‘International Refugee Law – Yesterday, Today, but Tomorrow?’

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January 2017

This paper is based on two talks, the first being a presentation on 29 June 2016 at the Conference on ‘The Future of Refugee Law’, organised by the Refugee Law Initiative, University of London; and the second being the Sir Kenneth Bailey Memorial Lecture at the University of Melbourne on 14 September 2016.

Introduction

For many of those who supported the United Nations at its inception, social justice and economic advancement were as important to international harmony as the prevention or war. Today, these needs are no less a concern, even if the realities of population growth, under-development, under-investment, and a world still riven by inequality might lead us to question just how far we have come.

The picture is by no means entirely negative, however, and the international refugee regime demonstrates good evidence of co-operation, of solutions found and protection ensured; of progress, of a substantial degree of resilience, a solid historical base in the practice of States, and the capacity to evolve. We do move on, and even if that does not necessarily lead to progress in all things, it may mean that certain issues are now more clearly delineated, and that we can look to the future with a measure more confidence.

Of course, like so much of the law which regulates relations between States and their conduct towards individuals, certain elements remain contested. Whether the regime can respond effectively to today's challenges may be doubted, for much depends on political will among States; and on a quality of leadership and vision seen before, but which today seems only too lacking.

Still, it helps to look to the past. International lawyers do that a lot, seeking patterns of behaviour which, in their turn, may herald the emergence or consolidation of a customary rule of law and the sense of an obligation. But we also look to the past empathetically, to gain understanding of how earlier, not so dissimilar situations were encountered, how they were perceived and analysed, and how they were met. It is not that history repeats itself, or can be made to repeat itself; or that what worked then, must necessarily work now. It is simply that there are lessons to be learned and mistakes to be avoided.

International refugee law yesterday

So let's go back to the beginning, and see how the history of international refugee law closely parallels the modern history of international law and organisation.

It all began at a meeting in Paris in February 1921. Gustave Ador, then President of the International Committee of the Red Cross (ICRC), met with the President of the Council of the League of Nations, and brought up the urgent problem of several hundred thousand Russian refugees then adrift in Europe and elsewhere – adrift and without protection, written off by their country of origin, with no prospect of settling locally, of finding employment, let alone of moving on to other countries. The ICRC and the League of Red Cross Societies took up the challenge of relief, with considerable assistance from the American Red Cross and the International 'Save the

Children' Union. But relief was not enough, the resources of voluntary organisations were rapidly diminishing, and something had to be done with regard to legal status, employment and emigration. There was no better organisation than the League, argued the ICRC, to look into the issues, and only the League was in a position to surmount the political and social difficulties and come up with solutions.

In a letter on 15 June 1921 to the President of the Council of the League, Gustave Ador urged it to take the necessary action. The Secretary-General, Sir Eric Drummond, sounded out governments on what to do, and many responded positively, favouring both 'a general organisation under the auspices of the League', and a High Commissioner – someone with personal authority, able to secure the necessary support from governments, to influence non-governmental organisations and gain their respect. Such a High Commissioner would define the legal status of the refugees, organise their repatriation or allocation to other States, find them productive employment (a recurring theme) and, together with philanthropic organisations, undertake relief work. This would cost money, of course, and although it was briefly considered that 'funds belonging to former Russian Governments, ... at present deposited in various countries' might be used, nothing came of the idea.

A conference duly took place in Geneva from 22-25 August 1921. The Norwegian, Fridtjof Nansen was proposed as High Commissioner – he had already worked on famine relief in Russia and on the repatriation of former prisoners of war – and a telegram was sent off. On 1 September, he replied by letter, accepting the post, and at once began the search for solutions. One of the first problems was that of Russian refugees in Constantinople, many of them now 'absolutely without resources'. For them, as for others, Nansen saw answer as settling them 'in productive employment in countries where they will not become a charge on the public funds'. He set about finding opportunities, the governments of Bulgaria and Czechoslovakia stepped up, and Nansen then turned to organising transport, visas and transit.

A year later, he was able to report that funds had also been provided by Member States and by the American Relief Association for the 'evacuation' (we would now say 'resettlement') of Russian refugees from Constantinople, with the Serb-Croat-Slovene State also assisting. In the meantime, of course, Nansen had secured the agreement of governments under the Arrangement of 5 July 1922 to issue identify certificates to Russian refugees – a simple administrative step which was highly instrumental in their ultimately finding solutions. Almost all League members adopted the system, together with Germany, a non-member.

