The Legacy of the 1951 Refugee Convention and Palestinian Refugees: Multiple Displacements, Multiple Exclusions

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ABSTRACT

Article 1D of the 1951 Refugee Convention singles out individuals who receive aid from UN agencies, and specifically applies to Palestinian refugees receiving aid from the UN Refugee and Works Agency (UNRWA). While Article 1D was first introduced to afford Palestinian refugees heightened protection, national courts have often interpreted this clause to leave Palestinian refugees without protection. More than 60 years after the initial refugee crisis, how does this provision affect displaced Palestinians today? This paper shows that the haphazard interpretation of Article 1D has often left Palestinian refugees without protection and that this lack of protection has been exacerbated for Palestinians fleeing the crisis in Syria. One solution would be to enable the UNHCR to take on some of the protective functions that used to be provided by the now-defunct UN Conciliation Commission for Palestine.

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INTRODUCTION

In 1951, the Convention on the Status of Refugees (the "1951 Convention" or the "Convention") was adopted by the United Nations (the "UN"). At the time, the 1951 Convention was limited to refugees who found themselves outside of their country of nationality due to events that occurred in Europe before January 1, 1951 as a result of one of the five following grounds: race, religion, nationality, membership of a particular social group, or political opinion.[1] The 1967 Protocol removed both the geographical and temporal limitations of the Convention, enabling anyone with a well-founded fear of persecution on the abovementioned grounds to apply for refugee status in states that have ratified both the Convention and its Protocol.[2] Under Article 1D of the Convention, anyone receiving protection or assistance from a United Nations Agency – in this case, the UN Refugee and Works Agency (the "UNRWA") – is automatically excluded from the Convention.[3] The same Article stipulates that, should that assistance or protection cease, refugees shall come under the protection of the Convention, establishing both an exclusion and inclusion element in the same provision.[4] As 145 States are party to the 1951 Convention, and 146 are party to the 1967 Protocol (as of April 2015), the implications of this provision are far-reaching.[5]

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1. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, Article 1D, available at: http://www.refworld.org/docid/3be01b964.html (last visited Feb. 2, 2017).

2. Protocol Relating to the Status of Refugees, January 31, 1967, 606 U.N.T.S 267-274, available at: http://www.refworld.org/docid/3ae6b3ae4.html (last visited Feb. 2, 2017).

3. Convention Relating to the Status of Refugees, Article 1D.

4. *Id*.

5. *See* States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, UNHCR, available at: http://www.unhcr.org/3b73b0d63.html (last

The question is: who does this clause affect? UNRWA operates in 5 different areas: Jordan, Lebanon, Syria, the West Bank, and Gaza. There are currently about 5.1 million UNRWA-registered refugees,[6] out of a global population of 7.98 million displaced Palestinians.[7] As a result of the protracted nature of the problem and the various political crises in the countries in which UNRWA operates, Palestinians have been victims of secondary displacement. In turn, some have attempted to seek asylum in other countries. Civil war, economic difficulties, and legal discrimination in host states such as Lebanon have led a number of Palestinians to seek refuge in Europe.[8] Because these Palestinians are registered with UNRWA, the Convention asks not whether they fit its definition of "refugee," but rather, whether they fall under Article 1D, and what that means for their refugee status determination. The haphazard way in which Article 1D has been historically interpreted has left many Palestinians without protection, even when fleeing persecution within the meaning of Article 1 of the Convention. Given that tens of thousands of Palestinian refugees from Syria, most of whom are registered with UNRWA, have arrived in Europe in the last 4-5 years due to the conflict in the country, this interpretation of Article 1D has many implications today.[9] In addition to the tens of thousands of Palestinian refugees fleeing from Syria, over 110,000 others have sought refuge in Jordan, Lebanon, and Turkey, among other countries.[10]

This paper will assess the legacy of Article 1D on Palestinians seeking refuge outside of UNRWA areas, as well as the real-life impact of this Article on Palestinians fleeing Syria today. I will first discuss the history of the Palestinian refugee crisis and the creation of UNRWA to provide the context in which Article 1D was introduced. The paper will then discuss the drafting history of the 1951 Convention, and the intention

visited Feb. 19, 2016).

6. In Figures (2015), UNRWA, available at: http://www.unrwa.org/sites/default/files/unrwa_in_figures_2015.pdf (last visited Feb. 2, 2017).

7. There is no single authoritative source for the total number of displaced Palestinians. *See* Nidal Al-Azza & Amaya Al-Orzza*, Survey of Palestinian Refugees and Internally Displaced Persons* 31 (Vol. VIII 2013-2015).

8. *See* Mohamed K. Doraï, *Palestinian Emigration from Lebanon to Northern Europe: Refugees, Networks, and Transnational Pr*actices, 21 Refuge 23, 23–24 (2003).

9. *36,000 Palestinian refugees from Syria have arrived in Europe*, Middle East Monitor, available at: https://www.middleeastmonitor.com/news/europe/21915-36000-palestinian-refugees-from-syria-have-arrived-in-europe (last visited Feb. 8, 2016).

10. *See* UNRWA*,* Syria Crisis, available at: http://www.unrwa.org/syria-crisis (last visited Feb. 16, 2016).

behind the inclusion of Article 1D. I will then show how Article 1D has been interpreted over the years, and how these interpretations have affected Palestinians fleeing UNRWA-areas of operation over the years. Finally, I will show how Article 1D is impacting Palestinians fleeing Syria today to countries that have ratified the Convention. To ensure that Palestinian refugees are protected as required under international law we must not to do away with their existing status under UNRWA. Rather, the solution lies in enforcing existing laws specifically drafted for Palestinian refugees' protection, and in pressuring the UN High Commissioner for Refugees (UNHCR) to undertake some of the protective functions provided for in these laws.

