

A Numbers Game: Counting Refugees and International Burden-Sharing

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This paper is based on a presentation delivered on 19 December 2012 to the Law School, University of Tasmania.

I INTRODUCTION

The United Nations Refugee Convention recognises that the problem of refugees is inherently international and cannot be solved by a single state alone. Yet achieving international cooperation, or even achieving consensus on what this means, has had a long and chequered history. Moreover, debates on international cooperation (or responsibility- or burden-sharing) regularly involve ‘counting’ refugees and asylum-seekers. Who bears the biggest burden? And who is responsible for easing the burden? It’s a numbers game. This article will examine the many ways in which a focus on asylum statistics has impacted on the international protection regime for refugees, and what needs to be done about it.

This article is about numbers, but it is not only about numbers. It is really about the impact that ‘counting’ refugees and asylum-seekers has had on the international protection regime.¹ It is in three parts. The first gives a global and statistical snapshot of current trends in refugee and displacement situations. I will then turn to consider the impact that the focus on numbers has had on different elements of the international refugee protection regime. In particular, I will discuss how the question of ‘size’ has affected the concept of the refugee and how it has shaped state responses to access to territory, reception conditions including detention, and durable solutions. Woven throughout will be suggestions for ways to

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¹ The statistics used in this presentation are taken from UNHCR ‘Global Trends 2011’ (Report, UNHCR, 2011) <<http://www.unhcr.org/4fd6f87f9.html>> except where an alternative source is specifically indicated.

move forward, and in doing so, reverting to a more accurate interpretation and application of the 1951 Refugee Convention, underpinned by the need for international cooperation.

II STATISTICAL AND GLOBAL SNAPSHOT

In 2011, the United Nations High Commissioner for Refugees ('UNHCR') counted 42 million persons as being 'displaced' from their homes, the fifth consecutive year at this level. Of these, 15.2 million were classed as refugees and 900 000 were considered to be asylum-seekers, or persons whose claims for refugee status had not yet been adjudicated. These statistics do not include the 5.1 million Palestinian refugees or displaced persons, who according to the United Nations Relief and Works Agency for Refugees from the Near East ('UNRWA'), live in 58 camps or settlements in Gaza, the West Bank, Jordan, Lebanon and Syria, the majority having done so since 1948.²

The number of persons in asylum procedures in industrialised countries in 2011 jumped by 20 per cent from 2010, with an estimated 440 000 asylum-seekers in 44 countries.³ The largest rise was felt in southern Europe, mainly Italy and Malta, owing to movements out of Libya and the North African region as a result of volatilities there.⁴ However, it is important to put these asylum figures into perspective. The number of asylum claims received across all industrialised countries is still smaller than the population of Dadaab, a single refugee camp in north-east Kenya.⁵

The figures also do not acknowledge that the UNHCR is itself the second largest decision-maker in the world, carrying out refugee status determination in 67 countries, and in a further 10 together with governments. In 2011, the UNHCR received approximately 80 000 new asylum applications, about 10 000 less than 2010. The Office rendered approximately 52 600 decisions in the same period.⁶

2011 and 2012 saw an increase in the number of complex crises, leading to mass displacement of refugees and migrants across international

² UNRWA, *Resources, Statistics* (31 December 2012) <<http://www.unrwa.org/etemplate.php?id=253>>.

³ UNHCR, *Asylum Levels and Trends in Industrialized Countries: Statistical Overview of Asylum Applications in Europe and Selected Non-European Countries* (27 March 2012) <<http://www.unhcr.org/4e9beaa19.pdf>>.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ UNHCR, *Note on International Protection*, UN Doc A/AC.96/1110 (4 July 2012) para 18 (covering the period from May 2011 – May 2012) <<http://www.unhcr.org/refworld/pdfid/5072a4612.pdf>>.

borders. With conflicts and instability in the Democratic Republic of Congo, Mali, northern Rakhine State of Myanmar, Somalia, Sudan, Syria, and Yemen; and with the situations in Afghanistan and Iraq deteriorating, the crisis cycle is set to continue into 2013. It is also clear that Central and Latin America are becoming more volatile and violent. In December 2012, a leaked unofficial report from Mexico showed that 25 000 persons had disappeared over the past six years.⁷ This is also a region to watch.

