Kenneth Rivett Orations

International Refugee Protection: A Work in Progress

Canberra, Sydney & Melbourne
23-25 November 2005

Guy S. Goodwin-Gill
All Souls College, Oxford

It is a great pleasure, an honour and a privilege to be back in Australia and to have been invited to give three orations honouring the lifelong commitment of Ken Rivett to refugees and social justice.

My association with this country goes back to October 1978, when I was posted as the first legal adviser in the United Nations Office in Sydney, representing the UN High Commissioner for Refugees (UNHCR).

It was the time of the Indochinese refugee crisis. Beginning in 1977, some two years after the fall of Saigon and the first wave of refugees, the Vietnamese Government, now isolated by the United States and many of its allies, turned inwards and began a massive project of social reorganization. Determined to re-engineer the South, the Government targeted not only those associated with the former regime, but also the middle class; businesses were confiscated, huge numbers were forcibly relocated to open up so-called new economic zones; and class coincided with race and ethnicity.

The impact of these policies was dramatic, and their consequences are felt even to this day. A massive exodus from both south and north Vietnam resulted, joining other huge movements of people from the Communist take-over in Laos and from Pol Pot's excesses in Cambodia.

The scenes of flight by land and sea were horrific. Coastal States in the region were not hospitable; race and politics, they said, meant there could be no possibility of asylum. Boats were intercepted and towed out to sea, sometimes till they sank with loss of life; the rescued were refused landing; ships sailed by on the other side; piracy provided new opportunities for rape and robbery.

And as the pressure grew, so too did the desperation. The journeys in search of refuge grew longer. They began to find landfall, not only in Indonesia, the Philippines, and Malaysia, but also – with some help along the way – in Australia.

Something had to be done, both nationally and internationally. And if those years are remarkable for humanitarian commitment, it is in no small way due to the pressure which local communities

– sensitive to human needs, above all – brought to bear on governments, and through governments, on an initially reluctant international system.

Ken Rivett was a part of that process; an individual who made a difference. For UNHCR in Australia, Ken was a staunch and valued friend, our link to that deep vein of generosity present in all our nations, if only it can be tapped...

I was delighted to know him during my time here, and I am especially pleased to have been invited by the Refugee Council of Australia, together with Sydney University Law School, ANU's Asia Pacific College of Diplomacy, and the Refugee and Immigration Legal Centre, to honour him with these three orations around the theme, 'International Refugee Protection: A Work in Progress'. I am particularly grateful, too, for the very warm welcome extended to me, and to the care and attention with which Margaret Piper of the Refugee Council has organized this visit, together with Dr Jane McAdam of Sydney University Law School.

In the first presentation (Canberra, 23 November 2005), I look at the history of refugee protection and at what we can learn. Here, I try to show how States have reacted over time, and how they have brought *their* own national concerns into the debate. To do that, I focus on two events in particular: the negotiation of two refugee treaties, one in 1933 and one in 1951, one in which Australia played no part, and one in which it was especially active. These events, I think, say something useful about the way in which refugees are defined or described, about the space or place for law and obligation, and about the fears and insecurities of States.

In the second oration (Sydney, 24 November 2005), I take some of these lessons a step or two farther on, looking at State sovereignty and State cooperation in the resolution of refugee problems. Recognizing the continuing gap between the 'duty to cooperate' and actual cooperation, still commonly mediated by self-interest, I show how the *Tampa* incident might be used as the basis for a cooperative model to resolve refugee and migration problems arising out of rescue at sea.

Finally, in the third oration (Melbourne, 25 November 2005), I look at the possible future for refugee protection, and at what I see as the minimum requirements for reform of the present model.

In offering these views on the international protection of refugees here in Australia in 2005, I am conscious of conflicting emotions. During my time here as UNHCR's protection officer from 1978-1983, Australia was a major player both in providing solutions to refugees, particularly those from the Indochinese peninsular, and in developing instruments of protection. It was an

Australian initiative, for example, which prompted the debate on what was then called 'temporary refuge', and which led the UNHCR Executive Committee to adopt a seminal conclusion in 1982 on the provision of refuge in situations of mass influx. Since then, Australia's treatment of refugees and asylum seekers has not been characterised by an equivalent commitment to protection, and though it has continued to admit refugees for resettlement, its international reputation has suffered in consequence.

The forced displacement of people throughout the world presents us all with many challenges. Ken Rivett, I know, would certainly be locked deep into the debate, seeking to influence and to work change for the future, as he surely worked change for the present. I have not doubt that those who follow in his footsteps will not only make good use of his principled approach, but will also know how to make the positive aspects of this country's historical record and effective part of future policy and practice. The very nature of refugee and migratory movements should tell us that they are not 'problems' to be solved in the normal course of events, least of all by unilateral efforts at regulation.

What I hope is that the work in progress, which draws on and takes its spirit from the contributions of those like Ken Rivett, will be taken up and developed for the benefit of those in need of protection, even if it can never be brought to a final conclusion.

Kenneth Rivett Orations

International Refugee Protection: A Work in Progress

Part 1: History and its Lessons

Canberra, 23 November 2005

Eighty four years ago, the President of the International Committee of the Red Cross, Gustave Ador, wrote to the Council of the League of Nations, calling attention to the plight of some 800,000 Russian refugees still adrift in post-first world war Europe.

Unable for the most part to identify themselves, to work, or to travel, they remained uncertainly dependent on the charity of others, unable even to take the first steps on the road to a solution. Some were former prisoners of war unwilling to return to post-revolutionary Russia; others were themselves products of that revolution and of the civil war that followed, often formally deprived of citizenship.

Nowhere were they provided for; and no one – no government, no institution – seemed prepared to accept responsibility for any aspect of their situation.

That there was no disputing their situation seems clear. The League moved promptly to appoint the first High Commissioner for Refugees, naming the Norwegian polar explorer and humanitarian, Fridtjof Nansen, to the post two months later and charging him with defining the legal status of refugees; organizing their repatriation or 'allocation' to potential resettlement countries and, together with private organizations, providing legal and political protection to Russian refugees no longer enjoying the protection of their own or former government.

Nansen in turn moved fast. Within a year he had proposed and secured agreement on an arrangement for the issue of identify certificates to Russian refugees. Though initially limited and circumscribed, these Nansen certificates rapidly evolved into a pragmatic contribution to the 'self-solution' of many a refugee problem. Nansen certificates were increasingly accepted *de facto* as 'passports' – to work, to self-sufficiency and integration in countries of first refuge; and then literally as passports, as travel documents accepted for onward movement to other States in need of migrant labour.

These first initiatives were the beginning of a system of international protection; they mark the first formal recognition by States of the need to cooperate in the face of flight, and of the fact, reluctantly accepted perhaps, that refugee movements – the flight of individuals *from* persecution

in their own State *to* refuge in another State – are inescapably international in character. Every State member of the international community has an interest, a legal interest, in the occurrence of a refugee movement; and an equal interest, even a measure of responsibility, in finding a solution.

The appointment of Nansen also marked the first step in a process which was to lead, over time, to what is often referred to today as the *international regime of refugee protection*: A linking of rules – the obligations laid down in treaty or in general or customary international law – and institutions – initially within the League and now within the UN system; A system which also now engages governments and civil society itself, and which is oriented in principle towards the goal of durable *solutions* for refugees, whether voluntary return to countries of origin, integration and self-sufficiency in the country of asylum, or resettlement, that is, acceptance as refugee migrants by a third State.

Not that the process is or ever was one of smooth, unobstructed evolution to the higher goal. The history of State actions and initiatives on refugee protection and solutions is *not* the history of humanitarianism, of altruism in another guise. On the contrary, it is a mixture of self-interest, opportunism, politics, recalcitrance, obstruction, unilateralism, reluctance and resentment, a history leavened from time to time by immense generosity, often from civil society directly, rather than governments; by commitment, perhaps pragmatic, to international institutions; and by the binding force of principle as it emerged by slow degrees into a body of legal rules and standards.

