The Mediterranean Papers – Athens, Naples and Istanbul

Three papers addressing some of the legal and practical issues raised by the movement of people across the Mediterranean in search of protection

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Foreword

The three papers collected here were presented between March and June 2015, so preceding the rapid changes and the accompanying tragedies in the movements of people towards Europe which developed so dramatically in August and September.

The first, 'Regulating "Irregular" Migration: International Obligations and International Responsibilities' (page 3), was given at a Workshop convened at the Faculty of Law of the National and Kapodistrian University of Athens on 20 March 2015; the second, 'Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action' (page 15), at the Jean Monnet Centre of Excellence on Migrants' Rights in the Mediterranean at the University of Naples 'L'Orientale' on 11 May 2015; and the third, 'Refugees – Challenges for Protection and Assistance in the 21st Century' (page 26), at a meeting on 14 June 2015 in Istanbul of the *Ad Hoc* Committee on Large Scale Arrivals of Refugees to Turkey of the Parliamentary Assembly of the Council of Europe. A few grammatical errors and infelicities have been corrected, but they are otherwise unchanged and therefore somewhat repetitive, particularly on the 'next steps' question. A consolidated list of selected sources for the three papers is included at page 36, with some more recent documentation added at page 42.

The three papers look briefly at selected aspects of the 'crisis' created in many European minds by the recent and ongoing movements of people towards the region, mainly across the Mediterranean, but also over land. In many respects, these movements of refugees and others in search of a livelihood were readily foreseeable. Displacement-creating conflicts, such as those in Syria, Iraq and Afghanistan, have not been resolved, while the refuge which many found in bordering countries has become protracted and increasingly intolerable. Elsewhere, investment and development aid have not created, or not yet created, sufficient opportunities for a future in which migration is not needed.

States, in turn, have once again failed to plan for the fall-out, to think outside the box, or to re-evaluate sovereignty options in the face of human realities and only too human tragedies. The European Union's laudable goal of a Common European Asylum Policy, premised on common interpretations of harmonised criteria, is still to be achieved, while the Dublin Regulation contributes a region-wide bureaucracy, but not efficiency in the handling of claims to protection, let alone justice or equity in the regional sharing of responsibility.

Among other things, what is needed, as a matter of logic and coherence, is a European refuge status built on Member States' international obligations and supplemented with the broad community benefits of EU law, including freedom of movement; it's a long shot, but a European Protection Agency competent for refugees and migrants in need of protection would be a good start, for many issues are common to both.

Such a comprehensive re-organization of responsibilities, if it could be achieved, would need to be complemented by an external competence, through which EU could engage positively and constructively with other States confronted with the phenomenon of people on the move, though always consistently with EU law, international legal obligations, and the European Convention on Human Rights.

European States have special legal responsibilities in the Mediterranean, not least because they assert the right to control passage. These call again for a coherent approach to rescue at sea and interception, coupled directly to disembarkation in a place of safety, appropriate care and assistance premised on the protection of rights, and the active search for solutions and opportunities, for example, in the fields of asylum, migration, resettlement, or return. Again, the EU needs to turn outwards and to be prepared to engage with countries of transit (even with countries of origin, in the right instances), but on a basis of equality and equity, rather than just instrumentally, in pursuit of narrow regional interests and 'sovereign entitlements'. Traditional, unilateralist assumptions regarding State competence have proven inadequate as bases for dealing with today's humanitarian issues and close off thinking about urgently needed new approaches. As Christopher Clark has noted, though in a quite different context, 'The power of such narratives to shrink policy horizons should not be underestimated.'[1]

Serious thought is also called for on new ways to meet the costs produced by external displacement, which fall most heavily on 'front-line' States often lacking the experience and infrastructure to manage the movement of people within the rule of law. It should be obvious now – indeed, it always has been – that if the 'temporary' provision of refuge is underfunded or otherwise inadequate, or if the levels of international assistance to refugees are cut back, as they have been in recent months, further onward movement of those in need of protection is inevitable.

There are doubtless many explanations for the present lack of political will which paralyses Europe, and stands in the way of effective protection and coherent responses migration and displacement. History reminds us that States *can* co-operate to solve humanitarian problems, and that the interests of States *can* be accommodated in the process. The dimensions of the generations-long challenges raised by the movement of people between States call out for a standing or rolling mechanism, involving governments, international organizations, and particularly civil society. And if it is to be credible and effective in providing protection, saving lives, rekindling hope, and managing movements in the interests of all, any such mechanism will need a solid, clear foundation in human rights and a structure that ensures transparency and accountability.

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[1] Christopher Clark, *The Sleepwalkers: How Europe Went to War in 1914*, London: Penguin, 2013, 345.

‘Regulating “Irregular” Migration: International Obligations and International Responsibilities’
Athens, March 2015

Introduction and background

Thirty years ago we knew that there was a demographic and economic crisis on the horizon. We knew, because the ILO told us. We knew just how many young people would be entering the work force in the developing world; we knew how many jobs would be required; we knew that regular migration to the developed world could provide only a small percentage of solutions, at best; and we knew, too, that conflict, turmoil, upheaval and displacement would likely still be with us.

And what did we do? Essentially, we did nothing. We put our heads in the sand, crossed our fingers, and hoped that the inevitable would never happen. Well, it did, as the inevitable generally does. And the price is being paid today, in lives lost in flight and in transit from situations we saw coming, and in the floundering ineffectiveness of regional and national policies.

Of course, emigration and immigration touch the self-interest of States, and self-interest can and does lead to inaction. For long, the prevailing view was that these matters fell pre-eminently within the reserved domain of domestic jurisdiction, and that they were therefore subject to the absolute and uncontrolled discretion, or sovereign power of the State, and therefore unsuited to international regulation.

There was good historical authority for this view, but the picture was always rather more complex. Even in the nineteenth century, the treatment of the foreigner, once admitted, was indeed seen by many States as engaging international law, and as justifying the exercise of diplomatic protection in defence of an international minimum, if somewhat uncertain, standard. And the *practice* of States in relation to the protection of the rights and interests of their citizens in other countries played a major part in the development of what we now call the rules of State responsibility.

Today, there is a new reality. The General Assembly calls it a multidimensional reality. It is the product of a certain dynamic in relations between States, generated in part by globalization, and in part by inescapable facts, for example, that migration cannot be ‘managed’ unilaterally, let alone turned off.

At the same time, the persistent illusion of an absolute, exclusionary competence remains a matter of concern, because it tends to frame and direct national legislation and

policies in ways that are inimical to international co-operation and, not infrequently, contemptuous of human rights.

Although we can quibble about the exact start date, 'irregular migration' is largely a product of the late twentieth century, reflecting the desire of certain States to impose (their) order on that particular human activity which is the movement of people across borders. 'Irregular migration' is thus a State construct which, currently at least, is little represented in international law. The irregular migrant, like the migrant, is not defined by international law, other than by reference to his or her common humanity. Nor does international law prescribe what States shall do (as opposed to what they may not do), when confronting this product of their own idiosyncratic view of the migrant on the move.

There is a gap, then, or the perception of a gap, in the regulatory framework. Or perhaps the problem is not a gap, so much as an opportunity – like today – to bring together and to synthesize what we already have learned and what we are learning with regard to migrants and refugees in transit, in detention, in search of protection, in limbo, in distress at sea, in need of disembarkation in a place of safety, in need of resettlement.

Constraints

In the overall picture of inter-State relations and their interaction with 'events', certain things are constant. There is now and always has been a strong humanitarian dimension in responses to the movement of people, and not only in the case of refugees and those in search of protection.

More particularly, there is also a solid legal framework governing the actions of States in and outside their territory, which is *not* displaced by the fact that control of migration – the core decisions about entry, residence and removal – falls within the sovereign competence of the State.

International law is always there, as it were, even though some States may seek to displace it, to build the notion of 'irregular' status into some sort of foundational reason or excuse for denying to one particular class the rights to which we are all entitled in virtue of our common humanity.

When the 1951 Convention relating to the Status of Refugees was drafted, States began with a couple of simple principles – that those leaving their country for reasons of persecution were 'entitled to special protection on account of their position'. The European Court of Human Rights has taken a similar approach; in *Medvedyev*, it emphasised that, 'the end does not justify the use of no matter what means . . .', and again,

in *M.S.S.*, it remarked that, 'States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of... protection...'.

