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KEYNOTE PRESENTATION BY ERIKA FELLER
“PROTECTION ELSEWHERE – BUT WHERE?
National, Regional and Global Perspectives on Refugee Law’

INTRODUCTION

First a word of thanks to Professor Jane McAdam and the Kaldor Centre for the invitation to address you today. The question framing this Conference - protection somewhere, but where - is **the** central one at the current time. It has been made even more timely, with answers less and less obvious, as a result of the horrific events in Paris last weekend.

The repercussions of these acts, just as with the horrifying September 11 2001 attacks in the United States, will likely be felt for a long time, including in the refugee context. It would be unrealistic to assume otherwise and indeed appropriate mechanisms must be in place to ensure that there are no loopholes in national asylum practices that could conceivably be exploited by persons bent on committing such acts to allow them to gain admission to territory through the asylum channel. The challenge, of course, will always be to strike the right balance between the security interests of States and the protection needs of genuine refugees, who are themselves escaping persecution and violence, including terrorism. Any new security safeguards must take this into account. So too must the rhetoric. Equating asylum with safe haven for terrorists is not only legally wrong, but it vilifies refugees in the public mind and exposes persons of particular races or religions to discrimination and hate-based harassment.

Earlier this year I was invited to write the forward to a new book with the catchy title *Towards a Refugee Oriented Right of Asylum*¹. While asylum in principle should always be refugee-oriented, the fact is that in a world where borders are made ever more impenetrable and where the

¹ by Westra, Juss and Scovazzi

focus has turned to keeping people out, this is no longer self-evident. In the concluding segment of the book, comments by British author, Hanif Qureshi, are referenced. She is quoted as likening the immigrant figure in today's conversations to the "un-slayable zombie in a video game" who has not only migrated from one country to another, but "[into] the collective imagination, where he has been transformed into a terrible fiction". She goes on to observe, "If the 20th century was replete with uncanny, semi-fictional figures who invaded the decent, upright and hard-working... (they are now)... re-haunting us in the guise of the immigrant". As if to illustrate this point, the BBC reported in mid-September the small but telling anecdote of a young Czech woman in a small town near the German border who around 8.00 in the morning reportedly called the police in terror to come and deal with a dark skinned man, dressed in black, with a rifle over his shoulder. What the police, again reportedly, found was a soot-dusted chimney sweep and his brushes. Amusing yes, but an ominous sign of the irrational fears likely to loom ever larger, as events in Europe and the repercussions of Paris continue to play out including in the refugee context.

So where to begin with an examination of your question? Context is very important. Too often events are interpreted and policies formed in disregard of what is happening elsewhere, which is dangerous and ultimately unproductive. Context must include Europe, but also developments globally and in the Asia/Pacific region. The situation in Europe, dire as it is, should not be allowed to eclipse other problems, deflecting consideration away from issues still of serious concern, including those in the Andaman Sea and the Bay of Bengal.

A GLOBAL SNAPSHOT

There are some 60 million persons in displacement situations at the moment. More than one third are refugees and asylum seekers, and two thirds internally displaced, with some 10 million people estimated to be stateless. Of the over 17 million refugees, 85% live in developing countries, most of which suffer human rights and governance issues of their own. Conflict-stricken Yemen, with an internal displacement population of some 2.3 million, is also currently host to more than

264,000 refugees. Less than 1 in 40 refugee situations are resolved within 3 years and many continue for 10 or more², with donor funds progressively drying up and millions of people left in sub-standard living conditions with no foreseeable future prospects. There are today some 630,000 refugees in Jordan, 84% of who live outside any refugee camp, with one in six refugees living on less than \$40 per person per month. Coping strategies include children dropping out of school to work or to beg, and women turning to sex to survive.

This story is repeated in comparable ways in many displacement situations. Yet, facilitated solutions are not on the horizon for most, with local integration only exceptionally offered and with resettlement to third countries a possibility for no more than 1% of the global refugee population. One result is that, from humble beginnings as a small, essentially non-operational advocacy body with limited staff and a budget of only a few million, UNHCR is today one of the major shelter and assistance agencies in the UN system, with over 10,000 staff and a budget pushing towards 7 billion dollars.

