The Lawyer and the Refugee

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INTRODUCTION

Today's refugee regime owes more to US international lawyers than is often understood. Oscar Schacter, for example, was in the United Nations (UN) Secretariat when the UN High Commissioner for Refugees (UNHCR) and the 1951 Convention were on the agenda; Louis Henkin was the US representative on the 1950 UN Ad Hoc Committee which prepared the draft convention adopted the following year in Geneva; and it was he who said at the time that *non-refoulement*—the principle that prohibits States from sending a refugee back to the risk of persecution—was so fundamentally important that it should admit of no exception.[1]

Although it would be several decades before the United States formally signed on to the 1967 Protocol and adopted the Refugee Act in 1980, US decision makers soon started to make important contributions to refugee law doctrine—

https://doi.org/10.15779/Z38RN3082Z

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1. *See* Statement of Louis Henkin, U.N. Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Twentieth Meeting Held at Lake Success, New York, ¶¶ 54-56, U.N. Doc. E/AC.32.SR.20 (Feb. 10, 1950).

decisions that were noted by other courts in other countries and helped the development, for example, of a principled approach to the *particular social group* category of refugees. . . But that was *then*, and I will have to come back to *now* in a moment or two.

First, however, I want to look at where it all came from, at the origins of what we like to call, perhaps too complacently, the international refugee regime. International lawyers have an inclination to dig into the historical, but it's for the good cause of showing how deeply rooted certain rules, principles, and practices are. The history is important, and no international lawyer can avoid being an historian, for this gives us the long view essential to understanding law in the relations of States, enables us to counter misinformation dressed up as advocacy, and even to move forward.

I will also highlight a few of the well-founded criticisms of the early days, before leaping ahead to the more recent history, and thinking about some of the ways in which the law and lawyers can work with the refugee in finding protection, solutions and, we hope, a future in which the necessity for flight in search of refuge may be less frequent, but the prospect of protection more secure.

However, one caveat is needed. International refugee law is often accused of *not* providing protection where it is due, of *not* providing solutions, of *not* keeping refugees away from our shores, tied down in some other remote land, with no livelihood, no education, and no opportunity. But that is not how international law works. Even though it may set specific rules—*non-refoulement*, for example—it remains an incomplete system with many a grey area, often doing little more than providing a framework of principle within which States enjoy choice of means in fulfilling their obligations; this is why different countries have different procedures for deciding who is a refugee, and why there can be so much disparity in the results. Grey areas, as we know only too well, can be exploited negatively, but also offer scope for progressive development. The yardstick is still international law, however, and a State will be judged in the light of just how effectively it implements its obligations; and in the present context, the primary question is whether refugees as defined in international law are protected and not sent back to persecution.

I have taken the title "The Lawyer and the Refugee" not because the law provides all the answers, but because, like it or not, the law has become the standard of accountability in so much of daily life; because the refugee and the asylum seeker are so often targeted by the loose legal rhetoric of politicians and bureaucrats; and because it needs constantly to be repeated that, underlying the scheme of international protection, there is a range of fundamental principles with significant normative force.

I.
THE LEAGUE OF NATIONS

It is now 100 years since the League of Nations came into being and held its first sessions in Paris, London, and Rome.

These were early days, and exactly what the League could do had still to be worked out.[2] The Covenant recognized its competence and responsibilities with regard to mandates, certainly, and to the "sacred trust of civilization",[3] but sovereignty and the reserved domain of domestic jurisdiction were very much a part of the scheme.[4] For sure, the Covenant referred to fair and humane conditions of labor; to traffic in women and children; to supervision of the arms trade; to freedom of communication; to "matters of international concern for the prevention and control of disease,"[5] and a special place was reserved for national Red Cross societies in mitigating suffering throughout the world.[6] Overall, the organization's international "reach" seemed fairly limited, but as it turned out, it was the Red Cross which activated the League on the refugee issue, no less than on related questions of famine relief and measures to combat epidemic disease in Poland and eastern Europe.

Even if not yet on the international agenda, refugees were certainly around. In the mid-1920s, the British had had their first encounter with refugees in Mesopotamia—various Christian minorities displaced by conflict, and for whom, in one case, the chosen solution was to arm them with rifles and a few mountain guns, that they might go where they wanted and be able to defend themselves; and so they did.[7]

Later the same year the Russian Civil War drew to a close, and the British and the French were soon busy evacuating from the Crimea their own erstwhile allies in the White Russian resistance, including both military and civilians. Each acted independently, though with some cooperation between the respective militaries.[8]

2. League of Nations Covenant art. 1, Treaty of Versailles, U.K.T.S. 4, Cmd. 153 (1919). The original members who ratified the Peace Treaty were Belgium, Bolivia, Brazil, British Empire (Canada, Australia, South Africa, New Zealand, India), France, Guatemala, Italy, Japan, Poland, Peru, Siam, Czecho-Slovakia, and Uruguay. The Argentine Republic, Chile, Paraguay, Persia, and Spain had also acceded by the end of 1919. 1 LEAGUE OF NATIONS OFF. J. 12–13 (1920).

