



An Ongoing Anomaly: Pre- and Post-Second World War Palestinian Refugees

Mutaz M Qafisheh*

ABSTRACT

Present resembles past with regard to the case of Palestinian refugees. This article shows that the plight of these refugees dates back not only to 1948, but to as early as 1925. The status of Palestinian refugees scattered throughout the world has never been resolved. On the contrary, each wave of refugees has been overshadowed by another, often greater one. While the 1925 influx was aggravated by a catastrophe in 1948, the latter was worsened in 1967. The issue of refugees was delayed until the final stage of Palestinian-Israeli negotiation by the peace accords of 1993–1995 but has never been negotiated. In reality, the expulsion of Palestinians from their homeland is an ongoing phenomenon. Nonetheless, the recent recognition of Palestine as a state by the United Nations General Assembly may open a window of opportunity for the effective, not legal, resolution of the refugee problem within the State of Palestine's boundaries. This article aims to shed light on the initial stage of the Palestinian refugee problem, which started in the aftermath of the First World War, and to compare it with subsequent stages in an attempt to understand the various statuses that shaped the individuals who were affected at each stage. It seeks to propose lasting/legal as well as temporary/humanitarian solutions to a highly politicised global problem.

1. INTRODUCTION

The First World War marked the beginning of the Palestinian refugee influx. Tens of thousands of individuals who left the country before or during that war were denied return home. The plight of such individuals, and their decedents, has never been settled. On the contrary, in the aftermath of the Second World War, large numbers of Palestinians were expelled. The question of Palestinian refugees endures today. The unique feature of the Palestinian refugee problem is that these refugees were replaced by Jewish migrants and refugees who arrived from all over the world, forming a new people (the Israelis), and denying a return of the 'natives' in an unprecedented case in history.¹

* Dean, College of Law, and Professor of International Law, Hebron University, Palestine; PhD in International Law, Graduate Institute of International and Development Studies, Geneva. Email: mutazq@hebron.edu or mmqafisheh@gmail.com.

¹ E Sereni and R Ashery (eds), *Jews and Arabs in Palestine: Studies in a National and Colonial Problem* (1936); A Ruppin, *The Agricultural Colonization of the Zionist Organization in Palestine* (Martin Hopkinson 1926); G Muenzner, *Jewish Labour Economy in Palestine* (Victor Gollancz 1945); F Sakran, *Palestine Dilemma, Arab Rights Versus Zionist Aspirations* (Public Affairs Press 1948).

This article argues that the expulsion, or non-return, of Palestinian refugees has always been part of a well-designed plan in which key global powers were involved, including the League of Nations and the United Nations (UN). This argument is illustrated by the two cases of Palestinians who became refugees before and after the Second World War. The first institutionalization of Palestinian expulsion was initiated by Great Britain during its rule in Palestine and implicitly endorsed by the League of Nations and its member states. The mission has been completed by Israel and, once again, was maintained by the UN bodies, and formalized through the 1951 Convention relating to the Status of Refugees (the Convention) and by establishing a specialized UN agency for Palestinian refugees.

2. PRE-SECOND WORLD WAR PALESTINIAN REFUGEES

When Britain first regulated the citizenship/nationality of Palestinians by the Palestinian Citizenship Order of 1 August 1925,² those 'natives' who were residing in Palestine were considered as Palestinian citizens (article 1). Statistics reveal that 729,873 people, who were previously Ottoman subjects, acquired Palestinian citizenship at that time.³ Another group of Palestinians, who had been residing abroad, were denied the right to citizenship and became stateless in the countries where they were working or visiting. This group is the subject of this part of the article.

The citizenship of this group has been long ignored by historians and jurists. Unlike Ottoman subjects residing in Palestine in 1925, who automatically became Palestinians, the denial of this group's citizenship was an issue of concern. The debate among Arab Palestinians and internationally (at the League of Nations) surrounding this group continued until the end of the British Mandate. However, there were important developments after the end of the Mandate with the creation of the State of Israel and, particularly, the problem of Palestinian refugees during and after the 1948 war that overshadowed the plight of this group.

Palestine's inhabitants travelled abroad as part of general Ottoman emigration outside the Empire before, during, and after the First World War. People travelled as traders, students, and for pleasure. In the nineteenth and early twentieth century, the difficult economic conditions in the Empire, coupled with the frequent wars, motivated citizens to seek job opportunities abroad.⁴ It is not possible to determine accurately the total number of 'natives' of Palestine who were residing abroad on 6 August 1924, when the Treaty of Peace between Britain and Turkey, which officially ended the First World War, entered into force,⁵ as precise statistics are lacking.

² N Bentwich (ed), *Legislation of Palestine 1918–1925* (Whitehead Morris 1926), vol I, 37.

³ M Qafisheh, *The International Law Foundations of Palestinian Nationality: A Legal Examination of Palestinian Nationality under Britain's Rule* (Brill 2008) 93.

⁴ S Tamari, *Year of the Locust: The Great War and the Erasure of Palestine's Ottoman Past including Diary of an Ottoman Soldier: Jerusalem 1915–1916* (Institute of Palestine Studies 2008).

⁵ The Treaty of Peace, which was agreed upon by the Allied Powers and Turkey, was signed in Lausanne, Switzerland, on 24 July 1923. It came into force for Britain (which by then was the Mandatory for Palestine) on 6 Aug 1924. The Treaty was signed between Britain, France, Italy, Japan, Greece, Romania, and the Serb-Croat-Slovene State (the Allies), on the one hand, and Turkey, on the other. See Treaty of Peace with Turkey and other Instruments Signed at Lausanne on 24 July, 1923 (His Majesty's Stationary Office, 1923). Setting out the legal status of the territories detached from Turkey, the Treaty had the effect of law in Palestine from 6 Aug 1924. See Treaty of Peace (Turkey) Ordinance, 1925, 1 Sept 1925; *Legislation of Palestine*, above n 2, vol I, 576.

However, it is possible to calculate a reasonable estimate from existing data. Data suggests that the total number of emigrants from what was then Greater Syria, mainly from Lebanon and Palestine, to both North and South America in the period from 1860 to 1914 amounted to about 600,000 persons.⁶ Historically, and up to the present day, the inhabitants of Palestine count for about one-quarter of the inhabitants of the Levant. It may therefore be roughly presumed that some 150,000 Ottoman emigrants from the region originated from the territory that became known as Palestine after the British occupation. These emigrants constituted about 20 per cent of Palestine's natives at the time, if proportionally compared with the total number of natives who acquired Palestinian nationality, as indicated above.

Certain existing data supports this estimate. A French consular report published in 1907 mentioned that emigrants from Palestine to the United States totalled 4,000 persons in ten years. Half of these subsequently also moved their families.⁷ Orfalea suggests that between 1920 and 1930, a total of 2,933 Palestinians arrived in the United States, while 7,047 Palestinians arrived in the following decade.⁸ However, most of Palestine's emigrants headed for Latin America, notably Argentina, Brazil, Chile, Honduras, Mexico, and El Salvador. In 1927, it was estimated by the 'Committee of the Defenders of the Rights of Palestine Arab Emigrants in Palestinian Naturalization', in a memorandum submitted to the High Commissioner for Palestine, that the number of Palestinian natives in Europe and the Americas totalled 25,000.⁹ By 1936, this figure reached 40,000, according to the British-led Palestine Royal Commission (Peel Report).¹⁰ Today, the number of Palestinians in Chile, for instance, who are mostly nineteenth and early twentieth century emigrants, is estimated at 350,000.¹¹ According to Baeza, 'Latin Americans of Palestinian descent claim today to be more than half a million.'¹² In addition, about 250,000 Palestinians reside in the United States.¹³

One may estimate from the above statistics that the number of Palestinian natives residing abroad stood at somewhere between 10 to 20 per cent of the total population at the end of British rule. Given that the number of Palestinians in 2014 is about 12 million, according to the Palestinian Central Bureau of Statistics,¹⁴ the number of Palestinian pre-1948 emigrants at present may not be under a million. Although figures may appear to be somewhat confusing; there are (to the author's knowledge) no exact statistical figures. What is sure, however, is that hundreds of thousands of Palestinian natives lost their homeland even before the creation of the State of Israel, and that was based on officially adopted legislative instruments. Indeed, 'little to nothing has been

⁶ K Karpat, 'The Ottoman Emigration to America, 1860–1914' (1985) 17 *International Journal of Middle East Studies* 185.

⁷ *ibid.*

⁸ G Orfalea, *The Arab Americans: A History* (Olive Branch Press 2006) 109.

⁹ Committee of the Defenders of the Rights of Palestine Arab Emigrants in Palestinian Naturalization, Memorandum submitted to the High Commissioner for Palestine (League of Nations, doc 60395, 29 July 1927, available at the League's archives, UN Office, Geneva) para 5.

