

# LOOKING BACK, MOVING FORWARD: THE HISTORY AND FUTURE OF REFUGEE PROTECTION

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## ABSTRACT

The origins of refugee protection are commonly associated with the aftermath of the Second World War and the huge outpouring of refugees that it sparked. The 1951 Refugee Convention, however, was in fact a revision and consolidation of previous international agreements relating to the status of refugees. In their own ways, all of the Convention's predecessors responded to the refugee crises by facilitating the movement of refugees to safe states. With the 1951 Convention, in contrast, *non-refoulement* – the promise not to send people back to persecution – has come to be considered the core of refugee protection. While resettlement is indeed part of many countries' current refugee schemes, it is voluntary, and therefore secondary, to the international legal obligation of *non-refoulement*. In a period when the fear of terror translates into a fear of foreigners and borders are turning into barriers, it is becoming increasingly difficult for refugees to reach safe states and trigger the legal obligation of *non-refoulement*. This article looks back to the refugee agreements made during the first half of the twentieth-century to argue that the international regime of refugee protection is as much about bringing refugees to safety as refusing to send them back to danger.

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## **Introduction**

History tends to repeat itself. With refugee protection reform proposals there is a Sisyphean tendency to roll and repeat. Little ever changes. New refugees emerge, solutions fail to be found, and situations become protracted. Constantly focused on the most recent crisis, the United Nations High Commissioner for Refugees (UNHCR) has been accused of “lack[ing] institutional memory and ... always reinventing itself.”<sup>1</sup> Looking further past UNHCR’s institutional foundation, a “historical perspective” is urged to recognize that “mass refugee movements are neither new nor exclusive to specific regions [but rather] [t]hey have been an enduring and global issue throughout the twentieth century.”<sup>2</sup> This article offers the rarely undertaken historical review and begins by looking back to the refugee agreements made during the first half of the twentieth century. The argument is that, from its origin, the international regime of refugee protection has been as much about bringing refugees to safety as refusing to return them to danger. The 1951 *Convention Relating to the Status of Refugees* (1951 Convention), the cornerstone of refugee protection, is thus seen to create a schism in protection by its focus on *non-refoulement* over resettlement.<sup>3</sup> From here, the article moves forward to review the most recent international statement on resettlement – the concept of “Convention Plus.” The “Plus” arose out of recognition of the 1951 Convention’s inadequacy as a complete tool for protection. Flowing from the review of the historical commitment to the movement of refugees, however, the resettlement strand of

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<sup>1</sup> GIL LOESCHER, *THE UNHCR AND WORLD POLITICS: A PERILOUS PATH* 4 (Oxford University Press 2001).

<sup>2</sup> CLAUDENA M. SKRAN, *REFUGEES IN INTER-WAR EUROPE: THE EMERGENCE OF A REGIME* 4 (Clarendon Press, Oxford University Press 1995) [hereinafter SKRAN, *REFUGEES IN INTER-WAR EUROPE*].

<sup>3</sup> *Convention Relating to the Status of Refugees*, 1951 art. 33, Apr. 22, 1954, 189 U.N.T.S. 150 [hereinafter 1951 Refugee Convention].

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Convention Plus will be seen to offer little in terms of an actual addition to the 1951 Convention. Progress is not being made and history is being forgotten.

### **Looking Back: The Development of International Refugee Protection in the 20th Century**

The origins of refugee protection are commonly associated with the aftermath of the Second World War and the huge outpouring of refugees that it sparked. The 1951 Convention, however, was in fact a revision and consolidation of previous international agreements relating to the status of refugees. This is acknowledged in the 1951 Convention's Preamble where it states:

CONSIDERING that it is desirable to revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments by means of a new agreement.<sup>4</sup>

The 1951 Convention was not the start, but rather the culmination of previous refugee protection instruments.

Founded in 1919 out of the Treaty of Versailles, the League of Nations was the first international organization to address refugee issues.<sup>5</sup> The product of the collapse of the dynastic Austro-Hungarian, Ottoman and Russian Empires was "a world of nation-states, in which the population of the globe is theoretically divided up into exclusive bodies of citizens."<sup>6</sup> The division was theoretical as many found themselves without documentation or lacking the attributes of citizenship.<sup>7</sup> The consequent population flows that arose from the fall of empires and the end of the First World War compelled the

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<sup>4</sup> *Id.* pmb1.

<sup>5</sup> *Peace Treaty of Versailles*, Covenant of the League of Nations arts. 1-30, April 28, 1919.

<sup>6</sup> JOHN C. TORPEY, *THE INVENTION OF THE PASSPORT: SURVEILLANCE, CITIZENSHIP AND THE STATE* 122 (Cambridge University Press 2000).

<sup>7</sup> *Id.* at 123.

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newly created League of Nations “to attempt to deal with the reality that many in the game of international musical chairs had ended up without a seat.”<sup>8</sup> The nearly one million Russian refugees scattered across Europe following civil war and famines in their homeland were therefore the first twentieth century refugees to receive international attention and protection.<sup>9</sup> While the refugee problem was not new, it was “magnified by the fact that Europe was drained by war; stirred by political tensions; and exhausted of capacities to provide adequate relief.”<sup>10</sup> The League of Nations was well suited to “combine the moral authority to represent the rights of the refugees with a practical appreciation of the problems of the states which lodged these people.”<sup>11</sup> In response to an appeal from the International Committee of the Red Cross (ICRC) to aid these refugees in 1921, the League of Nations appointed a High Commissioner for Refugees, Fridtjof Nansen, a Norwegian arctic explorer, scientist and statesman.<sup>12</sup>

Nansen, as the first High Commissioner for Refugees, created a refugee travel document that came to be known as the “Nansen Passport”. Although not the equivalent of a national passport, and attaching no obligation on governments to re-admit the bearer,<sup>13</sup> the document gave refugees a legal identity and enabled them to travel internationally.<sup>14</sup>

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 124. Torpey refers to the estimations of demographer Eugene Kulischer who suggests that a total of 1.75 million people left the Soviet Union between 1919 and 1922. This figure includes a variety of ethnically non-Russian groups; Kulischer estimates the Russian emigration to be 900,000.