3. League of Nations Covenant art. 22.

4. *Id.*

5. *Id.* art 23.

6. *Id.* art. 25.

7. *See* Secretary of State for India, Memorandum on The Assyrian and Armenian Refugees in Mesopotamia, CAB 24/108/72 (July 5, 1920); Secretary of State for India, Memorandum, CAB 24/114/74 (1920) (including Appendix and Enclosure B352, *Note on the Christian Communities in and around Mesopotamia* (Oct. 27, 1920)); Secretary of State for War, Memorandum, CAB 24/114/83 (Nov. 9, 1920).

8. On the evacuation, see Telegram No. 588z from Commander in Chief, Mediterranean Afloat, to Admiralty, London, CAB 24/115/5 (Nov. 15, 1920); Telegram No.598z from Commander

For the refugee issue was not then seen as a matter of *international* interest; rather, each State looked to deal on their own with such problems as might emerge. That was all to change, however, particularly as a consequence of the Bolshevik revolution, its radical nature, and policy and practice of denationalization. The political dimension was important then, as it was to be again in the 1930s and later during the Cold War. Many States refused to recognize or deal with the Soviet Government, which they considered both illegitimate and unprincipled.

There is no doubt that Russian refugees scattered around Europe at the time were a "problem", or at least raised issues, for States in the early 1920s. Their passports expired, for example, and either could not be renewed or, if renewed by diplomatic representatives of the old regime, might not be accepted for travel and related purposes. Private law issues had to also be resolved and the applicable law identified, while access by refugees to opportunities, such as work or education, or to the courts, or to services, such as welfare (if it existed), was often conditional on what was then called "reciprocity": the foreign national would benefit only to the same extent that you or I would if present in their country, and that required effective treaty relations, all of which had gone by the board.

A population without protection, with no State apparently responsible for those displaced or made stateless, was an anomaly for which the League of Nations was unprepared. It was not clear, however, that international law could provide any answers, particularly where one player had elected *not* to play by the rules.

A. Russian refugees

Although it can be insidious to single out anyone in what was a collective effort, four names in particular stand for their very special contribution to international cooperation. These were heady days, days of hope, of vision, and at least initially, of purposeful action, and those four were Fridtjof Nansen, Gustave Ador, Herbert Hoover, and Ludwik Rajchman.

Nansen, of course, is remembered for the refugee passport which carries his name; Gustave Ador was President of the International Committee of the Red Cross, and the Red Cross was a major relief organization in the post-war world; Herbert Hoover ran the American Relief Association, which supplied the bulk of assistance; and Ludwik Rajchman was instrumental in setting up the League's International Health Office which did so much to combat the spread of epidemic disease in Poland and famine-stricken Russia; he went on to become the first chairman of the UN Children's Fund (UNICEF).

in Chief, Mediterranean Afloat, to Admiralty, London, CAB 24/115/26 (Nov. 18, 1920). *See also* Letter from C. H. Harrington, Lieut. General, General Officer Commanding-in-Chief, Army of the Black Sea, to the Secretary, the War Office, CAB 24/117/25 (Dec. 18, 1920) (reporting on worsening conditions and of action taken to assist French operations, "in the name of humanity").

Despite their considerable individual achievements, each of these four was also quite typical of their time—idealists, yes, but pragmatists, too; they were probably also the sort of "damn internationalists" whom David Caron mentioned when the Riesenfeld award was given to Louis Henkin.[9]

Nansen, for example, was a well-known scientist and explorer and a Norwegian delegate to the Assembly when, in April 1920, the League entrusted him with the repatriation of prisoners of war who remained in exile notwithstanding the end of hostilities. Working with the Red Cross and with the governments of Poland, Germany, Estonia, Lithuania, and the Soviet Union, he successfully organized the two-way repatriation of over 400,000 former POWs in two years.[10] His knowledge and experience of Russia would stand him in good stead, as he took up the cause of famine relief in addition to his work for refugees.