¹⁰ Palestine Royal Commission, Report presented by the Secretary of State for the Colonies by Command of His Britannic Majesty (His Majesty Stationary Office, July 1937), Summary of Report 21. This Commission was known, following the name of its Chairman, Earl Peel, as the 'Peel Commission'. Based on Peel's Report, Britain decided to divide Palestine into two states: an Arab state and a Jewish state.

¹¹ M Holston, 'Proud Palestinians of Chile' (2005) 57 *Americas* 5.

¹² C Baeza, 'Palestinians in Latin America: Between Assimilation and Long-distance Nationalism' (*The Jerusalem Fund*, 21 Nov 2013) 1.

¹³ Orfalea, above n 8, 152.

¹⁴ Palestinian Central Bureau of Statistics, *Palestinians at the End of 2013* (Ramallah, 31 Dec 2013).

written about them [Latin Americans of Palestinian descent] and their relation with Palestine.¹⁵ The problem for this group arose from article 2 of the 1925 Palestinian Citizenship Order, which stipulated:

Persons of over eighteen years of age who were born within Palestine and acquired on birth or subsequently and still possess Turkish nationality and on the 1st day of August 1925, are habitually resident abroad, may acquire Palestinian citizenship by opting in such manner ... subject to the consent of the Government of Palestine which may be granted or withheld in its absolute discretion. ... This right of option must be exercised within two years of the coming into force of this Order.

The right of individuals belonging to this group to opt for citizenship had to be exercised between 1 August 1925 and 31 July 1927. On 12 November 1925, however, the High Commissioner for Palestine decided by a Proclamation, gazetted on 16 November 1925, that the right of option should begin retroactively from 6 August 1924.¹⁶ The time limit to opt for citizenship was thus terminated on 5 August 1926, one year after the enactment of the Citizenship Order. In effect, it was only possible to exercise the right of option when the amendment of the Order was gazetted on 16 November 1925. The persons concerned had effectively less than nine months, namely from 16 November 1925 until 5 August 1926, to opt for Palestinian citizenship. The reason for this legislative procedure was clear: to deny the return of as many Arab Palestinians to Palestine as possible, and to bring in as many Jews as possible from all over the world in order to pave the way for the establishment of a national homeland for the Jewish people, as set out in the Palestine Mandate adopted by the League of Nations on 24 July 1922, based on the Balfour Declaration of 2 November 1917 that had been incorporated in the text of the Mandate.

In formulating article 2 of the Order, the drafters narrowly interpreted article 34 of the 1923 Treaty of Lausanne. This article gave 'natives of territory detached from Turkey', including Palestine, the right to 'opt for the nationality of the territory of which they are natives'; article 2 replaced the phrase '*native of Palestine*' as it appeared in the Treaty, with '*born within Palestine*'. This limitation deprived the descendants of those born in Palestine, whose birth had occurred in a foreign country, of the right to opt for Palestinian citizenship, even if their parents had been born as Turkish citizens and the descendants themselves possessed Turkish citizenship. Article 4 of the Citizenship Order added more conditions, which served to make the acquisition of Palestinian citizenship by persons of this group even more difficult. It provided, *inter alia*, that the person concerned should have resided in Palestine for not less than six months immediately prior to the date of making the application for Palestinian citizenship. It is hard to see why a person belonging to this group should be unable to acquire Palestinian citizenship if he or she had not resided in Palestine for at least six months. Stoyanovsky has described this residence condition as an 'obvious paradox' and an unnecessary stipulation.¹⁷

¹⁵ Baeza, above n 12, 1.

¹⁶ British Government, Report of the High Commissioner on the Administration of Palestine, 1920–1925 (His Majesty's Stationary Office, 1925) 162.

¹⁷ J Stoyanovsky, *The Mandate for Palestine: A Contribution to the Theory and Practice of International Mandates* (Longmans 1928) 274.

The problem for those residing abroad lay in the interpretation of the expression ‘habitually resident abroad’, as phrased by article 2 of the 1925 Palestinian Citizenship Order (quoted above). The expression was interpreted by the Supreme Court of Palestine on 16 December 1927 in *K v Chief Immigration Officer*.¹⁸ The petitioner (Kattaneh), who had been born in Palestine as an Ottoman subject, was then residing in Lebanon. He applied for a Palestinian passport on the assumption that he was a Palestinian citizen. His application was rejected by the Government. This decision was upheld on 1 July 1927 by the Supreme Court, which denied Kattaneh’s application to become a Palestinian. The Court concluded that if a person was physically present in a place, for any reason, he would be considered to have been ‘habitually resident’ for the purpose of the acquisition of Palestinian citizenship.

It is relevant to refer to the situation of Ottoman citizens who were natives of other territories detached from Turkey and who were residing abroad. Such persons were given more guarantees of retention of the citizenship of their native country than article 2 of the Palestinian Citizenship Order. Article 7 of the Iraq Nationality Law of 9 October 1924 gave any ‘native’ who was residing abroad, even if he had not been born in the country, the right to opt for Iraqi citizenship. Such persons were allowed almost two years from 6 August 1924 to declare their intention to acquire Iraqi citizenship, not just nine months, as had been the case with Palestine.¹⁹ Trans-Jordan Nationality Law of 1928 gave any Ottoman born in Trans-Jordan before 6 August 1924, regardless of his place of residence and without a deadline, the right to become a citizen (article 5).²⁰ Similarly, article 5 of the citizenship legislation of both Syria and Lebanon gave ‘natives’ who held Ottoman citizenship and who had been residing abroad the right, within a two-year period, to opt for the citizenship of their native territory. These natives were further given the choice of declaring their desire to opt for Syrian or Lebanese citizenship to the diplomatic agents of France in the state where they were residing.²¹ No residence condition was applicable to the exercise of the right of option in Iraq, Syria, Lebanon, or Trans-Jordan. The strict rules of article 2 of the Palestinian Citizenship Order did not exist in any legislation in force in Palestine’s neighbouring countries, in spite of the fact that all such legislation, including the question of option, was derived from the same source – namely, article 34 of the Treaty of Peace.

Most of the multilateral peace treaties concluded in the early twentieth century recognized the right of option for citizens residing abroad. Almost all of the peace treaties that ended the First World War contained a provision whereby all persons born in the territory affected by succession, who had not acquired the citizenship of another state, automatically became citizens of the state of their birth, wherever their residence might be. Article 65 of the Treaty with Austria of 10 September 1919, for instance, stated: ‘All persons born in Austrian territory who are not born nationals of another State shall *ipso facto* become Austrian nationals.’ An identical article can be found in

¹⁸ M McDonnell, *The Law Reports of Palestine* (Waterlow 1934) 215.

¹⁹ R Flournoy and M Hudson, *A Collection of Nationality Laws of Various Countries as Contained in Constitutions, Statutes and Treaties* (OUP 1929) 348.

²⁰ United Nations, *Laws Concerning Nationality* (1954) 274.

²¹ Ordinance Concerning Turkish Subjects Established in Syria and Ordinance Concerning Turkish Subjects Established in Greater Lebanon, in Flournoy and Hudson, above n 19, 298–303.

the Allied treaties with Bulgaria, Czechoslovakia, Hungary, Poland, Romania, and the Serb-Croat-Slovene State.²²

For most affected persons, the nine-month period afforded to apply for Palestinian citizenship was inadequate. For example, representatives of natives residing in Mexico complained, in a letter sent to the British Secretary for Foreign Affairs, that the 1925 Citizenship Order 'did not become known to Palestinians resident abroad because the [British] Palestinian Government would not authorize advertisements in foreign countries to bring the instructions to their notice.'²³ Even when conditions for acquiring citizenship were fulfilled, the Government 'in its absolute discretion,' as article 2 of the Citizenship Order put it, could ultimately choose whether to grant or withhold Palestinian citizenship. In effect, the Government had refused most of the applications: of 9,000 applications submitted between 1925 and 1936, 'not more than 100 were accepted,' according to British sources.²⁴ British consulates outside Palestine had rejected applications for Palestinian citizenship. It was reported in 1927 that the:

British Consuls in Europe and America have asked ... Palestinian emigrants to make application for the maintenance of their Palestinian nationality. Applications were duly submitted, and the Palestinian residents abroad in the belief of having complied with the law, awaited the issue of the proper nationality certificates. They were greatly surprised to learn from their Consuls that the Palestine Government had refused its approval, on the plea that the applicants did not reside in Palestine the required [six-month] period.²⁵

These people, like any stateless persons, endured difficult conditions in their countries of residence. They were unable to travel without Palestinian passports. No diplomatic protection, which was particularly essential in the revolutionary countries of Latin America at the time, was afforded to them. Many were subjected to deportation from countries that refused to admit stateless persons, such as Chile and Mexico.²⁶ In certain countries, such as Panama, previously Turkish citizens were explicitly precluded from seeking naturalization. Article 1 of the Panama Law of 9 November 1926 stated that 'Chinese, Turks, Syrians [including Palestine's natives] ... are not included [in the naturalization]'.²⁷ In July 1927, the authorities in El Salvador requested that foreigners present documents to prove their citizenship as a condition for conducting business, a requirement that jeopardized the livelihoods of Palestinian natives residing in that revolutionary country.²⁸ Palestinian natives were precluded from obtaining visas, even to visit their relatives or to look after their property in Palestine. As indicated in the letter from Palestinians in Mexico to the British Government, mentioned above, those

²² Treaty with Bulgaria (27 Nov 1919), art 52; Treaty with Czechoslovakia (10 Sept 1919), art 6; Treaty with Hungary (4 June 1920), art 57; Treaty with Poland (28 June 1919), art 6; Treaty with Romania (9 Dec 1919), art 6; and Treaty with the Serb-Croat-Slovene State (10 Sept 1919), art 6.

