

## **KALDOR CENTRE CONFERENCE**

**20 November 2015**

### **YEAR IN REVIEW**

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Distinguished guests, ladies and gentlemen. As the Director of the Andrew & Renata Kaldor Centre for International Refugee Law, it gives me enormous pleasure to welcome you to UNSW Law for our second annual conference. In welcoming you, I acknowledge the Gadigal People of the Eora Nation on whose traditional land we are gathered, and their elders, past and present, the custodians of this land.

2015 marks 70 years since the end of the Second World War, a global conflict that saw the displacement of over 50 million people. The 1951 Convention relating to the Status of Refugees was in part a response to this situation, created to provide a legal status and thus some certainty for the many thousands of refugees still displaced some six years after the conflict had ended. While one must be cautious not to romanticize the Refugee Convention, for it, too, was plagued by political compromises and self-interest on the part of States, it is true that it was crafted at a time when the atrocities of the Second World War still loomed large, and the refrain ‘never again’ was front of mind.

A year earlier, in 1950, UNHCR was established as the international refugee agency to deal with (mainly European) refugees who had been displaced by the war. Initially, UNHCR was given only a three-year mandate. It was subsequently extended in five-year increments until 2004, when it finally became open-ended (and, in effect, permanent).<sup>1</sup> It was clear that the international community’s blind optimism that refugee crises would abate, world peace would prosper and people would treat each other kindly was not going to come to pass.

Indeed, 2015 has seen the largest number of displaced people on record since the Second World War – over 60 million. 42,500 refugees are displaced per day. When we add in internally displaced persons and people displaced by disasters, the numbers are even more confronting: two people are displaced every second.

All have acute assistance and protection needs. A varying constellation of legal instruments prescribes the minimum standards of treatment they must receive, and geography and jurisdiction determine which State or States have direct responsibilities to them. Humanitarian assistance may be more or less difficult to access depending on whether there are safe corridors into conflict zones, and the resource capacity of humanitarian actors to respond.

The protection provided by international law does not distinguish between one refugee or one million refugees. The legal principles are the same. Of course, policy responses may be adjusted for pragmatic reasons in order to accommodate large numbers of arrivals, but they, too, must be consistent with States’ legal duties. The European Court of Human Rights

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<sup>1</sup> UNGA res 58/153 (24 February 2004).

reminded us of this in a judgment in September 2015, reiterating that ‘large numbers’ do not affect the application of human rights law.<sup>2</sup>

In a climate where it is easy for panicked, kneejerk reactions to prevail, the importance of upholding strong legal principles and institutions cannot be overstated. These require political will to be meaningful and effective. Too frequently, the restraints that international law places on otherwise unfettered executive power become the scapegoat for political inaction or infraction. This is when those most in need of legal protection are the most vulnerable. As the preamble to the Swiss Constitution states, ‘the strength of a people is measured by the well-being of its weakest members’.

A silver lining in 2015 has been the generosity of countries like Germany and Sweden, which have opened their borders to refugees fleeing from Syria, and offers by a number of countries of additional resettlement places for Syrian refugees, including by Australia. The impact of global public pressure, given momentum and visibility by social media campaigns, has played a significant role. We have seen principled, ethical leadership and innovation by politicians, church leaders, civil society, the general public, and refugees themselves, placing protection and human dignity at the core of responses, and recognizing the shared humanity of refugees as people with hopes, dreams and capabilities.

Yet, in other respects, the protection space globally has contracted considerably in 2015, with border closures, increased deterrence measures, insufficient resettlement spaces, and restricted humanitarian access and resourcing.

In September, for instance, the World Food Programme ran out of funding in Jordan, and was forced to cut food aid to 229,000 Syrian refugees there.<sup>3</sup> The impact of such decisions does not occur in a vacuum. As a representative of the Norwegian Refugee Council explained: ‘Refugees mention to us cuts in food assistance as one of the main reasons for leaving Jordan’ and moving on to Europe.<sup>4</sup> While conflict may be the initial driver, the failure to address humanitarian needs in countries of first asylum adds to people’s desperation and search for safety.

