The Sir Kenneth Bailey Memorial Lecture
'International Refugee Law – Yesterday, Today, but Tomorrow?'

Notes for a Presentation

Guy S. Goodwin-Gill
Senior Fellow, Melbourne Law School
Emeritus Fellow, All Souls College, Oxford
Emeritus Professor of International Refugee Law, University of Oxford
Honorary Associate, Refugee Studies Centre, University of Oxford
Barrister, Blackstone Chambers, London

14 September 2016

I am honoured and delighted to be here tonight to give the Sir Kenneth Bailey Memorial Lecture, at a time when the subject of my talk, international refugee law, is facing, or said to be facing, something of a crisis.

But I am also especially grateful to Professor Carolyn Evans, the energetic and inspirational Dean of the Law School, for having encouraged and facilitated my visit, and to Professor Michelle Foster, for having allowed me to join her in five days of intensive but rewarding teaching – always a useful counter-weight to too much academic speculation.

Kenneth Bailey played a significant part in Australia's contribution to the formation of the United Nations, as Gareth Evans recalled when giving the first lecture in his honour. He had been a delegate to the League of Nations in the late 1930s, and then, through his secondment to the Commonwealth Attorney-General's Department, became involved in the creation of the United Nations itself, accompanying the Australian delegation to San Francisco in 1945.

As Gareth Evans also recalled, Australia's vision for the new body combined both a reasonable assurance from war with a reasonable prospect of international action to ensure social justice and economic advancement. Economic and social issues, in Australia's view, were as central to international harmony as military ones. That view was shared by many at the time, and I have no reason to doubt it continuing currency, although looking at the realities today of population growth, under-development, under-investment in developing countries and a world still riven by inequality, one might question how far we have come...

I am not *that* pessimistic, however, and in the case of the regime which we call international refugee law, I find good evidence of co-operation at times, of solutions found and protection ensured; of progress, of a substantial degree of resilience, a solid historical base in the practice of States, and the capacity to evolve.

Of course, like so much of the law which regulates relations between States and their conduct towards individuals, certain elements remain contested. Whether the regime can respond effectively to the challenges which it now faces, may be doubted, at least insofar as much depends on political will among States; and on a quality of leadership and vision which we have seen before, but which today seems only too lacking.

And yet, as I will try to show, there are grounds for optimism. First, however, I need to start with an admission. The title for tonight's talk is not entirely new. I used the same words for a talk I gave in London in June; but this is not the same talk, even if it necessarily covers a lot of familiar ground. Still, I take encouragement from André Gide, the French author and winner of the Nobel Prize for literature, who once helpfully wrote,

> 'Everything that needs to be said has already been said. But since no one was listening, everything must be said again.'

So let's go back to the beginning, and see how the history of international refugee law closely parallels the modern history of international law and organisation.

International refugee law yesterday

It all began at a meeting in Paris in February 1921. In a story I have told and re-told many times, Gustave Ador, then President of the International Committee of the Red Cross, met with the President of the Council of the League of Nations, and brought up the urgent problem of several hundred thousand Russian refugees then adrift – adrift and without protection, written off by their country of origin, with no prospect of settling locally, of finding employment, let alone of moving on to other countries. Nor were they the only ones...

The ICRC and the League of Red Cross Societies themselves were able to take up the challenge of relief, which they did with considerable assistance from the American Red Cross and the International 'Save the Children' Union. But relief was not enough, the resources of voluntary organisations were rapidly diminishing, and something had to be done with regard to legal status, employment and emigration. There was no better organisation than the League, argued the ICRC, to look into the issues and only the League was in a position to surmount the political and social difficulties and come up with solutions.

In a letter on 15 June 1921 to the President of the Council of the League, Gustave Ador urged it to take the necessary action. The Secretary-General, Sir Eric Drummond, sounded out governments on what to do, and many responded positively, favouring both a general

organisation under the League, and a High Commissioner – someone with personal authority, able to secure the necessary support from governments, to influence non-governmental organisations and gain their respect.

