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the right to return: four sides of the same
coin?*

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ARTICLE

The Prohibition on Forced Displacement, the Right to Leave, Non-Refoulement and the Right to Return: Four Sides of the Same Coin?

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Abstract

The article is set against the near absence of external protection responses to the humanitarian catastrophe in Gaza. Querying the interplay between four recognised international legal norms in the context of armed conflict, it seeks to provide doctrinal clarity in a context where the range and interaction of diverse legal standards may generate uncertainty or claims of apparent norm conflict: the prohibition on forced displacement, the right to leave any territory, non-refoulement and the right to return to one's 'own country', including as part of the realisation of a collective right to self-determination. The article posits that a future realisation of the Palestinian people's right to self-determination has been coopted by external actors as a justification for infringing, in an immediate and tangible sense, the individual rights of Gazans to leave the strip in order to seek and to enjoy elsewhere protection from rights violations, some of which breach jus cogens norms. This latest manifestation of 'Palestinian exceptionalism' has had dire consequences for individual Palestinians and, unless unwaveringly rejected, could detrimentally affect those fleeing future armed conflicts.

Keywords: Gaza; UNRWA; Refugee Convention; Article 1D; non-refoulement; border closures; occupation; evacuations; deportations; return

1. Introduction and context

This article is set against the background of an ongoing humanitarian catastrophe in Gaza. During the armed conflict that ensued following Hamas' attack on 7 October 2023, the majority of Gazans have been internally displaced to an area constituting a fraction of the small strip. Both of Gaza's neighbouring States, Egypt and Israel, have generally kept their borders closed: only some foreign nationals as well as some Gazans with family members elsewhere have been legally able to leave.¹ Gazans were not generally offered temporary protection in the Global North or Global South nor have

¹ See, e.g. B Sullivan, A Baba and B Chappell, 'First Americans and Other Foreign Nationals Leave Besieged Gaza' *NPR* (1 November 2023) <<https://www.npr.org/2023/11/01/1209859350/foreign-nationals-gaza-rafah-border>>.

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proposals for family reunification schemes gained traction.² Thus, despite real risks to lives and livelihoods, Gazans who have sought protection elsewhere have generally been unable to access it.³

Whereas the possibility of temporarily hosting Gazans in Israel has hardly been discussed, at least publicly, Egypt has been vociferously rejecting any calls to allow Gazans to enter its territory and to seek protection there. Egypt's core objection has been that opening its border to fleeing Gazans would facilitate ethnic cleansing, intensifying the 1948 *Nakba*, and that it would undermine the Palestinian people's right to self-determination (RSD).

Cross-border displacement in conflict engages at least three distinct yet interrelated regimes of international law: international refugee law (IRL), international humanitarian law (IHL) and international human rights law (IHRL).⁴ By analysing legal norms emanating from these regimes, the article aims to provide doctrinal clarity where the range and interaction of diverse legal standards may cause uncertainty or invoke claims of apparent norm conflict. The article's central contention is that non-refoulement obligations must prevail even if adherence thereto may affect a future realisation of collective RSD: adopting any other position legitimises the subjection of individual protection to geopolitical considerations and renders individuals political pawns. This is arguably what has happened in respect of displacement from Gaza: ostensible concerns regarding the adverse effects of cross-border displacement on the future realisation of the Palestinian people's collective RSD have been coopted by external actors as a justification for violating, in an immediate and tangible sense, the right of individuals to leave Gaza in order to seek protection elsewhere from rights violations, some of which breach jus cogens norms.

Gaza's border closures stand in marked contrast to State practice in other recent conflicts. Globally, conflicts are the main driver of cross-border displacement,⁵ often

² See, e.g. in the UK, the Petition to 'Create a Palestinian Family Visa Scheme for Palestinian People Affected by War' (2019–2024 Parliament) <<https://petition.parliament.uk/archived/petitions/648577>>, debated in the House of Commons on 13 May 2024; in Canada, D Robertson, 'Israel Close to Approving Gaza Reunification Program before Rafah Invasion: Miller' *CBC* (27 May 2024) <<https://www.cbc.ca/news/politics/palestinian-gaza-program-cap-increase-1.7216082>>.

³ Some Palestinians paid large sums of money to be smuggled through tunnels: see, e.g. A Guergues, 'How 100,000 Palestinians Are Surviving in Egypt without Refugee Status' (*Foreign Policy*, 15 August 2024) <<https://foreignpolicy.com/2024/08/15/gaza-palestinians-fleeing-egypt-refugees-rafah-crossing-israel-war/>>.

⁴ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (Judgment) [2005] ICJ Rep 239, para 116; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 199, para 106 (the ICJ holding that 'the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation'); *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* (Advisory Opinion) (General List No 186, 19 July 2024) para 100 (the ICJ holding that an occupier is bound by their IHRL obligations in occupied territory). IRL similarly applies both in peacetime and during armed conflicts. R Ziegler, 'International Humanitarian Law and Refugee Protection' in C Costello, M Foster and J McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) ch 12. See also V Chetail, 'Moving towards an Integrated Approach of Refugee Law and Human Rights Law' in Costello, Foster and McAdam, *ibid* ch 11 (analysing the interrelations between IHRL and IRL).

⁵ UNHCR, 'Global Trends Report 2023' (June 2024) <<https://www.unhcr.org/uk/global-trends>>. Cf Internal Displacement Monitoring Centre (IDMC) data which shows that, in most years, disasters are responsible for the majority of internally displaced persons: IDMC, *IDMC Data Portal* <<https://www.internal-displacement.org/database/displacement-data/>>.

leading those seeking protection to find it, at least in the first instance, in neighbouring States.⁶ Notable cases include displacement from Lebanon to Syria;⁷ from Ukraine to Poland, Hungary, Slovakia, Romania, Moldova and, indeed, Russia;⁸ from Sudan to Egypt and Chad;⁹ from Afghanistan to Pakistan and Iran;¹⁰ from Myanmar to Bangladesh and, to a far lesser extent, Malaysia, India and Thailand;¹¹ and from the Nagorno-Karabakh Region to Armenia.¹² In contrast, a recent case of partial border closure concerns Palestinian residents of Syria seeking protection in Jordan and Lebanon.¹³ Syria's partial and Gaza's near-hermetic border closures are the latest manifestations of the adverse effects of 'Palestinian exceptionalism'.¹⁴

The article proceeds as follows. Section 2 considers the interaction between the prohibition on forced displacement and the right to leave any territory, including occupied territory, in order to seek protection elsewhere. Its starting point is that forcible transfers and deportations from occupied territory, the corollary of a negative right not to be displaced and of a positive right to remain,¹⁵ are prohibited, and that evacuations outside an occupied territory are *prima facie* unlawful.¹⁶ All the same, individuals have a right to leave any territory and, in order to do so, must be able to obtain the necessary travel documents and reach a border crossing in safety. The article squares the apparent tension between the prohibition on forced displacement and the

⁶ UNHCR, *Key Facts for Countries Hosting the World's Refugees* <<https://www.unhcr.org/refugee-statistics/insights/explainers/refugee-hosting-metrics.html>>.

⁷ On 2 November 2024, UNHCR estimated that, at that time, 473,000 persons (Lebanese, Syrians and third-country nationals) had been displaced from Lebanon to Syria due to the escalation in September 2024 of hostilities between Israel and Hezbollah: UNHCR, 'Syria Short Brief: Response to Displacement from Lebanon to Syria' (3 November 2024) <<https://reliefweb.int/report/syrian-arab-republic/unhcr-syria-short-brief-response-displacement-lebanon-syria-reporting-period-24-september-2-november-2024>>.

⁸ UNHCR, *Ukraine Refugee Situation* <<https://data.unhcr.org/en/situations/ukraine>>.

⁹ UNHCR, *Sudan Refugee Situation* <<https://data.unhcr.org/en/situations/sudansituation>>.

¹⁰ UNHCR, *Afghanistan Refugee Situation* <<https://data.unhcr.org/en/situations/afghanistan>>.

¹¹ UNHCR, *Myanmar Refugee Situation* <<https://data.unhcr.org/en/situations/myanmar>>.

¹² On 24 September 2023, the Azeri Government opened the 'Lachin Corridor' between the enclave and Armenia; within a few days, more than 100,000 Armenians fled to Armenia. O Vartanyan, 'Armenia Struggles to Cope with Exodus from Nagorno-Karabakh' (*Crisis Group*, 4 March 2024) <<https://www.crisisgroup.org/europe-central-asia/caucasus/armenian-azeribajani-conflict-armenia/armenia-struggles-cope-exodus>>.

¹³ UNHCR, *Syria Refugee Situation* <<https://data.unhcr.org/en/situations/syria>>. For further discussion, see Section 4. In the 1990s and 2000s, there were several partial or complete border closures in conflict situations: Türkiye/Iraq (1991); Tanzania (1995); Macedonia/Kosovo (1999); Afghanistan (2001); Kenya/Somalia (2007). See K Long, 'No Entry! A Review of UNHCR's Response to Border Closures in Situations of Mass Refugee Influx' (UNHCR, June 2010) <<https://www.refworld.org/policy/strategy/unhcr/2010/en/73337>>.

¹⁴ M Kagan, 'The (Relative) Decline of Palestinian Exceptionalism and Its Consequences for Refugee Studies in The Middle East' (2009) 22 *JRS* 417, 418 (referring to a 'real or perceived uniqueness of the Palestinian plight that leads to institutionalized separation and a tendency to avoid comparisons with other cases or reference to common principles such as international law'). For further discussion, see Section 4.

¹⁵ M Morel et al, 'The History and Status of the Right Not to Be Displaced' (2012) 41 *Forced Migration Review* 5 (detailing the debate surrounding a definition that could endanger the right to seek protection); M Stavropoulou, 'The Right Not to Be Displaced' (1994) 9 *AmUIntlLRev* 689, 726 (noting that the right to freedom of movement includes the right to remain).

¹⁶ Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 *UNTS* 287, art 49(2).

facilitation of the right to leave. It then applies the legal norms to the armed conflict in Gaza.

Section 3 turns to the obligations of other States towards those fleeing conflict. Its starting point is the prohibition on *refoulement*. Exploring its scope and application in IRL, IHRL and IHL, the article argues that non-*refoulement* applies at the frontier; that its application is neither qualified by ‘mass influx’ of persons into the territory nor by general security or ‘burden-spreading’ considerations; and that host States’ concerns that, by providing protection, they may facilitate or accelerate ethnic cleansing aspirations must not lead them to close their borders. In turn, externally displaced persons have a right to return to their ‘own country’, including as part of an exercise of a collective RSD. The article explores past and present practices regarding the realisation of the right to return, identifying a gap between the strength of the international norm and its implementation. The prolonged displacement of Palestinian refugees manifests such a gap.

Section 4 explores the predicament of the majority of Palestinians residing in one of the United Nations (UN) Relief and Works Agency’s (UNRWA) five areas of operation and of Palestinians residing elsewhere in the region. The article considers Egypt’s early interactions with UNRWA and the UN High Commissioner for Refugees (UNHCR) in view of the Convention relating to the Status of Refugees (1951 Convention),¹⁷ shedding light on its contemporary approach towards displaced Palestinians. After highlighting the non-*entrée* policies which Palestinian residents of Syria faced in the 2010s, the article critiques the muted international responses to Egypt’s Gaza border closure. The fact that the majority of Palestinians fleeing Gaza would have been entitled to protection in 1951 Convention signatory States pursuant to Article 1D thereof demonstrates the adverse effects of their effective entrapment. The article asserts that the prolonged displacement of Palestinian refugees has not weakened their collective RSD, and that it was and remains wrong to deny individual Gazans protection elsewhere in the name of collective self-determination. **Section 5** concludes.

2. The prohibition on forced displacement and the right to leave any territory

2.1. Distinguishing forced displacement from evacuations

This section appraises the interrelations between two key international law norms, the prohibition on forced displacement and the right to leave any territory, including occupied territory. Consider, first, the prohibition on forced displacement, grounded in freedom of movement, insofar as it encompasses the right to remain *in situ*.¹⁸ In occupation, Article 49(1) of the Fourth Geneva Convention (GCIV) states that ‘individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive’. There is no

¹⁷ Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

¹⁸ International Convention on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 12; Stavropoulou (n 15) 690.

distinction between individual and mass transfers, and the destination of such transfers plays no role.¹⁹

Some scholars claim that the Article 49(1) prohibition has become *jus cogens*.²⁰ However, IHL permits an occupying power to undertake ‘total or partial evacuation of a given area if the security of the population or imperative military reasons so demand’.²¹ Indeed, the crime against humanity of ‘deportation or forcible transfer of population’ is defined as ‘forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, *without grounds permitted under international law*’.²²

Evacuations are thus an exception to the general prohibition in Article 49(1). The exception is phrased permissively (‘may’), not instructively. Hence, it must be interpreted restrictively, given it can easily be abused.²³ In this vein, reasons related to ‘the security of the population’ pose fewer challenges than ‘imperative military reasons’. However, the worry is that the former justification would be used as a pretext for the latter, which in turn runs the risk of unlawfully encompassing political objectives. Imperative military reasons can only be invoked in pursuit of efforts directed at the realisation of a legitimate military advantage: there must thus be a connection between the military gain purportedly obtained by the evacuation and the pursued military objective.