²³ Centro Social Palestino in Mexico, Letter to the British Minister of Foreign Affairs (with a cover letter to the League of Nations), 9 Sept 1929, 2 (available at the League of Nations archives, Geneva).

²⁴ Palestine Royal Commission, above n 10, 331.

²⁵ Committee of the Defenders of the Rights of Palestine Arab Emigrants, above n 9, para 1.

²⁶ *ibid* para 7.

²⁷ Flournoy and Hudson, above n 19, 459.

²⁸ A Musallam, *Folded Pages from Local Palestinian History in the 20th Century* (WIAM/Palestinian Resolution Centre 2002) 49.

who applied for visas 'received advice of rejection of their application ... thus making it physically impossible for them ... [to] travel to Palestine.'²⁹ In justifying its refusal to grant Palestinian citizenship, the British Government asserted that the intention of such natives was solely to receive diplomatic protection from the British authorities abroad, not to return home.³⁰

Persons whose return was denied protested to the British Government. When their efforts failed, they petitioned the League of Nations. In 1927, for instance, eleven Arab natives of Palestine then residing in Honduras, El Salvador, and Mexico, complained that they applied for Palestinian citizenship and that their applications had been refused. The applicants stated that they:

were all born in Palestine and that they had not during their absence changed their citizenship. Those residents in Honduras added that they still owned land in Palestine, and that, although their engagement in commerce had hitherto prevented their return to Palestine, they expected to return home at some future date. The residents of El Salvador complained that they have been refused passports to visit or return to Palestine. The petitioners of Mexico, represented by the Palestinian Association in Mexico which had membership of more than 3000 Palestinians, asked to be informed of what it meant that native born Palestinians could acquire citizenship in their native land. All the petitioners protested against the decision of the [British] Government of Palestine that rejected their applications for Palestinian citizenship.... The British Government maintained that it would entertain options for Palestinian citizenship only for those who maintained a substantial connection with Palestine. This principle was embodied in a rule according to which Turkish nationals, natives of Palestine but resident abroad, could acquire Palestinian citizenship only if they had emigrated from Palestine during or after the year 1920, or if, having emigrated before 1920, they had since returned to Palestine and resided there for not less than six months. This latter condition is explained by the undesirability of creating a class of persons permanently resident abroad who are entitled to British protection.³¹

The League of Nations Mandates Commission expressed the hope that the British Government would show a 'liberal spirit' in dealing with these persons.³² The Commission took no further action.

A small number of persons born in Palestine and residing abroad had acquired Palestinian citizenship by other means, such as naturalization. For example, only 78 out of 4,713 persons naturalized in 1928 were persons who had been born in Palestine and then resided abroad; the rest were immigrant Jews.³³ In 1937, 64 individuals from this category were able to acquire Palestinian citizenship, while 21,542 Jews from Poland,

²⁹ Centro Social Palestino in Mexico, above 23, 3.

³⁰ Permanent Mandates Commission, 'Petition from MM Sikaffy and other Arabs living in Honduras and from the 'Sociedad Fraternidad Palestina' of San Salvador: Observations from the British Government', League of Nations doc CPM656, Geneva, 28 Oct 1927 (document marked 'confidential', available at the League of Nations archives, Geneva).

³¹ Permanent Mandates Commission, Minutes of the Twelfth Session (League of Nations 1927), 128–29.

³² *ibid.*

³³ British Government, Report to the Council of the League of Nations on the Administration of Palestine and Trans-Jordan (1928) 93–4.

Germany, and Russia, were naturalized.³⁴ And in the following year, just 92 persons acquired citizenship by this method, whereas 17,988 immigrant Jews were accorded Palestinian citizenship during that year.³⁵

A recommendation on resolving the citizenship problem of these persons was presented to the British Government by the aforementioned Royal Commission in 1936, which had visited Palestine to investigate the causes of the disturbances of that year and to propose a solution.³⁶ The Commission suggested:

At least those who are able to establish an unbroken personal connection with Palestine and who are prepared to give a definite formal assurance of their intention to return, should be admitted to Palestinian citizenship.³⁷

In 1938, Britain informed the League of Nations that consideration had been given to this recommendation of the Palestine Royal Commission to grant Palestinian citizenship to those natives of Palestine then residing abroad.³⁸

On 31 August 1939, an amendment to the 1925 Citizenship Order was introduced to allow these persons to return to Palestine and to obtain Palestinian citizenship within two years (article 1).³⁹ On 23 October 1939, special regulations were enacted to that effect.⁴⁰ The Government of Palestine then advised the inhabitants, to inform their relatives and friends abroad to apply for Palestinian citizenship through this newly-opened channel.⁴¹

On 11 June 1942, another amendment to the Citizenship Order was passed, extending the time limit to apply for citizenship from two to six years. Article 1 of this Order gave those natives residing abroad the right to apply for Palestinian citizenship, providing they could establish an unbroken personal connection with the country.⁴² The granting of citizenship at this time coincided with a shift in British policy towards Palestine that favoured the native Arabs over immigrant Jews. The policy change was evident in the position taken by the Palestine Royal Commission, for example, and the subsequent policy statement released on 1 May 1939 (commonly known as the 'White Paper'), which attempted to strike a balance between Arab and Jewish demands, including the question of emigration and immigration.⁴³

In practice, it proved that only a very limited number of persons were able to opt for Palestinian citizenship. In 1946, it was reported that only 465 persons who had been born in Palestine and who were residing abroad had succeeded in acquiring Palestinian

³⁴ British Government, Report to the Council of the League of Nations on the Administration of Palestine and Trans-Jordan (1937) 84.

³⁵ British Government, Report to the Council of the League of Nations on the Administration of Palestine and Trans-Jordan (1938) 89.

³⁶ Palestine Royal Commission, above n 10, 331.

³⁷ *ibid.*, Summary of Report 21.

³⁸ Report on the Administration of Palestine 1938, above n 35, 90.

³⁹ Palestinian Citizenship (Amendment) Order of 1939 (Palestine Gazette, no 917, Supp 2, 31 Aug 1939, 845).

⁴⁰ Palestinian Citizenship Regulations of 1939 (Palestine Gazette, no 960, Supp 2, 21 Nov 1939, 1448).

⁴¹ Notice relating to Palestinian Citizenship Order, 1939 (Palestine Gazette, no 960, Supp 2, 21 Nov 1939, 1451).

⁴² Palestinian Citizenship Order (Amendment) of 1942 (Palestine Gazette no 1210, Supp 2, 16 July 1942, 1530).

⁴³ Statement of Policy Presented by the Secretary of State for the Colonies to Parliament by Command of His Majesty, 1 May 1939 (His Majesty's Stationery Office, 1939).

citizenship since 1925, while the cases of eighty-seven others remained under consideration.⁴⁴ Despite the change of British policy towards this group of natives, the situation had not really changed. This can be explained by the fact that the period during the Second World War, and the years that immediately followed (1939–1948),⁴⁵ led to the imposition of severe restrictions on entry and immigration into Palestine.⁴⁶

As a consequence, the citizenship of this group and their descendants remained unresolved. In short, this group constituted the first wave of Palestinian refugees. They became refugees despite the fact that they initially left Palestine at will, largely as economic emigrants; this was because they were unable to return home as a result of the denial by the British mandate authorities and later by the State of Israel.⁴⁷

British practice with respect to the citizenship of this group was contrary to the international law of state succession. Article 8(1) of the International Law Commission's Draft Articles on Nationality of Natural Persons in Relation to the Succession of States imposes no obligation on a successor state to attribute its citizenship to citizens of the predecessor state 'if they have their habitual residence in another State.'⁴⁸ This customary law article restricts that proviso by inserting as a condition that such citizens should have the citizenship of another state. In other words, such persons should not be rendered stateless as a result of state succession. They are entitled to exercise the right of option for citizenship and the successor state 'should provide a reasonable time limit for the exercise of the right of option.'⁴⁹ As noted by the International Law Commission, a 'reasonable time limit' is a period 'necessary to ensure the effective exercise of the right of option.' The facts following the adoption of the 1925 Citizenship Order prove that the nine-month time limit was unreasonable and that the majority of the persons concerned had become stateless at the time. These persons should have enjoyed the right to opt for the citizenship of any state that would be created in Mandate Palestine at any time in the future by the citizenship legislation of the State of Israel or the State of Palestine, or through an agreement between the two states, depending on their former habitual residence. Now these persons should enjoy all refugee rights pending the final settlement of their status by legislation or by treaty between the future State of Palestine and the State of Israel. Nevertheless, as most of them have presumably acquired other nationalities with the passage of time, their main right would consist of the right of return on the same footing as other refugees. This group, who are mostly descendants of natives, should also be able to recover their denied citizenship. Members of the

⁴⁴ Government of Palestine, *A Survey of Palestine* (Government Printer, 1946), vol I, 206.