He also called attention to issues which even then were of critical concern, just as they are today. He noted the 'exceedingly unhappy situation of Russian refugee children', and that some 140,000 refugee children were estimated to be in Europe. An orphanage was transferred *in toto* from Constantinople to Belgium, while other groups of children were evacuated to France and Bulgaria, special provision being made for their education.

No less in need of special attention were refugee invalids, and refugees in the Far East, including problematic numbers in China who had been engaged in military activities in their home country. He intervened with Romania to prevent the threatened expulsion, for 'military reasons', of some 10,000 Russians who had lost their nationality and who could only return to their country, 'at a grave personal risk'. Mass expulsion was averted, although on condition that interested organisations make arrangements, 'for their satisfactory evacuation elsewhere'. Similar issues arose in Poland, which proposed the expulsion of all 'non-political refugees'. The High Commissioner again intervened, noting that many had lost their Russian nationality and would not have been allowed to return in any event. 'Resettlement' opportunities were negotiated with the United States, even as discussions were initiated with the Soviets on the repatriation of those wishing to return.

When we think of the cardinal principle of *non-refoulement* today – the rule which prohibits the return of the refugee to wherever he or she may run the risk of persecution – we tend to look back no farther than the 1951 Convention relating to the Status of Refugees, or perhaps to the 1933 Convention on the International Status of Refugees. But the idea, the principle, was already implicit in the doctrine of refugee protection and assistance in the 1920s. The League and the ICRC both accepted that, if refugees were to return to Russia, then this would need to be accompanied by assurances of the 'most elementary security and the prospects of conditions at least as favourable as those under which they are now living'. Even in the absence of any explicit treaty provision, Nansen felt able to intervene with States to stop the threatened return of refugees.

In the League's attention to the situation of Russian refugees (soon joined by other groups and categories), we can see protection against forcible return and other emerging principles at work – recognition of responsibility to assist countries of first refuge; acceptance of the importance of a set of solutions to be promoted with and by States, including emigration (but with that emphasis always on 'productive employment'), and special measures for vulnerable groups; and recognition of the value of identity certificates, followed rapidly by the refugee passport.

The numbers of refugees in Europe always exceeded the 800,000 or so Russian refugees to which reference is often made, and other categories likely brought the figure to 3 million, if not more. In 1923, Armenians were added to the High Commissioner's mandate, followed by Assyrians, Assyro-Chaldeans and Turkish refugees in 1928. Although each of these later groups was seen to share certain common characteristics – the refugee was outside his or her country of origin, no longer enjoyed its protection, and had not acquired the protection of another – States preferred an *ad hoc*, group by group approach, seeking to limit their commitments to known categories and staying away from any general description of unknown quantity. However, this was not Nansen's view. On the contrary, as Louise Holborn noted, he believed that long-range

plans, ‘carefully conceived and carried through would prove not only far more successful but much less costly than the relief and piecemeal efforts being made’.

In 1930, Fridtjof Nansen died. No new High Commissioner was appointed at the time, but the functions and responsibilities were transferred to a new office, named in his honour. In October 1933, as the Nansen Office itself was on the point of winding up and on the eve of a decade or so of devastating displacements, a diplomatic conference was convened in Geneva to draft a convention on the legal status of the refugee, and to promote the principle of equal treatment with nationals. It was to be the first occasion in which the principle of *non-refoulement* was mentioned in an international agreement, in which limitations on expulsion were mooted, and in which access to education was seen as essential to equality.

More significant, perhaps, was the emphasis which delegates gave to national interests, particularly in the case of the so-called front-line States. For Poland, the refugee question looked quite different than for those countries more distant, where refugees arrived only after having passed through a sort of filter. Similarly, when the question of putting return clauses on Nansen certificates came to be discussed, together with whether refugees should be allowed to go back unhindered to the country of issue, the interventions of those days sound all too familiar, especially when placed alongside current proposals for revision of the Dublin scheme and the ‘common European asylum system’. Austria, for example, wanted to consider each potential readmission on a case by case basis. Finland thought that frontline receiving States deserved special attention, and that no one could think of *obliging* such States to readmit every refugee who had ever stayed there. Greece, too, said that a refugee’s departure was considered definitive, and Poland was of much the same view. The 1933 Conference wound down to its conclusion with little apparent enthusiasm. Only three States signed on the day, and ultimately only eight States ratified the convention, three of them with substantial reservations and declarations.