I.
A HISTORY OF PRIMARY AND SECONDARY DISPLACEMENT: PALESTINIAN REFUGEES

The current displacement of Palestinians is better viewed in context. Palestinians have been victim to various types of forced migration since 1948.[11] Israel does not recognize the Palestinian right of return,[12] ultimately preventing the majority of displaced Palestinians from returning to their homes.[13] This section will first describe the waves of Palestinian displacement and their treatment in host countries, the protective and relief mechanisms specifically in place for Palestinian refugees, and finally, their status under the 1951 Refugee Convention.

A. Palestinian Displacement

The first Arab-Israeli War in 1948 (the "1948 War")[14] resulted in the

11. Al-Azza and Al-Orzza at 1-29.

12. For arguments in support of the Palestinian right of return, *see*: John Quigley, *Displaced Palestinians and a Right of Return*, 39 Harv. Int'l L. J. 171, 221-22 (1998); Susan Akram, *Palestinian Refugees and their Legal Status: Rights, Politics and Implications for a Just Solution*, 31 J. Palest. Stud. 36, 36–51 (2002); For arguments rejecting the right of return for Palestinians, *see*: Ruth Lapidoth, *Legal aspects of the Palestinian refugee question*, Jerus. Cent. Public Aff. Jerus. Lett. (2002); Yaffa Zilbershats, *International Law and the Palestinian Right of Return to the State of Israel*, *in* Israel and the Palestinian Refugees 191–218 (Eyal Benvenisti, Chaim Gans, & Sari Hanafi eds., 2007).

13. As early as June 1948, Israeli Foreign Minister Moshe Sharett stated in regards to the refugees at a cabinet meeting that, "they're not returning." *See*: Jacob Tovy, *Israel and the Palestinian Refugee Issue: The Formulation of a Policy, 1948-1956* 14 (2014).

14. For convenience, the phrase "1948 War" is used. However, there were attacks by Jewish paramilitary forces beginning towards the end of 1947, which led to the fleeing and/or expulsion and displacement of many Palestinians. See: Rashid Khalidi, *The Iron*

flight and/or expulsion of an estimated 750,000 to 900,000 Palestinians into neighboring towns and countries, such as Gaza, the West Bank, Lebanon, Syria, and Jordan,[15] while smaller numbers fled to Egypt and Iraq.[16] While some 150,000 Palestinians managed to remain in Israel, many are considered internally displaced as they were prevented from returning to their original villages.[17]

The second large-scale displacement occurred in 1967, pursuant to the Six-Day War between Israel and its Arab neighbors,[18] during which Israel occupied the West Bank, Gaza, East Jerusalem, the Syrian Golan Heights, and the Egyptian Sinai. The Sinai was returned to Egypt as part of an agreement on September 4, 1975,[19] while the rest of the areas, including Gaza, remain occupied territory.[20] By the end of the war, the UN estimated that there were more than 200,000 Palestinian refugees in Jordan.[21] Almost half of those refugees were victims of secondary displacement: they were originally displaced in 1948, and uprooted for a second time in 1967.[22] However, the flow of refugees did not stop when the war ended.[23] Historian Nur Masalha estimates that the total number of those who fled or were expelled during the 1967 hostilities, or shortly after, was some 320,000 Palestinians,[24] while others place the numbers at between 350,000-400,000.[25]

Cage: the Story of the Palestinian Struggle for Statehood 131 (2006); Ilan Pappé, *The Ethnic Cleansing of Palestine* 40 (2006).

15. Al-Azza and Al-Orzza at xxxi.

16. Dawn Chatty, *Displacement and Dispossession in the Modern Middle East* 204 (2010).

17. Joseph Schechla, *The Invisible People Come to Light: Israel's "Internally Displaced" and the "Unrecognized Villages,"* 31 J. Palest. Stud. 20, 20–22 (2001).

18. Al-Azza and Al-Orzza at xxxiv.

19. Elias Sam'o, *The Sinai Agreement and Beyond*, 139 World Aff. 40, 40 (1976).

20. While Israel disengaged from Gaza in 2005, the area remained occupied under international law because Israel exercised 'effective control' over the Gaza strip. *See* L. Butler, *A Gaza Chronology, 1948–2008*, 38 J. Palest. Stud. 116 (2009); B'Tselem, The Gaza Strip - Israel's obligations under international law, available at: http://www.btselem.org/gaza_strip/israels_obligations (last visited Feb. 2, 2017).

21. UNRWA for Palestine Refugees, *Report of the Commissioner-General for 1966-1967,* General Assembly, Official Records, 22nd Session-Supplement No. 13 (A/6713) para. 30.

22. Peter Dodd & Halim Barakat, *River without bridges: a study of the exodus of the 1967 Palestinian Arab refugees* 6 (1968).

23. *Id.* at 5.

24. Nur Masalha, *The Politics of Denial: Israel and the Palestinian Refugee Problem* 178 (1st ed. 2003).

25. Badil Resource Center for Palestinian Residency and Refugee Rights, Handbook

Since 1967, it is estimated that over 800,000 Palestinians under Israeli occupation have been victims of various types of conflict-induced forced migration.[26] Some of these methods include deportations,[27] house demolitions,[28] revocation of residency,[29] and displacement by the so-called separation barrier/wall,[30] a barrier separating the West Bank and Israel.[31] Palestinians have also been victims of secondary displacement in host countries and countries of residence. For example: Palestinian refugee families were expelled from Jordan in the 1970s; the civil war in Lebanon caused almost 100,000 Palestinian refugees to flee; the Gulf war and subsequent expulsion from Kuwait forced out many Palestinians; the expulsion from Libya in 1995 left 30,000 Palestinians without a home; and the 2003 invasion of Iraq caused many Palestinians to be displaced, both internally and externally.[32]

The treatment of Palestinian refugees varies depending on the host-country. In Lebanon, for example, Palestinian refugees face significant discrimination and are excluded from many areas of public life as a result of a law that distinguishes between Lebanese citizens and foreigners, defining a foreigner as "any natural or juridical person who is not a Lebanese subject."[33] Because Palestinians do not have Lebanese citizenship, they are considered foreigners, and "are barred from owning property or practicing in more than 30 professions, among which all liberal professions."[34]

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on Protection of Palestinian Refugees 3 (2005).