Article 49(2) states that ‘evacuations may not involve the displacement of persons outside the bounds of the occupied territory except when *for material reasons* it is *impossible* to avoid such displacement’,²⁴ indicating a strong preference for evacuations inside the territory.²⁵ The International Committee of the Red Cross’ (ICRC) commentary to the four Geneva Conventions and their Additional Protocols (ICRC Commentary) notes that ‘as a rule ... evacuation must be to locations within the [occupied] territory’.²⁶ However, the application of Article 49(3) implicitly assumes either evacuation inside the territory or to the occupier’s territory, as it requires ‘an occupying power undertaking evacuations or transfers’ to ‘ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health,

¹⁹ J-M Henckaerts, ‘Deportation and Transfer of Civilians in Time of War’ (1993) 26 *VandJTransnatL* 469.

²⁰ E Henry, ‘The Prohibition of Deportation and Forcible Transfer of Civilian Populations in the Fourth Geneva Convention and Beyond’ in Md JH Bhuiyan and B Uddin Khan (eds), *Revisiting The Geneva Conventions: 1949–2019* (Brill 2020) 75.

²¹ GCIV (n 16) art 49(2).

²² Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 7(2)(d) (emphasis added). ‘Unlawful deportation or transfer’ constitute grave breaches of the Geneva Conventions of 12 August 1949 and hence are war crimes: *ibid* art 8(2)(a)(vii).

²³ M Jacques, *Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons under International Humanitarian Law* (CUP 2012) 56; see also B Hastie and F Crépeau, ‘Specific Rules on Refugees’ in A Clapham, P Gaeta and M Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP 2015) 1313, 1313–24.

²⁴ Emphasis added.

²⁵ In this context, Section 3 explores the tension between facilitation of ethnic cleansing and non-refoulement.

²⁶ ICRC, ‘Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949: Commentary’ (2025) para 3201.

safety and nutrition, and that members of the same family are not separated'. At times of intense fighting requiring evacuations, an occupier may be best able to ensure such conditions in its sovereign territory. As a general rule, evacuations must only take place when it is safe to do so.²⁷

Relatedly, Article 49(5) prohibits an occupier from detaining civilians in 'any area particularly exposed to the dangers of war'. This provision is subject to identical qualifications as those set in Article 49(2): the two provisions must therefore be interpreted consistently, understanding the term 'detain' to mean to keep or retain, rather than penal detention.

Finally, Article 58 of Addition Protocol I to the Geneva Conventions,²⁸ which applies 'without prejudice to Article 49', stipulates that 'the Parties to the conflict shall, to the maximum extent feasible ... endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives'. An interpretation of 'imperative military reasons' consistent with the above provision would, in certain contexts, necessitate certain evacuations as a precaution.

To be legal, evacuations must be temporary. Article 49(2) states that '[p]ersons thus evacuated *shall* be transferred back to their homes as soon as hostilities *in the area in question* have ceased'.²⁹ The ICRC Commentary frames evacuations as 'a temporary and provisional measure that must not last longer than required'.³⁰ Return must be secured once it has been assessed that the area is safe. Where an occupier fails to facilitate an individual's return to their home following a lawful evacuation, this could constitute an unlawful forcible transfer or deportation, a fortiori when the occupier prevents or prohibits the return of protected persons to their homes. The obligation to transfer persons back to their homes applies irrespective of whether the evacuation was to a location inside or outside the territory, and should take place even when hostilities elsewhere continue. Finally, simply notifying evacuees that an area is safe for their return is insufficient:³¹ it stands to reason that the party to the conflict that orchestrated

²⁷ T Mulder, 'Evacuations in Armed Conflict: A Fine Line between a Life Saving Measure and Forced Displacement' (*EJIL:Talk!*, 9 October 2024) <<https://www.ejiltalk.org/evacuations-in-armed-conflict-a-fine-line-between-a-life-saving-measure-and-forced-displacement/>>.

²⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol I). While Protocol I is not universally ratified, unlike GCIV, art 58 thereof is considered to reflect CIL. See J-M Henckaerts and L Doswald-Beck (eds), *Customary International Humanitarian Law* (CUP 2005).

²⁹ Emphasis added. Notably, a similar stipulation prohibiting the ordering of the displacement of the civilian population for reasons related to the conflict unless 'the security of the civilians involved or imperative military reasons so demand' applies in non-international armed conflicts (NIACs). See Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, art 17.

³⁰ ICRC Commentary (n 26) para 3202. See also ICRC, 'Rule 129: The Act of Displacement' in *Customary International Humanitarian Law* <<https://www.icrc.org/en/law-and-policy/customary-ihl>> (referring to 'imperative military reasons' as including the clearing of a combat zone) and 'Rule 131: Treatment of Displaced Persons'.

³¹ Cf L Blank, 'Sieges, Evacuations, and Urban Warfare' (*EJIL:Talk!*, 17 January 2019) <<https://www.ejiltalk.org/joint-blog-series-sieges-evacuations-and-urban-warfare-thoughts-from-the-transatlantic-workshop-on-international-law-and-armed-conflict/>>.

an evacuation, i.e. the Occupying Power, is also responsible for their return, especially as it is the primary addressee of the Article 49 obligations.

2.2. The right to leave any territory and its conflict-induced qualifications

The right to leave any territory, including occupied territory, is grounded in Article 12(2) of the International Covenant on Civil and Political Rights (ICCPR), which states that ‘everyone shall be free to leave any country, including his own’.³² Regional human rights instruments in Europe, the Americas and Africa similarly proclaim this right.³³ Its application is not conditional on the nationality of the person seeking to leave.³⁴ The UN Human Rights Committee (HRC) posits that the right to leave ‘exists independently of the length of time that the individual chooses to reside outside their state of current residence and the purpose of the leave’³⁵ and ‘may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country’.³⁶

Freedom of movement does not contain any requirement that persons must first prove that they will be admitted elsewhere.³⁷ The absence of evidence of possible admission elsewhere cannot be used to restrict the application of the right to leave.³⁸ For those controlling a territory, failure to respect, protect and fulfil the right to leave may expose individuals to persecution or other rights violations.³⁹ There is thus a negative obligation not to impede the departure of those seeking to leave and a positive obligation to issue without undue delay documents necessary for international travel.⁴⁰ A failure to do so simultaneously obstructs exit and entry.⁴¹

The effective realisation of the right to leave is a necessary but insufficient condition to be able to ‘seek and to enjoy in other countries asylum from persecution’.⁴² Whereas

³² ICCPR (n 18).

³³ Protocol No 4 to the European Convention on Human Rights (adopted 16 September 1963, entered into force 1 November 1998) ETS 46, arts 2(2), 3(2); American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, arts 22(2), 22(5); African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58, art 12(2).

³⁴ D Kochenov, ‘The Right to Leave Any Country including Your Own in International Law’ (2011) 28 Connecticut Journal of International Law 43.

³⁵ HRC, ‘General Comment No 27: Freedom of Movement’ (2 November 1999) UN Doc CCPR/C/21/Rev.1/Add.9, para 1.

³⁶ *ibid* para 8.

³⁷ E McDonnell, ‘Challenging Externalisation through the Lens of the Human Right to Leave’ (2024) 71 NILR 119, 122.

³⁸ E Guild and V Stoyanova, ‘The Human Right to Leave Any Country: A Right to Be Delivered’ (2018) YBEurConvHumRts 373.

³⁹ GS Goodwin-Gill, ‘The Right to Leave, the Right to Return, and the Question of a Right to Remain’ in V Gowlland-Debbas (ed), *The Problem of Refugees in The Light of Contemporary International Law Issues* (Martinus Nijhoff 1994) 62.

⁴⁰ Kochenov (n 34) 62; HRC (n 35) para 17.

⁴¹ McDonnell (n 37) 120–21 (describing externalisation as ‘equally designed as a tool of *containment* and to impede movement from *the beginning and throughout* the migrant trajectory’ (emphasis added)).

⁴² Universal Declaration of Human Rights (UDHR), UNGA Res 217 (10 December 1948) UN Doc A/Res271A/3, art 14. See A Edwards, ‘Human Rights, Refugees, and the Right “to Enjoy” Asylum’ (2005) 17 IJRL 293, 302 (also noting that regional instruments have clearly located the right to asylum within IHRL, pointing to the American Convention on Human Rights (n 33) art 22(9); African Charter on Human and Peoples’ Rights (n 33) art 12(3)).

individuals have a right to leave any territory, there is no corresponding general right to enter other States:⁴³ the right to leave is not matched by an obligation on a specific State to grant entry to a specific person. As Benhabib notes, the juxtaposition between the right to leave and the absence of a right to enter forms part of ‘a series of internal contradictions between universal human rights and territorial sovereignty’ that ‘are built into the logic of the most comprehensive international law documents in our world’.⁴⁴ Nevertheless, as the analysis in Section 3 demonstrates, host States’ adherence to non-refoulement obligations can give effect to the right to leave for those fleeing persecution and rights violations.

The right to leave in IHRL is qualified: it is subject to restrictions ‘which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other [ICCPR] rights’.⁴⁵ In general ‘the relation between right and restriction, between norm and exception, must not be reversed’.⁴⁶ However, in situations of conflict, derogations from some ICCPR rights, including freedom of movement, are permitted pursuant to Article 4 thereof ‘to the extent strictly required by the exigencies of the situation’. The measures must not be inconsistent with the State’s other obligations under international law, and must not ‘involve discrimination solely on the ground of race, colour, sex, language, religion or social origin’. Faced with severe national security threats, States may claim that they must limit the right to leave. For instance, following Russia’s full-scale invasion of Ukraine in February 2022, Ukraine declared a state of emergency throughout its territory and notified the UN Secretary-General of its decision to derogate from the ICCPR.⁴⁷ Since then, it has controversially restricted freedom of movement by preventing most of its male population aged 18–60 from leaving its territory, purportedly to enable effective conscription.⁴⁸

The right to leave in IHL is also qualified: Article 35 GCIV states that protected persons who ‘desire to leave the territory at the onset of, or during a conflict shall be entitled to do so unless their departure is contrary to the national interests of the state’.⁴⁹ Viewed through an IHL lens, Ukraine’s measures are directed towards parts of the

⁴³ C Harvey and R Barnidge, ‘Human Rights, Free Movement, and the Right to Leave in International Law’ (2007) *IJRL* 1, 20.

⁴⁴ S Benhabib, *The Rights of Others* (CUP 2004) 11.

⁴⁵ ICCPR (n 18) art 12(3).

⁴⁶ HRC (n 35) para 13.

⁴⁷ ‘Ukraine: Notification C.N.64.2022 under Article 4(3) ICCPR’ (UN, 1 March 2022), indicating that a state of emergency was declared throughout Ukraine on 23 February 2022.

⁴⁸ For a critique, see J Norosky and C Carpenter, ‘The Right to Flee the Dangers of War: Rethinking Ukraine’s Gender-Based Restriction on Civilian Men’s Freedom of Movement’ (2024) 46 *HRQ* 461 (highlighting the ban’s harm to civilian men, families (including women and children) and trans and nonbinary individuals, and contending it is unjustified). For a July 2025 report suggesting that an easing of the prohibition is being considered, see L Pakhnyuk, ‘Ukraine Considers Easing Travel Ban for Men Ages 18–24, Parliament Speaker Says’ *Kyiv Independent* (20 July 2025) <<https://kyivindependent.com/ukraines-parliament-considers-easing-travel-ban-for-men-ages-18-24/>>.

⁴⁹ GCIV (n 16) art 35. The provision, like the rest of Section II, pertains to ‘[a]liens in the territory of a party to the conflict’. It applies to situations of occupation by virtue of art 48, stating that ‘[p]rotected persons who are not nationals of the Power whose territory is occupied, may avail themselves of the right to leave the territory subject to the provisions of Article 35’.