Flight has to be understood as people taking control of their own futures in the face of the grave danger or otherwise the impossibility of staying where they are. Not all the displaced are refugees. Many leave for reasons linked to desperation, but not to persecution or dire security risks. Distinctions between refugees and migrants are blurring, contributing in many developed countries to asylum being in negative territory. Generosity when it comes to refugees has had to contend over the years with global economic crises, unavailability of jobs, terrorism and transnational crime on the rise, a heightened sense of general insecurity on the part of civil society in many countries and the accompanying rise of populist politics. Then there is the reality of unbalanced burden-sharing between receiving states, distorting the push and pull factors, while creating a civil society backlash and closing some doors.

The prognosis on the horizon for future mass movements is not so good. Conflict, which is the chief displacement driver at the moment, looks to

² See generally *Protracted Displacement: uncertain paths to self-reliance in exile*, Overseas Development Institute report, September 2015, <http://www.odi.org/hpg>

be a constant. The last five years alone have witnessed some fifteen new or re-occurring conflicts. There is a high probability that patterns of displacement will be increasingly impacted by environmental factors such as population growth, declining resources and inequality of access to them, ecological damage and climate change. Many refugees come from or find themselves in countries not only falling into the highest risk category for civil conflict, but also ranked amongst the world's poorest nations, where endemic and cyclical ethnic and civil strife is acting in concert with factors like low cropland and limited availability of fresh water to force further displacement. Niger, which registered a record high in early November of 54,000 refugees from Mali, is but one example. The Peace Accord signed between the Government and the rebels in June 2015 has done little to stem the outflow. Those fleeing are reportedly leaving because of a combination of "lawlessness, extortion, food shortages, inter-tribal rivalry, (and) fighting between herders and farmers" all exacerbated by a "power vacuum in the absence of a strong government and military presence in the East".³

Refugee and migrant exoduses are clearly not solely a concern for the humanitarians. They can prove a huge burden on the economy, infrastructure, security and society of affected countries and a destabilising force for regions, and globally. They can also be a positive force for social change and economic development. Whichever, it is increasingly clear that, in our globalised, tech-savvy and interconnected world, the ability of States to forestall or halt them is seriously diminished.

THE CRISIS IN EUROPE

Recently, not a day has passed when there hasn't been a despairing article about migrant flows into Western Europe. Images of UK-bound Afghans, Syrians or Eritreans around the port of Calais; Bulgaria and Hungary building walls against an ever record-breaking flow of people hoping to transit to Germany, Austria or Sweden; Greece in deep trouble as it tries to cope not only with a debt crisis but a people crisis, with some 6 - 9000 persons a day arriving on its outlying islands; EU justice

³ UNHCR Briefing Note of 10 November, www.unhcr.org

and Home Affairs Ministers disagreeing on just about everything, from how the Dublin agreement should work through to intake quotas; and of course, the floating dead, with around 700,000 having crossed into Europe via Mediterranean routes so far this year, and over 3,400 having lost their lives in the process. The photograph of the lifeless body of a three year old, washed up on the shores of a Turkish beach in September, has become the leitmotif of this humanitarian emergency, arousing a storm of global concern and protest.

The composition of the groups presenting at EU frontiers has been very mixed. Clearly a high percentage is Syrians, both those who have come directly from Syria, but also a growing number leaving from first asylum countries like Turkey, Lebanon or Jordan. There is a significant increase in returns to Syria, from where there is onward travel to Turkey and beyond. Does this make a difference? Sometimes it does. Coming directly from life threatening situations is one of the stipulations in the 1951 Refugee Convention for unauthorised entry not to attract a penalty. But “coming directly” is at best an ambiguous concept. It is not confined to those leaving their own countries. Life is hardly tolerable, and indeed can constitute a serious risk, for Syrians in neighbouring asylum countries, especially if you are a woman alone, a single young man suspected, warranted or otherwise, to be a security risk, or an unaccompanied child. Sea arrivals to Europe have included over 10,000 unaccompanied children. There is a misconception that the majority of refugees in neighbouring countries are tolerably looked after in camps. This is false. Some 70% throughout the region are actually living desperate lives outside any organised camp.

