

# The Role of National Courts and National Lawyers in Developing International Refugee Law

Notes for a Presentation

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## Introduction

As an academic and as a practising lawyer until recently, I greatly welcome this meeting and the opportunity for us to share experience and discuss strategy and tactics, so that we can give the law a full and effective role in the protection of refugees and in the search for solutions to the problems of displacement.

I cannot over-emphasize the critically important, if not exclusive, weight which law and lawyers will have in meeting these challenges, although there will certainly be obstacles along the way and success can never be guaranteed. From a broader perspective, as academics or practitioners, lawyers are a part of civil society at large, and we must always make sure that we remain in contact with our roots, no less than with those for whom we would advocate.

Likewise, international refugee law is not and should never be a purely theoretical exercise. If at times, it seems to get too abstract – ‘academic’ in the not so good sense of the word – it must be reeled back to stay focussed on practical outcomes, on protection and on people’s lives.

Today, I will look briefly at the ‘traditional’ sources of international law, and then think for a moment outside the box and about how national courts and therefore national lawyers can contribute to and benefit from its rules and principles.

The focal point is ‘developing international refugee law’. That may sound like a step too far, particularly for anyone familiar with Article 38 of the Statute of the International Court of Justice (ICJ). However, as I hope to show, lawyers and domestic courts have a role in creating or making international refugee law, as well as in identifying it. After all, national courts are organs of the State, and State practice is a key component, both in the development of customary international law and in firming up the interpretation and application of treaty rules.

Still, there is something of a gap here. Questions of international refugee law, as such, rarely get heard by competent international tribunals – the authoritative voice of the International Court of Justice, for example. If there were such a jurisdiction, then national jurisprudence might get its due, and be seen as source in its own right, reflective of State practice and that sense of obligation which are the hallmarks of customary international law.

But no matter. In the absence of international rulings from above, national jurisprudence can be a ‘source’ for others, a model to reflect on, perhaps to follow, perhaps to refine. Increasingly, also, cross-fertilisation is at work, as courts across jurisdictions and across systems – common law, civil law, hybrid law – look to see how others are dealing with problems and issues which we face in common, and then factoring that into their own decision-making.

### The sources...

Article 38 of the ICJ Statute is still the starting point of any discussion about the ‘sources’ of public international law, directing the Court to apply treaties, international custom, and general principles of law, and to take account of various subsidiary means, including judicial decisions, in the process of identifying relevant rules or principles.

These sources, it is said, reflect that ‘common consent’ of the international community which is the basis of international law, but this does not mean that the source of every rule must be found in consent, or that the will of States therefore plays an unrestricted role. Custom, for example, is matter of *general*, not universal consent.

Looking beyond treaties and custom, we can see that ‘general principles’ and ‘subsidiary means’ offer interesting potential for legal development, and I will come back to them in a moment. Before that, however, we need to recall that whether international law ever gets into a domestic legal system is in principle a question for that system itself to decide; in some States, international law is automatically considered to be a part of the law of the land, while in others, some formal process of incorporation may be required, such as an act of the legislature. Nevertheless, the very nature of the judicial process itself may prove to be another way in, for example, when a national judge is called on to interpret constitutional principles analogous to those in international law and common to other jurisdictions.

Coming back to international refugee law, the obvious point of departure is the 1951 Convention and its 1967 Protocol. Some 149 States have ratified one of both of these instruments, but the treaties do not stand alone; on the contrary, they exist within and as part

of a *regime* that is so much broader, bringing together, within the general framework of public international law, an international organization (UNHCR), an Executive Committee of some 102 States, an operational dimension focused on protection, assistance and the search for solutions, the practical involvement of States and tribunals in the implementation of international law and obligations, and the engagement of civil society through the work of NGOs and concerned individuals.

The 1951 Convention and the 1967 Protocol may be foundational and fundamental in this regime, but they are by no means the only relevant source. International human rights law plays a clear, complementary role, and in both States party and States not party, there is a growing recognition of the role of public law, constitutional law, and civil law in protecting the rights, not only of the displaced, but of all of us.

Overarching everything is the system of international law generally, which sets limits to the manner in which States respond to international phenomena, such as refugee movements and migration, governs the relations between States and, to a significant extent, also governs the relations between States and individuals. A few examples will illustrate this background of rule and obligation.

The 1948 Universal Declaration of Human Rights first began to sketch out the legal limits, speaking to the rights of *everyone*, confining and structuring the power of the state to deal with the migrant, the asylum seeker, the refugee and the citizen, protecting life and liberty, prohibiting torture, cruel, inhuman or degrading treatment, insisting on equal protection of the law and an effective remedy for wrong done. The original list is longer now, rights have been given greater substance and clearer content in treaties and practice, and the obligation to protect human rights has moved much closer to the centre.

Non-discrimination on the specific basis of race, for instance, is now firmly established in international law, backed by a general principle of non-discrimination that requires States to demonstrate why distinctions are relevant and necessary in a democratic society, and that measures taken in furtherance of discriminatory policies are reasonable and proportionate. In addition, the principles of refuge and protection underpin permissible responses to the movement of people between states, with multiple sources of their own: the customary and now treaty-based rules on the rescue of those in distress at sea, or on admission and assistance to the shipwrecked; the rich history of *non-refoulement* in treaty and in customary international law; the recognition, rather more recently, that smuggling and trafficking are not 'simply' crimes to be prevented or prosecuted, but actions which result in victims and survivors whose rights require protection.