State's own population in pursuit of its perceived shared national interest: in contrast, an occupying power would need to demonstrate that the departure of protected persons from the territory undermines *its* national security, for example, if there is concrete evidence to suggest that the departed would assist an adversary.

In some cases, individuals may wish to leave conflict zones but consider it too difficult, dangerous or expensive to make it to the border of a neighbouring State, leading them to flee to purportedly safer areas within their territory.⁵⁰ Exploring past conflicts, Schmitt notes that zones 'providing shelter to the wounded, the sick, and civilians have been agreed upon in conflicts',⁵¹ sometimes with the assistance of international organisations.⁵² While 'safe zones' may vindicate the right to remain,⁵³ there is a risk that they may be relied on to prevent individuals from exercising their right to leave to seek asylum elsewhere.⁵⁴ In the 1990s, some States seized on a 'right to remain' as a rationale to block asylum-seekers from fleeing Bosnia and Herzegovina, declaring the creation of supposedly safe areas to contain and protect the displaced; yet tragically, such a 'safe zone' in Srebrenica saw the massacre in July 1995 of more than 7,000 Bosniaks.⁵⁵

2.3. Distinguishing 'voluntary' departure from 'constructive' deportation

Section 2.1 noted that an occupier is prohibited from forcibly displacing protected persons, and must not 'evacuate' them from an occupied territory unless it is 'impossible' to avoid such evacuation. Section 2.2 outlined the IHRL and IHL obligations to facilitate the exercise of protected persons' right to leave, subject to clearly defined exceptions. How do the prohibition on forced displacement and the right to leave interact in conflict situations,⁵⁶ and can one meaningfully distinguish between voluntary departure and forced displacement, particularly in a coercive environment where it may be impossible for civilians to remain in situ?⁵⁷

When persons are loaded onto lorries and forcibly driven to the border, there is a clear-cut case of forced displacement. How should one assess cases where displacement results indirectly from the conditions of life created by the commission of unlawful acts

⁵⁰ E Ferris, 'Internal Displacement and the Right to Seek Asylum' (2008) 27(3) *Refugee Studies Quarterly* 76.

⁵¹ MN Schmitt, 'Protected Zones in International Humanitarian Law' (*Articles of War*, 24 August 2022) <<https://lieber.westpoint.edu/protected-zones-international-humanitarian-law/>> (referencing Bangladesh's war of independence, the war in the South Atlantic and the conflicts in Cambodia, Chad, Cyprus, Nicaragua, Lebanon, Sri Lanka and the former Yugoslavia).

⁵² For critical appraisal, see, e.g. H Macey, "'Safe Zones': A Protective Alternative to Flight or a Tool of Refugee Containment? Clarifying the International Legal Framework governing Access to Refugee Protection against the Backdrop of "Safe Zones" in Conflict-Affected Contexts' (2022) 104 *International Review of the Red Cross* 1455.

⁵³ Coined in that context by S Ogata, the then UN High Commissioner for Refugees: see Morel et al (n 18).

⁵⁴ J Hathaway, 'New Directions to Avoid Hard Problems: The Distortion of the Palliative Role of Refugee Protection' (1995) 8 *Journal of Refugee Studies* 288, 292.

⁵⁵ Long (n 13) 462.

⁵⁶ E Pothelet, 'The Evacuation of Eastern Aleppo: Humanitarian Obligation or War Crime?' (*EJIL:Talk!*, 14 March 2017) <<https://www.ejiltalk.org/the-evacuation-of-eastern-aleppo-humanitarian-obligation-or-war-crime/>>.

⁵⁷ C Procter, 'Coerced Migration: Mobility under Siege in Gaza' (2024) 5 *Journal of Ethnic and Migration Studies* 2359, 2371.

against civilian persons? Chetail distinguishes lawful from unlawful displacement based on the genuine consent of the persons concerned.⁵⁸ Yet, when one is faced with a choice, real or perceived, between leaving behind their home and all of their belongings, or having limited chance of survival, the notion of consent seems rather elusive. Cantor thus argues that the IHL prohibition on forced displacement is rooted in *directly* coercive acts:⁵⁹ for him, Article 49 prohibits the *forcible* transfer of civilians, on an individual or collective basis, from occupied territory to the territory of the occupier or to another State,⁶⁰ not least as such forcible transfer may itself threaten the life, liberty and security of the displaced.⁶¹ Under both interpretations, however, parties to a conflict would be breaching other IHL obligations by inducing displacement through acts that may advance the party's strategic objectives,⁶² such as terrorising the civilian population, creating inhumane conditions of living or carrying out indiscriminate attacks.⁶³

How should a deportee's wish to leave an occupied territory be addressed? The United States (US) Department of Justice's appraisal of the legality of facilitation of departure from occupied Iraq provided a helpful illustration of interpretive and normative challenges. Its memorandum opined that 'facilitating the voluntary decision of a "protected person" to leave an occupied country and go abroad should ... not count as "deportation"'. The rationale given was that 'otherwise, an Occupying Power could be required to force "protected persons" to remain within the territory, even if they desired to leave, or at least to avoid facilitating in any way those persons' departure, for fear of being charged with having "deported" them'. Nevertheless, the memorandum required the Occupying Power to make clear to protected persons that they were not being deported and that they could return to Iraq at any time.⁶⁴

In the final analysis, individuals must retain their agency to determine whether to flee their territory or remain in situ, even if the conditions to which they are subjected render their departure coerced and constitute violations of IHL norms. It would be a perverse outcome if, as a matter of international law, the right to leave were to be curtailed by an occupier's unlawful actions, leaving protected persons trapped and exposed to rights violations. In turn, an occupier must facilitate departure, subject to the defined exceptions, irrespective of whether one would hold it responsible for constructive deportation.

2.4. *The armed conflict in Gaza since 7 October 2023: Gaza's trapped residents*

In his request of May 2024 for the issuance of arrest warrants against Israeli and Hamas leaders, the then Prosecutor of the International Criminal Court defined the conflict in

⁵⁸ Chetail (n 4) 1190.

⁵⁹ D Cantor, 'Does IHL Prohibit the Displacement of Civilians During War?' (2012) 24 IJRL 840; D Cantor, 'Laws of Unintended Consequence: Nationality, Allegiance and the Removal of Refugees during Wartime' in DJ Cantor and J-F Durieux (eds), *Refuge From Inhumanity? Refugee Protection and the Laws of War* (Martinus Nijhoff 2014) 343.

⁶⁰ Y Dinstein, *The Laws of War* (CUP 1983) 225.

⁶¹ M Stavropoulou and LT Lee, 'Proceedings of the Annual Meeting of the American Society of International Law', March 27–30, 1996' (1997) 90 AJIL 549, 553–54.

⁶² C Querton, *Conflict Refugees* (CUP 2023) 71.

⁶³ See, e.g. Ziegler (n 4) 232.

⁶⁴ US Department of Justice, 'Memorandum: Voluntary Departure from Occupied Territory' (16 July 2004).

Gaza since 7 October 2023 as comprising an international armed conflict (IAC) and a non-international armed conflict (NIAC) running in parallel; the panel of experts that he convened had reached a similar conclusion.⁶⁵ The legal determination whether there is only an IAC or both an IAC and a NIAC in Gaza since 7 October 2023 falls outside the scope of this article: it suffices that Palestinian residents of Gaza are ‘protected persons’ within the meaning of Article 4 GCIV, namely, ‘those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals’.

The International Court of Justice (ICJ) concluded in its Advisory Opinion of 19 July 2024 on the *Legality of Occupation* that, even prior to 7 October 2023, ‘Israel remained capable of exercising, and continued to exercise, certain key elements of authority over the Gaza Strip, including control of the land, sea and air borders’ and that ‘this is even more so since 7 October 2023’.⁶⁶ Applying a functional approach to occupation, the ICJ held that Israel’s legal obligations ‘have remained commensurate with the degree of its effective control over the Gaza Strip’.⁶⁷

Against this background, the article proceeds to apply the IHRL and IHL norms analysed in Section 2 to displacement in and from Gaza.⁶⁸ Even before 7 October 2023, and certainly since then, no Palestinian could leave the strip legally without being permitted to do so by Israeli military authorities.⁶⁹ Article 49(1) GCIV prohibits Israel from forcibly transferring or deporting Gazans outside the territory. At the time of writing, Israel has not sought to pursue ‘evacuations’ outside Gaza or claim that, if pursued, they would meet the Article 49(2) threshold: namely, that it would be ‘impossible’ for Israel to conduct its military operations otherwise. Rather, Israel has been issuing increasingly restrictive internal evacuation orders, forcing the majority of

⁶⁵ Office of the Prosecutor, ‘Report of the Panel of Experts on International Law’ (20 May 2024) paras 13–14 <<https://www.icc-cpi.int/about/otp/special-advisers-to-the-prosecutor/panel-of-experts-in-international-law/report-of-the-panel-of-experts-in-international-law>> (claiming that ‘the international armed conflict began at the latest on 7 October 2023, when Israel first started responding to the Hamas attack on its territory by using force on the territory of Palestine without the latter’s consent’).

⁶⁶ *Legality of Occupation* Advisory Opinion (n 4) para 93.

⁶⁷ *ibid* para 94. See also *Prosecutor v Naletilić and Martinović* (Judgment) IT-98-38-T (31 March 2003) para 221 (holding that ‘for the purposes of those individuals’ rights, a state of occupation exists upon their falling into “the hands of the occupying power”. Otherwise civilians would be left, during an intermediate period, with less protection than that attached to them once occupation is established’).

⁶⁸ Israel rejects the parallel application of IHRL and IHL in occupied territory. It filed a derogation from the ICCPR on 3 October 1991, notifying of its continuous ‘state of emergency’ since May 1948 as a basis for derogating from art 9 (liberty and security of persons) obligations ‘to the extent strictly required by the exigencies of the situation, for the defence of the State and for the protection of life and property, including the exercise of powers of arrest and detention’. Israel has not derogated from art 12 (freedom of movement).

⁶⁹ ‘Policy regarding the Movement of Persons between the State of Israel and Gaza’ (undated) <http://www.gisha.org/UserFiles/File/LegalDocuments/procedures/entering_and_exiting_gaza/03.pdf> (Hebrew); ‘General Request Form for Existing Gaza’ (December 2017) <<http://www.gisha.org/UserFiles/File/LegalDocuments/application%20for%20permit%20general%201.12.17.pdf>>. In order to leave or enter Gaza via its border crossings, Gaza residents must hold an identification document issued by the Palestinian Authority based on the Israeli-controlled Palestinian population registry. Registration with UNRWA in Gaza does not entitle an individual to enter or exit Gaza: UNRWA, ‘Letter from UNRWA to UNHCR describing UNRWA’s Mandate and Services’ (22 September 2021) <<https://www.refworld.org/policy/opguidance/unrwa/2021/en/123916>>.

Gazans to move to an ever smaller enclave in the strip's south-west corner. For most of the period between October 2023 and September 2025, apart from a hiatus in early 2024, Palestinians 'evacuated' from their places of residence were generally not allowed to return. In summer 2025, Israeli officials floated the idea of creating a 'humanitarian city' to which Gazans will be confined, prohibiting their return to the rest of the strip,⁷⁰ and cabinet members advocated reestablishing Israeli settlements in Gaza.⁷¹

This article cannot consider in detail the impact that Israel's military operations since 7 October 2023 have had on Gaza's civilian population.⁷² For present purposes, it suffices to note that, at the time of writing, Israel's actions have rendered very large swathes of Gaza uninhabitable; that tens of thousands of civilians have been killed and many more have been injured; that the conditions in the 'humanitarian' area to which Israel has gradually confined the majority of the strip's population have likely failed to meet the Article 49(3) GCIV criteria; and that, during the conflict, Israel has generally been preventing Gazans from returning to areas from which they had been displaced, likely breaching Article 49(2).

The harsh conditions of life imposed on Gazans would cast doubt on the voluntariness of any individual's 'desire' to leave the strip. However, they must not deny Gazans their right to leave. Israeli facilitation would be required for Gazans to effectively exercise their right to leave, ensuring they can obtain appropriate travel documents and that they can arrive safely at a land border—the only route out of Gaza absent a functioning port or airport. Yet, whereas such facilitation would be necessary, it would not be sufficient: Gazans would need to be then admitted elsewhere—in the first instance, that would require one or both of Gaza's neighbouring States, Egypt and Israel, to open their borders.