It is the refugee's *international status* which entitles him or her to protection, and that is and ought to be the point of departure. It does not mean that the refugee is privileged, for the refugee's circumstances are not like those of everyone else, but exist in a space of difference regulated by international law.

And this is a useful starting point precisely because of the legal exceptions to sovereign discretion which it demands. It is the protected status of the refugee in international law which requires anxious scrutiny of any measure which appears to deny or limit rights, or of claims to disregard or not to hear requests for protection.

I would go further, however, and argue that there are equally limits to the right of the State to act 'differentially' when operating at its borders, or beyond them, and when treating non-citizens on the move as 'others' to whom something less than equal treatment is said to be due.

Here, I would call in aid, first, the principle of non-discrimination which, originally limited to distinctions drawn on the basis of race alone, has much a wider scope today. The general principle of equality now imposes on those who wish to treat individuals differently the duty of showing valid reasons for such differential treatment.

It is not enough that the individual is a migrant, a non-citizen, an alien. Nor is it enough, when it comes to human rights protection, to invoke the individual's irregular or undocumented status. This factor may count in determining what to do next, within the limits of the law, but it cannot be sufficient justification for ill-treatment, arbitrary and indeterminate detention, denial of wages earned, and so forth; nor does international law support such restrictions or limited conceptions of rights. The question is, whether the bases advanced for distinction are *relevant*, and thereafter whether the measures adopted are reasonable and proportional.

Next, I would consider the special situation of the migrant, and turn to the pioneering work begun in the old Commission on Human Rights, and continued in that of the three Special Rapporteurs since 1999. The Commission singled out the problem of vulnerability (not in the sense of weakness, so much as in exposure to smuggling, trafficking and exploitation), and the lack of any effective protecting authority as key elements affecting those who move between States, while it also confirmed the existence of a relevant body of international law with which better compliance was required.

In her first report, the Special Rapporteur, Gabriela Rodríguez Pizarro, noted that there is no 'commonly accepted generic or general legal concept of the migrant in international law'. Moreover, it was increasingly difficult, if not impossible, to distinguish

clearly between those, 'who leave their countries because of political persecution, conflicts, economic problems, environmental degradation or a combination of these reasons and those who do so in search of conditions of survival or well-being that do not exist in their places of origin.'

For the purposes of her human rights mandate, she therefore proposed to consider as migrants those who have moved or been moved, irrespective of their status, but with due regard to their particular needs and vulnerabilities; in this context, irregular or undocumented migrants required special attention.

In the years that followed, the Special Rapporteurs have succeeded in sensitising the international community to the protection needs of those who migrate. In 2012, the UN General Assembly took note of a full spectrum of relevant issues, including the prevention of violence against migrants, especially women migrant workers, non-discrimination, freedom of movement, the need for due diligence in the prevention of crime, for co-operation in combatting trafficking, for the compliance of nationals laws with international obligations, and for a holistic approach to migration management.

In his August 2013 report to the General Assembly, the current Special Rapporteur on the Human Rights of Migrants, François Crépeau, noted that the major problem is inadequate implementation at the national level, while the Secretary-General's report emphasised the intrinsic quality of human rights to all human beings, 'regardless of their instrumental value as units of labour or agents of development'.

Following the Second High-level Dialogue on Migration and Development, held in New York in October 2013, the General Assembly adopted a Declaration, which can be read as something of a rights agenda, calling for proactive policies and programmes on the part of States, while recognizing also their particular competence. None of this changes the law, of course, but insofar as resolutions adopted in the General Assembly can be evidence of the views of States, they can also provide examples of a growing consensus on the need for a newer, more realistic approach.

A gap nonetheless remains between acceptance of a human rights based approach and the reality for today's migrants, and it will need to be bridged by way of effective implementation of the applicable law. Here again, European jurisprudence has helped to clarify the legal framework within which national and regional measures must be organized and operationalised.

In *M.S.S.*, in *Hirsi*, and in *N.S.*, for example, *knowledge* was a key factor which effectively determined what had to be done, or not done, if a violation of the European Convention and/or the Charter of Fundamental Rights was to be avoided. Article 3 of the European Convention appears at first to impose a regime of strict liability which is contingent on certain factual findings, rather than one of absolute liability, in the sense of

that liability which follows, simply and straightforwardly, from the State's engagement in a particularly dangerous or perilous activity with harmful results. In a strict liability regime, once the facts and the risk of prohibited treatment have been determined or proven to the requisite degree, there are no exceptions; but substantial *evidential* hurdles may need to be overcome, as the case law confirms.

The door to absolute liability, however, may not be closed. The import of the judgment in *Hirsi*, and perhaps also that in *Al-Saadoon*, is that State operations in presumptively perilous or hazardous situations impose a special duty of care, a form of absolute liability in which the obligation not to harm (in this context, not to violate a human right) is effectively translated into a *positive obligation to protect.*

This has major implications for the formulation and implementation of programmes to 'manage migration', including by way of interception and return. The framework of international law and obligation, appropriately contextualised, implies more than the passive avoidance of direct harm, and demands an active protection role – one in which responsible States are obliged to ensure that those over whom they do or may be expected to exercise jurisdiction and control are effectively protected as a consequence.

Protecting the human rights of all migrants, refugees and asylum seekers, is still very much a work in progress, though, and Europe must face up to the task.

Europe: Challenges

Challenges produce ideas, some positive, others negative; some viable, others unrealistic; some progressive, others destructive; some backward-looking, others forward-looking.

Some call for the borders to be closed, everywhere. As François Crépeau has pointed out, however, 'sealing' national borders is not a realistic or viable option. It is premised on the use of levels of force and control which are both unattainable and unacceptable in a community founded on the rule of law. Moreover, the very idea flies in the face of experience – the discredited practices of 'deterrence' through detention, or of 'deterrence' through enforced destitution; and it flatly ignores reality – the very real push factors, such as conflict or extreme poverty; and the very real pull factors reflected in the cheap labour needs of key sectors of the European economy, including agriculture, construction and the care industry.

Still, there is no shortage of other suggestions. The European Commission has just announced plans for a new 'European Agenda on Migration' which, we will be pleased to know, will include '*fighting* irregular migration and human trafficking more robustly...' (why the language of war?); '*securing* Europe's external borders...' (do we know where they

are?); 'a strong *common* asylum system...' (where 'common' is perhaps the problem, the enemy within...); and 'a *new* European policy on legal migration...' (at last...).

UNHCR has proposals, too, some of them drawing on practices developed and refined during the Indo-China refugee crisis, such as compensating or otherwise mitigating the direct costs incurred by merchant ships rescuing those in distress at sea; and making a working reality out of disembarkation in a place of safety.

UNHCR also argues for *proactive* use – full implementation – of Dublin options (on the long-term future of which I have many doubts); suggests support for Greece and Italy through a pilot relocation programme for Syrian refugees using whatever 'instruments' are available in the EU law and policy library; and is making positive noises about involvement with States in bringing international protection processing closer to where the needs now are.

In similar vein, the EU Fundamental Rights Agency last month published a comprehensive overview of 'legal entry channels' to the EU for those in need of international protection, with the aim of making the (Charter) right to asylum a *reality*, and of making legal entry options a *viable alternative* to the risks of irregular entry.

From another perspective, the Office of the United Nations High Commissioner for Human Rights has recently drafted and issued a set of 'Recommended Principles and Guidelines on Human Rights at International Borders'. As it notes:

> 'International borders are not zones of exclusion or exception for human rights obligations. States are entitled to exercise jurisdiction at their international borders, but they must do so in light of their human rights obligations...'

The High Commissioner emphasizes the *primacy* of human rights, and the overarching principles of non-discrimination, and of assistance and protection from harm.

No less important is the Fundamental Rights Agency's 2014 critique of the criminalisation of migrants in an irregular situation, and of those who may assist or engage with them.

While preventing 'illegal immigration' is one feature of the 'common immigration policy' now in course of development (Article 79, Treaty on the Functioning of the European Union), the ardour with which certain sections of certain governments embrace sanctions and criminalisation suggests a major rights and rule of law deficit – a blatant disregard of those values on which the EU is based, and of those principles at the heart of any representative democracy.

