

OF REFUGEES AND RESIGNATION

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Abstract: Building on topics explored in *East West Street: on the Origins of Genocide and Crimes against Humanity*, this article traces the development and publication of James McDonald's Letter of Resignation of League of Nations High Commissioner for Refugees. Expanding on events outlined in his book, Sands describes how the letter was published in 1935 as a political statement in the wake of emerging news about Nazi atrocities against the Jews and other minority groups. Drawing analogies between these events and the contemporary refugee crisis, he raises questions about the current legal, political and moral frameworks associated with refugees, calling for an end of the 'closing of the doors' mentality.

A. INTRODUCTION

‘The victims of the terrorism are being driven to the point where, in utter anguish and despair, they may burst the frontiers in fresh waves of refugees.’ (James G McDonald, 1935¹)

Over a million refugees came to Europe last year, the overwhelming majority from Syria (41%) and Afghanistan (26%).² Most arrived by sea, into Greece and Italy.³ The United Nations Refugee Agency (UNHCR) has pointed out that the ‘vast majority’ of migrants and refugees trying this perilous journey ‘are in need of international protection.’⁴ Germany received almost half a million asylum applications in 2015, and official reports count arrivals in more than a million on that same year in that country.⁵ EU Asylum claims numbered 1,321,560 in 2015.⁶ This – and parallel domestic qualms – has led to the signing and entry into force of the EU-Turkey Agreement, which sets up (in broad terms) a migrant exchange program between Europe and Turkey, with visa waivers and €3 billion thrown in as incentive

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¹ ‘Letter of Resignation of James G. McDonald: High Commissioner for Refugees (Jewish and Other) Coming from Germany addressed to The Secretary General of the League of Nations with an Annex regarding Germany’s measures against ‘Non-Aryans, and their effects in creating refugees’ (London, 27 December 1935) (‘The McDonald Letter’) vii.

² UNHRC, ‘Refugees/Migrants Emergency Response – Mediterranean’ <data.unhcr.org/mediterranean/regional.php> accessed 10 May 2016.

³ *ibid.*

⁴ *ibid.*

⁵ ‘Migrant crisis: Migration to Europe explained in seven charts’ *BBC News* (London, 4 March 2016) <www.bbc.com/news/world-europe-34131911> accessed 10 May 2016.

⁶ *ibid.*

for Turkey.⁷ As the 18 March 2016 Joint Statement of EU Heads of State or Government informs, the joint action plan consists of:

- (i) Return of all irregular migrants entering Greece from Turkey starting 20 March – all of it in accordance with international and European Law; and
- (ii) Resettlement by the EU of one ‘vulnerable’ Syrian from Turkey per one Syrian who is returned to Turkey from the Greek islands.⁸

The statement informs the measures to be ‘temporary and extraordinary’ and ‘in accordance with the relevant international standards and in respect of the principle of non-refoulement.’⁹

The UN Secretary General has described this as ‘a crisis of solidarity.’¹⁰ The gravity of the situation in Europe suggests that it might be without precedent. Yet that is not the case. In researching my latest book *East West Street: on the Origins of Genocide and Crime against Humanity* I came across an episode within an episode, for which I express my gratitude to Professor James Loeffler: the effort of Professor Oscar Janowsky to recruit the assistance of Professor Hersch Lauterpacht in preparing the Letter of Resignation of League of Nations High Commissioner for Refugees James McDonald, in 1935. The drafting process of that letter, and the circumstances in which a proposed Annex setting forth a declaration on the rights of individuals was discussed, is helpful in shedding a certain light on the matters we face today. In particular, when faced with a political imperative to act, the balancing of legal considerations with the desire to minimise causing offence that would exacerbate the problem that is being addressed is a recurring tension.

In 1935, James McDonald reached the point at which he decided to resign, and recruited a number of individuals to assist him in drafting a letter of resignation. One issue McDonald faced was whether to include an Annex to the letter and if so, whether to make reference to certain delicate matters. In general lines, one section of the draft Annex – which indeed was published¹¹ – regarded domestic measures adopted by the Nazi government against minorities, particularly non-Aryans. But an unpublished section of the draft Annex concerned an analysis on the duty of the international community, as a matter of international

⁷ European Commission, ‘EU-Turkey Agreement: Questions and Answers’ (19 March 2016) <europa.eu/rapid/press-release_MEMO-16-963_en.htm> accessed 10 May 2016.

