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The ‘Protection Gap’ and the Palestinian Refugees of the Gaza Strip

The concept of a ‘protection gap’ is often used by scholars interested in studying the legal status of Palestinian refugees in host countries.¹ To say that such a gap exists for refugees in a host country means that international protection mechanisms are missing, and leaves refugees subject to domestic laws and policies.

In this paper, I will first show why this protection gap came into existence, then suggest different mechanisms for protecting Palestinian refugees in the West Bank and Gaza Strip from the effects of the Israeli occupation. I will further make suggestions with regard to keeping the distinction clear between West Bank and the Gaza Strip when dealing with refugee protection. This distinction paves the way for my central proposition in this paper, that Gaza poses a challenge to international law and to the current international system. UNRWA in particular is pushed towards assuming a protection mandate, which it was originally deprived from assuming. This shift toward an expanded UNRWA mandate is inevitable, but it is not for that reason devoid of risks.

Protection Gap

Many facts, taken together, contributed to creating and widening this protection gap. First, UN General Assembly (UNGA) Resolution 181 of 1947 contributed to the original forced displacement of Palestinians, by authorizing the creation of a Jewish state in Palestine, despite the fact that the vast majority of residents of the region were Arab Palestinians. Second, the 1951 Convention relating to the Status of Refugees (and in particular article 1-D) has been interpreted in a way that excludes most Palestinian refugees from its protection.² Third, separate international

¹ For example, Akram (2002), BADIL (2005), and Suleiman (2006), whether they use this term or not.

² It is often the case that article 1/D of the Convention Related to the Status of Refugees of 1951 (Refugee Convention) is interpreted in a way that excludes Palestinians based on only the first paragraph of that article that states: “D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.” However, the second paragraph immediately states that: “When such protection or assistance has

agencies have been established for Palestinians (Rempel 2006, 5),³ and this has consolidated the perception (or perhaps reality) that the Palestinian case is exceptional (Kagan 2009). The gap is widened further by the continuous refusal of Israel to re-admit Palestinian refugees into Israeli territory, beginning with when the state was newly established (Elsayed-Ali 2006, 13), and the international community's inability or unwillingness to impose UN resolutions, including the right of return, on Israel (Khalil 2009, 5).

Protecting Refugees under Occupation

Scholars interested in the legal status of Palestinian refugees distinguish, almost instinctively, between those who are in the West Bank and Gaza Strip on the one hand, and all other refugees on the other. (A further distinction is drawn between those who are in the other three areas in which UNRWA operates – Lebanon, Jordan and Syria - and those who are in the rest of the world). The distinction is not drawn as a result of different historical roots of their displacement, nor is it the result of different prospects for their futures. Rather, it is the result of being subjected to completely different legal regimes.

ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention.” This means that it is wrong to exclude Palestinians from the protection of the Refugee Convention because 1) UN Conciliation Commission for Palestine (UNCCP) is not practicing its mandate to protect Palestinian refugees because of states' lack of cooperation; and/or, 2) because the UN Relief and Works Agency for Palestine Refugees (UNRWA) has no mandate to protect Palestinian refugees; and/or 3) UNRWA is present only in five areas of operation, so the protection of the Refugee Convention to Palestinian refugees shall not be denied to Palestinian refugees outside those areas; and/or 4) even in those areas where UNRWA is present, the Refugee Convention shall apply to those Palestinians who are not registered at UNRWA (provided that the concerned states ratify the convention, of course). For more, see Khalil 2009, 7, 14.

³ The UNCCP and UNRWA. The UNCCP was established by UN General Assembly (UNGA) Resolution 194 of 11 December 1948, with a protection mandate for Palestinian refugees but then failed to exercise a significant role. UNRWA, on the other hand, was established by UNGA Resolution 302 (IV) of 8 December 1949, becoming the only international 'face' of the plight of Palestinian refugees, while its protection function is virtually non-existent (Akram, Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution 2002, 43). Besides, most Palestinian refugees are present in Jordan, Lebanon and Syria (besides the West Bank and the Gaza Strip, the other two areas of operation of UNRWA), countries that did not ratify the 1951 Refugee Convention. For more about the 'protection gap', see Khalil 2009, 2-17.

