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# *Between Asylum and Liberation: The New Palestinian Refugees*

Itamar Mann\*

## **Abstract**

*Contemporary Palestinian asylum seekers raise fundamental questions regarding the relationship between the institution of asylum and struggles for national liberation. Underlying the legal framework that applies to them is an assumption of inverse correlation: the more Palestinians obtain access to individual asylum claims, the less secure are the fundamental Palestinian claims of self-determination and return. But is this trade-off acceptable today? Comparable dilemmas animate other large-scale displacements, but scholars seldom discuss their full implications for international legal theory. Rather than providing a definite answer to the question, this article maps out four major aspects of how individual protection and self-determination are interrelated, or, indeed, bifurcated, in international law. The new Palestinian refugees are important to consider not only because their continued displacement is foreseeable but also because their exceptional plight invites a reconsideration of the political foundations of refugee law. How can policy makers and legal interpreters uphold principles of both individual and collective protection, preventing the two from cutting against each other?*

After the Palestinian died, he expected to go straight to heaven. After all, he has lived in hell all his life. He immediately ran straight to heaven, but at the entrance he was asked to show his documents. When the border guard saw where the Palestinian came from, he refused his entry: 'We do not recognize that state.' He thought, fine, I will go back to hell. But when he arrived in hell the border guard there too demanded his documents, and his response was the same: 'Sorry, we can't allow you in with this document.' And so, a tent was built between heaven and hell, and this is where the Palestinian lives.

*Palestinian parable*<sup>1</sup>

\* Associate Professor of Law, Faculty of Law, University of Haifa, Israel. Email: [imann@univ.haifa.ac.il](mailto:imann@univ.haifa.ac.il). Drafts of this article were presented at Gaza as Paradigm: Transnational Governance, International Law, and Rightlessness at the Minerva Center for the Rule of Law under Extreme Conditions at the University of Haifa in July 2022; the Yale Law School Middle East Legal Studies Seminar, Barcelona, in January 2023 and the International Law Workshop at Tel Aviv University in March 2023.

<sup>1</sup> Palestinian parable, shared by Sharhabeel Alzaeem at the Yale Law School Middle East Legal Studies Seminar, Barcelona, January 2023.

## 1 Introduction

This article seeks to explore legal, moral and political questions arising from the recognition of Palestinians seeking asylum in Europe as refugees under the Refugee Convention.<sup>2</sup> Traditionally, Article 1D of the convention excluded Palestinian refugees registered with the United Nations Relief and Works Agency (UNRWA) from such recognition. But new displacements and changing political landscapes are leading to a transformation in Article 1D's interpretation among European Union (EU) member states. This development invites reconsideration of the plight of Palestinian asylum seekers entering Europe. Providing individuals with effective protection is surely a laudable purpose. However, as Palestinian displacements continue and will likely proceed in the foreseeable future, it becomes imperative to also ask: what should be the political and moral principles guiding such a reinterpretation? Might there also be disadvantages to this seemingly overdue move?<sup>3</sup> And, most importantly, what is the relationship between the protection of Palestinian individuals and the Palestinian people's struggle for national liberation? This article zooms in on the interpretation concerning Article 1D to reveal philosophical conundrums resting under its fold.

Section 2 provides some background on Palestinian displacements, emphasizing that recent displacements serve as a warning that Palestinian expulsion may continue or intensify. It then explains the special status of Palestinian refugees under international law. The next four sections of the article discuss one dilemma each, all arising from the problems that Palestinian refugees face as they seek asylum in European countries: section 3 raises the question whether the recognition of Palestinians as refugees has gone far enough; section 4 asks whether expanded recognition for Palestinians assists Israel in a campaign of expulsion; section 5 examines what expanded recognition for Palestinians means for Palestinian statehood; and section 6 discusses what expanded recognition for Palestinians may mean for the UNRWA, an organization that has been crucial in many Palestinians' lives.<sup>4</sup> All four dilemmas relate to the larger inquiry about the relationship between asylum and liberation struggles. By addressing this difficult relationship, the article seeks to shed light on a foundational issue in the

<sup>2</sup> Convention Relating to the Status of Refugees (Refugee Convention) 1951, 189 UNTS 150. As a Jewish Israeli scholar, I acknowledge that my positionality makes it difficult for me to write about this topic and, especially, to accurately represent dilemmas confronting contemporary Palestinian refugees. Inasmuch as the thesis below suggests expanding the rights of Palestinian refugees to access asylum in Europe, it may seem like the article conveys a preference for a solution of the Palestinian refugee problem in Europe rather than in Israel. This, however, is not my preference. I support the Palestinian right of return as a requirement of justice and as a component of establishing a society based on fundamental equality in the region. However, at present, the demand of return remains far from realization – hence, the urgency of reopening the question of access to asylum elsewhere.

<sup>3</sup> The 'novelty' of Palestinian displacement and the need to reconsider law accordingly is arguably itself a recurring phenomenon, at the very least in the last two decades. See, e.g., Akram and Rempel, 'Temporary Protection as an Instrument for Implementing the Right of Return for Palestinian Refugees', 22 *Boston University International Law Journal* (2004) 1.

<sup>4</sup> See generally Bauböck, Mourão Permoser and Ruhs, 'The Ethics of Migration Policy Dilemmas', 10 *Migration Studies* (2022) 427 (proposing a study of 'dilemmas' as a methodology in the political theory of migration).

theory of refugee law – namely, the tension between the underlying assumptions of each issue. Rather than providing a definitive answer to the large conundrum emanating from this tension, or to the four sub-questions therein, I try to provide a schema for how to think about it, which is hopefully applicable to other refugee crises. To do so, I attempt to reconstruct the perspective of an individual seeking both protection and liberation.

Section 7 concludes by setting out some preliminary reflections on what the plight of ‘the new Palestinian refugees’ can teach us about refugee protection and collective self-determination more broadly. Here you will find the normative aspect of the article, defending policies that refuse to sever individual protection from larger considerations of collective self-determination in the Palestinian case and beyond. The interpretation of Article 1D may seem at first blush like a doctrinal issue influencing the lives of relatively few asylum seekers. I aim to show that it provides inroads to a foundational question that refugees raise in international legal theory.

## 2 The New Palestinian Refugees

More than 700,000 Palestinian refugees were displaced during the 1948 war in what for Palestinians and many others came to be known as ‘the Nakba’ (‘the catastrophe’). These refugees came under the mandate of the UNRWA, which was established in December of that year.<sup>5</sup> At that time, the United Nations General Assembly (UNGA) also created the United Nations Conciliation Commission for Palestine (UNCCP). Specified in UNGA Resolution 194, which called upon Israel to allow for the return of ‘Arab Refugees’, the UNCCP’s mandate sought to relieve their conditions but quickly became defunct.<sup>6</sup> The contemporary regime of ‘refugee law’ emerged separately shortly thereafter. Under Article 1D of the 1951 Refugee Convention, the convention ‘shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance’. The UNRWA is one such agency (as was historically the UNCCP). Consequently, an interpretation of the convention that has long been accepted by many European national courts excludes Palestinian refugees and their following generations from the protection of the convention.<sup>7</sup> Article 1D is thus often referred to as an ‘exclusion clause’ in the convention.

The recognition of Palestinians as UNRWA refugees did not prevent their repeated displacement. During the 1967 war, Israel displaced about 300,000 Arab Palestinians, some of them already under the UNRWA mandate. Following Black September in

<sup>5</sup> United Nations Relief and Works Agency (UNRWA), *The United Nations and Palestinian Refugees* (2007), available at [www.unrwa.org/userfiles/2010011791015.pdf](http://www.unrwa.org/userfiles/2010011791015.pdf).

<sup>6</sup> GA Res. 194, 11 December 1948. ‘Question of Palestine’, *United Nations Conciliation Commission for Palestine (UNCCP) Archives*, available at [www.un.org/unispal/document-source/united-nations-conciliation-commission-for-palestine-unccp/](http://www.un.org/unispal/document-source/united-nations-conciliation-commission-for-palestine-unccp/).

<sup>7</sup> This interpretation is not, however, accepted by all scholars. Notably, Francesca Albanese and Lex Takkenberg argue that courts have erroneously interpreted Article 1D as an exclusion clause. F. Albanese and L. Takkenberg, *Palestinian Refugees in International Law* (2nd edn, 2020).

1970, tens of thousands of Palestinian Liberation Organization (PLO) members fled from Jordan to Lebanon, only to be expelled to Tunisia after Israel's 1982 invasion to Lebanon. Palestinians who temporarily leave East Jerusalem have long been subjected to an abusive policy of revoking residency, approved by the Israeli Supreme Court.<sup>8</sup> Aharon Barak's 1988 judgment formed a central tenet of what the Palestinian human rights organization Al-Haq has called, in a later report, 'Israel's forcible transfer of Palestinians from East Jerusalem'.<sup>9</sup> Also in 1988, Jordan disengaged from the West Bank, stating that '[e]very person residing in the West Bank before 31 July 1988 is considered a Palestinian, not a Jordanian citizen'.<sup>10</sup> As one scholar has put it, 'there was no State of Palestine to issue Palestinian citizenship in lieu of the nullified Jordanian citizenship; the State of Palestine exists only on paper. Thus the mass population of the West Bank was transformed overnight by a Royal Decree of fakk al-irtibat into a stateless population. In the name of Arab unity of course'.<sup>11</sup>

In 1990–1991, due to the Gulf crisis, Palestinians who enjoyed de facto integration in Kuwait and other Gulf states were displaced once more.<sup>12</sup> First, 200,000 fled during the Iraqi occupation beginning in August 1990 due to Iraqi threats and discrimination (some of them were already abroad during that summer). In March 1991, about 200,000 more were forced to leave as the PLO's alignment with Iraq rendered them unwanted. In 1995, Muammar Gaddafi declared that all Palestinians must leave, exposing long-standing Palestinian communities in Libya to renewed displacement.<sup>13</sup> At the turn of the 21st century, more than 3,700,000 Palestinians were stateless worldwide.<sup>14</sup> More recently, with Israel's withdrawal from ground presence in Gaza in 2006, the takeover of Hamas and repeated Israeli attacks on Gaza, Palestinians have once again been displaced from Palestinian territories. Israeli bombs displaced many of them. More commensurate with the Refugee Convention's refugee definition, which focuses on political persecution, have been claims by Palestinians who had fled from the Hamas government's measures against opposition.<sup>15</sup>

<sup>8</sup> High Court of Justice (Israel) 282/88, *Mubarak Awad v. Yitzhak Shamir*, 42(2) PD 424.

