indirectly through the employment envisaged...; (f) study the problem of compensation to refugees...with special reference to the relationship of such compensation to the proposed settlement projects; (g) study the problem of rehabilitation of refugees, including matters concerning their civil status, health, education and social services; (h) propose an organizational structure to achieve the objectives...within a United Nations framework, to coordinate, supervise and facilitate measures for relief, resettlement, economic development and related requirements such as community service facilities, bearing in mind the interests of all governments concerned.

*See Id.* at Annex I.

<sup>26</sup> UNGAR 302 (IV), 8 December 1949.

preparation for the time when international assistance is no longer available, and for the realization of conditions of peace and stability in the area.”<sup>27</sup> Thus, by the early 1950’s, the special regimes put in place by the United Nations to deal with the Palestine refugee problem, crystallized into two institutions: (1) the UNCCP, charged with facilitating the search for durable solutions and the provision of protection to the Palestine refugees; and (2) UNRWA, mandated to provide essential humanitarian and relief assistance.

### UNHCR and the 1951 Convention

In contrast to the *ad hoc* protection regime established by the United Nations to deal with the Palestine refugees, the General Assembly created UNHCR through resolution 319 (IV) of 3 December 1949.<sup>28</sup> UNHCR’s mandate is set out in the Statute of the Office of the United Nations High Commissioner for Refugees, adopted by the General Assembly in resolution 428 (V) of 14 December 1950.<sup>29</sup> Article 1 of the UNHCR Statute provides that the UNHCR “shall assume the function of providing international protection...to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and...private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.”<sup>30</sup> Furthermore, article 8 of the UNHCR Statute provides that the High Commissioner “shall provide for the protection of refugees falling under the competence of his Office by:

- (a) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto;
- (b) Promoting through special agreements with Governments the execution of any measures calculated to improve the situation of refugees and to reduce the number requiring protection;
- (c) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
- (d) Promoting the admission of refugees, not excluding those in the most destitute categories, to the territories of States;
- (e) Endeavouring to obtain permission for refugees to transfer their assets and especially those necessary for their resettlement;
- (f) Obtaining from Governments information concerning the number and conditions of refugees in their territories and the laws and regulations concerning them;
- (g) Keeping in close touch with the Government and inter-governmental organizations concerned;
- (h) Establishing contact in such manner as he may think best with private organizations dealing with refugee questions; and

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<sup>27</sup> UNGAR 393 (V), 2 December 1950. Importantly, although UNRWA was mandated to facilitate the “reintegration of the refugees into the economic life of the Near East, either by repatriation or resettlement,” in practice its efforts solely focused on resettlement in host countries and, to a very limited extent in its early years, provided limited assistance to refugees seeking to resettle in third countries. By the mid-to-late 1950s the General Assembly had annually noted that “no substantial progress” had “been made in the programme for reintegration of refugees,” and directed the Agency to “plan and carry out projects and programmes relating to self-support, education and vocational training.” See UNGARs 916 (X), 3 December 1955; 1315 (XIII), 12 December 1958; 1456 (XIV), 9 December 1959; 1856 (XVII), 20 December 1962; and 1912 (XVIII), 3 December 1963.

<sup>28</sup> UNGAR 319 (IV) 3 December 1949. This resolution decided to “establish, as of 1 January 1951, a High Commissioner’s Office for Refugees.”

<sup>29</sup> Statute of the Office of the United Nations High Commissioner for Refugees, UNGAR 428 (V) 14 December 1950, annex [hereinafter “UNHCR Statute”].

<sup>30</sup> *Id.* at art. 1.

- (i) Facilitating the co-ordination of the efforts of private organizations concerned with the welfare of refugees.”<sup>31</sup>

Thus, from its very inception, the “cornerstone” of the UNHCR has been the “international protection” of refugees and displaced persons.<sup>32</sup> Among other things, it has discharged this duty through the promotion of international refugee law – particularly as codified in the 1951 Convention and the 1967 Protocol thereto<sup>33</sup> – foremost of which is the principle of *non-refoulement*, or the prohibition against the expulsion or return of “a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>34</sup> For these purposes, article 1A(2) of the 1951 Convention defines as a “refugee” any person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>35</sup>

In addition to protection, the UNHCR has sought “long-term” or “durable solutions” to refugee problems “by helping refugees repatriate to their homeland if conditions warrant, by helping them to integrate in their countries of asylum or to resettle in third countries.”<sup>36</sup>

Over the years, UNHCR has developed a range of operational experience that includes: asylum and resettlement assistance; the provision of health, education and social services; the implementation of special programmes for women, children, and the elderly; large scale relief operations; community development for purposes of durable reintegration of refugees; and repatriation operations.<sup>37</sup> Although the UNHCR was originally created as a temporary organization, its mandate has been extended every five years since its founding.<sup>38</sup> Today, it is “one of the world’s principal humanitarian agencies,” employing more than 5,000 personnel and helping over 21.8 million people in over 120 countries.<sup>39</sup> This mandate, however, does not extend to the vast majority of Palestine refugees by virtue of the existence of the special international *ad hoc* regime governing their treatment.

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<sup>31</sup> *Id.* at art. 8.

<sup>32</sup> UNHCR, *Helping Refugees: An Introduction to UNHCR* (2001) at 6 [hereinafter “Helping Refugees”].

<sup>33</sup> Protocol Relating to the Status of Refugees, 31 January 1967 (entry into force: 4 October 1967), 606 UNTS 267 [hereinafter “1967 Protocol”].

<sup>34</sup> 1951 Convention, *supra* note 7, art. 33(1). The prohibition against *refoulement* is not absolute however. Article 33(2) provides that the principle of *non-refoulement* may not be invoked “by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

<sup>35</sup> 1951 Convention, *supra* note 7, art. 1(A)2. Through UNHCR promotion, the legal principles outlined in the 1951 Convention and the 1967 Protocol – particularly the definition of a “Convention refugee” and the principle of *non-refoulement* – have been gradually incorporated into the domestic legislation of many of the states party to those conventions.

