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**REINTERPRETING PALESTINIAN REFUGEE RIGHTS UNDER
INTERNATIONAL LAW, AND A FRAMEWORK FOR DURABLE
SOLUTIONS**

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

Background

The paper presented here is based on a much larger brief produced by two experts in international refugee law, Susan Akram and Guy Goodwin-Gill assisted by a team of law students at Boston University. Both the larger brief and the paper presented here argue for a re-interpretation of the current international refugee law which adequately expresses the principle of heightened protection for Palestinian refugees, a principle which had guided the drafting and consequent approval of international law and UN resolutions.

The author argues that the current lack of legal protection of Palestinian refugees derives from the misinterpretation of the existing refugee regime, especially the 1951 Refugee Convention, with regard to the Palestinian case. She proposes a legal reinterpretation which - if widely adopted - could turn international refugee law into an efficient tool for the protection of Palestinian refugee rights, including international protection in the framework of a durable solution based on the Palestinian right of return. The paper also addresses central strategic questions pertaining to legal representation and law enforcement which must be resolved in this context.

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Introduction

Palestinian refugees have a status that is unique under international refugee law. Unlike any other group or category of refugees in the world, Palestinians are singled out for exceptional treatment in the major international legal instruments which govern the rights and obligations of states towards refugees: the 1951 Geneva Convention Relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol (Refugee Protocol); the Statute of the United Nations High Commissioner for Refugees (UNHCR); and, specifically with regard to the Palestinians, the Regulations governing the mandate of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). Almost all states and international entities have interpreted the relevant provisions in these instruments as severely restricting the rights of Palestinian refugees *qua* refugees in comparison to the rights guaranteed every other refugee group in the world. As a result, Palestinian refugees have been treated as ineligible for the most basic protection rights guaranteed under international law to refugees in general, further eroding the precarious international legal guarantees that international human rights and humanitarian law currently extends to this population.

There are a number of consequences flowing from this unique application of refugee law to the Palestinian refugee situation. First, it affects the question of the type of *protection* afforded Palestinians under international refugee law, as opposed to the *assistance* they receive as refugees. Second, it affects the extent to which Palestinian refugees can assert guarantees of *international human rights* and *humanitarian law* protections, and whether there are fora available for them to assert such rights. Third, it implicates the issue of what entity or agency has the authority to *represent* the interests of Palestinian refugees, whether in international bodies such as the United Nations, before other international or domestic legal/political fora, or in negotiations with states such as Israel. Fourth, it raises the complex issue of whether individual human rights recognized under international law can be protected and promoted in the Palestinian refugee case when such rights collide with collective rights under international law—in this case, the right to self-determination.

It is the contention of this author that interpreting refugee law principles and instruments as requiring a special and exceptionally weak international human rights regime for Palestinian refugees is an incorrect interpretation of the law. Palestinian refugees are entitled not to reduced protection, but to a *heightened protection regime*. These conclusions are based on an exhaustive review of the plain language of the relevant provisions, the intentions of the drafters of the instruments, and the purpose and scope of coverage of the instruments themselves. Reinterpreting the instruments in this way dramatically changes the conclusions one draws on each of the issues listed above. This paper addresses in summary form the four issues listed, examines their application under the reinterpreted instruments, and discusses some of their implications for establishing durable solutions for Palestinian refugees.

International Refugee Law Principles and Instruments Applicable to Palestinian Refugees

The primary international instrument governing the rights of refugees and the obligations of states towards them is the 1951 Convention relating to the Status of Refugees. This Convention and its 1967 Protocol incorporate the most widely accepted and applied definition of refugee, and establish minimum guarantees of protection towards such refugees by state parties. The Refugee Convention and Protocol define a “refugee” as a person who is outside the country of his nationality and is unwilling or unable to obtain the protection of his country due to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. However, the Convention has a separate provision that applies solely to Palestinian refugees. Refugee Convention Article 1D states:

This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.

When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall *ipso facto* be entitled to the benefits of this Convention.