A part of the history of the international refugee regime can indeed be marked by numbers: 800,000 Russian refugees assisted; over 6.5 million displaced by the second world war returned home; over a million resettled in the late 1940s by the International Refugee Office. But it is also and strongly marked by these principles, not necessarily or immediately declared formally or signed off, but which emerged within the interstices of the practice of States, as they came to accept that the refugee was ever present, as much a product of global confrontation, as of the small wars between and within nations near and far.

This history is also one of balancing. Balancing State concerns – the unavoidable necessity of taking decisions in manifestly humanitarian cases and the traditional desire of nation States to preserve their sovereign interests, and all of this against a political background, events, which they were simply unable to change or even to influence, or which other political interests led them to maintain or encourage.

It is certainly *not* the case that State practice reveals a common golden thread of humanitarian commitment, which time duly translated from conduct into rule. On the contrary, legal *development* as such was frequently interrupted by bouts of negative self-interest and dissembling – the 1938 Evian Conference a case in point – and persistent *un*willingness to sign on to legal obligation.

Indeed, the first 'agreement' brought home by Fridtjof Nansen was not a treaty as such, but an 'arrangement' – an understanding among governments regarding the circumstances in which each would, or might, or might not, issue an identify certificate to Russian refugees. Nevertheless, over time some fifty-six governments did indeed organize their practice around a particular set of understandings, and that now-organized practice became the norm.

Negotiating the 1933 International Convention on the Status of Refugees

The first High Commissioner's work expanded through the 1920s; to the mandate for Russian refugees were added Armenians, Assyrians, Assyro-Chaldeans, and Turkish refugees. Although each of these later groups was seen to share certain common characteristics – the refugee was outside his or her country of origin, no longer enjoyed its protection, and had not acquired the protection of another – States preferred an *ad hoc*, group by group approach, seeking to limit their commitments to known categories and staying away from any general description of unknown quantity.

In 1930, Fridtjof Nansen died. No new High Commissioner was appointed at the time, but the functions and responsibilities were transferred to a new office, named in Nansen's honour. In October 1933, as the Nansen Office was on the point of winding up and on the eve of a decade or so of devastating displacements, a diplomatic conference was convened in Geneva to draft a convention on the legal status of the refugee, and to promote the principle of equal treatment with nationals.

At once the question arose, whether the new treaty should go beyond the specific categories already recognized in the 1920s, and include anyone who no longer enjoyed the protection of their country of origin. League officials were concerned with what appear today to be legal niceties. They worried that the former countries of origin – the 'refugee-producing countries' – might protest, even as they also affirmed that the international community of the time, being based on principles of law and justice, could hardly allow a substantial number of individuals to live without a clear legal status.

Like the drafters who followed them twenty or so years later, they were cautious, anxious not to appear to be doing anything innovative, and claimed merely to be consolidating earlier practice.

But there were indeed innovations and hints of problems yet to come. *Non-refoulement* – the now familiar principle that no State should return a refugee in any manner whatsoever to where he or she may face persecution – was mentioned for the first time in an international agreement. Limitations on the power of expulsion were also mooted, for example, where the only reason was destitution, and where destitution in turn was consequential on the State itself having prohibited employment. The interlinkage of responses and consequences began to be seen and understood; access to education was readily seen as an essential condition of equality, but also a resource of potential benefit to the asylum State, should the refugees it trained ever be able to return home.

And so it was that over two and a half days, from 26-28 October 1933, the representatives of fifteen States – all save China and Egypt from east, west and central Europe – debated the issues, voiced their concerns, and recited their achievements.

That debate revealed and further confirmed the central elements, to some of which I have already alluded; first, recognition and acceptance of the international character of the refugee problem, at institutional and practical levels; secondly, the continuing relevance of national interests; and thirdly, the convergence *in fact* of national practices, reflecting in various degrees the acceptance of common principles.

But as is often the case with international meetings, this Geneva Conference in 1933 was also a time for self-congratulation. One after another, the participants recited their own State's contribution to solving the Russian refugee problem, and why, more often than not, they could not be expected to do much more.

Mr Myers for Belgium, for example, explained why his country could support a particular legal status for refugees, yet have reservations in matters of security and social and economic order.

Mr Gorge, for Switzerland, noted how much had been spent on refugees since 1919, but also how his country was threatened with an overpopulation of foreigners.

Mr Kulski reported how his country, Poland, had taken in more Russian refugees than any other, all of whom, as far as possible and notwithstanding the financial and economic crisis, were treated as if they were Polish nationals. Still, he too had reservations about taking on specific legal obligations, particularly given Poland's special situation. For countries bordering Russia,

he said, the refugee question looked quite different than for those more distant, where refugees arrived only after having passed through a sort of filter. Finland agreed, most heartily.

Like Czechoslovakia, Poland too had problems with the refugee definition, which seemed remote from reality. Did it cover *everyone* who no longer enjoyed the protection of the Soviet Union? When exactly should protection have been lost? Because it was not clear, the number of refugees might increase indefinitely, which was unacceptable. The refugee definition should be time limited, and not extend to those who lost protection after a certain date (though he accepted that this might not be acceptable to all States).

The Yugoslav representative also found it difficult to contemplate legal obligations in a field driven up to now by 'sentimental reasons.' Austria did not want to go beyond existing arrangements, particularly if they involved more expense. Bulgaria and Romania both were sure that everyone knew of *their* contributions, and in Romania's case, of the complete assimilation of Russian refugees in matters of social and judicial assistance.

Lithuania raised the concerns of a small State neighbouring a refugee source country; she had to accommodate the poorest of refugees, those with the means having moved on elsewhere. The Chinese representative, on the other hand, recalled the length of his country's frontier with Russia, and hinted at the 'political activities' which refugees had engaged in .

Debating the draft

Among the first of the substantive issues to be debated was 'return clauses' for Nansen certificates, and whether refugees should be allowed to go back unhindered to the country of issue. Again, States were divided. Austria wanted the option of considering each potential readmission on a case by case basis. Finland thought that frontline receiving States deserved special attention, and that no one could think of *obliging* such States to readmit every refugee who had ever stayed there. Greece, too, said that a refugee's departure was considered definitive, and Poland was of much the same view.

Next came *non-refoulement.* Poland took a strong stand against any obligation, again by reason of its geographical situation. Belgium and Egypt too were reluctant to accept any limitation on their expulsion powers, particularly on security grounds.

The French representative, however, noted how it was often impossible to expel a refugee, and how essential it was to find a solution to a deplorable situation in which refugees could find themselves repeatedly incarcerated, simply by reason of their inability to leave.

When it came to the vote, though, while Poland maintained its position on the possibility of *refouling* refugees who had entered irregularly, other States demurred, voting to retain the original text which seemed to include them in the general prohibition: an essay in negotiated ambiguity only too common in international affairs.

The debate turned to assimilation, and States were perhaps more accommodating, recognizing the need for refugees to access both the labour market and social security, even if equal treatment with nationals was perhaps a step too far.

In the afternoon of Saturday 28 October 1933, the Conference wound down to its conclusion. Most States indicated, with little obvious enthusiasm, that the matter of signature and ratification would have to be referred to capitals. Promises to continue to receive refugees were made, but the reluctance to accept specific obligations re-emerged. For Yugoslavia, humanitarian action must spring from the natural generosity of States, not from treaty.

Only three States signed on the day. The President of the Conference was confident that a substantial number of ratifications would follow; but it was not to be. Only eight States ratified, and three of them with substantial reservations and declarations.

The years that followed

The years that followed of course were dominated by refugee movements – from fascism, from nazism, from the Spanish civil war (400,000 crossed into France in ten days). One new High Commissioner for Refugees, James Macdonald, resigned, because he could not get States to recognize and deal with the root causes, with the *political* reasons for flight.

As the reality of nazi militarism began to penetrate political circles, US President Roosevelt convened a conference at Evian in 1938. Notwithstanding the times, notwithstanding knowledge of events and of persecution and of flight, humanitarian responses were not in the air. On the contrary, refugees were the potential threats – to the economy, to social cohesion, to the process of 'appeasement'. Accommodation on exodus with the nazi regime was contemplated, a new intergovernmental committee on refugees was set up, but practical action (let alone agreement on standards of treatment) was not forthcoming. The war would change all that, though in unexpected ways.