<sup>36</sup> *Helping Refugees*, *supra* note 32 at 7.

<sup>37</sup> *Id.* at 10.

<sup>38</sup> This is with the exception of its first mandate, which spanned three-years. *See id.* at 4-5.

<sup>39</sup> *Id.* at 5.

This flows from the following two related provisions of the UNHCR Statute and the 1951 Convention, respectively. The first is article 7C of the UNHCR Statute which 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.”<sup>40</sup> As the Palestine refugees had then been considered to be receiving protection and assistance through the UNCCP and UNRWA, respectively, they were effectively excluded from UNHCR’s mandate. Despite the clarity of the language employed by the drafters of article 7C, there was considerable confusion among UNHCR officials in the early 1950’s as to the extent of the geographical and personal jurisdiction exercised over the Palestine refugees by UNRWA, primarily due to the Agency’s inability to establish a firm definition of “Palestine refugee” or to set out the exact geographical parameters of its area of operations in its early years. The matter was eventually settled in 1954 when both organizations issued the following joint press release:

As far as the United Nations is concerned, and without prejudice to the responsibility of individual governments, the material welfare of Palestine refugees in the Near East is the exclusive responsibility of UNRWA, whereas the protection interests of those refugees as regards compensation and repatriation is the concern of the Palestine Conciliation Commission. The mandate of the High Commissioner [for Refugees] does not extend to them.<sup>41</sup>

The second of the provisions excluding most Palestine refugees from UNHCR coverage is article 1D of the 1951 Convention. Building on article 7C of the UNHCR Statute, article 1D attempts to address the issue of Palestine refugees not actually receiving protection or assistance from UNRWA through the addition of what some have termed an “inclusion clause”. Article 1D provides that the 1951 Convention

shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.<sup>42</sup>

Over the years, the second paragraph of article 1D has been interpreted by UNHCR to mean that any registered Palestine refugee situated *outside* of UNRWA’s area of operations – not able to receive protection or assistance from UNRWA because the Agency requires physical presence to claim beneficiary status – is automatically subject to UNHCR’s jurisdiction and may claim the benefits of the 1951 Convention.<sup>43</sup> Although it is impossible to know with any precision the number of Palestine refugees actually resident outside of the Agency’s area of operations, it would be reasonable to assert that they comprise a significant minority of the total registered refugee population.<sup>44</sup> Moreover, the protection needs of this minority of

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<sup>40</sup> UNHCR Statute, *supra* note 29, art. 7(c).

<sup>41</sup> Takkenberg, *supra* note 12 at 305.

<sup>42</sup> 1951 Convention, *supra* note 7, art. 1D.

<sup>43</sup> Takkenberg, *supra* note 12 at 306. See *UNHCR Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestinian refugees* (Office of the United Nations High Commissioner for Refugees, October 2002) [hereinafter “Note on the Applicability of Article 1D”].

<sup>44</sup> According to UNRWA, as of 30 June 2003 there were 4.082 million registered Palestine refugees.

Palestine refugees tend to focus on claims for asylum and resettlement in third states which, although important, cannot be said to represent the main protection concerns of the vast majority of Palestine refugees who continue to reside in UNRWA's area of operations. In particular, those Palestine refugees resident in the OPT, as well as those who have at various periods in history been subject to other occupations, harbour far more pressing and substantial protection concerns based principally, though not exclusively, on the need to safeguard their right to life and security of the person and property. As will be seen in the following section, the failure of the special *ad hoc* regime for the Palestine refugees to provide protection in accordance with international law and practice has led to the emergence of a "protection gap" in comparison to other refugee groups.

## The Protection Gap

### What is "Protection"?

Although "refugees have existed as long as history,...an awareness of the responsibility of the international community to provide protection and find solutions for refugees dates only from the time of the League of Nations."<sup>45</sup> Since that time, mechanisms of international refugee protection have evolved in a manner that have constantly challenged the state-centered foundation upon which the international system was founded. At its very core, international refugee protection concerns *individual/group* rights as opposed to state rights. The constant need to balance between competing individual/group and state rights, coupled with the ever-increasing complexity of global refugee crises, has produced a wide array of mechanisms available for international refugee protection, the suitability of which depends on the situation in which the refugee finds her/himself. As noted by one expert, although there are "certain fundamental principles in the protection of refugees, each problem has to be considered on its own facts."<sup>46</sup>

Although article 8 of the UNHCR Statute provides a good general statement of the mechanisms available for protection of refugees,<sup>47</sup> it does not set out the totality of protection options that has evolved since its promulgation in 1950. The options available in international refugee protection include:

- (a) registration and documentation of refugee individuals or groups;
- (b) provision of special travel documents to refugee individuals or groups;
- (c) protection by publicity, particularly in relation to human rights violations; and
- (d) promotion of international refugee law, both at the international and domestic levels.
- (e) provision of humanitarian emergency assistance, including food, shelter and primary health care;
- (f) provision of "temporary protection" in third states;
- (g) provision of legal aid to refugees, or legal intervention with relevant state authorities;
- (h) unilateral or multilateral interventions short of the use of force, such as economic sanctions against relevant state authorities; and

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<sup>45</sup> E. Feller, "The Evolution of the International Refugee Protection Regime," *5 Journal of Law and Policy* 129, at 131.

<sup>46</sup> D. McNamara and G. S. Goodwin-Gill, *UNHCR and International Refugee Protection*, Oxford Refugee Studies Programme Working Paper No. 2, University of Oxford, June 1999 at 16 [hereinafter "UNHCR and International Refugee Protection"]

<sup>47</sup> See text accompanying *supra* note 31.