A particular focus in 2011 and 2012 has of course been the Arab Spring. From the perspective of forced migration studies, it has been noted by the University of Oxford's Refugee Studies Centre that:

Migration in its various forms has been a key part of the popular uprisings that spread across North Africa and the Levant in 2011. The columns of vehicles escaping from cities and villages under siege in Libya, the boats crammed with Tunisians crossing the Mediterranean Sea and landing on the island of Lampedusa, and the numerous Egyptian émigrés and university students returning to Cairo to join the protests in Tahrir Square are a few examples of the ways in which human mobility intersects current events in North Africa and the Levant.⁸

The Libya crisis saw over 650 000 migrants and refugees escape the fighting. While Tunisia and Egypt generally kept their borders open, a humanitarian airlift organised jointly by the UNHCR and the International Organization for Migration – as well as by states – facilitated the return of some 144 000 migrants to their countries of origin in a few short months. Tragically, while the reception centres on the Italian island of Lampedusa filled to the brim, over 1000 asylum-seekers and migrants lost their lives trying to cross the Mediterranean over the course of a few short weeks.⁹ At the same time, the European Union ('EU') was unable to reach agreement on activation of its Temporary Protection Directive, which it had arguably created for this exact situation. Tellingly, they could not achieve consensus on burden-sharing within the Union. Meanwhile, certain member states of the EU considered for the first time suspending the Schengen free movement zone as approximately 25 000 Tunisians and third country nationals threatened to move through the Union. The situations in North Africa and the Middle East remain tentative, as fledgling democracies take hold.

⁷ William Booth 'Mexico: More than 25,000 People Disappear in Six Years', *The Independent* (online), 1 December 2012, <<http://www.independent.co.uk/news/world/americas/mexico-more-than-25000-people-disappear-in-six-years-8372482.html>>.

⁸ University of Oxford, Refugee Studies Centre and International Migration Institute, *The Arab Spring and Beyond: Human Mobility, Forced Migration and Institutional Responses*, International Symposium (May 2012) <<http://www.rsc.ox.ac.uk/pdfs/ev-arab-spring-beyond-310112.pdf>>.

⁹ UNHCR, *Note on International Protection*, UN Doc A/AC.96/1098 (28 June 2011) para 47 <<http://www.unhcr.org/refworld/docid/4ed86d612.html>>.

Turning to Syria, over 19 months of conflict has resulted in increasing civilian casualties, internal and external displacement, destruction of homes, livelihoods and public infrastructure, as well as restricted access to basic commodities and essential services in many parts of the country. As of December 2012, the number of Syrian refugees receiving humanitarian assistance outside of Syria has surpassed the half a million mark. The continued refugee influx has stretched the resources of neighbouring countries, who are also feeling the increased burden and impact of hosting refugees. There are reports of some Syrians being turned away at the border. In early December 2012 I was in Jordan at the Za'atari refugee camp, about 10 kilometres from the Syrian border. The camp currently hosts around 30 000 refugees. But what I found most depressing were the miles of cleared ground with toilet blocks at regular intervals, for as far as the eye could see, ready for expansion. It is likely that the conflict will drag on and, even if hostilities cease, we should be prepared for years of instability and rebuilding. Based on reports from the Syrian Government Ministries and the Syrian Arab Red Crescent, another 1.2 million persons are displaced inside Syria, some of whom have been compelled to relocate on multiple occasions. In late November 2012, the UN evacuated everyone other than essential staff from Syria and access to parts of the country remains limited to the UNHCR and other humanitarian actors.

Every other week at the UNHCR, we are contingency planning for the next crisis, or preparing for the escalation of existing crises. It is predicted that refugee numbers will be even higher in 2013 than what we see currently. The High Commissioner for Refugees, António Guterres, described 2012 to the General Assembly in November this year, as a 'succession of crises'.¹⁰ In December 2012 states pledged US\$550 million to the organisation, against an estimated need of US\$3.9 billion.¹¹ The UNHCR operates in 120 countries, with a staff of over 7000.

The final point of comparison is between the global refugee figures and the global figures on international migration. According to the United Nations Department of Economic and Social Affairs, which publishes a global migration 'stock' index every five years, the global migration 'stock' has remained at only 3.1 per cent of the world's population.¹² The

¹⁰ António Guterres, United Nations High Commissioner for Refugees (statement delivered at the Third Committee of the General Assembly, 67th Session, 7 November 2012) <<http://www.unhcr.org/509d056d9.html>>.

¹¹ UN News Centre, 'UN Refugee Agency Receives Pledge of \$550 Million towards \$3.92 Billion Sought for Next Year' (12 December 2012) <<http://www.un.org/apps/news/story.asp?NewsID=43737&Cr=refugees&Cr1=>>.