Together with those coming to Europe from refugee producing countries like Syria or Iraq, Eritrea or Afghanistan, there are also many others: Nigerians, Kosovars, Albanians, Serbians and Macedonians. The forces fuelling all this flight are strong and various: insecurity and desperation are driving an increasing number of refugees and migrants to leave; the drawcard of quality services, education and work possibilities in Europe is strong, as is the push factor of decreasing levels of humanitarian assistance in first asylum countries; opportunity is enticing others to join the mass flows; lucrative earning possibilities are opening ever more

avenues for people-smugglers to exploit; it is also for some becoming cheaper as increased supply meets growing demand; social media is facilitating travel, even while misinformation is compounding the situation leading to false hopes; unbalanced burden-sharing is creating a backlash, starting to close doors and encouraging those to try and enter while it is still possible; and vacillation among leaders is creating exploitable gaps. It is clearly a migrant and refugee mix.

If there is one positive thing coming out of this crisis, it is that it has launched an avalanche of ideas about how better to respond. Advice is streaming into EU countries from many sources. Some ideas being acted on or canvassed, which should be considered by countries outside Europe as well, involve: enforceable national intake quotas based on GDP, number of asylum seekers or unemployment levels; joint reception and processing arrangements, including specialized centres for those coming from countries deemed safe; differentiated stay arrangements pegged to the likely duration of protection needs; and legal migration pathways. Most of these ideas are not new. What will be new, if it happens, is how they are pieced together and then acted upon in a coherent and coordinated manner, to determine who, how and where to protect.

What has yet to emerge is the leadership necessary to build this coordination effectively and beyond Europe, for this is truly a global crisis, not the responsibility of only one or several regions to bear.

THE ASIA/PACIFIC CONTEXT

Mixed movements are as prevalent in the Asia/Pacific region as anywhere else. The region includes major refugee-producing countries, like Myanmar, Sri Lanka, Afghanistan and even North Korea. It is also experiencing multi-layered migratory movements, driven or drawn out by economic and social factors, such as high levels of poverty in some countries and in others rapid economic growth creating a strong demand for foreign labour. People smuggling and trafficking is rife.

Asia is, of course, not the EU. The traditions, cultures and systems of governance are much more heterogeneous, human rights are understood and prioritised very differently, and the right to asylum has

not found an integral place in the legislation of the majority of countries. Only thirteen countries in the region have acceded to the international refugee instruments. Some are not even signatories to core international human rights treaties. National refugee structures are scarce, as are migration policies that take account of the special circumstances of refugees. Asylum applicants without the requisite entry or stay authorisation mostly fall into the category of illegal migrant.

There is a widespread fear in the region that establishing formal asylum procedures could create a pull factor, would prove too expensive, and would more than likely end up provoking problems with neighbouring countries. An exacerbating factor is a tradition in the region of bilateralism and non-interference in domestic affairs.

With the pervasive lack of government ownership of and engagement with asylum issues, and limited resources in many countries to change this, the majority of governments still prefer to rely primarily on UNHCR to determine refugee status, assist refugees and identify solutions. Of the 15 biggest RSD operations globally for UNHCR, five are in the Asia region.

If asylum structures are lacking, asylum-seekers are not. An estimated 63,000 people made the boat journey in 2014, mainly from Myanmar and Bangladesh, to Thailand, Malaysia and beyond. 25,000 used this route in the first quarter of 2015, with the level and scale of accompanying abuse unprecedented. People have been starved, beaten, imprisoned and sexually violated, both on-shore but also increasingly on the smugglers' boats. They are often held for ransom and non-payment can result in death. The many stranded boats and the discovery of mass graves in smugglers' camps in Thailand and Malaysia helped to galvanise global attention and a call for action.

In summary, taking into account the sobering global context, the disarray in protection's traditional home in Europe and the particularities of the Asia/Pacific region, obvious and compelling answers to the question where to protect are not readily on offer. The current state of international law does not overly assist with answers!