And this work came about because, in 1921, Gustave Ador wrote to the President of the Council of the League of Nations, and brought up the urgent problem of several hundred thousand Russian refugees then in Europe and elsewhere; he mentioned 800,000, but the number in fact was a least one and a half million.[11] Although individual circumstances differed, many were 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 International Committee of the Red Cross (ICRC) and the League of Red Cross Societies had taken 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 organizations were rapidly diminishing, and something had to be done. The ICRC argued that there was no better organization than the League 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.[12]

Governments agreed that something had to be done, and many supported the idea of some sort of organization under the League, and of a High Commissioner—someone with personal authority, able to secure the necessary political support, to influence non-governmental organizations and gain their respect. Such a High Commissioner would define the legal status of the refugees, organize their repatriation or allocation to other States, find them productive employment (a recurring theme) and, together with philanthropic organizations,

9. David D. Caron, *Remarks on the Awarding of the 2003 Stefan A. Riesenfeld Award: Louis Henkin and the Felicitous Expression of Reason*, 22 BERKELEY J. INT'L L. 1, 6 (2004).

10. *Fridtjof Nansen Facts*, NOBEL FOUND., https://www.nobelprize.org/prizes/peace/1922/nansen/facts/.

11. Letter from Gustave Ador to the President of the Council of the League of Nations, 2 LEAGUE OF NATIONS OFF. J. 225, 227–29 (Feb. 20, 1921) (confirming an earlier telegram, and attaching a memorandum).

12. Id.

undertake relief work.[13] 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.[14]

Even though law and anything resembling individual rights were not as such immediately part of the solution, already a number of principles were emerging: the idea that refugees needed to be able to identify themselves and, if possible, to travel between States; freedom of movement was understood as essential, if refugees were to be able to move to where work was available; ideally, national labor markets would be open to refugees, and equality of treatment would be the norm. Finally, and remarkably, it was taken for granted that there could be no question of anyone being sent back to their country, in the absence of sufficient guarantees of security.[15]

In September 1921, Nansen accepted the post of High Commissioner for Russian Refugees,[16] but it would take time for these general principles to be translated into law. In the meantime, one of the earliest successes was the certificate of identity, which came to be known as the Nansen passport.

B. Certificates of identity/travel documents

Early in the crisis, the Government of Czecho-Slovakia had emphasized that the legal status of the refugees, including "international protection in connection with. . . passports, certificates of identity, and all other documents bearing on legal status,"[17] could not be settled by isolated action, lest further complications arise. The papers issued to Russian refugees needed to be recognized internationally, and that required agreement between States.

Nansen took this up immediately and repeatedly stressed the importance of passports and papers for travel as part of the strategy to move refugees to where work was available. He proposed two ways forward: either the necessary papers should be issued by the countries in which the refugees had found temporary abode, or they might be issued by the High Commissioner on behalf of the

13. M. Hanotaux, Report on The Question of the Russian Refugees June 27, 1921), 2 LEAGUE OF NATIONS OFF. J. 755, 756 (1921).

14. *Id.* at 757. The British Government concluded that this would not be lawful, the resources in question belonging to the successor government; Id. at 1014; *see also* Guy S. Goodwin-Gill & Selim Can Sazak, *Footing the Bill: Refugee-Creating States' Responsibility to Pay*, FOREIGN AFFS. (July 29, 2015), https://www.foreignaffairs.com/articles/africa/2015-07-29/footing-bill.

15. Conference on the Question of the Russian Refugees, Resolutions Adopted by the Conference on August 24, 1921, 2 LEAGUE OF NATIONS OFF. J. 899 (1921).

16. On the last day of the Conference, Fridtjof Nansen was invited by telegram to take up the post of High Commissioner for Russian Refugees, which he accepted on September 1, 1921: 2 LEAGUE OF NATIONS OFF. J. 1006, 1027 (1921).

17. The Question of the Russian Refugees. Summary of the Documents received by the Secretariat, 2 LEAGUE OF NATIONS OFF. J. 485, 491, Annex 6 (1921).

League.[18] These proposals provided the agenda for the conference convened by Nansen in Geneva in July 1922, at which participating States unanimously agreed on the form of a certificate which they would issue to Russian refugees, and recommended its adoption by other States, both members and non-members of the League.[19] Very soon, over 50 States had signed on.[20]

One deficiency, however, would have to be remedied, for initially States insisted that a certificate should not imply the right for the refugee to return to the issuing State, and that special authorization was required. And the absence of a return clause significantly reduced the value of a certificate for the purposes of international travel.

That would eventually change, but there are insights here which are no less relevant today—one of the reasons why front-line States were inclined *against* the return clause, was that being host to the great majority of refugees, they hoped that a certificate of identity would speed onward movement to other countries, that it would facilitate self-resettlement as an element of international solidarity.[21] Those concerns have not gone away, but documentation nevertheless was also seen as essential to personal security and identity, to gaining access to employment, which is so important both for personal dignity and to relieve the public purse, and for the opportunities that freedom of movement can bring, particularly where the refugee is able to move to where he or she may find work.