The propaganda directed at the irregular migrant and the asylum seeker is, not unintentionally, a driver of discrimination. To label as a criminal the 'other', allegedly guilty each day of a continuing offence, is intended to open the way to further measures of control. And the effects of such labelling are well understood, resulting in social hostility, suspicion among the wider community, and fear of assisting those in need, even in distress at sea. For those targeted, it means fear of reporting crime, or discrimination, or abuse, fear of seeking medical assistance, fear of exploitation.

We seem to have come a long way, and down the wrong road, from historically sound principles of humanitarian assistance; small wonder then, but prescient, that the drafters of the 1951 Convention thought it best to make it an *obligation* not to penalise the refugee for entering illegally...

Whether we are thinking about sealing borders or of the many current 'lesser' policies and practices favoured by governments today, what we see time and again is how they fail entirely to understand what it is that drives people knowingly and rationally to risk their own and their families' lives.

Such ignorance is perhaps best illustrated by the United Kingdom's refusal to support rescue operations in the Mediterranean, on the ground that it will merely encourage others to make the journey. How little they know, those now complicit in the loss of life.

Only when knowledge and understanding of the despair of others, of their need to survive, and of their persistent optimism, only when these factors are integrated into serious, long-term policy-thinking will we begin to see programmes with a chance of making a positive impact – of providing, pro-actively, not reactively, humanitarian alternatives to the present crisis on the doorstep of Europe.

Europe: From the General to the Particular

So what exactly is wrong with the European approach, other than the lack of political will? Let's start with *Dublin*, as symptomatic of the whole.

Dublin did one good thing, in principle, at least: Within the EU, it broke the vicious circle of responsibility denial which had been fostered by States on spurious first country of asylum arguments, and in consequence it has helped to strengthen the right to seek asylum, by entrenching the rule that the asylum seeker is *entitled* to a decision. Whether it also reduced 'forum shopping', as some might argue, is another matter to which I will come back.

Dublin did not, of course, provide for the effective *sharing* of responsibility among European States, in the fulfilment of protection obligations held in common; but it was never intended to do so.

Nor did Dublin obviously help to streamline asylum procedures, or speed up access to protection. On the contrary, the resulting region-wide bureaucratisation appears overall to have slowed down the asylum and protection process, to have disrupted family unity, to have proven inadequate in face of the rights of the child, and to have had little or no impact on secondary movements.

Like the Common European Asylum System in its present form, Dublin reflects certain assumptions that have proven unrealisable – that asylum seekers would receive equal treatment and consideration wherever they applied, and that there would be equivalence among Member States in procedures, reception and integration. We have come to learn otherwise...

Dublin and the Common European Asylum System are also premised on something else – on disregard of individual interests, in an almost dehumanizing approach to the asylum seeker as object, not subject, as therefore disentitled from any right to express a preference, let alone choose his or her destination; as someone, something, therefore, to be 'taken back' or 'taken in charge'.

Again, we see that divorce between the policy-maker and the legislator, on the one hand, and what happens out there in the real world, on the other – the world of the EU in which secondary movements and asylum shopping are matters of *rational* choice, just like the decision to flee one's country, itself a process which engages elements of risk assessment, personal networks, language ability, culture, employment opportunities, not to mention an assessment of the chances of acceptance.

Knowing what we know – about reception conditions, about decision-making, about disparities in recognition rates – can we be surprised that the failures of 'harmonisation' are themselves the drivers of onward movement?

Why should we expect to build a common European asylum system on such shaky foundations as twenty-eight more or less *national* procedures? Why, having formulated a general catalogue of agreed principles and criteria – at a certain level of generality, to be sure – and having translated them across multiple languages, should we expect independent and more or less experienced national courts and tribunals to arrive at uniform and consistent interpretations?

Why should we expect the essential *factual* judgements, which are at the heart of protection decisions, also to be consistent, absent agreed common and authoritative sources, absent an agreed philosophy and practice of risk and credibility assessment?

So what next? A European Migration and Protection Agency...

There can be no Common European Asylum System that is not a *European* one, in which protection decisions are taken by a European institution, appealable to a European court, and in which the decisions are valid region-wide – a European refugee or protected status to be enjoyed across a Europe without internal borders.

And we have the resources – experienced judges and interlocutors across so many jurisdictions – who can be brought within and under the roof of European protection, in an institution built from the ground up, but with top-down competence and authority.

Why cling to outmoded national procedures? Let's think outside the box, and tap into the resources reflected in the rest of Europe's engagement with those in need of protection; let us ensure that civil society and the knowledge and understanding which non-governmental organizations have of the refugee and migrant experience are fully factored into a new European refugee and migrant institution, and let us ensure ongoing accountability through FRA oversight and judicial control.

After all, there is a certain logic in the idea of the European Union. As I have argued before, a regional group of States organized without internal frontiers suggests certain outcomes when it comes to refugee protection. All Member States are party to the 1951 Convention and 1967 Protocol relating to the Status of Refugees, and all are bound by the same obligations and the same legal understanding of the refugee. Given that they have all agreed to treat refugees in the same way, to recognize the same rights and to accord the same benefits, national refugee status determination systems are redundant. The EU demands – I am shortening the argument – a simple European response, in which Europe's refugees enjoy a European asylum and European protection, and the rights and benefits accorded by European law. Meanwhile, good policy, if not strictly logic, argues equally for a common, obligation-based approach, not just to refugee status determination, but also to resettlement, rescue at sea, and protection at large.

If the EU can sign treaties, then in theory it could replace individual Member States as party to the regime of protection organized under the 1951 Convention/1967 Protocol; or if it does not replace them, it could exercise their competences by way of delegation.

The terms of those treaties in fact mean that they are presently open to ratification only by States, but there is no legal reason why an EU institution should not be set up, competent to determine refugee status and enabled to fulfil, collectively as it were, the individual obligations of the Member States.

What would be the objectives and the basic organizing principles of such a European Migration and Protection Agency? That would justify a separate workshop, and

some further thinking also about how its mandate might also encompass the migrant, as well as the refugee.

But in short, it would be a *protection agency*, with a mandate ideally encompassing refugees, asylum seekers and migrants (the last-mentioned being limited perhaps to those in an irregular situation or whose status is unresolved following disembarkation after interception or rescue at sea).

The Agency's primary protection responsibility with regard to those within its mandate would be to ensure, directly and by way of oversight and supervision, that the international obligations accepted by and/or binding on Member States and the EU are implemented and fulfilled in good faith.

Specifically, and without prejudice to other applicable rules, the Agency would ensure that the principle of *non-refoulement* was upheld, and that no one was returned to any State or territory in which he or she would be at risk of persecution, of torture, of inhuman or degrading treatment, of a serious violation of fundamental human rights, or of indiscriminate violence arising from armed conflict.

In overseeing the arrival, reception, and treatment of those under its mandate within the EU, the Agency would ensure that the principles of non-discrimination and equality were upheld; that no one was subject to inhuman or degrading treatment; that no one was subject to arbitrary, indefinite or unnecessary detention; that the best interests of the child were a primary consideration in every decision affecting a child, both in the years of childhood and in anticipation of adult life; and that the family was protected and family unity upheld

In determining whether anyone within its mandate was entitled to international protection as a refugee or otherwise in accordance with relevant and applicable human rights principles, the Agency would ensure prompt access to its decision-making procedure in a location close to where the individual was accommodated; that the applicant was informed of the procedure in a language which he or she understood; and that he or she was provided with legal advice and representation in making a claim for protection.

The Agency would establish procedural rules governing the determination of claims to protection which ensured the standards of due process and good administration required by EU law, including the Charter of Fundamental Rights. In particular, the rules would provide for the claimant to appear personally before the decision-maker, and to be provided with representation, and with interpretation where necessary. The decision would be provided in writing and would be reasoned with regard to the facts and the law; the claimant would be advised of the decision in a language which he or she understood. and of the opportunities for appeal.

The Agency would ensure that its staff were drawn from across the Member States and that they had appropriate levels of knowledge and experience of refugee determination, human rights protection, and country conditions.

The Agency would establish Appeals Boards located proximate to the place or places of first instance decision-making. The members of the Appeals Boards would be independent of first-instance decision-makers, drawn from across the Member States, and have appropriate levels of knowledge and experience in refugee and human rights law. An appeal would be available on any point of law or fact, and would be conducted as a *de novo* hearing at which the appellant could be present and represented.

