Closing Protection Gaps

Handbook

on Protection of Palestinian Refugees

in States Signatories to the 1951 Refugee Convention

بديل
المركز الفلسطيني
لمصادر حقوق المواطنة واللاجئين

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Preface

The status and protection of Palestinians have been a matter of controversy since 1949-50, when the UN Third Committee first considered the scope of the Statute then being drafted for the High Commissioner for Refugees. Arab States, in particular, were concerned that Palestinians, to whom the United Nations owed a special responsibility, should not be subsumed and lost in the more general regime being set up for refugees. For this reason they argued successfully for the non-applicability of the UNHCR Statute and the 1951 Convention to refugees receiving protection and assistance from another UN agency, unless and until such protection or assistance ceased without an internationally accepted solution having been found.

It is sometimes said that this means that Palestinians are 'excluded' from the Convention, but this does a disservice to the drafters, and can seriously compromise the goal of protection. None of the participants would have predicted that, over 65 years later, Palestinians would still be without a solution, or that their entitlement to protection would continue to be disputed, or that a *Handbook* such as this would be needed.

It may be that the primary cause of this necessity is the manifest failure of the international community to reach a lasting political solution to the problem posed by the absence of a Palestinian State. But this is only part of the problem, and the status and protection of Palestinian refugees have also been frustrated by drafting inconsistencies in relevant texts, misinterpretation (at times, seemingly for political reasons), and even by abstruse academic readings. Indeed, a review of state practice does not leave one fully confident in the good faith interpretation and implementation of international obligations.

Still, certain principles were always clear. The *travaux préparatoires* ("*preparatory works*") of paragraph 7(c) of the UNHCR Statute and Article 1D of the 1951 Refugee Convention confirm the intention of participating states *not* to exclude Palestine refugees. What was important to all participants was *continuity of protection*, and the non-applicability of the 1951 Convention was intended to be temporary and contingent, postponing or deferring the incorporation of Palestine refugees until certain preconditions were satisfied. Unfortunately, however, the wording of the UNHCR Statute and the 1951 Convention is far from clear.

The UNHCR Statute limits the High Commissioner's competence in regard only to a person "who continues to receive [...] protection or assistance" (UNHCR Statute, paragraph 7(c)). By contrast, those to whom the Convention is not to apply are those "at present receiving [...] protection or assistance" / "*qui bénéficient actuellement d'une protection ou d'une assistance,"* and only until such time as protection or assistance shall have ceased "for any reason," without their position having been definitively settled in accordance with the relevant General Assembly resolutions. In those circumstances, these persons "shall *ipso facto* be entitled to the benefits of this Convention" / "*bénéficieront de plein droit du régime de cette Convention*."

The purpose of Article 1D was thus to provide a non-permanent bar to Convention protection; at the time of drafting, it was thought that the Palestine refugee problem would be resolved on the basis of the principles laid down in UNGA Resolution 194(III), particularly through repatriation and compensation in accordance with paragraph 11, and that protection under the 1951 Convention would ultimately be unnecessary. However, should there be no settlement, then it was essential to avoid any lacuna in the provision of international protection.

The refugee character of the protected constituency was never in dispute. Hence, in the absence of settlement in accordance with relevant General Assembly resolutions, no new determination of eligibility for Convention protection would be required. They would "*ipso facto*" / "de plein droit" benefit from the Convention regime. The *travaux préparatoires* clearly show the United Nations and member states determining, as a matter of policy, that Palestinian refugees were presumed to be in need of international protection, and that in certain circumstances they would accordingly and automatically fall within the 1951 Convention.

Clearly, the expectations of the international community in 1949-1951 have failed to materialize in many ways. The "problem" is unresolved, and institutional measures taken to promote a solution (such as the United Nations Conciliation Commission) have been frustrated in their work. Over the years, the international dimensions to the Palestinian issue have magnified, not only at the political level, but also at the individual level, as more and more Palestinians sought and found employment and settlement opportunities outside UNRWA's area of operations, or were obliged to move again because of violence and armed conflict.

When their legal status was at issue, when they were expelled from their country of residence, or sought asylum elsewhere for compelling reasons, so the problems of interpretation and application emerged; sense had to be made of rather incomplete and often unclear texts. In a number of jurisdictions, decision-makers appear to have relied on the textual inconsistency highlighted above, to the prejudice of Palestinian refugees. In particular, instead of applying the 1951 Convention automatically to Palestinians outside UNRWA's area of operations and no longer enjoying protection or assistance, many states required a separate determination of well-founded fear, treating the Palestinian like any other asylum seeker. In this way, a provision intended to help them has in fact worked against their best interests.