C. The principle of no compulsory return

Perhaps the most significant achievement, if that's the right word, was the acceptance among States of the principle of no compulsory return; in fact, I see it not so much as an achievement, as a reflection of something innate. Even before the High Commissioner had actually been appointed, the 1921 Conference stressed, on the one hand, that no Russian refugee should be compelled to return, but that, on the other hand, information should be gathered with regard to those who might want to go back.[22]

This fundamental position of principle, lacking the force of international law, was nevertheless translated into practice, long before the word *non-refoulement*

18. Special Report by the High Commissioner, requesting the assistance of the Governments and Members of the League in the Accomplishment of his Work (Mar. 24, 1922), 3 LEAGUE OF NATIONS OFF. J. 385, 396, Annex 321a (1922). Nansen included a model certificate and reported also that refugees were in favor of papers issued by governments, provided always that they were free not to take up the option. *Id*. at 396–97.

19. Arrangement with respect to the issue of certificates of identity to Russian Refugees, July 5, 1922, 13 L.N.T.S. 355 (1922).

20. *Id.*

21. *See* Tytus Filipowicz, Memorandum on Russian Refugees in Poland (July 7, 1922), League of Nations Doc. C.483.M.305.1922 (1922) (circulated under cover of the Secretary-General's note of July 14, 1922).

22. Conference on the Question of the Russian Refugees, Resolutions Adopted by the Conference on August 24, 1921, 2 LEAGUE OF NATIONS OFF. J. 899, 901 (1921).

entered the vocabulary of protection. In 1923, for example, Nansen intervened to protect Russian refugees in China, many of whom had been engaged in military activities against the Soviet government and were a source of concern to the Chinese government. He intervened also with regard to a particular group of Russian refugees, "whose previous political associations were such as to render dangerous their presence in Constantinople," and saw that they were evacuated to Serbia. He then managed to avert the threatened expulsion, "for military reasons," of refugees from Romania; and of refugees in Poland, who were alleged to have left their country, not on political grounds, but for economic and other reasons. Nansen pointed out that many refugees had lost their nationality and would not be allowed to enter Russia, and he took steps to ensure their relocation in other countries.[23]

Then, as today, repatriation often seemed to be the only possible solution, particularly where large numbers of refugees were involved. The American Relief Association and the American Red Cross, major philanthropic partners in assisting Russian refugees, were of the view that there could be "no final satisfactory solution" other than return, and they requested that, "the matter of the protection in and repatriation to Russia of several thousands of these refugees be taken up with the Soviet Government by the League through Doctor Nansen or such other agency as they may elect."[24]

Approaches were made, some did repatriate, but the political situation changed again, and the question became academic; does this story provide lessons for today?

D. Defining refugees

One obvious curiosity of the League's involvement with refugees was its initial limitation to *Russian* refugees, and the fact that no definition was considered necessary; everyone knew who a Russian refugee was, and politics clearly drove the perception. Other refugees were known to be out there, but somehow they were not immediately thought to be of international concern, or to require the same attention. That was to change over time, but piecemeal and not in any systematic way.

The first extension of the Nansen passport scheme was to Armenians in 1926.[25] Again, it was driven by politics, but also by recognition of the urgent need for solutions. The arrangement of that year was the first occasion on which the refugee was defined. Still limited to just two national groups, Russians and

23. Russian Refugees, Report by Dr Nansen (July 7, 1923), 4 LEAGUE OF NATIONS OFF. J. 1040–44 (1923). *See also* George Ginsburgs, *The Soviet Union and the Problem of Refugees and Displaced Persons 1917-1956*, 51 AM. J. INT'L L. 325, 336–38 (1957).

24. Russian Refugees, Report by Dr. Nansen (Sept. 1, 1922), 3 LEAGUE OF NATIONS OFF. J. 1125–26 (1922).

25. Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, 89 L.N.T.S. 47 No. 2004 (1926).

Armenians, the defining characteristics were that they no longer enjoyed the protection of their former government and had not acquired another nationality.

Two years later, the 1928 Arrangement added yet more groups, namely, certain "Turkish, Assyrian, Assyro-Chaldean and assimilated refugees,"[26] but there was no desire on the part of States, either to deal with the issues more generally, or to adopt a treaty-based approach under which they would accept formal, legal obligations.

To be sure, the 1928 Arrangement had indicated a variety of political and legal protection activities which the High Commissioner might undertake, but everything was framed in the language of recommendations, not that of law or obligation,[27] and recommendations were becoming less and less effective in achieving results. Freedom of movement remained discretionary, as did the issue of a return clause; in the case of expulsion, States were simply entreated to avoid or suspend such measures, "where the person concerned is not in a position to enter a neighboring country in a regular manner;"[28] and even that did not apply in the case of a refugee who entered in violation of national law.