26. *Id.* at 10.

27. Security Council Resolution 607 of 5 January 1988, S/RES/ 607 (1988); Security Council Resolution 608 of 14 January 1988, S/RES/608 (1988); Security Council Resolution 636 of 6 July 1989, S/RES/636 (1989); and Security Council Resolution 641 of 30 August 1989, S/RES/641 (1989).

28. Shane Darcy, *Israel's Punitive House Demolition Policy: Collective Punishment in Violation of International Law*, Al Haq (2003).

29. B'Tselem, Revocation of Residency in East Jerusalem, available at: http://www.btselem.org/jerusalem/revocation_of_residency (last visited Sep. 3, 2013).

30. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) ICJ Rep 136, paragraph 133 (2004).

31. Eighty-five percent of the wall encroaches upon Palestinian territory. *See*: B'tselem, The Separation Barrier, available at: http://www.btselem.org/separation_barrier (last visited Feb. 1, 2017).

32. Badil Handbook at 4.

33. Law of 1962 Regulating the Entry and Stay of Foreigners in Lebanon and their Exit from the Country, Bulletin de Législation Libanaise (Journal Officiel), No. 28-1962, Article 1.

34. Jad Chaaban et al., *Socio-Economic Survey of Palestinian Refugees in Lebanon* ix (2010).

In Jordan, Palestinians have varying legal statuses. In December 1949, the Jordanian Council of Ministries amended the 1928 Citizenship Law such that all Palestinians who took refuge in Jordan (the East Bank) or who remained in the West Bank (which included East Jerusalem) became full Jordanian citizens.[35] These Palestinians could be registered as refugees with UNRWA and still be considered full citizens of Jordan. In 1983 however, the government began a dual card system to distinguish between Palestinian-Jordanians living in the West Bank and those living in Jordan.[36] Palestinians who lived in, and who were citizens of Jordan at the time, received a yellow card, which connoted full residency and citizenship status.[37] The "yellow card" simply indicated that these Palestinians were also given family reunification permits by Israel.[38] In recent years however, both changes in laws and various political incidents unsettled the status of some, stripping Palestinians (particularly those with a yellow card) of their Jordanian citizenship.[39] Although it is believed that over 2,700 Palestinians had their citizenship revoked between 2004 and 2008,[40] there is no official public record of the numbers.[41] Palestinians who lived in the West Bank or left the West Bank after June 1, 1983 were given a green card, revoking their right to reside in Jordan, and allowing them only to visit Jordan on a temporary basis.[42] When King Hussein officially severed legal and administrative ties with the West Bank in 1988, Palestinians who held a green card were considered solely Palestinian, and not Jordanian.[43] This change stripped hundreds of thousands of Palestinians residing in the West Bank of their Jordanian

35. Badil Resource Center for Palestinian Residency and Refugee Rights, Interview with Anis F. Kassim by Hazem Jamjoum, *Palestinian Refugees in Jordan and the Revocation of Citizenship* (2010), available at: http://www.badil.org/en/component/k2/item/1569-interview1.html (last visited Feb. 1, 2017).

36. Badil Handbook at 16.

37. *Id*.

38. Anis F. Kassim, "The Palestinians," *Citizenship and the State in the Middle East: Approaches and Applications* 213 (2000).

39. Human Rights Watch, Stateless Again: Palestinian-Origin Jordanians Deprived of their Nationality (2010).

40. *Id*.

41. Interview with Anis F. Kassim by Hazem Jamjoum, *Palestinian Refugees in Jordan and the Revocation of Citizenship* (indicating that the number of Palestinians who have had their Jordanian citizenship revoked since 1988 is kept secret by the Jordanian Ministry of Interior).

42. Badil Handbook at 16.

43. Jad Chaaban et al., *Socio-Economic Survey of Palestinian Refugees in Lebanon* at ix.

citizenship.[44] Jordan is also home to temporary passport holders, who are mainly from Gaza and who fled to, or remained in, Jordan as a result of the 1967 War.[45] These stateless Palestinians were originally holders of Egyptian Refugee Travel Documents (RTDs).[46] The temporary passport enabled Gazans to travel abroad, but granted them few privileges in Jordan aside from allowing them to remain in the country temporarily.[47] Temporary passport holders could not attend public schools, enjoy health services, obtain driving licenses, open bank accounts, or purchase land.[48]

In Syria, prior to the 2011 uprising, Palestinian refugees lived in relatively stable conditions, and were afforded civil rights that were not available to stateless Palestinian refugees in other host countries.[49] Between 1949 and 1956, the Syrian government passed laws specific to Palestinian refugees, granting them civil rights on par with those of Syrian citizens, with the exclusion of the right to vote, and the right to citizenship. This process culminated in Law No. 260 of 1956, arguably the most significant law relating to Palestinians.[50] Law No. 260 states that Palestinians living in the Syrian Arab Republic are on equal footing with Syrian citizens "in all the laws and valid regulations regarding the rights of employment, commerce and military service while retaining their original nationality."[51] As of March 2016, more than half of the Palestinian refugees in Syria were internally displaced in the country.[52]

Given these various waves of displacement and the exclusion of Palestinians from certain areas of public life in host countries, what mechanisms were set up to address the needs of Palestinian refugees?

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44. Uri Davis, *Citizenship and the State: A Comparative Study of Citizenship Legislation in Israel, Jordan, Palestine, Syria and Lebanon* 74 (1997).

45. Oroub El-Abed, *Immobile Palestinians: The Impact of Policies and Practices on Palestinians from Gaza in Jordan*, 26 Forced Migr. Rev. 17, 17 (2006).

