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The Legal Dimension of Migration: The Palestinian Case

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The Legal Dimension of Migration: The Palestinian Case

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Abstract

In this report I consider Israeli policies aimed at reducing the number of Palestinians in the areas under its control. I then deal with the rights and freedoms of Palestinian refugees in host countries. I show how Palestinian refugees are dealt with in host countries as a security issue, with consequently limited rights and freedoms, an extra burden on their already fragile situation. I urge for a more stable legal status for Palestinian refugees. I then deal with the special challenge that the Gaza Strip poses for the international community. I argue that UNRWA is being pushed into a risky though perhaps necessary field, namely the protection of refugees and other fragile categories of civilians. Finally, I present an update of Palestinian Authority legislative enactments notwithstanding the stagnation in the Palestinian constitutional system that followed the 2007 Hamas coup in Gaza.

Résumé

Cet article aborde plusieurs points. Il se penche sur les politiques israéliennes visant à créer des faits accomplis en réduisant le nombre de Palestiniens dans les zones sous contrôle israélien. Il évalue l'état des droits et des libertés dont bénéficient les réfugiés palestiniens dans leurs pays d'accueil. Il montre que les réfugiés palestiniens sont abordés dans les pays hôtes comme un problème sécuritaire, entraînant une réduction des droits et des libertés et aggravant leur situation déjà fragile. L'article recommande un statut juridique plus stable pour les réfugiés palestiniens. La bande de Gaza représente un défi particulier pour la communauté internationale. L'UNRWA est entraînée sur un terrain risqué, et pour cette raison utile, celui de la protection des réfugiés et d'autres catégories de civils vulnérables. Enfin, l'article présente une actualisation de l'activité législative de l'Autorité palestinienne en dépit de la stagnation du système constitutionnel palestinien qui a suivi la prise de contrôle du Hamas à Gaza en 2007.

This paper follows two previous reports published in 2007 and 2009,[1] that offered major updates on migration issues in Palestine with a special focus on the legal dimension. In particular this paper deals with: (1) the newly adopted Israeli measures that consolidate its much older policy of forcibly displacing Palestinians – deemed by Israel to be foreign residents in their home country; (2) an update on the socio-economic rights of Palestinian refugees in host countries and the new legal changes and legislative amendments in Arab countries where most Palestinian refugees are based; (3) an update on the Gaza Strip and population movement as a result of continuous siege and the challenge that this poses to the international community and to UNRWA in particular; (4) and, finally, an update of the legislative and legal changes related to migration that have been introduced by the Palestinian Authority.

1. New Order, Old Policy

On April 13, 2010, a new Israeli military Order 'regarding Prevention of Infiltration' – Order No. 1650 of 2009 – took effect, six months after being signed by the Israeli Commander of the IDF (Israeli Defense Forces) in the 'Judea and Samaria Area'.[2] It is an amendment to Order No. 329 of 1969,[3] which was almost as old as the occupation itself.[4] Order no. 1650 contains nine sections that introduce changes to almost all sections of Order no. 329. There are, however, two major – but still subtle – changes in this new order: one is related to the definition of infiltrator and the other regards the way that Israel deals with cases of infiltration.[5]

In fact, according to this new order, it is now possible for Israeli military commander to define as 'infiltrators' any person who is present in the 'area' (a term referring *grosso modo* to the West Bank, excluding East Jerusalem) and who is found without an ID or a permit issued by a military commander or by Israel proper. This applies to thousands of Palestinians who are (and for some of them, have) lived in the West Bank, but who – for various reasons – do not have an ID number and could not obtain a permit. It also applies to those Palestinians of East Jerusalem and the Gaza Strip who now need a permit in order to reside lawfully in the 'area', or failing that will be considered infiltrators.[6] Besides, the Order limited the possibilities of paying fines in order to regulate an unlawful stay, leaving only two options: prison and/or deportation.