After reviewing the frequently difficult and deteriorating situation of refugees in Europe and the increasing ineffectiveness of recommendations, the Inter-Governmental Advisory Commission attached to the Nansen International Refugee Office (Nansen died in 1930), strongly urged the adoption of a formal convention, as the best way of assuring refugees of stability, whether as regards their legal status, their settlement and work, access to the professions, to schools and universities, and to the courts.[29] The Commission was encouraged to undertake the drafting, and in October 1933, after a short conference in Geneva, the Convention relating to the International Status of Refugees was adopted.[30] Not the most auspicious time you may think, for that was the same year in which the Nazis came to power in Germany, and new challenges were close at hand.

From one perspective, the Convention did little more than translate the status quo—the 1922, 1924, 1926, and 1928 arrangements—into treaty language, but it

26. Arrangement concerning the Extension to other Categories of Refugees of certain Measures taken in favour of Russian and Armenian Refugees: 89 L.N.T.S. 63 No. 2006 (1928).

27. Arrangement relating to the Legal Status of Russian and Armenian Refugees: 89 L.N.T.S. 53 No. 2005 (1928).

28. *Id.*

29. See Annex 1313, Russian Armenian Assyrian Assyro-Chaldean and Turkish Refugees (1931) 12 LEAGUE OF NATIONS OFF. J. 2118.

30. 159 L.N.T.S. 199 No. 3663 (1933). For a detailed account of the Convention and of British practice, *see* Robert J. Beck, *Britain and the 1933 Refugee Convention: National or State Sovereignty?* 11 INT'L J. REFUGEE L. 597 (1999); *see also*, Claudena Skran, *The Historical Development of International Refugee Law, in* THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY 19–35 (Andreas Zimmerman ed., 2011); CLAUDENA SKRAN, REFUGEES IN INTER-WAR EUROPE: THE EMERGENCE OF A REGIME (1995); Peter Fitzmaurice, *Between the wars – the Refugee Convention of 1933: A contemporary analysis*, *in* THE CHALLENGE OF HUMAN RIGHTS: PAST, PRESENT AND FUTURE 236 (David Keane & Yvonne McDermott, eds., 2012).

is most often cited today as being the first occasion on which the principle of *non-refoulement* appeared in a binding legal instrument. That is so, but the rule as stated was apparently limited to refugees residing regularly in the contracting States, even if an ambiguously worded provision did bind them not to send back or *refoule* a refugee to the frontiers of their country of origin.[31] As we have already seen, the practice that would consolidate *non-refoulement* over time as a rule of customary international law had already begun in the 1920s, but its expression in a binding treaty was helpful in the process of crystallization, even if few States finally ratified it.

The suggestion for a more open approach to the refugee definition, incorporating all those who did not enjoy or no longer enjoyed the protection of their country of origin and had not acquired another nationality, was rejected by those working on a draft, for fear it would raise objections from governments.[32] Even at the time, it was well understood that many refugees—Italians, Hungarians, Austrians and Germans—continued to have no protection, and the following years would necessitate further *ad hoc* measures as Nazism took hold and the Spanish Civil War came to an end.

E. Preliminary conclusions

As we can see, up until 1933, the law had not yet formally entered the picture, although principles of protection and cooperation can be discerned—the germ of what would come to be called *non-refoulement*; the provision of relief in face of humanitarian necessity (with special attention to women and children and those with disabilities); the practical yet inexorable link between solutions and refugee self-reliance and employment; the agency of those displaced, who needed a voice; the practical protection that goes with documents certifying identity and status; the repeated hope that repatriation would be the answer.

At the inter-governmental, institutional level, cooperation is beginning to emerge, though falteringly, even as the particular national interests of individual States also made themselves felt. Still, the limited and circumscribed nature of these first steps cannot be ignored; the focus was exclusively on just a few refugees, defined by reference to national origin and lack of protection. The "international" response was heavily dependent on non-governmental private agencies; the politics of recognition and confrontation with the Bolshevik government played a part in the 1920s, and were to come up again in the 1930s; and individual rights were just not there.

31. Article 3 (in the official French text): 'Chacune des Parties contractantes s'engage à ne pas éloigner de son territoire par application de mesures de police, telles que l'expulsion ou le refoulement, les réfugiés ayant été autorisés à y séjourner régulièrement, à moins que lesdites mesures ne soient dictées par des raisons de sécurité nationale ou d'ordre public. Elle s'engage, dans tous les cas, à ne pas refouler les réfugiés sur les frontières de leur pays d'origine. . .'

32. Member of the Social Section, Memo to M. Ekstrand, League of Nations Doc. 6786 (1933); M Gentili, Memo to M Ekstrand, League of Nations Doc. 20A/6786/3948 (1933).