When States finally came together again in the new United Nations, refugees were suddenly high on the agenda. In its first London session in February 1946, the General Assembly identified three key principles: (1) that the refugee problem was international in character; (2) that there

should be no forced return of those with valid objections to going back to their country; and (3) that, subject to the above, repatriation should be promoted and facilitated.

The following year, 1947, with a short-term specialized agency (the International Refugee Organized – IRO) now in principle established, the General Assembly called on States to accept a 'fair share' of so-called unrepatriable refugees. And over the next four years, a phenomenal resettlement and integration programme got underway, with places and opportunities found for well over a million refugees and displaced persons.

But it was expensive: $400 million over 4 years or so at 1940s values, with the US bearing 60% of the total cost, and the US and the UK together carrying 75%.

Yet the IRO had only ever been seen as a temporary agency, charged with providing protection and solutions for a temporary problem. Even with the continuing exodus from eastern Europe, western States generally were keen to find an alternative. The model they chose was an initially non-operational United Nations agency – the UN High Commissioner for Refugees – and a complementary international agreement by way of which States would commit themselves to specific obligations on behalf of refugees – the 1951 Convention.

Negotiating the 1951 Convention: Australia's contribution

From having been something of a bystander in earlier negotiations, Australia moved to participate more fully in the 1951 Conference of Plenipotentiaries which met in July to finalize the Convention.

As a country of immigration, distant from the major sources of refugee displacement, Australia's interventions reflect a particular perspective, the continuing relevance of which may be questionable. But I suggest that they should not be discarded as merely quaint or time- and situation-specific. On the contrary, they can provide insight into contemporary attitudes, explain persistent perceptions of the refugee condition, and perhaps even provide guidance on future choices.

Australia's background contribution to the resettlement of refugees and displaced persons under the auspices of the International Refugee Organization should also be recalled – its response in effect to the General Assembly's 1947 call on States to take a 'fair share' of non-repatriable refugees. Some 160,000 refugee migrants had by then been admitted to Australia under an agreement with the IRO. Every resettled refugee was required to sign an undertaking, agreeing to remain for two years in the employment found for them and not to change employment

without permission. This, said Australia, provided for a high intake – who could doubt it? – and was sustainable because it secured the labour essential for the development of Australia's resources, basic industries and services, and reduced the pressure that would otherwise have affected metropolitan areas.

The refugee migrant, in turn, also benefited. The Government undertook to find work, ensured paid labour from day one, prevented exploitation, and provided an opportunity for familiarisation and assimilation. The success was evident from the numbers accepted under the Displaced Persons Resettlement Scheme.

Many of Australia's concerns at the 1951 Conference and many of its ten or so formally proposed amendments reflected Australia's concern that these programmes, including directed labour schemes, might fall foul of the Convention's non-discrimination provisions.

Right from the start, the Australian representative, Mr Shaw, emphasized that, as a country of immigration, Australia's approach to the refugee problem differed from that of other States. Though it might not be of direct interest to Australia, since it did not confer any benefits on refugee migrants that were not already provided by Australian legislation, his government nevertheless supported the idea of a convention designed to secure definite rights for refugees and a proper definition of their status in the new country. It was essential, however, that its policy and practice on resettlement and directed employment should be recognized, lest they be considered incompatible with the Convention.

Just as in 1933, it was not long before someone mentioned how different and difficult it was for those countries which had no choice but to admit refugees without prior examination. Here, too, employment restrictions might be called for, and they were not just a matter for immigration countries. Mr Shaw himself was later to admit that dividing States into countries of resettlement and countries of asylum was an 'unduly facile simplification'. Australia too had had to receive many thousands of refugees from the Japanese occupation, who had landed 'illegally' on its territory.

He added, and Ken Rivett would surely have been amused by this, that several economists of world-wide repute had argued that the Australian immigration rate was too high. Australia was prepared to take the risk, but wanted to be clear about its commitments. Mr Shaw persisted. Four separate amendments were proposed with the express purpose of reminding refugees of their duty to observe the conditions of admission. And still mutual misunderstanding continued. Even Canada, which operated a similar scheme, did not want the particular concerns of an immigration

country to water down the Convention. Others pointed out that discrimination *in favour of* refugees was precisely what the Convention was about.

The fact is that, for all his manifest concerns, the other participating States were singularly unconcerned with the issue of principle, and none of Australia's proposed amendments was accepted, notwithstanding dire warnings of non-ratification.

The recurrent problem of 'security'

Interestingly, given today's 'obsession' with terrorism, Australia's second main area of concern related to national security as a basis for taking 'provisional measures' in time of war or other grave and exceptional circumstances. Australia proposed that 'national security' should be added as an additional basis justifying such measures, though Mr Shaw disclaimed any intention, 'to open the way to an indefinite extension' of the circumstances in which such measures might be taken. Others, nevertheless, were indeed worried about what the national security reference might lead to. The Swiss Representative recalled that the aim of the Convention was primarily to protect refugees – whatever the intention, the danger of an overwide interpretation of such terminology remained. In the event, the national security option was not pursued.

A change...?

As this 1951 Conference wound its way to a close, the Australian representative seemed to gain confidence. The more he had studied the question, he said, the more he had been impressed by the fact that Australian practice, so far as refugees were concerned, was fully in keeping with and at times even more liberal than was required by the terms of the Convention.

In his final intervention, on the federal clause, he recalled that the purpose of the Convention was not so much to prescribe mutual obligations between States, as to accord certain rights to refugees. Hence, the goal should be to ensure that as many States as possible were able to implement its provisions; and indeed, it was with Australia's ratification in April 1954 that the 1951 Convention relating to the Status of Refugees entered into force.

What is to be learned?

These two moments in history are revealing. They show a common understanding of just who the refugee is, and of the inherently international character of the refugee phenomenon. They reveal recognition of the constancy of refugee movements, rather than of their temporariness. They disclose acceptance of the need for refugees to be protected, and eventual acceptance of the

necessity for international obligations, most readily in regard to standards of treatment, but also in the matter of basic principles, such as non-return.

Above all, these two moments confirm the continuous impact of ‘sovereign self-interest’ in international negotiations, but also how it may and must be moderated in the mutual relations of States, by their recognition of the need to cooperate in facing up to forced displacement and related humanitarian problems.

Kenneth Rivett Orations

International Refugee Protection: A Work in Progress
Part 2: Sovereignty and Co-operation

Sydney, 24 November 2005

Background

What emerges first from an examination of the history of today's international protection regime is the common understanding of the refugee as someone who no longer enjoys the protection of his or her country of origin, and who has not found the protection of another.

Secondly, there is the recognition, among all those States which participated in the various League initiatives, that the situation of the unprotected was to be deplored, and to be remedied, in particular, by assuring for him or her a clear, legal status.

Thirdly, there was acceptance, on the basis of experience if nothing else, that the key to the refugee's self-solution was to ensure that he or she enjoyed a guaranteed standard of treatment; ideally, equality with nationals, but in any event treatment no worse than would be accorded to another non-citizen.

What is also clear is the initial reluctance of States to move from non-binding arrangements and recommendations into the field of legal obligation. The first such arrangement for and on behalf of refugees dealt simply with the conditions for the issue of identity certificates, initially with no consequential legal implications. Some fifty-six States eventually adjusted their practice to accommodate the agreed conditions, and to recognize the validity of documents issued by others. But it took time for the certificates – the Nansen passports – to be accepted as valid for international travel, and yet more time for issuing States formally to complete such documents by adding a 'return' clause, by way of which they undertook to readmit the holder should he or she wish or be compelled to return from abroad.

It was also not until the 1930s, however, that States working through the League were prepared even to contemplate additional obligations. But that did come, and in 1933 they began to accept that certain standards of treatment essential to successful integration – employment, social security, education – should be guaranteed as a matter of treaty law. At the same time, and often on the basis of an empirical understanding of the practical difficulties in actually removing refugees, they came to see that the very unprotected situation of the refugee necessitated certain

restrictions even on their jealously guarded sovereign competence to expel the foreigner on economic, social or security grounds. The principle of *non-refoulement,* the principle that no refugee should be expelled or removed or returned to his or her country of origin, now entered the emerging picture of international protection.

