Trapped in Gaza

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Thousands of Palestinians are amassed at the Rafah border crossing into Egypt – the only land border point from Gaza that is not controlled by Israel. Many are no doubt among the 1.1 million civilians ordered by Israel to move from northern to southern Gaza. They have been joined by other Palestinians already living in southern Gaza and who, like those from the north, are desperately seeking to escape the horror of the Israeli air campaign unleashed upon them.

The Rafah crossing has been periodically opened by Egypt to allow at least some aid convoys to enter Gaza and will likely be selectively opened to allow foreign passport holders through. Yet, it has been firmly closed to Palestinians seeking to leave Gaza since October 10. Egyptian president Field Marshall Abdel Fattah el-Sisi announced that "[w]hat is happening now in Gaza is an attempt to force civilian residents to take refuge and migrate to Egypt, which should not be accepted." King Abdullah II of Jordan (which borders the West Bank, but not Gaza) was even more succinct: "No refugees in Jordan, no refugees in Egypt," he declared.

The Deafening Silence of UN Officials

It is remarkable that the United Nations refugee agency – UNHCR – has completely avoided engagement with this issue. Indeed, UN High Commissioner for Refugees Filippo Grandi has limited himself to just three posts on the Israel-Gaza situation: one focused mainly on the protection of aid workers; a second lamenting the loss of lives, in particular of aid workers; and a third expressing solidarity with colleagues of UNRWA, the UN Relief and Works Agency for Palestine Refugees in the Near East (which has long delivered aid in the region). Not one word about the closing of the Rafah border crossing, or even about the rights of civilians seeking safety.

Nor has the UN's High Commissioner for Human Rights, Volker Türk – himself a former Assistant High Commissioner at UNHCR – done any better. Neither the word "refugee" nor even a reference to "Gaza" has found its way into his posts, even as the only escape route from horrific human rights abuse in Gaza remains firmly closed to desperate Palestinians.

It's of course possible that diplomatic considerations have prompted these top UN officials responsible for refugee and human rights protection to sidestep any mention of the legal right of Gazans to escape into Egypt. Yet even as events in Gaza were unfolding the High Commissioner for Human Rights himself proudly proclaimed that as a general matter "[w]e should not be afraid to put protection front and centre… We must… spotlight violations and ensure accountability of international law."

So why the deafening silence in this case?

It is not because international law is unclear.

A Clear Violation of the Duty of Non-Refoulement

First and most critically, the duty of *non-refoulement* (anchored in Art. 33 of the Refugee Convention, Arts. 6 and 7 of the Civil and Political Covenant, and Art. 3 of the Torture Convention – all of which bind Egypt) unequivocally includes a duty not to reject people arriving at a state party's border. Indeed, the main reason to codify a prohibition of *refoulement* in the Refugee Convention (a duty that is in addition to Art. 32, which disallows expulsion) was to ensure that the prohibition captured the "various methods by which refugees could be expelled, refused admittance or removed."[1] This bedrock principle has been routinely affirmed, with the European Court of Human Rights insisting that "[i]t is crucial to observe… that the prohibition of *refoulement* includes the protection of asylum-seekers in cases of both non-admission and rejection at the border [178]."

The second question is whether at-risk Gazans are entitled to protection against *refoulement*.

The easiest "yes" is given with respect to the duty arising from Arts. 6 (right to life) and 7 (freedom from torture or cruel, inhuman, or degrading treatment or punishment) of the Civil and Political Covenant. As the UN Human Rights Committee has determined, Art. 6 "... should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death [para 3]." At least as important, "[t]he right to life is the supreme right from which no derogation is permitted, even in situations of armed conflict and other public emergencies that threaten the life of the nation [para 2]."

There may be disagreement about whether the intentionality and specific intent requirements for the risks faced by civilians in Gaza to be classified as torture are satisfied. Yet it is surely beyond dispute that the risk of grave injury or denial of the necessities of life amounts to "inhuman or cruel treatment" that engages Art. 7 [paras 4-5]. As in the case of the right to life, "no justification or extenuating circumstances may be invoked to excuse a violation of article 7 [para 3]."

If there are substantial grounds to believe that an individual would upon return be subjected to treatment contrary to Art. 6, Art. 7, or both, there is an implied duty of *non-refoulement* [12], at least insofar as the risk is "irreparable [per G. Neuman]."

The Status of Palestinians under the Refugee Convention

The duty of *non-refoulement* arising under the Covenants is independent of, and is in some ways broader than, the original duty of *non-refoulement* set by Art. 33 of the Refugee Convention [para 9.3]. This simplifies matters substantially, since there is debate about whether Palestinians are excluded from Convention refugee status by virtue of Art. 1(D) of the Refugee Convention:

> *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.*

Much ink has been spilled about the history and interpretation of this clause. In short, it was included in the Refugee Convention with the specific intention to exclude Palestinian refugees – a reflection of the interest-convergence between Arab states and European states [para 16]. While the former were determined to avoid subversion of the self-determination claim that might result from a diaspora of Palestinians, the latter wanted to avoid protection obligations to this large group of refugees within striking distance of their territories. But the *quid pro quo* demanded by Arab states (and codified in the second paragraph of Art. 1(D)) was that should the UN ever abandon the Palestinians, they would receive refugee protection *automatically* ("ipso facto") in any state party they could reach.