II.
CONTEMPORARY CRITICISM

Many of the shortcomings of the emerging regime were noticed at the time, of course. Not only did millions of refugees fall outside the safety net, but it was increasingly difficult for refugees to find employment in a time of economic depression: borders were tightening up, and the League itself was entering its period of decline. Totalitarianism was gaining ground, League members were engaging in aggressive war, and the early idealism was slipping away.

Writing in 1951, and looking back over near history, Hannah Arendt didn't think much of what the League had done for refugees. She evidently had little time for those she called "well-meaning idealists" wedded to the notion of inalienable rights and yet so distant from "the situation of the rightless themselves," among whom might be found "a few international jurists without political experience. . . or political philanthropists supported by the uncertain sentiments of professional idealists." [33] She was certainly right to pinpoint the League's failure to deal with totalitarianism, particularly in the crisis decade of the 1930s. She paints a bleak picture—"not the loss of a home, but the impossibility of finding a new one"—language that echoes today in the protracted refugee situations around the world.[34]

That picture is a telling corrective to what we might otherwise infer from the work of Fridtjof Nansen, or from the various arrangements and, ultimately, conventions adopted for refugees. And yet it is incomplete and, for the international lawyer, somewhat ahistorical, so far as it ignores the legal and international political context of the day.

After all, these were early days in a coalescing international community of States as yet unprepared, legally and institutionally, for the shock of unprotected populations—people for whom no one appeared to be "responsible." At great human cost, individual States were concerned with protecting, or at least asserting, the primacy of national interest and to wash their hands of responsibility for the displaced and the persecuted.

III.
MODERN TIMES

Let me now leap ahead, leaving aside the Second World War, skipping over the International Refugee Organization and the political divisions of the Cold War, and just glancing back to note the creation of the Office of the United Nations High Commissioner for Refugees in 1950, the signing and entry into force of the 1951 Convention relating to the Status of Refugees and its "amending"

33. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM: INTRODUCTION BY SAMANTHA POWER 371–75 (2004).

34. *Id*.

1967 Protocol, as well as significant developments at the regional level, both with regard to refugees and more generally in the protection of human rights.[35] Let me pause there for a moment, for the post-war arrival of human rights changed the scene in a significant way, putting the individual, no matter who she or he was, front and center in the scheme of protection.

Already in 1948, the Universal Declaration had begun to sketch out the legal limits, confining and structuring the power of the State to deal with the migrant, the asylum seeker, the refugee, and, indeed, the citizen.[36] It makes clear that *everyone* has the right to non-discriminatory treatment;[37] "to life, liberty and security of the person";[38] not to be subject to torture, or to cruel, inhuman or degrading treatment or punishment;[39] "to equal protection of the law";[40] "to an effective remedy" where rights are violated,[41] and, of course, "to seek and to enjoy … asylum from persecution".[42]

That original list is longer now, rights have been given greater substance and clearer content in treaties and practice, and the obligation to protect human rights has moved much closer to the center. The principle of *non-refoulement*, for example, has slipped the bounds of the 1951 Refugee Convention, requiring States at large not to return people to face the risk of persecution, torture, or other serious violations of fundamental rights, thus going some way towards bridging the gap to a right to asylum that was left undeveloped in later treaties.[43]

Today, the principle of non-discrimination on the basis of race is firmly established in international law, with non-discrimination as a *general* principle standing alongside. This fact alone raises the question, whether we should not closely re-examine judgments of the past that were premised on, if not rooted in, practices of racial discrimination considered abhorrent and impermissible today. Here, I am thinking in particular of the decision of the US Supreme Court in *Nishimura Ekiu* and of the Privy Council in *Musgrove v Chun Teeong Toy*.[44]

35. G.A. Res. 428 (V), (Dec. 14, 1950); Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

36. G.A. Res. 217 (III), (Dec. 10, 1948).

37. *Id.* art. 2.

38. *Id.* art. 3.

39. *Id.* art. 5.

40. *Id.* art. 7.

41. *Id.* art. 8.

42. *Id.* art. 14.

43. *See* Guy S. Goodwin-Gill & Jane McAdam, *Protection under human rights and general international law*, *in* THE REFUGEE IN INTERNATIONAL LAW 350–99 (4th ed. 2021); Guy S. Goodwin-Gill, INTRODUCTORY NOTE, DECLARATION ON TERRITORIAL ASYLUM, 1967: https://legal.un.org/avl/ha/dta/dta.html.

44. For the background on racial discrimination in immigration, Eve Lester, MAKING MIGRATION LAW: THE FOREIGNER, SOVEREIGNTY AND THE CASE OF AUSTRALIA (2018); also, Nishimura Ekiu v. United States, 142 U.S. 651 (1892); *Musgrove v. Chun Teeong Toy*, [1892] AC 272.

