

‘Refugees – Challenges for Protection and Assistance in the 21st Century’

Notes for a Presentation

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Ad Hoc Committee on Large Scale Arrivals of Refugees to Turkey

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Introduction

It is now nearly 100 years since the League of Nations appointed the first High Commissioner for Refugees, and that the modern story of international refugee law and organization began. We have come a long way since then. Millions have been displaced by conflict and persecution, and millions have found protection and either a solution in another land, or the opportunity to return in safety to their own country.

We have seen institutional progress, too, with successive *ad hoc* and temporary mechanisms finally leading to the Office of the United Nations High Commissioner for Refugees being placed on a permanent footing, established now within the UN ‘until the refugee problem is solved’.

And from the first hesitant steps to agree on an identity certificate for refugees, we have seen States sign on to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees – 147 being party to one or the other or both – and witnessed States’ increasing participation in the work of the UNHCR Executive Committee, which now comprises 98 Members.

At one level, the refugee regime is thus truly international, linking the plight of refugees, which no State should have to carry alone, to a solid body of legal rules and principles and to a forum for discussion, debate and decision with, in principle, all the potential of a cooperative, supportive collective response.

This does not mean, though, that it is sufficiently representative – the refugee voice is often unheard – or that the system is sufficiently effective and accountable, whether at the national or international level. The number of protracted refugee situations around the world is evidence enough of that. Moreover, serious flaws remain in the overall scheme, which

international law alone cannot remedy, and it may be that the regime is facing its most serious challenges ever.

Thirty years ago, as refugees continued to flee Indo-China, Central America, and Africa, the UN General Assembly endorsed the Governmental Experts' report on international cooperation to avert new flows of refugees. As a result, the UN itself is now better placed and better organized to anticipate crisis and to coordinate the efforts of its various agencies, but its capacity to deal with *causes*, to make *peace*, and to develop and implement lasting *solutions* is seemingly as marginal as ever.

In situations of mass displacement, the international community relies still on individual States to shoulder primary responsibility, to abide by international law and to take on the costs entailed by fulfilling that powerful principle of humanity which lies at the heart of protection: *non-refoulement* – by which States have committed themselves not to send anyone to a country in which they may be at risk of persecution or serious harm.

Speaking in the UNHCR Executive Committee in 1987, the Turkish representative made a point which is still worth recalling:

‘The principle of *non-refoulement*’, he said, ‘had to be scrupulously observed. Nevertheless, ... countries of first asylum or transit ..., faced with the difficulties of repatriation and the progressively more restrictive practices of host countries, might find themselves unable to continue bearing the burden and, for want of any other solution, come to regard *refoulement* as the only possible way out. If that should occur, they would not be the only ones at fault, since the responsibility for ensuring the conditions necessary for observance of the *non-refoulement* principle rested with the international community as a whole.’

Much the same had been said at the 1951 Conference in Geneva, when the Convention was debated and adopted. Such reality checks are certainly helpful from time to time, although the international lawyer may prefer to recall J. L. Brierly's observation that ‘order and not chaos is the governing principle of the world’ in which we have to live...

Nevertheless, the lack of sufficient, concrete cooperation among States continues to hamper the search for humane solutions, while the absence of any evident sense of obligation limits the capacity for productive thought and meaningful action. Simplistic preconceptions about sovereignty, migration, and responsibility can and do lead States into policy positions that are

unrealistic and unrealisable – a sort of wishful humanitarian thinking, hoping against hope that perhaps the refugees won't come, and if they do, that they won't stay long.

A word of appreciation

In a talk which I gave in Naples last month on duties of care and protection in the Mediterranean,¹ I began with a note of appreciation, of thanks, to Italy and the people of Italy for what they have done, rescuing more than 140,000 people in 2014, and for what they continue to do, acting as the conscience of Europe.

I want to do the same again today, to thank Turkey and the people of Turkey for the hospitality shown and the sanctuary offered to nearly two million refugees, mostly fleeing the conflict and violence in Syria. Historically, Turkey has often been a place of refuge, or has stood at the crossroads of flight. Today, like Jordan and Lebanon, Egypt and Iraq, Turkey is the conscience of the international community once again, even also the conscience of Europe.

As the General Assembly recognized in 1946, the refugee problem is international in scope and nature. Every State which admits refugees acts on behalf of the international community and in defence of fundamental principles. It provides protection, international protection, which the country of origin is unable or unwilling to do. And in acting on behalf of the international community, the asylum State is entitled to expect the support of other States, whether financial, political or material, as the case may be; or in the active pursuit of solutions, in the general sense of dealing with causes and removing or mitigating the need for flight; and in the particular sense, facing up to the needs of individuals and groups of refugees.