<sup>9</sup> 'Residency Revocation: Israel's Forcible Transfer of Palestinians from Jerusalem', *Al-Haq* (3 July 2017), available at [www.alhaq.org/advocacy/6331.html](http://www.alhaq.org/advocacy/6331.html).

<sup>10</sup> 'Jordan: Disengagement Instructions for the Year 1988', 28 July 1988, Art. 2, available at [www.unhcr.org/refworld/docid/43cd04b94.html](http://www.unhcr.org/refworld/docid/43cd04b94.html).

<sup>11</sup> U. Davis, *Citizenship and the State: A Comparative Study of Citizenship Legislation in Israel, Jordan, Palestine, Syria and Lebanon* (1997); see also Human Rights Watch, *Stateless Again: Palestinian-Origin Jordanians Deprived of Their Nationality* (2010).

<sup>12</sup> For background, see Ghabra, 'The Iraqi Occupation of Kuwait: An Eyewitness Account', 20 *Journal of Palestine Studies (JPS)* (1991) 112.

<sup>13</sup> Shiblak, 'Residency Status and Civil Rights of Palestinian Refugees in Arab Countries', 25 *JPS* (1996) 36, at 40 (explaining that this was essentially a displacement of workers, and that, '[u]nder Arab and International pressure, Libya allowed most to return at the end of October 1995' (at 45, n. 7); see also Fiddian-Qasmiyeh, 'Invisible Refugees and/or Overlapping Refugeeedom? Protecting Sahrawis and Palestinians Displaced by the 2011 Libyan Uprising', 24 *International Journal of Refugee Law (IJRL)* (2012) 263.

<sup>14</sup> Goodwin-Gill and Akram, 'Amicus Brief on the Status of Palestinian Refugees under International Law', 11 *Palestine Yearbook of International Law* (2000–2001) 185, at 222.

<sup>15</sup> Note that under the refugee definition, the former does not formally constitute the basis for refugee status. The latter can. See section 5 of this article.

The new wave of Palestinian refugees was not uniquely displaced from Gaza.<sup>16</sup>

Starting in 2011, Palestinians who are descendants of 1948 refugees have been displaced in large numbers due to the Syrian civil war. According to the UNRWA, as of March 2021, roughly 120,000 Palestinians have fled Syria since 2011.<sup>17</sup> The treatment they have faced in countries under the UNRWA mandate – primarily, in Lebanon and Jordan – has reportedly been discriminatory and sometimes inhuman, triggering further journeys to Europe.<sup>18</sup> Palestinians from Syria who have arrived in Turkey, by and large, have not found safety there, despite the fact that a large recently displaced Palestinian population resides there.<sup>19</sup> Recent years have brought considerably intensified Israeli measures to uproot Palestinians from their lands in the West Bank. For example, in its judgment in *Masafer Yatta*, the Israeli Supreme Court joined efforts to displace Palestinian villagers in the Hebron area.<sup>20</sup> This decision has so far not brought about repeated attempts to conduct massive forcible transfer of populations.<sup>21</sup> Yet there may be reason to worry that such a measure is not out of the question.

On the political level, Bezalel Smotrich is Israel's minister of finance and Itamar Ben-Gvir is Israel's minister of national security. Both have called for the transfer of Arab Palestinians from the West Bank, and the latter was a member of the Ultranationalist Kach Party of Israel, which proposed in its platform to transfer all Palestinians out of

<sup>16</sup> For a major judgment illustrating the Israel Supreme Court's role in transferring members of Hamas both from Gaza and from the West Bank, see High Court of Justice (Israel) 5973/92, *ACRI v. Commander of IDF Forces in the West Bank*, 47(1) PD 267, available at <https://hamoked.org.il/items/4890.pdf>.

<sup>17</sup> UNRWA, *Palestine Refugees in Syria: A Tale of Devastation and Courage*, 14 March 2019, available at [www.un.org/unispal/document/palestine-refugees-in-syria-a-tale-of-devastation-and-courage-unrwa-commissioner-general-op-ed/](http://www.un.org/unispal/document/palestine-refugees-in-syria-a-tale-of-devastation-and-courage-unrwa-commissioner-general-op-ed/).

<sup>18</sup> A. Irfan, 'The Exclusion of Palestinian Refugees Who Fled Syria', *Palestine Studies*, 5 November 2021, available at [www.palestine-studies.org/en/node/1651862](http://www.palestine-studies.org/en/node/1651862).

<sup>19</sup> Gabiam, 'Recurring Displacement, Homemaking and Solidarity amongst Syrian and Palestinian Syrian Refugees in Turkey', 16 *Anthropology of the Middle East* (2021) 32.

<sup>20</sup> High Court of Justice (Israel) 413/13, *Mouhammad Mousa Shehadah et al. v. Minister of Defence*, 4 May 2022 (note that in this case the issue is internal displacement, although, historically, such internal displacement of Palestinians has been almost invariably bound up with expulsion); see also Ben-Naftali and Diamond, 'No Place for Palestinians: The Israeli High Court of Justice Fades out of the Global Community of Courts – The Farical Tragedy of the 2022 Judgment of Masafer Yatta', 41 *Boston University International Law Journal* (2023) 47.

<sup>21</sup> As Raef Zreik notes, 'despite Israel's slow and steady sociocide and polticide against the Palestinians, Israel is incapable of fully annihilating them. It probably could do so in terms of sheer military force, but I do not think that it can do it politically. First, there are no political forces that can enact such a decision in Israel politics, neither currently nor in the foreseeable future. Second, I do not believe that the Zionist project can maintain its unity and coherence within the local and global Jewish community if such an act was undertaken. Third, I think that despite everything, the Jews in the Middle East do bear some sense of being a minority in an open geographical space, and despite their overwhelming power, they do not and cannot act as an imperial superpower. Given all of this, I would venture to guess that, in the long run, mutual recognition is the more, though not the only, reasonable option. In this way, the ethical and the practical collapse into each other'. See Zreik, 'When Does a Settler Become a Native? (with Apologies to Mamdani)', 23 *Constellations* (2016) 351, at 355. Compare to Susan Akram and Terry Rempel, who wrote already in 2004 that '[t]he escalating Israeli violence, directed at a Palestinian population held captive in towns and villages by curfews and checkpoints, as well as the ongoing Israeli policy of ethnic cleansing, is causing a renewed exodus of Palestinian refugees'. Akram and Rempel, *supra* note 3, at 4.

Israel.<sup>22</sup> Coalition agreements reportedly include a governmental commitment to further land grabs in the West Bank.<sup>23</sup> As for Palestinian citizens of Israel, living inside its 1967 borders, their rights are also under increasing threats. Israeli police and secret service have allegedly subjected Palestinian Israeli citizens to inhuman and degrading treatment and/or torture during the May 2021 events.<sup>24</sup> Meanwhile, the Palestinian Authority in Ramallah has also become increasingly authoritarian. The Palestinian Authority is reportedly subjecting political opponents to torture, and, occasionally, to killing, in a mixture of collaboration with Israel and targeting collaborators with Israel.<sup>25</sup> On the level of Palestinian society, gay Palestinians are exposed to well-documented deadly risks both in Gaza and in the West Bank, which has led some to seek asylum in Israel.<sup>26</sup>

From a European perspective, Palestinians are one group among many that have sought asylum, increasingly by unauthorized journeys through various maritime routes. Both the ‘Eastern Mediterranean’ and the ‘Central Mediterranean’ migration routes to Europe have gradually transformed into mass graves for migrants, among them Palestinians (Figure 2). To leave the Gaza Strip is not an easy feat as it is encircled by a seemingly permanent Israeli military blockade, with Egypt controlling the southern Rafah crossing. But Palestinians searching for safety have managed to exit, often clandestinely through tunnels to Egypt and, from there, by maritime journey to Europe. In many instances, Gazan refugees have drowned on the way.<sup>27</sup> According to Eurostat, 3,220 asylum seekers whose nationality has been registered as ‘Palestine’ requested asylum in EU members states for the first time in 2021 (see Figure 1).<sup>28</sup>

<sup>22</sup> ‘MK Outlines New “Palestinian Emigration Plan”’, *Habayit Hayehudi*, available at [www.israelhayom.co.il/news/article/13113315](http://www.israelhayom.co.il/news/article/13113315); R. Hecht, ‘The Face of Israel’s Far Right Wants to “Abort” Palestinian Hope’, *Haaretz*, available at [www.haaretz.com/israel-news/2016-12-03/ty-article-magazine/.premium/the-face-of-israels-far-right-wants-to-abort-palestinian-hope/0000017f-f2f8-d497-a1ff-f2f875960000](http://www.haaretz.com/israel-news/2016-12-03/ty-article-magazine/.premium/the-face-of-israels-far-right-wants-to-abort-palestinian-hope/0000017f-f2f8-d497-a1ff-f2f875960000); J. Leifer, ‘Kahanism’s Raucous Return’, *Jewish Currents*, 23 September 2022, available at <https://jewish-currents.org/kahanisms-raucous-return>; J. Leifer, ‘Israel’s New Kingmaker Is a Dangerous Extremist, and He’s Here to Stay’, *New York Times*, 7 November 2022, available at [www.nytimes.com/2022/11/07/opinion/itamar-ben-gvir-israel-election.html](http://www.nytimes.com/2022/11/07/opinion/itamar-ben-gvir-israel-election.html).

<sup>23</sup> The euphemistic title of these land grabs is ‘settlement regularization’. For a useful analysis of the relevant coalition agreements, see Brandes, ‘Annexation Is in the Details: Why There Will Be No Formal Annexation of the Occupied Territories’, *Verfassungsblog* (2023), available at <https://verfassungsblog.de/annexation-is-in-the-details/>.

<sup>24</sup> See ‘What Happened in the “Torture Room” at Israel’s Police Station in Nazareth?’, Adalah, available at <https://www.adalah.org/en/content/view/10351>.

