American Society of International Law
2021 Virtual Annual Meeting
Reconceiving International Law – Creativity in Times of Crisis
International Refugee Law Interest Group
Look both ways: Future and historical perspectives on the Refugee Convention at 70

Guy S. Goodwin-Gill
Professor, Kaldor Centre for International Refugee Law, University of New South Wales, Sydney, Australia; Emeritus Fellow, All Souls College, Oxford

---

Hello, I'm Guy Goodwin-Gill, a professor at the Kaldor Centre for International Refugee Law at the University of New South Wales in Sydney, Australia, where it's way past my bedtime. So I am grateful to Alice and Ian for allowing me nonetheless to contribute to this panel on the 70th Anniversary of the 1951 Convention relating to the Status of Refugees.

In fact, this is an anniversary year in many respects – it is also 70 years since UNHCR was set up; and 100 years since the League of Nations decided to appoint Fridtjof Nansen as its first High Commissioner for Refugees.

Much to celebrate, you may think. And today in this anniversary year, I want to highlight just a few things: the fundamental character of the basic principle of protection, *non-refoulement*; the commonalities of those in search of protection and refuge; and the need for change, if protection and the right to asylum are to be maintained.

First, no compulsory return

Article 3 of the little ratified 1933 Convention on the international status of refugees is often cited as the first occurrence in treaty of the principle of *non-refoulement*, but in fact the most significant achievement, if that's the right word, was the acceptance among States at the international conference in 1921 of the principle of no compulsory return in the absence of sufficient guarantees of security.

In fact, I see it not so much as an 'achievement', as a reflection of something innate – a reflection of a basic human value common, as we now know, to peoples and communities everywhere.

Now in 1921 politics may have been a driving factor – no one trusted the Bolsheviks and their coming to power and conduct in office upset the norms and the status quo – but there was no hesitation in accepting the principle of no compulsory return.

It may have lacked the force of international law, but this fundamental principle was nevertheless translated into practice, long before the word *non-refoulement* entered the vocabulary of protection. In 1923, Nansen intervened to protect 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 stepped in, too, with regard to another group of refugees in Constantinople; managed to avert the threatened expulsion, 'for military reasons', of refugees from Roumania; and also of refugees in Poland, who were said to have

left their country, not on political grounds, but for economic and other reasons. Nansen pointed out that many, having lost their nationality, would not be allowed to return.
His success drew on the willingness of other States to work with him on alternatives, even though then, as today, repatriation often seemed to be the only possible solution, particularly where large numbers were involved.

Today, the principle of *non-refoulement* occupies a key position in the regime of protection and in the policy and practice of States. It has slipped the bounds of the 1951 Refugee Convention, and it finds solid support in customary international law, with States at large accepting that they are obliged not to return people to face the risk of persecution, torture, or other serious violations of fundamental rights.

Not all is plain sailing, however, and the challenge of implementation – in the short, medium and long term – remains. The persistent illusion of an absolute, exclusionary competence, for example, tends to frame national legislation and policy in ways that are inimical to international cooperation and, not infrequently, contemptuous of human rights.

At the same time, the perception that the refugee problem is temporary, rather than indefinite, works its own generally negative effect...

Commonalities in the flight and needs of refugees

One hundred years ago, the needs of refugees were little different from those of refugees today – protection, refuge, assistance, self-sufficiency, and the opportunity to work and not to be a burden on host communities.

The institutions may have changed, from the small secretariat charged with looking after Russian refugees to the more than 17,000 staff working today for UNHCR in 135 countries.

That protection has got harder, or more complex, can hardly be denied, with States now facing the challenges of a global pandemic, a globalising economy and what might appear to be existential threats to the international system at large.

Twenty years ago, US Ambassador Richard Holbrooke noted the lack of any real difference between the refugee and the internally displaced – each was uprooted, each seeking shelter and safety. But in either case, co-ordination was inadequate and overall responsibility for every aspect of the problem, particularly protection, was lacking.

Today, many are uprooted by circumstances beyond their control, and are effectively without the protection of their own or any government. This daily reality cannot be denied. What is needed is a comprehensive, international response capacity, competent to deal with those who must move, whose numbers will likely be increased by the effects of climate change and disaster.

Effective management and humane solutions demand such a response, and not just to erase bureaucratic and semantic distinctions between those who do and those who do not cross borders, or between those who qualify as refugees in the sense of the 1951 Convention/1967

Protocol and those who do not; and notwithstanding that the international response will necessarily vary, depending on context.