Despite the novelty of this new order, and despite the particularly negative impact this new order has on the Palestinians as a people, and on the West Bank and the Gaza Strip as one geographical and political unit; it is nonetheless an error to look at said order as a new Israeli policy. On the contrary; this *new* order fits perfectly within a legal system that Israel set up in the West Bank and Gaza Strip through hundreds of military declarations and orders. It is through military orders that Israel

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[1] Khalil, Palestine, the Legal Dimension of Migration, 2007; Khalil, Palestine: the Legal Dimension of Migration, 2009.

[2] The text is in Hebrew. An unofficial translation was made available by Hamoked: http://www.hamoked.org.il/items/112301_eng.pdf .

[3] The first amendment was in Order no.831 of 1980, that included minor changes, an addition to article 3-B. An unofficial translation of order 329 is made available online by Hamoked: http://www.hamoked.org.il/items/112300_eng.pdf

[4] Order no. 1650 of 2009 is the second amendment to order no. 329 of 1969. The first amendment was effected by order no. 831 of 1980. Order no.329 of 1969 was a substitution of an earlier order, no.125 of 1967 adopted on September 21. The latter substituted an earlier order no.106 adopted in that same year, in the aftermath of the Israeli occupation of the West Bank. There are two interesting changes between order no.329 and order 125: first, order no.125 defined the 'area' as being the 'area' of the West Bank; while order no.329 ignored such a definition all together; second, while in order 125 it is the IDF area commander, or the one delegated by him, who is empowered to deport any infiltrator, order 329 empowers any military commander to take such a decision. The deportation decision in both decrees shall be in writing. All military orders referred to in this paper, unless otherwise specified, are from Birzeit University Database: http://muqtafi2.birzeit.edu/.

[5] I have looked at this matter in detail in earlier publication; for more details, see: (Khalil, Impact of Israeli Military Order No. 1650: On Palestinians' Rights to Legally Reside in Their Own Country, 2010). See, *generally*, (Abu Eid 2011).

[6] As appears clearly in Section 5-B, introduced by Order no. 1650.

unilaterally distributed entitlements: who can have an ID number and who cannot; who can stay in and/or reenter his/her homeland and who cannot; who needs a permit to enter the 'area' and who does not; who can enjoy residency status through family unification and who cannot.[7] These examples show clearly that the *new* order is part of an overarching policy that has been growing since 1967: maximizing Israeli control of (Palestinian) land and minimizing the number of (Palestinian) people. The fact that this policy is targeting a specific national group and the fact that it is accompanied by a persistent settlement policy in the occupied Palestinian territories renders these policies, not only discriminatory, but also racist and colonial in nature.

Israel has applied similar discriminatory policies – though with different legal tools and justifications – on the Palestinians of Jerusalem (Jerusalemites). Recently, the Israeli Supreme Court validated the Israeli government decision to withdraw ID cards from Jerusalemite MPs, because they refused to resign from the Palestinian Legislative Council following the 2006 elections and refused to swear an oath of loyalty to the state of Israel (despite the fact that Jerusalemites, for Israel, are deemed foreign residents, not citizens). These MPs are threatened with deportation and for that reason took refuge in the ICRC building in Jerusalem.[8]

2. Socioeconomic Rights of Palestinian Refugees

Enjoyment of socio-economic rights by Palestinian refugees in countries in the region has long been precarious, notwithstanding an international legal framework for the protection of refugees' rights. In fact, the problem of socio-economic rights is less a matter of recognition than it is a matter of enforceability; besides, the lack of internationally sanctioned protection mechanisms for Palestinians (what some authors referred to as the 'protection gap'[9]) leaves Palestinians completely dependent on national policies and measures.[10]

The result is an impossible situation where Palestinian refugees lack a secure legal status (through citizenship rights or other forms of secure residency). Unstable legal status has serious implications for Palestinian refugees' enjoyment of socio-economic rights because legal status is about the 'right to have rights.'[11]

Some clarification is needed here. Since the distribution of rights depends on national laws, there is definitively not 'one' legal status, but rather various legal statuses (depending on the state), and various types of 'Palestinians' (depending on the conditions of refugeehood). The most appropriate metaphor to describe this plurality is not a 'map', but a matrix, in which legal status is not defined in general and abstract norms, but where it is largely dependent on contingent conditions related to the category of Palestinians whose status is being defined. Distributing rights and freedoms according to