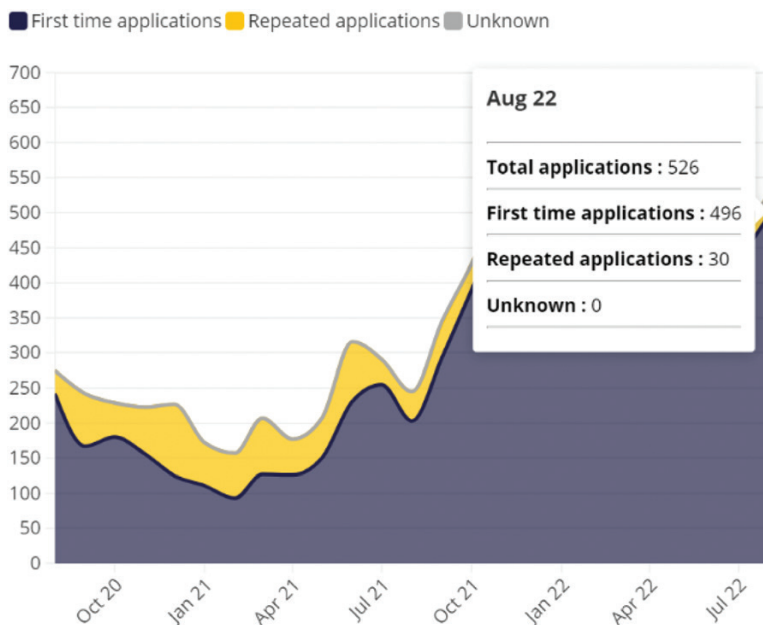
<sup>25</sup> ‘Palestine: Impunity for Arbitrary Arrests, Torture’, *Human Rights Watch*, 30 June 2022, available at [www.hrw.org/news/2022/06/30/palestine-impunity-arbitrary-arrests-torture](http://www.hrw.org/news/2022/06/30/palestine-impunity-arbitrary-arrests-torture).

<sup>26</sup> M. Kagan and A. Ben-Dor, ‘Nowhere to Run: Gay Palestinian Asylum Seekers in Israel’, *Tel Aviv University Public Interest Law Program*, available at [https://en-law.tau.ac.il/sites/law-english.tau.ac.il/files/media\\_server/Law/NowheretoRun,%20Michael%20Kagan%20&%20Anat%20Ben-Dor%20\(2008\).pdf](https://en-law.tau.ac.il/sites/law-english.tau.ac.il/files/media_server/Law/NowheretoRun,%20Michael%20Kagan%20&%20Anat%20Ben-Dor%20(2008).pdf).

<sup>27</sup> See, e.g., R. Lewis, ‘Palestinian Migrants Fleeing Gaza Strip Drown in Mediterranean Sea’, *Al Jazeera*, 14 September 2014, available at <http://america.aljazeera.com/articles/2014/9/14/gaza-migrants-boat.html>; ‘IOM Investigates Reports of Deliberate Drowning of 500 Migrants in Mediterranean’, *International Organization for Migration/ UN Migration*, 16 September 2014, available at [www.iom.int/news/iom-investigates-reports-deliberate-drowning-500-migrants-mediterranean](http://www.iom.int/news/iom-investigates-reports-deliberate-drowning-500-migrants-mediterranean).

<sup>28</sup> European Union Agency for Asylum (EUAA), Latest Asylum Trends – Annual Review 2021 (2021), available at <https://euaa.europa.eu/latest-asylum-trends-annual-overview-2021>.





**Figure 1:** Number of Palestinian asylum applications across EU countries. Source: Eurostat

The new Palestinian refugees thus raise urgent humanitarian concerns. In some ways, the concerns they raise are not different from those raised by other asylum seekers who have taken dangerous maritime routes to Europe (in 2022, Syrians and Afghans lodged the most asylum applications in EU countries, together accounting for almost 25 per cent of all applications).<sup>29</sup> Survivors of the maritime journeys, by and large, have not found the European shores to be welcoming.<sup>30</sup> Yet Article 1D has rendered asylum requests by UNRWA-registered Palestinians uniquely difficult. Asylum requests by Palestinians confront a legal hurdle that asylum seekers from other nationalities do not.<sup>31</sup> As I will show, the very existence of Article 1D reveals why merely framing the issue as ‘humanitarian’ is not enough. International law has always constructed the Palestinian refugee issue as political, but we may at times forget the political aspect of refugee law, and the Palestinian case may make it easier to see; in truth, it exists with respect to the displacement of every refugee.

As new waves of Palestinian asylum seekers have sought protection in Europe, the exclusion clause of Article 1D has come under pressure. More and more, European

<sup>29</sup> ‘Latest Asylum Trends’, EUAA, available at <https://euaa.europa.eu/latest-asylum-trends-asylum>.

<sup>30</sup> For an emotive rendition of the experience of one Palestinian refugee who reached Europe, see Allan, ‘The Long Turning: A Palestinian Refugee in Belgium’, 35 *Cultural Anthropology* (2020) 225.

<sup>31</sup> Interestingly, precisely because Israel does not accept Palestinians back, they may be rendered practically undeportable – a fact that has sometimes led members of other groups of asylum seekers, who it may otherwise be easier to deport, to masquerade as Palestinians. See Mann, ‘Border Masquerades’, 39 *Berkeley Journal of International Law* (2021) 127, at 129.



**Figure 2:** *Abed Abdi, Drowned in the Mediterranean, acrylic on canvas (2022)*

governments are pushed, sometimes by their own judiciaries, to recognize Palestinians that are within the UNRWA mandate as ‘refugees’ under Article 1 of the Refugee Convention. Consequently, the newly displaced Palestinians are triggering a change in the interpretation of Article 1D. Granted, the interpretation has not always been consistent and has fluctuated historically. Yet, generally, change is underway. For UNRWA-registered Palestinians, access to individual asylum requests seems to be increasing.<sup>32</sup>

In October 2009, the United Nations High Commissioner for Refugees (UNHCR) took the position that, when UNRWA-registered Palestinian refugees leave the regional mandate of the UNRWA in the Middle East, they may be eligible for refugee protection under the Refugee Convention: ‘[I]f a Palestinian refugee leaves that area, such protection or assistance ceases, meaning that he or she is ipso facto entitled to the benefits of the 1951 Convention.’<sup>33</sup>

In May 2013, the UNHCR opined once more on the subject, explaining how the new interpretation can conform to existing EU rules.<sup>34</sup> The agency analysed the rights deficit that Palestinian asylum seekers may suffer: ‘A narrow interpretation of the

<sup>32</sup> For the general treatment of this, see Albanese and Takkenberg, *supra* note 7.

<sup>33</sup> See United Nations High Commissioner for Refugees (UNHCR), UNHCR Revised Statement on Article 1D of the 1951 Convention (2009), para 2.2, available at [www.unhcr.org/4add88379.pdf](http://www.unhcr.org/4add88379.pdf).

<sup>34</sup> See UNHCR, Note on UNHCR’s Interpretation of Article 1D of the 1951 Convention Relating to the Status of Refugees and Article 12(1)(a) of the EU Qualification Directive in the Context of Palestinian Refugees Seeking International Protection (2013), available at [www.refworld.org/docid/518cb8c84.html](http://www.refworld.org/docid/518cb8c84.html).



first paragraph of Article 1D would actually lead to the denial of protection for many Palestinians in need of the 1951 Convention protection regime provided by Article 1D, and therefore create protection gaps in that regime.’ It then appealed to the sovereign discretion that each EU member state possesses to go beyond the floor of protection set forth by EU law:

For the purposes of how this should be approached and reconciled as a matter of European law, UNHCR notes that Article 3 of the Qualification Directive provides that Member States may introduce or retain more favourable standards for determining who qualifies as a refugee. Member States are thus recommended to adopt the more favourable interpretation put forward by UNHCR, which is more in line with the object and purpose of Article 1D.<sup>35</sup>

These recommendations opened the way for a more flexible interpretation at the levels of supranational and national courts. The real legal question is now whether a person enjoys *de facto* protection from the UNRWA rather than whether they are a formally registered Palestinian refugee. Arguably, formal UNRWA registration alone is no longer a valid reason for exclusion. Yet, arguably as well, controlling rules still single out Palestinian refugees. Despite the fact that UNRWA protection and Refugee Convention protection are fundamentally different,<sup>36</sup> Article 1D creates a presumption against granting refugee status under the convention to UNRWA-registered refugees. This presumption is rebuttable, and mechanisms of collective protection may serve to work around it. But the fact remains that other asylum seekers do not face such a presumption. The first dilemma raised below is thus about whether protection for UNRWA-registered asylum seekers has gone far enough.

Before discussing this question, it is worth briefly noting the way in which the relevant progressive interpretation unfolded among European judiciaries. The Court of Justice of the European Union (CJEU) addressed the relationship between Article 1D and the Refugee Convention’s protection for Palestinians in a number of cases,<sup>37</sup> including *Alheto*, which was decided in July 2018.<sup>38</sup> The applicant, Serin Alheto, left the Gaza Strip during the armed conflict between Israel and Hamas in July and August 2014. She searched for safety first in Jordan, a country she then left for Bulgaria. As Jordan is within the territorial mandate of the UNRWA, the Court found that Alheto could in principle receive effective protection there. However, the CJEU also found that the ‘referring court’ had to make a factual determination as to whether such effective protection was possible and whether Jordan fulfilled its obligations towards UNRWA refugees. The *Alheto* judgment illustrates the emerging doctrine whereby UNRWA-registered Palestinians are no longer excluded from Refugee Convention protection

<sup>35</sup> *Ibid.*

<sup>36</sup> L. Takkenberg, *The Status of Palestinian Refugees in International Law* (1998), at 68.

<sup>37</sup> Two other cases have strictly interpreted Article 1D as pertaining only to Palestinians who actually availed themselves of assistance and protection by the UNRWA or, even stricter, as pertaining only to Palestinians who availed themselves of UNRWA services shortly before applying for asylum in a member state of the European Union (EU). See Case C-31/09, *Bolbol* (EU:C:2010:119), para. 72; Case C-364/11, *El Kott* (EU:C:2012:826), para. 52.

<sup>38</sup> Case C-585/16, *Alheto* (EU:C:2018:584).

but must show that they are unprotected by the UNRWA. This is a clear illustration of the presumption discussed above.

As foreshadowed by the 2013 UNRWA recommendations, the practice regarding UNRWA-registered Palestinian asylum seekers from Gaza has differed among European states. For example, the Belgian appeal panel for asylum cases – the Council for Alien Law Litigation (CALL) – decided in November 2019 that ‘[the] UNRWA was, despite financial difficulties, still operational and that the security situation in Gaza was generally speaking precarious but did not amount to systematic persecution nor inhumane living conditions’. In February and March 2021, CALL reversed its position, however, granting refugee status to UNRWA-registered applicants from Gaza. CALL found that the difficulties that the UNRWA was facing made ‘the protection and assistance it is supposed to offer to refugees in Gaza ineffective’.<sup>39</sup> In another significant development, the Amsterdam District Court found in August 2021 that refugees from Gaza registered with the UNRWA cannot be excluded from protection under Article 1D of the Refugee Convention.<sup>40</sup> Though the doctrinal terrain is still uneven, these developments do reveal a certain directionality. Long after scholars have demanded that the exclusion of UNRWA-registered Palestinians from Refugee Convention protection be discarded,<sup>41</sup> it finally seems to be happening. What are the dilemmas that such progressive interpretation may invite?