Funding protection, assistance and solutions

One of the most remarkable features of the international refugee regime – and I use the word 'remarkable' in both positive and negative senses – is that it runs on voluntary funds, that is, on contributions, the amount of which Governments decide individually, taking account of UNHCR's assessment of needs. UNHCR is a subsidiary organ of the General Assembly, not a treaty-based specialized agency competent to levy even a percentage of core requirements on its members; and requirements still commonly exceed contributions.

¹ 'Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action', 11 May 2015: <http://www.jmcmigrants.eu/category/working-papers>

In October 2014, the UNHCR Executive Committee approved a revised budget for 2015 of \$6.2 billion. The Middle East and North Africa region accounts for some 29% (\$1.46 billion of this total), with most requirements being directly related to the Syria crisis and its impact on neighbouring countries and Eastern Europe. Pledges totalling \$2.5 billion were made at the Second International Conference on Syria, hosted by Kuwait in January 2014; and on 12 June 2015, the Government of Kuwait contributed a further \$121 million.

In 2013, 52% of UNHCR's overall income was provided by its top three donors, and 82% by the top ten, while private sector contributions had risen to some \$215 million by the end of 2014. As noted in its Global Appeal 2015 Update, UNHCR's requirements since 2009 have increased by 130%, annual income from voluntary contributions by 70%, but in 2013, the funding gap for operations still amounted to some 45% of overall requirements. At the national level, too, in refugee receiving countries such as Turkey, with support, protection and infrastructural costs in the region of \$6 billion, there is generally also a massive shortfall between local costs and what is received from the international community.

UNHCR has repeatedly emphasized, and the Security Council has likewise affirmed, new solutions are required to alleviate the impact on refugee-receiving communities, and to the challenge of providing increased, flexible and predictable funding for critical humanitarian needs.

Costs and compensation

In the 2007 edition of *The Refugee in International Law*, Professor McAdam and I tread very lightly on the linked issues of *State responsibility* for the 'creation' of refugees (recognizing that this is multi-faceted), and of *compensation* for the losses which result for States admitting refugees on behalf of the international community and in fulfilment of their international obligations.

Back in 1939, the eminent British international lawyer, R. Y. Jennings, considered that source State liability could be based on the repercussions which a refugee exodus has on the material interests of receiving States. In his view, conduct resulting in 'the flooding of other States with refugees' was illegal, the more so, 'where the refugees are compelled to enter the country of refuge in a destitute condition.'

Today, more often than not, refugee flows are driven by violations of international law, in particular, of human rights and the laws of war. But legal theory and practice have not developed to the point at which the source State can be said to have a *duty* to compensate either receiving countries or the refugees themselves. Where, then, is this line of thought actually going? For that, I am indebted to Selim Can Sazak who, in May last year, passed by me the idea that refugee receiving States and/or competent international institutions should have access to the frozen assets of refugee source countries, such funds to be used for humanitarian assistance to the displaced; this proposal is developed more fully in his recent article in the *Journal of International Affairs*.

Here is an idea with many positive dimensions. It resonates ethically with the need for justice, and a source country, one might think, could hardly complain if its assets were used to bring relief to its own people. Of course, they will complain, and will argue doubtless that their refugee citizens are undeserving, or traitorous, or terrorists. But good information, documentation and analysis, coupled with close tracking, auditing and accountability, should ensure that when such funds are used, humanitarian goals are maintained.

As a practical model, Selim Sazak's idea can also draw on the now considerable UN experience with sanctions, compensation and regulation, and with the body of State practice codified by the International Law Commission in the Articles on the Responsibility of States for Internationally Wrongful Acts, particularly as regards 'countermeasures'.

Countermeasures

At first blush, the use of source country assets for humanitarian assistance to refugees looks like a ready candidate for the category of *countermeasures* – unilateral action by a State in response to a wrongful act committed by another State and undertaken precisely to induce that State to comply with its international obligations. The action in question – the countermeasure – would otherwise be unlawful, but wrongfulness is 'precluded' or effectively excused, provided at least that it is proportionate, reasonable, preceded by notification, and not arbitrary.

For an individual State acting on its own, however, the situation is not necessarily straightforward. Countermeasures may be permitted where there is an internationally wrongful act which injures the State taking the countermeasure. In a situation of conflict, such as that in Syria, many violations of international law are indeed occurring, as the Security Council recognized in resolutions 2139 and 2191 adopted in February and December 2014.