⁴⁵ On the conditions in Palestine during the Second World War, see, eg, Esco Foundation for Palestine, *Palestine: A Study of Jewish, Arab, and British Politics* (Yale University Press 1947), vol II, 956–1076.

⁴⁶ Defence (Entry Prohibition) (Amendment) Regulations, 1940 (Palestine Gazette, No 1062, Supp 2, 9 Oct 1940, 2017); Defence (Entry Prohibition) Regulations, 1940 (Palestine Gazette, No 1052, Supp 2, 18 Oct 1940, 1709). During the war, the state of emergency was declared and Palestine's borders were closed. Entering or leaving the country required a special permit and arrangements. Most of those who entered were illegal Jewish immigrants from Europe.

⁴⁷ cf Baeza, above n 12, 6–7. She explains: 'Palestinians in Latin America do not easily fit in a national narrative shaped by the refugee experience. In fact, Palestinian historiography has long seemed uninterested in this diaspora which doesn't meet the criteria of Palestinian-ness, as defined by the political necessities of a nationalist discourse centered on the state of dispossession, denial and statelessness of the refugees' at 1.

⁴⁸ Draft Articles on Nationality of Natural Persons in relation to the Succession of States with commentaries, 1999 (United Nations 2005).

⁴⁹ *ibid* art 11(5).

group belong to various areas of pre-1948 Palestine. If they (or largely their parents or grandparents) were habitual residents of those parts of Palestine in which Israel was established, they should be allowed to return thereto and to acquire Israeli citizenship. If members of the group were habitual residents before 1948 in the areas of Mandate Palestine that are now the West Bank or the Gaza Strip, they should be granted the citizenship of the State of Palestine on a similar basis to persons originating from the 1967-occupied territory who now live in that territory.

It may be relevant to note that Jordanian Nationality Law of 4 February 1954 included a provision concerning the granting of Jordanian citizenship to members of this group.⁵⁰ Article 5 of this law stipulated:

His Majesty, upon the nomination of the Council of Ministers, may confer Jordanian nationality on any emigrant who submits a written declaration by which he opts for Jordanian nationality, providing that such emigrant renounces any former nationality that he might have been holding prior to the submission of the aforementioned declaration.

Article 1 of the same law defined the term 'emigrant' as:

Any Arab who has been born in the Hashemite Kingdom of Jordan [including the West Bank at the time] or in those occupied parts of Palestine [in which Israel was established] and emigrated from the countries [Jordan or the parts of Palestine in which Israel had been established] or was forced to leave. This definition includes descendants of such emigrant regardless of their place of birth.

As this article sets no time limit for the grant of Jordanian citizenship to such persons, many of the persons concerned have effectively applied and acquired that citizenship since the 1950s. The names of these persons, who are mostly Palestinian natives or their descendants, have been published in the Jordanian Official Gazette. The future citizenship law of the State of Palestine ought to take this provision as a precedent.

3. POST-SECOND WORLD WAR PALESTINIAN REFUGEES

After the Second World War, both Arabs and Jews in Palestine were determined to be liberated from British rule.⁵¹ Both wanted to establish a state of their own in the territory of Palestine. In this context, Britain brought the question of Palestine to the United Nations on 2 April 1947 requesting the organization's intervention.⁵² The UN decided on 29 November 1947 to divide Palestine into two states, Arab and Jewish.⁵³ The conflicting demands of both sides for establishing a state led to confrontation between Jewish militias, backed by the Great Powers, and Arab inhabitants in Palestine, backed politically by the then existing Arab states. The balance of power was clearly in favour of the Jews, who succeeded in establishing the State of Israel. Meanwhile, hundreds of

⁵⁰ Jordan Official Gazette, No 1171, 16 Feb 1954, 105.

⁵¹ D Trevor, *Under the White Paper: Some Aspects of British Administration in Palestine from 1939 to 1947* (Jerusalem Press 1948); A Koestler, *Promise and Fulfilment: Palestine 1917-1949* (Macmillan 1949).

⁵² UN doc A/286 (1947).

⁵³ UN doc A/RES/181(II) (A+B).

thousands of Palestinian Arabs, fearing the consequences of the war, fled their homes in the areas of Palestine in which Israel was established. Many others were driven out by the Jewish militias. Most of these persons, who became refugees, were unable to return.⁵⁴ Today they number over five million, according to the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA).⁵⁵ The situation of Palestinian refugees coincided with other waves of refugees who fled areas of conflict in Europe in the context of the Second World War. The post-war scale of refugee influx prompted the international community to consider drafting a new treaty governing the position of refugees – the 1951 Convention relating to the Status of Refugees.⁵⁶ This part looks at the question of Palestinian refugees as formally discussed by the states that took part in the drafting process of the Convention.

In the briefest historical detail, as Jewish immigration began to increase, from 1917 onwards until 1948, and due particularly to the conflicts that took place before and during the creation of Israel, approximately one million Palestinians were displaced from their homes, property, and country and sought refuge elsewhere.⁵⁷ The bulk arrived in neighbouring Arab countries, whilst others were dispersed all over the world. General Assembly Resolution 194 (III) of 1948 called for the return of refugees and the compensation of those who could not return (para 11).

In response to the Palestinian refugee flow outside the British mandatory Palestine, the General Assembly called upon states and various international organizations, including UN agencies, to contribute to the relief of this group of refugees. Key UN specialized agencies that were requested to provide support to Palestinian refugees included: the Food and Agriculture Organization; the UN International Children's Emergency Fund; the World Health Organization; the UN Educational, Scientific and Cultural Organization; and the International Refugee Organization. States and UN agencies were urged to coordinate their assistance collectively into one unified programme. An administrative UN body, named the United Nations Relief for Palestine Refugees (UNRPR), was established for this purpose on 19 November 1948. Concurrently, UN specialized agencies were requested to continue providing their support to Palestinian refugees, alongside the work of UNRPR.⁵⁸ The General Assembly later replaced UNRPR with UNRWA on 8 December 1949.⁵⁹

Alongside these humanitarian relief efforts, the UN simultaneously set up another body to accord durable solutions for Palestinian refugees – the United Nations Conciliation Commission for Palestine (UNCCP), which was established by General Assembly Resolution 194 (III), para 2.⁶⁰ This resolution instructed UNCCP, *inter alia*,

⁵⁴ E Buehrig, *The UN and the Palestinian Refugees: A Study in Nonterritorial Administration* (Indiana University Press 1971); B Morris, *The Birth of the Palestinian Refugee Problem, 1947–1949* (CUP 1989); N Aruri (ed), *Palestinian Refugees: The Right of Return* (2001); M Bouchard, *L'Exode Palestinien: construction d'une représentation occidentale du conflit israélo-arabe* (2003); A Lesch and I Lustick, *Exile and Return: Predicaments of Palestinians and Jews* (University of Pennsylvania Press 2005).

⁵⁵ UNRWA, UNRWA in Figures (1 Jan 2013) 1.

⁵⁶ 189 UNTS 150.

⁵⁷ A Badran, 'The Role of UNRWA: Refugee Statistics and UN Resolutions', in J Ginat and E Perkins (eds), *The Palestinian Refugees: Old Problems - New Solutions* (University of Oklahoma Press 2001) 255–63.

⁵⁸ UNGA res 212 (III) of 19 Nov 1948.

⁵⁹ UNGA res 302 (IV) of 8 Dec 1949.

⁶⁰ Para 11 of this resolution requested UNCCP to 'maintain close relations with the Director of the United Nations Relief for Palestine Refugees'.