A review of global trends this year begs the question posed by the conference title: protection elsewhere, but where? Earlier this year, the Kaldor Centre published a policy brief on extraterritorial processing. When it was originally posted online, it was erroneously described as being about extra-terrestrial processing. If this were possible, I am sure some States would be pursuing it. Too many States are shirking their responsibilities for refugees and asylum seekers, pushing them away, both figuratively and literally, by navies, border guards, walls, fences, visa regimes, carrier sanctions, pandering to hostile public opinion, and adopting domestic laws that flout international obligations. As UNHCR’s Assistant High Commissioner for Protection, Volker Türk, has rightly observed, such approaches ‘will never be the answer’ because they simply divert refugee movements along other routes, aggravating

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<sup>2</sup> *Khlaifia and Others v Italy*, App No 16483/12 (1 September 2015).

<sup>3</sup> Nick Miller, ‘Wars, Climate Change, Funding Cuts: World Food Program Battles to Give Hope’, *Sydney Morning Herald* (15 November 2015) <http://www.smh.com.au/world/wars-climate-change-funding-cuts-world-food-programme-battles-to-give-hope-20151113-gky4vu.html#ixzz3rcr7FzG9>.

<sup>4</sup> *Ibid*, citing Karl Schembri from the Norwegian Refugee Council.

‘already precarious situations in regions embroiled in conflict.’<sup>5</sup> The accident of geography should not be the basis on which refugees are supported – or not.

In 2015, Syria has dominated media coverage, which is appropriate for a humanitarian emergency of its magnitude. However, this has been largely at the expense of other significant humanitarian emergencies and protracted refugee situations, which have been too easily forgotten by the international community – crises in the Central African Republic, Nigeria, South Sudan, Ukraine, Burundi, Iraq, Libya and Yemen, and longstanding situations in Afghanistan and Somalia. Intensified fighting in Iraq, for instance, resulted in an additional 2.8 million IDPs this year, on top of 900,000 already living in sub-standard conditions without even the most basic services.<sup>6</sup> UNHCR has warned that this situation may become unmanageable if the international community does not provide greater assistance.<sup>7</sup> In April, Yemen, which itself hosts a quarter of a million registered refugees (mostly Somalis) saw some 150,000 people displaced in the space of just a few weeks by escalating violence.<sup>8</sup>

In Africa, thousands of South Sudanese continue to flee conflict each week, with around 1.5 million IDPs and 700,000 refugees hosted predominantly in Ethiopia, Kenya and Uganda. Challenges here include land and food shortages, and limited humanitarian access.<sup>9</sup> The Central African Republic is one of the most poorly funded emergency situations, where thousands of people lack even the most basic survival assistance. Since the end of 2013, around a quarter of the population has been displaced internally, and close to half a million refugees have fled to Cameroon, Chad, Congo and the Democratic Republic of the Congo.

In our own region, approximately 94,000 refugees and migrants fled Bangladesh and Myanmar by sea, including 31,000 people in the first half of 2015 – a 34 per cent increase compared to this time last year.<sup>10</sup> In April and May, an estimated 7,000 Rohingya refugees and Bangladeshi nationals were abandoned by smugglers and stranded at sea for weeks as governments refused to allow them to disembark. Malaysia, Indonesia and Thailand reportedly pushed boats out to sea. It is believed that up to 1,000 people died of starvation, dehydration or violence on the boats.<sup>11</sup>

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<sup>5</sup> ‘Statement by Volker Türk, Assistant High Commissioner for Protection, 66<sup>th</sup> Session of the Executive Committee of the High Commissioner’s Programme, Agenda point 5(a)’ (8 October 2015) 3 <http://www.refworld.org/docid/5617734e4.html>.

<sup>6</sup> UNHCR, ‘Note on International Protection’, UN Doc A/AC.96/1145 (2 July 2015) para 8 <http://www.unhcr.org/55dc1dd89.html>.

<sup>7</sup> Alexander Whitcomb, ‘Iraq’s Refugee Crisis Could Spin Out of Control, UN Warns’ (18 April 2015) <http://rudaw.net/english/middleeast/iraq/180420152>.