⁸ European Council, ‘EU-Turkey Statement’ (18 March 2016) <www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/> accessed 10 May 2016.

⁹ *ibid.*

¹⁰ UN Secretary General ‘Refugee Crisis about Solidarity, Not Just Numbers, Secretary-General Says at Event on Global Displacement Challenge’ (15 April 2016) SG/SM/17670-REF/1228 <http://www.un.org/press/en/2016/sgsm17670.doc.htm> accessed 10 May 2016.

¹¹ The McDonald Letter (n 1) Annex, 1–34.

law, to act in protection of those minorities¹² and exercise the ‘right of humanitarian intercession.’¹³ The fate of the letter and its Annex turned on competing considerations as to a balancing between the articulation of legal principles, on the one hand, and deference to matters of political risk, on the other.¹⁴

This is the same issue today in relation to the proposed EU-Turkey agreement, with some arguing for a strict adherence to the legal principles set forth in the 1951 Refugee Convention (and its 1967 Protocol) on the one hand, and recognition of political realities, on the other. That balancing is patent in some questions being asked by academics and politicians: Who can deny that the disparate effects of the Dublin framework which, were it to be fully complied with, would disproportionately burden bailed-out Greece vis-à-vis the rest of the EU? Who is oblivious to the fact that this distortion of the EU law principle of equitable responsibility is of deep political consequence to the discussion about how to comply with refugee law today in Europe? These are but a couple out of a thousand possible questions where law and policy inevitably converge.

Back in 1935, this issue of balancing came to a head by reference to the question of whether to add an Annex to McDonald’s letter of resignation. McDonald’s team took advice from different sources associated with either the American or British Jewish committees, which meant balancing different positions about the state of international law at the time, as well as questions of political convenience which were differently perceived on both sides of the Atlantic. The parallel with McDonald’s letter of resignation and its drafting process – which Oscar Janowsky so vividly portrayed in his unpublished memoirs – might offer some help in understanding the process which has led us to the agreement between Europe and Turkey.

And so here we are today again in Berlin, eighty-one years after McDonald’s resignation, debating our reaction to persecution, escape and apathy. In words attributed to Mark Twain ‘history does not repeat itself, but it rhymes.’¹⁵

¹² Oscar I Janowsky Papers (undated 1900– and 1916–1933) ch 17, 371–72, 74 (on file) (‘Janowsky Papers’).

¹³ Oscar I Janowsky and Melvin M Fagen, *International Aspects of German Racial Policies* (OUP 1937) 3-26.

¹⁴ Janowsky Papers (n 12) 368 ‘There was a good deal of discussion as to whether MacDonalld should or should not make such a statement: whether the lot of the persecuted ‘non-Aryans’ might be worsened by such a statement; whether the Nazi government should be provoked; whether the well-disposed Western powers should be troubled with a ‘small matter’ like human or minority rights.’

¹⁵ John Robert Colombo, ‘A Said Poem’ in *Neo Poems* (1970) (line attributed to Mark Twain).

B. JAMES MCDONALD’S LETTER OF RESIGNATION: LESSONS FROM 1935

In 1933 the League of Nations Council appointed James G. McDonald as High Commissioner for Refugees coming from Germany,¹⁶ an American academic who had taught history at the University of Indiana and served as chairman of the Foreign Policy Association in the United States.¹⁷ His mission was ‘to negotiate and direct the international collaboration necessary to solve the economic, financial and social problems of the refugees.’¹⁸ McDonald resigned before the Council just two years into his mandate.¹⁹ The letter of resignation became a political project – perhaps the most significant moment of his mandate – serving as an indictment not only of Germany’s persecution but also of the silence of other governments.²⁰

James McDonald’s office as High Commissioner was somewhat isolated from the League of Nations as its funding depended on ‘philanthropic bodies,’ ie private organisations, a fact McDonald would denounce as one of the main causes for failure in his letter of resignation.²¹ In those circumstances the letter was conceived as a political statement – a document to shock governments and public opinion. Its content and scope were the source of bitter disagreements between Oscar Janowsky and Melvin Fagen – delegates of the American Jewish Committee – and their British counterparts, including a number of influential intellectuals such as professors Norman Bentwich and Hersch Lauterpacht.²²

Internal differences meant the project started as an American-led effort – Janowsky and Fagen determining the scope of the project as ‘a scholarly and forceful memorandum, calling attention to the plight of the refugees, the burden Nazi policy imposed on states, and the legitimacy of international concern, as evidenced by historical precedents and legal precepts.’²³

As published and delivered to the Council of the League of Nations on 27 December 1935, the letter of resignation was accompanied with an Annex ‘containing an analysis of the measures in Germany against ‘Non-Aryans’, and of their effects in creating refugees.’²⁴ It denounces the intensification of German action against minorities, describing it as a ‘persecution [which] threatens the pauperization or exile of hundreds of thousands of

¹⁶ The McDonald Letter (n 1) v.