3. Non-refoulement, border closures and the right to return to one's own country

3.1. Non-refoulement obligations in IRL, IHRL and IHL: scope and relevance to conflict

Section 2 explored how the right to leave any territory, including occupied territory, interacts with the prohibition on forcible transfers or deportations. It concluded that, even in circumstances amounting to 'constructive' deportation, the right to leave must be honoured. When individuals flee conflict, which non-refoulement obligations follow, particularly for neighbouring States, and which factors may prompt their breach?

⁷⁰ See, e.g. E Benvenisti and C Gans, 'Our Duty to Explain Israel's Operation to "Concentrate and Move Population" in Gaza Is A Manifest War Crime' (*Just Security*, 8 July 2025) <<https://www.justsecurity.org/116459/israel-gaza-gideon-chariots-humanitarian-city/>>.

⁷¹ See, e.g. N Shpigel, 'Far-Right Minister Smotrich: Israeli Resettlement in Gaza Now a "Realistic Plan"' (*Haaretz*, 29 July 2025) <<https://tinyurl.com/4cwsel7y>>.

⁷² Readers are advised to consult proceedings before the ICJ in *Republic of South Africa v Israel* (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip*): Order for Provisional Measures (26 January 2024); Decision of the Court on South Africa's Request for Additional Provisional Measures (16 February 2024); Request for the Modification of the Order of 28 March 2024 (24 May 2024). See also the Report of the Panel of Experts on International Law (n 65).

IRL non-refoulement obligations equally apply in peacetime and conflict and can be found in global⁷³ as well as regional instruments.⁷⁴ Non-refoulement obligations under the 1951 Convention are non-derogable: they apply even ‘in time of war or other grave or exceptional circumstances’.⁷⁵ The benefits of non-refoulement can only be denied to a ‘refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country’.⁷⁶ This qualification applies only to a present or future danger which is assessed individually and thus cannot be the basis for general border closures. Host States can also impose temporary restrictions on the movement of those admitted, inter alia, to verify their identity and appraise the risk they may pose.⁷⁷

Beyond IRL, States are also bound by their IHRL and IHL obligations,⁷⁸ which protect everyone from refoulement—even persons formally excluded from refugee status under the 1951 Convention.⁷⁹ In IHRL, non-refoulement is explicitly articulated in the Convention against Torture⁸⁰ whereas the ICCPR right to life and its prohibition on torture and related forms of ill-treatment have been interpreted to include non-refoulement obligations.⁸¹ A similar interpretation has applied to the prohibition on inhuman or degrading treatment or punishment in the European Convention on Human Rights,⁸² to the right to life and prohibition on torture and related forms of ill-treatment in the Convention on the Rights of the Child⁸³ and to the right to security of person and protection by the State against violence or bodily harm in the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).⁸⁴

⁷³ 1951 Convention (n 17) art 33. The 1951 Convention’s temporal and geographical restrictions do not apply for signatories of the Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267.

⁷⁴ Convention governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974) 1001 UNTS 45, art II(3); Cartagena Declaration on Refugees (22 November 1984) art III(5).

⁷⁵ 1951 Convention (n 17) art 9; see also A Grahl-Madsen, *Commentary on the Refugee Convention* (UNHCR 1997) 43.

⁷⁶ 1951 Convention (n 17) art 33(2).

⁷⁷ *ibid* art 31(2).

⁷⁸ UNHCR, ‘Legal Considerations on Asylum and Non-Refoulement in the Context of “Instrumentalization”’ (24 September 2024) para 8.

⁷⁹ P Mathew, ‘Non-Refoulement’ in Costello, Foster and McAdam (n 4) 899, 903. See also M-T Gil-Bazo, ‘Asylum as a General Principle of International Law’ (2015) 27 *IJRL* 3; A Duffy, ‘Expulsion to Face Torture? Non-Refoulement in International Law’ (2008) 20 *IJRL* 390.

⁸⁰ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

⁸¹ ICCPR (n 18) arts 6, 7. See, e.g. HRC, ‘General Comment No 36 on Article 6: The Right to Life’ (3 September 2019) UN Doc CCPR/C/GC/36, para 31.

⁸² European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, art 3. See, e.g. *ND and NT v Spain* App Nos 8675/15 and 8697/15 (ECtHR, 13 February 2020).

⁸³ Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, arts 6 (the ‘inherent right to life’), 37 (prohibition of torture or other cruel, inhuman or degrading treatment or punishment).

⁸⁴ International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195, art 5(b).

In turn, in IHL, the only explicit prohibition on refoulement pertains to belligerent parties: Article 45(4) GCIV prohibits the return of protected persons to ‘a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs’. Nevertheless, this author has elsewhere argued, and the ICRC has agreed, that the obligation in Common Article 1 Geneva Conventions to ‘ensure respect for the present convention ... in all circumstances’ prohibits all High Contracting Parties from returning persons to areas where, due to an armed conflict, they face a real risk of, at minimum, Common Article 3 violations.⁸⁵

Further to its treaty bases, non-refoulement is arguably a customary international law (CIL) norm.⁸⁶ Some claim that it has obtained *jus cogens* status,⁸⁷ namely ‘a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character’.⁸⁸ However, the International Law Commission (ILC) has not included non-refoulement in its non-exhaustive list of *jus cogens* norms.⁸⁹ It is unnecessary for this article to determine the *jus cogens* status of non-refoulement: when those fleeing conflict face a real risk of violations of recognised *jus cogens* norms, including the prohibition on genocide, the prohibition on crimes against humanity and the basic rules of IHL, a State refouling anyone to a territory where one or more of these *jus cogens* norms may be violated would clearly be breaching its non-refoulement obligations by exposing refouled persons to such dangers. The key question is then which States’ non-refoulement obligations are engaged.

3.2. *Non-refoulement obligations of neighbouring States*

Non-refoulement clearly applies to refugees already within the State’s territory. It should be equally clear that it applies to those arriving at the State’s frontier.⁹⁰ Whereas the 1951 Convention does not reference ‘rejection at the frontier’, subsequent regional instruments in Africa and the Americas explicitly present it as a

⁸⁵ R Ziegler, ‘Non-Refoulement between “Common Article 1” and “Common Article 3”’ in Cantor and Durieux (n 59) 386; see also ICRC, ‘Commentary to Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949’ (2016) para 711.

⁸⁶ See, e.g. ‘Declaration of States Parties’ (13 December 2001) UN Doc HCR/MMSP/2001/09, para 4. Cf JJ Hathaway, ‘Leveraging Asylum’ (2010) 45 *TexIntlLJ* 503, 508, 536 (contesting that non-refoulement is CIL).

⁸⁷ See, e.g. J Allain, ‘The *Jus Cogens* Nature of Non-Refoulement’ (2011) 13 *IJRL* 533; M Foster and C Costello, ‘Non-Refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test’ (2016) 46 *NYIL* 273; GS Goodwin-Gill, ‘International Refugee Law: Yesterday, Today, but Tomorrow?’ (Refugee Law Initiative First Annual Conference, 29 June 2016) 6–7 (claiming non-refoulement is a peremptory norm of international law).

⁸⁸ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 53.

⁸⁹ ILC, ‘Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*Jus Cogens*), with Commentaries’ (2022) UN Doc A/77/10, annex, conclusion 23.

⁹⁰ UNHCR, ‘Conclusion No 99: International Protection’ (October 2004) (calling on States to ensure ‘full respect for the fundamental principle of *nonrefoulement*, including non-rejection at frontiers without access to fair and effective procedures for determining status and protection needs’); ICRC, ‘Note on Migration and the Principle of Non-Refoulement’ (2017) 99 *International Review of Red Cross* 345.

manifestation of refoulement.⁹¹ In Europe, the European Court of Human Rights held that it is ‘crucial to observe ... that the prohibition of refoulement includes the protection of asylum-seekers in cases of both non-admission and rejection at the border’.⁹² UNHCR’s note on externalisation claims that ‘the responsibility of all states ... to protect a person from *refoulement* is engaged as soon as individuals present themselves at the border’.⁹³

The normative basis for this understanding is that effective protection begins with a refugee’s ability to secure admission.⁹⁴ As UNHCR notes, the decisive factor is whether persons ‘come within the effective control and authority of that state’.⁹⁵ Yet, attempts to expand non-refoulement’s reach to require European States to issue ‘humanitarian visas’ to persons seeking to travel safely to their territories in order to seek asylum there have failed hitherto.⁹⁶ In conflict situations generating a ‘mass influx’ of persons, the ramification is that the initial ‘burden’ of protection falls, legally and practically, on neighbouring States. UNHCR’s longstanding position is that ‘access to asylum and the meeting by states of their asylum obligations should not be dependent on burden-sharing arrangements first being in place’.⁹⁷ Asylum-seekers should be admitted where they first seek refuge and, if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis.⁹⁸ Therefore, the absence of responsibility-sharing arrangements must not lead States to close their borders.

Protected persons may flee their territory to a neighbouring State that is a party to the conflict. As the case of over a million Russian-speaking Ukrainians who have fled to Russia since 2022 demonstrates, this is more likely to happen when the persons fleeing are aligned, ethnically and/or politically, with that party to the conflict. It seems counter-intuitive, for instance, that after 7 October 2023, Gazans would have sought protection in Israel, a party to the conflict whose actions have led to their internal displacement, even if it would in fact be the safer option for them. Legally though, a belligerent neighbouring State is bound by non-refoulement obligations. To the extent

⁹¹ OAU Convention (n 74) art II(3); Cartagena Declaration (n 74) art III(5).

⁹² *ND and NT v Spain* (n 82) paras 178, 209. The judgment has been otherwise widely critiqued, inter alia, for its restrictive approach to collective expulsion.

⁹³ UNHCR, ‘Legal Considerations on Asylum and Non-Refoulement in the Context of “Instrumentalization”’ (24 September 2024) <<https://www.refworld.org/policy/legalguidance/unhcr/2024/en/148736#:~:text=When%20facing%20mixed%20and%20For,to%20seek%20and%20to%20enjoy>>.

⁹⁴ J McAdam and GS Goodwin-Gill, ‘Israel-Hamas 2023 Symposium: Refugee Law’ (*Articles of War*, 17 November 2023) <<https://lieber.westpoint.edu/refugee-law/>>.

⁹⁵ UNHCR, ‘Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and Its 1967 Protocol’ (January 2007) paras 24, 43.

⁹⁶ Case C-368/16 *X and X v État Belge* ECLI: EU:C:2017:173. The applicants contended that Belgium’s refusal to issue visas exposed them to a risk of torture or inhuman or degrading treatment in contravention of art 3 ECHR and art 4 of the Charter of Fundamental Rights [2000] OJ C364/1. The ECJ held that visa issuance is a domestic law matter. See also *MN v Belgium* App No 3599/18 (ECtHR, 5 May 2020) (holding the applicants’ visa application at the Belgian embassy in Beirut did not bring them within Belgium’s jurisdiction for the purposes of art 1 ECHR).

⁹⁷ UNHCR, ‘Conclusion No 85: International Protection’ (1998) para P.

⁹⁸ UNHCR, ‘Conclusion No 22: Protection of Asylum-Seekers in Situations of Large-Scale Influx’ (1981) para II.

that border arrivals raise security concerns, they must be addressed through means other than refoulement.

3.3. *Border closures: rationales and institutional responses*

When a neighbouring State opens its borders during conflict, it does not know how long the conflict will last and, consequently, for how long protection would be needed. Ordinarily, it has no assurance that it would be able to return refugees when the conflict concludes, especially if one of the aims of a party to the conflict is to ethnically cleanse part or all of the territory.

Section 1 demonstrated that Gaza's border closures are unusual in comparison with State practice in recent conflicts. In the few past cases when neighbouring States have shut their borders, they typically invoked two rationales: security concerns and an expectation of 'burden-spreading'.⁹⁹ States have conceived of large refugee flows as likely to exacerbate ethnic tensions, and have insisted that the international community provides long-term solutions, generally by facilitating repatriation, so that the 'burden' does not fall exclusively or primarily on them.

How has the international community previously responded to such concerns? The displacement from Kosovo to North Macedonia offers a useful comparative lens. As the North Atlantic Treaty Organization's bombing campaign in Serbia commenced, ethnic Albanians were fleeing Kosovo towards its neighbour, North Macedonia. They were stranded at Blace without shelter and with minimal other assistance. North Macedonia refused to allow them to proceed into its territory, fearing a destabilising effect and demanding assurances that ethnic Albanians would not remain on its territory.¹⁰⁰ Two evacuation programmes summarily followed suit: a responsibility-sharing humanitarian evacuation programme to non-neighbouring States and a humanitarian transfer programme from North Macedonia to its neighbour, Albania.¹⁰¹

UNHCR was unwilling to explicitly demand the unconditional opening of North Macedonia's borders, reflecting unease at the prospect that advocating refugee hosting may inadvertently facilitate ethnic cleansing aspirations.¹⁰² A policy report written in the early stages of the conflicts in the former Yugoslavia addressed the argument that 'providing refuge ... is to conform to the policy of ethnic cleansing' head-on by

⁹⁹ Long (n 13) 462–63 (appraising border closures by Türkiye (Iraqi Kurds); Tanzania (Rwandan and Burundian); North Macedonia (Kosovars); Afghanistan's neighbours (post-9/11); Kenya (Somalis)).