A conference duly took place in Geneva from 22-25 August 1921. The Norwegian,, Fridtjof Nansen was proposed as High Commissioner – he had already worked on famine relief in Russia and on the repatriation of former prisoners of war – and a telegram was sent off. On 1 September, he replied by letter, accepting the post, and at once set about finding practical solutions and opportunities, particularly for employment, either locally or in third States.

He also negotiated resettlement opportunities with the United States, and even discussed the possible modalities for repatriation with the Soviets. He paid special attention to the needs of refugee children and to refugees with disabilities, but he is also remembered for having rapidly secured the agreement of governments to issue identify certificates to Russian refugees – a simple administrative step which was highly instrumental in their ultimately finding solutions. Almost all League members adopted the system, together with Germany, a non-member.

When we think of the cardinal principle of *non-refoulement* today – the rule which prohibits the return of the refugee to wherever he or she may run the risk of persecution – we tend to look back no further than the 1951 Convention, or perhaps to the first occurrence of the term in a little-ratified 1933 treaty.

But the idea, the principle, was already implicit in the doctrine of refugee protection and assistance in 1921. The League and the ICRC both accepted that, if refugees were to return to Russia, now the Soviet Union, then their return would need to be accompanied by assurances of the 'most elementary security and the prospects of conditions at least as favourable as those under which they are now living'. Even in the absence of any explicit treaty provision, Nansen felt able to intervene with States to stop the threatened return of refugees – with China, Romania, and Poland, among others.

In this early work with Russian refugees (soon joined by other groups and categories), we can see the principles of protection and co-operation emerging and at work – recognition of responsibility to assist countries of first refuge; acceptance of the importance of a set of solutions to be promoted with and by States, including emigration (but with that emphasis always on 'productive employment'), and special measures for vulnerable groups; recognition of the value of identity certificates, followed rapidly by the refugee passport; acceptance of the principle of protection against forcible return.

It was precisely the lack of protection that characterised Russian refugees and the others brought within the High Commissioner's mandate – a situation considered exceptional and anomalous at the time, and one which, in the opinion of States, would be temporary and required no permanent or long-term provision, whether organisational or financial.

This was not Nansen's view. On the contrary, he believed that long-range plans, 'carefully conceived and carried through would prove not only far more successful but much less costly than the relief and piecemeal efforts being made' (Holborn, May 1939).

But Nansen died in 1930. The Office established that year in his name was intended to be wound up in 1933, but in that and the following years radical political change would bring their own whirlwind of refugees – from fascism, from nazism, from the Spanish civil war.

Almost at once, States agreed that there should be a new High Commissioner responsible for Refugees (Jewish and other) coming from Germany, but formally outside the League owing to Germany's continuing membership.

James McDonald was appointed to the post in October, tasked to 'negotiate and direct' the 'international collaboration' necessary to solve the, 'economic, financial and social problem of the refugees...' It got worse. Doors were closed, the pressure grew, and while private organisations might do their best for the refugees, it was not enough just to help those who fled. Major efforts were needed to remove or mitigate the causes, and this, said McDonald in his December 1935 letter of resignation, was a political function and therefore the responsibility of the League itself, given the danger to international peace and security.

By this time, however, the League was too weak to influence events. A new High Commissioner was appointed, with his mandate extended to refugees from Austria after the Anschluss in 1938; and a new organisation was created, the Intergovernmental Committee on Refugees, following the Evian conference that year. Events, however, were rapidly to take over.

Notwithstanding the times, notwithstanding knowledge of events and of persecution and of flight, humanitarian responses were not the order of the day. On the contrary, refugees were seen as potential threats – to the economy, to social cohesion, to the process of 'appeasement'.

As Louise Holborn noted in May 1939, the League had,

> '... handicapped itself... first by always dealing with [refugee work] as a humanitarian question instead of treating it as a political one and striking at the root of the problem, as both Nansen and McDonald proposed, by negotiations with the refugee-producing countries; and second by its unwillingness to commit itself to long-range plans.'