SOME INTERNATIONAL LAW CONSIDERATIONS

While the right to leave any country, including one's own, is long enshrined in international law, [from the UDHR (Para.2) to the ICCPR (Article 12)], it has been called an asymmetrical right. There is no corresponding right to immigrate, with States retaining a largely unfettered sovereign discretion to decide who enters their territory. This is, unfortunately, almost as much the case with refugees as with "classical" migrants. The 1951 Convention relating to the Status of Refugees stops short of placing an absolute requirement on States to admit any particular individual for the purposes of providing sanctuary and solutions on its own territory. An "objects and purposes" approach to applying the Convention can, even should, entail the responsibility to admit, but there are still many States who do not see it this way. They argue that the non-refoulement obligation is their main constraint, which can be fulfilled by ensuring that a refugee is protected against refoulement somewhere, even if that somewhere takes no account of family links, whether a fair and effective asylum system is in place, or indeed how minimalistic the accessible protection might be.

The Convention recognises a link between asylum and burden sharing. Its Preamble acknowledges that granting asylum may impose heavy burdens and that states must be able to call upon international cooperation to underpin solutions. What this means in practice, though, has defied many efforts to clarify it. One potentially important but ultimately failed effort was the so-called Convention Plus initiative of UNHCR some twelve years ago. The C+ process was supposed to lead to special agreements and multilateral arrangements to improve responsibility sharing, but there was ultimately no appetite among States, who feared the "blank check" that might result. The most they could agree was a general commitment to use resettlement strategically, as needs demanded. Since that time, there have been periodic further calls for States, in the words of UNHCR's Executive Committee, "to equip themselves with appropriate planning, coordination and financial tools that make international solidarity and the realisation of durable

solutions more predictable” [conclusion 102{LV1} 2005]. But this is where it stops, at least internationally.

The Europeans thought they had found their own Eurocentric answer to responsibility-sharing, in the form of the treaty-based Dublin framework. This allows EU member states, albeit with constraints articulated by the European Court of Human Rights, to return asylum seekers to the EU State which first authorised entry into the Union space, by visa, disembarkation permission or otherwise. Traditionally this has meant return to the countries on Europe’s perimeter. While Dublin does allow States nevertheless to opt to handle any claims themselves, this has been a much under-utilized provision. Asylum seekers deciding themselves where they prefer to seek their own protection is rejected as “forum-shopping”.

If there is still broad agreement that there should be no unfettered right to choose your place of asylum, recent events seem to have shattered all confidence in the ability of the Dublin arrangements to fairly organise who should provide protection, where. It may well be that current events will force some reappraisal of the relationship between aliens, their wishes, borders and burden-sharing.

REGIONAL PROTECTION

A lot of hope has been placed in regional protection, the argument being that countries neighbouring each other will see the logic of sharing burdens and responsibilities through arrangements reflecting common interests and built on shared values. How feasible is it really to see regional arrangements coming to determine where and how people should be protected?

When it comes to Europe, one might have thought that the EU and a regional approach would be synonymous. Yet even in Europe, this was not to be! One lesson to draw is how rapidly sovereignty will reassert itself in crisis situations, even in a part of the world where one can talk with some confidence of the existence of a region, with many structural underpinnings in place.

The notion of “region”, shared structures and common jurisprudence to support it is also quite developed in Latin America. Regional cooperation on asylum continues to enjoy wide support here. The adoption in December 2014 in Brasilia, of a common regional roadmap on displacement and statelessness was a milestone in this regard. It includes 11 strategic programs, among them those to improve the quality of RSD systems, to establish “borders of solidarity and safety”, and to foster solutions, with local integration, not only resettlement, in focus. The region is looking to host a “Transit mechanism” to which recognised refugees from neighbouring countries outside the region could come to have their resettlement possibilities examined. Particularly interesting is the proposal for a “labour mobility” program which would offer refugees the option of putting themselves into existing migration arrangements permitting free movement and pairing labour needs in third countries with professional profiles of refugees. Realising such an ambitious program will be no mean feat, but it deserves real commendation as a genuine effort to attach actions to words, to give content not just text, to how regional cooperation on asylum might work.