46. Abbas Shiblak, *Stateless Palestinians*, 26 Forced Migr. Rev. 8, 8-9 (2006), available at: http://www.fmreview.org/palestine.htm#sthash.OR9N19I3.dpuf (last visited Jun. 5, 2014).

47. El-Abed at 17.

48. Interview with Anis F. Kassim by Hazem Jamjoum, *Palestinian Refugees in Jordan and the Revocation of Citizenship*.

49. Anaheed Al-Hardan, *The Right of Return Movement in Syria: Building a Culture of Return, Mobilizing Memories for the Return*, 41 J. Palest. Stud. 62, 62 (2012).

50. Laurie Brand, *Palestinians in Syria: The Politics of Integration*, 42 Middle East J. 621, 263 (1988).

51. Resolution No. 260 of 1956, cited in al-Hardan at 66.

52. The numbers have remained steady between 2015 and 2016. *See* UNRWA, Syria Crisis Response Progress Report 4 (2015); UNRWA, Syria Regional Crisis: Emergency Appeal (2016).

B. Protection and (or?) Relief

At the time of the first refugee exodus, Count Folke Bernadotte, the UN Mediator for Palestine, prepared a progress report to assess the conditions of the refugees and to suggest recommendations.[53] Among other things, Count Folke Bernadotte recommended that "the *right* of the refugees to return to their homes if they so desire must be safeguarded."[54] Acting upon the recommendations in the progress report, the UN passed General Assembly Resolution 194, which articulated 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."[55] In parallel, the UN also created the UN Conciliation Commission for Palestine (UNCCP).[56] Resolution 194 lists the functions of the UNCCP, one of which is to "facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation,"[57] pursuant to the solutions listed in the same paragraph. One year later, the UN created the UNRWA[58] to carry out "direct relief and works programmes"[59] to "prevent conditions of starvation and distress among them [the refugees] and to further conditions of peace and stability."[60]

UNRWA's task was to tend to the needs of 'Palestinian' refugees, which UNRWA defined as, "persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, who lost both their homes and means of livelihood as a result of the 1948 Arab-Israeli conflict."[61] It is evident from this definition that not all Palestinian refugees were able to register: they had to demonstrate that they had lost both their homes and their means of livelihood due to the war. UNRWA's narrow mandate was temporary, and assumed that refugees would soon be repatriated or resettled. Israel however, did not accept responsibility for the refugees, and after pressure from the international community, only

53. U.N. Mediator on Palestine, Para. 14, Progress report of the United Nations Mediator on Palestine, 7 (1948) (emphasis added); Executive Chairman of the U.N. Monitoring, Verification and Inspection Comm'n (UNMOVIC), *8th Quarterly Rep. of the Executive Chairman*, UN Doc. S/2002/195, annex (Feb. 26, 2002).

54. *Id*.

55. G.A. Res. 194 (III) para. 11 (Dec. 11, 1948).

56. *Id*. at para. 2.

57. *Id*. at para. 11.

58. G.A. Res. 302 (IV) 7 (Dec. 8 1949).

59. *Id*. at para. 7(a).

60. *Id*. at para. 5.

61. UNRWA, *Palestine Refugees*, available at: http://www.unrwa.org/etemplate.php?id=86 (last visited May 15, 2015).

offered to repatriate 100,000 of Palestinian refugees.[62] When the Arab states found this proposal to be unacceptable (indeed, the "offer" was effectively just over 10% of the total refugee population), Israel rescinded its proposal.[63] Due to this impasse, the UNCCP recognized that it could not carry out its mandate as it was originally written.[64] In 1952, the UN limited the UNCCP's functions to collecting and maintaining refugee property deeds.[65] UNRWA, on the other hand, continues to operate, and provides relief to registered, and sometimes unregistered, refugees.

Following the 1967 War, Palestinian refugees who were already registered with UNRWA were able to access UNRWA services in Jordan. On the other hand, those who were not registered were only aided as "non-refugees."[66] UNRWA established ten camps "to accommodate a new wave of displaced persons, both refugees and non-refugees."[67] As UNRWA does not operate in Egypt or Iraq, refugees who fled to these countries were initially only aided by Egypt and Jordan's respective governments.[68] Indeed, UNRWA was unable to protect or provide relief to Palestinian refugees who were displaced outside of their areas of operation. In some cases; however, UNHCR has been able to fill in some of the gaps by joining forces with UNRWA, all the while maintaining a clear separation between their mandates.

The United Nations General Assembly established the UNHCR on December 3, 1949 in Resolution 319 (IV).[69] The UNHCR was adopted on December 14, 1950,[70] and provides comprehensive protection for refugees, including: improving the situation of refugees; promoting

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62. Neil Caplan, "A Tale of Two Cities: The Rhodes and Lausanne Conferences, 1949," 21 (No.3) J. Palest. Stud. 5, 25 (1992).

63. Henry Cattan, *The Palestine question* 65 (1988).

64. Progress Report of the United Nations Conciliation Commission for Palestine, UN Doc.

A/1985 (Nov. 20, 1951).

65. *See* Akram at 41-42; Terry Rempel, *The United Nations Conciliation Commission for Palestine, Protection, and a Durable Solution for Palestinian Refugees*, Badil Resource Center for Palestian Residency and Refugee Rights (2000).

66. UNRWA provides some services to those who are unable to be registered. *See* UNRWA, Consolidated Eligibility and Registration Instructions 4 (2006).

67. UNRWA, *Palestine refugees*.

68. For more on Palestinian refugees in Egypt and Iraq, *see* Oroub El-Abed, *Unprotected: Palestinians in Egypt since 1948* (2009); Labīb ʻAbd al-Salām Qudsīyah, *al-Lāji'ūn al-Filasṭīnīyūn fī al-ʻIrāq* (1997).