It is ironic that the architecture of international law and organisation set up for refugees in the new era of the United Nations did little at the time to engage with these concerns. Causes remain a fundamental challenge to a community of States and an organisation premised on non-intervention; while the seductive but illusory pull of 'temporariness' continues to influence policies and practices at both national and international level.

Certainly, complementary legal developments and the practice of States have achieved much over the past 70 years, but further major steps are clearly called for.

International refugee law today

Although a number of agreements and treaties were concluded during the time of the League, the most significant contribution, to my mind, lies in the groundwork of protection laid by Nansen during the 1920s.

When the UN came to deal with refugees – the General Assembly took early action on matters of principle (formally recognising that that there should be no forced return), and on organisation at its first session in February 1946 – it necessarily built on what had gone before, but with one major, significant difference. With the adoption of the Universal Declaration of Human Rights in 1948, the individual was now clearly in the frame; and while sovereignty and non-interference might continue their role, the movement of refugees between States and the entitlement of refugees to protection was now clearly a matter of international law.

The UN's first agency, the International Refugee Organisation, focused on finding solutions for those displaced by the Second World War and later political developments. It engaged in comprehensive resettlement activities, but it was expensive, consistently criticised by the eastern bloc and, for some of its western supporters, unsuited to broader political purposes.

Alternatives were debated in the Third Committee and the Economic and Social Council, and States agreed that the IRO should be replaced by a non-operational subsidiary organ of the

General Assembly, the Office of the United Nations High Commissioner for Refugees, whose work would by 'complemented' by a new convention on the status of refugees. UNHCR, which came into being on 1 January 1951, was thus formally entrusted with responsibility to provide international protection and, together with governments, to seek permanent solutions for the problem of refugees.

But its work was also to be 'humanitarian' and 'non-political' – and as with the League, prevention and causes were no business of UNHCR.

Similarly, when States came to draft the 1951 Convention, they expressly declined to write in specific obligations on co-operation, which the then UN Secretary-General saw as crucial to an effective regime. His suggestion for an article on burden-sharing was rejected, as was his proposal that States give just 'favourable consideration' to admitting refugees.

It is precisely in these areas – causes and co-operation – that the international refugee regime reveals its incompleteness, and this helps to explain many, if not all, of the actions taken by States, particularly unilaterally, and of the concerns which many also share.

And yet there are still undoubted strengths in international refugee law, as it has evolved in practice and in the institutions set up by States. The 1951 Convention and its 'updating' 1967 Protocol are now complemented by regional arrangements in Africa, Central America and Europe. The protection of refugees has itself evolved and been strengthened by developments in the general field of human rights, while the principle of *non-refoulement* is manifestly one of customary international law.

Although the occasional official or politician may complain that the 1951 Convention is unsuited for today's conditions and call for an overhaul of the legal framework, they are generally hard pushed to say what exactly is wrong. There is certainly a debate here, which is probably worth having. Perhaps the refugee definition is not wide enough and it should be re-drawn to embrace more clearly the 'new' categories of displaced?

Or perhaps the principle of family unity should be moved from the Final Act into the body of the Convention? That does not seem to be what they want, but neither do these proponents of 'reform' seem inclined to challenge the core meaning of protection, and to demand the power to send people back to where they will be at risk of persecution, torture, or other serious violations of their human rights.

International refugee law is a dynamic regime, a matter of what is written, what is done, what is expected. It is an *international* regime, in that it links a treaty concluded under the auspices of the United Nations, to an agency – a subsidiary organ of the General Assembly which States have accepted both as partner and as supervisory mechanism; and then to a forum of States, the UNHCR Executive Committee.