¹⁷ Janowsky Papers (n 12) 362.

¹⁸ *ibid.*

¹⁹ The McDonald Letter (n 1) v.

²⁰ Janowsky Papers (n 12) 373.

²¹ The McDonald Letter (n 1) para 3.

²² Janowsky Papers (n 12) 366.

²³ *ibid* 372.

²⁴ The McDonald Letter (n 1) v.

Germans ... not only Jews but also the ‘non-Aryan’[,] Christians treated as Jews, and Protestants and Catholics who ... resist the absolute will of the National Socialist State.’²⁵

McDonald also highlights the plights of half a million people who were being ‘crushed’ for not conforming with the ‘Nordic’ idea of man idealised by the regime.²⁶ The systemic persecution was described at length in the letter.²⁷ McDonald winds up in a tone verging on desperation expressing that ‘[w]hen domestic policies threaten the demoralization and exile of hundreds of thousands of human beings, considerations of diplomatic correctness must yield to those of common humanity,’ and ‘plead[s] that world opinion, acting through the League and its Member States and other countries, move to avert the existing and impending tragedies.’²⁸ That effort failed.

As stated, one issue that arose was whether to include in a proposed Annex to the letter ‘a statement about the rights of religious and racial minorities which would be ‘a part of a ‘Bill of Rights’; and also an indictment of Germany for its persecution of non-Aryans, which created an increasing, grim problem of refugees.’²⁹ The proposal had apparently come from James N. Rosenberg³⁰ – an influential member of the American Jewish Committee, Columbia Law graduate and successful lawyer, who later served as delegate of the US Commission for the UN Genocide Convention, but is better known today for the artwork he produced after retiring.³¹

In preparing the Annex MacDonald worked with Oscar Janowsky – at the time only 35³² and Assistant Professor of History at the New York City College³³ – and Melvin Fagen – described by Janowsky as ‘a young man in his twenties who had not even completed his graduate studies in International Law.’³⁴ Janowsky devoted an entire chapter of his memoir to this event – Chapter 17 – which he described as ‘the day-to-day record of the MacDonald Letter of Resignation as [he] saw it and experienced it ... in 1935 ... a reconstruct[ion] from memory, good and reliable memory, from MacDonald’s and [Janowsky’s] own diaries, and

²⁵ *ibid* para 2.

²⁶ *ibid* para 3.

²⁷ *ibid* paras 11–14.

²⁸ *ibid* para 17.

²⁹ Janowsky Papers (n 12) 363 (citing McDonald’s Diary, 11 June 1935 entry) (on file).

³⁰ *ibid*.

³¹ ‘James N. Rosenberg, American Jewish Leader, Hailed on 85th Birthday’ JTA (24 November 1959) <www.jta.org/1959/11/24/archive/james-n-rosenberg-american-jewish-leader-hailed-on-85th-birthday> accessed 6 June 2016; his bibliographical note at the American Art Archive describes him as ‘painter, patron, [and] lawyer’ <www.aaa.si.edu/collections/james-n-rosenberg-papers-8383> accessed 6 June 2016.

³² Janowsky Papers (n 12) 413.

³³ Janowsky and Fagen (n 13) title page.

³⁴ Janowsky Papers (n 12) 367.

from much correspondence which [he] preserved.³⁵ It is from this unpublished document that I draw my account.

Janowsky favoured the proposal until the very end,³⁶ but his view evolved as he came to see the difference in approach and perception between the American Jewish community – which supported the idea – and the British Jewish community, which did not. Regarding the latter, Janowsky came into contact in particular with two men who occupied a significant place in his account.³⁷ The first was Professor Norman Bentwich, the ‘Director’ of the High Commission for Refugees, who worked closely with McDonald. Janowsky described him as ‘a scholar of shallow draft and by no means an unsuccessful one’ with a ‘timid, cringing, underhanded manner.’³⁸ The second was Hersch Lauterpacht.