69. G.A. Res. 319 (IV), *Refugees and Stateless Persons* (Dec. 3, 1949).

70. G.A. Res. 428 (V), *Statute of the Office of the United Nations High Commissioner for Refugees* (Dec. 14 1950).

voluntary repatriation, host-country integration, or resettlement; and obtaining permission for refugees to transfer their assets, among other competencies.[71] The UNHCR does not provide protection or assistance to UNRWA refugees because "the competence of the High Commissioner. . . shall not extend to a person. . . who continues to receive from other organs or agencies of the United Nations protection or assistance."[72] Moreover, as will be discussed in further detail below, some have interpreted the 1951 Refugee Convention to exclude UNRWA refugees from the Convention's mandate.

Nevertheless, the UNHCR and UNRWA have collaborated when Palestinian refugees have suffered secondary displacement.[73] According to an interview by Noura Erakat with a UNHCR official, the UNHCR provides protection for Palestinian refugees outside of UNRWA areas of operation.[74] Indeed, during the Kuwaiti crisis of 1990-1991, the UNCHR and UNRWA worked together to facilitate Palestinian refugees' return to countries of asylum.[75] Similarly, in 1995, when Palestinians were expelled from Libya, the UNHCR and UNRWA collaborated to lobby Libya to allow Palestinians' return, and to neighboring countries to allow Palestinians' entry in their former host-states.[76]

Nevertheless, these sporadic collaborations have not enabled all Palestinian refugees to enjoy the comprehensive protection that the UNHCR offers. Rather, it is the *lack* of protection that characterizes Palestinian refugees' experience in the various host-territories. For this reason, throughout the years, Palestinians have sought asylum in countries that have ratified the 1951 Convention, as well as others.[77] The inconsistent application of Article 1D has, however, led to opposing outcomes at time: a Palestinian refugee who falls under Article 1D may automatically be able to claim refugee status in one state, or automatically be excluded because of the same clause in another state. The next section will discuss the drafting history of the 1951 Convention, and Article 1D in particular.

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71. *Id*. at Articles 8-10.

72. *Id*. at Article 7(c).

73. Lex Takkenberg, *The Status of Palestinian Refugees in International Law* 307 (1998).

74. Noura Erakat, *Palestinian Refugees and the Syrian Uprising: Filling the Protection Gap during Secondary Forced Displacement*, 26 Int. J. Refug. Law 581, 583–584 (2014).

75. Takkenberg at 300.

76. Erakat at 592.

77. *See e.g.* selected cases in Santo and Orchard at 76–325.

C. History of the 1951 Convention and Article 1D

The 1951 Convention on the Status of Refugees came in the wake of the unprecedented displacement caused by World War II. As such, the definition of a refugee was individualized and specific:

> 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.[78]

Although the definition has temporal and geographical limitations, the 1967 Protocol removed these limitations, and instead placed restrictions related to the amount of funding that may be received. In the same Convention, Article 1D states that:

> This Convention shall not apply to persons who are at present 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.[79]

At the 29th session of the Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, state representatives discussed the exclusion clauses under the Convention. While European states were dealing with the refugees of Europe, Palestinians were similarly displaced due to the 1948 War. According to the French delegate, Palestinian refugees were "different from those of the refugees in Europe."[80] The Arab states concurred. Moreover, the Saudi delegate stated that, "[t]o accept a general definition [of a refugee] [. . .] would be to renounce insistence on repatriation."[81] This is because the 1951 Convention focused on

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78. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. Article 1A.

79. *Id.* at Article 1D.

80. Statement of Mr. Rochefort of France, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting, U.N. Doc. A/C2/SR.19 (Nov. 26, 1951), available at: http://www.unhcr.org/protection/travaux/3ae68cda4/conference-plenipotentiaries-status-refugees-stateless-persons-summary.html (last visited Feb. 1, 2017).

81. Statement of Mr. Baroody of Saudi Arabia U.N. GAOR, 3d Comm., 5th Sess., 328th mtg., U.N. Doc. A/C.3/SR.328 (1950), cited in: Badil, Handbook on Protection of

nonrefoulement – the right not to be returned – whereas the main issue for Palestinian refugees was their desire to return. At the same time, Arab states recognized that if UN agencies were to cease operations before refugees were repatriated, Palestinian refugees would be left without assistance or protection. As a result, they secured the second half of the clause. The Egyptian representative clearly stated:

> The object of the Egyptian 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.[82]

After some discussion, the amendment was ultimately incorporated.

There was no ambiguity in the intentions of the drafters: Palestinian refugees were to be excluded from the ambit of the Convention so long as they received aid and protection from other UN Agencies. Once that special regime of protection or aid ceased, Palestinian refugees would automatically come within the scope of the Convention. As mentioned above, the UNCCP, which provided protection to Palestinian refugees, has ceased to function. UNRWA, while still operating, does not have the extensive competencies of the UNHCR, nor does it have the ability to lobby host-states for more rights for refugees. Thus Palestinians are in a limbo, and this has proved to be a hindrance to some of their asylum claims in different countries.

II.
SEEKING ASYLUM IN STATES PARTY TO THE 1951 REFUGEE CONVENTION

How has Article 1D been interpreted? The UNHCR provides some guidelines on the interpretation of the 1951 Convention's clauses, but they are not binding.[83] Rather, interpretations of the Convention have varied depending on the court.

Between 1985 and 1990, Denmark was one of the few countries that

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Palestinian Refugees 79 (2005).