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[7] I have covered those matters in previous research papers. For more, *see*, (Khalil, Family Unification in the Occupied Palestinian Territory 2009) (Khalil, Impact of Israeli Military Order No. 1650: On Palestinians' Rights to Legally Reside in Their Own Country 2010) (Khalil, Irregular Migration into and through the Occupied Palestinian Territory 2009) (Khalil, Legislating for Migration: The Anomalous Case of the Palestinian Authority 2006) (Khalil, Palestine: the Legal Dimension of Migration 2009) (Khalil, Palestine: the Legal Dimension of Migration 2007) (Khalil, The Circulation of Palestinian Refugees and Migrants 2008).

[8] The Israeli government decision was taken on 19/5/2010 and the Israeli Supreme Court validated it on 20/6/2010. For more on this particular case, *see*, (Abu Soai 2011).

[9] For example: (Suleiman 2006); (Akram, Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution 2002); (Badil, Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention 2005).

[10] I have dealt with the socio-economic rights of Palestinian refugees in host countries in much more detail. For more, *see*, (Khalil, Palestinian Refugees in Arab States: A Rights-Based Approach 2009); (Khalil, Socioeconomic Rights of Palestinian Refugees in Arab Countries Forthcoming).

[11] (Shiblak 2006, 9).

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this matrix inevitably means that rights and freedoms may be much more easily manipulated by host countries. This manipulation will depend on both government politics and local concerns, but also on the unstable relations host countries have with the PLO.

This is not merely a theoretical point, but one that has concrete consequences for Palestinian refugees. Among these consequences are: first, satisfying UNRWA conditions and, in any case, registration with UNRWA does not convert Palestinian refugees into 'one category' of persons, governed by same set of rules and for that reason subject to similar treatment in all countries where UNRWA is operating. Second, though registration by UNRWA may be necessary as a condition for recognition by the host state, it is only one of many conditions imposed arbitrarily by the state.

This plurality of different legal treatments explains why even countries that apply largely favourable treatment to Palestinian refugees do not extend this treatment to all Palestinians but only to *their* Palestinians. So Jordan treated Palestinian refugees from Gaza following the 1967 war differently from 'Jordanian' Palestinians,[12] while Syria had little to offer Palestinian refugees from Iraq following on from the 2003 war and the persecution that followed.[13]

Being a Palestinian refugee, according to national regulations, sometimes involves favourable treatment:[14] in Syria, for example, Palestinians are treated as nationals in almost all respects.[15] It is also the case in Jordan, at least for those having obtained Jordanian nationality.[16] In other countries, however, Palestinian refugees are treated like other foreign nationals: for example, in Egypt[17] and Lebanon.[18]

Treating Palestinian refugees as foreign nationals meant in practice excluding them from certain rights and freedoms enjoyed by nationals such as access to public education and health facilities and access to certain jobs. The most striking cases of discrimination, however, are more subtle than this. Some host countries subject Palestinian refugees to restrictions that are much more stringent than those applied to other foreign residents; this is the case of Lebanon in particular where work permits for example and social security were conditioned by satisfying the 'reciprocity of treatment' clause – which is impossible to satisfy in the case of stateless Palestinian refugees.[19]

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[12] For more about Palestinian refugees on the Gaza Strip in Jordan, *see,* (El-Abed, Immobile Palestinians: ongoing plight of Gazans in Jordan 2006).

[13] There are around 30,000 Palestinians from Iraq, mostly Muslim Sunnis, not registered with a UN agency. They were caught in sectarian violence and suffered particularly because of preferential treatment, real or perceived, under Saddam. Many Palestinians of Iraq came to Syria between 2003 and 2005 and settled in northern Syria. In early 2006 the Syrian government started to apply a more restrictive policy toward Palestinians coming from Iraq. In April-May 2006, UNHCR, the International Organization for Migration, and UNRWA organized a convoy to Syria for Palestinians who had been stranded on the Iraqi-Jordanian border, where Jordanian authorities had refused them entry. After negotiations with the Syrian government, these people were allowed into Syria and then settled in a camp at al-Hol, near Hasaka, in north-eastern Syria. (Al-Khalidi, Hoffmann and Tanner 2007, 14).