The fact that the West Bank and Gaza Strip are deemed occupied territory means that they are subjected to the provisions of the Fourth Geneva convention, something Palestinian refugees present in other host countries cannot of course claim (unless in specific circumstances of armed conflicts, whether local or international). Besides, Israeli authorities – whenever it comes to counting the population and regulating their legal status – have not distinguished between those who are refugees and those who are not. Neither does the Palestinian Authority make such a distinction in its laws and policies. The result is that Palestinian refugees of the West Bank and Gaza Strip have a legal status which is specific to them, and constitutes an obstacle to any comparison with their counterparts in other host countries.

Why Gaza is Special

Less evident is the distinction one needs to draw between West Bank on the one side and Gaza Strip on the other. I argue that there is a need – at least conceptually and didactically, if not legally or politically – to keep in mind the distinction between the West Bank and Gaza Strip when it comes to legal protection and to assistance for refugees. At least two reasons inform this need.

Different Legal Regimes

On the one side, the West Bank and Gaza Strip were under two completely different legal and political regimes from 1948 to 1967. The Israeli occupation unified them again in 1967; but this unity was not legal, administrative or political, but rather a result of applying parallel systems of military rules through declarations and decrees. In other words, Palestinians of the West Bank and Gaza Strip were unified in their subjugation to an occupation that was long, discriminatory, racist and colonial. They were unified in their similar rightlessness.

Palestinians of the West Bank and Gaza Strip were granted ID numbers by the authority in place (Israel, as an occupation authority), giving them the option – not the right – of residence in the ‘areas’ that ‘fell’ under Israeli control.⁴ Those were not signs of entitlements to rights.

⁴ Israel refers to the West Bank and Gaza Strip as “areas”, refusing to admit their status as occupied territories, as admitted by the international community and the various UN resolutions. According to the Israeli official narrative, Israel controls these “areas” because they “fell” under its authority as a result of the war, and in the absence of another sovereign state.

They were rather grants given by the authority in place as benevolent acts, and as a result were subject to the prevailing mood of the Israeli military commander or officials, reflecting internal Israeli politics and expansionist Zionist policies that excluded Palestinians even from being recognized as a people entitled to rights in this land. This regime essentially continues today.

The above argument is relevant to keep in mind because it allows us to understand how Israel used the pre-1967 division and the subsequent maintenance of the legal separation between the two 'areas' when Israeli occupation took place. This division enabled Israel indeed to use military declarations and orders to widen the gap between Palestinians of the West Bank and Gaza Strip to the point that Military Order No.1650⁵ codified the separation between Palestinians of Gaza and Palestinians by rendering Gazans (having an ID number issued by Israeli military commander for Gazans, different from the one issued for West Bank Palestinians and for those issued for Palestinians of East Jerusalem) foreigners for the purposes of the order and in need of legal documentation authorizing any stay in the West Bank. The military order consolidated a practice, dating from 1967, of increasing separation between the two areas under Israeli control, even under different military regimes and civil administrations during the first Intifada and Oslo Agreements.⁶

The new order subjects Palestinian residents of Gaza, whenever they are in the West Bank but cannot prove they have an Israeli-issued permit to be there, to the threat of 'deportation' back to Gaza. The word 'deportation' – with the new order deportation became the only remaining option to adjust the anomaly of lack of legal documentation – is a dangerous word used by some inattentively but that reflects the

⁵ On April 13, 2010, 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 Israeli Defense Forces in the 'Judea and Samaria Area'. The text is in Hebrew. An unofficial translation was made available by Hamoked at http://www.hamoked.org.il/items/112301_eng.pdf.