<sup>10</sup> Alessandra Roversi, *The Evolution of the Refugee Regime and Institutional Responses: Legacies from the Nansen Period*, 22 REFUGEE SURV. Q. 21, 23 (2003).

<sup>11</sup> Louise W. Holborn, *The Legal Status of Political Refugees, 1920-1938*, 32:4 AM. J. INT’L L. 680, 683 (1938).

<sup>12</sup> Claudena M. Skran, *Profiles of the First Two High Commissioners* 1:3-4 J. REFUGEE STUD. 277, 277 (1988) [hereinafter, Skran, *Profiles*]. See also *Special issue: Fridtjof Nansen and the International Protection of Refugees* 22:1 REFUGEE SURV. Q. (2003) for a detailed review of Nansen’s life and work.

<sup>13</sup> TORPEY, *supra* note 6, at 128.

<sup>14</sup> Convention Travel Documents (CTDs) pursuant to art. 28 of the 1951 Refugee Convention, *supra* note 3 and Executive Committee Conclusion No.13 now enable similar travel.

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At the time of Nansen's appointment, the League of Nations adopted a series of resolutions concerning the transfer of Russian refugees between states:

a) The Conference considered the difficulties which existed with reference to *passports* for Russian refugees. These called for special arrangements which could only be made by the High Commissioner with the various interested Governments. In particular such arrangements should make possible the egress of Russian refugees from countries where they were presently congregated and for their ingress to the States which were willing to receive them.<sup>15</sup>

The Nansen Passport facilitated this envisioned movement of Russian refugees. Both Nansen and the League of Nations were also quite conscious of geographic realities.<sup>16</sup>

The League's resolutions provide an early recognition of the importance of burden-sharing amongst states in response to the unequal natural distribution of refugees:

d) The Conference was also of the opinion that, as the problem was of interest to the entire world, it would not be just to leave the burden on relieving Russian refugees to the few nations which have hitherto borne it alone, both for philanthropic reasons and by reason of their geographical situation, a course which might involve them in sacrifices beyond their power; and that not only all the States belonging to the League of Nations, but all the States of the civilized world, ought to be invited to contribute support in proportion to their resources for this urgent and essential task in the interest of mankind.<sup>17</sup>

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<sup>15</sup> Fourteenth Council Session, Annexes 245 and 245a [hereinafter Fourteenth Council Session] *quoted in* Ivor C. Jackson, *Dr. Fridtjof Nansen a Pioneer in the International Protection of Refugees*, 22 REFUGEE SURV. Q. 7, 8 (2003) [hereinafter Jackson, *Nansen*].

<sup>16</sup> See MATTHEW J. GIBNEY, *THE ETHICS AND POLITICS OF ASYLUM: LIBERAL DEMOCRACY AND THE RESPONSE TO REFUGEES* 195 (Cambridge University Press 2004) on the "tyranny of geography".

<sup>17</sup> Fourteenth Council Session, *supra* note 15, at 9.

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Nansen's 1922 Report of the High Commissioner refers to the passport in this burden-sharing language as "a great step towards a more equitable distribution of Russian refugees."<sup>18</sup>

Initially provided only to Russian refugees, the documents were extended to refugees from Armenia in 1924 and Assyrians and other Christians from the Ottoman Empire in 1928.<sup>19</sup> A total of 54 nations recognized the Russian passports, 38 approved the extension to Armenians,<sup>20</sup> and 13 to the Assyrians and other Christians.<sup>21</sup> The Nansen Passport has been cited as the "beginning of international refugee law."<sup>22</sup> It is significant to note that rather than a promise not to turn refugees away, the passport assisted in the *movement* of refugees – their 'egress' and 'ingress' – in an 'equitable' manner to willing states.<sup>23</sup>

Ideals and intention did not, however, immediately move "States of the civilized world...to contribute support...for this urgent and essential task in the interest of

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<sup>18</sup> "Russian Refugees: Report to the Council of July 20<sup>th</sup>, 1922 by Dr. Nansen," *Official Journal* (August 1922) C.472.M.297.1922, annex 384, 926 *quoted in* SKRAN, REFUGEES IN INTER-WAR EUROPE *supra* note 2, at 105.

<sup>19</sup> Issue of Certificates of Identity to Russian Refugees, July 5, 1922, 13 L.N.T.S. 237; Plan for the Issue of a Certificate of Identity to Armenian Refugees, May 31, 1924, LoN Doc. C.L. 72(a). 1924; Arrangement relating to the Issue of Identity Certificates to Russian and Armenian Refugees, Supplementing and Amending the Previous Arrangements dated July 5, 1922 and May 31, 1924, signed on May 12, 1926, 89 L.N.T.S. 47; Arrangement Concerning the Extension of Other Categories of Refugees of Certain Measures taken in Favour of Russian and Armenian Refugees, June 30, 1928, 89 L.N.T.S. 63 *quoted in* ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 13, vol. 1, at 122 (A. W. Sijthoff 1966).

<sup>20</sup> James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920-1950*, 33 INT'L & COMP. L. Q. 348, 353 (1984) [hereinafter Hathaway, *Evolution of Refugee Status*].