- (i) facilitating durable solutions, including repatriation, resettlement in host states and asylum in third states.
- (j) implementing durable solutions, including repatriation, resettlement in host states and asylum in third states; and
- (k) ensuring physical protection through unilateral or multilateral interventions, not excluding under Chapter VII of the UN Charter, particularly in situations of armed conflict or belligerent occupation.

It is important to recognize that each of the protection options listed above is capable of being applied in a variety of “protection contexts”. These contexts include: human rights protection, diplomatic protection, consular protection, protection of the vulnerable including women, children, and the elderly, protection of peoples, including through political representation, protection of groups, and protection of civilian persons in armed conflict. Oftentimes, as is the case in the OPT, these contexts overlap and operate simultaneously, demanding a concerted and multi-pronged approach from the international community. In addition, although there is a general distinction between “international protection” on the one hand (i.e. of basic rights enjoyed by refugees qua refugees) and “durable solutions” on the other (i.e. measures taken to end refugee status), the case of the Palestine refugees is unique in the sense that the international community vested one particular body (the UNCCP; see below) with the mandate over both of these functions, to be exercised coterminously. As will be seen, the international community’s approach to protecting Palestine refugees has not sufficiently evolved in accordance with universal protection practices.

#### UNHCR and the Protection Gap

As previously mentioned, UNHCR provides protection to Palestine refugees residing outside UNRWA’s area of operations. For the most part, this protection is focused primarily on assisting Palestine refugees in seeking asylum in third states. Although UNHCR is well equipped to provide such assistance to Palestine refugees who may be outside UNRWA’s area of operations, its efforts in this respect have for years been frustrated by the manner in which national courts or administrative tribunals of States, particularly in Western Europe and North America, have interpreted provisions of the 1951 Convention that have been incorporated, in whole or in part, into their domestic legislation. In particular, years of “restrictive” interpretation of article 1D by judicial authorities in third countries has made it very difficult for Palestine refugees to obtain asylum in such countries.<sup>48</sup>

The restrictive interpretation of article 1D by judicial authorities in some third states has been the result of a failure to give effect to the “inclusion” clause contained in the second sentence of the article. Thus while some of these bodies recognize that the so-called “exclusion” clause of article 1D may not apply to a Palestine refugee asylum claimant on account of the fact that he/she is outside UNRWA’s area of operations, they do not determine that as a result such persons are *ipso facto* entitled to the benefits of the 1951 Convention (i.e. entitled to Convention refugee status on the basis alone of being outside UNRWA’s area of operations). Instead, once it is determined that the Palestine refugee asylum claimant is outside UNRWA’s area of operations, these authorities deem article 1D inapplicable and proceed to assess the claim under a generic “well-founded fear of persecution” test based on the Convention refugee definition contained in article 1A(2) of the 1951 Convention.<sup>49</sup> Countries that employ

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<sup>48</sup> Takkenberg, *supra* note 12 at 90.

<sup>49</sup> See text accompanying *supra* note 35.

this approach include the Federal Republic of Germany and the Netherlands.<sup>50</sup> Other countries – such as Austria, Canada, Switzerland and the United States – do not incorporate article 1D into domestic legislation at all, and the Convention refugee status of Palestine refugee asylum claimants is determined solely with reference to article 1A(2) or similar municipal legal provisions.

Over the years, these approaches have been encouraged by the UNHCR through its *Handbook on Procedures and Criteria for Determining Refugee Status*,<sup>51</sup> which is considered the most authoritative commentary on the 1951 Convention. With respect to article 1D, the UNHCR handbook provides that “a refugee from Palestine who finds himself outside” UNRWA’s area of operations “does not enjoy the assistance mentioned” in the first sentence of article 1D, “and may be considered for determination of his refugee status under the criteria of the 1951 Convention”<sup>52</sup> – thereby requiring the refugee claimant to satisfy the requirements of article 1A(2), notwithstanding the “inclusion” clause contained in article 1D.

In recognition of the difficulties its Handbook commentary on article 1D may have produced for Palestine refugees seeking asylum in third States, in October 2002 UNHCR published a Note on the Applicability of 1D to Palestine refugees.<sup>53</sup> The Note offers the most extensive commentary on article 1D to date, including the following important provisions:

6. If the person concerned is inside UNRWA's area of operations and is registered, or is eligible to be registered, with UNRWA, he or she should be considered as receiving protection or assistance within the sense of paragraph 1 of Article 1D, and hence is excluded from the benefits of the 1951 Convention and from the protection and assistance of UNHCR.

7. If, however, the person is outside UNRWA's area of operations, he or she no longer enjoys the protection or assistance of UNRWA and therefore falls within paragraph 2 of Article 1D, providing of course that Articles 1C, 1E and 1F do not apply. Such a person is *automatically entitled to the benefits of the 1951 Convention* and falls within the competence of UNHCR. This would also be the case even if the person has never resided inside UNRWA's area of operations. [emphasis added]<sup>54</sup>

Thus, whereas the UNHCR interpretation of article 1D once required Palestine refugees outside of UNRWA’s area of operations to satisfy the terms of article 1A(2) of the 1951 Convention before Convention refugee status could be granted, UNHCR now definitively regards any such refugee as *ipso facto* entitled to the benefits of the 1951 Convention, subject to various other generic exclusions contained in articles 1C, 1E and 1F.<sup>55</sup> This interpretation is

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<sup>50</sup> S. Akram and G. Goodwin-Gill, *Brief Amicus Curiae, United States Department of Justice Executive Office for Immigration Review* (Board of Immigration Appeals, Falls Church, Virginia) at 47 [hereinafter “Brief Amicus Curiae”].

<sup>51</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979) [hereinafter “UNHCR Handbook”].

<sup>52</sup> UNHCR Handbook, paras. 142-143, as quoted in Takkenberg, *supra* note 12 at 95.