<sup>8</sup> ‘Yemen: UNHCR Braces for Refugees Fleeing by Boat’ (21 April 2015) [http://www.unrefugees.org.au/news-and-media/news-headlines/yemen-unhcr-braces-for-refugees-fleeing-by-boat/?WT.mc\\_id=AW0015-31&gclid=CPCkU4yflMkCFUyUvQodhhAN1g](http://www.unrefugees.org.au/news-and-media/news-headlines/yemen-unhcr-braces-for-refugees-fleeing-by-boat/?WT.mc_id=AW0015-31&gclid=CPCkU4yflMkCFUyUvQodhhAN1g).

<sup>9</sup> UNHCR (n 6) para 12.

<sup>10</sup> UNHCR, *South-East Asia: Mixed Maritime Movements, April – June 2015* (August 2015) 2 <http://www.unhcr.org/554c6a746.html>.

<sup>11</sup> Kathleen Newland, *Irregular Maritime Migration in the Bay of Bengal: The Challenges of Protection, Management and Cooperation* (July 2015) 2 <http://www.migrationpolicy.org/research/irregular-maritime-migration-bay-bengal-challenges-protection-management-and-cooperation>, referring to Joe Cochrane, ‘Indonesia and Malaysia Agree to Care for Stranded Migrants’, *The New York Times* (20 May 2015) [http://www.nytimes.com/2015/05/21/world/asia/indonesia-malaysia-rohingya-bangladeshi-migrants-agreement.html?\\_r=1](http://www.nytimes.com/2015/05/21/world/asia/indonesia-malaysia-rohingya-bangladeshi-migrants-agreement.html?_r=1) and UNHCR Alarmed at Reports of Boat Pushbacks in South-East Asia (UNHCR Press Release, 13 May 2015) <http://unhcr.org/555345959.html>.

Closer to home, Australia's approach to asylum seekers continues to be marked by a parochialism that is at best naïve, and at worst, downright selfish. Although the numbers of refugees Australia receives are comparatively inconsequential, the impacts of the government's policies are deeply personal, and will have intergenerational effects. The countless reports documenting abuse and ill-treatment in offshore processing countries, and in detention facilities within Australia's own territory, are shocking not only for what they detail, but also for the fact that Australia has created a climate in which this kind of treatment can occur. Internationally, Australia's approach has attracted incredulity and much criticism. Many refugee-hosting States wish for the resources our government has at its disposal, yet watch with incredulity as we spend billions of dollars creating the kinds of conditions that they are desperate to alleviate.

While there have been welcome developments, such as the creation of 12,000 additional resettlement places for Syrian and Iraqi refugees, and Australia's financial contribution of \$44 million to those displaced in countries of first asylum in the Middle East, it must nonetheless be acknowledged that these are comparatively small gestures in light of global humanitarian needs. In no way can they compensate for the harm that Australian laws and policies are inflicting on refugees and asylum seekers who have arrived here by boat.

Last year, we were honoured to have Professor Graeme Hugo present as part of our conference – one of his last public presentations before his sad and untimely death in January this year. Professor Hugo's study of the important and often remarkable long-term contributions made by refugees to the Australian community. As Chris Bowen, then Immigration Minister, stated in his introduction to the report:

Given the often extreme hardship from which humanitarian entrants have come, it is all the more impressive that they are able to achieve so much in such an unfamiliar environment. It is these characteristics—resourcefulness, hard work and determination to improve their lives and the lives of their children—that come through so clearly in this research. And it is these attributes that Australians will recognise as those that will continue to make this country great, long into the future.<sup>12</sup>

As part of the international community – and a democratic, prosperous, educated country at that – Australia has both a legal and moral responsibility to share in the search for durable solutions to displacement. This means modelling best practice in our own region, stepping up to assist and protect those further afield, and heralding the significant economic, social, demographic and cultural contribution that refugees have made, and continue to make, to our society.