⁶ The new military order fits within the same Israeli policy of separating the two areas (the Gaza Strip and the West Bank), thus dealing with Palestinians holding an ID issued by the military government of the Gaza Strip differently from those having an ID number issued by the military government in the West Bank. Of course such ID numbers are different from ID numbers provided to Palestinians of East Jerusalem. For more, see Khalil 2010.

idea of the Gaza Strip being a different ‘country’ from the West Bank.⁷ Such deportation is still prohibited under international humanitarian law, because forced transfer of population is by definition arbitrary and does not respond to any urgent need to ensure the security of the population or to any immediate military needs of the occupation authority.

Israeli Withdrawal in 2005

There is another reason why I believe we need to keep the distinction between the West Bank and the Gaza Strip in mind whenever legal protection of Palestinian refugees in Gaza Strip is invoked. That is the fact that in the Gaza Strip, since the unilateral Israeli withdrawal in 2005, several events have rendered the Gaza Strip *sui generis* and made legal protection even harder to realize – though in no way less urgent. These events are the post-2005 agreements related to border control, the Hamas takeover of the Gaza Strip, the subsequent intensification of the Israeli siege, and Israel’s declaration that Gaza is an “enemy entity”.

Of course the status of the Gaza Strip under international law since 2005 was and is the subject of hot debate among specialists in international law. I believe, however, that this debate is tempered, now that we have seen clear evidence of Gaza’s ongoing subjugation to the same occupation regime – although in a slightly different form. Such evidence comes from the Israeli invasion in 2008/2009, Israel’s continuous control of the territorial borders of Gaza (air, water, and land), and the Israeli attacks on solidarity ships that did not acquire Israeli approval to enter the territorial waters of the Gaza Strip. Such events showed that withdrawal meant nothing in practice but the redeployment of Israeli forces, while maintaining the full control of borders, keeping all other elements necessary to the qualification of that territory as occupied territory.⁸

⁷ I am thankful for this insight offered by Cordula Droege, the ICRC legal advisor, who explained that we must distinguish between deportation (transfer of population to a third country) and forcible transfer of population that can be applied within the same ‘country’ (remarks in a roundtable organized by the Ibrahim Abu-Lughod Institute of International Studies, September 20, 2010). Under international law both deportation and forcible transfer of population are forbidden, but if the word ‘deportation’ is used to refer to transferring population from the West Bank to the Gaza Strip, it implies that the Gaza Strip is a ‘third country’, which in fact it is not. See report of the session at <http://home.birzeit.edu/fmru/conferences/conferences.htm>.

⁸ Even when an agreement for the Rafah Crossing was reached in November 2005 (The

Gaza as a Challenge

The Gaza Strip poses a particular challenge to the international community because Israel fully controls its borders and restricts movement of goods and people across those borders, and at the same time there is no state authority able and willing to provide assistance and protection for Palestinian civilians. In such circumstances, Palestinian refugees in the Gaza Strip, their protection and their need for assistance, are pushing UNRWA to reshape its mandate, towards more protection rather than only assistance and relief. This shift actually tends to consolidate UNRWA's past efforts, much earlier in history, and on more than one occasion⁹, to add to the role defined in its mandate the responsibility for protection of refugees. Yet expanding UNRWA's mandate in this way renders it more fragile and vulnerable to attack; and such attacks oppose not just the expansion of UNRWA's role, but the existence of the organization itself, as well as its whole mandate and its role in keeping alive the issue of Palestinian refugees.

The position of UNRWA is rendered even more fragile 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 of financing UNRWA.¹⁰

Alarmed voices are much more often 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 may lead to a humanitarian crisis much deeper and worse than the one we have now in the Gaza Strip, as well as worse than we might imagine, with consequences that go beyond the Palestinian refugees of the Gaza Strip.