But one should not discount, disregard, or indeed forget the fact that States continued to express serious reservations about the form and manner of their response to refugees. What today we might call the 'front-line States' often considered that they deserved special consideration. They had to bear the greater burden of reception, and should not therefore have to readmit any refugee who had moved on to another State. Their very position, it was said, also meant that they could not accept restrictions on traditional sovereign powers over entry and expulsion.

At the same time, some other States also doubted the very point of moving from simple humanitarian practice into obligation. Generosity, it was suggested, had to spring forth naturally, and could not be guaranteed by any rule. And no State which participated in the discussions of the day appeared to consider that any special effort, let alone any 'legal' effort, was needed to make co-operation in pursuit of solutions a matter for greater regulation.

Nevertheless, the fears and apprehensions of the 1920s and 1930s (many of them not without foundation, given the economic, social and security threats of those years), did not generally stand in the way of pragmatic solutions – at least until the rise of nazism brought out the worst in a community of nations apparently determined to reject any responsibility to accept Jewish and other refugees, best illustrated perhaps by the voyage of the *St. Louis,* which sailed from Hamburg on 15 May 1939 carrying some nine hundred German Jews in an ultimately fruitless search for refuge.

But of course it was also the experience of nazism, the second world war, and the political aftermath, which were to provide the backdrop to the refugee regime of today.

The first product of that process was the International Refugee Organization, a short-term, specialized United Nations agency, treaty-based and funded. Its responsibility was to clear up the population displacements left over from the war, on the basis of three principles singled out by the UN General Assembly early in 1946: the *international* character of the refugee problem; no forcible return to their country of origin of those with valid objections; and, subject to these considerations, facilitation and promotion of repatriation.

In 1947, shortly after the IRO came into being but with the Cold War underway and the east-west divide no longer in doubt, the General Assembly called on States to accept a 'fair share' of so-

called unrepatriable refugees; repatriation to the Soviet Union and the eastern bloc was no longer the goal, if it ever truly had been. Over the next four years, a phenomenal resettlement and integration programme got underway, with places and opportunities found for well over a million refugees and displaced persons from Europe. This necessitated co-operation and co-ordination in practice, but even though there were then some fifty-four members of the United Nations; only eighteen joined the IRO and contributed to its programmes, either financially or with commitments to the resettlement of Europe's refugees and displaced.

The scope for formal co-operation was as limited as it had been in the time of the League, even though a reading of the United Nations Charter might have hinted at something stronger. There, in Article 1, the 'purposes' of this new organization clearly include 'international co-operation in solving international problems of [a]... humanitarian character', with the UN itself to be a 'centre for harmonizing the actions of nations in the attainment of these common ends.'

Translating the principle of co-operation into effective arrangements for action was, and is, another matter. At times, the very word seems to be purely symbolic, to be invoked at periodic moments of crisis or concern, or embedded with little intended significance in resolutions, declarations, constitutive instruments, and the like.

So, for example, when the General Assembly adopted resolution 428 (V) and a statute for the new office of UN High Commissioner for Refugees, it called on governments to co-operate with this office in the performance of its functions. It lists the options, none of them obligatory: Becoming party to conventions, entering into special agreements with UNHCR, admitting refugees, assisting with efforts to promote repatriation, and so on.

The Preamble to the 1951 Convention likewise recognizes the 'unduly heavy burdens' which certain countries face when granting asylum, and that satisfactory solutions cannot be achieved without international co-operation. Article 35 of that Convention seems formally to oblige States party – there are now 146 of them – to co-operate with UNHCR in the exercise of its functions, but again it does not show clearly how to translate the general undertaking into particular commitments.

Still, with their self-evident humanitarian dimension and their latent capacity to impact the economic, social and even security situation of receiving States, cross-border refugee movements certainly have an international character, and give rise to a legal 'interest' of some sort on the part of every State member of the international community. The apparently normative or binding references to co-operation in a succession of documents, even in treaty, might have led one to suppose that the principle implied also a measure of responsibility, and required practical action.

Both history and more recent developments, however, appear to confirm that what counts first for States is self-interest, as Georg Schwarzenberger commented in 1954.[1] The immense gap between a literal reading of international provisions and the reality could hardly be more compelling.

And yet still there is evidence pulling in the other direction. The institutions of international co-operation are indeed more comprehensive, more universal, and more firmly established than at any time in the past. We now see 146 States party to the 1951 Convention, and sixty-four States members of the UNHCR Executive Committee which has, not surprisingly, consistently endorsed the principles of co-operation and international solidarity.[2]

Pursuing an idealised 'obligation' of co-operation is probably pointless. It is self-interest which drives co-operation, and action in pursuit of solutions for refugees depends, as it always has done, on the formal consent of States, staggering from one crisis to another. And so it is, ironically or understandably, the largest of emergencies that engage self-interest, rather than the persistent niggling of small, distant, humanitarian situations.

By 1989, for example, many States had begun to tire of the huge costs – human and material – involved in the Indo-China refugee crisis. So they co-operated to bring it to an end. The Comprehensive Plan of Action adopted that year contained a combination of measures to deter clandestine departures; regular departure programmes; reception and temporary refuge for new arrivals; region-wide refugee status determination procedures; resettlement undertakings for various groups such as long-stayers and new arrivals found to be refugees; and repatriation of non-refugees – the whole brought together under an institutional framework of international co-operation.

The undertakings which States gave in the context of the Comprehensive Plan of Action were indeed translated into action on the ground – not always consistently with international legal principle, it must be said – but ultimately in a manner which brought the crisis either to an end, or within manageable proportions.

---

1 Schwarzenberger, G., *Power Politics*, (2nd rev. ed., 1954), 228.

2 In 1988, for example, the UNHCR Executive Committee reaffirmed that 'refugee problems are the concern of the international community and their resolution is dependent on the will and capacity of States to respond in concert and wholeheartedly, in a spirit of true humanitarianism and international solidarity'; see Executive Committee Conclusion No. 52 (1988) on International Solidarity and Refugee Protection.

It is in regard to the small, distant, forgettable situations, however, that we find the strongest evidence of a lack of co-operation, of the absence of a sense of duty or responsibility, of enduring failure on the part of the international system to provide the resources, material, or resettlement places without which there will be no solution. UNHCR recently counted thirty-eight so-called protracted refugee situations still in need of resolution, comprising some 6.2 million refugees – two thirds of those presently within its mandate.

It would be nice to be able to conclude today with the confident assertion that there is at least an emerging legal principle which requires States to co-operate in on a basis of international solidarity and burden sharing; that it requires States to engage actively in promoting solutions such as resettlement or voluntary repatriation, or in dealing with and effectively removing the causes of forcible displacement.

But engagement still remains a political matter, a matter of discretion, in a context in which each and every State appears to act first and foremost in the light of its own self-interest. And the trend seems to be getting stronger.

The General Conclusion on International Protection adopted at the 2005 UNHCR Executive Committee meeting welcomed increased resettlement offers, but made no mention of co-operation, let alone obligation. The Executive Committee's Conclusion on local integration, adopted at the same session, even went out of its way to stress that this solution 'is a sovereign decision... an option to be exercised by States guided by their treaty obligations and human rights principles'. This is not, I suggest, what States have in fact committed themselves to through their acceptance of the 1951 Convention, Article 34 of which obliges them, 'as far as possible', to facilitate the assimilation and naturalization of refugees. In my view, the implementation in good faith of even such an incomplete obligation means that we are no longer solely within the area of sovereign decision.

Notwithstanding these legal dimensions, however, many States seem to want to put yet further distance between themselves and the United Nations ideal of co-operation in the resolution of humanitarian problems. In many respects this is quite strange, for many policies now being adopted and put into practice stand at odds with the lessons of experience, however much they may reflect the desire of many States to assert their sovereignty even in the face of humanitarian need.

If one stops to think about it, the benefits of co-operation are not just theoretical; again, South East Asia provides both model and example, not only by way of the Comprehensive Plan of Action, but also with the fact that some 1.4 million refugees were successfully resettled in the

years after 1975. The dangers of unilateralism are equally self-evident. Co-operative action leads to solutions and to a fair allocation of responsibilities among nation States; unilateral measures lead to isolation and a greater *un*willingness to help.