The end result is that the individual in flight is protected by law, and how States respond is a matter of international law, not just a matter of international concern. The challenge, all too often, is to get domestic courts to pay heed to that law, and if not directly, then indirectly; to show them that what may appear local and parochial is in fact part of a wider juridical picture, implicating international law and the legal interests of other States and of the international community at large.

When arguing in court, it can often help to call in aid the best authority one can, even from outside the jurisdiction. In domestic litigation, for example, an argument might be supported by pointing out that the International Court of Justice considers the prohibition of torture to be part of customary international law and a peremptory norm (*Obligation to Prosecute or Extradite (Belgium v Senegal)*); that the guarantees of liberty and security of person in Article 9 of the 1966 International Covenant on Civil and Political Rights extend also to administrative detention, and are not confined to criminal proceedings; and that, taking account also of Articles 7 and 10(1), ‘the prohibition of inhuman and degrading treatment is among the rules of general international law which are binding on States in all circumstances, even apart from any treaty commitments’ (*Diallo (Republic of Guinea v Republic of the Congo)*).

In many matters, of course, States continue to enjoy a significant margin of appreciation when interpreting and implementing their international legal obligations. In the refugee context, many key terms, such as ‘well-founded fear’, ‘particular social group’, ‘political opinion’, and ‘being persecuted’, were left to be defined or worked out in the practice of States, but increased judicialisation has led to a fertile interpretative environment in which domestic courts play an important role.

In fact, the growth in national refugee status and asylum procedures has led the 1951 Convention to be one of the most litigated treaties at the domestic level, with courts and tribunals around the world engaged almost daily in a common purpose – elucidating the meaning of and applying the refugee definition and other Convention provisions relevant especially to the admission, residence, non-removal and protection of non-citizens in search of refuge.

Even in States having no refugee status determination procedure, or not formally bound by the 1951 Convention/1967 Protocol, questions of refugee protection can and do enter the jurisprudence, for example, because of constitutional or other guarantees of rights. At once, the picture broadens, bringing to the fore the potential and opportunity for domestic courts to identify customary law and refine treaty interpretation. Indeed, the absence of a centralised

authority or treaty supervisory body in the traditional sense, means that such courts may have both scope and responsibility in ensuring compliance and promoting development.

Article 38 of the ICJ Statute is thus much more of an open box than might be assumed. Samantha Besson makes the point, especially pertinent where refugee law is concerned, that the relationship between international human rights and domestic human rights is not one way, but mutual; not static, but dynamic. Or considered from an international organizations perspective, as José Alvarez puts it, ‘Power... flows both ways: the global empowers the local and the local’s view of what international rules mean influences the global.’

Since the late 1970s, and particularly over the past 25-30 years, there has been an exponential growth in decision-making, not only on the refugee definition in all its dimensions – inclusion, cessation, exclusion – but also on cognate issues within the human rights field, including *non-refoulement*/non-return to the risk of harm, the detention and treatment of refugees and asylum seekers, children’s rights (including the right to be registered at birth), family and private life, and non-penalization for illegal entry.

In this environment, domestic courts can enjoy the multifaceted role of source and enforcer of international refugee law, and as ‘agents of development.’ This means that, when assessing State behaviour in this field, it is no longer enough to look only to the formal sources for the applicable law. What other courts do in other jurisdictions acquires significance, and evidence that does not fit neatly into traditional categories must also be factored in, so recalibrating the balance away from the State as primary actor.

UNHCR began to collect relevant jurisprudence seriously in the 1980s, and Refworld, its online database, now contains over 12,000 decisions from courts and tribunals from every region. If any of this is to have persuasive value in the subsequent interpretation, application and possible development of the law, then organization, analysis and assessment are needed within the framework of international protection. The decisions of national courts, as organs of the State, may amount or contribute to practice for customary international law purposes, but while they may implicate the State in question, any wider juridical influence cannot be assumed; after all, no national court is bound to adopt or follow foreign judgments. The judicial material could be distilled quantitatively, but even then a clear outcome favouring one or other interpretation seems unlikely, and there is no doctrine of binding precedent by numbers.

That means that someone has to pull it together; and if not all together, then such parts of it as can be shown, by method and authority, to be most consistent with advancing the goals of

international protection. That is something which UNHCR aims to achieve through its guidelines, but they will need the raw material that comes from below.

Here, national case law can come into its own, for it is often at the domestic grass roots level, that 'new' protection issues are first contested. Given the variety of jurisdictions and natural differences in the flows of asylum seekers, what we need is to tease out are those general principles that can make a substantive contribution to the progressive development of protection. Judicial dialogue across jurisdictions can thus be an important dynamic, particularly when national courts turn to customary international refugee law for guidance, whether in the evolution of treaty terms or for support in curbing executive extremism and legislative excess.