In fact, UNRWA's role is recognized in avoiding a worse situation,

Agreement on Movement and Access and the Agreed Principles for the Rafah Crossings), the Palestinian Authority agreed that Israel would monitor the borders via closed-circuit television under the supervision of the EU BAM Rafah (an EU police mission for Rafah) (Abu Mukh 2006, 21). Such agreement was in practice suspended after Hamas took control of Gaza and the departure of the EU police force.

⁹ See for example BADIL 2005, 42ff.

¹⁰ The decline in aid was felt by refugees in host countries much earlier than that; in fact, the establishment of the Palestinian Authority and Oslo process in general resulted in the "skewing of international funds away from the 'outside' refugees" (Sayigh 1995, 51).

and its role in responding to emergency needs is essential (Brynen 2009, 6). The best way to describe this approach can be summarized by a quote 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" (Brynen 2010).

The point this approach stresses is not that UNRWA is not necessary, but rather that UNRWA is not enough. The alternative, however, will not be to replace UNRWA by UNHCR, but rather to enhance the protection role of UNRWA, or to extend the protection mandate of UNHCR to Palestinian refugees alongside (not instead of) existing agencies dealing with Palestinian refugees. Note, however, that while UNHCR seems to be attractive for Palestinians on some issues, it may be resisted and rejected for others.¹¹

¹¹ As Kagan points out: "The attraction for Palestinians is that general refugee policy as advocated by UNHCR promotes three things that have been denied them: first, a clear recognition of the right to return, along with its complementary rights of property restitution; second, a clear goal of finding a durable solution, with particular emphasis on repatriation; third, a commitment to fundamental rights in exile until a durable solution can be found" (Kagan 2009, 434). Then he adds:

Yet it is important to recall that pro-Israel writers who are hostile to Palestinian aspirations are similarly questioning the wisdom of Palestinian exceptionalism because they believe that UNHCR involvement will help minimize the claims of Palestinian refugees. While general (i.e. non-Palestinian) refugee policy contains several attractions for Palestinians, it also contains some hidden features that might challenge longstanding Palestinian political orientations. Two examples illustrate this point. First, established norms of refugee law would condemn the militarization of refugee camps which has been a prominent feature of Palestinian armed conflict with Israel from the 1950s onwards. General refugee policy would thus back condemnation of groups like Hamas, and would call on host governments like Lebanon to disarm militant elements in refugee camps. Second, while it is true that refugee law generally backs the right of return and the right to property restitution..., UNHCR's approach to durable solutions is ultimately more pragmatic and flexible than many Palestinians might like. While UNHCR calls repatriation 'the solution of choice' for most refugees..., it cautions that 'there is no hierarchy of durable solutions' and that resettlement and local integration should be considered simultaneously ... What this means in practical terms is that UNHCR will look to local integration and third country resettlement when repatriation is impossible. UNHCR has indicated a similar flexible or ad hoc approach to compromises on property restitution... Thus, while UNHCR policy would back Palestinians on the abstract rights to return and restitution, in terms of implementation UNHCR might accept Israeli resistance as an immovable fact and turn pragmatically to other options in order to not leave refugees in limbo indefinitely. (Kagan 2009, 434; citations omitted).

Conclusion

UNRWA, this paper concludes, is still a necessary agency. The assistance it provides for Palestinian refugees is essential to avoid worst case scenarios. What Palestinian refugees always needed, and still do, is protection. The fact that they are left outside international protection mechanisms for refugees, and the fact that it was left for host countries to determine the kind of legal status they enjoy has meant in practice leaving them alone without any kind of protection. This is what this paper has referred to as a 'protection gap'.

Of course the assistance UNRWA provides may be considered as a form of protection, but attacks on Palestinian civilians, and in particular on residents of refugee camps in Lebanon, Jordan and Gaza, have shown that assistance is not enough and that there should be an agency responsible for their protection. This agency can be of the host state or of an international organization; it doesn't matter.