Although Palestinian refugees are not specifically mentioned in this provision, it is evident both from the drafting history and the interrelationship of Article 1D with three other instruments that Palestinians are the only group to which the Article applies. These other instruments are the Statute of the UNHCR, the Regulations governing UNRWA, and UN Resolution 194 establishing the United Nations Conciliation Commission for Palestine (UNCCP).

Paragraph 7 of the UNHCR Statute provides that “the competence of the High Commissioner...shall not extend to a person: who continues to receive from other organs or agencies of the United Nations protection or assistance.” The “other agencies of the United Nations” originally referred both to UNRWA and to the UNCCP. The significance of the language in these provisions lies primarily in the distinction between “protection” and “assistance”, which are dramatically different concepts in refugee law. UNRWA’s mandate is solely one of providing assistance to refugees’ basic daily needs by way of food, clothing and shelter. In contrast, UNHCR’s mandate, in tandem with the provisions of the 1951 Refugee Convention, establishes a far more comprehensive scheme of protection for refugees qualifying under the Refugee Convention. This regime guarantees to refugees all the rights embodied in international conventions, and mandates the UNHCR to represent refugees, including intervening with states on refugees’ behalf, to ensure such protections to them. Aside from the distinction between the mandates of UNRWA and UNHCR, the refugee definition applicable to Palestinians is different and far narrower under UNRWA Regulations than the Refugee Convention definition. Consistent with its assistance mandate, UNRWA applies a refugee definition that relates solely to persons from Palestine meeting certain criteria that are “in need” of such assistance.

Although UNRWA was not authorized to serve the protection function given to the UNHCR, this was not because the United Nations General Assembly believed that Palestinian refugees were any less deserving of protection. The Palestinian refugee situation was considered of such import that a separate “protection” agency was established for the sole purpose of resolving the Palestinian refugee crisis. This agency was the United Nations Conciliation Commission for Palestine (UNCCP). The General Assembly established the UNCCP by Resolution 194, setting forth its composition and terms of reference. The Resolution provided for the UNCCP to comprise three States Members of the United Nations, who were to continue the efforts of the United Nations Mediator on Palestine and begin conciliation efforts immediately. The UNCCP was further instructed to “take steps to assist the Governments and authorities concerned to achieve a final settlement of all questions outstanding between them”—specifically, according to UNGA Res. 194(III), to ensure repatriation and compensation.

Thus, the UNCCP was entrusted with the protection function normally assigned to the UNHCR, but with a very specific mandate concerning the requirements of a just resolution of the Palestinian refugee problem. Every recommendation to the UN, every UN Resolution concerning the Palestinians drafted when UNCCP, UNHCR and UNRWA were created, affirms that the consensus of the world body was that resolution of the Palestinian problem had to involve realizing the refugees’ right of return to their homes and to appropriate compensation for their losses. The UNCCP struggled to fulfill its mandate. Its efforts were stymied by a complete stalemate: the Arab states and the Palestinians demanded full repatriation, while Israel refused to accept any repatriation of the refugees. Thus, within four years of its formation, the UNCCP devolved from an agency charged with the “protection of the rights, property and interests of the refugees” to little more than a symbol of UN concern for the unresolved aspects of the Arab-Israeli conflict.

A Reinterpretation of the Regime Applicable to Palestinian Refugees, and the Impact of Reinterpretation on the Search for Durable Refugee Solutions.

According to the widespread interpretation of these instruments and the mandate of these agencies, Palestinian refugees are entitled to nothing more than assistance for their basic quotidian needs through the offices of UNRWA; they are left outside the mandate of protection of UNHCR and the Refugee Convention; and with UNCCP’s protection mandate emasculated, they are left without any of the protection mechanisms or guarantees to which all other refugees in the world are entitled. Certain consequences flow from this standard interpretation of the Palestinian refugee regime.