A new UNHCR Statute

In fact, despite its 70 years, what is needed is not a new convention, but a very substantially revised institutional base for United Nations activities concerning population displacement.

Like the 1951 Convention, UNHCR's Statute was adopted by the General Assembly 70 years ago. It has not changed since, even though the General Assembly has formally and informally extended UNHCR's mandate in successive resolutions.

UNHCR is a subsidiary organ of the General Assembly and rewriting its mandate is therefore within the competence of this body under Article 22 of the UN Charter. Revision is needed, both to do away with historical anomalies and redundancies, but more particularly, to reflect changes already made, to recognize formally the new realities, and to make clear provision for UNHCR's protection and assistance experience.

One aspect of the goal of revision is simple and straightforward: to update and revise the definition of the personal scope of its mandate for UNHCR's operational purposes, and to integrate within a single agency the UN's understanding of key international legal concepts, as these have evolved in practice.

Revisiting the UNHCR Statute would incidentally provide an opportunity to revise those historical elements no longer relevant or applicable, permit some re-thinking of UNHCR's protection and other activities in the light of practice, confirm UNHCR's entitlement to appeal for funds, and allow substantial reform of UNHCR's financing. Interesting though they are, these must be matters for another day...

Rewriting UNHCR's mandate does not mean, however, that new obligations are imposed on States besides those to which they have consented by becoming party to treaties, or which are applicable under customary international law. There has always been a disjuncture, and a certain 'creative' tension, between the institutional responsibilities of UNHCR, the obligations of States, and the latter's 'sovereign' interests – this is part of what makes international law a dynamic system.

This is also why UNHCR should continue to supervise the application of international treaties that concern refugees and, in conjunction with the Office of the UN High Commissioner for Human Rights, to oversee the application of international law generally when it touches on those compelled to move.

I cannot stress enough the fundamental importance of UNHCR's unique role in supervising the 1951 Convention and the 1967 Protocol, which is recognized in both treaties and expressly in the Statute. Its interventions with governments – often with the assistance of civil society, lawyers, advocacy groups, non-governmental organisations, parliamentarians and others – make it a particularly valuable partner, whose views on law and policy require honest and good faith consideration.

What is needed nevertheless is a re-writing of the personal scope and related functions of UNHCR's Statute, specifically to require that the High Commissioner provide international protection and, subject to resources, assistance also, to refugees, the stateless, the internally displaced, and to migrants without protection.

And in seeking solutions, which can evidently only be done with governments and civil society, UNHCR should actively pursue opportunities for voluntary repatriation, integration, settlement in third States, migration, return migration, and naturalization. These changes are not novel, but reflect what has been achieved piece-meal by the General Assembly over the past 70 years, and what has been mostly accepted and recognized in the practice of States.

Specifically, therefore, the revision should recognize that the term refugee with a well-founded fear of persecution should also accommodate contemporary practice, including gender and sexual orientation.

Second, and consistently with the *non-refoulement* requirement of CAT84 and the complementary jurisprudence developed by the Human Rights Committee and regional courts and tribunals, the term 'refugee' should also include those who there are substantial reasons to believe will be at risk of torture.

Third, again taking account of regional developments, the term 'refugees' should include those who have fled or who are unable to return to their country of origin by reason of internal or international armed conflict or events seriously disturbing public order.

Fourth, stateless persons should be included, as defined in international treaties providing for status and the reduction of statelessness, who do not enjoy the protection of any government.

Fifth, internally displaced persons should be included, as they are defined in the now widely accepted Guiding Principles.

And sixth, and most controversial perhaps, one particular category of migrants should be included – that is, persons who have moved or been moved, voluntarily or involuntarily, from one State to another, irrespective of their status and whether or not they have been smuggled or trafficked.

The essential criterion here is that they do not enjoy the protection of their State of origin, either because that State has refused them protection or is otherwise unable to provide such protection.

Bringing them under UNHCR's mandate would fill a protection gap which existing agencies, such as IOM, are not able to fill, no matter their other complementary functions, and it will facilitate internationally acceptable solutions to a growing problem for States and migrants, both in the contemporary context, but also in a future that must face the challenges of climate- and disaster-related displacement.

Conclusion

A revised statute will not impose obligations on States. Instead, by providing UNHCR with a sound juridical base for its own operations of protection and solutions, it will help to fill an important protection gap and complement States as they seek to implement the 1951 Convention and their other international obligations towards the involuntarily displaced.

I am sure there are many questions raised by these suggestions; I look forward to receiving feedback and comment, and to responding as far as I can.

Thank you.