<sup>21</sup> TORPEY, *supra* note 6, at 129.

<sup>22</sup> SKRAN, REFUGEES IN INTER-WAR EUROPE, *supra* note 3, at 105.

<sup>23</sup> The League's resolutions did mention *non-refoulement* but only briefly and in connection with repatriation:

- e) Finally, the Conference considered that no Russian refugee should be compelled to return to Russia (*non-refoulement*) but that it would be expedient to collect without delay particulars of the number of refugees desiring to be repatriated (*voluntary repatriation*).

Fourteenth Council Session, *supra* note 15, at 9.

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mankind.” In March 1922, Nansen reported that he had received few replies to inquiries directed at governments as to the categories of refugees they were willing to accept and that most of the received replies were negative and emphasized the global economic depression of the period.<sup>24</sup> Undeterred, Nansen pushed to realize this refugee movement, and, in 1924 the League of Nations entered into an arrangement with the International Labour Organization (ILO) in which the ILO matched refugees with countries and employers in need of workers. Once the Refugee Commissioner identified refugees, the ILO coordinated the refugees’ job-placements and emigration.<sup>25</sup> Between 1925 and 1929 the ILO coordinated employment placements for approximately 50,000 refugees.<sup>26</sup>

Following Nansen’s death in 1930, the League of Nations opted to create the Nansen International Office charged with the protection of refugees under the League’s mandate rather than appoint a new High Commissioner.<sup>27</sup> Hitler’s rise to power in 1933, however, sparked an outpouring of new refugees, mostly Jews, from Germany. This new crisis pushed the League of Nations to direct the focus of its refugee protection and appoint an independent “High Commissioner for Refugees coming from Germany.”<sup>28</sup> While the extension of the Nansen Passport to refugees from Germany was repeatedly debated during this period, it was rejected due to France and Britain’s hesitation to provoke Germany.<sup>29</sup> The High Commissioner’s task was therefore two-fold: to coordinate relief and settlement efforts and to negotiate and facilitate refugee travel and resettlement in

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<sup>24</sup> LoN Doc. C.124.M.74, March 15, 1922 *quoted in* Jackson, *Nansen*, *supra* note 15, at 9.

<sup>25</sup> Skran, *Profiles*, *supra* note 12, at 284.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 289.

<sup>28</sup> *Id.* at 289.

<sup>29</sup> TORPEY, *supra* note 6, at 138.

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third countries.<sup>30</sup> James G. McDonald, the American professor who first held the post from 1933-1935 resettled approximately two thirds of the 80,000 refugees who left Germany during his tenure.<sup>31</sup> His British successor, Sir Neill Malcolm, however, returned to the issue of identity documents. At the same time as Malcolm was arguing for the issuance of identity documents, a special refugee committee report was presented to the League of Nations in January 1936. This report stressed the importance of burden-sharing, whether by the provision of first asylum, resettlement or funds.<sup>32</sup> Consequently, in 1936, the League of Nations adopted a *Provisional Arrangement concerning the Status of Refugees coming from Germany* (1936 Provisional Arrangement) whereby governments were authorized to issue travel documents to Germans and stateless persons coming from Germany.<sup>33</sup>

Two years later, in 1938, this arrangement was adapted into the *Convention concerning the Status of Refugees coming from Germany* (1938 Convention).<sup>34</sup> The first *Convention relating to the International Status of Refugees* had been adopted in October 1933 (1933 Convention) but was ratified by only a few states.<sup>35</sup> The 1938 Convention specifically addressed resettlement in Article 15:

With a view to facilitating the emigration of refugees to overseas countries, every facility shall be granted to the refugees and to the

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<sup>30</sup> Skran, *Profiles*, *supra* note 12, at 291.

<sup>31</sup> TORPEY, *supra* note 6, at 138.

<sup>32</sup> SKRAN, REFUGEES IN INTER-WAR EUROPE, *supra* note 2, at 71.

<sup>33</sup> Provisional Arrangement Concerning the Status of Refugees Coming From Germany, Jul. 4, 1936, 3952 L.N.T.S. 77.

<sup>34</sup> Convention Concerning the Status of Refugees Coming from Germany, Feb. 10, 1938, 4461 L.N.T.S. 61.

<sup>35</sup> Convention Relating to the International Status of Refugees, Oct. 28, 1933, 3663 L.N.T.S. [hereinafter 1933 Convention]. Eight states ratified the Convention: Belgium, Bulgaria, Czechoslovakia, Denmark, France, Great Britain, Italy and Norway. It was signed but not ratified by Egypt. See Robert J. Beck, *Britain and the 1933 Refugee Convention: National or State Sovereignty?* 11:4 INT'L J. REFUGEE L. 597, 600, 603 (1999); and Roversi, *supra* note 10, at 27.

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organizations which deal with them for the establishment of schools for professional re-adaptation and technical training.<sup>36</sup>

The year 1938 also saw the merging of the League of Nations' Nansen International Office, which was scheduled to terminate, with the "High Commissioner for Refugees coming from Germany". The resulting "High Commissioner for Refugees under the Protection of the League of Nations" was assigned the responsibility to oversee the application of the 1933 and 1938 conventions, assist governments and "...to coordinate in general humanitarian assistance along with resettlement and other solutions..."<sup>37</sup> A separate organization, the Intergovernmental Committee on Refugees (IGCR) was also created at the League of Nations conference in Evian, France. The IGCR convened in July 1938 to address the growing refugee crisis.<sup>38</sup> The two organizations were essentially amalgamated in February 1939 when Sir Herbert Emerson, the "High Commissioner for Refugees under the Protection of the League of Nations" concurrently became Director of the ICGR.<sup>39</sup> This inter-war period was "a time of great creativity and innovation, a time when much was accomplished with minimal resources and a time when millions of refugees were helped to begin new lives."<sup>40</sup>

Despite such successes, the League of Nations' inability to prevent the Second World War signaled its downfall and it dissolved as the war drew to a close. The United Nations Relief and Rehabilitation Administration (UNRRA) was created in 1943 in an effort to repatriate the displaced persons of Europe following the war.<sup>41</sup> At the conclusion of this

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<sup>36</sup> *Supra* note 34, at art. 15.