I'm thinking, of course, of the *Tampa* incident in 2001, and of its consequences. Before an Australian audience, I do not need to recount the basic facts, on which there has already been much valuable comment, particularly from academics, practitioners and judges, both here and elsewhere.

What I want to do, however, is to use this incident to show what might be done – what in my view, ought to be done – in this and other similar circumstances in the future. The incident discloses a wider context, of course, particularly in relation to human rights, but it also typifies a scenario in which no single issue, such as rescue at sea and disembarkation, can ever be considered in isolation.

The *Tampa* incident usefully reminds us all that neither the law of the sea nor international refugee law provide clear guidance on the landing of rescued refugees, or on responsibility to determine their claims for refugee status, or on solutions. However, the premises of the international protection regime (which draws on the rather inchoate principle of co-operation, on the specifics of international refugee law, on human rights law, and general principles of international law), do provide a normative and institutional framework within which States ought to seek solutions.

Primary rules lay down the parameters for State action, indicating the limits beyond which the State cannot go without incurring responsibility for its (unlawful) actions. Such primary rules do not necessarily provide solutions for every resulting problem, but they are the essential juridical basis from which 'subsidiary' rules will take their normative and constructive force.

The first primary rule in the *Tampa* situation, never disputed, was to rescue those in distress at sea; the second, also never disputed, was *non-refoulement,* which prohibits the return of any individual to persecution or risk of other relevant harm. But there was no rule prescribing disembarkation, or identifying the appropriate port of call, let alone requiring the grant of asylum.

I use the phrase 'primary rule' in this context with a particular purpose in mind. The fundamental rules of the international refugee regime are *primary* in the sense that, unless there are very exceptional circumstances, they override or trump other important interests, commonly expressed in terms of sovereign powers. They change the picture, not just by creating an exception in the instant case, but also by laying down the conditions for *subsequent* State conduct (not to return

a refugee to where he or she may be persecuted; not to penalize a refugee by reason of illegal entry; to deal with a person *as a refugee*, and within the legal framework of protection, co-operation and solutions provided by international law and its institutions).

The identification of such primary rules is important for many reasons; they establish 'priorities' and set out the parameters for State action – boundaries that may not be crossed. For example, it is (and has probably always been) a fact that refugees will often use the same means of travel or facilitation of entry or residence as are used by illegal, irregular and undocumented migrants. They will often face the same or greater exploitation, but for many of those in search of protection, these will be the only means by which they are able to leave their country of origin or an intermediate country of temporary or ineffective refuge.

The measures that States may lawfully take to combat smuggling and trafficking are nevertheless likely to have a major impact on refugee protection. The primary rules remind States that, in this context of control, the necessary clear distinctions between refugees and others must always be made, even though many of the rules of international human rights law also apply, irrespective of status. It is in the very process of making such distinctions, moreover, that the key to the appropriate solutions may also be found.

In recent years, States have indeed come to accept that they must not only co-operate to deal with trafficking, but that they must also take steps to ensure humane options for the return of victims to their home countries and for their reintegration. Even those who, in the parlance of today, do not need or no longer need international protection, require still to be treated humanely and enabled to go back in safety and dignity.[3]

The issue, then, is not just about securing rescue and access to territory for refugees and asylum seekers. Rather, it is a multifaceted problem, covering a range of different interests, many of which will likely pull in different directions. The problem with knee-jerk reactions is that, while they may satisfy short-term electoral or political goals, they divert energy from truly international approaches. By sending out a message of unilateral disregard of the principles of international co-operation, they inevitably lead to a disinclination on the part of others to contribute to solutions.

---

[3] This is clearly recognized, for example, in Article 16(1) of the UN Protocol against the Smuggling of Migrants by Land, Sea and Air, which obliges States to take 'all appropriate measures... to preserve and protect the rights of persons' who have been the object of smuggling, 'in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.' According to Article 16(3),(4) States should also 'afford appropriate assistance to migrants whose lives and safety are endangered by reason of being smuggled, and shall... take into account the special needs of women and children'.

No one anywhere else in the world sees the *Tampa* incident, the Pacific 'solution', or the Pacific 'strategy', as anything but Australia's problem; one for which it is alone responsible, and for which it must pay. This is a pity, because the incident raised a host of truly international issues which are not confined to the Pacific region – issues which are ripe for a truly co-operative approach, just as rescue at sea and resettlement were in the years of the Indo-China refugee crisis. It is the nature of the international protection regime, however, that it is conditioned on each participating State *not* acting unilaterally; on each participating State *not* insisting on the paramountcy of its own self-styled sovereign interest in any particular case.

Of course, one should beware of exaggerating the extent of Australia's challenge to refugee law and the impact of its practice on others. Norway, the *Tampa's* flag State, rejected the Australian position, and no other maritime State indicated any support for its approach. In fact, the only sphere in which Australia may be considered to have succeeded in its unilateral action is in determining the scope of application of domestic law – a matter within its domestic competence in a formal sense, but not at all determinative of its obligations at the international level. No matter how much of Australia is 'excised' from Australia, its international obligations remain unchanged and its liability for breaches of international law that may arise are unaffected.

Nevertheless, there are aspects to Australian policy and practice which ought to give cause for concern. International refugee law acknowledges that refugee movements are likely to be irregular or unlawful, but that individuals nonetheless have the right to seek asylum from persecution. Australia's position aims to confound that principle, and to allow no room in which rights or protection may be claimed.

The denial of access to procedures, to recognition as a refugee in appropriate cases, and thereafter to the rights of a refugee, is thus tantamount to a rejection of the system of international protection as a whole – a system which is premised on the acceptance of responsibilities, within the rule of law, and on a commitment to work co-operatively in pursuit of solutions.

In 1982, at a time when it was one of the major donors to refugee needs generally and a leading country of resettlement for Indochinese refugees, Australia promoted Executive Committee Conclusion No. 22 on Temporary Refuge, precisely because it feared being abandoned by other States in the case of a mass influx of refugees and asylum seekers. Its recent essays in unilateralism and its steps outside the rule of law have certainly made it harder for other States to go on thinking of Australia as a trustworthy partner in refugee protection and solutions. And this too is a pity, because Australia does continue to play a critically important role in refugee resettlement.

An international solution

The *Tampa* incident is not untypical of the sorts of problems arising in every maritime sector – the Mediterranean, the Caribbean, the South China Sea, off the Horn of Africa, wherever. Protection is a dimension in every instance, as is the good faith implementation of international obligations.

The continued existence of 'grey areas', of unregulated gaps in and among different legal regimes – the law of the sea, shipping law, refugee law, human rights law – and of competing or unharmonised jurisdictions – coastal State, flag State, State of nationality, State of actual or potential disembarkation – stands as an open invitation for exploitation by any number of States anxious to place self-interest ahead of international co-operation.

Rescue at sea needs no explanation, no justification. It is a custom and a rule of indisputable authority, and an area too in which law and practice continue to develop with a view to improving the safety of life at sea.

It is an area full of relevant practice. During the Indo-China refugee crisis, governments, often driven by public opinion, ultimately did respond to the needs of refugees in distress at sea, and to the challenges posed by States also initially unwilling to play their part. Resettlement undertakings were developed, as well as practical assistance with disembarkation for ships' masters and, in a small way, with compensation for costs.

Today, no comparable refugee crisis galvanizes States or the public in quite the same way. Flows are more mixed than they were, migrants now joining refugees and asylum seekers. But the difficulties for ships' masters fulfilling their legal duty are the same. We know what the law requires, we know that solutions must be found. The challenge is the good faith implementation of the rules.

What I suggest we need is an 'Inter-Agency Action Group on Humanitarian Problems at Sea'. Bringing together those with recognized legal and practical interests in this increasingly humanitarian issue, its function would be to propose, promote and co-ordinate responsibilities in rescue at sea situations, generally, regionally, and in specific instances.

Its mandate would be to take into account and to apply existing rules and arrangements – the law laid down in the UN Convention on the Law of the Sea, the Convention on the Safety of Life at Sea, the provisions of coast-State Search and Rescue schemes. Its goal would be to resolve differences in pursuit of solutions; to ensure the safety and welfare of those rescued in distress

at sea; to ensure protection solutions for those who are refugees; and to 'manage' the disparate interests of States (flag States, disembarkation States, Search and Rescue States) and of the international community.