The discussion about the possible implications of Letter and Annex is summed up in the following excerpt from Janowsky’s memoir:

There was a good deal of discussion as to whether MacDonald should or should not make such a statement: whether the lot of the persecuted ‘non-Aryans’ might be worsened by such a statement; whether the well-disposed Western powers should be troubled with a ‘small matter’ like human or minority rights.³⁹

Bentwich apparently oscillated, but eventually came down against the idea. The entire American project was ‘ill-advised.’⁴⁰ Janowsky and Fagen decided to produce a ‘scholarly and forceful memorandum’ that would ‘call attention to the plight of the refugees, the burden imposed by Nazi policies on others, and the legitimacy of international concern as evidenced by historical ... and legal precepts.’⁴¹ Janowsky hoped that such a document, coming from McDonald, would stimulate public opinion and protest, although he did not believe that ‘appeals to justice – moral or legal justice – would have any effect on the German [g]overnment to moderate its racial policies.’⁴² Nor did he believe that the League ‘would be roused into action.’⁴³ His hope was that the memorandum would counteract ant-Semitic

³⁵ Janowsky Papers (n 12) 403.

³⁶ *ibid* 413. In his ‘conclusions and motivations’ section Janowsky expressed: ‘I still believe our Memorandum (including Part II or at least the Precedents) better, that is, sharper, more pointed, more challenging to the Council, a better protest and a better appeal to public opinion.’

³⁷ Janowsky Papers (n 12) 378–79. The critical appraisal of the draft Annex also involved, although in a secondary role, the likes of Neville J. Laski, Lionel Cohen, and Vladimir R Idelson.

³⁸ Janowsky Papers (n 12) 406 (citing O Janowsky diary).

³⁹ *ibid* 368.

⁴⁰ *ibid* 370–71.

⁴¹ *ibid* 372.

⁴² *ibid*.

⁴³ *ibid*.

propaganda, deter mass acceptance of such policies, and discourage other governments from emulation – it was a ‘plea ... to the conscience of humanity.’⁴⁴

The American duo researched and worked non-stop from mid-September to the end of October, 1935. ‘It was not only a full time job, it absorbed our energy, thoughts and even emotions,’⁴⁵ wrote Janowsky. He completed his chapter on ‘Aryan decrees’ and moved to ‘Precedents for International Action to Safeguard Human Rights’, working with Fagen on building a legal case – himself focusing on historical issues – but always ‘discuss[ing] every point and shar[ing] every conclusion.’⁴⁶

This must have been a draining and exhausting period for Janowsky. He declared himself to be ‘depressed by ... [the] lackadaisical and often downright indifferent attitude of an appreciable number of academics to the persecution of the Jews by the Nazis,’ particularly those of the ‘social-Scientist variety ... who saw no reason to condemn Nazi Germany or Soviet Russia [because human rights denial was consistent] with a set of principles and objectives differing from [those] of democratic societies.’⁴⁷ He grew exasperated with apologetic attitudes wrapped up in scientific-rigour considerations, going as far as to refer to a visiting scholar from the University of California, a Professor Steiner, as a ‘nut’ for arguing that objectivity demanded abstaining from judgments until the so-called ‘Aryan decrees’ were in fact enforced.⁴⁸

They left Geneva in late October, and arrived in London on 2 November 1935.⁴⁹ By then McDonald faced a division amongst his supporters: the Americans urged ‘a strong indictment of Nazi Germany for the persecution of the Jews,’ whereas the English counselled ‘caution’. By mid-November Janowsky had won his initial skirmishes, persuading Neville Laski to have their memorandum incorporated in full as an Annex to the Resignation Letter.⁵⁰ Preliminary conferences showed, at that point, a non-committal Bentwich. On Monday 18 November, a ‘[f]ull dress conference [was held] at the Chambers of Lionel Cohen [at Lincoln’s Inn]’.⁵¹ This was the first significant meeting in the critical appraisal process of Janowsky and Fagen’s memorandum. Amongst those present was Hersch Lauterpacht. Janowsky had mixed feelings about him. He thought him ‘a brilliant man on the rise ... and a

⁴⁴ *ibid* 373.

⁴⁵ *ibid* 375.

⁴⁶ *ibid*.