82. Statement of Mr. Mostafa Bey of Egypt, U.N. Docs. A/C.2/SR.29 (Jul. 19, 1951), U.N. Docs. A/C.2/13), (emphasis added), available at: http://www.refworld.org/docid/3ae68cdf4.html (last visited Mar. 5, 2017)

83. The UNHCR has noted the variations in interpretation and has recommended harmonizing the interpretation of the criteria for refugee status determination. *See* UNHCR, *Implementation of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees - Some Basic Questions - EC/1992/SC.2/CRP.10*, paras. 16-22 (15 June 1992), available at: http://www.unhcr.org/excom/scip/3ae68cca0/implementation-1951-convention-1967-protocol-relating-status-refugees-basic.html (last visited Feb. 1, 2017).

had interpreted Article 1D as meaning that Palestinians automatically came within the protections of the Convention, including those who *voluntarily* left UNRWA's areas of operation. However, this changed to a more restrictive approach in 1990.[84] The 2002 *El Issa* case in the U.K. also found that Palestinians were to come automatically within the ambit of the Convention. The case concerned a UNRWA-registered Palestinian refugee from Lebanon who sought asylum in the U.K. because he feared persecution from the Lebanese authorities as well as other political factions. The judge stated that Article 1D entitled Palestinian refugees to the benefits of the Convention "ipso facto."[85]

In UNHCR's revised note on the application of Article 1D in 2011, it stated that for "persons falling within paragraph 2 of Article 1D, no separate determination of well-founded fear under Article 1A(2) is required."[86]

Yet, the *El-Ali* case in July of that same year found that the *ipso facto* clause only applied to the original refugees of 1948, meaning only those who were personally displaced in 1948 could claim automatic refugee status. [87] Other national courts have also adopted a more restrictive approach, but for different reasons. In 1987, a Dutch court ruled that the second sentence of Article 1D could only be triggered when UNRWA ceased to function; therefore, Palestinians could only come under the protection of the Convention when UNRWA ceased to function.[88] Shortly after, in 1992, the New Zealand Status Appeals Authority (RSAA) made a similar finding. The case involved a Palestinian born in East Jerusalem, who had been living illegally in Morocco and was applying for asylum in New Zealand after being rejected in the Netherlands. In his application, he stated that he was *ipso facto* entitled to the benefits of the Convention as he was outside of UNRWA's areas of operation, and moreover, feared returning to Palestine.[89] The RSAA disagreed, and opined instead that

84. Takkenberg at 169.

85. *Isam El-Issa v. Secretary of State for the Home Office*, Immigration and Asylum Tribunal (UK), Appeal No. CC/21836/200 (Feb. 4, 2002).

86. UNHCR, Revised Note on the Applicability of Article 1D of the 1951 Convention Relating to the Status of Refugees to Palestinian Refugees (2009).

87. *See Amer Mohammed El-Ali v. The Sec'y of State for the Home Dep't and Daraz v. The Sec'y of State for the Home Dep't (The U.N. High Comm'r for Refugees, Intervener)* (2002) EWCA (Civ).

88. Judicial Division, Council of State (Afdeling Rechtspraak, Raad van State), 6 Aug. 1987,

No. R02.83.2767-A en B. *See also* Takkenberg at 105.

89. *Refugee Appeal No. 1/92 Re SA*, NZ: Refugee Status Appeals Authority (1992), available at: http://www.refworld.org/cases,NZL_RSAA,3ae6b73d8.html.

Article 1D intended for UNRWA-refugees to be included within the 1951 Convention only when "UNRWA ceases to operate *at all*."[90] As for the United States, it is not party to the 1951 Convention but to its 1967 Protocol, and has not incorporated Article 1D into its Immigration and Nationality Act (INA).[91] Thus, the courts in the U.S. make a separate assessment based on persecution.

In Europe, there is hope for a harmonized approach following the *El Kott* case. This case concerned three Palestinian refugees from one of the UNRWA camps in Lebanon. All three applicants feared for their safety due to (1) violent clashes in the camp between various factions, (2) individual targeting, and (3) the inability to seek protection. The court in *El Kott* stated that the inclusion of the phrase '*ipso facto*' would be "superfluous and ineffective" if its sole purpose was to signal the *possibility* that a person who has satisfied the criteria for inclusion under Article 1D *may* be considered for refugee status if they then *also* satisfy Article 1A (2).[92] The court decided that a person who is not excluded by Article 1D because UNRWA assistance has ceased "is not necessarily required to show that he has a well-founded fear of being persecuted."[93] However, this does not include those who voluntarily remove themselves from UNRWA's areas of operations; rather they must have been forced to leave.[94] This judgment is important for Palestinians from Syria fleeing to Europe under the current crisis.

III.
PALESTINIANS FLEEING TODAY

Today, over 526,000 Palestinian refugees are registered with UNRWA in Syria.[95] Of these, around 280,000 have been displaced inside Syria, and over 100,000 to other countries.[96] This section will look at the protections available in countries to which Palestinian refugees are fleeing, and that have ratified the 1951 Convention.

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90. *Id.* (emphasis in text).

91. *See* 8 U.S.C. § 1101(a)(42).

92. *El Kott* at para. 73.

93. *Id.* at para. 76.

94. *Id.* at para. 59.

95. UNRWA, *Where We Work: Syria*, available at: https://www.unrwa.org/where-we-work/syria (last visited Feb. 1 2017).

96. UNRWA, *Syria Crisis: Facts and Figures*, available at: http://www.unrwa.org/syria-crisis (last visited Feb. 1 2017).

A. Neighboring Countries

Given their shared borders, Lebanon and Jordan have seen a mass influx of refugees from Syria. Many human rights organizations have detailed the ways in which Palestinians fleeing Syria have been discriminated against, and have been denied protection because of their identity as Palestinians.[97] However, I will not be discussing these countries specifically, as they have not ratified the 1951 Convention.