Closer to home, one can say with certainty that Australia’s current vision for where and how to build regional protection structures is not the model to follow. Whatever has been said about it being “protection of lives” driven, it is pretty clear that the overriding motive has been deterrence. If the boats are fewer, this has been achieved by substituting one set of problems with another. The holding and processing centres have become long-term and deeply troubled detention centres. They have witnessed repeated incidents of serious physical violence, including rape, and they house many whose mental health gets worse by the day. The resettlement alternatives are not viable for the majority, meaning that these unfortunate people are in practice Australia's long-term responsibility, at exorbitant cost. Domestically the policies are hugely divisive. They have had to be underpinned by a swathe of highly contestable laws which are inconsistent with liberal legal traditions and international responsibilities.

The danger is also there that such bad practices will infect the main, relevant regional process, the Bali Process on Transnational Crime and People Smuggling, whose embrace of asylum and refugee protection is still rudimentary. Certainly recent documents coming out of Bali Process meetings leave little reason for optimism. Senior Officials of Governments, meeting in Canberra in August 2014, endorsed a Strategy for advancing Bali Process objectives, including the creation of a regional cooperation framework. That Strategy was reviewed and updated in May this year, in part to ensure that the priorities of the Regional Cooperation Framework are advanced. The priorities as they were originally conceived by UNHCR, who after all was the main proponent of the RCF, were national asylum structures progressively established, burden-sharing for solutions achieved and cooperation mechanisms in place to effect decent and sustainable return of the non-refugee/migrant element. While these were in one sense tacked on to a process centrally focused on transnational crime and people smuggling, they were to have had a life of their own, so as to embed core humanitarian and protection goals into the broader cooperation around law enforcement.

As regards the Bali Process Strategy for 2014 and beyond, one is hard-pressed to find the words “asylum” or “refugee” in the 13 pages comprising the update. It is all about law enforcement cooperation, border management, information and intelligence sharing on people smuggling, travel fraud and border security, visa cooperation to prevent illegal movements, secure exchange of biometric data, and disruption of criminal networks. A regional mapping exercise linked to initiatives on behalf of refugees and groups with specific needs, including stateless persons, is foreshadowed. Yet the mapping will also cover initiatives related to people smuggling and where the priorities will fall as between the various initiatives only time will tell! It seems safe to conclude that, although regional cooperation is still being talked about through the Bali Process, regional deterrence, rather than regional asylum system building has reasserted itself as the prime objective of enhanced cooperation between States.

Cooperation may, though, not stop at Bali. A “Special Meeting on Irregular Migration in the Indian Ocean” was convened on 29 May 2015

by Thailand to discuss Burmese and Bangladeshi asylum seekers. Spurred on by international outrage over the plight of boat people in the region, the participating governments adopted the Bangkok Declaration which sees action on several fronts, including rescue, reception, legal and safe migration channels and local root causes. Agencies including UNHCR, IOM and UNODC, are now trying to capitalise on the momentum with specific follow-up. Agencies which have not always seen eye-to-eye working together to build protection in a traditionally allergic region is in itself a hopeful sign!

Actions under development include:

1. making the sea journey safer, through strengthened search and rescue and guaranteed disembarkation in a safe place;
2. improving treatment on arrival through strengthened and supported reception facilities, reinforced national structures and deployable multi-functional teams, as well as reinforcement to local communities to care for people with specific needs;
3. putting processes in place to do status determination and needs assessment, using in the first instance UNHCR and mobile protection teams “pending the establishment of domestic asylum frameworks by the affected countries”;
4. ensuring there is an agreed solutions strategy, combining regularised local stay with work permits, third country resettlement and improved family reunification arrangements and, for the longer term, models for transitioning from refugee to migrant status, including through bilateral or multilateral agreements;
5. enhancing support for return programs for the non-protection cases, including IOM’s Assisted Voluntary Return and Reintegration programs;
6. strengthening action to address root causes, which clearly has to include the statelessness of the Rohingya, as well as their dire living circumstances, meaning not least more targeted investment in areas of departure.

