

## Introduction

In the 21st century, refugee flow and unauthorised people movement pose a major international challenge. Many developed nation states, including Australia, are taking increasingly draconian measures to prevent asylum seekers from crossing their borders. They often defend their actions by blaming and demonising refugees and asylum seekers and by fortifying national borders in the name of sovereign rights.

The year 2001 marked the 50th anniversary of the signing of the 1951 convention relating to the Status of Refugees (the Convention). As one of the many international activities held to commemorate this event, a conference was hosted by the Centre for Refugee Research, University of New South Wales (UNSW), to examine the relevance of the Convention to life in the 21st century. The majority of the articles in this special edition of the *Australian Journal of Human Rights* were drawn from that conference. The guest editor is Dr Christopher McDowell, from the Department of Anthropology, Macquarie University, NSW. Christopher brought to this task his extensive field experience of refugee situations in Africa and East Timor, and as an academic in the Refugee Studies Program, Oxford University, UK.

The Refugee Convention was written at the end of the second world war to protect European refugees from ongoing persecution and harm. It recognised the right to seek asylum from persecution as a fundamental and universal human right, enshrined in the Universal Declaration of Human Rights. Since the Convention was written, however, the world has changed dramatically and the face of the refugee has changed from that of a European to that of almost every race on earth. The political, social and economic forces that shape our world have altered beyond recognition. Borders of nation states have to some extent collapsed. For a large part of the world's population globalisation has homogenised the ways in which we live. There are unprecedented movements of people across borders, for reasons such as inter and intra country conflict, ethnic conflicts and natural disaster. Many people are displaced and live in dangerous and vulnerable situations within their own countries. The world is struggling to deal with these changes.

Fifty years after the signing of the Convention, the United Nations High Commissioner for Refugees (UNHCR) has over 22 million refugees and internally displaced persons under his protection. Additionally, there are an estimated 25 million people in the world displaced within their own countries, without any protection. Over 80 per cent of these refugees and displaced persons are women and their dependent children. They are subject to continuing violence, and are targets of rape and sexual abuse. They often live in substandard conditions, without adequate

food or sufficient water, and with ad hoc access to medical services and education. They are recognised as among the most vulnerable people in the world (UNHCR 2001).

When planning for the UNSW conference commenced, it was hoped that the coverage of issues would be truly international. However, during 2001, Australia's treatment of asylum seekers became international news, causing controversy both within Australia and across the world. It became a major agenda item at events such as the UN World Conference Against Racism in Durban August 2001, and at the "Three Tracks" Committee meeting of the United Nations High Commissioner for Refugees, Geneva, September 2001. It was widely reported in the world media. It was therefore inevitable that a major focus of the conference became that of Australia's refugee policy.

About 11,000 people enter Australia annually on either Refugee or Special Humanitarian visas as part of the resettlement program. Others arrive from refugee or refugee-like situations as part of the Family Reunion Program. These entrants are part of Australia's annual immigration intake of approximately 100,000. They are selected from refugee camps and situations where they have previously sought asylum, and are screened prior to acceptance for resettlement to Australia, using criteria which are focused more on selecting refugees who have good indicators for successful resettlement than on humanitarian need (National Population Council 1991). Once in Australia they are granted permanent residency status. This is the 'off-shore' refugee intake

Other people escape from situations of danger and seek asylum in Australia. Their experience is very different to those selected for resettlement overseas. They are referred to as 'onshore' asylum seekers. Many of the articles in this collection address Australia's treatment of these people.

The lead article in this edition focuses on the repatriation of refugees, which is regarded internationally as an issue of major importance. In their article, McDowell and Eastwood argue that since the mid 1980s refugee repatriation has been a cornerstone in the international management of forced migration emergencies. Their article considers and compares two major repatriation operations: Cambodian refugees from Thailand in the early 1990s; and East Timorese from West Timor in the past two years. A key element of these operations was the role of the UN in assuming some or all of the sovereign powers of the two states emerging out of conflict. The authors examine the implications of the UN's dual responsibility to act both as the architect and executive of state building, while at the same time having primary responsibility for the protection and reintegration of refugees. The article finds that

what are effectively politically-driven repatriation strategies often fail to protect refugee rights, and limit the likelihood of successful reintegration and livelihood re-establishment on return 'home'.