<sup>53</sup> See Note on the Applicability of Article 1D, *supra* note 43.

<sup>54</sup> *Id.* at 2.

<sup>55</sup> Article 1C provides that the 1951 Convention “shall cease to apply to any person falling under the terms of section A if: (1) he has voluntarily re-availed himself of the protection of the country of his nationality; or (2) having lost his nationality, he has voluntarily re-acquired it; or (3) he has acquired a new nationality, and enjoys the protection of the country of his new nationality; or (4) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or (5) he can no longer, because of circumstances in connexion with which he has

concurrent with by a number of experts, including Guy Goodwin-Gill, Susan Akram and Lex Takkenberg.

The extent to which states have adopted the UNHCR's new interpretation of article 1D into domestic law is unclear. What is certain, is that the vast majority of states will likely regard it as merely a *recommended* approach to be used by domestic judicial authorities in the interpretation of article 1D. The non-binding character of this interpretation practically means that to the extent that the judicial authorities of third states remain committed to the older interpretation of article 1D, the *de facto* protection gap for Palestine refugee asylum claimants will continue to exist. In countries whose legal systems are based on principles of *stare decisis* – or judicial precedence – this problem may prove very difficult, though not impossible, to redress.

### UNCCP and the Protection Gap

It will be recalled that the UN General Assembly, through UNGAR 194 (III) of 11 December 1948, established the UNCCP with the express purpose of taking steps “to assist the governments and authorities concerned to achieve a final settlement of all questions outstanding between them,” including the refugee issue.<sup>56</sup> UNGAR 194 (III) also expressly instructed the UNCCP “to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation,”<sup>57</sup> thereby establishing the UNCCP's durable solutions mandate. The General Assembly named France, Turkey and the United States to the Commission.<sup>58</sup> The UNCCP's mandate regarding international protection of the Palestine refugees was expressly set out by the General Assembly in UNGAR 394 (V) of 14 December 1950, which provided that the UNCCP should establish and oversee a “Refugee Office” whose task would be to, *inter alia*, “continue consultations with the parties concerned regarding measures for the protection of the rights, property and interests of the refugees”.<sup>59</sup> Taken together, these General Assembly resolutions vested the UNCCP with a dual responsibility over protection of and durable solutions for the Palestine refugees, as

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been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality; and (6) being a person who has no nationality he is, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence; provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence.” Article 1E provides that the 1951 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.” Article 1F provides that the 1951 Convention “shall not apply to any person with respect to whom there are serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; or (c) he has been guilty of acts contrary to the purposes and principles of the United Nations.”

<sup>56</sup> UNGAR 194 (III), 11 Dec. 1948, at para. 6. As the successor body to the UN Mediator on Palestine, it can be said that the UNCCP functioned, in today's terminology, as somewhat of a facilitator of “final-status” issues.

<sup>57</sup> *Id.* at para. 11.

<sup>58</sup> UNRWA, *UNRWA: A Brief History, 1950-1982* (Vienna), at 13 [hereinafter “UNRWA: A Brief History”].

<sup>59</sup> UNGAR 394 (V), 14 Dec. 1950, A/RES/394 (V), at para. 2.

previously discussed. Prior to that, the UNCCP had outlined the following preliminary measures for the protection of the “rights, property and interests of the refugees:”

[T]he return to their lands and homes of Arab owners of orange groves, together with the necessary workmen and technicians; the immediate unfreezing of Arab accounts in Israeli banks; the abrogation of the [Israeli] Absentee [Property] Act; the suspension of all measures of requisition and occupation of Arab houses and the reuniting in their homes of refugees belonging to the same family; the assurance of freedom of worship and of respect of churches and mosques; the repatriation of religious personnel; the freeing of Wakf property; the assurance to refugees returning to their homes of the guarantees necessary to their security and their liberty.<sup>60</sup>

Efforts to mediate a final settlement of all outstanding questions between the parties to the conflict in a manner that would secure the protection of the rights of the Palestine refugees, particularly to repatriation in accordance with UNGAR 194 (III), were undertaken by the UNCCP. A number of proposals for repatriation of the refugees were put to the parties, despite the fact that as early as “the end of 1948, US and UN officials recognized that Israel was unwilling to repatriate large numbers of refugees.”<sup>61</sup> The issue was extensively discussed at peace talks held at Lausanne, Switzerland, in the Spring of 1949. In July 1949, Israel indicated its willingness, under severe US pressure, to repatriate 100,000 Palestine refugees as part of a larger peace settlement with the Arab States.<sup>62</sup> The offer was rejected by the Arab states as insufficient.<sup>63</sup> Similar efforts undertaken by the UNCCP at a Paris conference in 1951 yielded no fruit, and the issue remained unresolved.<sup>64</sup>

Faced with the lack of movement on repatriation, the UNCCP’s protection efforts turned towards resettling the Palestine refugees in the Arab host states. However, recognizing that host states and refugees were just as opposed to resettlement as Israel was to repatriation, the UNCCP established the ESM and, for the first time, focused on the objective of reintegrating “the refugees into the economic life of the area on a self-sustaining basis.”<sup>65</sup> As previously mentioned, the UNCCP established the ESM to study the economic feasibility of resettlement, and was therefore focused on the objective of reintegrating “the refugees into the economic life of the area on a self-sustaining basis.”<sup>66</sup> In an interim report issued in November 1949, the ESM noted that repatriation of the refugees “requires political decisions outside” its “competence”, and noted that “the only immediate constructive step in sight” would be “to give the refugees an opportunity to work where they now are.”<sup>67</sup> Accordingly, the ESM recommended the establishment of an agency designed to continue relief activities and initiate job-creation projects. Acting on this recommendation, the General Assembly created UNRWA in UNGAR 302 (IV) of 8 December 1949.