These include that no agency (since none has a viable protection mandate) has the authority to intervene on behalf of Palestinian refugees to represent their interests in any international fora, or to protect their human rights against infringement by states, or to negotiate on their behalf to demand a just solution to their refugee situation. In addition, since this interpretation assumes Palestinians are left outside the Refugee Convention regime as long as UNRWA continues to provide assistance, they are not eligible for the guarantees of that Convention in the Arab states, including absorption and citizenship. A corollary to this premise is that under the most prevalent interpretations of Article 1D by non-Arab states (mostly European and North America) the majority who apply are also considered ineligible for permanent resettlement as refugees or asylees in third states. A final consequence of this special Palestinian refugee regime is that there is neither a representative for the refugees with authority to take their claims to international fora, nor is there a forum with jurisdiction over their claims of repatriation, compensation or restitution.

There is now substantial evidence that the prevalent interpretation of these instruments and relevant agency mandates is incorrect. As this author has argued exhaustively elsewhere, the history and purpose of Article 1D in the context of the creation of the Palestinian refugee problem indicates that the *ipso facto* language was intended to provide Palestinian refugees with continuity of protection, albeit under various organizations and instrumentalities. Rather than interpreting Article 1D-- along with Paragraph 7 of the UNHCR Statute and the UNRWA Regulations--as an exclusion clause, it is more accurate to interpret it as a contingent *inclusion* clause. This interpretation is far more consistent with the plain language, drafting history and applicable canons of treaty construction of the relevant provisions referred to above. Such an interpretation is grounded, as well, on two main factors. First, the UN body has recognized through hundreds of resolutions that it bore a large part of the responsibility for creating the refugee situation in the first place by way of General Assembly Resolution 181 (II) of November 1947, recommending partition of Palestine. Second, the Palestinian refugee problem was to be resolved on the basis of a special formula, that of repatriation and compensation--on which there was complete consensus by all states but Israel-- rather than the formula commonly accepted for refugees at the time, which was third-state resettlement. The consensus of the world body, as is evident from the drafting history of the Refugee Convention and related instruments, was that the Palestinian refugee situation required special attention because of the unique responsibility of the UN in creating it, and was of such urgency that it should not be subsumed under the existing refugee regime, but required a *heightened protection regime*. The discussions in the drafting history of the 1951 Refugee Convention, the UNHCR Statute, and the Committee and Conference that drafted the 1954 Convention relating to the Status of Stateless Persons provides ample evidence for such a conclusion.

Viewing the instruments in this way completely alters the conclusions one draws to the questions raised here at the outset. As to the first question, that of what type of *protection* Palestinians are guaranteed under international refugee law, as opposed to the *assistance* they receive as refugees, Article 1D in the context of a regime of heightened protection requires that they receive *at a minimum* the full panoply of protection rights as all other refugees in the world. Appropriately analyzed, the heightened regime set up two agencies with immediate mandates over the Palestinian refugees: UNRWA, which was to be the assistance agency, and UNCCP, which was to be the protection agency. Article 1D's function was to ensure that if for some reason *either* of these agencies failed to exercise its role before a final resolution of the refugee situation, that agency's function was to be transferred to the UNHCR, and the Refugee Convention would fully and immediately apply without preconditions to the Palestinian refugees. That is what the 'protection *or* assistance' and the *ipso facto* language of Article 1D requires. The ramifications of this are quite clear: first, if UNCCP has failed to fulfill its protection mandate, that function must be fulfilled by UNHCR. UNHCR has for quite some time expanded its protection mandate over Palestinian refugees in some situations, in *de facto* if not explicit recognition of this requirement.

The protective duties of UNHCR spelled out in its Statute thus applicable to Palestinian refugees include:

- (i) Promoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto...
- (ii) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities;
- (iii) Promoting the admission of refugees, not excluding those in the most destitute categories, to territories of States;
- (iv) Endeavoring to obtain permission to transfer their assets and especially those necessary for resettlement.