What might this mean for the question where to protect? If places of disembarkation can be agreed, acceptable reception arrangements can be in place, status can be adjudicated through mobile protection teams, stay arrangements can be settled and migration pathways set up, this

would in practice answer the question. The Achilles Heel, though, as always, will be getting States to sign on. In this regard, the issue that regularly comes up is whether a new Comprehensive Plan of Action for the region, modelled on the CPA for the Indo-Chinese refugees, could serve this purpose?

The actual CPA had a particular time and place which is unlikely to reoccur. This said, there are elements of that arrangement which would merit careful re-appraisal. The CPA rested on protection principles which all participants formally committed themselves to respect. It harnessed together temporary safe havens where screening could be done and a variety of solutions geared to the various needs of increasingly mixed groups of beneficiaries. Importantly it proceeded on the basis of a negotiated definition of the problem, allowing any country having a differing viewpoint for historical or security reasons to implement additional (not alternative) responses. The U.S. for one ran in parallel a program of orderly departure for those who might not meet the standard refugee definition, but were nevertheless persons in relation to whom that country was prepared to accept further responsibilities. The CPA worked because it was a global plan, which formally implicated countries of first asylum, the country of origin, and the international community on a burden-sharing basis. Perhaps its major contribution was to help redress the pull factor of the unlimited resettlement opportunities which had hitherto underpinned the international response to the Indo-Chinese outflow. Wholesale resettlement had become a complicating factor, serving to dramatically increase the migrant component of the boat departures, contributing to the growth of graft and corruption in the status process, and encouraging the expansion of a people smuggling business.

CONCLUSION

To conclude I have an observation, and a somewhat lateral postscript! My observation is that the “old order” when it comes to refugee protection is at a crossroads. There has of course been a lot of lip service paid to “new directions” for protection over recent years, but little to show for it. Subject to the yet unknown ramifications of Paris, the current displacement situation, even as desperate as it is, may nevertheless offer a rare opportunity to build upon the foundations of the

1951 Refugee Convention, through a process to finally clarify the meaning of international solidarity and the general content of burden-sharing. Necessity has been driving countries in Europe to re-embrace the issues more creatively, going beyond funding arrangements. Countries in SE Asia have also been pushed into thinking through some proposals for how and where to enhance cooperation on asylum. In the Middle East there are tangible signs of a willingness to work multilaterally on refugee and migration issues. Better regional arrangements have been high on the agenda in Australia as elsewhere. When such a conjunction of circumstances has presented itself in the past, it has proved the opportunity for a global step forward, in part through initiatives like the CPA, which drove cooperation into interesting new directions. The absence of agreement around what burden and responsibility-sharing should actually lead to has been a serious loophole in the protection architecture and the opportunity to remedy this now has at least a fighting chance.

POSTSCRIPT

Moving to the lateral reflection, as I watch the scenes in Europe, I am reminded of a group encounter between former Libyan dictator, Gadhafi, and a captive group of delegation heads of which I was one. We had all been hijacked without warning from a meeting in the capital, Tripoli, bussed to a palatial, chandelier-lit tent in an unannounced location, and left to wait. When Gadhafi finally materialised, he expounded for several hours, sometimes quietly and deliberately, sometimes wildly and incoherently, on the theme that, should he be deposed, Europe and the Western world would reap what it had sown in its former colonies, in the form of a veritable deluge of irregular migration.

This links in a way to a proposition that intrigued me in the publication I mentioned at the outset. One of the authors, Professor Juss, calls for a “refiguring of international refugee law as a compensation scheme just as much as a human rights protection scheme... to avoid poor people having to face the consequences of someone else’s military adventure”.⁴ He suggests “if we can give monetary compensation for tortious acts,

⁴Westra et al , at page 279

there is no reason why we cannot give refugee status in the same way.”
Maybe herein is the germ of a formula which could ultimately contribute
an answer to the question: *Protection Elsewhere - but where?*