<sup>37</sup> Roversi, *supra* note 10, at 28.

<sup>38</sup> TORPEY, *supra* note 6, at 135.

<sup>39</sup> Roversi, *supra* note 10, at 29.

<sup>40</sup> SKRAN, REFUGEES IN INTER-WAR EUROPE, *supra* note 2, at 9.

<sup>41</sup> TORPEY, *supra* note 6, at 143.

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second war, the world's leaders sought to form a new international forum for world opinion. The United Nations was established on 24 October 1945 and came to acquire a "symbolic importance" never achieved by the League of Nations.<sup>42</sup> The League of Nations' dissolution caused the High Commissioner's office to close on 31 December 1946.<sup>43</sup> That same year, the International Refugee Organization (IRO) was established by a resolution of the United Nations General Assembly.<sup>44</sup> By mid-1947, the IRO had assumed the responsibilities of the UNRRA, the ICGR and, indirectly the League of Nations' High Commissioner for Refugees.<sup>45</sup> The IRO was designed to assist those persons who could not be repatriated or who "in complete freedom and after receiving full knowledge of the facts...expressed valid objections to returning to [their countries of origin.]"<sup>46</sup> The IRO oversaw the resettlement of displaced Europeans to countries such as the United States (US), Canada, and Australia. Between 1947 and 1951 the IRO resettled close to 1 million refugees, including 329,000 in the US, 182,000 in Australia, 132,000 in Israel, 123,000 in Canada and 170,000 in various European states.<sup>47</sup>

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The IRO was established as a specialized agency of limited duration to close in 1951.

The massive population movement across Europe in the aftermath of the Second World War, with the number of displaced persons in Europe reaching 11 million at the end of

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<sup>42</sup> Paul F. Diehl, *Introduction to Part I*, in THE POLITICS OF GLOBAL GOVERNANCE: INTERNATIONAL ORGANIZATIONS IN AN INTERDEPENDENT WORLD 4 (Paul F. Diehl ed., Lynne Rienner Publishers 1997).

<sup>43</sup> GRAHL-MADSEN, *supra* note 19, at 17.

<sup>44</sup> Question of Refugees, G.A Res. 8/1, (Feb. 12, 1946).

<sup>45</sup> Hathaway, *Evolution of Refugee Status*, *supra* note 20, at 376.

<sup>46</sup> The Constitution of the IRO, Part I(C)(1) *quoted in* Hathaway, *Evolution of Refugee Status*, *Id.* at 374.

<sup>47</sup> Dennis Gallagher, *The Evolution of the International Refugee System*, 23:2 INT'L MIGRATION REV. 579, 579 (1989).

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the war,<sup>48</sup> forced the United Nations to revisit the issue of refugee protection. By resolution on December 3, 1949 the United Nations General Assembly decided to establish a High Commissioner's Office for Refugees.<sup>49</sup> The *Statute of the Office of the United Nations High Commissioner for Refugees* was adopted by the United Nations General Assembly on December 14, 1950.<sup>50</sup> UNHCR began its work on January 1, 1951 with 33 staff and a budget of \$30,000.<sup>51</sup> The *Convention relating to the Status of Refugees* was adopted on July 28, 1951 and came into force on April 22, 1954.<sup>52</sup> As was the case with the offices and organizations that had preceded it and worked only with specific groups of refugees, the scope of the 1951 Convention was limited to persons who became refugees as a result of events occurring in Europe before January 1, 1951.<sup>53</sup> The accompanying 1967 *Protocol relating to the Status of Refugees* (1967 Protocol) finally confronted the reality that refugee crises are chronic and worldwide and expanded the 1951 Convention's temporal and geographic coverage.<sup>54</sup> Not until December 2003 was the temporal limitation on the continuation of the High Commissioner's Office for

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<sup>48</sup> TORPEY, *supra* note 6, at 143.

<sup>49</sup> Refugees and Stateless Persons, G.A. Res. 319(IV), U.N. Doc. (Dec. 3, 1949).

<sup>50</sup> Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), U.N. Doc. (Dec. 14, 1950).

<sup>51</sup> Erika Feller, *The Evolution of the International Refugee Protection Regime* 5 Wash. U. J. L. & POL'Y 129, 151 (2001) [hereinafter Feller *Evolution*].

<sup>52</sup> 1951 Refugee Convention, *supra* note 3.

<sup>53</sup> Article 1(B)(a), paragraph (b) permits contracting states to make a declaration at the time of signature, ratification or accession specifying whether the geographical limit of Europe is to apply. Torpey importantly notes that the geographic limitation was imposed despite the fact that two major refugee crises had arisen outside of Europe since the end of the war – the partition of India and Pakistan in 1947 causing the movement of some 14 million persons and the movement of hundreds of thousands of Palestinians following the creation of the state of Israel in 1948. TORPEY, *supra* note 6, at 144.

<sup>54</sup> Protocol relating to the Status of Refugees, Oct. 4, 1967, 606 U.N.T.S. 267.

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Refugees removed by Resolution 58/153. This created a permanent framework for refugee protection “until the refugee problem is solved.”<sup>55</sup>

The 1951 Convention focused refugee protection on the principle of *non-refoulement*.