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<sup>60</sup> United Nations Conciliation Commission for Palestine, Fourth Progress Report, 22 September 1949, A/992 [hereinafter “UNCCP Fourth Progress Report”].

<sup>61</sup> B. Schiff, *Refugees unto the Third Generation: UN Aid to Palestinians*. Syracuse: Syracuse University Press, 1995, at 16.

<sup>62</sup> UNCCP Fourth Progress Report, *supra* note 60 at para. 9

<sup>63</sup> *Id.* at para. 10.

<sup>64</sup> United Nations Conciliation Commission for Palestine, Progress Report, 20 November 1951, A/1985, paras. 28-34 [hereinafter “November 1951 Progress Report”].

<sup>65</sup> *Terms of Reference of the Economic Survey Mission*, annex I to Fourth Progress Report, *supra* note 60.

<sup>66</sup> *Id.*

<sup>67</sup> Takkenberg, *supra* note 12 at 26.

Another protection activity undertaken with increased vigour by the UNCCP as a result of the lack of progress on repatriation, was the effort to obtain compensation for the refugees. UNGAR 394 (V) expressly directed the UNCCP Refugee Office to “make such arrangements as it may consider necessary for the assessment and payment of compensation in pursuance of paragraph 11 of General Assembly resolution 194 (III).”<sup>68</sup> After conducting a study on the matter, the Refugee Office determined that the estimated value of the movable and immovable property abandoned by the Palestinian refugees was 120 million Palestine pounds,<sup>69</sup> and held that this was a sum that “constituted a debt by the Government of Israel to the refugees.”<sup>70</sup> In the absence of agreement between the parties, no further action was taken on the issue. The UNCCP had limited success in 1952, when it concluded an agreement with the Government of Israel for “the complete release of Arab refugee accounts and safe deposit items blocked in banks in Israel.”<sup>71</sup>

Unable to qualitatively protect the interests of the Palestine refugees through efforts to mediate the conclusion of an agreement between the parties on repatriation and compensation, the UNCCP’s protection efforts focused on the establishment of an Office for Identification and Valuation of Arab Refugee Property, charged with the task of cataloguing the property records of the Palestine refugees with the ultimate aim of laying a foundation for the implementation of paragraph 11 of UNGAR 194 (III).<sup>72</sup> By 1964, the cataloguing was complete.<sup>73</sup> Since that year, the UNCCP has not made any contribution towards protecting the Palestine refugees. In fact, as early as 1951 the UNCCP concluded that “during its three years of existence” it had “been unable to make substantial progress in the task given to it by the General Assembly of assisting the parties to the Palestine dispute towards a final settlement of all questions outstanding between them,” and that “the present unwillingness of the parties fully to implement the General Assembly resolutions under which the Commission is operating, as well as the changes which have occurred in Palestine during the past three years, have made it impossible for the Commission to carry out its mandate.”<sup>74</sup>

Having never been formally wound-up, the UNCCP continues to report annually to the General Assembly asserting that its efforts to advance matters toward the implementation of UNGAR 194 (III) presuppose “substantial changes” in the positions of the parties.<sup>75</sup> The regularity with which these reports appear year after year constitutes a sober reminder of the extent of the protection gap that persists for Palestine refugees. This is particularly significant, given the fact that within the special *ad hoc* regime put in place by the United Nations to deal with the Palestine refugee problem, the UNCCP was expressly charged with facilitating the search for durable solutions and the provision of protection to the Palestine refugees, while UNRWA was specifically mandated to provide essential humanitarian and relief assistance.

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<sup>68</sup> UNGAR 394 (V), 14 Dec. 1950, at para. 2.

<sup>69</sup> *Historical Survey of the Efforts of the United Nations Conciliation Commission for Palestine to secure the implementation of paragraph 11 of General Assembly resolution 194 (III)*, UN Doc. A/AC.25/W.82/Rev.1, at paras. 56-59 [hereinafter “Historical Survey”].

<sup>70</sup> *Id.* at para. 59.

<sup>71</sup> *Id.* at para. 74.

<sup>72</sup> *Id.* at paras. 75 and 76.

<sup>73</sup> United Nations Conciliation Commission for Palestine, Twenty-Second Progress Report, UN Doc. A/5700, 11 May 1964, at para. 1.

<sup>74</sup> November 1951 Progress Report, *supra* note 64 at paras. 79 and 87.

<sup>75</sup> See for instance United Nations Conciliation Commission for Palestine, Twenty-Fourth Progress Report, UN Doc. A/6451, 30 September 1966. See also United Nations Conciliation Commission for Palestine, Twenty-Fifth Progress Report, UN Doc. A/6846, 30 September 1967.

## UNRWA and the Protection Gap

In accordance with General Assembly resolution 393 (V), UNRWA spent its first six years focused on reintegrating the Palestine refugees “into the economic life of the Near East either by repatriation or resettlement,” noting that it is “essential in preparation for the time when international assistance is no longer available, and for the realization of conditions of peace and stability in the area.” This form of “protection” was largely undertaken through four types of programmes: (1) “Work Relief”, i.e. small scales training and employment creation; (2) “Works Projects”, i.e. medium-sized public sector government-controlled projects such as road-building and tree-planting aimed at employment creation; (3) assistance to and subsidization for small numbers of Palestine refugees willing to resettle; and (4) large-scale regional development projects with regional governments. During this period, however, it became clear to the Agency that these programmes held little promise for significantly improving the economic well being of the Palestine refugees, in part because the first three were limited in scope and the fourth encountered resistance from the refugees and host governments.

This resulted in the gradual shift in the Agency’s programmes from reintegration to relief and human resource development. By the late 1950’s, the Agency had established its primary blueprint for its operations focused on vocational training, self-support, primary education, primary health care and continued relief for needy refugees. These humanitarian interventions eventually developed into the Agency’s three regular programmes of education, health and relief and social services, along with its microenterprise and microfinance special programme.

