

TEMPORARY PROTECTION AND ITS APPLICABILITY TO THE PALESTINIAN REFUGEE CASE

Susan M. Akram, Associate Professor, Boston University School of Law*

BADIL-Briefs aim to support the Palestinian-Arab and international debate about strategies for promotion of Palestinian refugees' right of return, restitution, and compensation in the framework of a just and durable solution of the Palestinian/Arab - Israeli conflict.

Introduction

Temporary protection is widely regarded as an international legal norm that is now obligatory on states in certain circumstances with regard to their treatment of refugees, or persons fleeing "refugee-like" situations.⁽¹⁾ As a recognized status, it is the most recent of the three major possibilities for protection of refugees which a state can offer - the other two being the now-universal obligation of *non-refoulement* ("non-return") and the non-obligatory protection of political asylum.

Temporary protection has special significance to the Palestinian refugee case. Since all states examining the issue, as well as the relevant United Nations bodies, universally interpret the international legal refugee regime as excluding Palestinian refugees from its coverage, for the last 50 years Palestinian refugees have essentially been denied minimal international legal protections available to all other refugees. This has had grave implications both for Palestinians within the occupied Palestinian territories and in the diaspora, the latter including those within the Arab states and elsewhere in the world. The implications of this legal interpretation have become even more stark in the post-Oslo era, when a final status agreement - negotiated in an atmosphere of extreme power imbalance between the two main parties at the negotiating table - appears likely to further compromise Palestinian refugee rights and protections.

It is in the post-Oslo framework that temporary protection appears to be a particularly attractive option for both diaspora Palestinians who lack third-state citizenship, and Palestinian refugees who either remain in Arab states or wish to live in a future West-Bank/Gaza Palestinian state. Temporary protection would offer diaspora Palestinians the protection rights they currently lack, with all the concomitant rights of an individual granted asylum, but without the permanent status accompanying resettlement that might compromise their right to repatriate to their places of origin. Temporary protection within the future Palestinian state would offer protection to Palestinian refugees living in its territory based on a distinct legal status (which differs from the status of non-refugee citizens) until such time as they can return to their original homes and lands within the pre-1948 boundaries of the Israeli state. Finally, the status of temporary protection with the expectation of repatriation to place of origin is fully consistent with principles of international law on the right of return, as well as principles governing the design and implementation of durable solutions for refugees in general and Palestinian refugees in particular.

Temporary Protection and its Place in the Search for Durable Refugee Solutions:

The current international legal regime for refugees is a very recent phenomenon, originating in the framework of the 1951 Refugee Convention Relating to the Status of Refugees (Refugee Convention, or CSR51)(2), its companion 1967 Protocol Relating to the Status of Refugees (Refugee Protocol, or PSR67)(3), and the Statute of the United Nations High Commissioner for Refugees (UNHCR)(4). There are a number of major ways in which the international community's attitudes towards refugees dramatically changed with the entry into force of the Refugee Convention and the establishment of the UNHCR. First, the prior practice of recognition of refugees as groups, or categories, was changed to an individualized assessment of whether a person qualified as a "refugee" under a specific, case-by-case definition. Second, prior state practice was to grant refugee status to groups/categories of persons on the basis of political considerations, driven by such motivations as whether or not the individual was fleeing a country which the receiving state considered an "enemy state", or a country which the receiving state wished to embarrass. The Refugee Convention definition was intended to be ideologically-neutral, an objective definition that would make granting protection to a refugee a non-political act. Third, the Refugee Convention heralded a new regime that was to view refugee flows as an international problem, no longer a regional or single-state problem, and to design and implement durable solutions for refugees in the spirit of international burden-sharing.(5) The entity that was established to provide the mechanism for determining how refugee burdens would be shared in any particular situation was the Executive Committee of the High Commissioner's Programme (EXCOMM).(6) As such, the international community was to function through a consensus model of refugee problem-solving, driven by the pivotal principle of refugee choice in implementing his/her own durable solution.

The Refugee Convention and Protocol incorporate two essential state obligations: the application of the now universally accepted definition of "refugee" which appears in Article 1A(2) of CSR51, and the obligatory norm of non-refoulement, which appears in Article 33.1 of the Convention.(7) It is important to note that nowhere in the Refugee Convention or Protocol, nor in any other universal human rights instrument, is there an obligation on any state to grant the status of political asylum. Although it is true that the international consensus at the time the Refugee Convention was drafted was for third-country resettlement and that states should grant asylum, this consensus was simply a reflection of the attitude towards the categories of refugees who were the main concern of the UN delegates drafting the Convention at that time: post-World War II European refugees and displaced persons. The international consensus towards refugee solutions has changed over time, and the current consensus for the last 15-20 years has quite consistently been to seek solutions focusing on refugee repatriation to place of origin.(8)

Recent History of Temporary Protection:

Temporary protection, although relatively recent in terms of a recognized status granted by states towards persons who may or may not fall within the 1951 Refugee Convention definition of "refugee" but are deserving of international protection, is not a new concept. It has precedents in the concept of temporary refuge, granted in response to large-scale humanitarian emergencies such as in Southeast Asia, where surrounding states accepted, on a *de facto* basis, the presence of thousands of Vietnamese and Cambodians fleeing conflict; in Pakistan, which accepted approximately 4 million Afghan refugees while war raged in their home country; and in Mexico and Honduras, which temporarily admitted hundreds of thousands of refugees from civil war in El Salvador and Guatemala. As a recognized legal status, however, the status of Temporary Protection in Europe, or Temporary Protected Status in the United States, is relatively recent. In 1980 and 1981, the EXCOMM issued two Conclusions concerning temporary protection in situations of large-scale refugee influx.(9)

These Conclusions recommended, in relevant part: “in the case of large scale influx, persons seeking asylum should always receive at least temporary protection; and ...States which, because of their geographical situation or otherwise, are faced with a large-scale influx, should as necessary and at the request of the State concerned receive immediate assistance from other States in accordance with the principle of equitable burden-sharing.”⁽¹⁰⁾ The UNHCR’s proposals that states should grant temporary refuge, or temporary protection, pending durable solutions for refugees found in their territories, evolved into various temporary protection statuses under state domestic legislation.

In Europe, Temporary Protection evolved in the early 1990’s as a widespread European response to the more than two million Yugoslav refugees flooding Europe from the conflict in the Balkans.⁽¹¹⁾ In the United States, Temporary Protected Status began in 1990 in response to the pressure on the asylum system by hundreds of thousands of Central American refugees fleeing the protracted civil war in El Salvador.⁽¹²⁾ Although different in their parameters, the various temporary protection statuses in Europe and Temporary Protection Status in the US have several common characteristics. From the perspective of the state granting the status, temporary protection has the following advantages: 1) it is a humanitarian response to situations of mass influx, whether of persons who might qualify as refugees under the CSR51 definition, or who would not qualify, but are fleeing emergency situations in their home countries and deserve humanitarian treatment in their place of refuge; 2) it offers an alternative to the receiving states’ obligation to provide the full asylum procedures otherwise required for persons seeking refugee status; 3) it absolves receiving states from having to grant asylum to large numbers of putative refugees; and 4) it demonstrates both to the arriving alien and the world at large that the state is providing protection on only a temporary basis, with the understanding that this status will be revoked once repatriation is feasible.

From the perspective of the putative refugee, temporary protection has both advantages and disadvantages, depending on a number of variables determined by domestic legislation. Generally, however, the advantages include: 1) the arriving alien is not required to go through a protracted and often taxing asylum application procedure; 2) the alien is usually granted most of the protection rights afforded to an asylee: the right to work, the right of freedom of movement, the right to obtain certain basic benefits for subsistence, the right of family reunification, and so on; 3) the status is granted for a definite period of time, allowing the alien to make specific plans for repatriation, or for resettlement in a third state within a certain timeframe; and 4) in the case of TPS in the US, the alien has the option of going forward with an asylum claim while s/he is in TPS status if s/he chooses to do so (however, low grant rates for certain TPS groups signal that TPS is intended to be temporary and not a substitute for asylum).

Relevance to the Palestinian Case:

There are three contexts in which temporary protection has special relevance to the Palestinian refugee case: the first is temporary protection in the Arab host states; the second is in other states of the Palestinian diaspora; the third is temporary protection in the future Palestinian state itself. For all three contexts it is necessary to compare certain aspects of the special Palestinian refugee regime with the international regime established for all other refugees; it is also necessary to understand certain basic premises concerning the internationally-recognized right of return.

Palestinian Refugees and International Refugee Protection

Article 1A(2) of the Refugee Convention sets out the universally-accepted definition of “refugee” as:

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

This individualized definition of refugee, however, was not intended to apply to Palestinian refugees. In fact, no legal definition of Palestinian refugee has ever been adopted by the international community.⁽¹³⁾ Their situation was specifically designated for different treatment than for other refugees falling within the Refugee Convention regime.⁽¹⁴⁾ Palestinians as a group or category of refugees⁽¹⁵⁾ - are covered by the Refugee Convention in Article 1D - a provision whose drafting history makes absolutely clear that it applies solely to Palestinians and no other group of refugees. Article 1D provides:

“This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance. When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.”