‘to facilitate the repatriation, resettlement and economic and social rehabilitation of the refugees and the payment of compensation.’⁶¹ In December 1950, UNCCP was mandated to establish an office to fulfil these instructions and, more concretely, to work with relevant parties regarding ‘the protection of the rights, property and interest of refugees.’⁶² An office was opened in Jerusalem to protect Palestinian refugees collectively by means of finding durable solutions in consultation with relevant states and parties.⁶³

Effectively, today, the principal UN agency for Palestinian refugees is UNRWA, whose operations cover a wide range of areas, including education, health, and relief programmes, guaranteeing a considerable number of refugees’ basic rights. Although its work was initially characterized as ‘assistance’, it could now be termed as ‘international protection’ as it performs *de facto* the functions of other UN agencies.⁶⁴ The mandate of the agency has been periodically renewed for three-year terms and has proved flexible enough to allow its operations to evolve as the situation demanded. In 1950, there were 914,000 refugees registered with UNRWA and, as of January 2013, their number has grown to 5,271,893 persons.⁶⁵ UNRWA has progressively developed its protection role, and considers itself the ‘global advocate for the protection and care of Palestine refugees.’⁶⁶

The deliberation on Palestinian refugees within the framework of the Convention had yielded paragraph D of article 1. The paragraph read as follows:

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

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

This paragraph comprises two sentences. The first excludes a specific category of persons from the scope of the Convention in certain circumstances and addresses the matter of overlapping competencies. The second sentence brings such persons back to the Convention’s applicability if the circumstances that justified their exclusion ceased to exist, thereby aiming for continuity of protection. Given its general wording, which does not refer to refugees of a specific national origin, article 1D could apply to any group of refugees that satisfy its conditions. However, the drafting history of the Convention and the practice of its application since its entry into force show that article 1D *de facto* concerns Palestinian refugees only.⁶⁷ Over the past six decades, this

⁶¹ *ibid.*

⁶² UNGA 394 (V) of 14 Dec 1950.

⁶³ UN doc A/1985 (1951).

⁶⁴ Despite the absence of the word ‘protection’ in its mandate, UNRWA has exercised over the years a mandate that can be characterized as protection. On 16 Dec 1982, the word ‘protection’ appeared explicitly for the first time in connection with UNRWA’s role in UNGA res 37/120. L Takkenberg, *The Status of Palestinian Refugees in International Law* (OUP 1998); P McCann, ‘The Role of UNRWA and the Palestine Refugees’ (2008) 15 *Palestine-Israel Journal* 83–89.

⁶⁵ UNRWA, above n 55, 1.

⁶⁶ UN doc A/63/13 (2008).

⁶⁷ J Hathaway, *The Law of Refugee Status* (Butterworths 1991) 205–09.

paragraph has shaped the international regime relating to the status of Palestinian refugees and created considerable jurisprudence across the world.

The history of article 1D started on 26 January 1950 when the representative of the United States at the *Ad Hoc* Committee on Statelessness and Related Problems, which was charged with the drafting of the Convention, was the first to propose the exclusion of Palestinian refugees, among other refugees, from the framework of the Convention. The purpose was to confine the term ‘refugee’ to certain categories of refugees and, in particular, to exclude from the scope of the Convention’s application those refugees whose case was taken care of by other bodies of the UN.⁶⁸ The draft prepared by the said *Ad Hoc* Committee, therefore, included a definition of the term ‘refugee’ along the lines of the US suggestion and covered three groups of refugees.⁶⁹ Palestinian refugees were not among the three groups.⁷⁰

In September 1950, the draft Convention was submitted to the UN General Assembly’s Third Committee for further debate. Here Arab states (Egypt, Lebanon, and Saudi Arabia) proposed to insert a joint amendment to the definition of the term ‘refugee’. A consensus favoured the Arab proposal, which was accordingly included in the draft Convention in the form of paragraph C of article 1, which read as follows:

The present Convention shall not apply to persons who are at present receiving from other organs or agencies of the United Nations protection or assistance.⁷¹

By inserting this provision, Arab states wanted to maintain the special status granted to Palestinian refugees based on their return home.⁷² France, among some other Western states, on the other hand, favoured excluding Palestinian refugees from the mandate of the UN Office of the High Commissioner for Refugees (UNHCR) on the ground that these refugees already received protection and assistance from other UN bodies,⁷³ the United Nations Conciliation Commission for Palestine and UNRWA.⁷⁴

The above-quoted paragraph was then presented as part of the draft Convention at the Conference of Plenipotentiaries that adopted the Convention in 1951.⁷⁵ A detailed discussion that led to the final adoption of article 1D took place in July 1951 as part of this Conference. There was general agreement among participating states on the need for a special status for Palestinian refugees.⁷⁶ The representative of Egypt explained that

⁶⁸ UN doc E/AC.32/SR.3 (1950) 9.

⁶⁹ Ad Hoc Committee on Statelessness and Related Problems, UN doc E/1618 (1950) and UN doc E/AC.32/5 (1950) 38–40; Ad Hoc Committee on Statelessness and Related Problems, UN doc E/1618/Corr.1 (1950) and UN doc E/AC.32/5/Corr.1 (1950).

⁷⁰ The three groups are ‘refugees who became such “as results of events in Europe after 3 September and before 1 January 1951”, “victims of the Nazi regime or of regimes associated with it and the victims of the Falangist regime in Spain” (who were covered at the time by the International Refugee Organization), and “any person who in the period between 4 August 1914 and 3 September 1939 was considered to be a refugee”.

⁷¹ UNGA res 429(V) of 14 Dec 1950.

⁷² Statements of Azmi (Egypt), Azkoul (Lebanon), and Baroody (Saudi Arabia), General Assembly Third Committee, 328th Meeting, UN GAOR 5th Session, SR 328 (1950), paras 37–55.

⁷³ Hathaway, above n 67, 208.

⁷⁴ UN doc A/CONF.2/SR.3 (1951) 10.

⁷⁵ UN doc A/CONF.2/1 (1951) 5.

⁷⁶ Some states were of the opinion that the problem of Palestinian refugees is ‘completely different from those of the refugees in Europe, and could not see how Contracting States could bind themselves to a text under the terms of which their obligations would be extended to include a new, large group of refugees’. Statement of Rochefort (France), UN doc A/CONF.2/SR.19 (1951) 11.

the draft of article 1C intended to make the exclusion of Palestinian refugees temporary, namely as long as UN assistance continued.⁷⁷ Thereby, once such assistance ceased, Palestinian refugees 'should automatically enjoy the benefits of the Convention.'⁷⁸ Yet some participating states, as well as the UN High Commissioner himself, who took part in that session of the Conference, expressed an understanding that draft article 1C permitted the exclusion of Palestinian refugees from the Convention and UNHCR's mandate, but 'it did not imply that when such protection ceased the refugees concerned would come under the protection of the Convention.'⁷⁹ In order to eliminate such doubt, Egypt proposed a second amendment.⁸⁰ This additional amendment, introduced on 3 July 1951, read as follows:

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 United Nations General Assembly, they⁸¹ shall *ipso facto* be entitled to the benefit of this Convention.⁸²

This passage, called the 'Egyptian amendment', was later adopted by the Conference of Plenipotentiaries on 28 November 1951 as the second sentence of draft article 1C.⁸³ Article 1C was henceforth re-numbered article 1D and adopted by the Conference on 30 November 1951.⁸⁴

The foregoing shows that, although Palestinian refugees were not specifically mentioned in article 1D, this group of refugees was in the minds of the drafters of the Convention. States that advocated this provision were concerned with the exclusion of Palestinian refugees from the Convention for two reasons. One was to maintain specific UN attention on the case of these refugees through UNRWA and UNCCP. Secondly, excluding Palestinian refugees from UNHCR, which was created by the General Assembly, would avoid duplication in the UN assistance or protection provided by UNRWA and UNCCP, which both also derived their existence from the General

⁷⁷ UN doc A/CONF.2/SR.2 (1951) 22.

⁷⁸ *ibid.* 20. The representative of France pointed out that 'the question of whether the Arab refugees [from Palestine] were covered by the Convention was a controversial one'.

⁷⁹ *ibid.* 27.

⁸⁰ Introducing his amendment, Mostafa Bey of Egypt said that 'the aim of his delegation ... was to grant to all refugees the status for which the Convention provided. To withhold the benefits of the Convention from certain categories of refugee would be to create a class of human beings who would enjoy no protection at all.... The limiting clause contained in paragraph C of article 1 of the Convention at present covered Arab refugees from Palestine. From the Egyptian Government's point of view it was clear that so long as United Nations institutions and organs cared for such refugees their protection would be a matter for the United Nations alone. However, when that aid came to an end the question would arise of how their continued protection was to be ensured. It would only be natural to extend the benefits of the Convention to them; hence the introduction of the Egyptian amendment', UN doc A/CONF.2/SR.19 (1951) 16–17. Furthermore: 'It was only right and proper that, as soon as the Palestine problem had been settled and the refugees no longer enjoyed United Nations assistance and protection, they should be entitled to the benefits of the Convention on the status of refugees, and it was for that reason that the Egyptian delegation had submitted its amendment', UN doc A/CONF.2/SR.20 (1951) 9.

⁸¹ The word 'they' was replaced by the phrase 'these persons' by the Style Committee of the Conference of Plenipotentiaries on 24 July 1951, UN doc A/CONF.2/102/Add.2 (1951) 5.

⁸² UN doc A/CONF.2/13 (1951).