All the while, the flight from nazism took hold. To their credit, in one small respect at least, States agreed that there should be a new High Commissioner responsible for Refugees (Jewish and other) coming from Germany, but formally outside the League owing to Germany’s continuing membership. James McDonald was appointed to the post, also in October 1933, and was tasked to ‘negotiate and direct’ the ‘international collaboration’ necessary to solve the, ‘economic, financial and social problem of the refugees...’ It got worse. Doors were closed, the pressure grew, and while private organisations might do their best for the refugees, it was not enough just to help those who fled. Major efforts were needed to remove or mitigate the causes, and this, said McDonald in his December 1935 letter of resignation, was a political function and therefore the responsibility of the League itself, given the danger to international peace and security.

By this time, however, the League was too weak to influence events. A new High Commissioner was appointed to succeed McDonald, with his mandate extended to refugees from Austria after the Anschluss in 1938; and a new organisation was created, the Intergovernmental

Committee on Refugees, following the Evian conference that year. Events, however, rapidly took over. Notwithstanding the times, notwithstanding knowledge of events and of persecution and of flight, humanitarian responses were not the order of the day. On the contrary, refugees were seen as potential threats – to the economy, to social cohesion, to the process of 'appeasement'. As Louise Holborn concluded in May 1939, the League had,

> '... handicapped itself... first by always dealing with [refugee work] as a humanitarian question instead of treating it as a political one and striking at the root of the problem... by negotiations with the refugee-producing countries; and second by its unwillingness to commit itself to long-range plans.'

It is ironic that the architecture of international law and organisation set up for refugees in the new era of the United Nations did little at the time to engage with these concerns. To this day, causes remain a fundamental challenge to a community of States and to an organisation premised on non-intervention, while the seductive but illusory pull of 'temporariness' continues to influence policies and practices at both national and international level.

International refugee law today

When States finally came together in the new United Nations, refugees were high on the agenda. In its first London session in February 1946, the General Assembly identified three principles which had already figured in League of Nations doctrine, but which now acquired new salience: first, that the refugee problem was international in character; second, that there should be no forced return of those with valid objections to going back to their country; and third that, subject to this consideration, repatriation should be promoted and facilitated. While the UN necessarily built on what had gone before, there was one major, significant difference. With the adoption of the Universal Declaration of Human Rights in 1948, the individual was now clearly in the frame; and while sovereignty and non-interference might continue their role, the movement of refugees between States and the entitlement of refugees to protection was clearly a matter of international law.

The Constitution of the UN's first agency, the International Refugee Organisation (IRO), was adopted in December 1946, and focussed on finding solutions for those displaced by the Second World War and by contemporaneous political developments. Co-operation was as limited as it had been in the time of the League, even though a reading of the Article 1 of the United Nations Charter might have hinted at something stronger. Recent developments, even within such a supposedly well-integrated regional organisation as the European Union, have shown only too well how difficult it is to distil the principle of co-operation into practical results. Self-interest

remains at the heart of the matter, and action in pursuit of solutions for refugees depends, as it always has done, on the formal consent of States, staggering from one crisis to another.

The IRO's successes and failures cannot be separated from its political context. On the one hand, it undertook comprehensive resettlement activities, but on the other, it was expensive, consistently criticised by the eastern bloc and, for some of its western supporters, unsuited to broader political purposes. Even though there were then some fifty-four members of the United Nations, only eighteen joined the organisation and contributed to its programmes, either financially or with commitments to the resettlement of Europe's refugees and displaced.

Alternatives were debated in the Third Committee and the Economic and Social Council in the late 1940s, and States agreed that the IRO should be replaced by a non-operational subsidiary organ of the General Assembly, the Office of the United Nations High Commissioner for Refugees (UNHCR), whose work would by 'complemented' by a new convention on the status of refugees. UNHCR, which came into being on 1 January 1951, was formally entrusted with responsibility to provide international protection and, together with governments, to seek permanent solutions for the problem of refugees. But its work was also to be 'humanitarian' and 'non-political' and, as with the League, prevention and causes were none of its business.