When this provision was drafted, Palestinians were afforded a special, and heightened, protection regime consisting of the United Nations Conciliation Commission on Palestine (UNCCP), which had a protection mandate, and the United Nations Relief and Works Agency for Palestine refugees (UNRWA), which had an assistance mandate.⁽¹⁶⁾ The delegates to the committee drafting the Refugee Convention considered that it was both unnecessary and inadvisable to include Palestinians in the Refugee Convention regime as long as two other UN agencies were providing them with the twin functions of protection and assistance. Moreover, for reasons that made the Palestinian case unique, the drafters believed that Palestinians would get less protection than they deserved if they were subsumed with other refugees in the general protection system of the Refugee Convention.⁽¹⁷⁾ However, for a number of historical and political reasons, Palestinian refugees are considered to be excluded from the coverage of the Refugee Convention, and at the same time, the heightened refugee regime has long-since failed to provide the international protection they were to receive as long as their refugee situation remained unresolved. All countries in which Palestinians seek protection outside their place of origin interpret the relevant provisions in a manner that fails to grant them adequate protection—although the precise interpretations may differ from state to state. Palestinians for the most part have great difficulty when they find themselves in third (non-Arab) states and apply for political asylum, residence based on family reunification, or other related protections that are available to other refugees in the world. Many remain in Western states without recognized legal status, without work permits, and without the basic essentials to live in basic freedom and dignity.

In the Arab states, due to the long-standing consensus that the solution to the Palestinian problem is repatriation to their homes and lands, a series of agreements and resolutions bound Arab host countries to give Palestinian refugees the right to remain in their territories with only temporary status.⁽¹⁸⁾ At the same time, most Arab states are not signatories to the 1951 Refugee Convention, and are thus not bound by either Article 1A(1) or Article 1D of that Convention.⁽¹⁹⁾

They are, however, bound by the customary international law principle of *non-refoulement*, obliging them not to expel Palestinian refugees from their territories to places where their 'lives or freedom would be threatened.'⁽²⁰⁾ Due to the Arab states' failure to recognize Palestinians as refugees under the Refugee Convention - recognition which would guarantee them the minimal rights of that Convention - and the failure of these states to guarantee Palestinian refugees legal protection, these states do not routinely grant Palestinian refugees many basic human rights. Thus, Palestinians are routinely denied the right to work, to travel freely either inside or outside their territories, to unite with family members, to own private property, or to benefit from a wide spectrum of international human rights guarantees.

Temporary protection is particularly relevant in light of the heightened protection regime established for Palestinian refugees. Appropriately interpreted, the regime of UNCCP, UNRWA and Article 1D of the Refugee Convention were designed to guarantee that Palestinian refugees would at all times receive both protection and assistance, whether by two other UN agencies, or by UNHCR (preferably in combination with UNRWA). Article 1D was meant to ensure that if the twin-agency regime of UNRWA/UNCCP should fail in either of its functions, the Refugee Convention would automatically cover Palestinian refugees as an entire group or category, without the necessity of applying the individualized definition of refugee of Article 1A(2). Since the Refugee Convention only obliges states to respect the principle of *non-refoulement*, states are free to grant any additional status to refugees they choose, whether asylum or temporary protection or some other form of permanent status.⁽²¹⁾

However, Article 1D mandates that in the Palestinian case, states must grant "*the benefits of [the] Convention*" to Palestinian refugees pending "the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations." This language has several implications. First, once Article 1D is triggered, states are required to grant Palestinian refugees protection ("the benefits of this Convention"). Second, states are required to grant protection to Palestinian refugees only until their position is settled according to the relevant UN resolutions. The relevant resolutions clearly center on UNGA 194 (III), which embodies the consensus of refugee repatriation and compensation. This is so primarily because the drafting history of Article 1D makes clear that the drafters intended to create - and did create - the heightened protection regime with an agreed-upon durable solution in mind, which was embodied in UNGA 194. Indeed, UNGA 194 both set forward the necessary solution and created one of the essential prongs of the protection regime, the UNCCP. Third, such protection should be consistent with the international legal rights of refugees both to return to their places of origin and to choose the appropriate solution for their plight.

Palestinian Refugees and the Right of Return under International Law

The right of repatriation, or right of return, is a critical component of the heightened protection regime, and of the recommendation that Palestinian refugees be granted temporary protection. Thus, a brief analysis of the right of return under international legal principles is necessary.⁽²²⁾

Israel is a signatory to the International Convention on Civil and Political Rights (ICCPR, 1966).⁽²³⁾ Article 12(4) of the ICCPR states: "No one shall be arbitrarily deprived of the right to enter his own country." Israel has made no reservation to this provision. Israel is also a party to the Convention on the Elimination of Racial Discrimination (CERD, 1965).⁽²⁴⁾ Article 5(d)(ii) of the CERD requires states "to prohibit and to eliminate racial discrimination in all its forms and guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: d) other civil rights, in particular: (ii) the right to leave any country, including one's own and to return to one's country." Israel has also made no reservation to this provision.