The Appeals Board would give written reasons for its decisions. The claimant would be entitled to appeal/apply for review of the Appeals Board's decision to the European Court of Protection, which would be established independently of the Agency and with its own jurisdiction.

Decisions recognizing entitlement to refugee status, to complementary status, or to status on humanitarian grounds, whether made by the Agency, the Appeals Board, or the European Court of Protection, would be valid and effective throughout the Union.

In principle, status beneficiaries would be entitled to reside in the territory of the Member State where their status was determined. From the date of determination and/or the date of issue of the first residence permit, status beneficiaries would be entitled to the same treatment with regard to freedom of movement as EU citizens, bearing in mind, however, that a pilot project may have limited territorial scope.

While maintaining its paramount responsibility to provide protection and subject to appropriate oversight and accountability, the Agency would receive information from the police and security services of Member States on matters which may have an impact on entitlement to protection, including questions of 'exclusion' as set out in Article 1F of the 1951 Convention relating to the Status of Refugees or the exceptions to the principle of *non-refoulement* in Article 33(2).

The Agency would be guided by the principles of transparency and accountability; it would be subject to oversight and audit by the Fundamental Rights Agency.

The Agency would have the right to be consulted, for example, preparatory to the initiation of interdiction or interception operations, and before any agreement was concluded with third States dealing with readmission; in every case, its views would have to be taken into account in good faith.

Together with the European Asylum Support Office, the Agency would promote solidarity and practical co-operation among Member States with a view to ensuring that the responsibilities of protection were shared equitably, and that the views and interests of

those within its mandate were acknowledged and taken into account individually and in the context of policy-making.

This is just a beginning, and there is lots of room for debate about how best to develop protection institutions consistent with the organizing values and principles of the European Union and with the Charter of Fundamental Rights. For example, and in particular, what should be the relationship between Agency decision-making and appeals bodies and national courts having jurisdiction over public acts? Should the first appeal or review lie to a national court or tribunal, and only then to the European Court of Protection? Should the European Asylum Support Office be functionally integrated into the new Agency?

Moreover, the EU regional dimension, which is the point of departure, cannot remain inward looking. Action is needed beyond the region, beyond the sea, as is engagement with countries directly involved, in one way or another, with the movement of people between States. Whatever is proposed in this context, the overarching principles of protection must remain the same – and given its mandate, the Agency would need to be a partner in the process.

There will be objectors, of course. On present form, certain countries cannot be relied on to abide by the rule of law or to favour a principled approach to the situation of refugees, asylum seekers and 'irregular' migrants. Given the likely difficulty of reaching agreement among all Member States, this project might best begin as a pilot limited to those States in fact committed to a rights-based, co-operative approach.

These, then, are just a few of the challenges for us today, and tomorrow; and among them there is that of bringing policy-makers, legislators and administrators to the recognition and fulfilment of their duties to the migrant and the refugee, and to do something new and effective.

‘Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action’
Naples, May 2015

A note of appreciation...

I am particularly pleased to be here today at the ‘initiation’ of the Jean Monnet Centre of Excellence on Migrants’ Rights in the Mediterranean, and I would like to express my thanks to Professor Giuseppe Cataldi and to Dr Anna Liguori for the invitation and for what is a most timely initiative in a most appropriate location.

Above all, however, I would like to express my thanks to Italy, to the people of Italy, for all that they have done over the past eighteen months and more to bring safety and protection to those putting their lives, their future, at risk on the sea. It is a noble record. Italy has acted as the conscience of Europe, putting into daily practice the values which so many of us, speaking as a European, count dear. But it has done so without the degree of support – material, moral and practical – which it is entitled to expect from its partners in the community.

Europe, or at least, the European Union, claims the right to manage the movement of people across the Mediterranean, but it is too ready to decline the responsibilities and to dispute the obligations that go with that claim. Many of us hope that this will change, and this afternoon, I want to follow up my thanks with what I hope will be some insights into the nature of those duties, and some suggestions about what needs to be done next.

Let me begin, however, with some views from outside, from across the Atlantic. Writing in *The New Yorker* on 4 May, Philip Gourevitch put it clearly and succinctly:

> ‘... every year, people drown in the waters between Africa and Europe. And this year almost two thousand have died, including, last week, nearly eight hundred on one ship, which capsized and sank en route to Italy. Before that horrifying incident, this year’s death rate for Mediterranean boat people was ten times higher than it was for the same period a year ago. Now it’s thirty times higher, and that increase is attributable to Europe’s dereliction of duty...’

After reviewing aspects of that continuing failure and the predilection for tightening border controls and acting militarily against traffickers, he went on to note that Europe's leaders seem,

> '... to be avoiding the fact that, as long as people are prepared to risk everything for a better life, there will be boat people, and that when dealing with them the law of the sea is the place to start: rescue first, then sort out the rest on land. When it comes to the drowned and the saved, we know dereliction of duty when we see it.'

Turning closer to home, as one Syrian refugee said to the *Guardian* (4 May 2015), he had been,

> '... determined to go, whether or not there is a rescue operation. I'm risking my life for something bigger, for ambitions bigger than this... If I fail, I fail alone. But by risking this, I might create life for my three children.'

Europe's role and Europe's responsibilities

In a paper which I presented in Athens in March (above, page 3), I considered what the European Union might do, indeed, ought to do, with regard to so-called irregular migration, and I looked in particular at the 'inwards-looking' dimensions of the EU's common policy on refugees and asylum.

The strategy of implementing a common policy through twenty-eight national systems, I suggested, was always bound to fail, no matter how comprehensive the top-down, legislative agreement on qualification, standards and criteria. The Dublin scheme, too, for all that it guarantees a decision for the asylum seeker somewhere, contributes nothing to what is and always was clearly needed in Europe, namely, effective, equitable sharing of protection responsibilities among a community committed to common, fundamental principles.

The situation for refugees and asylum seekers is now further compounded by the fact that the EU remains uncertain how to respond to the essentially demographic and economic drivers of movement between States, (a substantial working age population with no work to turn to), which accompany flight from conflict and persecution, and which could already be anticipated two or three decades ago.

I suggested that, given the nature of the Union, its basis in common values and shared international obligations, what was needed was a truly European response, in which 'Europe's refugees' would enjoy European asylum, European protection and the rights and benefits accorded by European law. This would require, in turn, an EU institution, a ***European Migration and Protection Agency*** competent to fulfil collectively and to implement the individual obligations of Member States and the policy and protection goals of the EU. Moreover, it is essential to add 'migration', along with refugees and asylum seekers, precisely because the arrival of those in an irregular situation, whether directly or following interception or rescue at sea, presents Member States with legal and practical challenges that demand a community-based response.

But the *internal* dimension can only ever be but one aspect of a coherent response. Europe must also look outwards and engage beyond the region, beyond the Mediterranean, for the movement of people today affects the interests of multiple States and stakeholders.

There is no European Migration and Protection Agency just yet, and while existing institutions, such as the European Asylum Support Office and the Fundamental Rights Agency, can play a role in monitoring for effective protection the sorts of 'solutions' to which I will now turn, a much more international approach is still needed.

Duties of care and protection

When thinking about the movements of people and about international legal obligations – 'Whose obligations?' is a question to which I will return – it helps to recall certain basic principles.

States party to the 1951 Convention relating to the Status of Refugees accept that those leaving their country for fear of persecution, are entitled to ***special protection***, on account of their position. The European Court of Human Rights has spoken to like effect, noting that asylum seekers are a 'particularly underprivileged and vulnerable population group in need of ***special protection***...'

The *vulnerability* of the migrant, not in the sense of weakness, so much as in exposure to smuggling and trafficking and the absence of any effective protecting authority, was recognized by the Commission on Human Rights back in 1997, and their need for ***protection*** has been underlined since in the work of successive Special Rapporteurs on the Human Rights of Migrants and in a series of UN General Assembly resolutions.

Children seeking refuge are also entitled to 'receive ***appropriate protection and humanitarian assistance***', whether accompanied or not; and in 2014, of the roughly 170,000 who arrived one way or another in Italy, more than 13,000 were children travelling alone; this year already, the number is approaching 2,000.