Egypt, on the other hand, is a signatory to the Convention and to its 1967 Protocol, as well as to the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention). Theoretically, this means that Palestinians fleeing the conflict in Syria should automatically qualify as refugees in Egypt. Consider the definition of a refugee under the OAU Convention:

> The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or *events seriously disturbing public order* in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[98]

More specifically, Palestinians are entitled to the protections of the 1951 Convention. Indeed, as mentioned above, the crux of Article 1D, introduced by the Egyptian representative at the time, is to ensure that Palestinians always have some form of protection. However, during this crisis, Egypt instructed the UNHCR to refrain from registering the 6,000 Palestinians fleeing from Syria,[99] as the Egyptians claimed these refugees were the responsibility of UNRWA.[100] UNRWA does not operate in Egypt and, as such, these refugees fall within a legal gap where their status is not recognized. As a result, they are unprotected and illegally present in Egypt. Under the Egyptian Law of Entry, foreigners require valid documentation to enter or exit Egypt, and to date, Egyptian authorities have held 1,500

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97. *See, e.g.,* Amnesty International, *Families Ripped Apart as Palestinian Refugees from Syria Denied Entry to Lebanon*, available at: http://www.amnesty.org/en/news/families-ripped-apart-palestinian-refugees-syria-denied-entry-lebanon-2014-07-01 (2014); Human Rights Watch, *Jordan: Palestinians Escaping Syria Turned Away*, available at: http://www.hrw.org/news/2014/08/07/jordan-palestinians-escaping-syria-turned-away (2014); Not Welcome: Jordan's Treatment of Palestinians Escaping Syria, 46 (2014).

98. Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45, Article 1.2. (emphasis added).

99. Cynthia Orchard and Andrew Miller, *Protection in Europe for Refugees from Syria,* Oxf. Refug. Stud. Cent. (2014).

100. Leah Morrison, *Egypt: a desperate refuge for Palestinians fleeing the Syrian conflict,* Al-Majdal (2015).

refugees from Syria for violating that law.[101] Because they cannot be registered with UNHCR, the Egyptian government refuses to release Palestinian refugees detained in Egypt.[102] Indeed, reports have shown that the inability to register as refugees and subsequent detention is one of the main reasons Palestinians from Syria make the dangerous journey to Europe.[103]

B. Turkey

Turkey is a party to the 1951 Convention and its 1967 Protocol, but it made a reservation to the 1967 Protocol that it would only accept refugees from Europe. As such, only refugees fleeing Europe may apply for refugee status under the Convention in Turkey. However, Turkey did not make any reservations concerning Article 1D of the Convention, meaning that this provision should be applied to Palestinian refugees registered with UNRWA, and that Palestinian refugees should *ipso facto* be entitled to the benefits of the Convention.[104] Yet, there is very little information on Turkey's interpretation of Article 1D. Turkey did, however, incorporate the European Directive concerning Article 1D,[105] but it remains to be seen how the country will apply this Directive. This has not appeared to be a problem during the current crisis, as Turkey has generally treated Palestinians and Syrians fleeing Syria equally.

For the most part, Turkey has maintained an open-border policy with Syria, enabling many refugees fleeing Syria to enter into the country. The temporary protection regime in Turkey provides that Palestinians will not be forced to return to Syria, and will be allowed in Turkey for an unlimited period.[106] The Turkish government has taken responsibility for the

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101. *Id.*

102. Tom Rollins, *The Palestinian-Syrian "protection gap": inside an Egyptian police station*, Al-Majdal (2015).

103. Patrick Kingsley, *A Syrian-Palestinian refugee in Egypt: "If I go back to Syria I will die,"* The Guardian, Jan. 14, 2014, available at: http://www.theguardian.com/world/2014/jan/14/syrian-palestinian-refugee-egypt-mahmoud (last visited Feb. 16, 2016).

104. UNHCR, *Reservations and Declaration to the 1951 Refugee Convention* 12 (2011).

105. Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, 30 September 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC, available at: http://www.refworld.org/docid/4157e75e4.html (last visited Mar. 5, 2017)

106. Sarah Bidinger et al., *Protecting Syrian Refugees: Laws, Policies, and Global*

refugees, and the UNHCR provides services to Palestinian refugees through the Turkish government, rather than directly to the population.[107] Under the current regime, Palestinians fleeing Syria are able to register and be treated "on par with Syrian nationals, which includes the right to reside in the camps set up by the [Government of Turkey]."[108]

However, according to Amnesty International, since mid-2012, Turkey has blocked thousands of people "without a passport or an urgent medical need" from entering its territory. [109] This presumably affects Palestinians fleeing Syria as they are stateless. A report by the Action Group for Palestinians in Syria and the Palestinian Return Center has shown that Palestinians fleeing Syria need visas to enter Turkey, and that the Turkish embassy in Damascus has refused to provide visas for Palestinians.[110] Yet, government officials and some aid agencies have stated that they do not make distinctions in their treatment of these refugee groups.[111] As there are conflicting reports, we are unable to ascertain the treatment of Palestinian refugees coming from Syria.

Part of the issue is Turkey's ambiguous stance on Article 1D; while it is officially incorporated, its application is vague.

C. Europe

The previous section showed that, following the *El Kott* case, Palestinian refugees who are forced to flee UNRWA locations (?) should automatically be included within the protections of the Convention, without a separate determination under Article 1A(2). Again, theoretically, Palestinians fleeing the conflict in Syria should find it relatively easy to claim refugee status in Europe. In a 2013 interview, an attorney at the Hungarian Helsinki Committee, Gábor Győző, stated that the judgment in the El Kott case meant that, "[all] Palestinians who meet the criteria of being registered with UNRWA, settled in a location where

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Responsibility Sharing, Boston Univ. Sch. Law, 104 (2014), available at: http://www-syst.bu.edu/law/central/jd/programs/clinics/international-human-rights/documents/FINALFullReport.pdf (last visited Feb. 16, 2016).

107. *Id*. at 99.

108. *Id*. at 111.

109. Amnesty International, *Growing Restrictions, Tough Conditions: The Plight of Those Fleeing Syria to Jordan*,(2013), available at: http://www.amnestyusa.org/research/reports/growing-restrictions-tough-conditions-the-plight-of-those-fleeing-syria-to-jordan (last visited Feb. 17, 2016).

110. Palestinian Return Center, *Report on the Conditions of Palestinian Refugees in Syria: A Comprehensive Documentary Study 27* (2014).