### 3 Has Palestinian Recognition Gone Far Enough?

There are sound reasons to believe that the reinterpretation of Article 1D has not gone far enough. First, the new interpretations have not truly put UNRWA-registered refugees on an equal footing with other asylum seekers. From an international human rights law perspective, focusing on non-discrimination among individual asylum seekers seeking protection, it is not a sufficient remedy.<sup>42</sup> UNRWA protection and refugee status under the Refugee Convention are completely different in their object and purpose.<sup>43</sup> The UNRWA is a humanitarian agency, mandated with providing food and medicine as well as with offering education and job opportunities (more on this subject below). General refugee status is about not being returned to a place of persecution (*non-refoulement*) and, ultimately, is about providing ‘durable solutions’: a safe

<sup>39</sup> Regarding the socio-economic situation in Gaza during 2020–2021, see UNRWA, Occupied Palestinian Territory Emergency Appeal 2021 (2021), at 6, available at [www.unrwa.org/sites/default/files/content/resources/2021\\_unrwa\\_occupied\\_palestinian\\_territories\\_emergency\\_appeal.pdf](http://www.unrwa.org/sites/default/files/content/resources/2021_unrwa_occupied_palestinian_territories_emergency_appeal.pdf).

<sup>40</sup> P. d’Oliveira, *Amsterdam Court Grants Palestinian Refugee Protection under the Refugee Convention* (2020), available at [www.prakkendoliveira.nl/en/news/news-2020/amsterdam-court-grants-palestinian-refugee-protection-under-the-refugee-convention](http://www.prakkendoliveira.nl/en/news/news-2020/amsterdam-court-grants-palestinian-refugee-protection-under-the-refugee-convention).

<sup>41</sup> See, e.g., S. Akram, *UNRWA and Palestinian Refugees* (2014); Akram, ‘Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution’, 31 *JPS* (2002) 36.

<sup>42</sup> See International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171, Art. 26; Refugee Convention, *supra* note 2, Art. 3.

<sup>43</sup> According to the Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331, Art. 31 1, ‘[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

return home, resettlement in a third country or local integration.<sup>44</sup> Thus, there is no legitimate distinction between UNRWA-registered asylum seekers and other asylum seekers coming before European authorities, which might have justified the legal difference. It does not seem justified to put barriers before individuals who seek refugee status just because they are within the mandate of a humanitarian agency.<sup>45</sup> As Lex Takkenberg has pointed out, even the drafters of the Refugee Convention did not truly believe that UNRWA and Refugee Convention statuses were substitutable.<sup>46</sup> They had other reasons – partly rooted in the Palestinian struggle for national liberation – to introduce Article 1D.

The systematic negative discrimination against Palestinian refugees has perhaps been decreased by the new interpretation discussed above. However, it has not been eliminated. To put UNRWA-registered Palestinians on *de jure* equal footing with other asylum seekers would mean entirely discarding Article 1D. This could be achieved by a finding that such individuals fall squarely under Article 1A or, *ipso facto*, because they have left the UNRWA's areas of operation. In practice, Palestinian asylum seekers would no longer have to lift any evidentiary burden concerning Article 1D because it would no longer exist. Such a result would surely be in some tension with the text of the Refugee Convention. However, with further progressive interpretation, it may be possible to achieve.

We now know very well that, when considered politically expedient, European states and the EU are able to go far beyond the rights provided for by the Refugee Convention. Recall the sovereign discretion that member states possess to adopt 'more favourable standards' in interpreting the Refugee Convention under the Qualifications Directive.<sup>47</sup> Recent years have illustrated what that may mean for refugees in terms of tangible and material outcomes. At the initial stages of the 2015 'refugee crisis', Germany granted humanitarian admission to those individuals fleeing Syria.<sup>48</sup> More dramatically, the triggering of the EU's Temporary Protection Directive (TPD) on 4 March 2022 has massively cut procedural hurdles to protection for those fleeing Ukraine and expanded

<sup>44</sup> UNHCR, Framework for Durable Solutions for Refugees and Persons of Concern (2003), available at [www.unhcr.org/partners/partners/3f1408764/framework-durable-solutions-refugees-persons-concern.html](http://www.unhcr.org/partners/partners/3f1408764/framework-durable-solutions-refugees-persons-concern.html).

<sup>45</sup> This could seem to be the normative decision expressed in UNHCR's statement on the application of Article 1D. See UNHCR, *supra* note 33, para. 25. Cf. Lilly, 'UNRWA's Protection Mandate: Closing the "Protection Gap"', 30 *IJRL* (2018) 444 (suggesting that 'while Palestinian refugees continue to be confronted by serious protection challenges, the protection that UNRWA is able to provide them is not too dissimilar to that provided by other humanitarian organizations, including the protection UNHCR provides for the refugees globally').

<sup>46</sup> Takkenberg, *supra* note 36; Cf. UNHCR, The Office of United Nations High Commissioner for Refugees ('UNHCR') Statement on the Interpretation and Application of Article 1D of the 1951 Convention and Article 12(1)(a) of the EU Qualification Directive (2020), para. 13, available at [www.refworld.org/docid/5f3bdd234.html](http://www.refworld.org/docid/5f3bdd234.html).

<sup>47</sup> Directive 2011/95/EU of the European Parliament and Council of 13 December 2011, 20 December 2011, Article 3, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>.

<sup>48</sup> Some of them Palestinians. See Ayoub, 'Understanding Germany's Response to the 2015 Refugee Crisis', *Review of Economics and Political Science* (2019), 2631, available at <https://doi.org/10.1108/REPS-03-2019-0024>.

substantive rights.<sup>49</sup> While the legal floor of protection is firm, there is no such ceiling, and states are free to adopt policies of welcome. Perhaps, rather than being treated in an equal way to any other asylum seekers, Palestinian asylum seekers – including those registered with the UNRWA – should receive preferential treatment?<sup>50</sup> Might Palestinians ultimately expect to receive temporary and/or collective protection status that is more similar to the kind of protection granted to Ukrainians under the TPD?<sup>51</sup>

When the TPD came into force, following numerous reports of violence and discrimination against non-white asylum seekers at the Eastern borders of the EU, observers accused the EU's border regime of racism. Groups who had fled comparable levels of violence in Yemen, Somalia, Syria, Afghanistan and elsewhere could only dream of triggering the TPD or of comparable levels of protection. Surely, the intensity of the violence in Ukraine in February 2022 could not by itself explain the differential treatment: some of these non-white asylum seekers had come from extremely violent and protracted conflicts. The critique resonated on social media and was also advanced in various ways by academic observers.<sup>52</sup> If racism against black and brown people is the only reason why the EU has offered such a generous welcome to Ukrainians, Palestinians are unlikely to enjoy such expansive protections. In the current conditions, they are not culturally registered as 'white'.<sup>53</sup>

But perhaps there is another, political, reason why Ukrainians have enjoyed such protection. Even before the Refugee Convention was signed in 1951 and surely during the Cold War, refugee recognition was never only about protection for individuals. Whether implicitly or explicitly, refugee protection has always also been about collective politics. Specifically, refugee protection has been a measure of interstate disciplining: a state that recognizes refugees from a particular country can also use that recognition to admonish and tarnish the reputation of the sending country. As is well known, in the Cold War, refugee protection was a central tool of the West's public relations against countries behind the iron curtain. Refugee protection has thus also been a way to wield symbolic geostrategic power. Guy Goodwin-Gill has called this the 'politics of

<sup>49</sup> Council Decision (EU) 2022/382 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection, OJ 2022 L 071.

<sup>50</sup> See generally Costello and Foster, '(Some) Refugees Welcome: When Is Differentiating between Refugees Unlawful Discrimination?', 22 *International Journal of Discrimination and Law* (2022) 244.

<sup>51</sup> For a proposal to grant Palestinians an internationally recognized blanket of temporary protection from almost two decades ago, see Akram and Rempel, *supra* note 3.

<sup>52</sup> See, e.g., A. Luquerna, 'Why the Discrimination against Non-white Ukrainian Refugees Is a Violation of International Law', *Opinio Juris*, 22 February 2022, available at <https://opiniojuris.org/2022/04/22/why-the-discrimination-against-non-white-ukrainian-refugees-is-a-violation-of-international-law/>; R. Wilde, 'Hamster in a Wheel: International Law, Crisis, Exceptionalism, Whataboutery, Speaking Truth to Power, and Sociopathic, Racist Gaslighting', *Opinio Juris*, 17 March 2022, available at <https://opiniojuris.org/2022/03/17/hamster-in-a-wheel-international-law-crisis-exceptionalism-whataboutery-speaking-truth-to-power-and-sociopathic-racist-gaslighting/>.

<sup>53</sup> On ties between Black American and Palestinian struggles, see Erakat and Hill, 'Black-Palestinian Transnational Solidarity: Renewals, Returns, and Practice', 48 *JPS* (2019) 7; but see F. Wilderson, *Afropessimism* (2021), at 11.

denunciation' within refugee protection.<sup>54</sup> To use Oona Hathaway and Scott Shapiro's term, referring to the broader dynamics within transnational law, refugee protection has also been a mechanism of interstate 'outcasting'.<sup>55</sup> Accordingly, triggering the TPD was not only about the individual rights of Ukrainians, nor was it only about humanitarian sentiments (or racism for that matter). Triggering the TPD, in this view, is also one of the many ways in which European governments are participating in a war of images,<sup>56</sup> alongside sending arms and other war machines, against Vladimir Putin's Russia. Call this 'the political foundation of asylum law'.<sup>57</sup> It amounts to something like saying: 'Because Putin is our enemy, the Ukrainian refugees are our friends.'<sup>58</sup> This idea of 'the political' is not synonymous with racism, but it does not exclude it either.

What UNRWA-registered and other Palestinian asylum seekers need in order to truly improve the situation of their protection is not (only) to show that they have been exposed to brutal Russian-style bombings. That has not helped asylum seekers from Yemen, for example, to come anywhere close to the blanket of temporary protection that Ukrainians have received. What would truly make a difference is a political shift in the way EU member states see the oppression that Palestinians suffer – whether they are oppressed under Israel's 'prolonged occupation, settlement, and annexation of the Palestinian territory'<sup>59</sup> or in other parts of the Middle East. Palestinians would have to be considered as 'friends' fleeing from a common 'enemy'. Historically, asylum law has been most effective when it is part of a campaign for interstate admonition or rebuke.<sup>60</sup> Today, it is unlikely that the EU member states will actively seek to admonish Israeli policies, let alone see Israel as an 'enemy'. Yet not all forms of differential treatment are rooted in racism.<sup>61</sup> Some may also rest on mutable, legitimate, political choices, which may contribute to reinterpreting refugee law more favourably towards Palestinian applicants.