¹⁰⁰ M Bartuciski, 'The Reinforcement of Non-Admission Policies and the Subversion of UNHCR: Displacement and Internal Assistance in Bosnia-Herzegovina (1992–94)' (1996) 8 *IJRL* 49, 108–09 (arguing that North Macedonia's initial response was reminiscent of the Indo-China refugee crisis in the late 1970s: a displaced group that is ethnically related to a significant minority in the receiving State, leading to host State fears of destabilisation of the internal ethnic balance, resulting in temporarily or definitively denied asylum to arrivals).

¹⁰¹ J-F Durieux, 'Three Asylum Paradigms' (2013) 20 *International Journal on Minority and Group Rights* 147, 166.

¹⁰² For critique, see M Bartuciski and A Suhrke, 'Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-Sharing' (2001) 14 *Journal of Refugee Studies* 95. Cf Long (n 13), noting that at the time of her writing, UNHCR was 98 per cent dependent on voluntary contributions and thus not particularly well-placed to directly oppose, rather than to facilitate or modify, State strategies responding to mass exodus: *ibid* 460, 472–73.

suggesting that ‘it is essential to reaffirm and provide lasting protection for the right to return’.¹⁰³ Recognising that evacuation of vulnerable groups can assist the perpetrators of ethnic cleansing, the report submitted that ultimately, UNHCR was obliged to concede that evacuation was the lesser of two evils. As UNHCR’s senior official in the Balkans later observed, ‘we chose to have more displaced persons and refugees, rather than more dead bodies’.¹⁰⁴ International actors’ responses to displacement from Kosovo demonstrate that, when such actors are willing and able to provide assurances to host States, that can assuage their concerns and enable persons to flee conflict to safety.

3.4. The right of return of persons displaced by conflict

A key concern for persons displaced by conflict is whether and when they will be able to return to their places of residence, particularly when their displacement has been driven by ethnic cleansing aspirations. The harm of exile has been described as a ‘fundamental deprivation of homeland, a deprivation that goes to the heart of those immutable characteristics that comprise our personal and collective identities’.¹⁰⁵ The right to return reflects people’s strong interest in being able to return to the place that they regard as their homeland.¹⁰⁶

Section 2 explored the unequivocal IHL obligation to return ‘protected persons’ to their former places of residence once hostilities in that area cease.¹⁰⁷ A fortiori there is an obligation to facilitate their return to the territory post-conflict. The ICRC states that ‘displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist’, referring to it as a CIL norm.¹⁰⁸ The norm applies to those who have been displaced from conflict, whether voluntarily or involuntarily, and the UN Security Council (UNSC) recognised it with respect to conflicts in Abkhazia, Afghanistan, Bosnia and Herzegovina, Croatia, Korea, Liberia, Sudan and Tajikistan.¹⁰⁹

In IHRL, Article 12(4) ICCPR enunciates that ‘no one shall be arbitrarily deprived of the right to enter his own country’.¹¹⁰ The right to return to one’s ‘own country’ does not

¹⁰³ UN Commission on Human Rights, ‘Report on Human Rights in Former Yugoslavia’ (1992) UN Doc E/CN.4/1992/S-I/10, para 25(a).

¹⁰⁴ UNHCR, ‘The State of the World’s Refugees 1995’ (1995) 70, cited in M Cox, ‘The Right to Return Home’ (1998) 47 ICLQ 599, 619. In this context, see also the UN High Commissioner for Refugees Sadako Ogata’s ‘Statement to the International Meeting on Humanitarian Aid for Victims of Conflict in the Former Yugoslavia’ (29 July 1992) <<https://www.unhcr.org/uk/publications/statement-mrs-sadako-ogata-united-nations-high-commissioner-refugees-international-2>>: ‘whatever mechanism for burden-sharing is adopted, it must not limit the right to seek asylum ... military and political considerations should not override the humanitarian concerns’.

¹⁰⁵ B Frellick, ‘The Right of Return’ (1990) 2 IJRL 442, 444. On the right to return generally, see R Zetter, ‘Refugees and their Return Home: Unsettling Matters’ (2021) 3 Journal of Refugee Studies 7.

¹⁰⁶ D Miller, ‘Justifying the Right of Return’ (2020) 21 Theoretical Inquiries in Law 369, 375–77.

¹⁰⁷ M Cox, ‘The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina’ (1998) 47 ICLQ 599, 616.

¹⁰⁸ ICRC, ‘Rule 132: Return of Displaced Persons’ in *Customary International Humanitarian Law* <<https://ihl-databases.icrc.org/en/customary-ihl/v1/rule132>>.

¹⁰⁹ *ibid* nn 8–9.

¹¹⁰ The provision is an inexact repeat of the stipulation in art 13 UDHR (n 43) which states that ‘everyone has the right to leave any country, including his own, and to return to his country’. Unlike the right to leave, the right to return is not subject to art 12(3) restrictions.

require the person to be a national.¹¹¹ This is important because a change of borders and/or sovereign affecting the territory of origin may lead to a formal severance of the State-national legal bond.¹¹² Relatedly, it ‘includes not only the right to return after having left one’s own country; it may also entitle a person to come to the country for the first time if he or she was born outside the country’.¹¹³ The HRC opines that ‘[t]he scope of “his own country” is broader than the concept “country of his nationality”, embracing individuals whose special ties to a place mean they cannot be considered to be a mere alien.¹¹⁴ Although the notion of arbitrariness is not defined, the HRC posits that ‘there are few, if any, circumstances in which deprivation of the right to enter one’s own country could be reasonable’.¹¹⁵

Whether the right to return in IHRL covers situations of ‘mass influx’ has been contested. Writing in 1981, Jagerskiold claimed that, in the drafting of Article 12(4),

there was no intention ... to address the claims of masses of people who have been displaced as a byproduct of war or by political transfers of territory or population such as ... the flight of the Palestinians from what became Israel, or the movement of Jews from Arab countries.¹¹⁶

Yet nothing in the text of Article 12 or in the travaux préparatoires limits the provision’s application to individual instances.¹¹⁷ Jagerskiold’s position implies that one’s right to return becomes less compelling if others are in the same situation: yet, normatively, it would be wrong to conclude that an individual’s rights as a displaced person are weakened by virtue of being part of a displaced group.¹¹⁸

In the first half of the twentieth century, internationally-endorsed post-conflict bilateral or multilateral population-exchange agreements were common.¹¹⁹ A shift has since occurred, and population transfers and mass expulsions have been held to violate international law.¹²⁰ In turn, voluntary return and repatriation form a key part of global refugee policy.¹²¹ Since the early 1990s, UN organs have called for or supported the return of all refugees and displaced persons in respect of conflicts that resulted in mass displacement.¹²² The Dayton Accords pertaining to post-conflict returns to

¹¹¹ (In)famously, the ICJ in *Nottebohm Case (Liechtenstein v Guatemala) (Second Phase)* (Judgment) [1955] ICJ Rep 4, describes nationality as ‘a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties’.

¹¹² K Lawland, ‘The Right to Return of Palestinians in International Law’ (1996) 8 IJRL 532, 546.

¹¹³ *ibid* paras 19–20.

¹¹⁴ HRC (n 35) para 20.

¹¹⁵ *ibid* para 21.

¹¹⁶ SAF Jagerskiold, ‘The Freedom of Movement’ in L Henkin (ed), *The International Bill of Rights* (Columbia University Press 1981) 180.

¹¹⁷ J Quigley, ‘Family Reunion and the Right to Return to Occupied Territory’ (1992) 6 GeoImmigrLJ 223. Cf Miller (n 106) 379 (arguing that when a ‘whole community is expelled from or chooses to leave its homeland’ the task of justifying an individual right of return becomes more difficult, given that it is premised on a ‘symbiotic relationship’ between land, people, culture and politics).

¹¹⁸ E Rosand, ‘The Right to Return under International Law following Mass Dislocation: The Bosnia Precedent?’ (1998) 19 MichJIntL 1094, 1127, 1135.

¹¹⁹ *ibid* 1115–17 (referring e.g. to the Treaty of Neuilly regarding Bulgaria/Greece and the Treaty of Lausanne regarding Turkey/Greece).

¹²⁰ HRC, ‘General Comment No 15’ (11 April 1986) UN Doc CCPR/GC/15.

¹²¹ *ibid* 1119–20.

¹²² *ibid* 1136.

Bosnia and Herzegovina stipulate that '[a]ll refugees and displaced persons have the right freely to return to their homes of origin'.¹²³ The right to return features also in Bosnia and Herzegovina's Constitution, proclaiming that '[a]ll refugees and displaced persons have the right freely to return to their homes of origin'.¹²⁴ Relatedly, the CERD Committee's general recommendations stipulate that '[a]ll such refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety'.¹²⁵ Yet, despite the emergence of a clear global norm, mass returns have become less prevalent: in 2024, the UNHCR reported that 67 per cent of persons displaced under its mandate¹²⁶ are in a 'protracted situation', defined as 'one in which 25,000 or more refugees from the same nationality have been in exile for five consecutive years or more in a given asylum country'.¹²⁷

A recent case of 'mass influx' to a neighbouring State may put to the test the global commitment to the realisation of the right to return. Azerbaijan's attack on the Nagorno-Karabakh region in September 2023 caused the displacement of nearly all of its ethnic Armenian population to neighbouring Armenia via the 'Lachin corridor'.¹²⁸ On 28 September 2023, Armenia submitted to the ICJ a request for indication of provisional measures in its pending contentious case against Azerbaijan. Granting the request, the ICJ ordered Azerbaijan to:

- (i) ensure that persons who have left Nagorno-Karabakh after 19 September 2023 and who wish to return to Nagorno-Karabakh are able to do so in a safe, unimpeded and expeditious manner;
- (ii) ensure that persons who remained in Nagorno-Karabakh after 19 September 2023 and who wish to depart are able to do so in a safe, unimpeded and expeditious manner; and
- (iii) ensure that persons who remained in Nagorno-Karabakh after 19 September 2023 or returned to Nagorno-Karabakh and who wish to stay are free from the use of force or intimidation that may cause them to flee.¹²⁹

UNGA resolutions consider Nagorno-Karabakh to be part of Azerbaijan.¹³⁰ Hence, for the UN, the displacement of ethnic Armenians from Nagorno-Karabakh engages their right to return to the territory *qua* individuals, not as part of a RSD. It is notable

¹²³ General Framework Agreement for Peace in Bosnia and Herzegovina (21 November 1995) (Dayton Accords) annex 7.

¹²⁴ Rosand (n 118) (citing Dayton Accords, annex 4, art 5).

¹²⁵ CERD Committee, 'General Recommendation No 22: Article 5 and Refugees and Displaced Persons' (24 August 1996) UN Doc CERD/C/GC/22, para 2.

¹²⁶ UNHCR's mandate excludes Palestinian refugees in UNRWA areas of operation: see Section 4.

¹²⁷ See, e.g. UNHCR, 'Global Trends: Forced Displacement in 2024' (UNHCR, 2024) 40.

¹²⁸ Freedom House et al, 'Why Are There No Armenians in Nagorno-Karabakh? Fact-Finding Report' (November 2024) <https://freedomhouse.org/sites/default/files/2024-11/NO-ARMENIANS-IN-NK-DDF-FH_FACT-FINDING_REPORT_FULL_VERSION.pdf> (noting that '[a]s of 2024, there are virtually no ethnic Armenians living in Nagorno-Karabakh').

¹²⁹ *Application of the International Convention on the Elimination of all forms of Racial Discrimination (Armenia v Azerbaijan)* (Provisional Measures) [2023] ICJ Rep 619.