However, the legal situation between Syria and Turkey is quite unlike that in which, in an essentially bilateral relationship, one State elects to apply countermeasures in response to another's breach of obligation towards itself. The obligations at issue in the present case – to protect human rights, to implement international humanitarian law – are mostly owed *erga omnes*, to the international community at large; and it may be difficult to identify specific State conduct resulting in specific loss.

Nevertheless, there are examples of countermeasures taken against States violating human rights. The US Congress authorised such measures against Uganda in 1978, avowedly for its role in genocide; and against South Africa in 1986 because of *apartheid*. Collective measures were instituted against Iraq in 1990 and, on the occasion of the Kosovo crisis in 1998, Member States of the European Community adopted legislation providing, among others, for the freezing of Yugoslav funds.

No United Nations sanctions are in force against Syria, but pursuant to the Common Foreign and Security Policy and Article 29 of the Treaty on European Union, the EU has had such measures in place since May 2011, 'in view of the seriousness of the situation'. Sanctions include restrictions on travel and the freezing of 'all funds and economic resources belonging to, owned, held or controlled by persons responsible for the violent repression against the civilian population... and natural or legal persons, and entities associated with them...'. Those targeted include financial and other supporters of the government and ministers and military commanders believed or presumed to be involved.

While in no case so far have frozen assets been employed for humanitarian relief, this is not to say that international law and obligation are irrelevant, but only that unilateral action in the form of countermeasures may not be the most appropriate response. Indeed, it could expose the acting State to liability if it misjudges the law or acts disproportionately. The apparent simplicity of countermeasures – a tit-for-tat response to violations of international law resulting in material injury to the refugee receiving State – may be offset by doubt and uncertainty as to the precise legal implications. These objections could be avoided by authorisation under a Security Council resolution.

In 1991, following the first Gulf War, the UN Security Council took note of the necessity urgently to meet humanitarian needs in Kuwait and Iraq. Acting under Chapter VII of the UN Charter, it reaffirmed Iraq's liability in international law for any direct loss resulting from its unlawful invasion and occupation of Kuwait. To this end, it decided to create a fund to pay compensation for such losses, the fund to be financed by Iraq on the basis of an appropriate

percentage of the value of its oil exports. Certain guarantees were included, with account to be taken of Iraq's capacity to pay, of the requirements of the people of Iraq, and of the needs of the economy. So was born the UN Compensation Commission which adjudicated hundreds of claims in the years that followed.

In 1995, again with Iraq on the agenda, the Security Council decided to set up the Oil for Food Programme, as a 'temporary measure to provide for the humanitarian needs of the Iraqi people...' The UN and the Government of Iraq signed a memorandum of understanding in May 1996, in which the Government undertook to guarantee equitable distribution throughout the country of humanitarian supplies (medicine, health supplies, foodstuffs, and materials essential for civilian needs, purchased with the proceeds from the sale of Iraqi oil. The UN set up a special account for the purpose, to be audited externally, and the distribution process was observed and monitored by UN personnel and coordinated by the Department of Humanitarian Affairs (now OCHA, the Office for the Coordination of Humanitarian Affairs). The programme (which was not without its critics) went on to provide humanitarian relief to some 27 million Iraqis, with the result that malnutrition was cut and many lives saved through the delivery of vaccine and medicine.

There is still much to be worked out, of course. 'State' assets may or may not be readily identifiable, but experience with sanctions and measures to combat money laundering, corruption and the financing of terrorism, means that more can be achieved than was once the case. There may be a case also for targeting the wealth of individuals, if this can be organized fairly, within the rule of law, and provided that some objective element of responsibility can be identified.

On the down side, of course, is the possibility of a veto in the Security Council, particularly where conflict is internationally politicised; in such cases, the case for countermeasures at the State or regional level may re-emerge more strongly.

Selim Sazak's proposal is thus definitely one worth pursuing, not only because of the material contribution it could make to the assistance and protection of refugees, but also because of the impact it may have on State agents able to influence State policy, as countermeasures are intended to do; and, above all, because it helps to square the circle of justice.

Next steps

The use of a refugee source country's assets for humanitarian assistance to its displaced citizens could certainly help to bridge the funding gap, although the amounts to be realised will vary and their 're-distribution' to relief purposes may sometimes be largely symbolic.

However, the urgent and continuing need for funds to ensure protection, assistance and the search for lasting solutions is just one facet or dimension of people moving between States today, which calls for far greater concerted action. Back in 1989, and again in the UNHCR Executive Committee, the Turkish representative remarked that the refugee problem, 'was such that it was no longer possible to disassociate international protection from international co-operation and assistance'. That necessary, if not contingent, relationship is made clearer still today by the crisis in the Mediterranean, in which many Syrian refugees are caught up. What we are witnessing is not just a European phenomenon, but an international one, engaging States on all sides of the sea, and many also beyond its shores.