Enshrined in Article 33(1), the principle states that:

No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>56</sup>

It has been noted that in the 1920s *refoulement* practices reflected the exception rather than the norm but that the reverse was true by the 1930s.<sup>57</sup> The 1933 Convention introduced the notion that signatory states were obligated to refrain from expelling authorized refugees from their territories and to avoid “non-admittance [of refugees] at the frontier.”<sup>58</sup> Only eight countries, however, ratified the 1933 Convention, and most of them imposed restrictions on their obligations.<sup>59</sup> The concept of *refoulement* is not even mentioned in either the 1936 Provisional Arrangement or the consequent 1938 Convention. With the 1951 Convention, in contrast, *non-refoulement* has come to be considered the core of refugee protection. The promise not to send people back to persecution is commonly viewed as the response of “nations still bruised by post-Holocaust guilt, conscious of having denied entry to pre-Holocaust Jews.”<sup>60</sup> In addition

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<sup>55</sup> Implementing Actions Proposed by the United Nations High Commissioner for Refugees to Strengthen the Capacity of his Office to Carry Out its Mandate, G.A. 58/153, U.N. Doc. A/RES/58/153 (Dec. 22, 2003).

<sup>56</sup> 1951 Refugee Convention, *supra* note 3.

<sup>57</sup> SKRAN, REFUGEES IN INTER-WAR EUROPE, *supra* note 2, at 131.

<sup>58</sup> 1933 Convention, *supra* note 35, at art. 3.

<sup>59</sup> *Id.*

<sup>60</sup> PETER SHOWLER, REFUGEE SANDWICH: STORIES OF EXILE AND ASYLUM 212 (McGill-Queen’s University Press 2006). *See also* ARTHUR MORSE, WHILE SIX MILLION DIED: A CHRONICLE OF AMERICAN APATHY (Random House 1968).

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to the impetus of guilt, there was “the new imperative to protect heroes of Western capitalist freedom in a world divided by the Cold War.”<sup>61</sup> Beyond these guilts and goals was the “desire to promote regional and international stability”<sup>62</sup> and the need of “labour for economic growth and people for demographic growth.”<sup>63</sup> The above rationales culminated in an international willingness to make the strong statement counter to their sovereignty of *non-refoulement*.

In their own ways, all of the 1951 Convention’s predecessors responded to the refugee crises in Europe by facilitating the movement of refugees to safe states. In particular, it is suggested that the 1938 Convention, the ICGR and the IRO “assumed that there was little likelihood that refugees would be accommodated in the first asylum country.”<sup>64</sup> Writing in 1938 Louise Holborn commented specifically that one of the key issues facing Nansen upon his appointment was “the movement of refugees to overseas countries.”<sup>65</sup> However, unlike previous programs, with the 1951 Convention “[t]he challenge of getting... into (or to the door of) a country of potential asylum is left up to the refugee.”<sup>66</sup> In 1971, Atle Grahl-Madsen wrote that “[i]n the post-IRO period, the practice of concluding resettlement agreements is no longer *en vogue* in Western Europe...the coming into force of the Refugee Convention, 1951, made it superfluous to conclude such detailed

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<sup>61</sup> Adrian Favell and Randall Hansen, *Markets Against Politics: Migration, EU Enlargement and the Idea of Europe* 28:4 J. ETHNIC & MIGRATION STUD. 581,588 (2002).

<sup>62</sup> Gil Loescher, *UNHCR at Fifty: Refugee Protection and World Politics*, in PROBLEMS OF PROTECTION: THE UNHCR, REFUGEES AND HUMAN RIGHTS 4 (Niklaus Steiner, Mark Gibney & Gil Loescher, eds., Routledge 2003).

<sup>63</sup> Stephen Castles & Sean Loughna, *Asylum Migration to Industrialized Countries*, in POVERTY, INTERNATIONAL MIGRATION AND ASYLUM 41 (George J. Borjas & Jeff Crisp, eds., Palgrave MacMillan 2005) [hereinafter Borjas & Crisp POVERTY].

<sup>64</sup> JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 964 (Cambridge University Press 2005) [hereinafter HATHAWAY, *THE RIGHTS OF REFUGEES*].

<sup>65</sup> Holborn, *supra* note 11, at 683.

<sup>66</sup> Janet Dench, *Controlling the Borders: C-31 and Interdiction*, 19:4 REFUGEE 34, 34 (2001).

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agreements.”<sup>67</sup> While resettlement is indeed part of some countries’ current refugee schemes, a crucial difference between these programs and the earlier agendas of the ICGR and the IRO is that “these new initiatives have been conceived and operated by particular states, rather than by an international refugee agency.”<sup>68</sup> This has meant *ad hoc*, inconsistent resettlement programs operated by a small number of countries and sometimes in an effort to self-select migrants and avoid obligations under the 1951 Convention. Put another way, resettlement is under-used. When it is used, it is often abused.

Thus, while the 1951 Convention was a positive step in the development and expansion of refugee protection, it also caused a significant change in the direction of that protection. By no means the first attempt to confront the refugee problem, the 1951 Convention did mark the shift from refugee *issues* to refugee *law*. For the first time a definable obligation, that of *non-refoulement*, was placed on signatory countries. Beyond this, countries were to ratify the 1951 Convention and incorporate this obligation into their own national laws. The principle of *non-refoulement* has been labeled a “minimal constraint” of “mythic proportions.”<sup>69</sup> Much has been written on the extent and interpretation of this constraint on state sovereignty. What has been left unnoticed is the schism this constraint on sovereignty has created in how two streams of refugee protection – resettlement and *non-refoulement* – are regarded. Catherine Dauvergne suggests international law prescribes how refugees are to be treated once they have

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<sup>67</sup> ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW*, vol. 2, 233 (A. W. Sijthoff 1966).