This same emphasis on ***protection*** appears expressly in the Palermo Protocol on Trafficking – to protect and assist the victims – and again in the Palermo Protocol on Smuggling. In each case, the Protocol includes specific 'savings clauses' preserving the 'rights, obligations and responsibilities of States and individuals…', under the refugee treaties and the principle of *non-refoulement*.

How, if at all, are these principles to be made meaningful in the Mediterranean today, and how should they govern Europe's operations?

In my view, that comes about through a combination of context, circumstance, knowledge and, in particular, engagement. Europe already asserts the right to manage the movement of people across those waters, and with that comes obligations.

Some might argue that protection is compromised by fragmentation, by the apparently contradictory pull of obligations relating to interception and rescue at sea or combatting smugglers and traffickers, on the one hand, and of human rights, on the other. States' responsibilities are certainly not part of a seamless web of rights and obligations when it comes to seaborne migration, but some things are clear. A State minded to take action, as it should, against smuggling and trafficking, *already* has duties towards the victims. A State which elects to intercept boats believed to be carrying irregular migrants likewise has protection obligations to those over whom it exercises authority and control, irrespective of the legality of any particular interception.

The State which commendably engages in a dedicated search and rescue operation situates itself straightaway within the legal framework set by the UN Law of the Sea Convention, the Safety of Life at Sea Convention, the Search and Rescue Convention, the standards set by the International Maritime Organization, and the basic principle of disembarkation in a place of safety.

All of this is known to the EU and to its Member States. After all, the 2014 EU Regulation governing Frontex search, rescue and interception operations at sea could not be clearer on the basics, underscoring the obligation of Member States to render assistance to any vessel or person in distress at sea, and prohibiting the disembarkation of intercepted or rescued persons in a country where they would risk serious harm.

It is common knowledge, of course, that notwithstanding the primary role of the State responsible for a Search and Rescue Region to ensure cooperation and coordination, an obligation deficit remains with regard to disembarkation – in large measure, I suspect, because no State can come close to anticipating with confidence the potential scope of its

responsibilities; and none, it seems, can yet rely on the support of others. There's a contingency issue here which calls for closer examination, and it is precisely the reason why we need to step beyond the field of individual State responsibilities to consider the regional dimension and the distinct opportunities for co-operation and mutual support presented by this unique environment.

Due diligence

The Mediterranean is an interesting place to start. It covers some 2.5 million square kilometres. Some twenty-three States have littoral responsibilities, and for twelve or thirteen of them, that involves responsibility for Search and Rescue Regions.

The Mediterranean has also become something of a proving area, where a few States have sought to question the applicability of certain protective principles in the context of extra-territorial operations, but where the European Court of Human Rights, among others, has confirmed what students of the law of State responsibility already knew, that liability can follow the flag.

The Mediterranean is special, and being a shared and much exploited space, it raises questions about collective responsibility, and the ways in which that might be translated into practical results.

Certainly, the EU has a collective role and a collective responsibility. Through the operations of individual Member States, but particularly through Frontex, it has staked a claim to control or manage large areas of the Mediterranean with a view to curbing irregular migration, and regular calls on search and rescue responsibilities have helped to underline the EU's practical engagement in the area.

What, then, are its duties? 'Responsibility' in international law has a number of facets, and we need always to look at the nature of the primary obligations involved.

Fault, in the sense of wilful or negligent conduct may be relevant in some instances; or responsibility may be consequential on the breach of due diligence obligations, understood as an objective, international standard; and actual liability itself may be contingent on circumstances, such as the parties involved, knowledge, capacity, the requisite goals, and so forth.

For a number of reasons, the Mediterranean provides the basis for a special regime which engages, in general, the responsibility of littoral States and those which stand behind them or otherwise involve themselves in relevant conduct; the result, I suggest, is a special regime, linking States which act both in the fulfilment of their individual obligations and

in the interests of the community, to those which are part also of that community and share those interests.

Bases of obligation: Search, rescue, interception, protection and solutions

The reasoning of the International Court of Justice in the *Hostages* case suggests a useful approach for identifying the key elements of legal responsibility in comparable situations, including,

- where States are fully aware of urgent ongoing situations of risk, endangering life at sea, in part as a result of smuggling and trafficking;
- where States are fully aware of their obligations (a) to establish search and rescue regions in the area; (b) to provide and/or to co-ordinate search and rescue services; (c) to combat smuggling and trafficking, including by taking preventive measures against non-State actors whose conduct violates human rights; (d) to protect human rights; and
- where States and their institutions have the capacity and the means at their disposal to respond through surveillance and rescue, both individually and collectively.

Unlike the *Hostages* case, where two parties only were involved, the situation in the Mediterranean engages many potential actors, few of which will necessarily have a direct juridical relationship with the individuals at risk. Nevertheless, the circumstances and the known facts clearly put in issue the individual and collective responsibility of identifiable States to save lives at risk and to ensure, respect and protect human rights.

The Mediterranean is a large, but enclosed maritime area, subject to regular, close surveillance and to a certain level of effective control. The failure by those States (and their institutions) to respond comprehensively and in such a way as to maximise protection and solutions engages their responsibility, whether individually or *inter se*, irrespective of the availability of a remedy in the individual case.

This is *not* a counsel of perfection, or a statement of obligation to achieve the required result in all circumstances, but rather, '... an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result', as the Seabed

Disputes Chamber of the International Tribunal for the Law of the Sea described it in 2011.

What we see is nonetheless a positive protection obligation, not immediately absolute in the sense of the prohibition of torture, but a positive due diligence obligation to save lives; and thereafter to treat those rescued or otherwise brought within the jurisdiction in accordance with settled law.

Moreover, given the nature of the humanitarian crisis, this regime of responsibility does not stop at the shore line. The phenomenon of contemporary migration has much deeper roots and so long as the drivers of desperation continue, so too will the search for refuge. The legal interests of States of origin, transit and intended or accidental destination are all engaged, and only a rights- and protection-based strategy can have any impact. This is a bigger question, requiring more time and more thought, and this paper can do little more than signal the urgent necessity to respond both to symptoms and to causes.

Rescue at sea

On one issue in particular, there is a pressing need to act, and to reduce and ideally eliminate the disjuncture between rescue and safety of life at sea, on the one hand, and solutions, on the other; disembarkation in a place of safety is essential, but it cannot be the end of the story.

In principle, a starting point for disembarkation could be flag-State responsibility in the case of rescue or interception by public ships (that is, a State's naval or equivalent vessels). But although a beginning, that must not be allowed to result in ultimate gross disparities between States, lest they be disinclined to commit resources to the safety of life at sea. States committed to search and rescue in the Mediterranean fulfil a community responsibility, and a formula for equitable sharing is called for which, while securing prompt disembarkation, then leads on to land-based assistance, processing, and solutions.

Nor can flag-State responsibility be applied to merchant vessels. What is needed here, as experience with the Indo-China refugee crisis demonstrated, is an internationally agreed and administered scheme or pool of disembarkation guarantees, together with provision for compensating ships' owners for at least some of the costs incurred when ships' masters fulfil their international legal duties.

In thinking medium- and long-term, attention must also focus on assistance to States of transit, many of which are facing new challenges in the management of migration, but without the infrastructural capacity to accommodate, assist, protect and process non-nationals on the move. The EU has taken initiatives with third States in the region, but

too often they are oriented to control alone (in the EU's interest), with no regard to the wider, international dimensions.

If those intercepted or rescued at sea are not disembarked in European space, then effective, open and internationally supervised agreements will be essential to ensure their landing and accommodation in a place of safety, their treatment and protection in accordance with applicable international and European standards, and a solution appropriate to individual circumstances, such as asylum, resettlement, facilitated third country migration, or return in safety and dignity to countries of origin. Indefinite detention of refugees, asylum seekers and migrants in sub-optimal conditions ought never to be on Europe's agenda, and given the extraterritorial reach of Europe's obligations (both EU and ECHR), may well engage its liability.

This means bridging, in law and practice, the migration/refugee protection gap, which is what Mediterranean transit is effectively achieving *in fact*. And it means a readiness on the part of the EU and its Member States to integrate their own human rights and fundamental values into truly cooperative relations with transit and other affected States.