Notwithstanding UNRWA’s humanitarian focus, its mandate has at various points included a “passive” protection function, especially at times when the security and human rights of the Palestine refugees were under particular threat. The Agency’s “passive” protection activities began in 1982, following Israel’s invasion of Lebanon and the Sabra and Shatila massacre. In resolution 37/120 J of 16 December 1982, the General Assembly urged

the Secretary-General, in consultation with the United Nations Relief and Works Agency for Palestine Refugees in the Near East, and pending the withdrawal of Israeli forces from the Palestinian and other Arab territories occupied by Israel since 1967, including Jerusalem, to undertake effective measures to guarantee the safety and security and the legal and human rights of the Palestinian refugees in the occupied territories.<sup>76</sup>

As a result, UNRWA undertook to monitor the security of Palestine refugees in occupied Lebanon, issued public statements on the situation from time to time, and “took up the need for appropriate action...to protect the refugees” with the Government of Israel and various members of the Security Council.<sup>77</sup>

In addition, the General Assembly requested in resolution 37/120 I of 16 December 1982 that the Secretary-General, in cooperation with UNRWA, “issue identification cards to all Palestine refugees and their descendants, irrespective of whether they are recipients or not of rations and services from the Agency, as well as to all displaced persons and to those who have been prevented from returning to their homes as a result of the 1967 hostilities, and their

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<sup>76</sup> UNGAR 37/120 J, 16 Dec. 1982, at para. 1.

<sup>77</sup> Takkenberg, *supra* note 12 at 282.

descendants.”<sup>78</sup> Prior to that point, the Agency had decided to issue registered refugees with individual registration cards to replace the family cards, though it could not actually be implemented. The issuance of identification cards to those refugees and displaced persons not registered with the Agency required the concerted cooperation of the numerous countries in which they had taken-up residence over the years. In the absence of such cooperation, the Secretary-General and UNRWA were unable to carry out this measure.<sup>79</sup>

The *intifada* of 1987-1993 was the next occasion when UNRWA was called upon to implement “passive” protection activities in relation to the Palestine refugees. This came by way of Security Council resolution 605 of 22 December 1987, which after taking note of and strongly deploring Israeli violations of the human rights of the Palestinian people in the OPT, called upon the Secretary-General to assess the situation and to report to the Security Council “recommendations on ways and means for ensuring the safety and protection of the Palestinian civilians under Israeli occupation.”<sup>80</sup> In accordance with this resolution, the Secretary-General provided a report to the Security Council in which he outlined four principal means by which the protection of the Palestinian people in the OPT, including the refugees, could be secured: (1) physical protection; (2) legal protection; (3) protection by way of general assistance; and (4) protection by publicity.<sup>81</sup> Of these four protection mechanisms, UNRWA was specifically requested by the Secretary-General to enhance its “general assistance” capacity through the addition “of extra international staff” in the OPT to, *inter alia*, intervene with the authorities of the occupying Power in an effort to provide a modicum of “passive protection” to the Palestinians. Thus was initiated the Agency’s Refugee Affairs Officer (RAO) Programme, an integral component of its “programme of general assistance and protection.”

The RAO programme, which began in January 1988, constitutes the most expansive protection mechanism ever instituted by the Agency. According to the RAO Guidelines of 15 March 1989, the goals of the programme were two-fold: (1) to facilitate “UNRWA operations in the difficult prevailing circumstances” of the *intifada*; and (2) to provide “a degree of passive protection for the refugee [and, eventually, non-refugee] population.”<sup>82</sup> At any given period, there were 21 RAOs operating in the OPT. In addition, each of the Gaza and West Bank fields appointed a legal officer to support the programme. The specific duties of the RAOs included the following:

- (a) circulating throughout the OPT on a frequent, though unannounced, schedule for the purpose of observing and reporting to the respective Field Office any unusual or abnormal circumstances;
- (b) visiting Agency installations in the OPT and reporting any disruptions in Agency operations;
- (c) visiting camps and other areas under curfew, and reporting to the respective Field Office on any problems affecting the welfare of the population;
- (d) ascertaining and reporting as accurately as possible the names, ages, refugee status, circumstances and other appropriate information relating to Palestinians killed or wounded as a result of hostilities in the OPT;

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<sup>78</sup> UNGAR 37/120 I, 16 Dec. 1982, at para. 2.

<sup>79</sup> Takkenberg, *supra* note 12 at 283.

<sup>80</sup> UNSCR 605, 22 Dec. 1987, at para. 6.

<sup>81</sup> Report submitted to the Security Council by the Secretary-General in accordance with resolution 605 (1987), UN Doc. S/19443, at para. 28.

<sup>82</sup> RAO Guidelines, 3<sup>rd</sup> ed., 15 March 1989, at 2 [hereinafter “RAO Guidelines”].

- (e) liaising with local military governors and civilian administrators of the occupying Power on matters affecting the Agency's operations or the welfare of the refugees; and
- (f) visiting UNRWA staff members detained by the occupying Power.<sup>83</sup>

The general assistance and protection programme became a central supportive feature of UNRWA's programmes in the OPT by the early 1990s. By 1991 it had come to include a "legal aid scheme" run by the Agency with the purpose of helping the "refugees deal with a range of problems of life under occupation," including "sustained follow-up in cases of deaths, injuries and harassment; bureaucratic difficulties in obtaining various permits; discrimination in access to courts of law, welfare benefits, etc.; travel restrictions; and, various forms of collective punishment."<sup>84</sup> The conclusion of the Declaration of Principles on Interim Self-Government Arrangements (DOP) in 1993 and the establishment of the PA ushered in a period in which it was thought the RAO programme would soon no longer be required. Accordingly, the programme was officially suspended in the Gaza field in May 1994 and in the West Bank field in April 1996.<sup>85</sup> To this day, each of the Fields maintains a legal officer as part of its operations, although the functions of these officers have evolved and cover general legal matters.