In fact, the links are more extensive still. UNHCR's staff of 9,000 plus operate, and inter-operate with States at the officials level, in 125 countries world-wide. Often, UNHCR will be involved when refugee status decision-making authorities seek to apply international criteria to the disparate facts of individual lives. Wherever people arrive in search of protection, often in large numbers, it is UNHCR's responsibility to provide protection, that is, to intercede with governments where necessary to ensure that those in need of protection are identified and treated accordingly. UNHCR may not have the authority to bind States or to interpret legal matters with final effect, but the role in the regime which States have given it means that its views must be considered in good faith, and justifiable reasons given for disagreement. In such contexts, national and international officials are engaged in common cause, as indeed they have been, if not since time immemorial, then at least since 1921.

The essence of refugee protection today, can be stated quite simply. The refugee is someone whose status is defined and recognised by international law, both under treaty and as a matter of customary international law. He or she *does* have a right to seek asylum, and the search for refuge is *not* a criminal act from an international law perspective, whatever States may pretend. It follows that refugees in search of protection is not to be penalised by reason of their illegal entry or presence, and that each claim must be examined on its merits; in this context, the precise standard of international due process may be a work in progress, but the essentials are emerging in the practice of States and in light of overarching principles of human rights.

Above all, as over ninety years of sufficiently conforming practice have confirmed, the refugee must not be *refouled*. Yes, there are gaps and grey areas which States can exploit in their own interest – the gap between *non-refoulement* and asylum, for example, which human rights is seeking to bridge; or the gap between primary obligations and responsibility when it comes to identifying which State or group of States should protect and assist.

But the core is clear, and at the risk of simplifying a complex scenario, the outlines of the scheme of protection are self-evident in those *primary rules* which lay down the parameters for State action, indicating the limits beyond which the State cannot go without incurring responsibility for its actions. Such primary rules do not necessarily provide solutions for

every resulting problem, but they are the essential juridical basis – the framework – from which 'subsidiary' rules will take their normative and constructive force.

The fundamental rules of the international refugee regime are *primary* in the sense that, unless there are very exceptional circumstances, they can override or trump other important interests, commonly expressed in terms of sovereign powers. They change the picture, they lay 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 framework of protection, co-operation and solutions provided by international law and its institutions).

Refugees, for example, commonly use the same means of travel and entry as irregular and undocumented migrants. What States do to combat smuggling and trafficking has a major impact on refugee protection, and here the primary rules emphasise the clear distinctions which must be made between refugees and those not in need of international protection, who fall under other legal regimes. It is in the very process of making such distinctions that the key to appropriate solutions is found, whether within the field of international refugee law or of international law at large.

And yet there are challenges here, and some contingency, I fear, between the implementation of international protection obligations, on the one hand; and the orderly and humane management generally of the movement of people between States, on the other.

International refugee law tomorrow?

Does international refugee law, with all its constraints on States' freedom of action, have a future?

We can certainly rest assured that the present international community of independent 'sovereign' States will continue, and that people will continue to move between States in search of refuge from persecution and other human rights-related harm, and in search of livelihood opportunities.

As States continue to search for solutions, history and practice suggest that perceptions of self-interest will influence policy formulation and their readiness to co-operate with others. At the same time, other developments suggest that some States will increasingly call for a review of those aspects of 'sovereignty' which appear to be obstacles to humanitarian action. Here,

we may see the hitherto unrealised potential of the 'responsibility to protect' come into its own.

Clearly, international refugee law will have to find its place in a world of increasing international migration, in a highly globalised and securitised political and economic context, and this brings challenges. Although we can explain the differences, there is no clear bright line between the refugee and the economic migrant, no matter what the UNHCR *Handbook* may wish.

But I see that not so much as a problem, as an urgent invitation finally to introduce a workable international legal framework for the governance of migration and for the protection of the rights of migrants, irrespective of their status.

In 1946, the General Assembly recognised that the refugee problem was international in scope and nature, by which it meant that no one State should be expected or required to shoulder responsibility on its own.

Even as States have attempted, and continue to attempt, to assert unbound unilateral sovereign competence in such matters, it is now clearly evident that principles, effective management and the declared interests of States in security and order require international co-operation, and that this, in turn, will require States to deal with one another – States of origin, States of transit, States of intended or eventual destination – on a basis of equality and equity.