Thus, UNHCR is fully empowered to oversee and implement the appropriate Conventions and Resolutions relating to the rights and enforcement of solutions for the Palestinian refugees. Second, if the UNCCP ceases to function (as it has), triggering the alternative regime under Article 1D, then the Refugee Convention and all its guarantees towards refugees becomes fully applicable to the Palestinian refugees as well. These guarantees include rights to freedom of movement, access to courts, administrative assistance, regarding movable and immovable property, freedom of religion, and housing rights among many others.

The second question flows logically from the first, that is, what is the extent to which Palestinian refugees can assert guarantees of *international human rights* and *humanitarian law* protections? The answers to question one begin to answer this question as well: at an absolute minimum, all international human rights and humanitarian protections available to other refugees are equally available to Palestinian refugees. In addition, refugee law principles applicable to other refugee situations are applicable to the Palestinians as well. These principles include the guarantee that the options for permanent solutions available to refugees will be guided by each refugee's *voluntary choice* in determining which of the three main durable solutions s/he wishes to exercise for him/herself. In fact, in delineating durable solutions, UNHCR describes them as voluntary repatriation, voluntary host country absorption, or voluntary third-country resettlement. Refugee law principles and precedents also include the right to claim restitution of property, and/or compensation for losses caused by the refugee-producing state. In the last twenty years the principles on refugee return, restitution and compensation have been greatly strengthened through inclusion in numerous negotiated settlements, such as the Comprehensive Plan of Action in the Indochinese refugee situation; the Bosnia-Serbia settlements in the Dayton Peace Accords; and the peace agreements on Guatemala and El Salvador.

But the heightened refugee regime for Palestinians requires the application of an additional body of declaratory principles, that of the numerous UN Resolutions which are to be implemented in any final resolution of the refugee problem. The legal effect of these Resolutions, which include on the refugee issue UNGA Res. 194 and UNGA Res. 181, has been discussed at length elsewhere, but is relevant to the body of rights and principles applicable to the Palestinians as refugees. The Resolutions establish a body of legal authority reflecting the consensus of the world community that *in addition* to standard refugee law and rights, the Palestinian case is to be resolved in accordance with a particular agreed-upon solution, that of repatriation and compensation. Article 1D's language, "without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations..." emphasizes that Palestinian refugees continue to be entitled to Refugee Convention benefits under the special scheme because their situation is not resolved unless the solution is consistent with the UN Resolutions. This also means that if Palestinian refugees obtain residence in host or resettlement states, their right to exercise the choice of repatriation or compensation is not necessarily compromised because their position has not been "definitively settled in accordance with the relevant resolutions". The fact that UNGA Res. 194 has been reaffirmed over 100 times is strong evidence of its authority as customary international law on the Palestinian refugee question.

As to the third question, that of which entity or agency has the authority to *represent* the interests of Palestinian refugees, one must first recognize that the special regime requires that a separate agency be empowered with the capacity to stand in the shoes of the Palestinian refugees. With that premise, if the UNCCP is not capable of carrying out such a mandate, the obvious choice—effectuating Article 1D—is the UNHCR. Indeed, UNHCR has a clear mandate to represent refugees in most international fora, in negotiations over durable solutions for refugees, and in bilateral or multilateral committees or task forces. The International Court of Justice has recognized in its Advisory Opinion on Injuries Suffered in the Service of the United Nations that the UN has the capacity to bring an international claim against a state with a view to obtaining reparation for damage caused to its agent or to the “interests of which it is the guardian”. Under the theory of this Advisory Opinion, UNHCR, as a UN subsidiary body, has the right to represent the interests of refugees before that body. Although UNRWA has been present in an observer capacity in the committees established by the multilateral negotiations under the Madrid agreement and the bilateral negotiations begun at Oslo, its presence has been protested by Israel, and it currently does not have capacity to represent the refugees by the terms of its own Regulations. A final possibility for representing the refugees is creating separate bodies directly authorized by the refugees to carry out their wishes. Examples are the various Jewish groups that negotiated for restitution and compensation with the European Nazi states following World War II. Another example is the World Organization of Jews from Arab Countries, which represents the interests of those individuals in their claims for restitution and compensation against the Arab states.