Next steps

What we are witnessing in the Mediterranean today is not just a European phenomenon, but one which engages States on all sides of the sea, and many also beyond the littoral. Certainly, it has resonance in the European Union, because we have mutually agreed principles of cooperation – solidarity and fair sharing of responsibility; because we are committed to certain values – democracy, the rule of law; because we are obliged to protect those fundamental rights now set forth in the Charter; and because we have elected to engage pro-actively in this maritime space.

But the 'international' dimension, the impact of EU policies and practices on third States is also evident, whether in the EU's negotiation of readmission agreements; its endorsement of individual Member States' use of so-called safe third country removals outside the Dublin scheme; in the management of internationally agreed search and rescue areas (for better or worse); and necessarily also in the interests of a variety of non-State stakeholders, whether international organizations or representative organizations such as the International Chamber of Shipping.

Given the manifest need for a concerted, internationally agreed and implemented response, why does the EU continue to dither? Why do the practical proposals of key organizations, such as UNHCR, seem to fall on deaf ears? The EU's response to date is

woefully inadequate, in principle, in practical proposals, in comprehending the situation and the power and magnitude of the drivers at work, in looking beyond narrow self-interest, and in characterizing the challenges almost exclusively in terms of control and security.

This lack of direction and sense of purpose seems due in part to the nature of the entity, and to the fact that, for all its formal espousal of 'community' goals and 'community' values, the Union remains a congeries of dislocated, dysfunctional sovereign States, unable to contemplate working together on what is perceived perhaps as a 'difficult' issue touching sovereignty, security, and, of course, 'the other'.

As the European Council on Refugees and Exiles noted last month, commenting on the then latest response to the crisis, current proposals merely seek to prevent migrants and refugees reaching Europe, essentially by moving border control farther and farther outwards, 'fighting' the traffickers, destroying the boats, building fences, and, we suppose, 'preventing' illegal migration.

But one look at *who* is moving and *why* shows how the focus on smuggling and trafficking misses the big picture. What is needed, clearly, are *opportunities* – substantial safe, legal access to Europe, through resettlement, family reunion, humanitarian visas, and temporary protection, coupled with greater protection capacity along the way and real solidarity between north and south.

But we have been here before, and we know that with the right political will, workable and working solutions can be found; that mechanisms can be put in place which will ensure disembarkation against appropriate guarantees (such as assistance in identification and determination of status, or with care and accommodation, or with appropriate solutions in asylum, migration or return); that transit States (which also have problems of accommodation, processing, solutions) *can* be brought on board as partners in a protection oriented response with international and regional oversight; that countries yet more distant can be brought into what will have to be longer-term planning for development.

The Mediterranean thus has an international and not purely regional dimension. It is a microcosm of indecision and inaction, but it also brings forth issues and challenges common to many other parts of the world – the Caribbean and the Pacific, to name just two. What could be achieved in the Mediterranean, properly founded on principles of protection and accountability intrinsic to a democratic community oriented to the rule of law, could serve as a model for elsewhere (unlike the unilateralist Australian approach, which is premised on arbitrariness and clouded in secrecy).

In the 1970s, too, there were difficulties galvanizing political will and political action around the no less desperate situation of Indo-Chinese refugees, and it took an

international conference to kick-start serious progress. Ironically, given the nonsense spouted by British ministers apparently content until recently to witness continuing loss of life at sea, it was the United Kingdom which, in May 1979, proposed to the United Nations Secretary-General that he convene an international conference to deal with the problem. The Secretary-General, together with the High Commissioner for Refugees, conducted intensive preliminary consultations, following which he called a meeting in Geneva in July that year, with representation at the ministerial level.

Sixty-five governments participated in the conference, chaired by the Secretary-General, together with observers, international organizations and NGOs. Building on the preceding informal consultations, it led to substantial increases in the funding of relief and the provision of resettlement places; in the offer of sites for processing centres; in opening discussions with the principal source country, Viet Nam, on family reunion, orderly departures, and return; and, as already mentioned, in practical proposals regarding rescue at sea.

Looking at the results of that conference and at the concrete initiatives which followed, it is surprising how similar are the issues we are facing today, notwithstanding the very different political situation. Then, as now, it was essential to maintain the primacy of protection principles; to engage with governments across the broadest spectrum; to secure commitments both from within and outside the region; to ensure the involvement of competent international organizations and NGOs; to promote practical and humanitarian relations with source countries; and to bring in the shipping community and build on its commitment to rescue at sea by devising practical disembarkation schemes.

That was just the beginning. Ten years later, the Secretary-General was back in the picture, working again with UNHCR and convening a second international conference on Indo-Chinese refugees, this time to adopt a Comprehensive Plan of Action which would eventually bring to an end a humanitarian crisis which had nevertheless changed dramatically over the years.

A new international consensus was needed, and the Secretary-General urged States to refrain from acting unilaterally. The outcome of this international approach, to what by then comprised both refugee and migration dimensions, was ultimately effective in restraining ‘clandestine’ departures, enhancing regular family reunion programmes, confirming the principle and practice of temporary refuge, determining entitlement to protection against international standards, making continuing provision for third country resettlement, developing internationally administered return and repatriation operations, and reviewing progress over time.

Conclusions for now

Today we need a similar initiative, for what we are facing in the Mediterranean is not an isolated issue, not a purely European problem. On the contrary, it is truly international. The movement of people leaves few States untouched, and much of that movement is driven by desperation – unremitting conflict and persecution, failed and exhausted economies. Only a long-term approach, combining protection, humanitarian assistance and opportunity with political and financial investment in mitigating and removing causes can have any impact.

The Secretary-General is already involved in a number of migration and development projects. It is time now to think and act wider and deeper, to turn to and address constructively the humanitarian dimensions. It is time to learn from Indo-China and other experience that international cooperation can work.

It is time to convene an international conference, perhaps on a rolling basis, for this is not a one-off situation. It is time to draw on the knowledge and experience of the United Nations; on the UN High Commissioner for Refugees; the UN High Commissioner for Human Rights; the Emergency Relief Coordinator and the Office for the Coordination of Humanitarian Affairs; the Special Rapporteur on the Human Rights of Migrants; the UN Development Programme; the UN Children's Fund; the World Health Organization; the International Maritime Organization.

It is time to bring in regional organizations – Europe, of course, in its different cooperative forms; the African Union; ASEAN; the Organization of American States.

It is time to being in other international and non-government organizations, including the International Chamber of Shipping, the Inter-Parliamentary Union, the International Organization for Migration, the International Committee of the Red Cross and the grass roots capacities of the International Federation of Red Cross and Red Crescent Societies.

Only by engaging across the broadest spectrum of interest can we make a start to what will and must be a generations-long project of protection and opportunity, in strengthening asylum, but also in realising human potential both at home and abroad, in bringing working and workable alternatives to those whom desperation drives to risk all.

‘Refugees – Challenges for Protection and Assistance in the 21st Century’
Istanbul, June 2015

Introduction

It is now nearly 100 years since the League of Nations appointed the first High Commissioner for Refugees, and that the modern story of international refugee law and organization began. We have come a long way since then. Millions have been displaced by conflict and persecution, and millions have found protection and either a solution in another land, or the opportunity to return in safety to their own country.

We have seen institutional progress, too, with successive *ad hoc* and temporary mechanisms finally leading to the Office of the United Nations High Commissioner for Refugees being placed on a permanent footing, established now within the UN ‘until the refugee problem is solved’.

And from the first hesitant steps to agree on an identity certificate for refugees, we have seen States sign on to the 1951 Convention and the 1967 Protocol relating to the Status of Refugees – 147 being party to one or the other or both – and witnessed States’ increasing participation in the work of the UNHCR Executive Committee, which now comprises 98 Members.

At one level, the refugee regime is thus truly international, linking the plight of refugees, which no State should have to face alone, to a solid body of legal rules and principles and to a forum for discussion, debate and decision with, in principle, all the potential of a cooperative, supportive collective response.

This does not mean, though, that it is sufficiently representative – the refugee voice is often unheard – or that the system is sufficiently effective and accountable, whether at the national or international level. The number of protracted refugee situations around the world is evidence enough of that. Moreover, serious flaws remain in the overall scheme, which international law alone cannot remedy, and it may be that the regime is facing its most serious challenges ever.