### Developing international refugee law

As already mentioned, general principles of law and so-called 'subsidiary means' suggest an interesting and perhaps unique role for judicial decisions in taking the law forward.

In arguing for the protection of international refugee and human rights law, certain principles of 'public law' have already been accepted, particularly in the procedural sphere. Their legal weight often derives from a combination of acceptance at the municipal level with a body of authoritative judicial practice regionally and nationally, where a strong current of cross-fertilisation is to be found. The identification of such general principles is thus assisted through judicial decisions when interpreting and applying the State's treaty obligations, or drawing out elements considered fundamental to a functioning legal system.

For example, the right of recognized refugees to access the courts is expressly stated in Article 16 of the 1951 Convention, but those seeking protection whose status is not yet determined may need to rely on the general principle, as may those outside the legal space in which the Convention and Protocol operate.

In one classic case, *Golder v United Kingdom*, the European Court of Human Rights described the individual's right of access to the courts as one of the 'universally "recognised" fundamental principles of law', no less than the rule of international law forbidding denial of justice, and the United Kingdom Supreme Court recently confirmed it as a constitutional right, 'inherent in the rule of law.' The principle of equality of the parties could also claim a place in the procedural aspects of international refugee law, for example, with regard to access to appellate remedies, for it 'follows from the requirements of good administration of justice', as many legal systems will recognize.

In addition, an increasing number of courts are paying attention not just to UNHCR's 1979 *Handbook*, but also to its more recent guidelines which themselves draw extensively on national jurisprudence. These include regional courts, such as the Inter-American or European Courts of Human Rights, but also domestic courts in South Africa, Canada, Kenya, Finland, the USA, the Czech Republic, Hong Kong, Switzerland, Norway, Ireland, New Zealand, Germany, Australia, to name but a few. And more and more examples are appearing of courts themselves looking over the wall, as it were, to see how judges in other jurisdictions are dealing with the self-same problems, within the self-same legal framework. And so it goes...

In short, domestic courts can 'take in' international law and, depending on context and circumstance, also produce international law. Initially, this may only be felt at the local level, but then more widely, as a contributing element in strengthening and clarifying rules and principles, particularly as judicial dialogue evolves.

In all of this, UNHCR can be a useful partner. It may be an organization created by and dependent on States, but it has a significant measure of autonomy and a very particular mandate. Its involvement with States, with civil society, with NGOs and, above all, with refugees, means that it is well-placed to bring together the threads of national judicial decision-making in support of the broader international protection agenda. It won't always work out like that, of course, but UNHCR *does* have standing, it can often intervene formally, or provide support, and it needs to be informed if that dialogue is to succeed.

## Advocating for refugees

In developing international refugee law, the broad, now global constituency of advocates and non-governmental organizations active in local communities has a major role to play. Face to face with the ever-evolving needs of those in search of refuge, it is commonly their efforts, canvassed before national courts and tribunals, which first flag inconsistency and incompatibility and then push the envelope of protection; in the words of the UN General Assembly, 'a dynamic and action-oriented function', indeed.

Litigation carries risks, of course, and may not deliver what we want; unfortunately, there is no golden rule and if we lose, refugees may be worse off. Ironically, that's one of the reasons why governments will often settle a case, rather than risk a ruling that clearly ties their hands. Regrettably also, the disadvantages of losing can be long-term, particularly if we end up with a supreme court ruling that says there is nothing – no rule of law, constitutional, international or other – that prevents a government from detaining a stateless person indefinitely and therefore for ever, as Australia's High Court did in the *Al Kateb* case.

So we do need to think both tactically and strategically, while never forgetting that the interests of the client – the refugee, the asylum seeker – come before the fun of arguing some esoteric point of jurisprudence, simply because we can.

A good result, however, can go beyond the individual case, and contribute to policy and practice that is more consistent with international law, while also raising awareness of and strengthening a culture of protection in the community at large.

Increasingly, we can also see distinct advantages in lawyers engaging not so much with the obviously large questions like *non-refoulement* (although that must *always* be defended), as with the day-to-day violations of rights that can impact the community of the displaced at large – denial of access to education; exploitation of labour; non-payment of wages; unsafe working conditions; employment related injuries; physical assaults, and the like.

Litigating the small stuff is often the way in, particularly when governments put legislative or other barriers in the way of protecting the refugee as a refugee. And this approach should not be underestimated for its potential to build grand principles, if you like, piece by piece, step by step, staking out space both for refugees and asylum seekers, and for communities committed to equality and bounded by the rule of law.

This grass roots dynamic is of fundamental importance in theory and in practice. Many of the most significant developments in protection thinking – on the protection of women and children or youth, for example – were not led from above, but from below. They were driven by practitioners, lawyers, refugee advocates, NGOs and others, presenting claims and fighting cases in first instance tribunals and then higher up the domestic legal ladder and beyond.

Integrity of methodology and rigour of analysis will be crucial to successful advocacy, but just as the Global Compact recognizes within its own area of focus, a key contributor to success is and will be civil society. With active support from lawyers and the advocacy community, the scales can be calibrated back to protection, and so again to the foundations of social justice.