¹² According to the United Nations, the global migration 'stock' has been increasing as follows: between 1990-1995 (+1.3%); 1995-2000 (+1.5%); 2000-2005 (+1.8%); and 2005-2010 (+1.8%): In 1990, there was an estimated global migrant 'stock' of 155 million; in

majority of us remain sedentary, being raised in one place and living, working and dying there. Of the 214 million migrants, refugees and asylum-seekers made up only a very small proportion. Based on 2010 figures, this equated to less than 5 per cent (only 4.9 per cent) of the total migration 'stock'. And while one can question the statistics – and there are of course flaws in the collection and analysis of statistics – even adjusting for certain variables of error, the picture remains fairly similar.

There is no doubt that the ongoing crises will continue to push people across international borders, but more commonly, to be displaced within their own countries. It is clear that the lion's share of the burden emanating from conflict and violence is borne and felt and by the countries in conflict themselves, and secondarily by those in the 'neighbourhood' who host approximately 80 per cent of the world's refugees. This is another factor which puts the refugee dimension into perspective.

So how do these numbers relate to, or impact upon, the protection of refugees?

III THE REFUGEE CONCEPT

In 1948, the Universal Declaration of Human Rights, the blueprint of human rights standards for the post-war era, was penned. In Article 14, the international community recognised that '[e]veryone has the right to seek and enjoy in other countries asylum from persecution'. The 1951 Convention defined a 'refugee' as someone who is outside their country of origin and has a well-founded fear of being persecuted for one or more of the Convention grounds, namely race, religion, nationality, social group or political opinion.¹³ Initially limited to refugees fleeing the events in Europe prior to 1 January 1951, the Convention was 'amended' by the 1967 Protocol to allow states to remove the geographical and temporal limitations and to make it truly universal in scope. At present, there are 148 state parties to either or both the Convention and/or Protocol.

There have also been developments at the regional level – notably in Africa in 1969, in Latin America in 1984 and in the EU in 2000s – to expand upon the refugee definition to cover broader categories of persons

2000, it was estimated to be 178 million and in 2010, this is estimated to be 214 million, constituting 3.1 per cent of the global population: United Nations, Department of Economic and Social Affairs, Population Division, *Trends in International Migrant Stock: The 2008 Revision* (2008) <<http://esa.un.org/migration/index.asp?panel=1>>.

¹³ *United Nations Convention Relating to the Status of Refugees ('1951 Convention')*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) art 1A(2).

in need of international protection.¹⁴ It is worth noting that the right to asylum has been incorporated into several regional human rights treaties.¹⁵ ASEAN, too, recently adopted a Declaration on Human Rights, recognising the right to apply for asylum.¹⁶ For the purpose of this paper, I will focus on the 1951 definition of a ‘refugee’.

So what have refugee numbers got to do with the refugee definition? If you look at the drafting history, nothing at all. The 1951 Convention was in fact created to respond to the millions of refugees residing outside their countries of origin after the Second World War and who had been persecuted on account of their race, religion, nationality, social group, or political opinion. While the drafters were conscious of the magnitude of support needed to assist refugees from the Second World War, this was never intended to disqualify them from that assistance. Rather, the other provisions of the 1951 Convention – such as, the schedule of rights set out in Articles 2-34 – dealt with the impact of large refugee populations. For example, not all of these rights are immediately applicable to refugees, but accumulate over time based on extended presence in the territory.

Yet governments, and even courts, have imported ‘size tests’ into their decision-making, which do not have a legal basis in the text of the Convention. Quantification rather than qualification has crept into the refugee definition. I will provide just two examples of this.

The first example is the fact that ‘war refugees’ or persons fleeing armed conflict or other situations of violence, while being the image of the ‘refugee’ in the media, face many obstacles to being recognised as such, at times more so than persons fleeing peacetime oppression.¹⁷ While the

¹⁴ Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, opened for signature 10 September 1969, 1001 UNTS 45 (entered into force June 20 1974); 22 November 1984, <<http://www.unhcr.org/refworld/docid/3ae6b36ec.html>>; European Union: Council Directive 2011/95/EU of 12 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337, pp 9-26 <<http://www.refworld.org/docid/4f197df02.html>>.

¹⁵ Organization of American States, *American Convention on Human Rights* (‘*Pact of San Jose*’) opened for signature 22 November 1969, B-32 (entered into force 18 July 1978) art 22(7); *African(Banjul) Charter on Human and People’s Rights*, opened for signature 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986) art 12(3).