In addition, when States came to draft the 1951 Convention, they expressly declined to write in specific obligations on co-operation, which the then UN Secretary-General saw as crucial to an effective regime. His suggestion for an article on burden-sharing was rejected, as was his proposal that States give 'favourable consideration' to admitting refugees. It is precisely in these areas – causes and co-operation – that the international refugee regime reveals its incompleteness, and this helps to explain many, if not all, of the actions taken by States, particularly unilaterally, and of the concerns which many also share.

Although the occasional official or politician may complain that the 1951 Convention is unsuited for today's conditions and call for an overhaul of the legal framework, they are generally hard pushed to say what exactly is wrong. There is a debate here, which is worth having. Perhaps the refugee definition is not wide enough and it should be re-drawn to embrace more clearly the 'new' categories of displaced? Or perhaps the principle of family unity should be moved from the Final Act into the body of the Convention? That does not seem to be what they want, but neither do the proponents of 'reform' seem inclined to challenge the core meaning of protection, and to demand the power to send people back to where they will be at risk of death, persecution, torture, or other serious violations of their human rights.

There are still undoubted strengths in international refugee law, as it has evolved in practice and in the institutions set up by States. The 1951 Convention and its 'updating' 1967 Protocol are now complemented by regional arrangements in Africa, Central America and Europe. The protection of refugees has itself evolved and been strengthened by developments in the general field of human rights, while the principle of *non-refoulement* is manifestly one of customary international law.

International refugee law is a dynamic regime, a matter of what is written, what is done, what is expected. It is an *international* regime, in that it links a treaty concluded under the auspices of the United Nations, to an agency – a subsidiary organ of the General Assembly accepted by States both as partner and supervisory mechanism; and then to a forum of States, the UNHCR Executive Committee.

In practice, the links are more extensive still. UNHCR's staff of 9,000 plus operate, and inter-operate with States at the official level, in 125 countries world-wide. UNHCR will often be involved when refugee status decision-making authorities seek to apply international criteria to the disparate facts of individual lives. Whenever and wherever people arrive in search of protection, whether or not in large numbers, it is UNHCR's responsibility to provide protection, that is, to intercede with governments, if necessary, to ensure that those in need are identified and treated accordingly. UNHCR may not have the authority to bind States or to interpret legal matters with final effect, but the role with which it has been entrusted by States means that its views must be considered in good faith, and justifiable reasons given for disagreement. In such contexts, national and international officials are engaged in common cause, as indeed they have been, if not since time immemorial, then at least since 1921.

The essence of refugee protection today can be stated quite simply. The refugee is someone whose status is defined and recognised by international law, both under treaty and as a matter of customary international law. He or she *does* have a right to seek asylum, and the search for refuge is *not* a criminal act from an international law perspective, whatever States may pretend. It follows that refugees in search of protection are not to be penalised because of their illegal entry or presence, and that each claim must be examined on its merits; in this context, the precise standard of international due process may be a work in progress, but the essentials are emerging in the practice of States and in light of overarching principles of human rights.

Above all, as over ninety years of sufficiently conforming practice have confirmed, the refugee must not be *refouled*. There are gaps and grey areas which States can exploit in their own interest – the gap between *non-refoulement* and asylum, for example, which human rights is seeking to bridge; or the gap between primary obligations and responsibility when it comes to identifying which State or group of States should protect and assist. But the core is clear, and at the risk of simplifying a complex scenario, the outlines of the scheme of protection are self-evident in those *primary rules* which lay down the parameters for State action, indicating the limits beyond which the State cannot go without incurring responsibility for its actions.

The fundamental rules of the international refugee regime are *primary* in the sense that, unless there are very exceptional circumstances, they can override or trump other important interests, commonly expressed in terms of sovereign powers. They change the picture, they lay down the conditions for *subsequent* State conduct (not to return a refugee to where he or she may be persecuted; not to penalize a refugee by reason of illegal entry; to deal with a person *as a refugee*, and within the framework of protection, co-operation and solutions provided by

international law and its institutions). Such primary rules do not necessarily provide solutions for every resulting problem, but they are the essential juridical basis – the framework – from which 'subsidiary' rules will take their normative and constructive force.