⁴⁷ *ibid* 375, 377.

⁴⁸ *ibid* 377.

⁴⁹ *ibid* 377–78.

⁵⁰ *ibid* 377.

⁵¹ *ibid* 380.

bit overbearing;⁵² Janowsky showed great respect and deference towards him on the professional plane – ‘unquestionably a brilliant authority on International Law [whose] contributions to the ... Letter were excellent,’ but held similar amounts of personal contempt – thinking him a man consistent with the ‘libellous stereotype of the Galitznianer’⁵³ much prone to ‘steam-roller tactics.’⁵⁴

At this point the rubber hit the road, with a major dispute as to whether the letter should also set out to build a legal case on the point of ‘Precedents for International Action to Safeguard Human Rights.’ Janowsky thought it was essential to include this part in the Annex to the letter;⁵⁵ another group, led by Hersch Lauterpacht – ‘the voice of authority’ Janowsky wrote of him⁵⁶ – thought that part should be scrapped altogether.⁵⁷ A case of pragmatism prevailing over principle. The issue remained open at the end of the meeting, the parties agreeing to resume discussions later. This they did in two different sub-groups, one including Janowsky, Fagen, McDonald and Laski; the other composed by the opposition camp: Lauterpacht, Bentwich, Idelson, and ‘probably’ Lionel Cohen.⁵⁸

Janowsky speculates on the scope of the attack that was being concocted by the opposition camp, and thought that not only Fagen’s legal argument was threatened, but also his chapters on precedents for international action and his conclusion on League intercession.⁵⁹ His premonition proved accurate: ‘The opposition came [to the] November 24th [conference] with a complete strategy.’⁶⁰ The memorandum was divided in two parts: Part I concerned domestic policy, mainly the so-called ‘Aryan decrees’, while Part II – ‘more than one half of the Memorandum’ – regarded the chapters on ‘Precedents for International Action to Safeguard Human Rights’ and the duties of the League of Nations (both authored by Janowsky), as well as the legal case against Germany (penned by Fagen).⁶¹

Lauterpacht proposed Part II to be eliminated in its entirety – ‘mutilated’ in the words of Janowsky⁶² – while the latter thought this part, now labelled generically as ‘Precedents,’ ‘lent powerful support to McDonald’s plea to the Council of the League of Nations for intercession on behalf of the refugees ... [and are] evidence that ... the League would not be

⁵² *ibid* 367.

⁵³ *ibid* 368.

⁵⁴ *ibid* 387.

⁵⁵ *ibid* 376.

⁵⁶ *ibid* 382.

⁵⁷ *ibid* 380–81.

⁵⁸ *ibid* 382.

⁵⁹ *ibid*.

⁶⁰ *ibid* 383.

⁶¹ *ibid*.

⁶² *ibid* 407.

embarking on a new and untried policy.⁶³ As expressed by Janowsky, '[him and Fagen] put up quite a fight' and discussions 'became a little 'ardent' and testy.'⁶⁴

At this point Janowsky's exasperation muted into plain contempt for Lauterpacht and Bentwich. He felt he was not being given reasons why '[the] case would be stronger without the Precedents.'⁶⁵ He was of the idea that an Annex containing only Part I exposed the argument to Germany's reproach of it being mere interference in domestic affairs, and that the Precedents provided a safeguard against that argument.⁶⁶ Verbal altercations ensued between Janowsky and Lauterpacht, but both pressed on with their respective agendas.⁶⁷

Lauterpacht pressed the idea that the memorandum be sent to Ernst Cohen who – surprisingly – supported the whole of it. This supposed a great victory to Janowsky and Fagen since this was an idea concocted by Lauterpacht perhaps thinking Cohen would rebuff Part II of the memorandum.⁶⁸ But, unbeknownst to Janowsky at the time was that McDonald had already made up his mind: Part II 'should be left out entirely', he had told Laski, which is confirmed both in an entry to his diary, as well as in a letter to Rosenberg, both dated 24 November 1935.⁶⁹ Janowsky continued to defend his memorandum, but by early December 1935 an understanding of the reasons why his 'Precedents' section may be discarded started to sink in: McDonald 'could not disregard the strong opposition taken by the English-Jewish leaders against Part II of the Memorandum.'⁷⁰

A final conference was held on 8 December. Although the issue remained formally open at the end of the meeting, Janowsky rightly read McDonald as having made the decision to eliminate Part II.⁷¹ On 15 November, the day McDonald and Fagen left London for the US, Janowsky met him at Waterloo Station.⁷² McDonald expressed regret about the fate of Part II, which perhaps was only a good gesture towards Janowsky: McDonald's diary reveals that he was 'pleased' and that the elimination of Part II was also generally well-received in the US, including by Professor Einstein.⁷³

⁶³ *ibid* 384.