The persistent illusion of an absolute, exclusionary competence is nevertheless still a matter of concern, because it tends to frame and direct national legislation and policies in ways that are inimical to international cooperation and, not infrequently, contemptuous of human rights. Some things have changed, but some of what has changed for the better protection of those in flight is now under threat in many jurisdictions.

On the plus side, the international legal status of the refugee, the stateless person, and the individual at large, is beyond dispute, as are the obligations that States owe generally to all and specifically to the refugee and the stateless. It is not, and probably cannot be, a perfect picture. Neither international law nor international organizations yet provide that "community," which some see as the necessary condition precedent to the protection of rights. On the contrary, compliance, effectiveness, enforcement—however we want to call it—still falls (mostly) within the competence of States. After all, States are the only ones possessed of territory on which to provide refuge.

That is the challenge and the opportunity. That is the terrain on which the refugee and the lawyer must seek out the promise of protection, wherever the rule of law can be found. A "new" approach being unlikely, the progressive development of international refugee law—the dynamic approach—is needed, employing the instruments and principles which have their origins and their solid foundation in the practice of the League and its members and in the consolidation of practice ever since.

What is exciting and potentially so progressive is the fact that different legal systems and cultures are involved in the interpretation and application of a common agenda. Challenges lie in responding to new factual situations, to novel interventions in controlling the movement of people in search of refuge, and to circumstances which, from a humanitarian and commonsense perspective, seem to cry out for protection in one form or another.

The grass-roots dynamic is of fundamental importance, for progress in protection has long been driven by practitioners, refugee advocates, teachers and professors, legal clinics, pro bono groups, students and non-governmental organizations presenting claims and fighting cases in first instance tribunals, appeal and supreme courts, and before regional and universal oversight mechanisms. The record of success here—in the better protection of women in flight, of LGBTQI and others similarly situated, of those in fear of FGM, of drug-related violence or youth targeting—that is what counts.

A. Lawyers and the law

The origins of international refugee law and organization lie in a "groups and categories" approach, in which the displaced were the objects of attention and neither rights nor agency played a significant role. Today, the individual is very much at the center.

The growth in national refugee status determination procedures and the judicialization of process have led the 1951 Convention to be one of the most litigated treaties at the domestic level, with courts and tribunals around the world engaged almost daily in a common purpose—elucidating the meaning of and applying the refugee definition and other Convention provisions relevant to admission, non-penalization by reason of irregular entry or presence, residence, non-removal, and protection at large.

This immediately broadens the picture, showing the potential of domestic courts as "agents of development," where both customary law and treaty interpretation are concerned. Indeed, the very absence of a centralized authority or treaty supervisory body in the traditional sense, means that domestic courts have particular responsibilities in compliance and development; and we have to learn how to make the very best use of them.

And here lawyers, as advocates, *amici*, or in NGOs or working with other providers of front-line legal advice and assistance, can play a critical role by, among other things, bringing to the attention of domestic courts the rulings of other courts in other jurisdictions, as they interpret and apply the very same treaty terms and obligations shared in common.

Precisely because the decisions of national courts, as organs of the State, can amount or contribute to practice for customary international law purposes, we need to ensure that our own courts are provided with the best evidence of what is the applicable international law, and what is the commonly accepted interpretation.

B. . . . and in the United States

As all of us here know, US lawyers are actively litigating every aspect of the assault on asylum and refugee protection which seems central to the policy of the present government. I would like to suggest that the counter-attack can be strengthened by more focused and more consistent recourse to international law and, in particular, to the work being done by other courts in other countries.

I was recently in correspondence with a US lawyer on precisely this issue, which provoked the following reply: "[f]rom an advocacy perspective in the US, our courts are, unfortunately, generally not very interested in the UNHCR or rulings of other jurisdictions…" Kate Jastram confirmed this a few years back, with an empirical study noting that UNHCR's *Handbook* is hardly ever referenced in the United States, and that its Guidelines on exclusion were not mentioned, even in passing, in over 100 US exclusion cases.[45]

To me, the lawyer's conclusion smacks of defeatism. What we need is a more assertive and coherent strategy, one which identifies clearly the international legal issues involved—for example, interpretation of the refugee definition—and then

45. Kate Jastram, *Left Out of Exclusion: International Criminal Law and the "Persecutor Bar" in US Refugee Law*, 12 J. INT'L CRIM. JUST. 1183, 1194–96 (2014).

determines where the international legal consensus lies, and what the customary international law position is. Little if anything will be gained by bandying academic commentary back and forth, mine included; this is sterile, and what we need to do is dig out the law and the practice.