¹³⁰ See, e.g. UNGA Res 62/243 (14 March 2008) UN Doc A/Res/62/243 (demanding 'the immediate, complete and unconditional withdrawal of all Armenian forces from all the occupied territories of the Republic of Azerbaijan'). See also the US House of Representatives, HRes 1327 (27 June 2024), stating that 'international law provides for a right of return for populations displaced from their country of origin'.

that, at the time of writing, most ethnic Armenians from Nagorno-Karabakh have not sought Armenian citizenship, potentially due to fear of forgoing a right to return.¹³¹ Ultimately, while demanding the realisation of the right of ethnic Armenians to return to Nagorno-Karabakh, Armenia has opened its borders, effectively facilitating what appears to be a successful ethnic cleansing campaign.¹³²

3.5. Return and RSD

The ICCPR proclaims that ‘all peoples have the right to self-determination’.¹³³ The ICJ characterised the RSD as a fundamental human right.¹³⁴ In its *Legality of Occupation* Advisory Opinion, the Court held that in cases of foreign occupation it is ‘a peremptory norm of international law’.¹³⁵ It is conceivable that, by complying with its non-refoulement obligations, a State would effectively facilitate ethnic cleansing. Relatedly, even though displaced persons have a right to return, their displacement could impede the future realisation of a collective RSD. This is because a people ordinarily exercises its RSD in a bounded territory: the presence or absence of parts of the people in that territory may affect its implementation. However, it is also conceivable that if at least part of the population remains in the territory, persons present there will be able to exercise their collective RSD, and displaced persons will eventually be able to return to the territory.

The ILC’s non-exhaustive list of jus cogens norms is instructive when considering the interrelations between non-refoulement and RSD. The list includes, alongside RSD, prohibitions on genocide and crimes against humanity, as well as basic principles of IHL. When there is a real risk of breaches of any of these norms in conflict situations, non-refoulement is clearly ‘triggered’ for States whose border closures could expose persons to such breaches. This article argues that States must abide by non-refoulement obligations which seek to prevent immediate and concrete harm to individuals, even at a potential cost to the future realisation of RSD. It would be legally—and morally—wrong to refole persons to places where they face tangible risks of violations of their rights, purportedly to protect the same persons’ RSD.

Section 3 contended that, in international law, persons fleeing rights violations in conflict must be protected from refoulement at the frontier, and that they retain an individual right to return which may also facilitate the realisation of collective self-determination. However, the reality facing many displaced persons and their host States

¹³¹ ‘Karabakh Armenians Reject Armenian Citizenship: Fears and Expectations’ *JAM News* (21 October 2024) <<https://jam-news.net/armenian-citizenship-fears-of-karabakh-armenians/>>.

¹³² Armenia claimed at the oral hearing on 16 April 2024 that Azerbaijan is ‘erasing all traces of ethnic Armenians’ presence’: see ICJ, *Application of the International Convention on the Elimination of all forms of Racial Discrimination (Armenia v Azerbaijan)* (Verbatim Record 2024/18, 16 April 2024) <<https://tinyurl.com/jmccrycy>>.

¹³³ ICCPR (n 18) art 1.

¹³⁴ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 131, para 144.

¹³⁵ *Wall Advisory Opinion* (n 4) para 233. E Proukaki, ‘The Right of Displaced Persons to Property and to Return Home after Demopoulos’ (2014) 14 HRLR 701, 730 (arguing that an individual’s right to return is not weakened by the political nature of a dispute or the passage of time). See generally M Zieck, ‘Refugees and the Right to Freedom of Movement: From Right to Return’ (2018) 39 MichJIntL 19.

is one of protracted displacement. Against this background, Section 4 explores Palestinian displacements and their ensuing predicament.

4. Palestinian displacements and their RSD

4.1. Palestinian displacements: UNRWA's areas of operation and Arab host States

The predicament of Palestinian refugees remains unresolved since their mass displacement in 1948 and the subsequent, smaller-scale displacement in 1967.¹³⁶ UNRWA's mandate, to provide protection and assistance in its five areas of operations—Syria, Lebanon, Jordan, the West Bank and Gaza¹³⁷—is occasionally renewed by the UN.¹³⁸ Despite the temporary suspension of funding by some donor States in early 2024, the organisation continues to operate.¹³⁹ UNRWA entitles 'any person whose normal place of residence was Palestine during the period June 1, 1946 to May 15, 1948 and who lost both home and means of livelihood as a result of the 1948 conflict' as well as their descendants living in an UNRWA area of operation to register for its services, and has extended registration to those displaced in the 1967 war.¹⁴⁰

The majority of Palestinians reside in UNRWA's five areas of operation. Yet, many other Palestinians reside in the wider region, including in Egypt—the only Arab State bordering the Occupied Palestinian Territory (OPT) where UNRWA does not operate. To understand Egypt's response to the prospective flight of Palestinians to its territory after 7 October 2023, it is instructive to consider its early decisions regarding Palestinian displacement. Following the 1948 Israeli-Arab war, the Gaza Strip, which was previously part of the British mandate, was placed under Egyptian military administration¹⁴¹ and became one of UNRWA's areas of operation. Egypt did not want UNRWA to operate in its sovereign territory.¹⁴² Instead, an agreement was signed between

¹³⁶ Sources documenting the displacements, projecting starkly different narratives, are too numerous to cite; it is uncontested that displaced persons have hitherto not been permitted to return to their former places of residence inside Israeli sovereign territory.

¹³⁷ UNGA Res 302/4 (8 December 1949) UN Doc A/RES/302/4 establishing UNRWA to provide relief and works programmes to Palestinian refugees in its five areas of operation.

¹³⁸ See, e.g. UNGA Res 78/74 (7 December 2023) UN Doc A/RES/78/74, para 3: 'Assistance to Palestine refugees' which 'affirms the necessity for the continuation of the work of [UNRWA] and the importance of its unimpeded operation and its provision of services, including emergency assistance, for the well-being, protection and human development of the Palestine refugees and for the stability of the region, pending the just resolution of the question of the Palestine refugees'. In 2024, Israel outlawed UNRWA's operations in its territory. Law for the Cessation of UNRWA Activities, 5784–2024 (unofficial translation: Adalah) <https://www.adalah.org/uploads/uploads/UNRWA_bills_translation_October_2024.pdf>.

¹³⁹ 'UNRWA's Lifesaving Aid May End due to Funding Suspension' (27 January 2024) <<https://www.un.org/unsipal/document/unrwas-lifesaving-aid-may-end-due-to-funding-suspension-27jan-2024/>>.

¹⁴⁰ See UNRWA, 'Consolidated Eligibility and Registration Instructions' (CERI) <<https://www.unrwa.org/sites/default/files/2010011995652.pdf>> (regarding 1967, see UNGA Res 2253 (4 July 1967) UN Doc A/RES/2253).

¹⁴¹ Egypt-Israeli Armistice Agreement (24 February 1949) art VI.

¹⁴² O El-Abed, *Unprotected: Palestinians in Egypt since 1948* (Institute for Palestine Studies, 2009) 36 (offering detailed discussion of the changeable status of Palestinians in Egypt, noting that 15,500 have arrived between 1948 and 1960); O El-Abed, 'The Forgotten Palestinians – How Palestinian Refugees Survive in Egypt' (*Forced Migration Review*, undated) <<https://www.fmreview.org/elabed/>>. See also T Badawi, *The Memorandum of Understanding between Egypt and the Office of the UNHCR: Problems and Recommendations*

Egypt and UNRWA.¹⁴³ Article 1 thereof ensured freedom of movement between Egypt and ‘southern Palestine’ and inside both areas. In turn, Egypt signed a Memorandum of Understanding with the UNHCR, delegating the functional responsibilities for all aspects related to asylum-seekers and refugees, including registration, status determination, resettlement and voluntary repatriation.¹⁴⁴ Subsequently, it acceded to the 1951 Convention (on 22 May 1981) as well as to the Organization of African Unity Convention governing the Specific Aspects of Refugee Problems in Africa (on 17 November 1980). Yet, those Palestinians who had relocated from Gaza to Egypt over the years have not been enjoying UNHCR or, indeed, Egyptian Government support.¹⁴⁵

Unlike Egypt, other Arab neighbours that host Palestinian refugees, including Jordan, Syria and Lebanon (where UNRWA operates) have not acceded to the 1951 Convention. Attempts to ensure regional standards of protection for Palestinians have had limited success. In 1965, the League of Arab States (LAS) sought to regulate the treatment of Palestinians across the Arab world: its Casablanca Protocol¹⁴⁶ required Arab host States to provide the same treatment to Palestinians as the treatment given to their nationals concerning residence and employment; to issue and renew travel documents and visas to Palestinians; and to grant them the right to leave and return to their host State. Yet, the Protocol also emphasised the importance of preserving Palestinian identity and maintaining Palestinian refugee status, professedly to enable their return.¹⁴⁷ In 1991, the LAS decided that the Casablanca Protocol could be applied according to the national laws of each State party, a resolution which Arab States have interpreted as permitting suspension of the Protocol’s guarantees.¹⁴⁸ Ultimately, the status and rights of Palestinians in Egypt and elsewhere in the region outside UNRWA’s areas of operation remain precarious and are subject to national discretion.

4.2. *Palestinians fleeing conflicts and border closures*

The conflict in Syria in the 2010s saw mass cross-border displacement, primarily to neighbouring States.¹⁴⁹ When Palestinian residents sought to flee Syria, the reaction of

(European University Institute, 2010) n 50 (stating that ‘out of the 50,000 Palestinian residents of Egypt [at that time], less than 300 receive assistance from UNHCR. The remaining Palestinian refugees endure discriminatory measures on a daily basis’).

¹⁴³ Agreement between the Government of the Kingdom of Egypt and the United Nations Relief and Works Agency for Palestine Refugees in the Near East (12 September 1950).

¹⁴⁴ Memorandum of Understanding Between the Government of Egypt and UNHCR (1954). For an unofficial English translation, see annex A <<https://tinyurl.com/39n8kuj>>.

¹⁴⁵ MA Moghli, N Bitarie and N Gabiam, ‘Palestinian Refugees From Syria: Stranded on the Margins of Law’ (*Al-Shabaka*, 19 October 2015) <<https://al-shabaka.org/briefs/palestinian-refugees-from-syria-stranded-on-the-margins-of-law/>>. Notably, in order to avoid overlapping competencies, UNHCR’s competence is not extended ‘to a person who continues to receive from other organs or agencies of the United Nations protection or assistance’. UNGA Res 428/5 (14 December 1950) UN Doc A/RES/428, para 7(c).

¹⁴⁶ LAS, Protocol for the Treatment of Palestinians in Arab States (adopted 11 September 1965).

¹⁴⁷ El-Abed (n 142) 163–64.

¹⁴⁸ LAS, Res 5093 (12 September 1991) discussed by S Akram, ‘UNRWA and Palestine Refugees’ in Costello, Foster and McAdam (n 4) 643, 652.

¹⁴⁹ See UNHCR, *Syria Regional Refugee Response* <<https://data.unhcr.org/en/situations/syria>>.

its neighbours was mixed.¹⁵⁰ In January 2013, the Jordanian Government decided to refuse their admission.¹⁵¹ In May 2014, Lebanon started requiring Palestinians from Syria to demonstrate that they meet conditions for temporary residence or that they are only transiting through Lebanon, thereby effectively denying them entry.¹⁵² In contrast, Palestinians from Syria have generally been able to enter and remain in Türkiye, although they were neither granted refugee status there nor direct access to UNHCR services.¹⁵³ Some Palestinians who have managed to flee Syria were granted asylum in non-neighbouring States, primarily in EU Member States.¹⁵⁴ Akram notes that, by 2021, about 60 per cent of Palestinian refugees in Syria had been displaced,¹⁵⁵ reflecting both the scale of displacement generally and the fact that, at all times, at least one of Syria's borders remained open for Palestinians seeking to flee the conflict.

Not so for Palestinians seeking to flee Gaza since 7 October 2023. Its two neighbouring States, Israel and Egypt, have generally kept their borders shut. No official Israeli communication contemplated the construction of temporary displacement camps for Gazans inside Israel, should Palestinians wish to flee the armed conflict, and appraisals of the legality of Israel's internal evacuation orders had not generally entertained this option.¹⁵⁶ This is despite the fact that the risk of ethnic cleansing leading to protracted displacement, which arises in the context of displacement to non-belligerent States, would arguably have been much reduced, as it would have been in Israel's interest to seek Gazans' repatriation to their former places of residence as soon as practicable.