The Inter-Agency Action Group would necessarily involve those United Nations agencies having or likely to have competence – the International Maritime Organization, the UNHCR, but also others outside the UN system, such as the International Chamber of Shipping. It would necessarily include States, either *ad hoc* or from among those willing to provide resettlement places for refugees, and places also for others unable for good reason to repatriate or to return in safety and dignity to their country of origin. So far as protection issues had already been resolved compatibly with international standards – an important qualification, for we are now talking about an agency which is not part of the United Nations and which does not consider itself internationally accountable in matters of human rights – the International Organization for Migration might also be invited to assist with migration solutions.

But there would be a limit to this Inter-Agency Group's formal responsibilities. Save in exceptional circumstances and with the agreement of its membership, it would not be competent in matters of unilateral maritime interception, where one State or a group of States decides to engage in the physical interception or blocking of boats or ships believed to be carrying irregular migrants or refugees, or to be engaged in any other 'prejudicial' activity.

In this context, I suggest, international law already regulates the issue of responsibility, which falls squarely on those doing the intercepting. Neither international human rights law nor international refugee law are limited, in their most fundamental provisions, to the territorial domain of States. This means that it is the intercepting States which must ensure that any refugees among the intercepted receive protection and are not returned to persecution, torture or death; *and* that they are offered appropriate solutions. No obvious international responsibility falls on States not engaging in interception operations, and there is thus no formal basis upon which the intercepting State is entitled to invoke the co-operation of other members of the international community.

The primary responsibility of the intercepting State has many legal consequences. For example, that State must ensure that basic principles of protection are factored into its operations, if loss of life, violation of human rights, and damage to long-standing and mutually beneficial rules and principles are to be avoided.

Some conclusions

The sovereignty of States is still very much a part the international scene, as is the tension between obligation and humanitarian commitment. Co-operation may be the poor relation of duty, but experience shows that it is essential if refugee problems and humanitarian problems at large are to be solved compatibly with fundamental human rights.

In the matter of the high seas, standard-setting is on-going, within the International Maritime Organization and within the UN system at large. It is in the interests of all States, I suggest, to co-operate in this exercise, but also in new initiatives, such as I have described. Not only will this ensure that law and obligations are observed, but it could equally serve as a model of co-operative effort for many of the complex situations which we are surely likely to face in the future.

Given its position as well as its manifest interests in the field, this is precisely the sort of initiative in that Australia should take leadership; whether the leaders are there, of course, is another matter – one for the people...

Kenneth Rivett Orations

International Refugee Protection: A Work in Progress

Part 3: What Future Protection?

Melbourne, 25 November 2005

To inquire into the future of refugee protection raises a variety of potentially interesting questions, the first of which is perhaps the most obvious: Does it have any future at all? This in turn might be a question about the movements of people – have people stopped fleeing from persecution or other relevant danger, or is it likely that they will stop soon? Or it could be a related question, about the availability of effective protection of human rights throughout the world.

Yet another version of the futures question might ask whether States, whose territory and jurisdiction make them primarily responsible for providing protection, are in fact still willing to abide by the principles and precepts agreed in the past. Or has the political environment changed so much that States see no need to fulfil their legal obligations of protection, such as the duty not to send refugees back to where their lives or freedom may be endangered; or to accept responsibility for deciding whether a non-citizen seeking entry is indeed in need of such protection?

While some of these questions may well be relevant, others may involve mere arid speculation. What I want to do is more straightforward. To look at the present day international refugee protection regime in light of its history and recent and ongoing challenges, and then to consider what might be its future, bearing in mind certain assumptions.

The first assumption is that the present international community of independent 'sovereign' States will continue into the foreseeable future, and that people will indeed continue to leave their country of origin in search of refuge from persecution and from other human rights-related harm.

The second assumption is that States will continue to look for solutions to this problem; and that, as we have seen historically and recently, their self-interest will be a factor in policy formulation and in their future co-operation with other States. At the same time, they, or some of them, will be increasingly willing to revisit those aspects of 'sovereignty' which appear to stand in the way of alternative responses.

My third assumption is that, whatever form a future international refugee protection regime may take, it will be required to operate in a world of increasing international migration, and in a political context in which security issues continue high on the agenda.

What I hope to achieve is relatively modest: To show, first, that there are indeed a number of serious weaknesses in present international protection arrangement; secondly, to identify certain basic premises on which I believe a future protection arrangement should be founded, and principles by which it should be governed; thirdly, to set out the goals which such an arrangement should aim for, and from that to infer aspects of the institutional framework by which those goals might best be achieved; and fourthly, to consider briefly how existing models of international organization and regulation might be reformed.

Background

The short eighteen year period of League of Nations activity for refugees saw the coming of some eight treaties and arrangements, and of some six different agencies, high commissioners, and offices. On the other hand, since 1 January 1951, we have seen just one High Commissioner's office, and one treaty, the 1951 Convention, amended just one time.

One reason for this relative stability is that, after several starts, States were finally prepared to agree to a definition of the refugee which could apply to new situations and which, particularly after the formal removal of temporal and geographical limitations by way of the 1967 Protocol, could apply universally.

Another aspect of the refugee problem which has not visibly changed has been States' view that it is essentially 'temporary' in nature. This might be thought encouragingly optimistic, and evidence of States' intent and willingness to ensure that solutions to forced migration will be quickly forthcoming, and that no refugee situation should become protracted through time. Alternatively, it might merely signify States *unwillingness* to commit themselves to meeting humanitarian and protection needs without limit of time.

Some refugee situations, considered in the round, are indeed of relatively short duration, but the history of the last eighty or so years also tells us that the general issue is enduring; that given the regularity with which societies organize and disorganize themselves, flight in search of refuge could be as much a natural feature of the human condition as migration itself.

The present regime

During the late 1940s, as the International Refugee Organization was close to fulfilling its own temporary mandate, States agreed to follow it with the creation of a further temporary office, a United Nations High Commissioner for Refugees, to be elected by the General Assembly. The work of the High Commissioner was to be facilitated by a new treaty, and work began in parallel on the Statute of the new office and on the text of what was to become the 1951 Convention relating to the Status of Refugees.

The new High Commissioner would take on the role of providing international protection to refugees and assisting governments to find permanent solutions, while the new treaty would ensure that refugees were better protected and enjoyed a status that would allow them to settle successfully.

In the years that followed, the UN's refugee agency remained relatively small and relatively stable, even as its operations expanded beyond Europe, to deal with displacement caused by national liberation struggles in the 1960s and 1970s. With the huge exodus from Indo-China from 1977 onwards, however, UNHCR entered on a period of exponential growth until, in the 1990s and subsequently, its staff exceeded 5,000 and its annual budget grew to more than $1 billion.

UNHCR's operational tools – the Statute and its intended complement, the 1951 Convention – remained largely unchanged, however; they had been framed in the light of League and World War Two experience, developed in the shadow of an emerging Cold War, and influenced by the new concept of individual human rights. But the regime of High Commissioner and Convention had also been drafted at a time when State sovereignty and the principle of non-intervention within the reserved domain of domestic jurisdiction carried very particular weight.

All of this had certain consequential and institutional disadvantages. Neither UNHCR's mandate nor the Convention were triggered until the occurrence of a particular event, that is, the crossing of an international border. Neither UNHCR nor any other UN body was willing or able to take action to prevent refugee flows, or to bring protection and assistance to groups, such as internally displaced persons, whose situation was no different and no less dire than that those who had managed to cross the frontier.

UNHCR's mandate identified it as, in principle, a non-political and essentially *reactive* organization, whether in the provision of protection or finding solutions. It was not expected to *promote* repatriation, or to provide relief outside the refugee community, or to assist the return of those having no need of international protection, let alone to *prevent* the flow of refugees.

But these were the sorts of tasks for which States were increasingly seeking a partner, despite the apparent inadequacies of the legal regime. For example, the 1951 Convention and the 1967 Protocol have a number of serious weaknesses. The refugee definition, although general in character, was always intended to be of *limited* application; in 1951, States were as unwilling to write a blank cheque for unknown future groups of refugees, as they had been in the 1920s and 1930s.