Refugees, for example, commonly use the same means of travel and entry as irregular and undocumented migrants. What States do to combat smuggling and trafficking has a major impact on refugee protection, and here the primary rules emphasise the clear distinctions to be made between refugees and those not in need of international protection, who fall under other legal regimes. It is in the very process of making such distinctions that the key to appropriate solutions is found, whether within the field of international refugee law or of international law at large.

The challenges today lie precisely at the intersection between the implementation of international protection obligations, on the one hand; and the orderly and humane management generally of the movement of people between States, on the other.

International refugee law tomorrow?

Does international refugee law, with all its constraints on States' freedom of action, have a future? Certainly, the present international community of independent 'sovereign' States will continue, and people will continue to move between States in search of refuge and livelihood opportunities. As States look for solutions, history and practice suggest that perceptions of self-interest will continue to influence policy and their readiness to co-operate with others. At the same time, with an eye on the goal of mitigating the necessity for flight, some States will increasingly call for a review of those aspects of 'sovereignty' which are obstacles to humanitarian action: the unrealised potential of the 'responsibility to protect' may yet come into its own.

Clearly, international refugee law will have to find its place in a world of increasing international migration, in a highly globalised and securitised political and economic context. Although the differences are readily explicable in the abstract, there is no clear bright line between the refugee and the economic migrant, no matter what the UNHCR *Handbook* may wish. But that is not so much a problem, as an urgent invitation finally to introduce a workable international legal framework for the governance of migration and for the protection of the rights of migrants, irrespective of their status.

In 1946, the General Assembly recognised that the refugee problem was international in scope and nature, by which it meant that no one State should be expected or required to shoulder responsibility on its own. Even as States have attempted, and continue to attempt, to assert unbound unilateral sovereign competence in such matters, it is now evident that the multiple and multi-dimensional interests of States require international co-operation for their realisation, and that this, in turn, will require States to deal with one another – States of origin, States of transit, States of intended or eventual destination – on a basis of equality and equity.

A European perspective

The recent and ongoing crisis in Europe has exposed the illusion that there was much 'common' in the so-called 'Common European Asylum System'. Bearing in mind the principles of solidarity, co-operation and fair sharing of responsibility, one can see that 'expectations' of Greece's ability to manage the EU's external borders were never well-founded; it was just wishful thinking, as it is also with regard to other Member States who have faced large numbers of refugees and asylum seekers.

As many have emphasised, the only way to get into the EU as a refugee is, in fact, irregularly. While the EU has institutionalised a broader protection base for those who get there (Convention refugee status, subsidiary protection, humanitarian grounds), it has remained more or less closed to applications 'from outside'. Hence the advocacy, over many years, for opening up avenues for legal admission by refugees presently in non-EU countries, including humanitarian visas, more generous family reunion, study opportunities, and the like; the response has been mainly rhetorical, not substantive.

Recent events have showed also the critical need for immediate shelter and assistance for those on the move, no less than for support so that transit and receiving States can provide reception facilities and a measure of control and organisation, both for better management and to bring assurance to those on the move and the communities through which they pass or where they remain. Such first steps are crucial, not only to avoid inhumane and degrading conditions contrary to the European Convention on Human Rights and the EU Charter, but also to open the way to considered and defensible evaluations of overall protection needs, and to engage in the essential processes of identification and security assessment.

A co-ordinated, collaborative European response could help to avert a future race to engage in border closures, summary denial of entry and removals inconsistent with EU and international law, or which pass on an insupportable burden to 'front-line' EU and non-EU States. In addition, well-structured, co-ordinated and organised reception can and should be the pathway to protection decision-making, whether on a group or individual basis.

A truly communitarian response would put fairness front and centre. What is needed, is for responsibility for determining protection claims to be transferred from the national to the EU level. For there will be no end to chaos and fragmentation unless refugee reception and status determination are truly Europeanised, with decision-making by a European body competent to fulfil collectively the individual obligations of Member States and the policy and protection goals of the EU.

An international perspective

International law is not itself a 'solution' to the problem of refugees and the challenges produced by migratory flows, but it can be a facilitator and a guide to the principled effectiveness of measures which States may take or contemplate. In this sense, it offers a framework and the goals by which to judge the viability of process and the quality of success, if any. International law thus conditions the sovereignty dimension, particularly when considered within the institutional context of the United Nations.