As Volker Türk has noted, if there are lessons to be learned from the world's current humanitarian emergencies, they are that States must 'take the forecasting seriously, accept the realities of migration and displacement, and deal with them effectively and as a matter of urgency.'<sup>13</sup> They must plan, instead of ignoring the warning signs and then scrambling to respond in a chaotic and unsystematic fashion. Syrian refugee movement into Europe was all too foreseeable: the combined effects of protracted conflict, inadequate humanitarian

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<sup>12</sup> Cited in Graeme Hugo, *A Significant Contribution: The Economic, Social and Civic Contributions of First and Second Generation Humanitarian Entrants: Summary of Findings* (Commonwealth of Australia, 2011) 4.

<sup>13</sup> Volker Türk, Assistant High Commissioner for Protection, UNHCR, 'Nansen Initiative Global Consultation: Keynote Address' (Geneva, 12 October 2015) <http://www.unhcr.org/561bb1de9.html>.

assistance in countries of first asylum (linked closely to the UN's underfunding), and the EU's dysfunctional Dublin system, among other things.

This lesson is crucial when it comes to considering other significant drivers of displacement, such as disasters and the impacts of climate change, which in 2014 displaced more than 19.3 million people.<sup>14</sup> Each year since 2008, disasters have displaced an average of more than 26 million people.<sup>15</sup> Mostly people moved within their own countries rather than across international borders (a trend that is predicted to continue<sup>16</sup>), but the protection gaps have led UNHCR to place the issue firmly on the agenda of this year's High Commissioner's Dialogue on the root causes of displacement. This will build on the findings of the Nansen Initiative's global protection agenda on cross-border displacement in the context of disasters and climate change, which was endorsed by 114 States in October in Geneva.

There's an Irish joke about a man who stops a passer-by to ask how to get to London. 'To London?', the passer-by asks. 'If I wanted to go to London, then I wouldn't start from here.' I am often reminded of this when I am asked about how the world should respond to refugees. If only we had a different starting point.

As one scholar has noted, '[s]olidarity remains, unfortunately, the Achilles' heel of the international refugee regime',<sup>17</sup> even though States themselves identify its importance in addressing cross-border movement. As the Chairperson of UNHCR's Executive Committee meeting of States in October observed:

Many of you remembered times when your own citizens benefitted from asylum and expressed profound gratitude to host States, particularly those who host large numbers at great cost. You urged the international community to match the solidarity, hospitality and compassion of host communities with international burden-sharing. As one delegation reminded us, no country can face the challenges of dealing with large numbers of arrivals on their own.<sup>18</sup>

The reality is that forced migration is a long-term, global challenge. The best that States can ever hope to do is to manage spontaneous movements, not prevent or control them. States need to move beyond haphazard approaches towards smarter, holistic responses at the national, regional and international levels. This can only be done by bringing States together across multiple policy areas to create more integrated, predictable and protection-focused responses.

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<sup>14</sup> Internal Displacement Monitoring Centre, *Global Estimates 2015: People Displaced by Disasters* (July 2015) 8, <http://www.internal-displacement.org/assets/library/Media/201507-globalEstimates-2015/20150713-global-estimates-2015-en-v1.pdf>.

<sup>15</sup> Ibid.

<sup>16</sup> The Government Office for Science, *Foresight: Migration and Global Environmental Change: Future Challenges and Opportunities* (The Government Office for Science, 2011) 37; Asian Development Bank, *Addressing Climate Change and Migration in Asia and the Pacific: Final Report* (Asian Development Bank, 2012) viii, 4; Walter Kälin and Nina Schrepfer, *Protecting People Crossing Borders in the Context of Climate Change: Normative Gaps and Possible Approaches* (UNHCR Legal and Protection Policy Research Series, 2012) 32–34, <http://www.refworld.org/docid/4f38a9422.html>.

<sup>17</sup> Jean-François Durieux, 'Temporary Protection: Hovering at the Edges of Refugee Law' (2014) 45 *Netherlands Yearbook of International Law* 221, 251.

<sup>18</sup> *Report of the Sixty-Sixth Session of the Executive Committee of the High Commissioner's Programme*, UN Doc A/AC.96/11/54 (13 October 2015), Annex I, 'Chairperson's Summary of the General Debate' <http://www.unhcr.org/5631df5f9.html>.