In Europe, at least, certain problematic interpretations of Article 1D of the 1951 Convention, adopted by national courts have been laid to rest in two important judgments of the Court of Justice of the European Union (the *Bolbol* and *El Kott* cases).

Applying Article 1D with due regard to historical context, the Court rightly stressed the importance of ensuring continuity of protection for Palestinian refugees. It rejected the view that only Palestinians receiving protection or assistance in 1951 came within Article 1D's contingent inclusion provisions, and that the reference to cessation of protection and assistance implied nothing less than the winding up of

UNRWA. Nevertheless, in *Bolbol* (2010), the Court limited the class of Palestinians entitled to invoke the protection of the 1951 Convention under Article 1D to those who have actually availed themselves of UNRWA assistance, while those who were merely "eligible" fell outside. This ruling was mitigated somewhat by the Court also finding that evidence of registration for assistance was enough.

In *El Kott* (2012), the Court was faced with the question of what it means for protection or assistance to have ceased "for any reason." It rejected the argument that simple residence outside UNRWA's area of operations was enough, or that UNRWA itself would have to come to an end. Instead, and in-between, the Court imposed the requirement that protection or assistance to an "eligible" Palestinian refugee would need to have ceased for a reason beyond the control and independently of the volition of the individual concerned, for example, when he or she was forced to leave UNRWA's area of operations because their personal safety was at risk.

The Court then emphasized – and here it reflected the European Union's predisposition for procedures, rather than the non-specific terms of the 1951 Convention – that Palestinians did not enjoy an unconditional right to refugee status and the benefits of the Convention. Rather, they needed still to submit an application for refugee status, which the national authorities should consider with regard, not to whether the applicant had a well-founded fear of persecution, but to whether (a) he or she had actually sought assistance from UNRWA, (b) that assistance had ceased for reasons beyond the applicant's control or volition, and (c) the applicant might otherwise be denied protection, for example, by reference to Articles 1C, 1E or 1F of the Convention. If the applicant were able to return to that area of UNRWA's operations where he or she was formerly resident, then refugee status would cease.

On the plus side, the Court underlined that the words of Article 1D entailed entitlement "as of right" to the benefits of the Convention (or, perhaps more accurately, the benefits of the European Union's Qualification Directive, which is based on the Convention). If there is one clear phrase in Article 1D, it is that once the general conditions are met, then Palestinians are "ipso facto entitled" to the benefits of the Convention. In the compelling French version, they "*bénéficieront de plein droit du régime de la Convention*."

"Ipso facto" means "by that very fact," "by virtue of the fact itself," in this case the cessation of protection or assistance and the absence of definitive settlement, which are the facts expressly mentioned. The French text is equally or even more clear: "*de plein droit*" means, "*par le seul effet de la loi, sans contestation possible; à qui de droit*." The intent of these words should have guided the application of Article 1D as a whole, and it is seriously to be hoped that, so long as Palestinian refugees continue to be in need of protection and assistance, an approach consistent with the object and purpose of the relevant international instruments will be adopted; the goal of *continuity of protection* should be especially recalled, and given life and meaning.

Despite the welcome clarifications by the CJEU, the regime of protection for Palestinian refugees remains incomplete. Within its area of operations, UNRWA's

assistance role has necessarily translated from time to time into a protection one, but without the clarity of a specific mandate from the international community. Outside that area, "continuity of protection" still cannot be assured, as distinctions are drawn between Palestinians who have actually availed themselves of UNRWA assistance, and those who are merely eligible; and between those who leave UNRWA's area of operations for reasons of personal safety, and those who, having left for any number of reasons, are now effectively barred from returning through denial of the necessary permission or documentation. The realm of the unprotected may have shrunk because of these judgments, but many displaced Palestinians will not satisfy the criteria now read into Article 1D; clearly, there is still work to be done.

The second edition of this *Handbook*, of course, covers a much broader range of issues and concerns. BADIL, the author and the contributors are to be congratulated on such a monumental gathering of the evidence. The *Handbook* provides a history of the circumstances giving rise to the Palestinian exodus, and of the international institutional mechanisms set up to provide protection and assistance. It explains the "protection gaps" which have emerged in national practice, and makes practical, rule-based suggestions for bridging those gaps. It remains essential reading and an important resource for everyone engaged in the Palestinian refugee issue, whether on an individual case level, or in promoting the long wished-for political solution.

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