Renzaho takes us to the realities of the refugee situation, with a focus on food security as a human right. The human right to adequate and nutritious food in refugee settings implies that every refugee has physical and economic access to sufficient food to provide the necessary nutrients for effective physical and physiological functions and achieve well being. He argues that there are many grounds for believing that the current humanitarian responses to disasters more often violate than respect the human right to adequate and nutritious food.

Uricher discusses how Germany is addressing the issue of asylum seekers. Germany provides an illustration of the dynamics of asylum policies and politics in a country that until recently has not had an official immigration program. The article discusses the notion of asylum as a human right that is enshrined in the German constitution. In its original form, the German asylum system granted anybody access to the refugee status determination process. On the background of the massive inflow of asylum seekers in the 1980s and 1990s, a constitutional amendment was passed in 1993. It included the two central clauses regarding 'safe third countries' and 'safe countries of origin' and has severely restricted access to the asylum system.

This leads into the articles which focus on Australia. They are on the whole critical of the current Australian response and provide a range of analyses and recommendations for future directions. Bailey argues for 'a more balanced approach to refugee policy by adopting a more idealistic interpretation of 'national interest'. While every state has the right to control its borders, the present Australian policy of deterring asylum seekers is simply shifting the burden to other states and increasing the worldwide refugee problem. By upholding the human rights of asylum seekers and respecting its international obligations, Australia can contribute to the development of the international community, and strengthen its own position as a sovereign state. Possible alternatives to mandatory detention are presented by Alexander Nicholas, who starts with the contention, shared by most human rights advocates, that in its treatment of asylum seekers, Australia is contravening human rights law.

Taylor poses questions about whether Australia's current response to asylum seekers is in fact in complying with human rights conventions. She argues: 'Australia has undertaken non-refoulement obligations under the Refugees Convention, CAT and the ICCPR. However, Australia's interpretations of its non-refoulement obligations are so narrow, and its law and policy allowing visa refusals on bad character grounds

is so sweeping, as to create a real possibility that Australia may return some asylum seekers to their countries of origin in breach of its international obligations.' Using a recent case, Hunter explores the concept of gender in relation to the refugee convention, and how well Australia responds to asylum claims based on gender considerations. She refers to the *Khawar* case, where the High Court of Australia decided that a failure by the applicant's state to protect her from domestic violence was sufficient to meet the requirements of the definition of a refugee. It was decisions such as this that prompted the introduction of legislation to narrow the interpretation of the definition in Australian courts and tribunals. Hunter illustrates that this interpretation is in line with international practice and the intentions of the Refugee Convention definition's drafters. The article also shows that the new legislation is likely to discriminate against gender-related refugee claims.

The article by Tascón examines how refugee policy has developed in the current climate of fear and uncertainty about our national identity. Tascón discusses how refugees and asylum seekers within Australia have triggered anxieties that have been translated into policies and practices that actively eject, contain and place refugees in limbo. The article considers the reasons for this treatment, starting at the point where the discourse of national borders has come to impact heavily on refugees.

Stratton and McCann provide an interesting opinion piece on recent developments in Australian policy and legislation as it relates to asylum seekers and refugees. They examine the events surrounding the rescue of Afghan asylum seekers by the MV *Tampa* near Christmas Island last year and the legislation which was introduced in response to that event. The case note by Feld also examines this incident. It looks at those events (including the litigation that followed them) against the background of domestic and international law. It questions the sincerity of the Australian Government's claim throughout the events and the subsequent litigation to be seeking fully to meet Australia's legal obligations to refugees.

## Conclusion

The answers to the problems posed by the increasing flow of refugees, asylum seekers and unauthorised people movement are incredibly complex. They involve examination of the root causes of refugee flow, of the way that aid is provided in situations of refuge, of the process of settlement and resettlement and the services provided to refugees to assist them in these processes. It involves an acknowledgement that 80 per cent of refugees are women and children and they have special needs.

It also requires a thorough examination of the way in which the member states of the United Nations define and interpret the Refugee Convention. Many experts argue for the introduction of mechanisms to ensure accountability, such as an Optional Protocol to the Refugee Convention, or the appointment of a Special Rapporteur on Refugees answerable to the Human Rights Commissioner. to ensure that in the future, standards are set, and reporting processes are in place. It is acknowledged that new provisions have to be made for the tens of millions of people displaced by economic and environmental factors. Until these issues are addressed, refugee flow will increase, nation states will put in place increasingly draconian measures to defend their borders with unforeseen long term consequences, and people smuggling will flourish. ●

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