Despite the General Assembly's 2003 decision to put UNHCR's mandate on a permanent footing ('until the refugee problem is solved'), nothing much else has changed – States continue to see the refugee problem as essentially 'temporary' in nature. This might be thought encouragingly optimistic, and evidence of their intent and willingness to ensure that solutions to forced migration will be quickly forthcoming, and that no refugee situation should become protracted through time. The consequence, however, is that States remain unwilling to commit themselves to humanitarian and protection realities without limit of time.

The idea that refugee situations are 'temporary' has a certain seductive appeal, despite the multiple lessons of history. What we do know, is that refugees will move, from persecution and conflict to places of refuge, and from places of uncertain or strained refuge, to places of actual or perceived greater security. The fact that we will not know exactly how many is itself reason enough to put institutionalised mechanisms of mutual support into place, recognising also that there is no working or workable conception of the 'temporary' (as a predictive tool), which allows or justifies the muddle-headed, short-sighted, often quite mean-spirited policy and legislative proposals which have emerged from the dark side in recent months. Looking at the broader issues raised by an increasingly mobile world in which, too often, those on the move are left adrift, abused, and without protection, novel, long-range thinking is clearly called for, much as Nansen and McDonald thought in earlier times, even if on somewhat different issues.

The UN Secretary-General has urged States to commit to upholding safety and dignity in large movements of both refugees and migrants, to commit to a Global Compact on responsibility sharing for refugees and migrants, and to commit to a Global Compact for safe, regular and orderly migration. The 'New York Declaration', adopted on 19 September 2016 by Heads of State and Government meeting in the General Assembly is full of fine words, very fine words, recognizing that the world is a better place for the contribution made by migrants, and re-affirming that the human rights of all refugees and migrants, regardless of status, are to be protected. It acknowledges finally that large-scale movements are such that no one State can manage them on its own, and that greater co-operation is called for if lives are to be saved, root causes addressed, and prevention and mediation of conflict promoted. It proposes a number of 'commitments', which include working to address root causes, to prevent or resolve conflict, and to promote human rights. The 1951 Convention and the 1967 Protocol remain the 'foundation'

of the international refugee protection regime, in which human rights and humanitarian law also play their part, and in which there needs to be 'a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees'.

The proposed 'Comprehensive refugee response framework' offers an outline for the future, with regard to reception and admission, meeting immediate and ongoing needs, supporting host countries and communities, and working towards durable solutions. The primary goal remains return to countries of origin, with legal stay in host States in the interim and an emphasis on measures to foster self-reliance. Third States are then encouraged to make available or expand resettlement opportunities and what are now called 'complementary pathways for admission'. But this, and the rest, remains just an outline. It is not the 'Global Compact' that the Secretary-General hoped for – that is postponed to 2018; rather, it is a pilot project, a scheme for action to be pursued by UNHCR and States, to see how it all works out. Does it add anything to what is already in place and what is already being done? That seems doubtful; its value for the moment may lie in its calling attention, once again, to the need for a 'comprehensive' approach.

Next, the Declaration proposes a number of steps, 'Towards a global compact for safe, orderly and regular migration'; this, too, is a work in progress, with 2018 also as the intended dateline. Once again, this is to be a process of intergovernmental negotiations, and considerably more time and effort will be required to bring States to any sort of consensus on such contested questions. At this stage, the proposals do little more than highlight issues and identify 'actors', including the Special Representative of the Secretary General for International Migration, the International Labour Organisation, the High Commissioner for Human Rights, and the International Organization for Migration. The effective protection of migrant rights, however, remains to be included, developed and placed on a more effective and credible institutional base.

Alternative ways and other things to do

There is still much to be done at the international level, over, above and beyond the New York Declaration. Among others, the competencies of the Security Council and the UN Secretary-General should be revisited seriously and urgently, with a view to anticipating crisis, acting to mediate and prevent conflict, and moving to counteract the necessity for flight, for example, through effectively operationalised 'safe zones'.

What we know, and what we keep re-learning, is that if security against displacement by conflict is not provided, and if security conditions in countries of first refugee fall short of providing assistance, livelihood, education and at least some opportunity, then refugees will continue both to flee and to keep moving. That is the lesson of experience, after experience, after experience.