111. Bidinger et al., at 112.

the security situation is 'bad enough' to constitute a serious risk of personal safety and where UNRWA is unable to operate, should be granted refugee status in the EU."[112]

However, most European countries have not implemented special provisions for Palestinian refugees. Indeed, the UNHCR does not have precise numbers for Palestinians fleeing Syria in Europe, as they can be registered as 'stateless,' 'Palestinian,' or even 'Syrian'.[113] Their treatment varies accordingly. In Sweden in 2014, the majority of stateless applications were by Palestinians fleeing Syria, and the protection rate for these Palestinians was 98 per cent.[114]

Moreover, in 2013 in Germany, the Central Aliens Register mentioned over 2,000 new asylum applications by 'stateless persons' and 'persons with unknown nationality.' The overall protection rate for these groups, including 'persons from other Asian countries of origin,' varied between 45 per cent and 80 per cent.[115] In the U.K., a cursory view of the asylum statistics shows that the refusal rate for Palestinians is high.[116] However, even in cases where asylum is rejected, there are other possibilities for protection, such as humanitarian/discretionary leave, which Palestinians may be eligible for.[117]

Given the group approach towards Palestinians under the 1951 Convention and the interpretation favored in the *El Kott* case, European countries should implement a harmonized approach towards Palestinian refugees, especially those who are fleeing Syria. This is even more crucial considering the difficulties Palestinians face in neighboring countries.

IV.
SOLUTIONS?

As an overview of the law has shown, Palestinians who fled in 1948, as well as their descendants, are already recognized as refugees under

112. The International Refugee Rights Initiatives Refugee Legal Aid Newsletter, *Rights in Exile: Palestinians and Article 1D,* (2013), available at: http://rightsinexile.tumblr.com/post/44317910924/palestinians-and-article-1d (last visited Feb 17, 2016).

113. UNHCR, *Syrian Refugees in Europe: What Europe Can Do to Ensure Protection and Solidarity* 34 (2014).

114. *Id*.

115. *Id*.

116. UK Home Office 'Immigration Statistics, April to June 2015, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/455573/asylum2-q2-2015-tabs.ods, (last visited Mar. 5, 2017)

117. Orchard and Miller at 71.

international law. The special regime that was created to ensure their protection (in particular, the UNCCP), has ceased to function since the 1950s, and has been left without replacement. This, in turn, has made Palestinians even more vulnerable in their host states, and has made it difficult for them to claim refugee status in many of the countries that have ratified the 1951 Refugee Convention. Thus, the issue is not the law itself. Rather, it is the application and enforcement of the law.

Faced with the current refugee crisis, states that have ratified the 1951 Convention should coordinate with UNRWA in Syria. States that have been excluding Palestinian refugees from refugee protection and detaining them instead, such as Egypt, must follow the UNHCR's guidelines for refugee determination, which include automatic refugee status for UNRWA registered refugees.[118] In the alternative, and at the very least, Egypt should be required to allow those who are fleeing Syria to register with the UNHCR so it may work to resettle them.

However, a more long-term approach is desirable. While the ultimate solution lies in the realization of Palestinian self-determination and other internationally recognized rights, in the meantime, stateless Palestinian refugees must be protected. As Article 1D has been subject to various interpretations, one might suggest that this Article should be repealed, and that Palestinian refugees should simply be treated similarly to other refugees, with their status determined under Article 1A(2). The problem with this suggestion is that Palestinians residing in host countries are generally stateless, with the exception of Palestinians in Jordan, and hold on to their right of return to their original homes.[119] Having their refugee status 're-determined' under the Article 1A definition would be redundant. The 1951 Refugee Convention ensures the rights for those without protection from their states, but for the majority of Palestinian refugees there is no 'state' to which they can point. They have been prevented from returning to their original homes for decades, and have not been granted citizenship in their host states. The purpose of introducing a separate category for Palestinian refugees was a result of, as the French delegate stated, their situation being different from other refugees. A modest suggestion would be to enable the UNHCR to officially take on the responsibilities of the UNCCP in order to ensure that Palestinian refugees are protected. Such an arrangement would allow the UNHCR to work in tandem with governments in order to ensure that Palestinian refugees are

118. UNHCR, Revised Note on the Applicability of Article 1D of the 1951 Convention Relating to the Status of Refugees to Palestinian Refugees (2009).

119. Susan Akram, *Myths and Realities of the Palestinian Refugee Problem: Reframing the Right of Return* (2014).

not excluded, ironically, for being recognized as refugees.

Palestinian refugees will remain vulnerable, and at the mercy of the political crises of their host countries, unless and until a global harmonized approach is adopted. The legacy of the 1951 Convention is that it has left many Palestinians without the 'back-up' protection that was intended by Article 1D, and this must be remedied.

CONCLUSION

Since 1948, Palestinians have been subject to multiple displacements from their original homes as well as from their host countries. While Article 1D was introduced to ensure that Palestinian refugees were never left without protection pending their return, the legacy of this article has proved otherwise. Palestinians, for the most part, have been left unprotected in their host countries, and have found additional hurdles seeking asylum in third-states that are party to the 1951 Convention.

While this has been the case in general, the current crisis in Syria has further exacerbated the issue. Palestinians are turned away from states that are part of UNRWA areas of operation, and must deal with the rather paradoxical Egyptian interpretation of Article 1D, meaning that they face further hardship simply for being Palestinian. Contradictory reports from Turkey mean that it is unclear whether Palestinian refugees are being treated on par with Syrian refugees in all aspects, or whether they fall into a gap because of their documents, or lack thereof. While the *El Kott* case in Europe opens the door to a more harmonized approach that would automatically grant Palestinian refugees fleeing Syria refugee status, this does not seem to be applied consistently.

In general, it should be easy to identify Palestinians fleeing Syria as they are registered with UNRWA. States that have ratified the 1951 Convention should work with UNRWA to determine the numbers of people that have fled, and accordingly aid them when they arrive. Moreover, the UNHCR should be given the capacity to take on some of responsibilities of the defunct UNCCP. Otherwise, there is a risk of punishing Palestinians simply because of their status as refugees.