The questions raised by the text of these provisions are: What is the difference between the right to enter, and the right to return? What is meant by the term 'arbitrarily'? What is the meaning of 'his own country'?⁽²⁵⁾

'Enter' is clearly broader than 'return', because it applies as well to people who were born outside their country, giving them the right to enter it even for the first time. The *travaux préparatoires* (drafting history) of the ICCPR supports this interpretation.⁽²⁶⁾ 12(4) thus incorporates a broader right to return, for second or third generation refugees born outside their country. The modifier 'arbitrarily' is a limitation on the right to return, and implies the state has a right to interfere with this right as long as the interference is not on an 'arbitrary' basis. The Human Rights Committee, the interpreting and enforcing body of the ICCPR has taken the position that any interference with the right to enter/return should be lawful, 'in accordance with the provisions, aims and objectives of the ICCPR and should be, in any event, reasonable in the particular circumstances.'⁽²⁷⁾

Under classic international law principles, a state has enormous discretion in the matter of conferring or denying nationality. However, this discretion has limits. For example, when there is a succession of states to a single territory, there are some limitations on how successor states may treat the population found on the territory. One noted international law scholar claims that "sovereignty denotes responsibility, and a change of sovereignty does not give the new sovereign the right to dispose of the population concerned at the discretion of the government. The population goes with the territory...it would be illegal for the successor to take any steps which involved attempts to avoid responsibility for conditions on the territory, for example by treating the population as de facto stateless."⁽²⁸⁾ Moreover, when denationalization is based on race or ethnic origin, it is a violation of the general principles of non-discrimination in customary international law, as well as of articles 2 and 26 of the ICCPR, and Art. 5(d)(ii) of the CERD.

Many commentators make the argument that aside from specific provisions in international treaties, the right to return is obligatory under customary international law. This argument is based on the fact that the right to return is expressly recognized in most international human rights instruments, for example: 13(2) of the Universal Declaration of Human Rights (UDHR, 1948); 12(4) of the ICCPR; 5(d)(ii) of the CERD; Art. VIII of the American Declaration of the Rights of Man; 22(5) of the American Convention of Human Rights (1969); 12(2) of the African Charter on Human and Peoples Rights (1981); 3(2) of Protocol 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1963). It is also included in many draft declarations, in constitutions, laws and jurisprudence of many states. It is also consistently referred to in resolutions of the UN dealing with rights of refugees. Finally, widespread state practice implements the rights of resident nationals to enter their state of origin. The exact parameter of the right under customary international law is difficult to delineate, but one of the strongest sources is the provision in the UDHR (because so many of the other provisions are based on the UDHR language).

Art. 13(2) of the UDHR provides: "Everyone has the right to leave any country, including his own, and to return to his country." Some have argued that the right of return under this and other provisions do not apply to persons who are non-nationals of the expelling state. Not surprisingly, this argument has been advanced by Israeli supporters with some vehemence. But the view most consistent with other convention provisions as well as with general principles of international law is that everyone means all persons, national or non-nationals, and 'his country' must be interpreted as place of origin. The UDHR, as well as other international human rights documents make clear distinctions between provisions applying to 'nationals' and persons from a 'country' or a 'state'. Basic principles of statutory interpretation inform us that the broader term ('his country') was chosen to include both place of nationality and place of origin.

Moreover, if the narrower term were chosen, the effect would be to permit states to avoid their obligations towards inhabitants in their territories by arbitrarily expelling particular inhabitants, removing them of their nationality, and then denying them the right to return on the pretext that they are non-nationals. The ICCPR provision is based on the UDHR language. Again, the terms chosen are 'no one' and 'own country', in contrast to 'national', 'state', or 'state of nationality.'

Aside from the significant support that exists to find the right of return, the right not to be expelled, and the right to a nationality in international conventions there is a large body of declaratory law that has developed through UN Resolutions affirming the right of return specifically in the Palestinian context, with UNGA Resolution 194(III) the central resolution among them.

The Principles of Right of Return and Temporary Protection Applied to the Palestinian Refugee Regime

Thus, if temporary protection is granted, according to Article 1D, pending the application of the appropriate UNGA-mandated durable solution, then the right of repatriation called for in UNGA Resolution 194 is repatriation to the refugees' place of origin. It would not be consistent with the internationally-recognized right of return to "repatriate" the refugees to yet another area, such as the Palestinian state, which was not their place of origin. In fact, sending Palestinian refugees to the Palestinian West Bank/Gaza state, would in fact be nothing more than another place of temporary refuge pending realization of their rights to return to their place of origin. Thus, for the Palestinian state, temporary protection is an appropriate status to grant to Palestinian refugees residing or wishing to reside in its territory, but for whom residency in the West Bank/Gaza state is neither appropriate nor legally compelled. It would also support the legal argument that Palestinian refugees would do not need to give up their absolute right to return to their homes and lands in order to improve their living conditions pending return.

Temporary protection would provide Palestinian refugees in Arab states, as well as other states of the Palestinian diaspora, a recognized legal status. Consistent with the parameters of temporary protection in Europe, or TPS in the United States, temporary protection for Palestinian refugees should afford them the basic protection rights of other persons who are granted such status when fleeing emergency situations, whether Convention-defined refugees or not. Temporary protection specifically addresses the real needs of Palestinian refugees: the need to work, to travel freely, to live where s/he chose within the temporary protection state, to reunite with family members, and to travel outside and return with special permission. Temporary protection also specifically addresses the fears of both the Arab and other states that they would either have to grant asylum or some more permanent type of status to the refugees, or expel them. Finally, it addresses the ongoing concern of Palestinian refugees and the PLO that the post-Oslo process might subvert the international consensus that the durable solution for Palestinian refugees is repatriation to their place of origin and compensation, as embodied in UN General Assembly Resolution 194.