⁶⁴ *ibid* 386.

⁶⁵ *ibid*.

⁶⁶ *ibid*.

⁶⁷ *ibid* 387–90.

⁶⁸ *ibid* 391–92.

⁶⁹ *ibid* 393.

⁷⁰ *ibid* 398.

⁷¹ *ibid* 399.

⁷² *ibid* 401.

⁷³ *ibid* 401–02.

McDonald's Letter of Resignation and its Annex was submitted to the League of Nations Secretary General on Friday 27 December 1935.⁷⁴ On Monday 30 December the New York Times featured McDonald's resignation in its front page under the heading 'League Aid Asked by M'Donald to End Nazi Persecution: Commissioner for Refugees, Quitting, Asserts 500,000 in Reich Are Being Crushed.'⁷⁵ Similarly, The Times gave ample coverage to the Letter and, besides providing a full transcript, it underlined that '[w]ith this letter ... Mr. McDonald includes an annex running to 34 printed foolscap pages in which he analyses the measures adopted by Germany against 'non-Aryans' and all their effects in creating refugees.'⁷⁶

C. THE OVERLAP BETWEEN LAW AND POLITICS: UNDERSTANDING LAUTERPACHT'S OPPOSITION

At the time Janowsky believed that Lauterpacht's position was without merit – and possibly grounded in intellectual vanity related to Lauterpacht's own position in the British system. But there may be an alternative explanation in relation to the British academic's contribution to the development of the modern system of human rights less than a decade later: in the absence of any treaty or other positive rule of international law, it would be preferable at that time to remain silent on any supposed obligation in international law requiring states to intervene in favour of the protection of the rights of individuals or minorities.

Aware of international law's limitations, Lauterpacht did not yield to pressure to support Germany's treatment of the Jews being referred to the international court in The Hague. The idea was 'inadequate, impracticable and highly dangerous.' To this, I would add that Lauterpacht was also very aware of how important the World Court was – and would become in the future – for the protection of the international rule of law, which not only relates to interstate dispute settlement, but to the gradual development of international law.⁷⁷ Indeed, Lauterpacht was aware that international law, in its state of development at the time,

⁷⁴ *ibid* 414.

⁷⁵ 'League Aid Asked by M'Donald to End Nazi Persecution: Commissioner for Refugees, Quitting, Asserts 500,000 in Reich Are Being Crushed' *NYT* (New York, 30 December 1935) <timesmachine.nytimes.com/timesmachine/1935/12/30/issue.html> accessed 7 June 2016.

⁷⁶ 'Persecution in Germany: Refugees Created by Nazi Laws' *The Times* (London, 20 December 1935) <www.thetimes.co.uk/tto/archive/page/1935-12-30/5.html> accessed 7 June 2016.

⁷⁷ Ian GM Scobbie, 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function' (1997) 8(2) *EJIL* 264, 270 (citing Lauterpacht's Provisional Report on the Revision of the Statute of the Court of 1 September 1955).

did not prohibit the persecution of minorities – that much was patent from a paper he published in 1933 titled ‘The Persecution of the Jews in Germany.’⁷⁸

But arguing that certain conduct is not yet prohibited by international law is not the same as denying its political and moral importance to the international community as a whole. Unaware as Janowsky and Fagen might have been in 1935, their analysis on precedents was correct but premature. Only in the aftermath of World War II would those precedents and actions occurred before and during the war elicit general international consensus as to their forbidden nature as a matter of international law.