Unfortunately, lessons, even recent lessons, have not been learned. Current proposals to reform Europe's 'Dublin' scheme, for example, are so framed as to try to keep the asylum seeker away, not because he or she may be a refugee, but because he or she is 'deemed' to be the responsibility of another State.

But 'safe third country' and 'first country of asylum' are essentially European constructs, glosses on the 1951 Convention which are *not* opposable to other States, whether party or not, absent their consent. While every State may be obliged to re-admit its nationals, there is no such corresponding obligation to re-admit any non-citizen who may have transited through en route to elsewhere.

As the EU seems unable or unwilling to negotiate with other States on a basis of equality and equity, it is unlikely that the new 'Partnership Agreements' will produce the sort of co-operative results which Ministers of the Interior appear to want – a policy goal which they have succinctly described as keeping refugees out of Europe.

The future for international institutions

In 2003, the UN General Assembly decided to put UNHCR's mandate on a permanent footing ('until the refugee problem is solved'), nothing much else has changed – States continue to see the refugee problem as essentially 'temporary' in nature.

This might be thought encouragingly optimistic, and evidence of their intent and willingness to ensure that solutions to forced migration will be quickly forthcoming, and that no refugee situation should become protracted through time. The consequence, as Nansen too understood, is that States remain unwilling to commit themselves to humanitarian and protection realities without limit of time.

The idea that refugee situations are 'temporary' has a certain seductive appeal, despite the multiple lessons of history. What we do know, is that refugees will move, from persecution and conflict to places of refuge, and from places of uncertain or strained refuge, to places of actual or perceived greater security. The fact that we will not know exactly how many is itself reason enough to put institutionalised mechanisms of mutual support into place, recognising also that there is no working or workable conception of the 'temporary' (as a predictive tool), which allows or justifies the muddle-headed, short-sighted, often quite mean-spirited policy and legislative proposals which have emerged from the dark side in recent months.

International law is not itself a 'solution' to the problem of refugees, but it can facilitate and guide the principled effectiveness of measures which States may take or contemplate. In this sense, it offers a *framework* and the *goals* by which to judge the viability of *process* and the quality of *success*, if any. International law thus conditions the sovereignty dimension, particularly when considered within the institutional context of the United Nations.

Over the past eighteen months, I have had occasion to speak, perhaps too often, about the crisis in Europe. Looking at the broader issues raised by an increasingly mobile world in which, too often, those on the move are left adrift, abused, and without protection, it seems to be that novel, long-range thinking is called for, much as Nansen and McDonald thought in earlier times, even if on somewhat different issues.

There may be scope for change. The UN Secretary-General has urged States to commit to upholding safety and dignity in large movements of both refugees and migrants, to commit to a Global Compact on responsibility sharing for refugees and migrants, and to commit to a Global Compact for safe, regular and orderly migration.

And next Tuesday, 19 September, Heads of State and Government and others will meet to consider and adopt a 'political declaration'. The present draft is full of fine words, very fine words, recognizing that the world is a better place for the contribution made by migrants, and re-affirming that the human rights of all refugees and migrants, regardless of status, are to be protected.

The Declaration will also acknowledge that large-scale movements are such that no one State can manage them on its own, and that greater co-operation is called for if lives are to be saved, root causes addressed, and prevention and mediation of conflict promoted.

The Declaration proposes a number of 'commitments'. While reaffirming the protection of human rights, it naturally recognizes, 'that States have rights and responsibilities to manage and control their borders', with a view to security and to combatting transnational organised crime, including people smuggling, trafficking, terrorism and illegal trade. *Non-refoulement*, moreover, is to be fitted into State measures to prevent irregular border crossing.

The Declaration covers the whole spectrum of the movement of people between States, not excluding reception, education, diaspora interests, development, and the protection of those unable to return.