Conclusion:

Strategies for Implementing Temporary Protection for Palestinians in the Arab States

In the Arab states, the advantages of legislating a temporary protection status for Palestinian refugees are much the same as for non-Arab states of the Palestinian diaspora. However, there are two essential aspects to temporary protection that should make it extremely attractive to the Arab states pending a durable solution to the Palestinian refugee problem: first, temporary protection preserves the consensus within the Arab world that no steps should be taken to grant permanent status to Palestinians pending implementation of their right to return under the authority of UNGA 194; second, granting temporary protection would create renewed pressure to implement UNGA 194 and the refugee right of return. In order to make temporary protection an effective tool to implement the right of return, companion strategies must be devised to heighten the pressure on all parties involved to implement the refugees' right of return.[\(29\)](#)

There are a number of issues which would have to be addressed for temporary protection to accomplish the goals which make it attractive to Arab states. First, the issue of the definition of who would be eligible for temporary protection among the Palestinian refugee population. A detailed discussion of the problems of designing a general legal definition of Palestinian refugee cannot be attempted here; however, for temporary protection purposes, it is only necessary to give a general description of who would be in need of such protection. Europe and the United States do not require an individual to qualify under a "refugee" definition in order to be eligible for temporary protection status. In addition, in the UNRWA-mandate Arab states, the process is made simpler by UNRWA registration: all persons who are registered as UNRWA refugees would de facto be eligible for the status. In addition, another definition would be necessary to encompass those Palestinian refugees who are not registered with UNRWA but would qualify for the purposes of the status. The problems with non-UNRWA-registered refugees would be issues of proof of qualification, but these are similar problems as in any temporary protection state, and are not insurmountable.

Second, the issue of duration of the status. In Europe and the US, the normal grant of temporary protection is for a period of approximately one-year, renewable upon review of the emergency situation compelling the status by the appropriate government authority. In the Arab states, it would make sense to have a longer initial temporary protection period, for example, three years - but the duration should be tied to the strategies for implementing UN Resolution 194.

Third, the issue of what rights are associated with the status of temporary protection. Palestinians granted temporary protection should be afforded at least the minimum rights granted persons in refugee status: the right to work; the right to unify with family members; and freedom of movement within the granting state. In addition, according to widespread practice for temporary protection grantees, state-issued travel documents should be granted the refugee, to allow him/her to depart and return for emergency and other urgent reasons.

Strategies for Implementing Temporary Protection in non-Arab Palestinian Diaspora States

Since Europe and the US have temporary protection legislation for other populations, the strategy for these countries will be a political one to persuade them to include Palestinian refugees for temporary protection coverage. The fears of these states will be that large numbers of people might qualify; that there is no possibility in the foreseeable future that repatriation to Israel will be politically feasible (and the US may simply not support such a strategy in any case); that if the Palestinian state does not recognize them as citizens/nationals, Palestinians will remain 'stateless', which creates greater obligations on the host states to grant them permanent status;[\(30\)](#) and that, if the status is granted but repatriation is impossible, the host states will be unable to expel this population elsewhere.

Aside from these considerations, there are several immediate problems in designing the political strategy. First, the definition of who will qualify.⁽³¹⁾ Since there is no accepted legal definition of "Palestinian refugee", and the point of temporary protection is to grant protection to persons not necessarily qualifying under a legal definition of refugee anyway, there will need to be a set of criteria for eligibility. In general terms, temporary protection applies to persons fleeing emergency situations: how would the emergency situation be described for Palestinian refugees? Such a definition could include persons covered by the language and purpose of Article 1D of the Refugee Convention ('Palestine refugees' who fled or were forced from their homes and lands in the 1948 conflict, and their descendants, as an entire category). Second, the time period. The time period would have to be attached to some meaningful strategy that would be persuasive to the host countries. Since temporary protection is normally for periods of a year, it would be difficult to advocate for a larger period of time without a solid strategy within the time period. Third, from the point of view of the individual applicants for temporary protection, all the normal rights and obligations associated with that status that are available to other temporary protection applicants should be available to Palestinians. This means, for example, that if the state permits an individual to apply for asylum despite a temporary protection grant, that right should also be granted Palestinian applicants for the status.

Strategies for Implementing Temporary Protection in the Palestinian State

In the Palestinian state, temporary protection resolves a number of difficult issues. It would be an adequate legal response to the refugees' demand that the Palestinian state must relate to this special population in its territory as a "host country". TPS as a special legal status designed to protect their right to return to their original homes and properties could accommodate this demand, while at the same time guaranteeing the basic human and civil rights of the refugee community in the future Palestinian state. Once again, however, as with the Arab states, the effectiveness of temporary protection legislation would depend primarily on aggressive strategies to implement UNGA 194.