Another lesson from history has been the disinclination on the part of States to place refugee and humanitarian funding on a more secure basis. Alternatives have certainly been

debated – the International Finance Facility, for example, back in 2005 – but effective planning and costs management demand at least a proportion of guaranteed funds. Perhaps some use might also be made of the frozen assets of States responsible for refugee and forced migration and population displacement, with the Security Council and/or States, acting through regional and related organisations, using sanctions and related competencies to free up funds for humanitarian assistance.

If there is one weakness in the regime established by the 1951 Convention/1967 Protocol relating to the Status of Refuges, it is in the failure of these instruments to establish clearly which State should be responsible for determining claims to protection; and which State or States should contribute to relieving countries of first asylum, and how. The resulting 'legal hole', has not been resolved through the political mechanisms of the regime at large, for example, in the now 98 Member State Executive Committee of the UNHCR Programme. Here, international experience in environmental protection may offer a model, and an opportunity to investigate the possibility of States committing to an outline instrument, a framework convention for durable solutions, setting out certain objectives to which they would agree in principle, while leaving a measure of discretion in the implementation of those agreed objectives. In this way, specific targets and detailed rules (if needed) could be addressed in a separate protocol, oriented to context and particular circumstances. A framework convention could thus strengthen the basics, while allowing specific challenges to be dealt with by groups of States contoured more precisely by shared national or regional interests, proximity, alliance, and the like. The key to such an approach would be to institutionalise a permanent 'steering group' within the treaty regime, competent to call a meeting of States party and to set the agenda; the UNHCR Executive Committee might be the place.

Keeping asylum 'alive' means matching it also with viable migration management. States have long resisted the 'internationalisation' of migration at large, and the results have been ineffective and inefficient, on the one hand, and insecurity and human rights violations, on the other. No international agency is yet responsible for the protection of forced migrants, and for working with governments to find solutions or improve arrangements for those outside their country, who may not fit within traditional categories. Change is urgently needed, on both fronts.

Over the years, the UN General Assembly has expressly affirmed that UNHCR's 1950 mandate extends beyond its original terms, and that it also includes stateless persons, the internally displaced, and others 'of concern'. This does not lead to new obligations on States additional to those to which they have consented by becoming party to treaties, or which are applicable under customary international law, but it does help to contextualise issues like protection in an operational sense. There has always been a disjuncture in practice, and a certain tension, between the institutional responsibilities of UNHCR, the obligations of States, and their 'sovereign' interests – this is part of what makes international refugee law such a dynamic system.

A number of radical, institutional changes could enable the international system to develop and maintain capacity to respond effectively to today's population displacements and to those which, inevitably, will follow. A first necessary step in 'nudging' the regime towards greater equity and more effectiveness is to 'internationalise' certain key migration issues, in particular, by providing for the protection or better protection of those moving between States who have no claim to enter or remain, but who are effectively adrift, exploited, detained, abused, and worse. This would not only improve the situation of countless individuals and families, but would also better serve the interests, including the security interests, of States, and constitute an important step towards better management.

This can be achieved not by a new treaty, which is unlikely today, but by an imaginative use of existing institutions engaging with practical matters – in this case, by having the UN General Assembly revise the UNHCR Statute for the twenty-first century. Revision is needed in any case, both to do away with historical anomalies and redundancies, but more particularly, to reflect changes already made and to bring in new tasks that call for the application of UNHCR's extensive and unique protection and assistance experience. In short, the organisation's mandate should expressly encompass refugees, stateless persons, the internally displaced, and migrants or those otherwise displaced, who are without or in need of protection.

This is just a beginning, but it could offer States an established and accepted partner, capable of operating across the whole spectrum of the movement of people between States; open up possibilities for future developments, for example, in standard-setting and strengthening regional opportunities; and keep human rights and protection front and centre in debate, policy and practice.

The basic rules of international refugee law are well-understood, and they do condition action and reaction. Related areas, however, are not so well regulated and regime gaps, both universal and regional, are readily exploited. There is a great need for leadership, joined up thinking, structural change, and UNHCR could take the lead – institutional responsibility can be extended and enhanced, while States can be left to watch and learn until such time as they are ready and able to take on more in the way of obligation.

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