⁸³ The proposal was approved by 14 votes to 2, with 5 abstentions, UN doc. A/CONF.2/SR.29 (1951) 9; whilst art 1D was adopted by 16 votes to none in its entirety, with 3 abstentions, UN doc A/CONF.2/SR.34 (1951) 12.

⁸⁴ UN doc A/CONF.2/SR.34 (1951) 12.

Assembly. This concern was reflected in the first sentence of article 1D. Countries that were concerned that the Palestinian refugees would be left without any protection if their special UN regime ceased to exist wanted to ensure on-going UN protection. This latter concern led to the adoption of the second sentence of article 1D. As the Federal Court of Australia has correctly noted, ‘if any provision of a Treaty arose as a result of compromise, it was Article 1(D) of the Convention.’⁸⁵

States that had accommodated Palestinian refugees which advocated the inclusion of paragraph D, had meant to grant such refugees international refugee rights, besides emphasising the right of return to their homeland in Palestine/Israel. Such rights, spelled out in the Convention, include the right eventually to choose from voluntary repatriation, local integration, or resettlement.⁸⁶ Having regard to the purpose of the special provision of article 1D and other interrelated instruments, the language of article 1D reveals that Palestinian refugees are to be ensured *heightened* protection.⁸⁷ Because Palestinian refugees were excluded by article 1D to ease the international administration of the refugee problem, namely, to avoid duplication of the international aid offered by UNCHR or UNRWA; this procedural/administrative reason, in the opinion of the present author, should in no way overshadow the legal obligation of the international community to grant Palestinian refugees the benefits set out in the Convention, besides the benefits guaranteed by other international legal foundations, including human rights law and humanitarian law, in the areas affected by armed conflict.

Although article 1D excludes certain groups of persons from the Convention’s scope of application, these persons are not herein prevented from being considered as refugees under other legal bases that regulate the status of refugees in international law. These bases might include: international law norms, particularly human rights, for example, the prohibition of *non-refoulement* as a rule of customary international law or under article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984;⁸⁸ domestic legislation, such as alien regulations and asylum laws;⁸⁹ standards of regional human rights and refugee bodies;⁹⁰ or UN resolutions mentioned elsewhere in this article.

Now we will turn to the interpretation of article 1D, as understood by the drafters, and how such interpretation is applied in practice by the UN and by various states.

The Convention’s drafting process reveals that its drafters did not refer to a specific UN organ or agency charged of taking care of Palestinian refugees. The particular drafting format for article 1D reflected a portrayal of the UN as an organisation that represents the international community. The interpretation provided by the French representative at the Conference, for instance, recalled the UN bodies: ‘various United

⁸⁵ *Minister for Immigration and Multicultural Affairs v WABQ* (no 329) Federal Court of Australia [2002] para 16. This jurisprudence was upheld also by *WAED v Minister for Immigration and Multicultural Affairs* (no 333) Federal Court of Australia [2002] para 6.

⁸⁶ Art 30 of the 1951 Convention.

⁸⁷ S Akram and T Rempel, ‘Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees’ (204) 22 Boston University International Law Journal 1, 31.

⁸⁸ 1465 UNTS 85.

⁸⁹ Examples in which Palestinian refugees were considered under national legislation include: *K v Secretary of State for the Home Department* Imm. AR 193 [1978] UK; *A v Secretary of State for the Home Department* Imm. AR 410 [1988] UK.

⁹⁰ *Eg, ECmHR, I v The Netherlands* App no 16505/90, Decision of 10 May 1990; *ECmHR, L and S v Sweden* App no 18288/91, Decision of 13 May 1992.

Nations *bodies* were at present giving [assistance] to the Arab refugees in Palestine.⁹¹ On another occasion he also referred to UN ‘agencies responsible for providing assistance to the Arab refugees from Palestine.’⁹² The Egyptian representative, on the other hand, used the term UN ‘institutions and organs’, noting that ‘it was clear that so long as United Nations *institutions and organs* cared for such refugees their protection would be a matter for the United Nations alone.’⁹³ The term ‘United Nations’, without reference to organs or agencies, was likewise utilized on its own.⁹⁴ The coordinating conjunction ‘and’ was used, rather than ‘or’, by referring to ‘organs *and* agencies’,⁹⁵ showing that the intention was to encompass all possible bodies. Referring to organs and agencies in the plural implies that there was more than one UN body taking charge of the excluded refugees.

As the exclusion of such refugees intended to eliminate the possible overlapping mandate of UN bodies, as discussed above, it follows that the protection or assistance given to Palestinian refugees should not be inferior to that assigned to non-Palestinian refugees under the Convention. As Palestinian refugees, notwithstanding the technicalities of the Convention, are refugees like any other refugees; this implies that the UN body or bodies mandated to ‘take care’ of such refugees (namely UNRWA), as well as hosting states, are obliged to do so according to the same standards that UNHCR, based on its Statute, applies to other refugees. The ‘benefits’ would necessarily include the rights granted under the protection scheme of the Convention. The object of the Convention is expressed by its preamble as being the enjoyment of ‘fundamental rights and freedoms without discrimination’ and their ‘widest possible exercise.’ The provisions on the benefits afforded by the Convention are found in chapters II to IV, including stipulations on judicial or personal status, employment, welfare, and administrative measures. This, in turn, places an obligation on the UN as a whole to protect and assist Palestinian refugees on at least the same footing as set out in the Convention for other refugees.

There have been different interpretations of ‘protection or assistance’, both jointly and used separately. One holds that UNCCP is in charge of protection, whilst UNRWA is in charge of assistance.⁹⁶ Another contends that UNRWA is in charge of both protection and assistance.⁹⁷

The first interpretation considers the actual protection and assistance that had been in place on the eve of the adoption of the Convention.⁹⁸ It says that UNCCP and UNHCR were simultaneously mandated to help Palestinian refugees: UNCCP by repatriation, settlement, and contact with relevant authorities; UNRWA by providing food, shelter, health care, and education. Supporters of this interpretation invoke certain statements to this effect throughout the drafting history of the Convention, an example of these being the following statement made by the French representative:

⁹¹ UN doc A/CONF.2/SR.19 (1951) 12, emphasis added.

⁹² UN doc A/CONF.2/SR.29 (1951) 7, emphasis added.

⁹³ UN doc A/CONF.2/SR.19 (1951) 16–17, emphasis added.

⁹⁴ *ibid.*

⁹⁵ UN doc A/CONF.2/SR.21 (1951) 11, 12, emphasis added.

⁹⁶ Takkenberg, above n 64, 99.

⁹⁷ *ibid.*

⁹⁸ BADIL, ‘Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention’ (2005) 42–63.

The General Assembly had extended its protection to the Arabs by setting up two bodies, an office to deal with relief questions [UNRWA] and a conciliation commission [UNCCP]... It could therefore be said that the General Assembly had already delegated certain of its powers with regard to the Arab refugees and it had delegated those powers to organs other than the High Commissioner [for Refugees].⁹⁹

There is some case law that supports this interpretation. The Federal Court of Australia referred to the 'protection' mandate of UNCCP.¹⁰⁰ Whilst interpreting article 1D with regard to a Palestinian refugee who applied for a visa in Australia, it pointed out that UNCCP was mandated 'to provide an element of protection to Palestinians.'¹⁰¹ It proceeded by ruling that 'it is clear that those who framed the Convention intended the reference to protection to be a reference to UNCCP.'¹⁰² Another judge concluded: 'Palestinians as a group were receiving protection under the mandate of UNCCP as at the date of the Convention.'¹⁰³ More specifically, one of the judges referred to article 1D as follows:

In this case, it is important to keep in mind that at the time of the Convention, there were two UN agencies in existence and the function of 'protection' was given to UNCCP and the function of providing 'assistance' was assigned to UNRWA. This factual context is relevant to the interpretation of Article 1D. There is of course some overlap in the expression 'protection' and the expression 'assistance' in that protection may qualify as a form of assistance. However, as used in Article 1D, the word 'protection' appears to embrace activities or measures extending beyond the social, educational and other types of assistance assigned to UNRWA. This distinct role assigned to UNCCP must be borne in mind in the interpretation of Article 1D.¹⁰⁴

If the logic of this view is continued, it must be concluded that, since UNCCP had terminated its protection, Palestinian refugees fall under the second sentence of article 1D and, therefore, benefit from the Convention and fall under the protection of UNHCR, or that UNRWA should undertake the role of UNHCR.

The other view is that UNRWA's assistance is sufficient to exclude Palestinian refugees from the scope of UNHCR's mandate, and from the benefits of the Convention. This is also the official position of UNHCR itself.¹⁰⁵ Furthermore, Goulding's report, commissioned by the Secretary-General, contains an analysis of what might be meant by 'protection' by identifying four types of protection: physical, legal, general assistance, and protection by publicity.¹⁰⁶ On the topic of general assistance, the report

⁹⁹ UN GAOR 5th Sess, SR 326 (1950).