Palestinian refugees of the occupied Palestinian territories have had the distinctive character of residing within historical Palestine, under Israeli occupation, and being dealt with in the same way as other residents of that area. The Gaza Strip in particular is challenging the international community, in light of the lack of a sovereign state exercising state authority – while Israel continues to maintain control over its borders. Gaza is pushing UNRWA to assume a role which is not part of its original mandate. Such a role is inevitable, but is not devoid of risks for UNRWA as an agency, already fragile because of the pressure some countries exert on it, and because of its dependency on voluntary financial contributions of states.

More than six decades after displacement, Palestinian refugees need assistance and protection. Their right to return is yet to be realized, and statelessness is still a destabilizing factor in the region. International aid, even in a time of global financial crisis, needs to be maintained, not out of charity but out of responsibility (Saiz 2009, 288). Most importantly, in the Palestinian case it is partially the responsibility of the international community, which partitioned Palestine, has yet to establish a Palestinian state, and still has not enforced the many resolutions related to the right of return for Palestinian refugees.

References

- Abu Mukh, Leena. 2006. *Movement to and from the Palestinian Territories under Israeli Occupation after Oslo (1993-2006)*. Research Report, CARIM-RR, 2006/02, European University Institute.
- Akram, Susan. 2002. Palestinian Refugees and Their Legal Status: Rights, Politics, and Implications for a Just Solution. *Journal of Palestine Studies* 31(3): 36-51.
- . 2009. Palestinian Refugees' Contributions to Norm-Creation in the Arab and Muslim World. UNRWA At 60 Panel: "UNRWA and Palestine Refugees, A Contribution to peace and development." Columbia University, New York City. http://www.un.org/unrwa/newyork/docs/susan_akram_speech.doc.
- Akram, Susan, and G. S. Goodwin-Gill. 2000/2001. Brief Amicus Curiae on the Status of Palestinian Refugees under International Law. In *The Palestine Yearbook of International Law*, 185-260. The Hague: Kluwer Law International.
- BADIL. 2007. *Survey of Palestinian Refugees and Internally Displaced Persons 2006-2007*. Bethlehem, Palestine: Badil Resource Center for Palestinian Residency and Refugee Rights.
- . 2005. *Closing Protection Gaps: Handbook on Protection of Palestinian Refugees in States Signatories to the 1951 Refugee Convention*. Bethlehem: BADIL Resource Center for Palestinian Residency and Refugee Rights.
- Brynen, Rex. 2009. UNRWA: Historical performance in a changing context. Comments prepared for the symposium on "UNRWA And Palestine Refugees: Drawing Lessons From 60 Years Of Service," Columbia University, http://www.un.org/unrwa/newyork/docs/brynen_speech.pdf.
- Elsayed-Ali, Sherif. 2006. Palestinian Refugees in Lebanon. *Forced Migration Review* (26): 13-14.
- Kagan, Mike. 2009. The (Relative) Decline of Palestinian Exceptionalism and its Consequences for refugee studies in the Middle East. *Journal of Refugee Studies*.

- Khalil, Asem. 2010. *Impact of Israeli Military Order No. 1650: On Palestinians' Rights to Legally Reside in Their Own Country*. CARIM Analytic and Synthetic Note No. 2010/46, European University Robert Schuman Centre for Advanced Studies.
- . 2009. *Palestinian Refugees in Arab States: A Rights-Based Approach*. CARIM Research Report 2009/08, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole: European University Institute.
- Rempel, T. M. 2006. Who are Palestinian Refugees? *Forced Migration Review* (26): 5-7.
- Saiz, Ignacio. 2009. Rights in Recession? Challenges for Economic and Social Rights Enforcement in Times of Crisis. *Journal of Human Rights Practice* 1(2): 277–293.
- Sayigh, Rosemary. 1995. Palestinians in Lebanon: Harsh Present, Uncertain Future. *Journal of Palestine Studies* 25(1): 37-53.
- Suleiman, J. 2006. *Marginalised Community: The Case of Palestinian Refugees in Lebanon*. University of Sussex, Development Research Centre on Migration, Globalisation and Poverty.