For some, the emphasis on individual criteria – the notion of a well-founded fear of persecution in every particular case – makes the Convention unsuited for application in large-scale movements. The OAU's regional arrangement of 1969, the 1984 Cartagena Declaration, and now the EU Qualification Directive do indeed suggest that the Convention now needs to be complemented by a broader approach.

Others argue that the development and consolidation of human rights principles have made refugee-specific protection redundant – that *everyone* is now entitled to protection against egregious violations of human rights, and thus, if a non-citizen, also against return to face the risk of such violations. To protect the class of *refugees*, it is said, is to privilege a particular group of human rights victims without justification.

See from the perspective of the State, many issues also were left unregulated. While the Convention lays out its field of application and the fundamental principle of *non-refoulement,* it says little about admission, nothing about procedures, and makes no provision for allocating responsibility, in the sense of identifying *which* State should take a decision in any particular case. As the opportunities for travel grew, so these gaps were perceived as problems by States, for which they devised home-grown solutions, such as safe third country and out of country interception, in all their various forms.

Finally, while the High Commissioner is charged with supervising the application of the Convention (and while States party undertake to cooperate with UNHCR in regard to this responsibility), the function is largely incomplete. Although in principle required to consider UNHCR's views in good faith, no State party to the 1951 Convention considers itself obliged as a matter of law to accept UNHCR's interpretation of the Convention, let alone to accept as a refugee one so identified by UNHCR.

Time for an audit

Even were there no problems on the ground, I would argue that with fifty or so years of experience now behind it, the time has come for an audit of the international refugee protection

regime, and for a review and an accounting of the United Nations High Commissioner for Refugees, of its role in and relations with the United Nations at large, and with governments and non-governmental organizations.

I would not stop there. We also need an international audit of the performance of States in relation to protection and solutions. For States are ultimately responsible, both for ensuring the capacity of 'their' institutions to respond to needs and to evolve progressively; and for the good faith performance of their own legal obligations, which provide the essential cohesion to the regime which is international protection.

Debate on the future

Let me pre-empt that audit, assume that the international protection of refugees will still be required in some form or other, but that change is needed; and try to respond to some of the questions set up earlier. The answers may not be so different from what we have today; the more important question, perhaps, is whether we should work now in different ways.

First, what should be the *premises* of a new, revised and revived international protection system? Working within the relatively ordered system of the United Nations, the foundation of refugee protection must surely be the recognition of everyone's equal right to dignity and worth. After all, this is what the United Nations Charter says when it reminds us that States members acknowledge their collective determination, 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person'; or when Article 1 of the 1948 Universal Declaration of Human Rights recalls that 'All human beings are born free and equal in dignity and rights'.

This is not the lesson of daily experience, of course, for individuals in flight are regularly treated as no more than units of displacement, denied their common humanity, and brutalized not only in their own countries, but also where they look for protection. It remains though as an ideal, and as a central value in any society, national or international, committed to the protection of human rights.

***Who* should receive international protection?**

Let us assume then a foundation in these common values, and move on to ask, *Who* is in need of international protection? This is partially an empirical question, a matter of *fact.* Given our original premise, the answer surely *cannot* be limited to the refugee as we have understood the term so far; that is, as someone whose claim to protection is necessarily contingent on having crossed an international frontier. It must now include others, such as internally displaced persons,

or the victims of human rights violations who are unable to move, or perhaps indeed, who are simply at risk.

That of course takes us back to an unspoken premise, inherent in my first assumption – that we are working within a United Nations system still premised on sovereignty and non-intervention. But if we leave that premise for the moment and focus on *external* displacement, then we will surely find no reason of principle to limit our international protection scheme exclusively to the refugee with a well-founded fear of persecution. The notion of *forcible* displacement, coupled with our recognition of fundamental human rights, suggests the ways by which we might develop our sense, not only of those who need of international protection, but also of those who *should receive* international protection, because the normal relationship of citizen to State has broken down, for whatever reason.

The governing principles

Once having recognized the nature of the circumstances leading to flight in search of refuge, the first objective is to ensure, precisely, that no one is returned to where he or she would be at risk. So far as these matters are rarely self-evident, the minimum due to refugees and asylum seekers is threefold: first, access to territory; second, access (whether individually or as a group) to a process for the assessment of risk; and third, protection for those in need.

The goals

Beyond protection, the goals of any future system of international refugee protection will surely include those which are now entrusted to the UNHCR: voluntary repatriation, local integration, or resettlement in a third State. But they will also surely include better provision in the allocation of responsibilities; a more sure funding base; and a greater involvement of or access to the *political* processes which are essential to resolving or mitigating the factors producing forced migration, and especially to firing up the commitment necessary to bring protracted situations to an end.

What institutional framework?

We now have eighty or more years experience of international organizations working with refugees and towards solutions. We understand the basic principles of refugee protection, and we know the objectives. How can we best achieve ends commensurate with human worth and dignity?

Two among many possibilities suggest themselves. First, we could think of an approach making use of UN resources, but *without* the present-day Office of the United Nations High Commissioner for Refugees. In this scenario, relief and assistance would be entrusted to other competent agencies, such as the World Food Programme, the World Health Organization, UNICEF, UNDP, or the International Committee of the Red Cross, while protection would be a matter for national governments and possibly regional institutions.

The primary emphasis, however, would be on removing the necessity for flight at the earliest opportunity, by engaging the collective security mechanisms of the United Nations and/or of member States acting under its authority. In present day discussions of UN reform, the notion of 'the responsibility to protect' is receiving a fair amount of attention. This concept, if such it be, has its origins in international relations theory rather than international law; it reflects, in particular, a deep-seated concern at the failures of the international system to deal effectively with crises through the 1990s and the first decade of the 21st Century – the failure to stop the genocide in Rwanda, the ethnic cleansing in Bosnia, the massive human rights violations in Darfur, to name a few.

Still in its early stages and by no means accepted by all States, the 'responsibility to protect' supposes an entitlement on the part of the international community to take steps to remedy a situation of humanitarian need – I paraphrase and abbreviate – in the event that the State or government responsible fails to do what is required. Its ultimate, but by no means only, sanction is military intervention on humanitarian grounds.

The notion of responsibility to protect is helpful. It focuses the mind on some of the weaknesses of an international protection regime founded and constructed on early- to mid-twentieth century conceptions of sovereignty; it encourages us now, in the twenty-first century, to step out of the box which led States to insist precisely that the UN should *not* get involved in costly humanitarian operations. In addition, it proposes a fundamental rethinking of sovereignty, in a way which would open up the reserved domain of domestic jurisdiction to international attention.

The notion of responsibility to protect is thus essentially 'needs driven'. Applied to the forced migration context, it would see no necessity to distinguish between the refugee with a well-founded fear of persecution, the refugee from conflict, the internally displaced person, the environmental refugee, the refugee from economic collapse. All are or may be 'in need' of protection.

What the responsibility to protect does not do, in its present state of evolution, is provide any answers to the institutional questions. Moreover, its internal logic suggests that humanitarian

relief operations could take the place of refugee protection, with the present rights-based approach being substituted by something else, something more discretionary, something more 'political'. Experience tells us that this approach cannot be trusted.

The continuing need for protection

Humanitarian need is not the only characteristic of the refugee. The refugee is also, in a very direct sense, in search of his or her *rights:* the right to be protected against violations; the right to be recognized. For these among other reasons, the necessity for an international refugee protection system will continue; and the institutional means, if they too are to continue, will need to draw on certain of the qualities identified in UNHCR's current Statute and on others inferred from eight decades of practice: independence, authority, impartiality, humanitarianism and accountability.

So long as borders remain and States are seen as sovereign, even in small things, the international dimension will be relevant; and precisely because serious interests of the State receiving refugees will be involved, so the individual will continue to require protection. That protection, in turn, must be provided not only by national institutions, but also by an agency with the authority, standing and competence to insist on the fulfilment of international obligations.

A 'law-based' approach to international protection already exists, beginning with the 1951 Convention and other relevant treaties, and while protection is often wider than rights, still it begins with rights and rights ought to permeate the whole. It is here, on the solid foundation of rights, that a truly protecting agency must make its stand and prove its worth. The responsibility to protect approach should surely galvanize the international community to recognize the gaps in the UN's humanitarian response system; but it cannot substitute for the rights-base of the present international protection regime.