<sup>68</sup> HATHAWAY, *THE RIGHTS OF REFUGEES*, *supra* note 64, at 964.

<sup>69</sup> Catherine Dauvergne, *Sovereignty, Migration and the Rule of Law in Global Times* 67:4 MOD. L. REV. 588, 596 (2004).

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arrived at a border and, in doing so, “skirt[s] the direct question of humanitarian admissions entirely.”<sup>70</sup> Resettlement, she notes, is, in contrast “rooted in moral or political suasion rather than legal requisite.”<sup>71</sup> Yet this division between moral and legal obligation is a false divide.

Refugee protection, in contrast to other migration, is based on a moral/humanitarian compulsion. It is this compulsion that compelled the League of Nations and later the United Nations to devote attention and resources to the refugee issue. And this development of refugee protection has historically been as much about bringing refugees to safe countries of asylum as about not turning them away when they find safety on their own. That the latter has been *legalized* does not negate its humanitarian core. States that have signed on to the 1951 Convention and/or the 1967 Protocol have self-inflicted a legal obligation out of an arguably humanitarian compulsion. Following this logic, Matthew Gibney asserts that:

...governments that claim that they recognize the moral importance of asylum – that are, in other words, respectful of the humanitarian principle – have a strong *ethical* reason for participating in and promoting cooperative schemes when and where they are possible.<sup>72</sup>

This notion of cooperative schemes, however, takes one beyond the confines of the 1951 Convention.

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<sup>70</sup> CATHERINE DAUVERGNE, HUMANITARIANISM, IDENTITY AND NATION: MIGRATION LAWS IN CANADA AND AUSTRALIA 74 (UBC Press 2005) [hereinafter DAUVERGNE, HUMANITARIANISM, IDENTITY AND NATION].

<sup>71</sup> *Id.* at 86.

<sup>72</sup> GIBNEY, *supra* note 16, at 247.

**Moving Forward: Does Convention Plus Add Anything?**

The 1951 Convention, while strong in its provision of rights, particularly *non-refoulement*, fails to offer enforcement or accountability mechanisms. Erika Feller, UNHCR Assistant High Commissioner for Protection notes:

Where is the 1951 Convention weak? It gives a voice and force to the rights of refugees. It does not, though, say how States should put it into practice. The Convention regime rests on notions of international solidarity and burden and responsibility sharing, but offers no agreed indicators, much less formulae, for such burden and responsibility sharing.

...

If it is clear in terms of rights, it is close to silent about whose responsibility it actually is to protect them in the context of modern displacement situations and population movements.<sup>73</sup>

The current regime has elsewhere been described as merely “half-complete.”<sup>74</sup> Given such deficiencies, calls have gone out for additional agreements or protocols to encourage or enforce resettlement.<sup>75</sup>

Former UNHCR High Commissioner Ruud Lubbers did directly acknowledge that while the “1951 Refugee Convention remains the cornerstone of the international refugee protection regime,...it alone does not suffice.”<sup>76</sup> And to an extent, under his leadership, an addition to the 1951 Convention was envisioned in the concept of “Convention Plus”. The *Agenda for Protection*, arising out of the Global Consultations on the 1951 Convention’s 50<sup>th</sup> anniversary and addressing the increasing challenges to the Convention’s relevance, introduced the notion of Convention Plus in 2002. Alexander

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<sup>73</sup> Erika Feller, *Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come* 18:3-4 INT’L J. REFUGEE L. 509, 525 (2006) [hereinafter Feller *Realities*].

<sup>74</sup> Alexander Betts & Jean-François Durieux, *Convention Plus as a Norm-Setting Exercise* 20:3 J. REFUGEE STUD. 509, 510 (2007).

<sup>75</sup> See Matthew J. Gibney & Randall Hansen, *Asylum Policy in the West*, in Borjas & Crisp POVERTY, *supra* note 63, at 90.

<sup>76</sup> UNHCR, *AGENDA FOR PROTECTION* (3d ed. 2003) 6 [hereinafter *AGENDA FOR PROTECTION*].

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Betts cautions however that Convention Plus evolved without substance from Lubber's tendency toward "gimmickry" and that contrary to official literature, some staff in UNHCR's Department for International Protection objected to the "co-optation of the Agenda (for Protection) and its association with Convention Plus."<sup>77</sup>

Despite arguably *ad hoc* origins, Convention Plus evolved into a coherent concept. Two key, inter-related components of the "plus" are improved burden-sharing and increased resettlement:

The "plus" concerns the development of special agreements or multilateral arrangements to ensure improved burden sharing, with countries in the North and South working together to find durable solutions for refugees. This includes comprehensive plans of action to deal with mass outflows, and agreements on "secondary movements", whereby the roles and responsibilities of countries of origin, transit, and potential destination are better defined. It also includes agreements aimed at better targeting development assistance in refugees' regions of origin, and multilateral commitments for resettlement of refugees.<sup>78</sup>

As addition to the Convention, the conceived "Plus" served to bridge the developed disjuncture between asylum protection (*non-refoulement*) and burden-sharing.<sup>79</sup> A Convention Plus unit was based at UNHCR's headquarters in Geneva and operated on a two and half year mandate until December 2005 when it was mainstreamed into the headquarters' structure. The unit worked with states to develop "generic agreements" on

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<sup>77</sup> Alexander Betts, *Convention Plus: Continuity or Change in North-South Responsibility-Sharing* (Jun. 14, 2005) (prepared for New Asylum Paradigm? Workshop, COMPAS Oxford) available at <http://www.compas.ox.ac.uk/events/previous/events-2005/nap/#c550>.