Thirty years ago, as refugees continued to flee Indo-China, Central America, and Africa, the UN General Assembly endorsed the Governmental Experts’ report on international cooperation to avert new flows of refugees. As a result, the UN itself is now better placed and better organized to anticipate crisis and to coordinate the efforts of its

various agencies, but its capacity to deal with *causes*, to make *peace*, and to develop and implement lasting *solutions* is seemingly as marginal as ever.

In situations of mass displacement, the international community relies still on individual States to shoulder primary responsibility, to abide by international law and to take on the costs entailed by fulfilling that powerful principle of humanity which lies at the heart of protection: *non-refoulement* – by which States have committed themselves not to send anyone to a country in which they may be at risk of persecution or serious harm.

Speaking in the UNHCR Executive Committee in 1987, the Turkish representative made a point which is still worth recalling:

> 'The principle of *non-refoulement*', he said, 'had to be scrupulously observed. Nevertheless, ... countries of first asylum or transit ..., faced with the difficulties of repatriation and the progressively more restrictive practices of host countries, might find themselves unable to continue bearing the burden and, for want of any other solution, come to regard *refoulement* as the only possible way out. If that should occur, they would not be the only ones at fault, since the responsibility for ensuring the conditions necessary for observance of the *non-refoulement* principle rested with the international community as a whole.'

Much the same had been said at the 1951 Conference in Geneva, when the Convention was debated and adopted. Such reality checks are certainly helpful from time to time, although the international lawyer may prefer to recall J. L. Brierly's observation that 'order and not chaos is the governing principle of the world' in which we have to live...

Nevertheless, the lack of sufficient, concrete cooperation among States continues to hamper the search for humane solutions, while the absence of any evident sense of obligation limits the capacity for productive thought and meaningful action. Simplistic preconceptions about sovereignty, migration, and responsibility can and do lead States into policy positions that are unrealistic and unrealisable – a sort of wishful humanitarian thinking, hoping against hope that perhaps the refugees won't come, and if they do, that they won't stay long.

A word of appreciation

In a talk which I gave in Naples last month on duties of care and protection in the Mediterranean (above, page 15), I began with a note of appreciation, of thanks, to Italy and

the people of Italy for what they have done, rescuing more than 140,000 people in 2014, and for what they continue to do, acting as the conscience of Europe.

I want to do the same again today, to thank Turkey and the people of Turkey for the hospitality shown and the sanctuary offered to nearly two million refugees, mostly fleeing the conflict and violence in Syria. Historically, Turkey has often been a place of refuge, or has stood at the crossroads of flight. Today, like Jordan and Lebanon, Egypt and Iraq, Turkey is the conscience of the international community once again, even also the conscience of Europe.

As the General Assembly recognized in 1946, the refugee problem is international in scope and nature. Every State which admits refugees acts on behalf of the international community and in defence of fundamental principles. It provides protection, international protection, which the country of origin is unable or unwilling to do. And in acting on behalf of the international community, the asylum State is entitled to expect the support of other States, whether financial, political or material, as the case may be; or in the active pursuit of solutions, in the general sense of dealing with causes and removing or mitigating the need for flight; and in the particular sense, facing up to the needs of individuals and groups of refugees.

Funding protection, assistance and solutions

One of the most remarkable features of the international refugee regime – and I use the word 'remarkable' in both positive and negative senses – is that it runs on voluntary funds, that is, on contributions, the amount of which Governments decide individually, taking account of UNHCR's assessment of needs. UNHCR is a subsidiary organ of the General Assembly, not a treaty-based specialized agency competent to levy even a percentage of core requirements on its members; and requirements still commonly exceed contributions.

In October 2014, the UNHCR Executive Committee approved a revised budget for 2015 of $6.2 billion. The Middle East and North Africa region accounts for some 29% ($1.46 billion of this total), with most requirements being directly related to the Syria crisis and its impact on neighbouring countries and Eastern Europe. Pledges totalling $2.5 billion were made at the Second International Conference on Syria, hosted by Kuwait in January 2014; and on 12 June 2015, the Government of Kuwait contributed a further $121 million.

In 2013, 52% of UNHCR's overall income was provided by its top three donors, and 82% by the top ten, while private sector contributions had risen to some $215 million by the end of 2014. As noted in its Global Appeal 2015 Update, UNHCR's requirements since 2009 have increased by 130%, annual income from voluntary contributions by 70%,

but in 2013, the funding gap for operations still amounted to some 45% of overall requirements. At the national level, too, in refugee receiving countries such as Turkey, with support, protection and infrastructural costs in the region of $6 billion, there is generally also a massive shortfall between local costs and what is received from the international community.

UNHCR has repeatedly emphasized, and the Security Council has likewise affirmed, that new solutions are required to alleviate the impact on refugee-receiving communities, and to the challenge of providing increased, flexible and predictable funding for critical humanitarian needs.

Costs and compensation

In the 2007 edition of *The Refugee in International Law*, Professor McAdam and I tread very lightly on the linked issues of *State responsibility* for the 'creation' of refugees (recognizing that this is multi-faceted), and of *compensation* for the losses which result for States admitting refugees on behalf of the international community and in fulfilment of their international obligations.

Back in 1939, the eminent British international lawyer, R. Y. Jennings, considered that source State liability could be based on the repercussions which a refugee exodus has on the material interests of receiving States. In his view, conduct resulting in 'the flooding of other States with refugees' was illegal, the more so, 'where the refugees are compelled to enter the country of refuge in a destitute condition.'

Today, more often than not, refugee flows are driven by violations of international law, in particular, of human rights and the laws of war. But legal theory and practice have not developed to the point at which the source State can be said to have a *duty* to compensate either receiving countries or the refugees themselves. Where, then, is this line of thought actually going? For that, I am indebted to Selim Can Sazak who, in May last year, passed by me the idea that refugee receiving States and/or competent international institutions should have access to the frozen assets of refugee source countries, such funds to be used for humanitarian assistance to the displaced; this proposal is developed more fully in his recent article in the *Journal of International Affairs*.

Here is an idea with many positive dimensions. It resonates ethically with the need for justice, and a source country, one might think, could hardly complain if its assets were used to bring relief to its own people. Of course, they will complain, and will argue doubtless that their refugee citizens are undeserving, or traitorous, or terrorists. But good information, documentation and analysis, coupled with close tracking, auditing and

accountability, should ensure that when such funds are used, humanitarian goals are maintained.

As a practical model, Selim Sazak's idea can also draw on the now considerable UN experience with sanctions, compensation and regulation, and with the body of State practice codified by the International Law Commission in the Articles on the Responsibility of States for Internationally Wrongful Acts, particularly as regards 'countermeasures'.

Countermeasures

At first blush, the use of source country assets for humanitarian assistance to refugees looks like a ready candidate for the category of *countermeasures* – unilateral action by a State in response to a wrongful act committed by another State and undertaken precisely to induce that State to comply with its international obligations. The action in question – the countermeasure – would otherwise be unlawful, but wrongfulness is 'precluded' or effectively excused, provided at least that it is proportionate, reasonable, preceded by notification, and not arbitrary.

For an individual State acting on its own, however, the situation is not necessarily straightforward. Countermeasures may be permitted where there is an internationally wrongful act which injures the State taking the countermeasure. In a situation of conflict, such as that in Syria, many violations of international law are indeed occurring, as the Security Council recognized in resolutions 2139 and 2191 adopted in February and December 2014.

However, the legal situation between Syria and Turkey is quite unlike that in which, in an essentially bilateral relationship, one State elects to apply countermeasures in response to another's breach of obligation towards itself. The obligations at issue in the present case – to protect human rights, to implement international humanitarian law – are mostly owed *erga omnes*, to the international community at large; and it may be difficult to identify specific State conduct resulting in specific loss.

Nevertheless, there are examples of countermeasures taken against States violating human rights. The US Congress authorised such measures against Uganda in 1978, avowedly for its role in genocide; and against South Africa in 1986 because of *apartheid*. Collective measures were instituted against Iraq in 1990 and, on the occasion of the Kosovo crisis in 1998, Member States of the European Community adopted legislation providing, among others, for the freezing of Yugoslav funds.

No United Nations sanctions are in force against Syria, but pursuant to the Common Foreign and Security Policy and Article 29 of the Treaty on European Union,

the EU has had such measures in place since May 2011, 'in view of the seriousness of the situation'. Sanctions include restrictions on travel and the freezing of 'all funds and economic resources belonging to, owned, held or controlled by persons responsible for the violent repression against the civilian population... and natural or legal persons, and entities associated with them...'. Those targeted include financial and other supporters of the government and ministers and military commanders believed or presumed to be involved.