For the Palestinian state, a primary issue will be the definition of who might qualify for the status. The considerations are somewhat different than for the Arab states, depending on what other nationality/citizenship/residency legislation is passed. Such considerations as family reunification, other legitimate ties to the West Bank/Gaza state, and needed work talents should be taken into account. Research on the critical question of which definition should be used for a temporary protection law should be undertaken by the Palestinian Legislative Council, which will have the task of drafting the nationality/citizenship legislation for the emergent state. On the issue of duration of the status, the entire temporary protection strategy will be most effective if the Palestinian and Arab states can agree on a similar time period, and link it to the strategies to implement the right of return to place of origin.

Temporary protection is an additional tool in a set of strategies available to Palestinians to begin working on implementation of the right of return of Palestinian refugees to their places of origin. To understand the usefulness, advantages and potential weaknesses of temporary protection vis-à-vis the Palestinian refugee case requires additional serious study at each of the levels where temporary protection might be adopted: in the Arab host countries; in the non-Arab countries of the Palestinian diaspora; and particularly in the future Palestinian state. Nevertheless, temporary protection can provide some important answers in the search for implementation of Palestinian refugees' right of return.

Endnotes:

* Susan M. Akram, Associate Professor, Boston University School of Law. No part of this paper may be reproduced, cited or otherwise relied on without express permission of the author, and without appropriate citation to this article as an unpublished working paper.

(1) For a survey of the literature on temporary protection and temporary refuge, see Donatella Luca, "Questioning Temporary Protection", *International Journal of Refugee Law*, Vol. 6 No. 4, (1994), p. 534. A compelling argument made in the 1980's by Perluss and Hartman who took the position that the norm of temporary refuge was already a binding principle of customary international law by virtue of existing state practice, at least where persons fleeing internal armed conflict were concerned. Perluss, D., and Hartman, J.F., "Temporary Refuge: Emergence of a Customary Norm", *Virginia Journal of International Law*, Vol. 26 No. 3, (1986), p. 551. A principle of customary international law can be binding on states even in the absence of the state being a party to a convention incorporating such principle. There is an accepted hierarchy of sources of law which can be considered binding on states: a) international conventions, establishing rules expressly recognized by the particular state; b) international custom, as evidence of general practice accepted as law; c) general principles of law recognized by civilized nations; d) judicial decisions and the teachings of highly qualified publicists, as a secondary source of interpreting rules of law. *Statute of the International Court of Justice*, Article 38(1).

(2) *Convention Relating to the Status of Refugees*, 189 UNTS 137 (28 July 1951).

(3) *Protocol Relating to the Status of Refugees*, 606 UNTS 267 (31 Jan. 1967).

(4) *Statute of the Office of the UNHCR*, UN GAOR, 5th Sess., Annex, UNGA res. 428(V) (14 Dec. 1950).

(5) The Preamble of the Refugee Convention, reflecting the burden-sharing commitment of the state parties, notes "that the grant of asylum may place unduly heavy burdens on certain countries and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation."

(6) The Executive Committee of the High Commissioner's Programme was set up in 1958 by the Economic and Social Council. It originally comprised twenty-four states, but has grown over time to its present membership of fifty states. See Guy Goodwin-Gill, *The Refugee in International Law*, (2nd Ed.), Oxford: Oxford University Press, 1996.

(7) Refugee Convention Article 33.1 states: "No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion". There is much debate about the parameters of the obligation of *non-refoulement*, both as a principle binding a state party to the Refugee Convention, and as a binding principle of customary international law for both Convention and non-Convention signatories towards persons fleeing situations not covered by the Refugee Convention definition, for example, persons fleeing armed conflict, widespread violations of human rights, or other grave emergencies.

(8) See, for example, Report of the 34th Session of the Executive Committee (1983); Executive Committee Conclusion No. 18 (1980); UNHCR, Note on Voluntary Repatriation: UN Doc. EC/SCP/13, 27 Aug. 1980; Report of the Subcommittee: UN Doc. A/AC.96/586, 8 Oct. 1980, paras. 17-29. Guy Goodwin-Gill, in his authoritative treatise, *The Refugee in International Law* states: "Voluntary repatriation will continue as the preferred solution to refugee problems, both as a matter of principle (it reflects the right of the citizen to return), and on the ground of self-interest (most States of refuge prefer to limit their obligations to refugees)." *Id.* at p. 275. See also, Guy Goodwin-Gill, 'Voluntary Repatriation: Legal and Policy Issues', in Loescher, G. and Monahan, L., *Refugees in International Relations*, Oxford: Oxford University Press, 1989, p. 255.

