TIME IN THE REFUGEE REGIME

Keynote Address – Jean-François Durieux

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These are tough times for international refugee law.

Two months ago in New York, a declaration was adopted that reaffirms the relevance and the centrality of international law – more specifically, the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. We have heard this before. I must confess that this type of solemn re-affirmation worries me, as it tends to be increasingly hollow and ritualistic. As a matter of fact, the language of re-affirmation was stronger 15 years ago – at the close of the Global Consultations marking the Convention's 50th anniversary – when the motto was a 'full and inclusive' application of the Convention. Nowadays, to the extent there is a consensus, it probably gels around a minimalistic application of the Convention.

How could it be otherwise? After all, those who will be charged with implementing the New York Declaration include the stubborn nationalists, the isolationists, the protectionists who seem to rule the world today. In their logic, international refugee law simply does not exist: the refugee problem is an immigration issue, and immigration is a domain ruled by a narrow vision of national identity and sovereignty, with which international law has no reason to interfere.

We know this is not true. Granted, immigration is one way – possibly the best way – of solving the refugee problem; however, this is about the how, not the what, much less the why, of the international refugee regime. What this regime truly embodies is a rather unique form of collective responsibility to rescue people in distress. International refugee law is the backbone of this regime, its purpose is to help states manage this collective responsibility.

The territorial dimension – where should a refugee stop? where is asylum to be granted? where will it come to an end? – is obviously a critical dimension of the legal regime, and it requires more, or clearer, rules than are currently available. However, the theme of this conference – the role of time in refugee protection – is illuminating in that it invites us to de-emphasize the dimension of place and to focus on the time dimension of international protection and international refugee law. It is no longer 'protection where?', but 'protection when?' instead. Indeed, time provides us with a fresh angle of attack – a utopian angle, in the literal sense of the word – on vexing issues that continue to plague the regime. This change of tack is not only refreshing, it is also tactically sound at this juncture, when the refugee regime and the law come under fire on grounds that stress territorial belonging, border control, and other geographic markers.

'How does international refugee law manage refuge time?' is, therefore, the question that should retain our attention. In this short address, I would like to focus on two time-related aspects of international refugee law. I submit that these aspects are present in the 1951 Convention, albeit that they are not necessarily or easily recognised therein.

My first topic is the trigger of the international legal regime, and the rule I would like to affirm is early identification of a need for international protection.

To say that the international refugee regime is based on a process of qualification is a truism. The Convention provides an agreed definition of who must be protected, and this is no small achievement. Furthermore, established doctrine has it that this definition serves to recognise a condition that pre-dates any formal qualification – the famous declarative, non-constitutive effect of refugee status determination. It is clear that identification and recognition of a protection need is what triggers the international protection regime. The implications are equally clear: when a state recognises a protection need under international law, it does so on behalf of all states partaking in the legal norm. By the same token, this act of recognition triggers an operating system of international cooperation and solidarity, aimed at effective protection and durable solutions.

It seems reasonable to require that this indispensable first step be taken at the first available opportunity – that is, as soon as a claim is made, regardless of location. Why is this important? Because debates over 'protection elsewhere', 'protection in the region' and the like are desperately sterile: there cannot be a principled answer to the question 'where should a refugee stop in his or her search for asylum?'. In the individual refugee's story, this indeterminacy translates into a state of limbo: s/he is 'in orbit' indeed, neither here nor there. S/he is also caught in a sort of time warp: whereas the declaratory nature of RSD is meant to eliminate any time gap between loss and reacquisition of protection, the 'irregular mover' does not get a chance to voice his or her claim while states argue over their responsibilities. The operation of the regime is effectively on hold.

To counter this unacceptable state of affairs, we must affirm that where the first state of asylum lies is immaterial. What matters is that there is, in every refugee's story, one state in which his or her claim is made for the first time. That state has a special responsibility vis-à-vis the refugee, and vis-à-vis the other regime participants: any measure or policy that delays recognition of refugee status, including through farming this responsibility out to another state, is wrong. Likewise, any measure or policy that maintains ambiguity over the refugee quality of an asylum seeker is wrong, as it runs against the basic tenets of the legal regime.

Let us now turn to our second scenario, which is a mass outflow of refugees. To recognise the refugee quality of a large-scale influx is arguably a different matter. It looks simple, because it is essentially pragmatic. In all cases I can remember, what has activated the international refugee regime following large-scale cross-border displacement has been a call for help by one or more affected states, overwhelmed by the size and speed of the flow. Thus, every new refugee situation is born as a refugee emergency.