In my view, Art. 1(D) has little contemporary clout since it excludes only a historically bounded class ("who are *at present* receiving") of refugees [at 509-523]. Today, only a very small minority of Palestinians falls into this group [28-50]. This historically bounded understanding follows from the choice for the Convention of different language than that used for the contemporaneously drafted UNHCR Statute (which excludes any person "who continues to receive" relevant UN protection or assistance); from the extraordinary strength of the residual remedy (if UNRWA were to end its operations) of automatic refugee rights, an unconditional guarantee unlikely to have been made to a group of indefinite size [at 50]; and from the context known to the drafters who "did not anticipate that, half a century later, there would be second or third generations of Palestinian Arabs... displaced and enjoying the assistance of UNRWA [*id,* at 65]." Moreover, at the level of principle, it is a construction that is a minimally intrusive deviation from the norm of

providing protection to all comparably in need without reference to ethnicity or place of origin [para 2].

But even those who disagree with this interpretation – such as the Court of Justice of the European Union [50-51] – would likely still agree that Art. 1(D) is no bar to the entitlement of refugees from Gaza to claim Convention rights. This is because the Court takes the view that the residual automatic protection guaranteed by the second clause does not refer to the termination of the mandate of UNRWA without a settlement of Palestinian claims (as I believe it does). Rather, it is triggered any time that an individual Palestinian has no access to UNRWA assistance [51]. Given the decimation of UNRWA capacity in Gaza in recent weeks, the CJEU's interpretation would lead to much the same result as my preferred understanding. Indeed, it may be even more liberal, requiring the automatic ("ipso facto") extension of protection against *refoulement* and all other Convention rights to any Palestinian from Gaza arriving at the Egyptian border – or at the frontier of any other state party.

Egypt's Illegal Refusal to Let Gazans Flee to Safety

Egypt has nonetheless sought to justify its refusal to allow the Palestinians to flee to safety on four main grounds.

First, it has said it is motivated by concern "for the safety of civilians" seeking to cross at a border point that has been under attack by Israel. This is a manifestly patronizing and disingenuous stance given the pervasive risk throughout nearly all of Gaza.

Second, Egypt has insisted that it does not want to be complicit in a forced expulsion that might "eliminate the Palestinian cause." This is, of course, precisely the concern that led to the drafting of the Refugee Convention's Art. 1(D) in the first place. But the drafters – including Arab delegates – recognized even in 1951 that at some point the political project of securing a Palestinian homeland had to yield to critical human imperatives for protection and assistance. This is why they included the second clause that guaranteed residual access to refugee protection. The Egyptian claim is very much at odds with the bargain struck, reducing at-risk Palestinians to little more than collateral damage in the quest for self-determination.

Third, Egypt argues that it has done its fair share for refugees. It is presently hosting some 300,000 UN-registered refugees (the largest group being from Sudan), in addition to roughly 100,000 Palestinians already living there illegally. That contribution is certainly substantial, though many other countries host more refugees, with Egypt having only the 22nd largest refugee population. The failure of the global community to establish a binding system of refugee responsibility sharing is a glaring inadequacy, with the whole developed world receiving only about 20% of the world's refugees. But while its responsibilities give Egypt good grounds to demand more support from other countries, they provide no basis *in law* to reject refugees arriving at its borders.

Fourth and in my view likely most critical to Egypt, there is a real worry that there will be Hamas and other extremists among those seeking protection in Egypt. Having fought a hard battle against an Islamic State-affiliated militant group in the Sinai, Egypt is understandably reluctant to import radical violence from Gaza. Importantly, international refugee law takes real account of the fact that criminals do infiltrate refugee movements. It specifically allows states to engage in provisional detention of those arriving pending verification of identity and any security concerns [Art. 31(2)], and even authorizes *refoulement* in cases of demonstrated grave risk to safety or security [Art. 33(2)]. But it gives no license to paint with a broad brush in a way that unfairly stigmatizes all Palestinian refugees as terrorists.

The bottom line, then, is that both international refugee and human rights law that bind Egypt make clear that its closure of the Rafah border crossing to all Palestinians – including to those at grave and imminent risk – is an illegal act of *refoulement*. In this case, it has proved to be an illegal act with truly deadly consequences and must be condemned as such.

[1] Statement of Mr. Cuvelier of Belgium, UN Doc. E/AC.32/SR.22, Feb. 2, 1950, at 20.

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