¹⁶ Association of South East Asia Nations, *ASEAN Human Rights Declaration* (12 November 2012) art 16, <<http://www.asean.org/news/asean-statement-communications/item/asean-human-rights-declaration>>.

¹⁷ Vanessa Holzer, *The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence*, UNHCR Legal and Protection Policy

Convention makes no distinction between refugees fleeing peacetime or wartime violence, and as noted, was in fact drafted in the aftermath of the Second World War, classifying a particular situation as an ‘armed conflict’ frequently distorts the basis for the claim, and seems to emphasise issues around the generalised impact of violence (which may be insufficient for protection under the Convention) rather than persecution, or around credibility.

Many decision-makers seem unable to comprehend fully that violence can be both generalised and discriminate at the same time; likewise violence can be widespread as well as targeted.¹⁸ A recent UNHCR study entitled *Safe at Last?* showed stark variations in recognition rates at first instance for Afghan, Somali and Iraqi refugees in various European countries.¹⁹ In armed conflict, whole communities may suffer or be at risk of persecution. The fact that many or all members of a particular community may be equally at risk does not undermine the validity of any particular claim. The test is whether an individual’s fear of being persecuted is well-founded. In fact, at times, the impact of a conflict on an entire community should strengthen, rather than weaken, the risk of any particular individual.²⁰ Yet, much case law has required that an applicant establish a risk of harm over and above that of others caught up in such situations (sometimes called a ‘differentiated risk’).²¹

Another trend in Europe and elsewhere has been a tendency to grant subsidiary or complementary forms of humanitarian protection, rather than refugee status, to persons fleeing conflict. Such practices can have significant implications for the status granted, and the rights acquired. Crucially, they ignore the primacy of the 1951 Convention, and fail to account for the fact that many of today’s conflicts are deeply rooted in ethnic, religious or political differences, or that these conflicts regularly impact along ethnic, religious, political, social or gender lines, and as such fall within the boundaries of the 1951 Convention.²²

The second example illustrative of the size dilemma is in relation to how courts have interpreted ‘social group’, the ground for Convention protection with the least clarity.²³ In 1986, the US’ Court of Appeals for

Research Series PPLA/2012/05, September 2012,
<<http://www.unhcr.org/refworld/docid/50474f062.html>>.

¹⁸ Ibid.

¹⁹ UNHCR, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence* (27 July 2011)
<<http://www.unhcr.org/refworld/docid/4e2ee0022.html>>.

²⁰ Holzer, above n 17, para 9.

²¹ Ibid, para 10.

²² Ibid, para 8.

²³ Michelle Foster, ‘The “Ground with the Least Clarity”: A Comparative Study of Jurisprudential Developments relating to ‘Membership of a Particular Social Group’,

the Ninth Circuit, in the case of *Sanchez-Trujillo*, held that ‘the term [‘particular social group’] does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance’²⁴ and therefore the group ought to be ‘small, readily identifiable.’²⁵ But when is a factor of identity such as sex/gender merely a demographic rather than a social attribute or characteristic?

Distinguishing between demographic versus social groups is not an easy task, and I would say has led at times to artificial constructs. For example, are ‘young women of the Tchamba-Kunsuntu Tribe who have not [been subjected to female genital mutilation], as practiced by that tribe, and who oppose the practice,’²⁶ – a group accepted by the US’ Board of Immigration Appeals – a social group? Or could the social group in question be simply ‘women’?

While generally rejecting the size argument *per se*, today, a number of the US’ circuits have formulated two further tests designed to limit the number of persons who would qualify for protection. The first is a so-called ‘particularity’ requirement, such that the group should be capable of being ‘accurately... described in a manner sufficiently distinct that the group would be recognised, in the society in question, as a discrete class of persons.’²⁷ The second additional test is that the group be ‘socially visible.’

In applying the latter test in *Re A-T-* the US Board of Immigration Appeals held, for example, that ‘we are doubtful that young Bambara women who oppose arranged marriage have the kind of social visibility that would make them readily identifiable to those who would be inclined to persecute them.’²⁸ So women opposed to female genital mutilation are

(UNHCR Legal and Protection Policy Research Series PPLA/2012/02, August 2012) <<http://www.unhcr.org/refworld/docid/4f7d94722.html>>.

²⁴ *Sanchez-Trujillo et al v Immigration and Naturalization Service*, 801 F.2d 1571, United States Court of Appeals for the Ninth Circuit, 15 October 1986, 1576 <<http://www.unhcr.org/refworld/docid/4a3a3af50.html>>.