Lauterpacht certainly played an essential role in the process of crystallisation of those international duties both through the conceptualisation of ‘crimes against humanity’ in the Nuremberg Charter, as well as with his proposal of ‘An International Bill of Rights of Man’, much of it reflected later in the Universal Declaration of Rights and Duties of Man and the European Convention of Human Rights.⁷⁹ But in 1935 the issue remained solely in the political plane. The Letter of Resignation confirms this when highlighting that, apart from the 1922 Upper Silesia Convention, Germany is not bound by any international obligation ‘providing for equal citizenship of racial, religious or linguistic minorities.’⁸⁰

Janowsky and Fagen did publish a monograph with Part II of the memorandum two years later, in 1937.⁸¹ Perhaps the most telling part of the book is its Preface. This section was authored by James Brown Scott, then President of the American Society of International Law and former President of the Institut de Droit International.⁸² There, in trying to apprehend Janowsky and Fagen’s argument in a positive light, Mr. Brown highlights its consistency with human rights declarations issued by the above-mentioned institutions. However, nowhere in this preface did this authorised voice in international law-related matters mention the existence of customary international rules or treaties supporting the argument of Janowsky and Fagen regarding the existence to protect minorities and individuals as set out in the draft Letter’s Annex.

At the time, it is important to remind ourselves, political orthodoxy dictated that diplomacy and non-provocation of Germany were the best available options – the 1938 Treaty of Munich should suffice as evidence on this point. This attitude, more marked in

⁷⁸ Hersch Lauterpacht, ‘The Persecution of Jews in Germany’ (1933), reprinted in Elihu Lauterpacht (ed), *International Law, being the Collected Papers of Hersch Lauterpacht* (CUP 2004).

⁷⁹ Hersch Lauterpacht, *An International Bill of Rights of Man* (Kindle edn, OUP 2013); Martti Koskenniemi, ‘Hersch Lauterpacht and the Development of International Criminal Law’ (2004) 2(3) JICJ 810.

⁸⁰ The McDonald Letter (n 1) para 12.

⁸¹ Janowsky and Fagen (n 13).

⁸² *ibid* x.

Europe than America, is reflected throughout Janowsky's memoirs.⁸³ In the end, the debate between the American and British camps was instrumental to the confection of the Letter. The differences between both camps regarded means, but not ends, a fact that Janowsky came to recognize and appreciate.⁸⁴ This in no way diminished the extraordinary moral and political value of the Letter – quite the contrary, it probably made it an even better document.

D. CONCLUSION

As we look from 1935 to the present day, the refugee crisis and the EU-Turkey agreement, we can note points of commonality, precedent. Again, we have seen a closing of the door. The 2016 vote by Parliament to not allow five hundred unaccompanied children from Calais into the United Kingdom says much about the state of public thinking right now, in both the UK and abroad. The turning away of refugees who are of an ethnicity or a religion which is seen as alien raises direct comparisons with another time.

It could be that we have arrived at a place in which the time for tinkering, for new protocol, for a new institutional structure, is just gone. That actually, the fundamental challenge that we face goes much, much deeper, especially in light of a return to identity politics. In most countries, the idea of granting nationality is losing ground, and instead we can see a return to stripping people of their nationality. At the core of this issue is the question of how we should think about the international legal order. We are where we are and we have what we have, and the system, as it stands, will not allow for the kind of changes we urgently need.

The truth is that we live in times of increasing disconnect between the legal structures that have been built, particularly in the post-war period, and broad public acceptance of those structures. You can illustrate this very simply by reference to a small town in north-east England, a town which voted en masse against remaining in the European Union. Their motivations for voting to leave were tied into the arrival of a significant number of families from Poland, or Hungary, or wherever it might be, which had changed the identity of the town. In the part of London where I live, I don't feel that change, but I do feel an increasing responsibility to take account of the real perception of people. Something is shifting; the disconnect between the legal order we have created and the world that we live in is becoming wider, not narrower, and this shift requires us to look at the world, as it currently stands, holistically.

⁸³ Janowsky Papers (n 12) 405.

⁸⁴ *ibid* 412.

Consider, for a moment, the striking fact that my country, the United Kingdom, dropped a lot of bombs on Afghanistan and on Iraq, yet doesn't wish to take a single refugee from either of those countries. Germany dropped not a single bomb on Afghanistan or Iraq, yet has taken over a million refugees, and it is this disparity that is fuelling a sense of disconnect between states – and between people. If we are to grapple with the cold, modern issue of refugees, whether in Europe or beyond – and beyond is even more challenging than in the European context – we need to begin to start looking at the causes of what is happening. We need to look at the nature of the international order and the increasing disparities between those who have and those to have not. We need to go beyond simply tinkering with arrangements on refugees, beyond even the world of law. You cannot solve a crisis of solidarity from behind locked doors.

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