It is often said that the 1951 Convention is not fit for emergencies. I tend to disagree, but I won't discuss this in detail here. What I would like to argue is that the Convention gives us, at a minimum, a sense of direction on how to manage 'refuge time' through and beyond an emergency. The key concept here is transition, and the standard is early and steady access to solutions.

That so many refugee situations have become protracted is a sure sign that an early focus on solutions is easier said than done – further evidence that the refugee regime as we know it has a serious problem with timing and sequencing generally. The term 'protracted refugee situation' itself carries an important qualitative connotation: it is about the duration of time of exile, but also, and more significantly, about the quality of such life, which is seen to deteriorate over time as solutions remain elusive. It is as though there were no standards to be followed between the emergency phase and durable solutions.

Yet, there are such standards in the 1951 Convention. The Convention's language may be convoluted, but the principle that runs through it is one of gradual acquisition of rights, akin to the human rights standard of progressive realisation found in the International Covenant on Economic, Social and Cultural Rights. It is time as 'attachment' in the work of Hathaway and others, 'time and ties' in the jurisprudence of the European Court of Human Rights. I am aware that this aspect of the Convention has been criticised for its 'exilic bias', and also for its bias in favour of local integration – to be sure, a concept within which the territorial dimension of protection again raises its ugly head, I'll return to this point later on. We must take these criticisms on board, but without forgetting the basic message of the Convention, which is that refugee protection is a dynamic concept. Progressive realisation of rights is also a realistic proposition, for no human situation is ever static. Rather, it is the system that is unable to capture and support its inner dynamics.

The conceptualisation of refugee situations in terms of successive 'phases' is a problem in itself, as it entails rigidity where fluidity should be the keyword. Time is represented as a series of isolated moments, and regime norms, institutional mandates and types of intervention are supposed to phase in, then phase out, almost mechanically. In contrast, a dynamic vision of 'refuge time' will rely on the concept of transition, and the regime's ability to meet its dual objective of protection and solutions will depend on the way those ingredients of the regime dovetail.

Such conceptualisation forces us to seriously re-think many responses we tend to take for granted. Thus, solution-oriented obligations cannot be imposed upon proximate countries of asylum alone. In large-scale refugee situations, the reluctance of frontline states towards local integration is a major factor in the degradation of standards in refugee settlements. What this attitude reflects, however, is essentially a deep mistrust in an international system of responsibility-sharing that has all too often failed to deliver fairness.

The perception that local integration is a duty for proximate asylum states, whereas burden-sharing and repatriation/reintegration are left to the discretion of resettlement states and states of origin, cannot be overcome within the parameters of the traditional trilogy of durable solutions. To be true to the objective of resolving the refugee problem, one has to acknowledge that the refugee regime does not contain in itself either the normative or cooperative instruments that can deliver the sought-after permanent solutions. At the end of the day, the sustainability of solutions to a refugee problem means the mutation of this problem into a set of non-refugee problems: migration, development, human security, … .

How early in a refugee situation should this mutation be prepared, and factored into a dynamic management of 'refuge time'? There cannot be a single clear-cut answer to this question. It matters, however, that it be on the minds of all stakeholders – governments, international organisations, NGOs and analysts – if they are serious about preventing new and future refugee situations from festering.

How to conclude? Modestly, I suppose … . The utopian, time-focused perspective on international refugee law is no panacea. Still, it helps make the case that there is more to the 1951 Convention than meets the eye. Some of that supplement may be easier to recognise in the spirit of the treaty than in its letter, though a lot is in the letter, too. Now, what should we do with it? I would contradict myself if I were satisfied by a mere affirmation of the principles of 'refuge time' management. I am acutely aware that a creative outlook is not a powerful

enough weapon against the restrictive trends that dominate refugee policies everywhere, or against the reductive trend that undermines refugee law and empties it of its protective substance.

Law is under attack. We lawyers have a special responsibility to fight back – with law. In other words, to turn the principles I have tried to elucidate into legal arguments. What form will these arguments take? In what forums will they be voiced, defeated, and voiced again – until they win and we have made international refugee law harder, not softer? Some fights will be reactive, and take the form of case law – notably on my first topic – as well as more aggressive monitoring and supervision. Others will be proactive, aimed at filling legal gaps, notably in the area of responsibility-sharing for early solutions, through protocols or binding situational agreements. My answer to most of these questions must be that I do not know – but I am sure I shall know more at the end of today, and as we continue this dialogue. I look forward to it.