The seeming discrimination against Palestinian asylum seekers, and the call above for granting them wider protection, help crystallize a basic question: should asylum seekers be regarded through a non-discriminatory individual rights lens, or should

<sup>54</sup> Goodwin-Gill, 'The Politics of Refugee Protection', 27 *Refugee Survey Quarterly (RSQ)* (2008) 8.

<sup>55</sup> Hathaway and Shapiro, 'Outcasting: Enforcement in Domestic and International Law', 121 *Yale Law Journal* (2011) 252.

<sup>56</sup> See generally Amir, 'Visual Lawfare: Evidential Imagery at the Service of Military Objectives', 21 *Journal of Visual Culture* (2022) 321.

<sup>57</sup> Cf. I. Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (2016), conclusion (discussing 'the dual foundation of international law').

<sup>58</sup> C. Schmitt, *The Concept of the Political: Expanded Edition* (rev. edn, 2007).

<sup>59</sup> UN General Assembly, Fourth Committee, Concluding Its Work, Approves Six Draft Resolutions, Including Request for ICJ Opinion on Israeli Occupation (2022), available at <https://reliefweb.int/report/occupied-palestinian-territory/fourth-committee-concluding-its-work-approves-six-draft-resolutions-including-request-icj-opinion-israeli-occupation>.

<sup>60</sup> See, e.g., Kirchheimer, 'Asylum', 53 *American Political Science Review* (1959) 958; I. Mann, *Refugees*, 2e Maft'e'akh (2011), at 81 (discussing the 'Schmittian' aspect of refugee law).

<sup>61</sup> Costello and Foster, *supra* note 50, at 268; cf. Achiume, 'Racial Borders', 110 *Georgetown Law Journal* (2021) 445, at 490–491 (contending that '[w]ithin domestic liberal-democratic legal frameworks, nationality within immigration regimes remains a mostly bulletproof mechanism for racialized exclusion and differentiation').

‘the political foundation of asylum law’ be embraced instead as a more candid and effective basis for asylum law? In other words, are equality before the law and non-discrimination appropriate normative benchmarks when it comes to comparing groups of asylum seekers? Or should we embrace a notion of political commitment, which does not aim to be colour blind but, rather, to show affinity with particular groups for political and solidaristic reasons (as is *de facto* already the case for certain groups of refugees)?<sup>62</sup> In a classical 1990 paper, James Hathaway emphasized that refugee law has never been independent of state interests – to the contrary, he explains, refugee law is designed to reconcile the basic ‘prerogatives’ of sovereignty with ‘the reality of forced migration of people at risk’.<sup>63</sup>

Yet there are considerable concerns about explicitly wedding refugee protection to interstate political struggles for the purpose of symbolic power. An approach that advocates the expansion of refugee rights for the purpose of interstate admonition and/or selective solidarity may be morally objectionable. It reflects an institutional choice to violate the Kantian imperative of treating persons (including refugees) as ends in themselves, not as the means to obtain other goals.<sup>64</sup> In this regard, such a choice to protect in order to admonish a government abroad mirrors many governments’ ‘deterrence’ policies. States that adopt deterrence policies inflict pain and suffering on asylum seekers entering their territories in order to send a message of warning to other would-be asylum seekers who are still far away.<sup>65</sup> Correspondingly, states that adopt interstate admonition by refugee protection grant rights to asylum seekers entering their territories just to send a foreign policy message of rebuke.

This ‘Kantian’ objection cannot be held as conclusive because there are also significant normative concerns militating towards recognizing the political judgment at the heart of asylum law. First, is the instrumentalization of persons where they enjoy rights really comparable to the instrumentalization where their rights are violated? Second, there is substantial evidence that wedding individual protection to interstate politics has historically secured firmer rights to larger numbers of people.<sup>66</sup> At a minimum, the political foundation of asylum law may therefore enjoy a consequentialist justification. One way or another, political judgment regarding Israel’s ‘prolonged occupation’ and blockade of Gaza, as well as Israel’s constitutive violence of the Palestinian ‘Nakba’, is bound to inform further interpretations of Article 1D. This will be the case whether authorized state interpreters admit it or not.

<sup>62</sup> See, e.g., Harvey, ‘Talking about Refugee Law’, 12 *Journal of Refugee Studies* (1999) 101; Kleist, ‘The Refugee Regime: Sovereignty, Belonging and the Political of Forced Migration’, in A. Pott, C. Rass and F. Wolff (eds), *What Is a Migration Regime?* (2018) 167.

<sup>63</sup> Hathaway, ‘A Reconsideration of the Underlying Premise of Refugee Law’, 31 *Harvard International Law Journal* (1990) 129, at 173–174.

<sup>64</sup> See generally S. Parekh, *No Refuge: Ethics and the Global Refugee Crisis* (2020), at 60–61.

<sup>65</sup> Mann, ‘Border Crimes as Crimes against Humanity’, in C. Costello, M. Foster and J. McAdam (eds), *Oxford Handbook of International Refugee Law* (2021) 1174.

<sup>66</sup> Cf. Kumin, ‘Orderly Departure from Vietnam: Cold War Anomaly or Humanitarian Innovation?’, 27 *RSQ* (2008) 104.



## 4 Does Recognition of Palestinian Asylum Seekers Assist Israel in a Campaign of Expulsion?

In his 1997 study *The Status of Palestinian Refugees in International Law*, Takkenberg discusses the reason why the drafters introduced Article 1D to the Refugee Convention. His reading of the *travaux préparatoires* demonstrates that different states parties expressed varying reasons to support the clause. Some said, in good faith or not, that they supported it because it would help advance Palestinian national liberation. Multiple Arab representatives advanced the view that excluding Palestinians from the convention's protection would help uphold the right of return as the only viable solution for Palestinian refugees. What Arab states objected to is any 'durable solution' other than repatriation to the cities and villages to which Palestinians have fled or have been transferred from during the war.<sup>67</sup> For example, in an early debate, the Lebanese representative explained precisely that 'the Palestine refugees ... differed from all other refugees'. The view that Lebanon articulated was that the responsibility towards Palestinian refugees was not only a moral one but also one based on a positive commitment previously undertaken by the United Nations (UN): the commitment to allow Palestinians to return to their homes before the war, which was articulated in UNGA Resolution 194.<sup>68</sup> Similarly, in later negotiations, the Saudi representative explained that the Palestinians should be excluded so that they would not 'become submerged' in all other refugee categories. Unlike other refugees, the only solution for Palestinian refugees was 'repatriation': '[T]he Palestine refugees should continue to be granted a separate and special status.'<sup>69</sup>

On the other hand, for France and other Western delegates, the exclusion was convenient because it relieved them from responsibility over a group that was already 'covered' by the UNRWA. The French knew that, at least for the time being, this would leave Palestinian refugees primarily as a humanitarian matter within the Middle East. For its own part, Israel also considered that the Palestinian refugees were different from other 'refugees'. Israel did not object to Palestinians enjoying humanitarian aid in the Arab countries surrounding it. Indeed, Israel expressed at many junctures the opinion that the 'solution' for Palestinian refugees must be integration in those countries—primarily, Jordan, Syria, Lebanon and Iraq. If granting Palestinian refugees aid in the refugee camps outside of Israel would mean Palestinians would stay there, so be it. Unlike the groups covered by the draft Refugee Convention, for Israel, Palestinians

<sup>67</sup> In their discussion in relation to citizenship surrounding the Casablanca Protocol 1965 (Protocol for the Treatment of Palestinians in Arab States, 11 September 1965, League of Arab States, available at <https://www.refworld.org/docid/460a2b252.html>), Arab states attempted to create a framework for maintaining the Palestinian liberation struggle and the right to return, while allowing Palestinians to still live with dignity. Of course, these Palestinians were incredibly vulnerable when Arab regimes changed or they were scapegoated, but they nevertheless benefited greatly when they were afforded certain protections. See Shiblak, *supra* note 13, at 38. Yet the protocol appears to have been poorly implemented. See Ryseck and Johannsen, 'UNRWA: Challenges for Humanitarian Aid in an Increasingly Sensitive Political Environment', 27 *Sicherheit und Frieden (S+F)/ Security and Peace* (2009) 260, at 262.

<sup>68</sup> Takkenberg, *supra* note 36, at 62.

<sup>69</sup> *Ibid.* (emphasis in original).

were simply not ‘refugees’ under the new legal definition.<sup>70</sup> Its primary policy objective was to prevent the return of Palestinian refugees into its territory.

All state delegates thus came together around the idea that Palestinian refugees were somehow exceptional. Further, as Anne Irfan has shown, many Palestinian refugees have rejected integration and/or resettlement, further contributing to the exceptionality of their status.<sup>71</sup> The idea of return is central to Palestinian national identity and has arguably been the centrepiece of the Palestinian struggle for national liberation since 1948.<sup>72</sup> More than 70 years after the Refugee Convention was signed, the general pattern of state interests described above may also largely still hold true. Particularly, with peace talks between Israel and the Palestinian Authority having failed for two decades, Israel is as adamant as ever not to let 1948 refugees back, and it has arguably pursued a campaign of gradual displacement.<sup>73</sup> This raises the question whether recognition of UNRWA-registered asylum seekers as refugees in European states may work to reinforce Israeli attempts to displace Palestinians. According to this view, making it easier for Palestinians to gain refugee status in Europe will compel more Palestinians to find their places there, which will end up weakening and replacing claims of return. In migration studies parlance, an easier road to asylum is sometimes described as a ‘pull factor’ for individuals who would otherwise not choose to leave.<sup>74</sup> Once in Europe, it will supposedly be more difficult to expect that these new Palestinian refugees will ever repatriate, especially if the conditions there are favourable. Expansive recognition of the rights of Palestinian asylum seekers in Europe will therefore amount to collaboration with a policy of Israeli displacement or forcible transfer.

To be sure, Palestinian national identity is not only about the right of 1948 Palestinians to return. It is also about resilience and connection to the national homeland. Recall that Ukraine has put in place rules against men of certain ages leaving the country: they are needed for fighting. Similarly (and keeping in mind that refugee status is far from the only way in which people leave), Palestinians have been wary of generating a condition in which those who can exercise resistance against Israel – armed and otherwise – can leave. Indeed, in the Palestinian case, this insistence

<sup>70</sup> *Ibid.*, at 66.

<sup>71</sup> Irfan, ‘Rejecting Resettlement’, 54 *Forced Migration Review* (2017), 68.

<sup>72</sup> Khalidi, ‘Observations on the Right of Return’, 21 *JPS* (1992) 29, 30 (stating that ‘as far as the Palestinians are concerned, the wrong done to them can only be righted, and the disasters ended, through a return to the homeland’).