Still, as Boutros Boutros-Ghali presciently observed, an evolving United Nations system will require greater transparency, greater accountability, and more democracy. This also applies to a future refugee protection agency, whether in deciding individual claims, administering refugee settlements, or planning grand solutions, such as repatriation or resettlement. Too often today and in the recent past, such matters have been kept behind closed doors and guarded against effective review; too often, the voice of the refugee has not been sought out, and if raised, has not been heard.

If there is indeed any future for international protection, then the issues of co-ordination and collaboration must also be revisited, for the protection of fundamental rights should never again

be subordinated to wooly thinking about humanitarian action, and lives no longer jeopardised in the name of pragmatism. A long, hard look is needed at the responsibilities of other UN and non-UN agencies, to see what they can and should contribute, among others, to the provision of *relief,* to protection and assistance for *internally displaced persons,* to local *capacity-building,* and to the protection and promotion of *human rights.*

Funding mechanisms, too, call for an equally long, hard look. An agency's dependency on voluntary contributions leads to institutional inefficiency, reducing the capacity for both strategic and contingency planning. What States donate in the humanitarian field is still very much a matter of sovereign discretion, but changes are urgently required.

Year in and year out, refugee needs combine both emergency and relatively stable dimensions. A new approach is called for, such as an 'International Finance Facility', which would include long-term donor commitments, the disbursement of funds in 4-5 year programmes, and replenishment at regular intervals; this would provide the predictability essential for effective relief management and solutions planning.

If UNHCR is to continue or an equivalent agency to be established, consideration might also be given to attaching an assessed financial contribution to membership of its governing or oversight body. UNHCR's Executive Committee, for example, now comprises sixty-four States members, each of which might be assessed a percentage of the cost of the 'General Programmes', discounted in the case of refugee-hosting and less developed countries.

These and other funding alternatives will need to be explored in the years ahead, although clearly some States will resist; long-term commitments undercut donors' capacity to earmark funds for pet, political projects, and limit their capacity to influence and control. Withholding core funding is a powerful tool which some may be reluctant to abandon, even as refugee hosting countries see burden- and responsibility-sharing as necessarily premised on the same principles of universality as refugee protection itself. Like so much else in the refugee world, however, funding refugee protection and solutions remains a 'fundamentally political problem',which will resist merely technical solutions.

If this is indeed the time for a 'new order' – and to survive every living system must evolve – then it will need to amalgamate both international and national elements. Experience, particularly over the last ten or twelve years, has shown that the international community ignores the causes of forced migration at its peril; that refugee movements can and do contribute to instability and thus also to apprehensions for international peace and security. The evolving order will have to respond proactively, with solutions in mind, to the challenges of internal displacement, intra-

State conflict, and the demographic and political pressures attaching to persistent underdevelopment.

While maintaining its position on issues of principle, the new order will need also to factor in States' concerns about individual threats to security, even though the connection between forced migration and the movement of individual terrorists is tenuous. Recent and current experience underlines the necessity for rule of law oversight, particularly where governments are inclined to act in disregard of human rights and internationally protected values. National bills and charters of rights and freedoms can help to moderate executive excess, but regional and universal protection mechanisms will still be needed.

If only from a rights, solutions and protection perspective, we will indeed need something like an Office of the United Nations High Commissioner for Refugees. But it must be fit for the twenty-first century, organized around improved accountability measures. A number of refugee operations in recent years were seriously compromised by a failure to adhere to the protection mandate laid down by the UN General Assembly and backed by international law; in the result, refugee lives were lost and rights were violated. That experience, however, also confirms the inherent strength and value of a prescribed, universal mandate, while serving as a warning against the compromises that inevitably follow from trespassing outside agency competence and authority.

Protection can be enhanced, moreover, through the recognition and acceptance of others' complementary responsibilities. Thus, the natural partner for a refugee protection agency in verifying conditions in countries of origin prior to repatriation is the UN High Commissioner for Human Rights, or a regional human rights mechanism; the natural partner on behalf of those displaced within their own lands by conflict is the International Committee of the Red Cross. On the other hand, the natural partner in migration-related matters has yet to be determined, the International Organization for Migration not having either a protection mandate or a sufficiency of independence.

The UN's sixty and more years of experience with refugee issues have produced other lessons, too: A 'temporary' agency is not the way to go; staffing procedures need radical remodelling, both so that the agency can expand and contract efficiently, as crises ebb and flow, and so that career development blends more effectively and humanely the benefits of field and central office experience; appropriate investment must be made also in building national capacities to offset the expatriate bias of the existing system.

At the inter-State level, the enhanced accountability of a revived refugee protection agency should be matched by strengthened legal competence, particularly in relation to the responsibility already recognized in behalf of UNHCR to supervise the application of conventions, whether refugee-specific or human rights-based. A more effective mechanism to oversee and supervise State obligations towards refugees and asylum seekers is sorely needed. Though not reciprocal, the obligations integral to the international refugee regime are nonetheless interlocking and often, though we may regret it, contingent. When States cross the line, they must be called to account, by the UN's refugee protection agency and by the weight of the international community behind it. Experience shows – and this was clearly recognized as long ago as 1946 when the General Assembly first debated the refugee question – that refugee problems are not solved unilaterally or through Pacific-style solutions imposed on others, but cooperatively and collaboratively. There will never be a perfect equity between States in burdens and responsibilities, anymore than in access to the sea or the continental shelf; life is not like that, but rather a matter requiring both burden- and responsibility-sharing.

A few conclusions

In short, then, this is a time for further evolutionary steps in the international protection of refugees, and it must be by way of the path of experience; recalling the lives lost in Bosnia and Herzegovina because of the barriers thrown up in the way of those in flight; of lives lost in Rwanda because Security Council members declined to read the writing on the wall; of lives lost at sea, because families are intentionally divided by policies designed to penalize those who would dare to seek asylum; of refugees and asylum seekers deliberately alienated and driven to destitution on our streets, because of a government's determination to play tough, and because of its persistent refusal to learn from the lives of those who have escaped persecution, torture and death.

Where will the impetus for change come from? As history has shown, and as I have tried to show in the first two of these orations, the self-interest of States will continue to play a role. That history also suggests that many governments will continue unwilling to learn from the past, preferring time and again to underestimate peoples' capacity for self-preservation when faced with desperate circumstances and risk to life and liberty. That is why community-based organizations have a critical role to play now, as they did in the past, in reminding political leaders that they too may be held accountable.

Ideally, I suggest, the international refugee regime stands for this: That any individual compelled or constrained to leave their country of origin should be ensured protection of their human rights; that any State receiving a refugee should be able, if it so needs, to call on the support of other

States party to the protection regime; that States, international organizations, non-governmental organizations and others will co-operate in finding solutions at both individual and global level. The goal of the regime is to moderate the inherent tensions – States, their interests, and their self-interest – to protect rights and to achieve solutions.

One of the many related challenges over the coming decades for States which count themselves democratic will be to integrate human rights into every aspect of public life and public action; not just as a matter of form, but of substance also. The best realization of these goals lies not through compliance mechanisms, by way of externally imposed judgments, or by adversarial means. Important though these will always be, the truest realization of human rights will come about only when every legislator, policy-maker, and decision-maker begins by automatic reflective reference to the standards so solemnly declared in the Universal Declaration of Human Rights and other instruments.

Equally, if any of us is serious about resolving the human rights *causes* of flight, then human rights must be *externalized* in effective, coherent and focused policies of assistance to the process of democratization, to conflict mediation, and to civil society. We cannot continue to be simply reactive, content to wring our hands in the face of forced migration. We cannot continue to dehumanize, to demonize the refugee, the asylum seeker, and the migrant, and seriously expect to solve anything.

The refugee problem is a human rights problem. It is a human rights problem, first and foremost, for refugees themselves. But it is also a human rights problem for us, so far as the demand for protection within our borders truly tests the mettle of our commitment and the strength of our acceptance of the principle that everyone has an equal right to dignity and worth.

Thank you.