The issue of representation of the Palestinian refugees is critical and urgent vis-à-vis the final status talks. The PLO, which is conducting the negotiations on behalf of Palestinians, represents the interests of all the stakeholders on the Palestinian side. Thus, the PLO is not the appropriate representative of the refugees’ interests, particularly as in the Palestinian case individual refugee interests may be diametrically opposed to the collective rights of the Palestinians, and to other stakeholders in the process. Under refugee law principles, the interests of refugees should be separately represented in negotiations involving their long-term solutions. Under the heightened protection regime established for the Palestinian refugees, the representation issue must immediately be resolved by way of one of the options suggested here.

As to the last issue, whether individual human rights recognized under international law can be protected and promoted in the Palestinian refugee case when such rights collide with collective rights, the Palestinian case appears unique in this regard. It is unique in that in no other refugee situation has the entire population been deprived of nationality as well as access to the entire territory comprising their former state. The UN Resolutions on the Palestine question follow two different tracks: initially, they focused on individual rights; and then, in the 1970’s, the Resolutions called for a solution focusing on the collective right of self-determination of the Palestinian people. Based on the premise that Palestinian refugees are entitled to benefit from the precedents established in other refugee situations, one can apply the formulae used in similar cases where both individual and collective rights are involved. In each such situation—Bosnia and Kosova are prime examples—the collective rights to an independent entity or statehood were preserved, along with a mechanism for individual refugees to assert their claims to repatriate and obtain restitution and/or compensation. Each of these situations involved the establishment of claims commissions as part of a negotiated settlement, but the right of the individual to assert his/her claim was preserved independently of the outcome of the self-determination issue.

Conclusion

Accurately interpreting Article 1D of the Refugee Convention and the provisions related to it in the UNHCR Statute, UNCCP Resolution and UNRWA Regulations compel the conclusion that a heightened protection regime was intended—and, indeed, established—for Palestinian refugees. Although it is not possible to do more than summarize the bases for the conclusions drawn here, and their consequences for the Palestinian-Israeli Final Status Talks on the issue of refugees, it is critical to assess the overall refugee law framework in which a final resolution of the Palestinian refugee question must be found. There is no evidence that a weakened protection system was ever envisioned for Palestinian refugees by the drafters of the relevant instruments. Moreover, there is no legal justification for denying Palestinian refugees the benefits of the existing refugee regime governing the rights of all other refugees worldwide. To be consistent with international refugee law principles and precedents, certain immediate issues must be addressed. *One*, an agency or entity fully competent to represent the interests and further the claims of the refugees must be immediately empowered to do so, both in the context of the negotiations themselves and before international and other fora. *Two*, the alternative scheme of Article 1D must be recognized as affording Palestinian refugees full benefits under the Refugee Convention, including access to the right of asylum and residence in whatever state they find themselves until they can exercise their rights of return, compensation and restitution, in accordance with the relevant UN Resolutions. *Three*, UNHCR, as the appropriately-mandated agency, must immediately intervene with Israel and with other state signatories to the Refugee Convention in which Palestinian refugees are found to demand the protection of the refugees and prevent further erosion of the refugees' human rights pending a final resolution of their status. This may include the agency's utilizing the ICJ's advisory opinion to make claims before that body until there is a fully sovereign entity empowered to raise such claims on the refugees' behalf. *Four*, UNHCR or the agency chosen to represent the refugees should draft its own framework for durable solutions based on the appropriate UN Resolutions on the question, and make clear to all stakeholders that an agreement not based on these Resolutions embodying the consensus of repatriation, restitution and compensation will not be acceptable to the refugees. *Five*, refugee communities themselves need to become aware of the legal framework available to them in

order to accurately assess options and possibilities for raising their own claims within and outside the context of negotiations. Only with such a framework can a just and durable solution to the Palestinian refugee situation be found.