Notwithstanding the many successes of the initiative, the RAO programme was from the start hindered by the fact that it possessed only a limited mandate of providing "passive protection" to the refugee and non-refugee populations of the OPT. This much was acknowledged in the RAO Guidelines which stated that the "passive protection" afforded through the programme was only "to be achieved by maintaining an international presence in the field, observing, reporting and, in appropriate circumstances, making contact with the Israeli security forces." As noted in the RAO Guidelines, "UNRWA has no power to enforce the rights of the refugees, and RAOs must not make physical contact or engage in heated arguments with the Israeli security forces."<sup>86</sup> Similarly, in a report to the Security Council dated 31 October 1990 the Secretary-General noted that although the RAO programme had "helped to defuse tense situations, avert maltreatment of vulnerable groups, reduce interference with the movement of ambulances, and facilitate the provision of food and medical aid during curfews," the programme's Palestinian beneficiaries were of the opinion that it did not have "the necessary impact on the behaviour of the Israeli authorities."<sup>87</sup> Thus, at its peak the RAO programme was unable to bridge the protection gap in relation to Palestine refugees in the OPT, who continued to face serious violations of person and property at the hands of the occupying Power. According to John Dugard, the Special Rapporteur of the United Nations Commission on Human Rights, these violations, which have persisted until the present, include:

[l]oss of life, inhuman and degrading treatment, arbitrary arrest and detention without trial, restrictions on freedom of movement, the arbitrary destruction of property, the denial of the most basic economic, social and educational rights, interference with access to health care, the excessive use of force against civilians and collective punishment.<sup>88</sup>

<sup>83</sup> See *id.* at 3 and Takkenberg, *supra* note 12 at 288.

<sup>84</sup> Takkenberg, *supra* note 12 at 300.

<sup>85</sup> *Id.* at 287.

<sup>86</sup> RAO Guidelines, *supra* note 82 at 2.

<sup>87</sup> UN Doc. S/21929, as quoted in Takkenberg, *supra* note 12 at 297.

<sup>88</sup> *Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine: Report of the Special Rapporteur of the Commission on Human Rights, Mr. John Dugard, on the situation of the human rights in the Palestinian territories occupied by Israel since 1967, submitted in*

In order to facilitate the Agency's activities under its emergency programme, the Operational Support Officers (OSO) programme was introduced in 2000 to assist in facilitating the delivery of humanitarian goods, securing the safe passage of Agency staff through checkpoints and more generally enhancing the proper implementation of Agency programmes in accordance with United Nations norms. While the OSO programme is not mandated or equipped to provide the Palestine refugees with protection (in the UNHCR sense), to the extent that it has assisted in the delivery of essential humanitarian aid to the refugees, it can be said to have indirectly, and in a relatively limited way, contributed to providing the refugees with a form of "passive" protection.

## Political Challenges

In contexts of conflict outside of the Palestine refugee case, success in providing "international protection", or effecting a durable solution, has been directly dependent on the existence of either (1) the support and will of the international community as manifest in the Security Council; and/or (2) the political will of the parties directly involved in the conflict. Thus, refugee problems in Afghanistan, Bosnia-Herzegovina, Cambodia, Central America, East Timor, Iraq, Kosovo, and Namibia have benefited from various levels of support/action from the Security Council, sometimes acting under Chapter VII of the UN Charter, and the political support of the parties directly involved in the conflict as manifest in either an express agreement or effective military intervention. In some of these cases, action was taken on the basis that the problem at hand constituted a threat to international peace and security.

The questions that must be posed in the context of the Palestine refugees are: Has the international community through the Security Council demonstrated sufficient will and support in bringing about conciliation or in militarily intervening with respect to the protection of Palestine refugees, deeming the issue a threat to international peace and security? Have the parties to the conflict demonstrated sufficient political will to address the issues of refugee protection and durable solutions? In short, the answer to each of the above must be "no".

This conclusion stems from the fact that in the Palestine refugee context, the concrete and practical support of the Security Council for a durable solution has never existed beyond its affirmation, in resolution 242 of 22 November 1967, of the necessity of achieving "a just settlement of the refugee problem",<sup>89</sup> as well as its endorsement of the Quartet Roadmap in resolution 1515 of 19 November 2003 which provides that there should be "an agreed, just, fair, and realistic solution to the refugee issue".<sup>90</sup> While the Quartet currently represents the international community, it has not taken any other practical steps in the direction of protecting the Palestine refugees or searching for a durable solution to their plight.

In so far as protection of Palestine refugees is concerned, an analysis of Security Council resolutions reveals a trend of weak Security Council intervention limited to instances of gross human rights violations of Palestinian civilians and refugees, a trend that is significantly at variance with Council behaviour in other refugee and conflict situations. For example, following the Sabra and Shatila massacre of September 1982 in which hundreds of Palestine refugees were brutally murdered in Beirut, the Security Council passed resolution 521 in which it condemned "the criminal massacre" but only went so far as to authorize the

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*accordance with Commission resolutions 1993/2 A and 2002/8*, UN Doc. E/CN.4/2003/30, 17 December 2002, at para. 4 [hereinafter "Human Rights Commission Report"].

<sup>89</sup> UNSCR 242 (1967), 22 November 1967.

<sup>90</sup> UNSCR 1515 (2003), 19 November 2003. For text of Roadmap, *see* UNDoc. S/2003/529.