[14] See (Badil, Survey of Palestinian Refugees and Internally Displaced Persons 2006-2007 2007, 125).

[15] One of those exceptions is the right to own multiple homes, and the right to vote, which is of course limited to Syrian nationals alone. *See, generally,* (Reeds 2006, 374).

[16] Many 1948 Palestinian refugees obtained Jordanian nationality based on the territorial jurisdiction of the state of Jordan in the West Bank and Transjordan. As for those who were displaced in 1967 and arrived in Jordan, a distinction is made between those who fled the West Bank (deemed internally displaced because the West Bank was part of Jordan) and those who fled from the Gaza Strip, until then under Egyptian administration. The second group did not have access to nationality, while the first did have access to nationality. Within the second group, however, a further distinction was made based on place of residence, especially following the late King Hussein's 1988 decision to sever legal and administrative liaison with the West Bank.

[17] For more about Palestinians in Egypt, see El- (El-Abed, Immobile Palestinians: ongoing plight of Gazans in Jordan 2006, 25).

[18] According to Takkenberg, Palestinians in Lebanon are in principle subject to the same legal status as other foreign nationals, with the exception of the period between 1969 and 1987 which was to a limited extent regulated under the Cairo Agreement and its annexes. (Takkenberg 1998, 162).

[19] (Suleiman 2006, 16); (Al-Natour 1997, 270); (Sayigh 1995, 44).

This subtle and indirect discrimination against Palestinians in Lebanon has been criticised by many human-rights organizations.[20] This situation finally came to an end in August 2010 with laws no.128 and 129 that exempt Palestinians duly registered in Lebanon from abiding by the reciprocity clause, both for obtaining a work permit and for social security;[21] amendments that were welcomed by both the International Labour Organization and UNRWA.[22]

3. Gaza Strip

The stagnation in the region that followed Hamas taking control of Gaza by force in 2007 is still a fact of life. Israel continues to apply restrictive measures towards access of both people and goods, besieging the Strip (using force against those who try to break the siege, such as with the 'Freedom Flotilla' in May 2010), while Egypt still limits access to and exit from Gaza through the Rafah Crossing to humanitarian and a few special cases.[23]

In what follows I will limit my reflections to the challenge that Gaza – where the majority of the population are refugees – poses for the international legal system; in particular I argue that the 'Gaza syndrome' is pushing UNRWA beyond assistance and relief towards a protection role.[24] Two reasons for this shift can be cited here.

First there is the lack of international protection mechanisms and institutions capable of dealing with the civilian and refugee causalities; as was shown so clearly in the latest Israeli 'war on Gaza' in 2008-2009.

Second there is the lack of a national authority capable of protecting civilians in Gaza. Israel has always refused to assume responsibility towards civilians under its control in its capacity as occupying power; and this has been underlined by Israel's unilateral withdrawal from Gaza in 2005. Then, the Palestinian Authority is not a state and, in any case, the PA is no longer able to reach Gaza's population since 2007 when Hamas' *de facto* government took power. Then, finally, Hamas is unable to provide protection for the population of the Gaza Strip.

This *de facto* shift – though contrary to what appears to be UNRWA's statuary mandate – reflects the different vision that the international community, and the General Assembly in particular, has in mind for the new/old UNRWA, in the absence of alternative national or international protection regime. This applies towards refugees, of course, but also towards other fragile groups, such as children and women.[25] This shift actually tends to consolidate UNRWA's past efforts, much earlier in its history, and on more than one occasion,[26] to add to the role defined in its mandate as responsibility for protection of refugees. Protection in that sense extends to all those activities that aim at the full respect of refugee rights that can be traced in international human-rights law, humanitarian law, and refugee law.[27]

Yet expanding UNRWA's mandate in this way renders it more fragile and vulnerable to attack; and such attacks oppose not only the expansion of UNRWA's role, but also the existence of the organization

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[20] (International Federation for Human Rights 2003, 13).