<sup>78</sup> AGENDA FOR PROTECTION, *supra* note 76, at 6-7; Report of the Fifty-third Session of the Executive Committee of the High Commissioner's Programme, UNHCR, Annex II, at 28, U.N. Doc. A/AC.96/973 (2002) (opening statement by Mr. Ruud Lubbers).

<sup>79</sup> Betts & Durieux, *supra* note 74, at 517.

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key focus areas including resettlement.<sup>80</sup> The core group on the “Strategic Use of Resettlement” was co-chaired by Canada and UNHCR. Canada’s role as facilitating state was to lead the process in crafting special agreements and coordinating discussion with other states and interested parties.

The Canada-led core group reached agreement on the “Multilateral Framework of Understandings on Resettlement” (MFU) in June 2004.<sup>81</sup> UNHCR’s Executive Committee welcomed the MFU and encouraged the full use of it by interested states, the UNHCR, and other relevant partners in its General Conclusion on International Protection adopted on October 8, 2004.<sup>82</sup> While far-reaching in its ambitions, the MFU falls short of comprehensively addressing the confines of the 1951 Convention. Far from enshrining in law the resettlement obligation of states, the MFU explicitly notes in its second paragraph that the understandings are “not legally binding.”<sup>83</sup> Further, in adopting the terms of reference, it was made clear that participation in the core group is not taken to mean a willingness to participate in situation-specific agreements.<sup>84</sup>

The difficulty with the MFU’s formulation is that it is not in fact an *expansion* of the 1951 Convention to encompass resettlement obligations. Rather, it envisions situation-specific multilateral agreements that are not grounded in increased resettlement numbers. The strategic use of resettlement is the “planned use of resettlement that maximizes the

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<sup>80</sup> UNHCR, “Convention Plus at a Glance (as of June 2005),” available at <http://www.unhcr.org/refworld/topic.4565c2251a.471cc40a2.471dcaedd.0.html>.

<sup>81</sup> High Commissioner’s Forum, *Multilateral Framework of Understandings on Resettlement* FORUM/2004/6 (Sept. 16, 2004), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=41597d0a4> [hereinafter MFU].

<sup>82</sup> *General Conclusion on International Protection*, EXCOM (No.99 (LV) - 2004) at paragraph (v).

<sup>83</sup> MFU, *supra* note 81, at paragraph 2.

<sup>84</sup> Informal Record, Meeting of the Convention Plus Core Group on the Strategic Use of Resettlement (Geneva, Nov. 24, 2003) FORUM/CG/RES/05 at paragraph 4, available at <http://www.unhcr.org/doclist/protect/408d17494.html> [hereinafter Informal Record].

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benefit of resettlement, either directly or indirectly, *other than to those being resettled*. Those benefits accrue to other refugees, the host States, other States, and the international protection regime in general.”<sup>85</sup> The focus is therefore on using resettlement as a tool to achieve durable solutions *other* than resettlement. In a non-governmental organization (NGO) statement made during the discussion period of the MFU’s development, the importance that “resettlement countries continue to use resettlement as a durable solution for refugees who are not included in multilateral resettlement operations” was highlighted in bold font.<sup>86</sup> The legitimate concern is that resettlement will come to be used only as a tool of negotiation and compromise within specific agreements to achieve other durable solutions and not as an equally valued durable solution in its own right. An example provided in UNHCR’s “The State of the World’s Refugees 2006” is that of “when a small group represents a stumbling block in the way of peace negotiations or a wider repatriation agreement. Here resettlement, even of small groups, may serve as a catalyst in leveraging other solutions.”<sup>87</sup> The MFU does acknowledge these concerns, noting that:

47. In cases in which refugees are not selected or accepted for the multilateral resettlement operation, all parties to continue to respond to their asylum and assistance needs while actively seeking other durable solutions.

48. Resettlement countries to continue to address through resettlement the needs of other refugees who are not included in the multilateral

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<sup>85</sup> Convention Plus Core Group on the Strategic Use of Resettlement, *Convention Plus: Framework of Understandings on Resettlement*, FORUM/CG/RES/03 (Nov. 3, 2003) (emphasis added), available at <http://www.unhcr.org/3fe814664.html> [hereinafter MFU Discussion].

<sup>86</sup> NGO Statement on the Convention Plus Strand on the Strategic Use of Resettlement, United Nations High Commissioner for Refugees’ Forum (Mar. 12 2004) Agenda Item 2(i) at 2, available at <http://www.unhcr.org/407110cea.html>.

<sup>87</sup> UNHCR, THE STATE OF THE WORLD’S REFUGEES 2006: HUMAN DISPLACEMENT IN THE NEW MILLENNIUM (2006), 143, available at <http://www.unhcr.org/publ/PUBL/4444d3cb11.html>.

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resettlement operation but for whom resettlement is the appropriate solution and/or the only means to guarantee their protection.<sup>88</sup>

In essence, these paragraphs express a passive continuance of the status quo. The lack of force in paragraphs 47 and 48 is reflective of the entire MFU, which intentionally “avoids being prescriptive and casts things in terms of aspirations.”<sup>89</sup>

By not being prescriptive, the MFU fails to address the 1951 Convention’s deficiencies as noted by Feller, that the Convention “offers no agreed indicators, much less formulae, for such burden and responsibility sharing.”<sup>90</sup> Preliminary discussions of the MFU did note that “[w]ith regard to the commitment to resettle, the drafters could prepare a paragraph that could have a commitment to resettle refugees until a durable solution is realized for the entire population and another with language that resettlement would be conducted over an “x” – year timeframe.”<sup>91</sup> However, in terms of actual guidance on selection criteria, the MFU states only that:

18. UNHCR to continue to develop its methodology for identifying groups for resettlement based on common characteristics.<sup>92</sup>

It was further noted early in the discussion process that “resettlement countries should consult and to the extent possible, co-ordinate the allocation of resources, to ensure that a sufficient number and type (e.g. vulnerable cases, women-at-risk, urgent protection etc.) of resettlement places are available to address the needs in the context of comprehensive

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<sup>88</sup> MFU, *supra* note 81.