<sup>73</sup> Adalah, ‘Forced Displacement’, position paper, May 2023, available at [www.adalah.org/uploads/uploads/Forced%20Displacement%20Paper%20May%202023.pdf?mc\\_cid=42c5df17c7&mc\\_eid=UNIQUID](http://www.adalah.org/uploads/uploads/Forced%20Displacement%20Paper%20May%202023.pdf?mc_cid=42c5df17c7&mc_eid=UNIQUID); see also Kattan, ‘The Nationality of Denationalized Palestinians’, 74 *Nordic Journal of International Law* (2005) 67.

<sup>74</sup> Hatton, ‘Asylum Migration to the Developed World: Persecution, Incentives, and Policy’, 34 *Journal of Economic Perspectives* (2020) 75, at 85–87. It is important to note, however, that scholars have often debated the ‘pull factor thesis’. See, e.g., Garelli and Tazzioli, ‘Migration and “Pull Factor” Traps’, 9 *Migration Studies* (2021) 383. Even if one rejects the ‘pull factor’ framing, it is clear that migrant and refugee decisions are informed by multiple cost and benefit considerations, including those that may or may not allow them access. See R. Arar and D.S. FitzGerald, *The Refugee System: A Sociological Approach* (2022), at 15.

on staying is not only about fighting: the steadfast effort to remain in the homeland (*'Bqā'*) has become in itself a form of resistance (*'ṣumud'*).<sup>75</sup> Is expanding Palestinian rights to seek asylum in Europe a blow to *ṣumud*? Palestinian asylum seekers who have reached Europe have sometimes enjoyed a form of de facto temporary protection from removal. However, this has not been due to a disciplining mechanism directed at Israel. It has simply been because Israel does not accept Palestinians back and/or will not cooperate with their removal.<sup>76</sup> There is no clearer illustration of the very real risk that expanding Palestinian rights to asylum will serve Israel's policies that seek to get rid of them. And the fluctuation between support for 'those who leave' and sometimes an open animosity against them is widely common to modern national liberation movements.<sup>77</sup>

This article has considered the moral decision behind individual refugee protection and the interpretation of the controlling European law. This moral-legal framing surrounding each person is complemented by a political question about a different category of human life: the nation. The second dilemma – whether refugee recognition assists expulsion – supplements the first dilemma (has protection gone far enough). For those who support expanding refugee protections for UNRWA-registered Palestinians – perhaps even giving them a blanket of collective protection – such measures may perhaps also best serve the Palestinian national liberation cause. Refugee protection has often been rooted in a political commitment to also admonish the country of origin, which seems like it may be a win for Palestinians in diplomatic terms in the context of a transnational struggle for reputation. However, what value may such a reputational win have if it helps empty Palestine of Palestinians? In this alternative line of argument, the struggle for liberation is not primarily about reputation or symbolic capital but, rather, about the toil of fighting or the struggle not to be displaced.

From a non-consequentialist perspective, these two competing arguments may seem equally objectionable. Both seem to entail different kinds of instrumentalization of individual refugees in service of the national cause. Try to imagine this dilemma from the internal point of view of an individual who seeks to obtain both individual protection and collective self-determination. It now no longer seems to be about instrumentalization at all. It is about a fundamental commitment to risk sacrifice for the collective (and stay) or a preference for personal and familial survival (which may require leaving). The choice confronts rebels and freedom fighters everywhere. The political foundation of asylum enjoys a non-consequentialist justification.

<sup>75</sup> Tatour, 'Citizenship as Domination: Settler Colonialism and the Making of Palestinian Citizenship in Israel', 27 *Arab Studies Journal* (2019) 8, at 18 (explaining that 'sumud' means steadfastness or 'Palestinian resistance and survival under conditions of Zionist/Israeli colonization and oppression'); see also D. Allan, *Refugees of the Revolution: Experiences of Palestinian Exile* (2013) (going beyond the 'stereotype' of *ṣumud*).

<sup>76</sup> Mann, *supra* note 31 at 127.

<sup>77</sup> For an example from an entirely different place and time, see, e.g., *Those Who Leave: The 'Problem of Vietnamese Boatpeople* (1979) (publication of the Vietnamese government). The same underlying assumption has certainly been central to a Zionist political consciousness. On the relationship between national liberation struggle and accepting refugees in Zionist history, see Mann, 'Disentangling Displacements: Historical Justice for Mizrahim and Palestinians in Israel', 21 *Theoretical Inquiries in Law* (2020) 434.

## 5 What Is the Relationship between Recognizing Palestinian Asylum Claims and Palestine’s Struggle for Statehood?

At least since its 1988 declaration of statehood, the PLO has struggled for the international recognition of the state of Palestine.<sup>78</sup> In 2012, by a vote of 138 to nine at the UNGA, Palestine was upgraded from an observer entity to a ‘non-member observer state’.<sup>79</sup> This result re-energized Palestine’s international legal bid for independence, and the Palestinian government in Ramallah subsequently acceded to numerous treaties, aiming to bolster its claim to sovereignty. The Palestinian government has also been able to marshal considerable influence on international legal fora, beginning with its mobilization of an International Court of Justice (ICJ) advisory opinion on the *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory*.<sup>80</sup> The Palestinian Authority then succeeded in triggering an International Criminal Court (ICC) investigation on the situation in Palestine in 2021, and, in 2022, remarkably, has brought about a UNGA resolution seeking an advisory opinion from the ICJ on the legal consequences of Israel’s prolonged occupation of Palestinian territory. Palestine has established embassies and other diplomatic missions in most countries around the world. Even though the ‘state of Palestine’ does not have control in Gaza, it does perform numerous governmental functions in the West Bank and East Jerusalem. Meanwhile, Hamas controls the Gaza Strip, and while it does not enjoy international recognition, it does have more de facto control over territory than the Palestinian Authority government in Ramallah.

Keeping in mind the role that asylum traditionally has had as an instrument of interstate reprimand, how should one recognize Palestinian asylum seekers coming specifically from the Occupied Palestinian Territories? A recognition of their claims, let alone an expansion of their protection, may be perceived as sending a message of rebuke – not towards Israel but, rather, towards the Palestinian governments on the ground. Is such an admonition appropriate? And how does it interact with the Palestinian struggle for statehood? The answer may seem quite straightforward. Inasmuch as recognizing asylum seekers from a certain country also means somehow disciplining that country, it depends on what the persecution claims are. Israel should be the addressee of such a message when it is responsible for the persecution or threat that a particular individual has suffered. For example, if a person is fleeing Israeli bomb attacks, their possible eventual recognition will function as a measure of ‘out-casting’ Israel. Conversely, if they are fleeing from torture by Palestinian authority

<sup>78</sup> Palestine National Council, Declaration of State of Palestine, 18 November 1988, available at [www.un.org/unispal/document/auto-insert-178680/](http://www.un.org/unispal/document/auto-insert-178680/).

<sup>79</sup> ‘General Assembly Votes Overwhelmingly to Accord Palestine “Non-Member Observer State” Status in United Nations’, *UN Press* (2012), available at <https://press.un.org/en/2012/ga11317.doc.htm>.

<sup>80</sup> International Court of Justice, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory*, 9 July 2004, available at <https://www.icj-cij.org/sites/default/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>.

agents, the disciplining message should be sent to Palestine. A two-state solution: to each according to their relative responsibility for an asylum seekers' displacement.

However, there may be tensions between the political rebuke that a receiving government would want to send and the way in which refugee law structures such a rebuke. Article 1 of the Refugee Convention defines refugees as those suffering from persecution due to race, religion, nationality, membership of a particular social group or political opinion. The latter category – political opinion – has traditionally been at the centre of the socio-legal imagination of refugees. Those individuals fleeing the 'generalized violence' of war are not always recognized as refugees (though they might enjoy collective or supplementary protection and are under the mandate of the UNHCR). These characteristics of the law suggest that asylum seekers leaving Gaza will find it easier to show that they have been 'persecuted' by Hamas than by Israel for the purposes of Article 1. The primary source of Israeli violence that Gazans most often experience is that of military conflict, which is ill-suited to fall under the persecution definition. On the other hand, when political opponents are jailed or harmed – a known Hamas practice – it goes to the heart of the refugee definition. When it comes to Gaza, the international legal system will end up rebuking the Hamas government more significantly than it will Israel (this will remain true even if, subjectively, asylum seekers may feel that the more significant violence they experienced was Israeli violence).<sup>81</sup>

With asylum seekers from the West Bank, the situation is potentially different. In the West Bank, Israel is often involved in de facto policing operations. Among the measures that Israel employs are administrative detention, ill-treatment and torture and house demolitions.<sup>82</sup> Some of these measures are imposed on the family members of individuals targeted by national security investigations and not only on those suspected of hostile activity. The latter practices are more easily squared within the Refugee Convention's 'persecution' box (especially since they are not employed equally against Jewish suspects). These aspects of an abusive and differential national security system are possibly solid bases for claims of persecution based on race, nationality or political opinion under the convention (when compared with bombings).<sup>83</sup> In order to fully consider asylum claims by Palestinians from the West Bank, European

<sup>81</sup> There is a comparable concern about the International Criminal Court's (ICC) investigation of the situation in Palestine. As Kevin Jon Heller noted in 2015, '[m]ost obviously, Hamas's deliberate rocket attacks on civilians would be by far the easiest of all the crimes to prosecute in either Gaza or the West Bank. Not the gravest crime – but absolutely the easiest to prove in terms of its legal elements and evidentiary considerations. So I would be very surprised if the OTP's initial charges were not against Hamas'. See K. Heller, 'The International Criminal Court Will Never Investigate Palestine's Problems', Quartz (6 April 2015), available at <https://qz.com/376448/the-international-criminal-court-will-never-investigate-palestines-problems>; see also Kersten, 'The ICC in Palestine: Be Careful What You Wish For', *Justice in Conflict* (2 April 2015), available at <https://justiceinconflict.org/2015/04/02/the-icc-in-palestine-be-careful-what-you-wish-for/>.

<sup>82</sup> See, e.g., International Federation for Human Rights (FIDH) and Public Committee Against Torture in Israel (PACTI), Communication to the Office of the Prosecutor of the International Criminal Court Under Article 15 of the Rome Statute, June 2022, available at [www.fidh.org/IMG/pdf/fidh-pcati\\_art\\_15\\_communication\\_palestine\\_crimes\\_isa.pdf](http://www.fidh.org/IMG/pdf/fidh-pcati_art_15_communication_palestine_crimes_isa.pdf).

<sup>83</sup> *Ibid.*, at 65–66.

governments must actively ask themselves whether Israeli national security policies are elements of persecution. But they do bring to the fore considerations about how much the interpreter wants to regard refugee law as a tool of interstate politics.