[21] See Law no.128 amending article 9 of the Social Security Law, available at: http://jo.pcm.gov.lb/j2010/j41/wfn/n128.htm#> and Law no.129 amending article 59 of Lebanese Labor Law issued in 23/9/1946 available at: http://jo.pcm.gov.lb/j2010/j41/wfn/n129.htm.

[22] See statement available at: http://unispal.un.org/UNISPAL.NSF/0/1FF8587D5032893685257783004BC157.

[23] For more, *see*, (Khalil, Palestine: the Legal Dimension of Migration 2009, 271-2).

[24] I have discussed this thesis in detail, *see*, (Khalil, The 'Protection Gap' and the Palestinian Refugees of Gaza Strip 2011).

[25] For more, *see*, (Bartholomeusz 2010)

[26] See for example: (BADIL, Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention 2005, 42ff)

[27] (Bartholomeusz 2010, 466).

itself, as well, of course, as its whole mandate and its role in keeping alive the issue of Palestinian refugees. The position of UNRWA has been made even more perilous since the global financial crisis. In fact, while depending on international funds, UNRWA is facing a serious risk because many countries are decreasing their funding due to the economic crisis, while others work to discredit the organization and argue for using international funds for refugee resettlement programs instead.[28]

Alarmed voices are now being heard. UNRWA's financial crisis will have a disastrous impact on Palestinian refugees in the Gaza Strip. The previous argument suggests that a weak UNRWA would lead to a humanitarian crisis much deeper and worse than the one we have now, and worse than perhaps we can imagine, with consequences that go beyond the Gazan refugees.

In fact, UNRWA's role in avoiding a worse situation, and its role in responding to emergency needs is essential.[29] The best way to describe this approach can be summarized by a quotation from Rex Brynen's speech on the occasion of the 60th anniversary of UNRWA: 'happy 60th anniversary, UNRWA. I wish you were unnecessary — that issues of refugees and peace had long ago been resolved. Until they are, however, the Agency, its staff, and their very hard work remain invaluable.'[30] The point this approach stresses is not that UNRWA is unnecessary, but rather that UNRWA is not enough. The alternative, however, would be not to replace UNRWA with UNHCR, but rather to enhance the protective role of UNRWA, or to extend the protection mandate of UNHCR to Palestinian refugees alongside (not instead of) existing agencies dealing with Palestinian refugees.

4. The Palestinian Authority

The Palestinian Legislative Council, under its new formation following the second legislative elections, has not adopted any new law since 2006. The President used his power to legislate through Decree Laws.[31] He adopted some interesting presidential decrees that will also be reported here:

> Decree-Law No.17 of 2009 concerns relations with foreign exchanges.[32] It cancels all registration and permission for any moral person dealing with foreign exchanges (art.2) except banks operating in the Palestinian territory and with permission from the Palestinian Monetary Authority (art.3). This prohibition was attacked in front of the High Court acting as High Constitutional Court because it was deemed to be contrary to free-market principles as expressed in the Basic Law (art.21). The court rejected the petition and confirmed the legality of this decree law.[33]

Decree-Law No.4 of 2010 deals with the Prohibition and the Boycott of the Products of the Settlements.[34] The decree-law does not extend to all Israeli products, but only to those products of the (Israeli) settlements, deemed illegal in the Palestinian market (art. 4) and on those persons who deal in them (art.3). The decree-law marks part of a series of national initiatives aiming at eliminating Israeli settlements constructed illegally on the Palestinian occupied territory (art.2). It is in harmony with the official position of the UN towards Israeli settlements. The European Union legal system finally became coherent with the official position of the Union related to Israeli settlement, as a result of a

[28] The decline in aid was felt by refugees in host countries much earlier than that; in fact, the establishment of the Palestinian Authority and the Oslo process in general resulted in the 'skewing of international funds away from the 'outside' refugees' (Sayigh 1995, 51).