In this, UNHCR can be a helpful ally. After all, it has a supervisory role where application of the Convention is concerned, which is expressly accepted by States, and its guidelines on protection, issued since 2000 and supplementing its 1979 *Handbook*, tend to be very soundly based in the jurisprudence and doctrine of the courts across multiple jurisdictions (with a dash of principle, of course. . .).[46] Judicial dialogue across jurisdictions can become an important dynamic, especially in the evolution of the terms of the refugee definition, such as persecution, protection, social group, or political opinion.

The use of comparative case law when interpreting the US Constitution may be controversial, but when treaties are involved, the jurisprudence of Justice Scalia is now our ally. In *Olympic Airways*, for example, he regretted in dissent the majority's,

> . . . failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us. . . One would have thought that foreign courts' interpretations of a treaty that their governments adopted jointly with ours, and that they may have an actual role in applying, would be (to put it mildly) all the more relevant.[47]

The door is ajar; we need to push it wide open.

IV.
FUTURES

There may still be no internationally recognized right to be "granted asylum" in the narrow sense of formal permission to enter and to remain in State territory, to work, to have one's children educated, and not to be returned to the risk of persecution. The individual in flight *is* protected, however, and how States respond is now a matter of international law, not just a matter of international concern.

Put simply, at the point of contact between the agents of the State and individuals claiming protection, for example, during rescue or interception operations and in what follows next, the State must ensure that its international obligations are implemented effectively and consistently with the rule of law.

Within the international refugee regime at large, the bases for discourse and cooperation have been strengthened over the past seventy years, but the politics remain resistant to such fundamental changes as are needed, either to deal

46. Guy S. Goodwin-Gill, *The Office of the United Nations High Commissioner for Refugees and the Sources of International Refugee Law*, 69 INT'L & COMP. L.Q. 1 (2020).

47. Olympic Airways v. Husain*,* 540 U.S. 644, 658 (2004).

effectively with causes, or to bring about prompt and equitable solutions consistently with the demands of international justice.

Overall, "international refugee law" has nevertheless demonstrated its dynamic character. Within the *legal* framework, such as the refugee definition, it has shown itself capable of responding positively to the emerging protection needs of groups and individuals at risk, while the normative background provided by human rights has strengthened its capacity to provide a principled approach to larger groups and categories of the displaced. The law alone, however, does not provide solutions, and much remains to be done in the face of bureaucratic ineptitude and the bankruptcy of policies premised, for example, on the illusion of deterrence and the "value" of cruel and inhuman practices.

Still, one should not underestimate the range of rules and principles that can be called in aid. So concerned was one independent Australian senator with the impact of his country's offshore interception policies that he referred the issue to the Office of the Prosecutor of the International Criminal Court. The reply arrived in mid-February 2020. Rather than dismissing it summarily, as the prosecutor might have done—no attack as such on civilians, so no jurisdiction—the Office undertook a serious and reasoned analysis of policy and practice, noted the extensive body of evidence, and considered the whole against the elements of relevant prohibited conduct, including crimes against humanity and cruel, inhuman, and degrading treatment. And it found that some of that practice did indeed cross the threshold and appear to constitute one or more offenses under Article 7 of the Statute of the Court. It appeared to be unlawful, and although it might not engage the jurisdiction of the Court for now, it could be looked at again.[48]

If a first principle is needed, international refugee law starts with recognition of the inherent dignity and worth of every human being. Although many things can be deduced from first principles, a legal system is also about accountability for what is done to others. International criminal law, in time and in part, may address the liability of those whose policies and practices are at the root of displacement, while international refugee law is about the architecture of response, and the accountability of systems in which decisions and actions have impact on individuals in search of refuge.

The history of international refugee law is being written now, of course, daily, from the ground up, in the work of civil society, of NGOs, of advocates, whether lawyers or not, of students in legal clinics, in international organizations such as UNHCR and the ICRC, and in the practice of States, both good and bad.

There is now and probably always has been a tension between the claim of the refugee in search of protection, and the State anxious about its "sovereign

48. Ben Doherty, *Australia's offshore detention is unlawful, says international criminal court prosecutor*, GUARDIAN (Feb. 15, 2020), https://www.theguardian.com/australia-news/2020/feb/15/australias-offshore-detention-is-unlawful-says-international-criminal-court-prosecutor.

borders," or concerned about other States potentially ridding themselves of unwanted population, or ideologically opposed to refugees, or those refugees, or that refugee. And that control over borders is now rapidly moving beyond the physical – the line in the land, the sea between, the wire and the wall—and into all the possibilities of surveillance and monitoring that technology has to offer. This is an aspect of the new terrain in which lawyers must repeatedly carve out their role, seeking to resolve or mediate that tension and that conflict, but always with a bias towards international protection—a vision, which, despite its ups and downs, continues to place value on human dignity, agency, identity, equality before the law, and security from harm.

This is surely the place to be, for the lawyer and the refugee . . .