<sup>89</sup> Rick Herringer, *Update on Status of Core Group on Resettlement* (Speaking Notes for High Commissioner’s Forum) (Mar. 12, 2004) available at <http://www.unhcr.org/407110c96.html>.

<sup>90</sup> Feller *Realities*, *supra* note 73.

<sup>91</sup> Informal Record, *supra* note 84, at paragraph 16.

<sup>92</sup> MFU, *supra* note 81.

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durable solution arrangements.”<sup>93</sup> At the same time it was suggested that a main undertaking of the resettlement countries should be to “[e]ngage in regular consultations to determine the number of refugees and types of caseloads to be resettled by each country.”<sup>94</sup> Again, only a toned down version of these suggestions is incorporated into the MFU:

11. Resettlement countries to cooperate in pledging places with the aim of meeting the identified resettlement needs and to provide undertakings regarding the number of refugees and profiles of populations to be resettled. In this regard, resettlement countries to consult with UNHCR and relevant resettlement partners so as to make best use of their respective expertise, in order to maximize the number of resettlement places being made available.<sup>95</sup>

The MFU is silent on the determination process for resettlement numbers. When one delegation inquired into available avenues to discuss issues such as how UNHCR would identify caseloads at the first meeting of the Convention Plus Core Group on the Strategic Use of Resettlement in November 2003, the UNHCR co-chair suggested that the Core Group “not get bogged down on question[s] of process.”<sup>96</sup>

It is precisely the question of selection process that must be answered before any comprehensive and transparent resettlement scheme can be implemented. Tied to this, an early NGO suggestion that “[s]tates should be encouraged to recognize the international dimension of refugee protection by moving away from national selection criteria for resettlement and towards acceptance of international (UNHCR) criteria”<sup>97</sup> is not

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<sup>93</sup> MFU Discussion, *supra* note 85, at 3.

<sup>94</sup> *Id.* at 9.

<sup>95</sup> MFU, *supra* note 81.

<sup>96</sup> Informal Record, *supra* note 84, at paragraph 38.

<sup>97</sup> MFU Discussion, *supra* note 85, at 7.

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addressed in the MFU. Moreover, highlighting once again the “tyranny of geography”<sup>98</sup> yet another NGO suggestion that “the response to humanitarian need is geographically balanced and non-discriminatory,” which seems so simple, obvious and important is not found within the MFU.<sup>99</sup>

While the MFU was hailed as a success early in the overall Convention Plus process, little seems to have been achieved since. The most recent statement on UNHCR’s website is from the 2005 Convention Plus Progress Report immediately before the unit was mainstreamed. It merely states:

It is encouraging that the Norwegian Chair of the Working Group on Resettlement has identified as a priority the need to seize opportunities for the strategic use of resettlement in 2006, with the MFU as a central planning document.<sup>100</sup>

There has been silence since and the emphasis on Convention Plus seems generally to have faded with the resignation of Ruud Lubbers as High Commissioner in February 2005.

### **Conclusion**

For some, Convention Plus highlights the progress in norm creation to supplement existing regimes by UNHCR.<sup>101</sup> Despite such conceptual optimism, the MFU is disappointing. Given the energy and enthusiasm that preceded and surrounded it, it fails to add any actual “plus” to the implementation of resettlement schemes. It lacks substantial guidance on how refugees for resettlement are to be selected, how the number

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<sup>98</sup> GIBNEY, *supra* note 16.

<sup>99</sup> MFU Discussion, *supra* note 85, at 6.

<sup>100</sup> High Commissioner’s Forum, *Progress Report: Convention Plus*, FORUM/2005/6 (Nov. 8, 2005), at paragraph 10, available at [http://www.unhcr.org/refworld/topic\\_4565c2251a\\_471cc40a2\\_471dcaf30.0.html](http://www.unhcr.org/refworld/topic_4565c2251a_471cc40a2_471dcaf30.0.html).

<sup>101</sup> Betts & Durieux, *supra* note 74, at 516.

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of refugees to be selected should be calculated, or on how, as a burden-sharing mechanism, such refugees should be geographically distributed. The entire MFU provides little more than additional words to the statement in the Preamble to the 1951 Convention that “the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.”<sup>102</sup> Moreover, by focusing on situation-specific agreements, the MFU is continuing with “initiatives [that] have been conceived and operated by particular states, rather than by an international refugee agency” which is, as already noted, the “crucial difference” between these programs and the earlier agendas of the ICGR and the IRO.<sup>103</sup> In doing so, the MFU lacks the “institutional memory” and “historical perspective” noted at the outset of this article.

With refugee reform seemingly back at the bottom of Sisyphus’ hill, history and memory are necessary tools of actual change. Understanding how past refugee flows were addressed and exploring instances of international cooperation demonstrates the past reality, current desirability, and future feasibility of an international resettlement scheme.

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<sup>102</sup> 1951 Refugee Convention, *supra* note 1, at pmb1.

<sup>103</sup> HATHAWAY, THE RIGHTS OF REFUGEES, *supra* note 64, at 964.