[29] (Brynen 2009, 6).

[30] (Brynen 2009, 7).

[31] All decree-laws and other legislative texts cited in this paper can be found in Al-Muqtafi (The Palestinian Legal and Judicial System) of Birzeit University: http://muqtafi2.birzeit.edu/. Registration is required to access.

[32] The text is available at: http://muqtafi2.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2009&MID=16050&lnk=2

[33] The decision was reported in: http://www1.wafa.ps/arabic/index.php?action=detail&id=70724

[34] The text is available at: http://muqtafi2.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2010&MID=16090&lnk=2

newly adopted ruling of the European Court of Justice in which the court decided that the products originating from Israeli settlements do not fall into Israeli customs authority and that they do not benefit from preferential treatment under the EC-Israel Association Agreement.[35]

In Decree No.19 of 2009, the President ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[36] The decree refers to the Basic Law and decides the application of the CEDAW convention in a way that is coherent with the Basic Law itself (art.1). Similarly, the President ratified the Statute of the Council of Arab Peace and Security in Decree No.34 of 2009.[37] Palestine, indeed, is a full member of the Arab League and the President's ratification was in line with the Khartoum Arab Summit Decision No.331 on 28-29/3/2009.

Decree No.6 of 2010 grants Palestinian nationality to those who participated to the solidarity Flotilla of Freedom.[38] This decree can be considered at best symbolic in the current state of affairs, given that the Palestinian Authority has no control over Palestinian borders – still under the full Israeli control – and given too the lack of sovereign control over the population register – still controlled by the Israeli military and civil administration. While in Decree No.7 of 2010 President Abbas established a fund, named for him, to help Palestinian students in Lebanon.[39] This decree is particularly relevant because it deals with the precarious situation of Palestinian refugees in Lebanon. In Decree No. 135 of 2010, the President formed a committee responsible for dialogue with the Vatican that will report directly to the Chairman of the Executive Committee of the PLO.[40]

[35] Case C-386/08, published in: OJ C 285 on 08.11.2008; the text is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:100:0004:0005:EN:PDF

[36] The text is available at: http://muqtafi2.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2009&MID=15994&lnk=2

[37] The text is available at: http://muqtafi2.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2009&MID=16054&lnk=2

[38] The text is available at: http://muqtafi2.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2010&MID=16163&lnk=2

[39] The text is available at: http://muqtafi2.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2010&MID=16164&lnk=2

[40] The text is available at: http://muqtafi2.birzeit.edu/Legislation/GetLegFT.aspx?LegPath=2010&MID=16171&lnk=2

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Conclusion

The Palestinian legal system has been in a state of complete stagnation since 2007. The paralysis of Palestinian Authority institutions, in particular the Palestinian Legislative Council, began even earlier with Hamas' victory in the 2006 legislative elections). The *de facto* separation between West Bank and Gaza Strip is still in place, while Israel continues to build settlement in the West Bank and to enforce its siege on Gaza.

In this report, I have updated legal data related to migration issues in Palestine. In particular I have dealt with Israeli policies aiming at reducing the number of Palestinians in the areas under its control. Israel has employed law and legality for that purpose. Law in that sense became a tool for subjugation, occupation and colonialism.

I then dealt with the rights and freedoms of Palestinian refugees in host countries. I showed how Palestinian refugees are dealt with as a security issue in host countries, resulting in limiting of rights and freedoms, and adding burdens to their already fragile situation. Instead, I urged for a more stable legal status for Palestinian refugees.

I came then with the special case of Gaza Strip and the challenges it poses for the international community. I argued that UNRWA is being pushed into a risky – though perhaps necessary field, namely the protection of refugees and other fragile categories of civilians.

Finally, I updated the Palestinian Authority legislative enactments which do not dismiss a thesis I defended earlier,[41] that legislative enactments of the Palestinian Authority in matters of migration are still limited and that legal regulation is still the exception.

[41] (Khalil, Legislating for Migration: The Anomalous Case of the Palestinian Authority 2006).

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