(9) Conclusions on the International Protection of Refugees of the EXCOMM of UNHCR no. 19 (XXXI) 'Temporary Refuge'—1980, and no. 22 (XXXII) 'Protection of Asylum Seekers in Situations of Large-scale Influx'—1981.

(10) Conclusions on the International Protection of Refugees adopted by the Executive Committee of UNHCR no. 19 (XXXI) b.

(11) In most European countries, temporary protection was granted for specified periods of time to citizens of Bosnia-Herzegovina who fled areas of conflict or were members of ethnic minorities. Many of the Bosnia-Herzegovina citizens would have qualified as refugees under the Refugee Convention, but were granted temporary protection in lieu of their applying for asylum status under European domestic refugee laws. See UNHCR and the Danish Ministry of the Interior, *Survey of Implementation of Temporary Protection, Comprehensive Response to the Humanitarian Crisis in Former Yugoslavia*, 16, July 1993. See also, Morten Kjaerum, "Temporary Protection in Europe in the 1990's", *International Journal of Refugee Law*, Vol. 6 No. 3 (1994), p. 445.

(12) In the United States, Section 244 of the Immigration and Nationality Act (INA) was amended with the passage of the Immigration Act of 1990 (IMMACT 90) to authorize the Attorney General to grant Temporary Protected Status to aliens within the US who are nationals of countries where 'armed conflict, natural disaster or other extraordinary conditions have created a temporary situation to which return is either unsafe or unfeasible.' The first group for whom TPS was designated was citizens of El Salvador. Since then, the US has granted TPS to nationals of the following countries: Bosnia, Burundi, ethnic Kosovars from Serbia-Montenegro, Liberia, Montserrat, Sierra Leone, Somalia, Angola, Sudan, Lebanon, Kuwait (including Palestinian residents), Rwanda, and most recently, Hondurans and Nicaraguans fleeing the ravages of Hurricane Mitch. TPS is normally designated for a period of approximately one-year, renewable if the Attorney General believes the situation so warrants. A related status to TPS in the category of 'temporary refuge' is Deferred Enforced Departure (DED), granted by administrative policy rather than legislation, to El Salvadorans for a period of time after their TPS designation expired.

(13) The only definition of "Palestine refugee" is that included in the UNRWA regulations. The working definition of "Palestine refugee" which operated from 1952 until 1993 was: "A Palestine refugee is a person whose normal residence was Palestine for a minimum period of two years preceding the outbreak of the conflict in 1948 and who, as a result of this conflict, has lost both his home and his means of livelihood...and who is in need." Operational Instruction No. 104, 18 Feb., 1952. In 1993, this definition was amended in the 'Consolidated Registration Instructions', 1 Jan. 1993, para. 2.13: "[Palestine refugee] shall mean any person whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948 and who lost both home and means of livelihood as a result of the 1948 conflict." It is important to note that the UNRWA definition relates solely to UNRWA's mandate of providing material assistance—food, clothing, shelter—to the refugees, and was never intended to be a general legal

definition of a Palestine refugee for purposes of international protection.

(14) For a more detailed description of the special Palestinian refugee regime, see Susan M. Akram, *Reinterpreting Palestinian Refugee Rights under International Law, and a Framework for Durable Solutions*. BADIL Information & Discussion Brief, Issue No. 1 (February 2000). For an in-depth analysis of the application of the 1951 Refugee Convention to Palestinian refugees and the necessity of providing them international protection, see Susan M. Akram and Guy Goodwin-Gill, *Brief Amicus Curiae, Board of Immigration Appeals, Falls Church, Va.*, in forthcoming issue of *Palestine Yearbook of International Law*. Also available on BADIL's web site, www.badil.org.

(15) 'Palestine refugees' were a category whose members were not defined, but clearly understood at the time as persons whose homes and lands were within the borders of the Israeli-declared 1948 state and who fled as a result of that conflict.

(16) The terms 'protection' and 'assistance' have very different meanings in international refugee law. Protection means, in essence, that body of obligations towards an individual, which a state ordinarily provides, and which are missing in the situation of a refugee. It is the denial or loss of protection by a state, which characterizes the refugee condition. This body of obligations has been entrusted to UNHCR for all refugees in the world. *UNHCR Statute*, Ch. II, para. 8, describes the protection functions of the agency. They include: intervening with states to promote and protect the internationally-protected rights of refugees; promoting and implementing durable solutions for refugees, including absorption, resettlement and repatriation; promoting the drafting and ratifying of international agreements to protect refugees; and preserving and promoting the restitution of refugee properties. Assistance, on the other hand, refers to nothing more than basic refugee relief, or subsistence benefits: clothing, food and shelter.

(17) See Akram and Goodwin-Gill, *Brief Amicus Curiae*.