While in no case so far have frozen assets been employed for humanitarian relief, this is not to say that international law and obligation are irrelevant, but only that unilateral action in the form of countermeasures may not be the most appropriate response. Indeed, it could expose the acting State to liability if it misjudges the law or acts disproportionately. The apparent simplicity of countermeasures – a tit-for-tat response to violations of international law resulting in material injury to the refugee receiving State – may be offset by doubt and uncertainty as to the precise legal implications. These objections could be avoided by authorisation under a Security Council resolution.

In 1991, following the first Gulf War, the UN Security Council took note of the necessity urgently to meet humanitarian needs in Kuwait and Iraq. Acting under Chapter VII of the UN Charter, it reaffirmed Iraq's liability in international law for any direct loss resulting from its unlawful invasion and occupation of Kuwait. To this end, it decided to create a fund to pay compensation for such losses, the fund to be financed by Iraq on the basis of an appropriate percentage of the value of its oil exports. Certain guarantees were included, with account to be taken of Iraq's capacity to pay, of the requirements of the people of Iraq, and of the needs of the economy. So was born the UN Compensation Commission which adjudicated hundreds of claims in the years that followed.

In 1995, again with Iraq on the agenda, the Security Council decided to set up the Oil for Food Programme, as a 'temporary measure to provide for the humanitarian needs of the Iraqi people...' The UN and the Government of Iraq signed a memorandum of understanding in May 1996, in which the Government undertook to guarantee equitable distribution throughout the country of humanitarian supplies (medicine, health supplies, foodstuffs, and materials essential for civilian needs), purchased with the proceeds from the sale of Iraqi oil. The UN set up a special account for the purpose, to be audited externally, and the distribution process was observed and monitored by UN personnel and coordinated by the Department of Humanitarian Affairs (now OCHA, the Office for the Coordination of Humanitarian Affairs). The programme (which was not without its critics) went on to provide humanitarian relief to some 27 million Iraqis, with the result that malnutrition was cut and many lives saved through the delivery of vaccine and medicine.

There is still much to be worked out, of course. 'State' assets may or may not be readily identifiable, but experience with sanctions and measures to combat money laundering, corruption and the financing of terrorism, means that more can now be achieved. There may be a case also for targeting the wealth of individuals, if this can be organized fairly, within the rule of law, and provided that some objective element of responsibility can be identified.

On the down side, of course, is the possibility of a veto in the Security Council, particularly where conflict is internationally politicised; it is then that the case for countermeasures at the State or regional level may re-emerge more strongly.

Selim Sazak's proposal is thus definitely one worth pursuing, not only because of the material contribution it could make to the assistance and protection of refugees, but also because of the impact it may have on State agents able to influence State policy, as countermeasures are intended to do; and, above all, because it helps to square the circle of justice.

Next steps

The use of a refugee source country's assets for humanitarian assistance to its displaced citizens could certainly help to bridge the funding gap, although the amounts to be realised will vary and their 're-distribution' to relief purposes may sometimes be largely symbolic.

However, the urgent and continuing need for funds to ensure protection, assistance and the search for lasting solutions is just one facet or dimension of people moving between States today, which calls for far greater concerted action. Back in 1989, and again in the UNHCR Executive Committee, the Turkish representative remarked that the refugee problem, 'was such that it was no longer possible to disassociate international protection from international co-operation and assistance'. That necessary, if not contingent, relationship is made clearer still today by the crisis in the Mediterranean, in which many Syrian refugees are caught up. What we are witnessing is not just a European phenomenon, but an international one, engaging States on all sides of the sea, and many also beyond its shores.

Even a cursory look at *who* is moving and *why* tells us that we need to keep an eye on the big picture, and why also we need a new start to the international 'management' of displacement. International protection is clearly required, whether we are talking about refugees, unaccompanied children, the smuggled, the trafficked, or the migrant seeking survival. 'Solutions' may be dependent on circumstance, but the starting point is and must

be protection – to ensure the life and safety of those at risk along migration and transit routes.

What is needed then is multi-dimensional, including opportunities – substantial safe, legal access to Europe and other countries with the capacity for refugees and migrant labour; greater protection capacity along the way, and real solidarity between north and south in the implementation of development programmes which have a chance of reducing the necessity for flight.

We have been here before, however, and we know that with the right political will, workable and working solutions can be found; that mechanisms can be put in place which will ensure the disembarkation of those rescued or intercepted at sea against appropriate guarantees (such as assistance in identification and determination of status, or with care and accommodation, or with appropriate solutions in asylum, migration or return); that transit States (which also have problems of accommodation, processing, solutions) can be brought on board as partners in a protection oriented response with international and regional oversight; that countries yet more distant can be brought into what will have to be longer-term planning for development.

The Mediterranean has an international and not a purely regional dimension. Though presently a microcosm of indecision and *ad hoc* measures, it also brings forth issues and challenges common to many other parts of the world – the Caribbean and the Pacific, to name just two. What could be achieved in the Mediterranean, properly founded on principles of protection and accountability, could easily serve as a model for elsewhere.

In the 1970s, too, there were difficulties galvanizing political will and political action around the no less desperate situation of Indo-Chinese refugees, and it took an international conference to kick-start serious progress. The UN Secretary-General, together with the High Commissioner for Refugees, conducted intensive preliminary consultations, following which he called a meeting in Geneva in July 1979, with representation at the ministerial level.

Building on the preceding consultations, that conference led to substantial increases in the funding of relief and the provision of resettlement places; in the offer of sites for processing centres; in opening discussions with the principal source country, Viet Nam, on family reunion, orderly departures, and return; and in practical proposals for rescue at sea.

Looking at the results of that conference and at the concrete initiatives which followed, it is surprising how similar are the issues we are facing today, notwithstanding the very different political situation. Then, as now, it was essential to maintain the primacy of protection principles; to engage with governments across the broadest spectrum; to secure commitments both from within and outside the region; to ensure the involvement of competent international organizations and NGOs; to promote practical

and humanitarian relations with source countries; and to bring in the shipping community and build on its commitment to rescue at sea by devising practical disembarkation schemes.

But that was only the beginning. Ten years later, the Secretary-General was back with UNHCR to convene a second international conference on Indo-Chinese refugees, this time to adopt a Comprehensive Plan of Action which would eventually bring to an end a humanitarian crisis which had changed dramatically over the years.

Conclusions for now

Today we need a similar initiative, and we need *leadership*, from the United Nations, from States, from Parliaments, and from civil society, for what we are facing in the Mediterranean is not an isolated issue, not a purely European problem. The linkages between the regional dimensions of this crisis and the refugees now benefiting from asylum in Turkey, Jordan, Lebanon and Egypt are clear, and if coherent, effective responses are not forthcoming, further onward movement is inevitable.

The movement of people leaves few States untouched, and much of that movement is driven by desperation – unremitting conflict and persecution, failed and exhausted economies. Nor is that movement a problem waiting for a solution; on the contrary, it is a phenomenon in a modern, globalized world presently no more able to resolve major economic challenges than to broker peace in conflict. It is a phenomenon we must learn to live with, and to manage as best we can in the interests of all. Among other matters, this will require States dealing with each other on a basis of equity and equality, not outmoded and unrealistic expectations of sovereign entitlement. In addition, better 'management' will require investing in long-term responses, not short-term, *ad hoc* measures focused simply on symptoms, not causes. Only an approach combining protection, humanitarian assistance and opportunity with political and financial investment in mitigating and removing the underlying push factors can have any impact.

The Secretary-General is already involved in a number of migration and development projects. It is time now for a fully comprehensive, far-reaching approach, and for the Organization and its members to think and act wider and deeper, to turn to and address constructively the humanitarian dimensions. It is time to learn from Indo-China and other experience that international cooperation can work.

It is time to convene an international conference, not as a one off, but on a rolling basis, and with the broadest participation possible. Only by engaging across the full spectrum of interest can we make a start to what will and must be a generations-long

project of protection and opportunity, in strengthening asylum, but also in realising human potential both at home and abroad, in bringing working and workable alternatives to those whom desperation drives to risk all.

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