In contrast, an Israeli Intelligence Ministry policy paper detailing strategic options, including the permanent removal of Gaza's civilian population, was leaked soon after 7 October 2023.¹⁵⁷ The paper advocated pressuring Egypt and European countries to 'absorb' Palestinians. According to the paper, mass migration from conflict zones is a 'natural and expected outcome' of conflict which has occurred in Syria, Afghanistan and Ukraine, and is the only way to generate 'meaningful deterrence' throughout the region.¹⁵⁸ In turn, senior Israel Government ministers, including Finance Minister Bezalel Smotrich, have been making explicit calls for the ethnic cleansing of

¹⁵⁰ N Erakat, 'Palestinian Refugees and the Syrian Uprising: Filling the Protection Gap during Secondary Forced Displacement' (2014) 26 *IJRL* 581, 584; V Badalic, 'Rejected Syrians: Violations of the Principle of "Non-Refoulement" in Turkey, Jordan, and Lebanon' (2019) 49 *Two Homelands* 87.

¹⁵¹ Human Rights Watch, 'Jordan's Treatment of Palestinians Escaping Syria' (2014) <<https://www.hrw.org/report/2014/08/07/not-welcome/jordans-treatment-palestinians-escaping-syria>>.

¹⁵² Amnesty International, 'Denied Refuge: Palestinians from Syria Seeking Safety in Lebanon' (2014) <<https://www.amnesty.org/en/wp-content/uploads/2023/06/mde180022014en.pdf>>.

¹⁵³ H Bulbul, 'Recognising Palestinian Refugees in Turkey' (2024) 43 *Refugee Studies Quarterly* 1, 3.

¹⁵⁴ I Mann, 'Between Asylum and Liberation: The New Palestinian Refugees' (2023) 34 *EJIL* 491, figure 1.

¹⁵⁵ S Akram, 'UNRWA and Palestine Refugees' in Costello, Foster and McAdam (n 4).

¹⁵⁶ Cf J Bastaky and L El-Malak, 'Israel is Obligated to Let Gaza Refugees In: A Response to Alice Edwards' (*Mondoweiss*, 11 May 2024) <<https://mondoweiss.net/2024/05/israel-is-obliged-to-let-gaza-refugees-in-a-response-to-alice-edwards/>> (arguing that Israel *rather than* Egypt should be accepting Palestinians).

¹⁵⁷ Y Avraham, 'The Full Document of the Intelligence Ministry: Occupation of Gaza and Full Transfer of Its Residents' (Mekmoit, 28 October 2023) (Hebrew) <<https://tinyurl.com/mt7ahkaa>>. For an unofficial translation, see <<https://www.scribd.com/document/681086738/Israeli-Intelligence-Ministry-Policy-Paper-on-Gaza-s-Civilian-Population-October-2023>>.

¹⁵⁸ *ibid.*

Palestinians from Gaza¹⁵⁹ that would facilitate the reestablishment of Israeli settlements.¹⁶⁰ Newspaper reports in March 2025 suggested that the US and Israel were seeking to persuade Sudan, Somalia and Somaliland to admit Gazans, thereby making way for turning Gaza into a ‘Riviera on the Mediterranean’.¹⁶¹

In turn, Egypt’s response to demands that it allow Gazans to enter its territory was defiant and unequivocal: a near-hermetic border closure policy.¹⁶² On 21 October 2023, prior to the commencement of Israel’s ground operation in Gaza, the Egyptian President Abdel Fattah el-Sisi stated that:

Egypt has affirmed, and is reiterating, its vehement rejection of the forced displacement of the Palestinians and their transfer to Egyptian lands in Sinai, as this will mark the last gasp in the liquidation of the Palestinian cause, shatter the dream of an independent Palestinian state, and squander the struggle of the Palestinian people and that of the Arab and Islamic peoples over the course of the Palestinian cause that has endured for 75 years.¹⁶³

Egyptian sources subsequently affirmed Palestinians’ ‘right to self-determination, the right to remain on their land, and the right to independence’ as well as ‘the right of Palestinian refugees—who were forcibly displaced from their homeland—to return’, clearly omitting their right to leave Gaza or, indeed, Egypt’s non-refoulement obligations.¹⁶⁴ Notwithstanding the public protestations, it was reported in February 2024 that Egypt had been building a cement-walled security perimeter, purportedly to

¹⁵⁹ See, e.g. A McDonald, ‘Bezalel Smotrich Says Israel Can Empty Half of Gaza through “Voluntary” Migration’ (*Middle East Eye*, 26 November 2024) <<https://www.middleeasteye.net/news/israel-can-empty-half-gaza-bezalel-smotrich-says>>. Smotrich made similar calls in the early phases of the war: see, e.g. Al Jazeera, ‘Israeli Minister Supports “Voluntary Migration” of Palestinians in Gaza’ *Al Jazeera* (14 November 2023) <<https://www.aljazeera.com/news/2023/11/14/israeli-minister-supports-voluntary-migration-of-palestinians-in-gaza>>.

¹⁶⁰ See, e.g. M Wagner, ‘Return to Gush Katif’ (*Times of Israel*, 3 December 2023) <<https://www.timesofisrael.com/return-to-gush-katif-determined-movement-emerges-to-resettle-israelis-in-gaza/>>.

¹⁶¹ See, e.g. J Burke and M Townsend, ‘Sudan Rejects US Request to Discuss Taking in Palestinians under Trump’s Gaza Plan’ *The Guardian* (14 March 2025) <<https://www.theguardian.com/us-news/2025/mar/14/sudan-rejects-us-request-discuss-taking-palestinians-donald-trump-gaza-plan>>.

¹⁶² The relatively few Gazans who have managed to cross to Egypt are unable to register with UNHCR nor receive help from the Egyptian State. See, e.g. E Bower, ‘Gaza Refugees in Cairo Find Little Help’ *The Guardian* (18 April 2024) <https://www.theguardian.com/global-development/2024/apr/18/people-are-begging-us-to-feed-their-children-gaza-refugees-in-cairo-find-little-help?CMP=share_btn_url>; N Al-Mughrabi and A Lewis, ‘Palestinian Embassy Seeks Temporary Status for Gazans Who Entered Egypt during War’ (2 May 2024) <<https://www.reuters.com/world/middle-east/palestinian-embassy-seeks-temporary-status-gazans-who-entered-egypt-during-war-2024-05-02/>>; M Mhawish, ‘Escaping Gaza’s War, Palestinians Find Little Solace in Egypt’ (*The New Humanitarian*, 1 July 2024) <<https://www.thenewhumanitarian.org/news-feature/2024/07/01/escaping-gazas-war-palestinians-find-little-solace-egypt>>.

¹⁶³ P Wintour, ‘Why Egypt Has Not Fully Opened Its Gaza Border for Fleeing Palestinians’ *The Guardian* (2 November 2023) <<https://www.theguardian.com/world/2023/nov/02/why-egypt-has-not-fully-opened-its-gaza-border-for-fleeing-palestinians>>; see also L Kayali, ‘Why Egypt Refuses to Open Its Border to Palestinians Forcibly Displaced From Gaza’ (*The Conversation*, 23 February 2024) <<https://theconversation.com/why-egypt-refuses-to-open-its-border-to-palestinians-forcibly-displaced-from-gaza-223735>>.

¹⁶⁴ State Information Service, ‘Egypt Affirms Palestinians’ Right to Return, Self-Determination, and the Establishment of an Independent State’ (10 February 2025) <<https://tinyurl.com/yc8bypm3>>.

hold up to 150,000 people in an enclosed area should the Israeli offensive in Rafah lead to a breach of its border.¹⁶⁵ Ultimately, no such breach has occurred.

It is noteworthy to contrast Egypt's closure of its Gaza border with its approach to the armed conflict in Sudan that was happening in parallel. Over a million displaced Sudanese nationals have crossed into Egypt since the conflict in Sudan intensified in 2023, making it at the time of writing the largest host State for Sudanese refugees.¹⁶⁶ Egypt has reportedly not welcomed displaced Sudanese with open arms,¹⁶⁷ nor does it officially recognise them as refugees. However, they were able to cross its border and, crucially, are not subject to refoulement. Hence, in addition to breaching its non-refoulement obligations towards Gazans, Egyptian border policy is arguably also a case of discriminatory non-admission.¹⁶⁸

Egypt's Gaza border closure has been criticised by many scholars.¹⁶⁹ Others have sought to explain or justify it, including by highlighting additional concerns pertaining to the risk of Gazans engaging in hostile activities in the Sinai directed against the Egyptian regime.¹⁷⁰ However, as Section 3 demonstrated, while IRL permits taking measures to address such security concerns, they do not include wholesale rejection of fleeing populations at the border. In turn, the reactions of international organisations displays an unusual and questionable degree of understanding for border closures. For instance, in October 2024, one year into the conflict, UN Secretary-General António Guterres stated: '[t]he intention might be for the Palestinians to leave Gaza, for others to occupy it ... but ... the courage and the resilience of the Palestinian people and ... the determination of the Arab world ... avoid[ed] the ethnic cleansing becoming a reality'.¹⁷¹

¹⁶⁵ J Horton and D Palumbo, 'Walled Site Grows at Egypt's Border Near Gaza' *BBC News* (22 February 2022) <<https://www.bbc.com/news/world-middle-east-68375460>>.

¹⁶⁶ UNHCR, 'Egypt Now Biggest Recipient of Sudanese Forced to Flee Ongoing War' <<https://tinyurl.com/57rxdcf9>>.

¹⁶⁷ A Guergues and M Amin, 'For Sudanese Fleeing to Egypt, a Hard Border and An Uncertain Future' (*The New Humanitarian*, 10 July 2023) <<https://www.thenewhumanitarian.org/news-feature/2023/07/10/sudanese-fleeing-egypt-hard-border-and-uncertain-future/>>.

¹⁶⁸ 1951 Convention (n 17) art 3 stating that: 'The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.' Instructively, in the context of displacement from Ukraine in 2022, the African Union released a statement in light of reports that Africans fleeing Ukraine were denied entry to neighbouring countries, in which it reiterated that 'all people have the right to cross international borders during conflict': 'Statement of the African Union On the Reported Ill-Treatment of Africans Trying to Leave Ukraine' (28 February 2022) <<https://au.int/sites/default/files/pressreleases/41534-pr-english.pdf>>.

¹⁶⁹ J Hathaway, 'Trapped in Gaza' (*Verfassungsblog*, 25 October 2023) <<https://verfassungsblog.de/trapped-in-gaza/>>; McAdam and Goodwin-Gill (n 95); J Crisp, 'Palestinians in Gaza: Do They Have a Right to Seek Asylum Elsewhere?' (*United against Inhumanity*, 16 April 2024) <<https://www.against-inhumanity.org/2024/04/16/palestinians-in-gaza-do-they-have-a-right-to-seek-asylum-elsewhere/>>; B Frelick, 'No Exit in Gaza: Left with No Other Options, Residents Should Have a Right to Flee' *The Hill* (1 April 2024) <<https://tinyurl.com/bdf22t2b>>; A Edwards, 'Egypt Is Obligated to Let Gaza Refugees In' (*Foreign Policy*, 30 April 2024) <<https://foreignpolicy.com/2024/04/30/gaza-refugees-egypt-border-palestine/>>.

¹⁷⁰ Bastaky and El-Malal (n 156); see also L Kalay, 'Why Egypt Refuses to Open Its Border to Palestinians Forcibly Displaced from Gaza' (*The Conversation*, 23 February 2024) <<https://theconversation.com/why-egypt-refuses-to-open-its-border-to-palestinians-forcibly-displaced-from-gaza-223735>>.

¹⁷¹ P Greenfield, MA Tantesh and J Borger, 'World Must Act to Prevent "Ethnic Cleansing" of Gaza, António Guterres Warns' *The Guardian* (31 October 2024) <<https://www.theguardian.com/world/2024/>>

At the time of writing, none of the UNSC's four resolutions on the conflict in Gaza since 7 October 2023 have referred to non-refoulement or a right to asylum.¹⁷² None of UNRWA's statements directly referred to potential departures from Gaza.¹⁷³ In turn, the UNHCR, entrusted in Article 35 1951 Convention to 'supervise' its implementation, has refrained from calling on Egypt to allow those seeking to flee to do so or from suggesting that other States should ease Egypt's potential burden by offering temporary protection.¹⁷⁴ Stating on 21 February 2024 that '[t]here is no safe place in Gaza', UNHCR proceeded to list 'ten requirements to avoid an even worse catastrophe', none of which concerned the right to seek asylum.¹⁷⁵ A UNHCR spokesperson posited that '[a]dding another complex layer of crisis and exodus will make the original solution to these problems even more intractable'.¹⁷⁶ This statement is hardly compatible with the UNHCR's approach to displacement in other conflicts.