(18) See the resolutions of the League of Arab States, including: LASC Res. 424, 14 Sept. 1952; LASC Res. 524, 9 Apr. 1953; LASC Res. 714, 27 Jan. 1954, and subsequent resolutions. One of the most important documents on the consensus of the Arab states towards Palestinian refugees is the 'Casablanca Protocol'—the Protocol on the Treatment of Palestinians in the Arab States, 11 Sept. 1965. For a thorough review of the treatment of Arab states towards Palestinians vis-à-vis their rights to remain, work, or travel in those states, see Lex Takkenberg, *The Status of Palestinian Refugees in International Law*, Oxford: Oxford University Press, 1998, Chapter IV, 'Status of Palestinian Refugees in the Arab World'.

(19) Of the Arab countries, only Algeria, Egypt, Morocco, Sudan, Tunisia and Yemen are parties to the Refugee Convention and Protocol. Israel is also a party to both, but has never passed legislation incorporating the Refugee Convention or Protocol into its domestic law. Jordan, Lebanon and Syria are parties to neither the Convention nor the Protocol.

(20) In terms of the precise meaning of Article 33.1, Guy Goodwin-Gill comments that: "[T]he drafters of the 1951 Convention clearly intended that refugees not be returned, either to their country of origin or to other countries in which they would be at risk." *The Refugee in International Law*, p. 120.

(21) Perluss and Hartman, however, argue that temporary refuge (a norm reflected in the statuses of temporary protection) is an obligatory international law principle. See *supra*, fn. 1.

(22) For detailed discussions supporting the internationally-grounded right of return of Palestinian refugees to their "places of origin", see W.T. Mallison and S. Mallison, "The Right of Return", 9 *Journal of Palestine Studies* 125 (1980); Kathleen Lawand, "The Right to Return of Palestinians in International Law", *International Journal of Refugee Law*, Vol. 8 No. 4 (1996); J. Quigley, "Family Reunion and the Right to Return to Occupied Territory", 6 *Georgetown Immigration Law Journal* 223, (1992); *The Right to Return of the Palestinian People* (New York, 1978): UN Doc. ST/SG/SER.F/2. For commentators refuting that Palestinian refugees have a 'right of return' to their places of origin, see Kurt Rene Radley, "The Palestinian Refugees: The Right to Return in International Law", 72 *American Journal of International Law* 586, (1978); Ruth Lapidot, "The Right to Return in International Law, with Special Reference to Palestinian Refugees", 16 *Israel Yearbook of Human Rights* 103, (1986); P. Weis, "The Middle East", in K. Vasak and S. Liskofsky, eds., *The Right to Leave and to Return, Papers and Recommendations of the International Colloquium Held in Uppsala, Sweden, 19-20 June 1972* (Ann Arbor: The American Jewish Committee, 1976).

(23) Although Israel ratified the ICCPR on 3 Oct. 1991, it has not ratified the First Optional Protocol, which gives the Human Rights Committee jurisdiction to hear individual complaints. Israel has also not made a declaration under Art. 41 giving the Human Rights Committee competence over inter-state claims in which Israel might be involved.

(24) Israel ratified the CERD on 3 Jan. 1979, but has not agreed to be bound by Art. 22 by which it would be required to litigate disputes under the Convention to the International Court of Justice. Israel has also refused to give the Committee on the Elimination of Racial Discrimination competence over individual complaints against it under Art. 14.

(25) For a thorough discussion of these questions, and an argument that return to one's country means, under international law, return to a country with which one has a 'genuine connection', see Kathleen Lawand, "The Right of Return of Palestinians in International Law", *supra*, note 22.

(26) M. Bossuyt, *Guide to the Travaux Préparatoires of the International Covenant on Civil and Political Rights*, Dordrecht: Martinus Nijhoff, 1987, p. 261.

(27) 'General Comment 16 (Article 17)', *General Comments adopted by the Human Rights Committee under Article 40, paragraph 4 of the International Covenant on Civil and Political Rights*: UN Doc. CCPR/C/21/Rev.1, 19 May 1989 pp. 19-20.

(28) I. Brownlie, *Principles of Public International Law*, (4th ed.), Oxford: Clarendon Press, 1990, pp. 664-5.

(29) Describing such strategies is beyond the scope of this paper, but could include litigation by the Arab states against Israel in international fora for forcibly expelling the refugees to Arab territories and for damages caused under principles of state responsibility; multileveled strategies designed to persuade the European states that their investment in the "peace process" will only result in a durable peace if the refugees' right of return is implemented; and strategies challenging Israel's refusal to accept Palestinian refugee return in every treaty-based body whose jurisdiction Israel has accepted.

(30) See below, note 31, on the obligations of host countries of stateless individuals.

(31) The issue of the refugee definition for Palestinians is further complicated by the fact that most Palestinians are both *de facto* and *de jure* stateless. An individual's statelessness is not equivalent under international law to his/her qualifying as a refugee; however, a country with stateless individuals on its territory may have additional legal obligations towards them under the provisions of the *Convention Relating to the Status of Stateless Persons* (1954) and the *Convention on the Reduction of Statelessness* (1961). A discussion of this issue is beyond the scope of this paper.