With regard to asylum seekers from the West Bank, there is no way around it: assuming Palestine has sovereignty, as the Palestinian Authority wants us to do, ensures that the state of Palestine will end up being reprimanded when asylum seekers leave its claimed territory. Perhaps this is appropriate; an entity that claims to have sovereignty must also bear responsibility. The refugee law question here is only a subset of a wider question – namely, does Palestine have the duties of a state under human rights law? Much of this issue, it seems, turns on whether we think that Palestine has de facto control of its own territory. Alternatively, one may take the position that Israel is the de facto sovereign over the entire territory of the West Bank and East Jerusalem. Rather than stemming from Palestine's statehood, this position is premised on Israel's effective control and reflects a 'one state reality'.<sup>84</sup> Accordingly, asylum seekers fleeing the West Bank and East Jerusalem – and perhaps Gaza too – will be understood as being displaced due to Israel's inability to secure their fundamental rights. If Palestine never truly obtained control over its territory, which is still the most central attribute of sovereignty, it cannot truly be held responsible. If Israel has concluded a de facto annexation of these areas, it surely must be the accountable party.<sup>85</sup> The 'state of Palestine' is but a contractor in Israel's service.

In this case, granting asylum to Palestinians from these areas will only serve to admonish Israel. At the same time, it can be understood as undermining Palestine's claim of independence. In the background of determinations regarding the possible expansion of protection for UNRWA-registered Palestinians from the West Bank is a question about whether the interpreter recognizes the independence of the Palestinian Authority. The view that a 'one state reality' has solidified is, despite its considerable merits, still the minority view among international lawyers. Indeed, even taking the more ordinary view that the territory is under occupation leaves international responsibility in the hands of Israel. But, in this case too, one must acknowledge that the Palestinian Authority will not be held as a fully sovereign entity and thus is not the ultimate subject of interstate reprimand. The Palestinian Authority cannot be a state for the purpose of rights and not for the purpose of duties. Note, however, that expanded recognition for Palestinian asylum seekers in Europe may contribute to a Palestinian form of sovereignty that is separate from, alternative to or complementary to the 'state of Palestine'. The latter is a transnational form of sovereignty based on cross-border networks of liberation struggles.

The Palestinian struggle for liberation has been transnational ever since the war of 1948 and clearly since the war of 1967. Starting from the PLO's base in Jordan; through its centre in Beirut, which remained primary until Israel's invasion of Lebanon in 1982; and then with the movement to Tunis, until the return to the West

<sup>84</sup> I.S. Lustick, *Paradigm Lost: From Two-State Solution to One-State Reality* (2019).

<sup>85</sup> R. Levine-Schnur, T. Megiddo and Y. Berda, 'A Theory of Annexation', SSRN, 5 February 2023, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4330338](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4330338).



Bank with the Oslo Accords – throughout the entire trajectory, the struggle has been waged across borders from within and from without. And this is not even to mention the continuing struggle from within Israel and its contacts with centres abroad, including Gulf states and Palestinian diasporas in Gulf states. Consider also contemporary Palestinian social movements in Europe and the USA, which are also part of the Palestinian struggle for national liberation, including the boycott, divestment and sanctions (BDS) movement.<sup>86</sup> The different junctures are partially connected. It is wrong to say that Palestinians have only struggled for liberation from locations within historical Palestine.

Recall the dilemma between a fundamental commitment to risk sacrifice for the collective (requiring staying) and preference for personal and familial survival (which may require leaving).<sup>87</sup> Realizing the transnational nature of the Palestinian struggle for liberation also means understanding that these two options are not always mutually exclusive. One may decide not only to leave in order to protect their family but also to carry on the struggle from abroad. Such a decision to flee may be due to persecution by Israel, by Hamas, by the Palestinian Authority or by any other competing faction. One way or another, such a decision is likely more helpful for the struggle than staying at home if the risk of being targeted and demobilized at home is very high. A Berlin café, with a Palestinian flag proudly hanging outside, may be a better platform for resistance than a West Bank home slated for demolition or, for that matter, a Gaza university classroom closely monitored by local authorities. Palestinian customers from refugee camps across the Levant – Yarmouk, Rafah, Balata, Shatila – have commonly frequented such establishments.<sup>88</sup> They have not been able to do so from homes in refugee camps. This notion of ‘networked sovereignty’ is separate from, alternative to or complementary to Palestinian statehood. Some networks are oppositional to the Palestinian Authority. Others bolster its cause, supplementing its foreign relations. Competing networks of national liberation struggle have always existed within the Palestinian national movement. They continue to compete with Ramallah over representation of the Palestinian cause.

## 6 What May Expanded Recognition for Palestinians Mean for the UNRWA?

To illustrate just how important transnational liberation struggles have been for Palestinians, it is necessary to discuss a fourth question about the role of the UNRWA. The Palestinian national liberation movement historically has had a complex relationship with the UNRWA. Western states, which generally expressed their preference

<sup>86</sup> On the boycott, divestment and sanctions movement as ‘overcoming the sovereignty gap’, see N. Erakat, *Justice for Some: Law and the Question of Palestine* (2019), at 228–234.

<sup>87</sup> This emphasis on personal choice in the face of changing circumstances draws from the systems in Arar and FitzGerald, *supra* note 74.

<sup>88</sup> M Unicomb, ‘Inside Berlin’s famous Palestinian Neighbourhood’, *Middle East Eye* (7 July 2022), available at [www.middleeasteye.net/discover/inside-famous-palestinian-berlin-germany-neighbourhood](http://www.middleeasteye.net/discover/inside-famous-palestinian-berlin-germany-neighbourhood).

for a solution for the Palestinian refugee problem outside of historic Palestine, have funded the UNRWA since its inception.<sup>89</sup> Palestinian national leaders therefore initially tended to suspect that the UNRWA was a vehicle for the international community to depoliticize the Palestinian refugee problem. That the UNRWA initially focused on the creation of jobs seemed to suggest a focus on local integration, adding to the suspicion that the UNRWA would undermine Palestinian claims of return.<sup>90</sup>

Yet, in the decades following its establishment, the UNRWA became a vehicle for the Palestinian struggle for liberation on the international plain. As Anne Irfan has documented, the agency responded to refugees' concerns and switched its focus to education.<sup>91</sup> In several Arab countries, including the Occupied Palestinian Territories, it hired mainly Palestinians, a process that empowered Palestinian autonomy. Indeed, in Jordan as well as in Lebanon, under PLO-UNRWA collaboration, several of the Palestinian camps became de facto independent Palestinian territories.<sup>92</sup> In its heyday in the 1970s, collaboration with the UNRWA and participation in it became an important aspect of the PLO's internationalist strategy.<sup>93</sup> Long before the transnational networks described above, the UNRWA was a platform for transnational collective action 'from below'. Its activities harnessed local action in Arab countries, the bureaucracy of an international organization and the provision of significant state-like functions for Palestinians. Concurrently, its rhetoric and *raison-d'être* often expressed the Palestinian dream of return. As anthropologist Randa Farah has noted, the relationship between the UNRWA and the Palestinian national liberation movement has always remained ambivalent; in 1993, the agency signed a Declaration of Principles, which was part of the Oslo Peace Process with Israel, alienating refugee populations.<sup>94</sup> Yet, as one commentator noted in 2010, the UNRWA 'has emerged as the main stakeholder in the Palestinian refugee issue'.<sup>95</sup> In practical terms, UNRWA-issued identification serves refugees as proof of identity and is necessary for them to realize their basic day-to-day needs.<sup>96</sup>

How may doing away with Article 1D influence the UNRWA? Could opening European doors to Palestinian asylum seekers deal a blow to an already weak UN

<sup>89</sup> Irfan, 'Palestine at the UN: The PLO and UNRWA in the 1970s', 49 *JPS* (2020) 26, at 27; Takkenberg, 'UNRWA and the Palestinian Refugees after Sixty Years: Some Reflections', 28 *RSQ* (2009) 253, at 253, n. 2–3.

<sup>90</sup> Irfan, *supra* note 89, at 36.

<sup>91</sup> *Ibid.*

<sup>92</sup> Irfan, *supra* note 89, at 30–36; see also United Nations Archives and Records Management Section, Palestine Liberation Organization (PLO) – Cairo Agreement between Lebanon and PLO, 9 November 1969, available at <https://search.archives.un.org/palestine-liberation-organization-plo-cairo-agreement-between-lebanon-and-plo-9-november-1969>.

<sup>93</sup> *Ibid.*, at 26.

<sup>94</sup> R. Farah, 'Uneasy but Necessary: The UNRWA-Palestinian Relationship', *Al-Shabaka* (30 November 2010), available at <https://al-shabaka.org/briefs/uneasy-necessary-unrwa-palestinian-relationship/>.

<sup>95</sup> Al Hussein, 'UNRWA and the Refugees: A Difficult but Lasting Marriage', 40 *JPS* (2010) 6.

<sup>96</sup> Y. Sayigh, *Armed Struggle and the Search for State: The Palestinian National Movement, 1949–1993* (2000), at 41–49.

agency? The UNRWA has recently been suffering a grave funding crisis.<sup>97</sup> This crisis came to a peak during the era of President Donald Trump, who cut the USA's funding.<sup>98</sup> Tellingly, Palestinian advocates responded by defending the agency vehemently, echoing earlier stances of the PLO. For example, Noura Erakat has argued that the financial blow to the UNRWA will result in food shortages among Palestinians, as well as massively cutting access to education. As she described it, Trump's move adopts a long-standing Israeli position against the Palestinian claims of return, according to which 'if Palestinian refugees were even more destitute than they already are, they would accept whatever they are offered'.<sup>99</sup> More recently, in May 2023, the World Food Programme decided to suspend 60 per cent of its budget for Palestinians in a move that, according to UN sources, could leave 200,000 Palestinians hungry.<sup>100</sup> The difficulty in providing aid for Palestinians in the Middle East is not going anywhere.

Realistically, expanding individual protections for Palestinian asylum seekers in Europe could indeed become the last nail in the UNRWA's coffin. Besides the harm to the Palestinian liberation struggle and the affront to Palestinians' claim of return, this could generate even more displacement due to the economic dearth. While any such outcome is clearly not certain, further emergencies are reasonably foreseeable. A possible defunding of aid, coupled with a potential calamity for claims of return, starkly illustrates the need to consider treaty interpretation beyond the 'object and purpose'. The interaction between asylum and humanitarian policies may lead to dramatic political and socio-economic ramifications that an exclusive focus on the legal provisions may obstruct from view.<sup>101</sup> An approach to refugee law that constructs refugees as the freedom fighters that they so often are should not focus exclusively on liberation as a statist project. It must always take into account the international organizations that refugees employ in order to receive state-like services, including social ones.<sup>102</sup> Refugees may choose to voice their collective struggle not only through a fight for independence but also through the platforms that international organizations offer.<sup>103</sup> The judgment over which kind of platform is more important – the statist one (embodied today by the Palestinian Authority and by Hamas) or the transnational one

<sup>97</sup> K. Berg, J. Jensehaugen and A. Tiltnes, 'UNRWA, Funding Crisis and the Way Forward', CMI Report no. R 2022:04 (2022), available at [www.cmi.no/publications/8574-unrwa-funding-crisis-and-the-way-forward](http://www.cmi.no/publications/8574-unrwa-funding-crisis-and-the-way-forward).