4.3. Putative displacement from Gaza after 7 October 2023: ramifications for refugee status pursuant to the 1951 Convention

In August 2023, UNRWA reported that 1.47 million Gazan residents were registered for its 'protection or assistance' out of 1.7 million Gazans eligible for such services: most of them are descendants of Palestinians displaced in 1948.¹⁷⁷ Article 1D(1) 1951 Convention excludes from refugee protection Palestinians who are 'at present receiving protection or assistance'¹⁷⁸ from UNRWA. However, per Article 1D(2), when such 'protection or assistance' has ceased 'for any reason' such persons are ipso facto entitled to the benefits of the 1951 Convention,¹⁷⁹ subject only to the 1951 Convention's exclusion (Article 1F) and cessation (Article 1C) clauses.

oc30/antonio-guterres-warns-israel-could-carry-out-ethnic-cleansing-of-gaza (reporting on Guterres' speech at the COP16 biodiversity conference in Colombia).

¹⁷² UNSC Res 2712 (15 November 2023) UN Doc S/Res/2712 (whose reference to displacement was confined to '[r]ejecting forced displacement of the civilian population, including children, in violation of international law, including international humanitarian law and international human rights law'); UNSC Res 2720 (2 December 2023) UN Doc S/Res/2720; UNSC Res 2728 (25 March 2024) UN Doc S/Res/2728; UNSC Res 2735 (10 June 2024) UN Doc S/Res/2735 (the last resolution pertaining to the Gaza at the time of writing).

¹⁷³ For a list of UNRWA statements, see UNRWA, *Official Statements* <<https://www.unrwa.org/newsroom/official-statements>>.

¹⁷⁴ There has also been no attempt to adopt a responsibility-sharing scheme for Gazans or to activate regional mechanisms such as the EU's Temporary Protection Directive facilitating the arrival of a 'mass influx' of persons. See Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L1/212, art 2(d). The directive was activated in March 2022 in response to the full-scale invasion of Ukraine.

¹⁷⁵ UNHCR, 'Civilians in Gaza in Extreme Peril while the World Watches On: Ten Requirements to Avoid an Even Worse Catastrophe' (21 February 2024) <<https://www.unhcr.org/uk/news/speeches-and-statements/civilians-gaza-extreme-peril-while-world-watches-ten-requirements>>.

¹⁷⁶ Crisp (n 169).

¹⁷⁷ UNRWA, 'Where We Work: Gaza Strip' (August 2023) <<https://www.unrwa.org/where-we-work/gaza-strip>>; see also S Bashi, *Gaza: Two Rights of Return* (Human Rights Watch, 2024) <<https://www.hrw.org/news/2024/01/27/gaza-two-rights-return>>.

¹⁷⁸ The phrase 'at present' is generally interpreted to apply at the time of assessment rather than the time of adoption of the 1951 Convention. Cf J Hathaway and M Foster, *The Law of Refugee Status* (2nd edn, OUP 2014) ch 6.

¹⁷⁹ The additional condition in art 1D(2) is that the position of Palestine refugees has not been 'definitely settled' in accordance with UNGA resolutions. This is a reference to UNGA Res 194/3 (11 December 1948)

Article 1D(2) can only be triggered by leaving an UNRWA field of operation, and case law suggests that the deportee must demonstrate that their departure was involuntary.¹⁸⁰ Bulbul poignantly observes that the phrase ‘for any reason’ has been effectively supplanted by a requirement for there to be ‘objective reasons’.¹⁸¹ The UNHCR describes four such alternative scenarios:¹⁸² first, termination of UNRWA’s mandate; second, inability of UNRWA to fulfil its protection or assistance mandate in one or more of its areas of operation by guaranteeing there living conditions compatible with its mission; third, a threat to the applicant’s life, physical integrity, security or liberty or other serious protection-related reasons; fourth, practical, legal and/or safety barriers preventing an applicant from (re)availing themselves of the protection or assistance of UNRWA.¹⁸³

Beyond UNRWA’s general financial challenges, its ability to operate in Gaza since 7 October 2023 has been severely curtailed. In June 2024, the Fourth Chamber of the European Court of Justice (ECJ) held that, in exceptional circumstances, Palestinian applicants that meet the Article 1D(1) criteria do not need to show they are personally targeted or that they are affected to a greater degree by risks generated from a general situation in UNRWA’s area of operation where they reside.¹⁸⁴ The court found that the extreme poverty and generalised insecurity in Gaza are sufficient to establish that UNRWA is unable to fulfil its mandate.¹⁸⁵ Notably, the applicants had left Gaza well before 7 October 2023, so the ECJ’s determination would apply a fortiori to the worsened situation there. Yet, trapped in Gaza, Palestinians cannot avail themselves of the 1951 Convention protections to which they would be entitled.

UN Doc A/RES/194, which resolved that ‘refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which, under principles of international law or equity, should be made good by the Governments or authorities responsible’.

¹⁸⁰ K Ogg, *Protection from Refuge* (CUP 2022) 165.

¹⁸¹ Bulbul (n 153) 6. See, in the EU context, Case C-364/11 *Mostafa Abed El Karem El Kott v Hungary* ECLI:EU:C:2012:826, para 82, where the provision was interpreted by the ECJ to cover ‘a person who, after actually availing himself of such [UNRWA] protection or assistance, ceases to receive it for a reason beyond his control and independent of his volition’.

¹⁸² UNHCR, ‘Guidelines on International Protection No 13: Applicability of Article 1D of the 1951 Convention relating to the Status of Refugees to Palestine Refugees’ (December 2017) para 22.

¹⁸³ ‘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’ (May 2013) para 2 <<https://www.refworld.org/policy/legalguidance/unhcr/2013/en/41179>>. Cf Case C-31/09 *Nawras Bolbol v Hungary* ECLI:EU:C:2010:351, para 51 (stating that ‘only those persons who have actually availed themselves of the assistance provided by UNRWA come within the clause excluding refugee status set out therein’).

¹⁸⁴ C-563/22 *SN, LN v Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite* ECLI:EU:C:2024:494 (concerning a stateless mother and child of Palestinian origin who had lived in the Gaza Strip. In July 2018, they fled Gaza due to unsustainable living conditions and entered Bulgaria irregularly).

¹⁸⁵ But see C Rauceau, ‘Fifty Shades of Non-Refoulement’ (*AdiM Blog*, August 2024) <<https://www.adimblog.com/2024/08/31/fifty-shades-of-non-refoulement/>> (critiquing the judgment for appearing to require UNRWA to have failed to meet the applicants’ basic needs both at the time when they lived in its area of operation and upon return).

4.4. *Non-Refoulement and Palestinians' RSD*

The ICJ's longstanding position, first expressed in its *Wall* Advisory Opinion, is that 'the existence of a "Palestinian people" is no longer in issue' and that the rights of the Palestinian people 'include the right to self-determination'.¹⁸⁶ In its *Legality of Occupation* Advisory Opinion, the ICJ held that 'by virtue of the right to self-determination, a people is protected against acts aimed at dispersing the population and undermining its integrity as a people'.¹⁸⁷ Hence, forced displacement and/or ethnic cleansing, in addition to being themselves violations of international law, may affect a people's ability to exercise their RSD. Yet, it would be wrong to suggest that the forced displacement of parts of a people whose RSD is at stake weakens that people's RSD. The converse position creates a perverse incentive to alter the demographic composition of a territory in order to weaken a displaced population's RSD.¹⁸⁸

The UNGA has repeatedly stated that the RSD of Palestinians 'extends to the displaced Palestinian population',¹⁸⁹ and nearly 150 States have recognised the State of Palestine, despite the fact that part of its putative population resides outside its territory.¹⁹⁰ This article argues that, even if Palestinians had been able to leave Gaza after 7 October 2023, it would not have normatively affected their RSD. 'Palestinian exceptionalism'¹⁹¹ should be rejected, and the reticence of international actors to call out breaches of rights of individual Gazans to flee should itself be called out. As Crisp noted, no UN agency has ever intimated that 'the stateless Rohingya population of Myanmar should be prevented from seeking asylum in Bangladesh because allowing them to leave it would facilitate the very evident ethnic cleansing objectives of the armed forces in their homeland'.¹⁹² Hathaway poignantly described Egypt's border closure as 'reducing at-risk Palestinians to little more than collateral damage in the quest for self-determination'.¹⁹³ Indeed, if asylum can be effectively denied on the grounds that it would facilitate mass expulsions, how many other States, confronted with an impending influx, would use this argument as a pretext for the closure of their borders?

Writing before 7 October 2023 in relation to Palestinian displacement from UNRWA areas of operations to the European Union, such as in the case of Palestinian residents of

¹⁸⁶ *Wall* Advisory Opinion (n 4) para 118; see also *Legality of Occupation* Advisory Opinion (n 4) para 230. A Sanger, 'Inherent Illegality: Israel's Presence in Occupied Palestinian Territory Violates Fundamental Rules of International Law' (2025) 84 CLJ 1, 3 (arguing for a distinction between a temporary interference with the RSD which is inherent in occupation and interference designed to permanently prevent the exercise thereof in the future and/or that is likely to have this effect).

¹⁸⁷ *Legality of Occupation* Advisory Opinion (n 4) para 239.

¹⁸⁸ See also V Tadros, 'The Persistence of the Right of Return' (2017) 16 *Politics, Philosophy & Economics* 375, 382–83 (arguing that children of first generation Palestinian refugees foster a relationship [to the land] through engaging with their parents' struggles); T Levinger, 'Denying the Right of Return as a Crime Against Humanity' (2021) 34 *IsrLRev* 205.

¹⁸⁹ See, e.g. UNGA Res 43/177 (15 December 1988) UN Doc A/RES/43/177, quoted by H Warmenhoven, 'Searching for Self: Realising the Right of Self Determination for the Palestinian People' (2020) 17 *CanBLR* 116.

¹⁹⁰ World Population Review, *Countries that Recognize Palestine 2026* <<https://worldpopulationreview.com/country-rankings/countries-that-recognize-palestine>>.

¹⁹¹ Kagan (n 14).

¹⁹² Crisp (n 169).

¹⁹³ Hathaway (n 169).

Syria (explored in Section 4), Mann analysed legal and policy dilemmas concerning the effects of expansive interpretations of Article 1D(2) which widen the scope of beneficiaries of protection on the realisation of the Palestinian people's RSD.¹⁹⁴ He noted 'an assumption of an inverse correlation' between international protection and self-determination.¹⁹⁵ Mann contemplated that, in deciding whether to leave an UNRWA area of operation and seek asylum elsewhere, individual Palestinians may be undertaking a balancing act: making a sacrifice for the collective by staying versus personal and familial survival which may require leaving.¹⁹⁶ Yet, even if Mann's description holds true for some Palestinians, it should be their balancing act, rather than that of external actors. Ultimately, for such a dilemma to arise, the individual Palestinian's agency to decide whether to leave or remain must be accompanied by an effective and realisable right to leave and go somewhere where they will be protected. A Palestinian seeking to leave an UNRWA area of operation needs to be able to cross an international border in order to receive protection in a State that adheres to its non-refoulement and other IRL obligations. It is their right, and it must be protected.

5. Conclusions

Displacement from conflict raises particular challenges pertaining to the voluntariness of departure and the effective possibility of return. However, the fundamentals are, or indeed should be, settled in international law. First, temporary evacuations inside occupied territory and, rarely, outside it may be permitted, but deportations and forcible transfers are always prohibited. Second, everyone has a right to leave any territory, including occupied territory. The right is not weakened by the unlawful actions of occupiers, even when those amount to constructive deportation. Third, States are bound by their non-refoulement obligations, which apply at their frontier, and they must adhere to them without discrimination. General border closures, including in situations of 'mass influx', are impermissible as they deny access to protection to persons fleeing rights violations, which in some cases include breaches of jus cogens norms. Fourth, displaced persons have a right to return to their 'own country', including in situations of mass displacement, inter alia, to exercise a collective RSD. Ultimately, adherence to non-refoulement must not be subjected to geopolitical calculi that condition protection of individuals from immediate, tangible rights violations on the future realisation of collective RSD.

The humanitarian catastrophe in Gaza that has unfolded since 7 October 2023, coupled with the adoption by international organisations and States of a 'Palestinian exceptionalism' approach, has effectively denied individuals who have been facing real risks of rights violations access to protection elsewhere. This lamentable outcome has already had dire consequences for many Gazans. Unless it is unwaveringly rejected, it may become a precedent which detrimentally affects those fleeing future conflicts.

¹⁹⁴ Mann (n 154) 507.

¹⁹⁵ *ibid* 492.

¹⁹⁶ *ibid* 514 (concluding that individuals' protection should not be instrumentalised for the purposes of group politics, but neither should an ethics of hospitality entirely bifurcate them).

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