Even a cursory look at *who* is moving and *why* tells us that we need to keep an eye on the big picture, and why also we need a new start to the international 'management' of displacement. International protection is clearly required, whether we are talking about refugees, unaccompanied children, the smuggled, the trafficked, or the migrant seeking survival. 'Solutions' may be dependent on circumstance, but the starting point is and must be protection – to ensure the life and safety of those at risk along migration and transit routes.

What is needed then is multi-dimensional, including opportunities – substantial safe, legal access to Europe and other countries with the capacity for refugees and migrant labour; greater protection capacity along the way, and real solidarity between north and south in the implementation of development programmes which have a chance of reducing the necessity for flight.

We have been here before, however, and we know that with the right political will, workable and working solutions can be found; that mechanisms can be put in place which will ensure the disembarkation of those rescued or intercepted at sea against appropriate guarantees (such as assistance in identification and determination of status, or with care and accommodation, or with appropriate solutions in asylum, migration or return); that transit States (which also have problems of accommodation, processing, solutions) can be brought on board as partners

in a protection oriented response with international and regional oversight; that countries yet more distant can be brought into what will have to be longer-term planning for development.

The Mediterranean has an international and not a purely regional dimension. Though presently a microcosm of indecision and *ad hoc* measures, it also brings forth issues and challenges common to many other parts of the world – the Caribbean and the Pacific, to name just two. What could be achieved in the Mediterranean, properly founded on principles of protection and accountability, could easily serve as a model for elsewhere.

In the 1970s, too, there were difficulties galvanizing political will and political action around the no less desperate situation of Indo-Chinese refugees, and it took an international conference to kick-start serious progress. The UN Secretary-General, together with the High Commissioner for Refugees, conducted intensive preliminary consultations, following which he called a meeting in Geneva in July 1979, with representation at the ministerial level.

Building on the preceding consultations, that conference led to substantial increases in the funding of relief and the provision of resettlement places; in the offer of sites for processing centres; in opening discussions with the principal source country, Viet Nam, on family reunion, orderly departures, and return; and in practical proposals for rescue at sea.

Looking at the results of that conference and at the concrete initiatives which followed, it is surprising how similar are the issues we are facing today, notwithstanding the very different political situation. Then, as now, it was essential to maintain the primacy of protection principles; to engage with governments across the broadest spectrum; to secure commitments both from within and outside the region; to ensure the involvement of competent international organisations and NGOs; to promote practical and humanitarian relations with source countries; and to bring in the shipping community and build on its commitment to rescue at sea by devising practical disembarkation schemes.

But that was only the beginning. Ten years later, the Secretary-General was back with UNHCR to convene a second international conference on Indo-Chinese refugees, this time to adopt a Comprehensive Plan of Action which would eventually bring to an end a humanitarian crisis which had changed dramatically over the years.

Conclusions for now

Today we need a similar initiative, and we need *leadership*, from the United Nations, from States, from Parliaments, and from civil society, for what we are facing in the Mediterranean is not an isolated issue, not a purely European problem. The linkages between the regional dimensions of this crisis and the refugees now benefiting from asylum in Turkey, Jordan, Lebanon and Egypt are clear, and if solutions are not found soon, further onward movement is inevitable.

The movement of people leaves few States untouched, and much of that movement is driven by desperation – unremitting conflict and persecution, failed and exhausted economies. Nor is that movement a problem waiting for a solution; on the contrary, it is a phenomenon in a modern, globalized world presently no more able to resolve major economic challenges than to broker peace in conflict. It is a phenomenon we must learn to live with, and to manage as best we can in the interests of all. Among other matters, this will require States dealing with each other on a basis of equity and equality, not outmoded and unrealistic expectations of sovereign entitlement. In addition, better ‘management’ will require investing in long-term responses, not short-term, *ad hoc* measures focused simply on symptoms, not causes. Only an approach combining protection, humanitarian assistance and opportunity with political and financial investment in mitigating and removing the underlying push factors can have any impact.

The Secretary-General is already involved in a number of migration and development projects. It is time now for a fully comprehensive, far-reaching approach, and for the Organization and its members to think and act wider and deeper, to turn to and address constructively the humanitarian dimensions. It is time to learn from Indo-China and other experience that international cooperation can work.

It is time to convene an international conference, not as a one off, but on a rolling basis, and with the broadest participation possible. Only by engaging across the full spectrum of interest can we make a start to what will and must be a generations-long project of protection and opportunity, in strengthening asylum, but also in realising human potential both at home and abroad, in bringing working and workable alternatives to those whom desperation drives to risk all.

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