¹⁰⁰ WABQ, above n 85.

¹⁰¹ *ibid* para 48.

¹⁰² *ibid* para 69.

¹⁰³ *ibid* para 155.

¹⁰⁴ *ibid* para 161.

¹⁰⁵ UNHCR, 'Revised Note on the Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees' (Oct 2009).

¹⁰⁶ UN doc S/19443 (1988).

notes that 'UNRWA has the leading role and provides a wide variety of assistance and protection.'¹⁰⁷

The drafting history of article 1D reveals that the words 'protection' and 'assistance' had not been intended to imply a technical/legal meaning. Other words were used to express the UN's mandate vis à vis Palestinian refugees. These words include 'care for': 'it was clear that so long as United Nations institutions and organs *cared for* such refugees their protection would be a matter for the United Nations alone.'¹⁰⁸ Article 1D had been inserted in order to avoid imposing 'on Contracting States the burden of the Arab refugees from Palestine so long as the United Nations was *caring for* them.'¹⁰⁹ The word 'aid' was also employed: 'the moment the *aid* at present being given by the United Nations to Arab refugees ceased; the latter would then be eligible for the benefits of the Convention.'¹¹⁰ Thus, the words 'protection' and 'assistance' are used as synonyms; this can be further understood from the coordinating conjunction 'or' inserted between the two words.¹¹¹ The two words together imply 'care', or 'aid', or 'support', or 'protection', or 'assistance' by the UN.

The second requirement for an application of the Convention to Palestinian refugees, namely, that the problem has not definitely been settled, still continues to apply more than six decades after the initial displacement of Palestinian refugees. The New Zealand Refugee Status Appeals Authority held that:

[A] Palestinian in receipt of assistance from UNRWA who travels outside the area of operations of UNRWA ... does not ipso facto become entitled to recognition as a refugee unless and until *the second cumulative condition* is satisfied, namely *the absence of a definitive settlement* by a General Assembly resolution.¹¹²

The 'relevant UN resolutions' include primarily, *inter alia*, General Assembly Resolution 194 (III). This resolution has been reaffirmed by the Assembly almost yearly since 1948 and the UN has never wavered from its terms.¹¹³ This resolution envisages a *comprehensive settlement* for Palestinians as a people, whereby they are entitled to repatriation (return) and compensation for property loss. Notably, even those Palestinians who are granted something approaching citizenship rights still remain vulnerable and thus their case can hardly be called 'definitively settled'.

With the exception of Jordan, Palestinians were at no point meaningfully integrated in the host countries because of special provisions and practices prohibiting their naturalization. There are numerous examples of expulsions of Palestinians from countries of refuge. Kuwait expelled close to 350,000 Palestinians during the Gulf War after 1990.¹¹⁴ In 1995, and again in 2011, thousands of Palestinian refugees were displaced from

¹⁰⁷ *ibid* para 37.

¹⁰⁸ UN doc A/CONF.2/SR.19 (1951) 16–17.

¹⁰⁹ *ibid*.

¹¹⁰ *ibid*.

¹¹¹ WABQ, above n 85, para 69.

¹¹² Appeal no 1/92, 30 Apr 1992, emphasis added.

¹¹³ There were only 3 years between 1952 and 1990 when the UN did not reaffirm its commitment to the resolution, namely in 1956, 1960, and 1964. The most recent is UNGA res 67/117 of 14 Jan 2013.

¹¹⁴ S Rosen, 'Kuwait Expels Thousands of Palestinians' (2012) 19 *The Middle East Quarterly* 75–83.

Libya.¹¹⁵ While it is difficult to assess the exact number of Palestinians who have been evicted from their homes, abusively detained, abducted, tortured, or killed in Iraq after its occupation in 2003, it is clear that the Palestinian community in Iraq has become a target of abuse on sectarian grounds.¹¹⁶ Most Palestinian refugees have fairly limited scope for integration in Lebanese society with poor prospects for the future.¹¹⁷ During the current civil war in Syria (2011–2014), hundreds of civilian Palestinian refugees were killed and thousands were displaced from their places of residence.¹¹⁸ Recently (2014), Egyptian media has launched a wave of propaganda against the Palestinians, accusing them of collaborating with the ousted President Mohammad Morsi and initiating terrorist attacks in the Sinai peninsula;¹¹⁹ substantial restrictions on the movement of Palestinians from and to Egypt, particularly Palestinians from Gaza, are imposed.¹²⁰ On the other hand, many Palestinian refugees who live in Jordan are able to acquire citizenship under the Jordanian Nationality Law of 4 February 1954 (cited above). However, even these are not considered nationals with equal rights, as in the case of East Bankers/original Trans-Jordanians. In 1988, for example, King Husain of Jordan decided to withdraw Jordanian nationality from hundreds of thousands of Jordanians of Palestinian descent.¹²¹ Jordan has also issued passports indicating varying degrees of nationality/protection.¹²²

The contemplation of the return of Palestinian individuals to the countries of their refuge after their departure would produce a counter protection under the Convention. Therefore, irrespective of whether the person is entitled to protection or assistance from UNRWA, if they are at risk of persecution upon return to their state of refuge, they would be entitled to the benefits of the Convention and would be protected by UNHCR and the country of residence, particularly where the state is party to the Convention.¹²³

When the problem of Palestinian exodus was aggravated in the aftermath of the 1967 war, the UN adopted a number of resolutions that have extended UNRWA's mandate towards the new refugees. Security Council Resolution 237 of 14 June 1967 and General Assembly Resolution 2452 (XXIII) of 1968 extended the temporal scope of UNRWA's work and urged the 'Government of Israel to take effective and immediate steps for the return without delay of those inhabitants who have fled the areas since

¹¹⁵ E Fiddian-Qasbiyeh, 'Invisible Refugees and/or Overlapping Refugeeedom: Protecting Sahrawis and Palestinians Displaced by the 2011 Libyan Uprising' (2012) 24 IJRL 263–93.

¹¹⁶ UNHCR, 'Aide-Mémoire: Protecting Palestinians in Iraq and Seeking Humanitarian Solutions for Those Who Fled the Country' (Geneva, Dec 2006).

¹¹⁷ S Haddad, *The Palestinian Impasse in Lebanon: The Politics of Refugee Integration* (Sussex Academic Press 2003), 40–50; A Knudsen, 'Widening the Protection Gap: The "Politics of Citizenship" for Palestinian Refugees in Lebanon, 1948–2008' (2009) 22 JRS 51–73.

¹¹⁸ D Cave, 'Deadly Attack on Refugee Camp in Syria Could Shift Palestinian Allegiances to Rebels' *The New York Times* (3 Aug 2012).

¹¹⁹ H Hassan, 'Why are Egyptian Media Demonizing Palestinians?' *The Electronic Intifada* (23 July 2013).

¹²⁰ A Solomon, 'Egypt Closes Rafah Gaza Crossing Indefinitely' *The Jerusalem Post* (28 Oct 2013).

¹²¹ M Qafisheh, *Nationality and Domicile in Palestine* (Birzeit International Studies Institute 2000), 74–80.

¹²² F Baer, 'International Refugees as Political Weapons' (1996) 37 *Harvard International Law Journal* 243, 249–50; A Khalil, 'Socioeconomic Rights of Palestinian Refugees in Arab Countries' (2011) 23 IJRL 680–719; Akram and Rempel, above n 87, 1, 23.

¹²³ See the following cases from the Federal Court of Australia: *Minister of Immigration v Quiader*, Case no 1458 (2001); *A v Minister for Immigration*, Case no 21 (2002).

the outbreak of hostilities.' The General Assembly has mandated UNRWA to assist Palestinian refugees, as per its Resolution 302 (IV) of 8 December 1949, Resolution 2252 (ES-V) of 4 July 1967, and subsequent resolutions endorsing or extending UNRWA's mandate. Subsequently, numerous resolutions have been adopted and it is likely that further resolutions relevant to Palestinian refugees will be adopted in the years to come by various UN bodies.¹²⁴ It is to be noted that the various UN resolutions do not define Palestinian refugees. Rather, UNRWA had introduced a working definition upon which the Agency supplies its assistance. UNRWA's definition of 'Palestine Refugee' is as follows:

[P]ersons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict. Palestine Refugees, and descendants of Palestine refugee males ... are eligible to register for UNRWA services. The Agency accepts new applications from persons who wish to be registered as Palestine Refugees.¹²⁵

Clearly, this definition has been formulated for functional purposes rather than as a legal basis, namely, for humanitarian assistance. It has been extended to include the 1967 refugees, as well as later refugees, based on the aforementioned resolutions.¹²⁶

UNHCR has throughout the years been approached by many Palestinian refugees, and this increased as a result of the coordination between UNHCR and UNRWA. UNHCR then made it clear that it was the Office's policy that Palestinians outside UNRWA's area of operations,¹²⁷ not falling under any other exclusion or cessation clauses, were *prima facie* to be considered as fulfilling the inclusion provisions of article 1D and therefore of concern to UNHCR. Throughout the years, UNHCR has had to intervene in cases where Palestinians outside UNRWA's area of operations were experiencing difficulties in renewing their documents, facing deportation or detention, or other measures affecting their legal status.¹²⁸

4. CONCLUSION

Palestinian refugees displaced since 1925 from the parts of Palestine in which the State of Israel was established, and their decedents, have the right to return to Israel and become Israeli citizens, regardless of when they were expelled or departed. Israel is likely to continue opposing the right of return to its territory.¹²⁹ The State of Palestine has no obligation to admit these refugees, but it has a political duty to defend their

¹²⁴ For a compilation of UN resolutions on Palestine, including Palestinian refugees, see the UN Information System on the Question of Palestine (UNISPAL) website (unispal.un.org).