<sup>98</sup> P. Beaumont and O. Holmes, 'US Confirms End to Funding for UN Palestinian Refugees', *The Guardian* (31 August 2018), available at [www.theguardian.com/world/2018/aug/31/trump-to-cut-all-us-funding-for-uns-main-palestinian-refugee-programme](http://www.theguardian.com/world/2018/aug/31/trump-to-cut-all-us-funding-for-uns-main-palestinian-refugee-programme).

<sup>99</sup> N. Erakat, 'Trump Administration Tells Palestinian Refugees to Submit or Starve', *Washington Post* (13 September 2021), available at [www.washingtonpost.com/news/global-opinions/wp/2018/09/13/trump-administration-tells-palestinian-refugees-to-submit-or-starve/](http://www.washingtonpost.com/news/global-opinions/wp/2018/09/13/trump-administration-tells-palestinian-refugees-to-submit-or-starve/).

<sup>100</sup> 'Severe Funding Shortfalls Could Leave 200,000 Palestinians Hungry', *UN News* (11 May 2023), available at <https://news.un.org/en/story/2023/05/1136572>.

<sup>101</sup> See generally I. Feldman, *Life Lived in Relief: Humanitarian Predicaments and Palestinian Refugee Politics* (2018).

<sup>102</sup> Irfan, *supra* note 89, at 28–29; Bocco, 'UNRWA and the Palestinian Refugees: A History within History', 28 *RSQ* (2009) 229, at 234.

<sup>103</sup> See Irfan, 'Petitioning for Palestine: Refugee Appeals to International Authorities', 5 *Contemporary Levant* (2020) 79.

(embodied most centrally by the UNRWA) should not be made *a priori*. Only by taking a close look at what each kind of organization offers refugees in reality can one understand the political foundation of asylum law and support both individual protection and national liberation.

## 7 Conclusion

Discussing a people's struggle for liberation from the perspective of the merits of its members' asylum claims is a painfully tragic exercise. It suggests that the struggle is far from its conclusion and perhaps at a particularly calamitous stage. However, the insight that asylum seekers may offer in understanding struggles for liberation is undeniably important. The contemporary asylum requests that Palestinians submit in European states must be understood, *inter alia*, in the context of questions about Palestinian self-determination.

How exactly we draw the lines between individual protection and collective self-determination remains an urgent question for international legal theory. So far, the expansion of the interpretation of Article 1D has not been coupled with open international rhetoric of rebuke towards Israeli policies, nor has it accompanied any definite change in foreign policy towards 'the State of Palestine'. Indeed, the changes in interpretation affecting Palestinians have partly been hushed in the broader, very lively discussion on asylum in Europe. But the discussion above has not merely been speculative or theoretical. Assuming Palestinian asylum seekers will continue to leave the Occupied Palestinian Territories for Europe due to policies of a far-right Israeli government, interstate politics of admonition will re-emerge. It is therefore worthwhile to consider their merits and pitfalls, alongside the more practical question of whether protection for Palestinians has gone far enough.

An ethics of hospitality towards Palestinians, and towards any group, should refrain from instrumentalizing the protection of individuals, or lack thereof, for the purposes of group politics. However, it should not entirely bifurcate between the two. Such an ethics should embrace the political foundation of asylum law and regard personal protection and collective self-determination as interrelated. If indeed an expanded interpretation of Article 1D is underway, European governments should carefully consider how to couple such an interpretation with support for the Palestinian collective. One way to do so may be to help foster transnational Palestinian liberation networks. Currently, European governments granting protection to Palestinians are still often hostile to such networks. For example, laws and resolutions limiting the freedom of expression of members of Palestinian diasporas decrease the availability of transnational platforms for struggle. Such are laws, in Germany and elsewhere, that deem the BDS campaign a form of anti-Semitism.<sup>104</sup> The argument is not that such a law violates, in and of itself, Germany's legal duty to grant refugee status to those who deserve it. Rather, it is that such a law influences the relationships structured

<sup>104</sup> K. Bennhold, 'German Parliament Deems B.D.S. Movement Anti-Semitic', *New York Times* (17 May 2019), available at [www.nytimes.com/2019/05/17/world/europe/germany-bds-anti-semitic.html](http://www.nytimes.com/2019/05/17/world/europe/germany-bds-anti-semitic.html).

by a particular legal environment between individual protection and a national liberation struggle. Similarly, in a move that, according to Human Rights Watch, violated Palestinians' freedoms of expression and assembly, the Berlin police banned demonstrations commemorating the Palestinian 'Nakba Day' in May 2023.<sup>105</sup> Within the ethics of hospitality, both individual protection and collective self-determination are key.<sup>106</sup>

On the supportive side, consider another (partially overlapping) group of refugees who have sought protection in Europe – Syrian refugees. As Yuna Han has argued, when German courts allow prosecutions of Syrian suspects of war crimes to go forward, under the doctrine of universal criminal jurisdiction, they are not only serving the interests of the 'international community'. No less importantly, they are also establishing a certain kind of relationship with the Syrian community in Germany.<sup>107</sup> As she shows, such a prosecution has responded to the demands of parts of the Syrian diaspora in Germany. It has been a component of demonstrating hospitality towards Syrians and allowing at least some of them to exercise their political will. Such a realization of will is associated with a form of collective self-determination. Similarly, European governments may decide to respond to demands by members of Palestinian diasporas to hold accountable Israeli and/or other actors responsible for their abuse. Another question about supporting Palestinians may focus on how to grant them individual protections without at the same time undermining the Palestinian Authority or leading to the final defunding of the UNRWA.<sup>108</sup> If and when they decide to do so, European governments will create environments amenable to exercising a measure of transnational quasi-sovereignty. They will also follow the dictates of an ethics of hospitality that embraces the political foundations of asylum law and demands policies that go beyond individual protection.

Palestinian asylum seekers are a particularly interesting case in point within a growing literature on international law and the politics of diasporas.<sup>109</sup> One thing that is relatively special about this diaspora is its long-standing transnational struggle for liberation, which, as of yet, has never established full sovereignty. Following the momentous work of Edward Said, the Palestinian politics of exile has been extraordinarily

<sup>105</sup> 'Berlin Bans Nakba Day Demonstrations', *Human Rights Watch* (20 May 2022), available at [www.hrw.org/news/2022/05/20/berlin-bans-nakba-day-demonstrations](http://www.hrw.org/news/2022/05/20/berlin-bans-nakba-day-demonstrations).

<sup>106</sup> To be sure, from the perspective of the political foundation of asylum, this combination of protection and limitations of freedom of expression may precisely reflect Germany's conflicted views on the Palestinian national struggle. These may be coloured by its own Nazi past and guilt for having contributed to conflicts in the Middle East that have endured ever since. On ethics of hospitality, see S. Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (2004).

<sup>107</sup> Han, 'Should German Courts Prosecute Syrian International Crimes? Revisiting the "Dual Foundation" Thesis', 36 *Ethics and International Affairs* (2022) 37.

<sup>108</sup> See 'EU Announces €261 Million in Support of UNRWA's Operations', *European Commission*, available at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_4884](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4884) (intended 'to address food insecurity and mitigate the impact of the Ukraine war'); see also 'EU and UNRWA Joint Declaration', *European Commission*, available at [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_6081](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6081).

<sup>109</sup> See, e.g., Mégret, 'The "Elephant in the Room" in Debates about Universal Jurisdiction: Diasporas, Duties of Hospitality, and the Constitution of the Political', 6 *Transnational Legal Theory* (2015) 89.

influential.<sup>110</sup> The liberation struggles of contemporary asylum seekers, who feel they no longer have any other choice but to flee, have so far been far less visible. A legal environment supporting a struggling group is one that, at a minimum, respects the freedoms of expression and association that the group needs to continue its struggle. The economic conditions that members of the group may enjoy or suffer are also squarely relevant to liberation struggles. At a maximum, a more aggressive foreign policy that can be adopted is solidarity with the struggling group. This does not necessarily mean military intervention in the refugee-sending country, though historically host states sometimes have considered such interventions.<sup>111</sup> It means granting protection for the displaced without losing sight of liberation, including repatriation, which refugee studies scholars often invoke as the preferred option.<sup>112</sup>

This article has aimed to provide a schema for thinking about the political foundation of asylum law in generalizable terms. My suggestion was that, as legal interpreters and as policy makers, we may employ a procedure including four basic questions: (i) are we going far enough in protecting each individual member of a struggling group; (ii) are there any negative ramifications that such individual protection for individuals may spell for the group; (iii) how are we affecting the group's political struggles, including struggles for sovereignty and statehood; and (iv) how does individual protection affect its members' material conditions, including their ability to articulate their interests through participation in transnational networks and international organizations? Especially important to this procedure is an attempt to reconstruct the dilemmas of people who are still undecided whether to stay or to leave and are weighing the political and moral costs and benefits of any action – people who ultimately wish to obtain both protection and liberation. Too often, refugees are regarded exclusively through a humanitarian lens.<sup>113</sup> The latter is no doubt important. But a fuller consideration of the legal and political challenges of refugees also brings into sharp relief their roles as participants in liberation struggles as well as their place in the global tapestry of sovereign states and statelessness. Taking all these aspects of their lives into account grants dignity to refugees.

<sup>110</sup> See the essays collected in A. Iskandar and H. Rustom, *Edward Said: A Legacy of Emancipation and Representation* (2010), especially, J. Massad's essay, 'Affiliating with Edward Said' (at 23).

<sup>111</sup> Martin, 'Large-Scale Migrations of Asylum Seekers', 76 *American Journal of International Law* (1982) 598, at 609; Garelli and Tazzioli, 'Military-Humanitarianism', in K. Mitchell, R. Jones and J. Fluri (eds.), *Handbook on Critical Geographies of Migration* (2019) 182.

<sup>112</sup> Irfan, *supra* note 71.

<sup>113</sup> S. Behrman, *Law and Asylum: Space, Subject, Resistance* (2018) (calling for a politicization of refugee subjecthood).