Specifically on refugees, States will 'commit' to work to address root causes, to prevent or resolve conflict and to promote human rights. The 1951 Convention and the 1967 Protocol remain the 'foundation' of the international refugee protection regime, in which human rights and humanitarian law also play their part in strengthening the system. States will commit also to 'a more equitable sharing of the burden and responsibility for hosting and supporting the world's refugees', but the drafters have resiled from the earlier proposed commitment to resettle one in ten of the world's refugees, in favour of just a general undertaking to expand the number of places and opportunities.

Refugees and migrants are then dealt with specifically in two separate annexes. The first, entitled 'Comprehensive refugee response framework', attempts to offer an outline for the future, with regard to reception and admission, meeting immediate and ongoing needs, supporting host countries and communities, and working towards durable solutions. The primary goal remains return to countries of origin, with legal stay in the interim and an emphasis on measures to foster self-reliance. Third States are then encouraged to make available or expand resettlement opportunities and what is now called 'complementary pathways for admission'.

But this, and the rest, remains for now just an outline. It is not the 'Global Compact' that the Secretary-General hoped for – that is postponed to 2018; rather, it is a pilot project, a scheme for action to be pursued by UNHCR and States, to see how it all works out. Does it add anything to what is already in place and what is already being done? That seems doubtful; its value for the moment may lie in its calling attention, once again, to the need for a 'comprehensive' approach...

Annex 2 is entitled 'Towards a global compact for safe, orderly and regular migration', and it too is a work in progress, with 2018 also as the intended dateline.

Once again, this is intended to be a process of intergovernmental negotiations, and it was already recognised that considerably more time and effort would be required to bring States to any sort of consensus on such a contested question. The Annex does little more than highlight issues at this stage and, while certain key actors besides States are to be involved, including the Special Representative of the Secretary General for International Migration, the ILO, the High Commissioner for Human Rights, and the International Organization for Migration, there still remains ample room for the protection of migrant rights to be included, developed and placed on an effective institutional base... We shall see.

Alternative ways and other things to do

There is much also to do at the international level, beyond what the 19 September meeting may achieve.

Among others, the competencies of the Security Council and the UN Secretary-General should be revisited seriously and urgently, with a view to anticipating crisis, acting to mediate and prevent conflict, and moving to counteract the necessity for flight, for example, through effectively operationalised '*safe zones*'.

Such 'zones' can clearly play a humanitarian role in situations of displacement. In a contested and later much disputed 1991 resolution, the Security Council requested that Iraq halt its attacks on the Kurdish people in northern Iraq and that Member States assist in the humanitarian relief efforts. A relief and protection/security operation, backed by the use and threat of force, particularly enforcement of a no-fly zone, was in place from 1991-2003 and effectively prevented or reduced the necessity for flight. For various reasons, its legal justification was challenged, and any future measures along these lines will require more careful location within the framework offered by Chapter VII of the UN Charter.

What we know, and what we keep re-learning, is that if security against displacement by conflict is not provided, and if security conditions in countries of first refugee fall short of providing assistance, livelihood, education and at least some opportunity, then refugees will continue both to flee and to keep moving. That is the lesson of experience, after experience, after experience.

If there is one weakness in the regime established by the 1951 Convention/1967 Protocol relating to the Status of Refuges, it is in the failure of these instruments to establish clearly which State should be responsible for determining claims to protection; and which State or States should contribute to relieving countries of first asylum, and how. The resulting 'legal hole', has not been resolved through the political mechanisms of the regime at large, for example, in the now 98 Member State Executive Committee of the UNHCR Programme. Here, there may be room to take a leaf out of the environmental protection context, among others, and to investigate the possibility of States committing to an outline instrument, a *framework convention for durable solutions*, setting out certain objectives to which they would agree in principle, while leaving a measure of discretion in the implementation of those agreed objectives. In this way, specific targets and detailed rules (if needed) could be addressed in a separate protocol, oriented to context and particular circumstances. A framework convention could thus strengthen the basics, while allowing specific challenges to be dealt with by groups of States contoured more precisely by shared national or regional interests, proximity, alliance, and the like. The key to making such an approach work would be to institutionalise a permanent 'steering group' within the treaty regime, competent to call a meeting of States party and to set the agenda; the UNHCR Executive Committee might be the place.