¹²⁵ UNRWA, 'Consolidated Eligibility and Registration Instructions' (Oct 2009) 3.

¹²⁶ cf L Bartholomeusz, 'The Mandate of UNRWA at Sixty' (2010) 28 RSQ 452–74.

¹²⁷ UNRWA operates in five areas: the Gaza Strip, Lebanon, Jordan, Syria, and the West Bank.

¹²⁸ UNHCR Revised Note on the Applicability of Article 1D of the 1951 Convention, above n 105.

¹²⁹ R Lapidoth, 'The Right of Return in International Law, with Special Reference to the Palestinian Refugees' (1986) 16 Israel Yearbook on Human Rights 103–25; E Benvenisti and E Zamir, 'Private Claims to Property Rights in the Future Israeli-Palestinian Settlement' (1995) 89 AJIL 295–340. Lapidoth, in an opinion that typically represents the officially declared position of Israel, said that the return of Palestinian refugees would imply 'the destruction of the State of Israel' at 120. Benvenisti and Zamir suggested that 'a just solution to the 1948 refugees problem ... does not entail a general right of return' at 329.

rights as it would be the guardian of the Palestinian people worldwide. This duty includes, for example, advocating their right of return, their rights in their states of residence, and easing their residence in its territory when possible. In the view of the author, Palestinian refugees should be granted the right to opt for Palestinian citizenship in, and therefore to return to, the State of Palestine as a political duty of the state. However, the right of return of these refugees will not end if they acquire Palestinian citizenship, unlike non-Palestinian refugees whose refugee status ceases to exist after acquiring another nationality. Substantial numbers of Palestinian refugees have already acquired the citizenship of other states and their refugee status is not denied. The right of return should not be confused with the refugee status granted by UNRWA or UNHCR, which is determined for the purpose of supplying assistance. Palestinians are the only group of refugees in the world that can have citizenship elsewhere and still be labelled as refugees, for the purpose of assistance by UNRWA and for the right of return. This is because of the special status created by article 1D of the Convention, as well as by myriad UN resolutions, as explained in this article.

As an individual right, the right of return cannot be compromised. It may solely be surrendered by the refugee concerned. Responsibility for the refugee issue lies with Israel and the international community. Thus the Palestinian leadership can reach an agreement that does not include the right of return. The utmost that the State of Palestine can do is to grant refugees its citizenship once the state is established, to protect them abroad, and to advocate their right of return to Israel.

Palestinian refugees residing in the West Bank and the Gaza Strip have a similar local status to the inhabitants of the occupied territory.¹³⁰ Under the future citizenship law of the State of Palestine, this group, which numbers 2,259,075 persons according to UNRWA as of January 2013,¹³¹ should be granted Palestinian citizenship. The State would become, in one sense, a host country for these refugees. The conferment of citizenship on such a category would in no way, from a legal perspective, undermine their status. Israel is expected to continue opposing their return, regardless of whether they acquire other nationalities. Hence the acquisition of Palestinian citizenship, like the citizenship of any other state, would not *per se* be a reason for ending the status of this category of refugee. Palestinian refugees who have acquired the citizenship of other states are, technically, not refugees according to the Convention, since such persons can be protected by the state that recognizes them as its citizens. Yet they continue to be regarded as refugees for various purposes, particularly for the right of return to Israel and the right of compensation for property loss. The majority of these refugees are in Jordan, but substantial numbers live in other countries. It is true that in the states in which the Convention is applicable these refugees would not be considered as refugees in the eyes of local law and for the purpose of UNHCR's protection; but they are still refugees pursuant to the international law of state succession, human rights law, humanitarian law, United Nations resolutions, and refugee law surrounding article 1D of the Convention.¹³²

¹³⁰ Qafisheh, above n 121, 82–83.

¹³¹ UNRWA, above n 55, 2.

¹³² M Qafisheh, 'Bases for the Palestinian Refugees' Right of Return under International Law: Beyond General Assembly Resolution 194', *Cambridge Journal of International and Comparative Law* (26 Nov 2012).

As mentioned above, the State of Palestine has no legal obligation to confer its citizenship on Palestinian refugees. However, given the Israeli refusal to grant its citizenship to members of the group or to readmit them to its territory, and because the State of Palestine will be the guardian of the Palestinian people at large, these refugees may be given the choice of acquiring the citizenship of the State of Palestine. Members of the group, after acquiring Palestinian citizenship, may lose other citizenships where internal laws prohibit citizens from acquiring another citizenship. For this reason, the right to Palestinian citizenship should be accorded on a case-by-case basis and at the request of the person concerned, that is, not collectively. Thus, if a person does not wish to apply for Palestinian citizenship, the State of Palestine should not impose its citizenship on him or her. In such cases, the state might, as an alternative, accord special treatment to these refugees based on their original link to mandatory Palestine. They might therefore be treated as Palestinian citizens in relation to entry, residency, elections, and employment; despite the fact that they lack Palestinian citizenship.

The mere fact of acquiring citizenship of the State of Palestine does not necessarily entail a person's automatic return to that State, especially if Israel retains control of the Palestinian border. The Palestine Liberation Organization may reach bilateral agreements with Lebanon, Syria, and Jordan to continue hosting refugees until such time as they are able to return to their original places of habitual residence in Israel or to Palestine. Legally-speaking, return to the state in the West Bank and Gaza Strip does not constitute an exercise of the right of return. Hence, the State of Palestine would have virtually the same standing as other Palestinian refugee host countries.

On the other hand, persons displaced in 1967 from the West Bank and Gaza Strip now number at least 1.2 million.¹³³ Those deported by Israel or denied the right of return since 1967, until now, have had a similar status. The State of Palestine is under an international legal obligation to allow members belonging to this group the right of return to their native homes. Once they have settled in the State of Palestine and acquired Palestinian citizenship, these persons will cease to be refugees. If Israel denies them entry into Palestine in the event of ongoing occupation, the group will continue to be refugees. Even before their return, such persons may be granted Palestinian citizenship, be offered diplomatic protection abroad, be allowed to participate in referenda and elections, and so on. Acquisition of citizenship of other states should not undermine the right of members of this group to return to the West Bank or Gaza Strip and to recover their residence and citizenship therein.

Present resembles past in the case of Palestinian refugees. The plight of these refugees goes back not only to 1948, but to as early as 1925. The status of Palestinian refugees has never been resolved. On the contrary, each wave of refugees has been overshadowed by another: the crisis of 1925 was followed by a catastrophe in 1948; the

¹³³ This group of Palestinians was displaced from the West Bank and the Gaza Strip during and after the 1967 Arab-Israeli war. Over 400,000 persons belonging to this category left the Occupied Palestinian Territory in 1967, according to the Palestinian Central Bureau of Statistics (2007). It is difficult to estimate the exact number of those currently displaced, as there is no central institution capable of collecting data regarding individuals belonging to this group in various parts of the world. Yet if one considers that the population of the occupied territory has increased over fourfold since 1967 and if this figure is used as an analogy for the group under consideration, the above number would be concluded. Another category belonging to this group consists of inhabitants of the West Bank or the Gaza Strip who were deported by Israel or who have been denied the right of return since 1967.

latter was aggravated in 1967. The question of Palestinian refugees has been delayed to the final stage of negotiations by the peace agreements of 1993–1995 and that stage has never been arrived at and it is not foreseen in the near future. The expulsion of Palestinians from their homeland is an ongoing phenomenon today.¹³⁴ Yet, the recognition of Palestine as a state, by the UN General Assembly on 29 November 2012, opens a window of opportunity for the resolution of the problem of Palestinian refugees within the State of Palestine's boundaries.¹³⁵

¹³⁴ I Pappé, *The Ethnic Cleansing of Palestine* (Oneworld 2007), 248–56.

¹³⁵ M Qafisheh, 'Citizens of the State of Palestine and the Future of Palestinian Refugees: Legal and Political Scenarios' in M Qafisheh (ed), *Palestine Membership in the United Nations: Legal and Political Implications* (Cambridge Scholars 2013), 45–133.