Secretary-General “to increase the number of United Nations observers in and around Beirut” and to “initiate appropriate consultations” with the Lebanese government regarding “the possible deployment of United Nations forces.”<sup>91</sup> Likewise, at the height of the 1997-1993 *intifada*, and two months following the 8 October 1990 killing of 17 unarmed Palestinian civilians and the injuring of another 150 by Israeli border guards in Al-Haram Al-Sharif compound, the Security Council adopted resolution 681 in which it merely called upon the High Contracting Parties of the Fourth Geneva Convention to ensure that Israel respect its provisions, and for the Secretary-General “to monitor and observe the situation regarding Palestinian civilians under Israeli occupation, making new efforts in this regard.”<sup>92</sup> Finally, in the aftermath of the murder of 29 Palestinian worshipers at Al-Haram Al-Ibrahimi by a machinegun wielding Jewish settler in 1994 in Hebron, the Security Council passed resolution 904 in which it condemned the “massacre” but only went so far as to “call for measures to be taken to guarantee the safety and protection of the Palestinian civilians throughout the occupied territory.”<sup>93</sup> This included the call for the establishment of “a temporary international or foreign presence” as per the Israel-PLO Declaration of Principles on Interim Self-Government Arrangements of 13 September 1993, not a Council mandated UN presence as has happened in other cases.<sup>94</sup>

In contrast, following the killing of a number of refugees and three UNHCR staff members in East Timor, the Security Council passed resolution 1319 in which it recalled “that grave violations of international humanitarian and human rights law have been committed and that those responsible for these violations should be brought to justice.”<sup>95</sup> The UN figured prominently in bringing about East Timor’s independence and is now in the process of examining the possibility of helping it establish an *ad hoc* criminal tribunal for the purpose of trying persons responsible for serious crimes committed during the period of Indonesia’s rule. Likewise, the Security Council displayed considerable political will in establishing UNAMA for the purpose of leading the relief, recovery and reconstruction efforts in Afghanistan, as well as with requiring UNPROFOR in Bosnia-Herzegovina to act as a cease-fire monitor and to assist the UNHCR in the delivery of essential humanitarian assistance. Security Council action in the case of Bosnia-Herzegovina was also important for establishing the principle of UN-protected “safe areas” as a means of protecting vulnerable civilian and refugee populations. Although the use of such safe area designations in Bosnia-Herzegovina failed to stop atrocities during the war, particularly at Srebrenica,<sup>96</sup> the principle itself is sound and represented an innovative step taken by the Security Council to protect civilians and refugees during armed conflict.

Similarly, in the Palestine refugee context there has never existed a common political will among the parties to the conflict sufficient to considerably enhance the protection of the refugees’ interests or to implement a just and durable solution to their problem. As is well known, the refugees and their political leadership have consistently been of the view that a “just” resolution of their plight necessitates the recognition of their right to return to their homes in accordance with General Assembly resolution 194(III). On the other hand, the State of Israel has been equally adamant that no right to return exists for the Palestine refugees, that

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<sup>91</sup> UNSCR 521 (1982), 19 September 1982.

<sup>92</sup> UNSCR 681 (1990), 20 December 1990.

<sup>93</sup> UNSCR 904 (1994), 18 March 1994.

<sup>94</sup> *Id.* This resolution gave birth to the Temporary International Presence in Hebron (TIPH) observer team. See *Declaration of Principles on Interim Self-Government Arrangements*, Israel-Palestine Liberation Organization, 13 September 1993, Annex II, art. 3(d).

<sup>95</sup> UNSCR 1319 (2000), 8 September 2000.

<sup>96</sup> See generally *The Fall of Srebrenica, Report of the Secretary-General Pursuant to General Assembly Resolution 53/55*, UN Doc. A/54/549, 15 November 1999.

any such return would necessarily bring about the demise of Israel as a Jewish state, and that, therefore, the answer to the refugees' plight must be found in resettlement in a future Palestinian state, the host states or third countries.

In over half a century of conflict, these positions have essentially remained the same, and the plight of the Palestine refugees has gradually become worse. As a humanitarian organization, UNRWA was never mandated to conciliate and influence the political positions of the parties to the conflict on the refugee question. As noted above, this task was left to the UNCCP, whose "durable solution" efforts essentially came to a halt because of the inability of the parties to reconcile those positions. Since the beginning of the Madrid and Oslo processes, the Secretary-General has exercised "durable solutions" efforts through the Office of the United Nations Special Coordinator in the Occupied Territories, his Personal Representative to the Palestine Liberation Organization and the Palestinian Authority and the framework of the Quartet. UNRWA, on the other hand, has continued to provide essential humanitarian relief and development-oriented interventions to the refugees for over five decades.

## Conclusion

Any approach to protecting Palestine refugees and implementing a just and durable solution must begin by acknowledging and dealing with the root of their problem: the unresolved territorial conflict and the denial of the right of the Palestinian people to self-determination, including statehood, and prolonged occupation, settlement construction and consequent dispossession and exile. In many ways, an international protection “regime” already exists in the form of relevant international legal principles as they relate to the rights of protected persons subject to occupation and the rights of peoples. In the short term, the focus must be on redoubling the effort to ensure that Israel respects and ensures respect for the law of belligerent occupation, particularly as embodied in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. As stated above, the principal protection vulnerabilities of the majority of Palestine refugees today are in relation to the OPT. As such, any meaningful protection of Palestine refugees must begin here. Furthermore, increased energies must be devoted toward ensuring Israeli and host state compliance with the “International Bill of Rights”,<sup>97</sup> in addition to numerous other human rights instruments including the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of all forms of Racial Discrimination, the Convention on the Elimination of all forms of Discrimination against Women, and the Convention on the Rights of the Child. In the long-term, the focus must be on the establishment of an independent and viable Palestinian state, living side by side with Israel within secure and recognized borders, thereby rendering protection a non-issue. Only a just and durable solution of the refugee problem that addresses the statelessness that is the lot of the majority of Palestine refugees and the issue of occupation in the OPT can comprehensively solve their protection gap dilemma.

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<sup>97</sup> This is composed of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights (along with its two optional protocols).