Keeping asylum 'alive' means matching it also with viable *migration management*, and that does not exist. States have long resisted the 'internationalisation' of migration at large, and the price has often been ineffective and inefficient management, on the one hand, and insecurity and human rights violations, on the other. No international agency is thus responsible for the protection of forced migrants, and for working with governments to find solutions or improve arrangements for those outside their country, who may not meet current criteria. Change is urgently needed, on both fronts.

Over the years, the UN General Assembly has expressly affirmed that UNHCR's mandate extends beyond the original terms set out in resolution 428 (V), adopted on14 December 1950, and that it also includes stateless persons, the internally displaced, and others 'of concern'. This does not lead to new obligations on States additional to those to which they have consented by becoming party to treaties, or which are applicable under customary

international law, but it does help to contextualise issues like protection in an operational sense.

There has always been a disjuncture in practice, and a certain tension, between the institutional responsibilities of UNHCR, the obligations of States, and their 'sovereign' interests – this is part of what makes international refugee law such a dynamic system.

In my view, however, a number of radical, institutional changes are called for if the international system is to develop and maintain capacity to respond effectively to today's population displacements and to those which, inevitably, will follow. A first necessary step in 'nudging' the regime towards greater equity and more effectiveness is to 'internationalise' certain key migration issues, in particular, by providing for the protection or better protection of those moving between States who have no claim to enter or remain, but who are effectively adrift, exploited, detained, abused, and worse.

This would not only improve the situation of countless individuals and families, but would also better serve the interests, including the security interests, of States, and constitute an important step towards better management.

This can be achieved not by treaty, which is unlikely today, but by an imaginative use of existing institutions engaging with practical matters.

What I suggest is that the UN General Assembly revise the UNHCR Statute for the twenty-first century. Revision is needed, both to do away with historical anomalies and redundancies, but more particularly, to reflect changes already made and to bring in new tasks that call for the application of UNHCR's extensive and unique protection and assistance experience. In short, the organisation's mandate should expressly encompass refugees, stateless persons, the internally displaced, and migrants without or in need of protection.

This is just a beginning, but it could offer States an established and accepted partner, capable of operating across the whole spectrum of the movement of people between States; open up possibilities for future developments, for example, in standard-setting and strengthening regional opportunities; and keep human rights and protection front and centre in debate, policy and practice.

The basic rules of international refugee law *are* understood, and they *do* condition action and reaction. However, regime gaps, both universal and regional, are readily exploited by nay-sayers and their fellow-travellers. There is a great need for leadership, joined up thinking,

structural change, and UNHCR could take the lead – institutional responsibility can be extended and enhanced, while States can be left to watch and learn until such time as they are ready and able to take on more in the way of obligation.

Conclusion

As I hinted in opening, I am not by nature a pessimist. I believe, strongly, in the innate capacity of us all to do good. I draw inspiration, not from the human mischief worked by functionaries who imagine that 'deterrence' is a public good, that it contributes somehow to reducing the need for protection, that it is an answer to that often fatal desperation which drives the refugee, even the migrant at times; or who would seek to balance inhuman and degrading treatment, or the destruction of childhood – an irrecoverable value, or the perpetuation of abuse, against the imagined benefits of a non-existent, sacred queue.

No. Rather, I look to the refugee, the asylum seeker, the migrant on the move. For there, so often, we find true resilience, imagination, initiative, enterprise, and very practical concern for family, children and community. These qualities explain also why people driven by desperation weigh rationally the risks of flight, and why they take risks that for you and me are unimaginable. For it is in those risks, and in the chances of success, that futures lie – and often nowhere else.

Which takes us near full circle, to the international goal of social justice which Australia identified as a central reason for States to co-operate under law – a goal no less valid today, but which clearly needs also to be integrated into international action both for refugees and for migrants.