²⁵ *Ibid* 1576.

²⁶ *In re Fauziya Kasinga*, 3278, United States Board of Immigration Appeals, 13 June 1996 <<http://www.unhcr.org/refworld/docid/47bb00782.html>>.

²⁷ *Matter of S-E-G- et al*, 24 I&N Dec. 579 at 584 (BIA 2008), United States Board of Immigration Appeals, 30 July 2008, <<http://www.unhcr.org/refworld/docid/4891da5b2.html>>, as referred to in Foster, above n 23, 31.

²⁸ *In re A-T-*, 24 I&N Dec. 296, 302 (BIA 2007), United States Board of Immigration Appeals, 26 September 2007 <<http://www.unhcr.org/refworld/docid/47cfe7c22.html>>. As noted by Foster, the decision was later vacated by the Attorney General and remanded for reconsideration, and in April 2011, the immigration judge granted the respondent the withholding of removal: see ‘The IJ’s Decision on Remand of Matter of A-T-’, (2011) 88(31) *Interpreter Releases* 1937, referred to in Foster, above n 23, 29.

refugees, but women opposed to forced marriage, are not? Such distinctions really make no sense. In fact, both should probably have been analysed as cases of persecution on account of political opinion – in both cases, the women opposed one of the most fundamental aspects of the societies in which they live, the role and place of women, and were faced with persecution for doing so. The best caution so far against the ‘social visibility’ test was articulated by Posner J of the Seventh Circuit in *Gatimi v Holder*:

Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual. If you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the target group are successful in remaining invisible, they will not be ‘seen’ by other people in society ‘as a segment of the population’.²⁹

Chief Justice Gleeson of the Australian High Court in *Khawar* explained that the particular social group in that case – Pakistani women having suffered extreme domestic violence and fearing serious threats to their lives from their husbands – could be characterised simply as ‘women’ on the basis that ‘[w]omen in any society are a distinct and recognizable group.’³⁰ He went on to state that, ‘[w]omen would still constitute a social group if such violence were to disappear entirely. The alleged persecution does not define the group.’³¹ Chief Justice Brennan’s judgment in *Applicant A* is also apt:

There is nothing in the term ‘particular social group’ which limits the criteria for selecting such a group nor anything in the *travaux préparatoires* which suggests that any limitation was intended.³²

He also noted that the qualification inherent in the Convention is that one needs to be persecuted on account of the common characteristic of the social group.³³ That said, the High Court found other ways to limit the class of beneficiaries of Convention protection in *Applicant A* by holding that laws of general application – such as China’s One-Child Policy and

²⁹ *Gatimi v Holder*, 578 F 3d 611 (7th Circ 2009) 7 (Posner J, 3) as referred to in Foster above n 23, 30.

³⁰ *Minister for Immigration and Multicultural Affairs v. Khawar* (2002) 212 CLR 162. [35].

³¹ *Ibid.*

³² *A and Another v Minister for Immigration and Ethnic Affairs and Another* (1997) 190 CLR 225 (‘*Applicant A*’).

³³ *Ibid.*

its forced abortion and sterilisation components – could not amount to persecution.³⁴

While we need to remain true to the construction of the refugee definition, we must avoid over-sophistication, or the importation of criteria that is neither evident on a plain reading nor contained in the drafting history. The quantification of the refugee definition, rather than qualification, can clearly lead to uncertainty and lack of harmonization across jurisdictions. The UNHCR has long argued that size is irrelevant to the Convention grounds, not least because the four other Convention grounds – of race, religion, nationality, and political opinion – are prescribed grounds of discrimination, to which limits cannot be imposed.³⁵ Having said this, each of the other elements of the refugee definition need to be satisfied, and so the Convention already contains its own in-built qualifications.

Additionally, alternative ways to deal with refugee status determination, especially in large-scale influxes, such as *prima facie* recognition of refugee status, or temporary protection, which remain compatible with the Convention, should also be explored.

IV ACCESS TO ASYLUM

Perhaps the starkest example of the impact the question of numbers has had on the refugee regime are the measures taken by states to prevent or to deter entry to their territory. During the Cold War, borders were erected by the Soviet Union and others to stop persecuted individuals and groups from being able to exit. Now, borders are constructed to prevent their entry. While it remains a state's right to control the entry and stay of non-nationals on its territory, this right is limited by international human rights law, including the right to seek and enjoy asylum and the prohibition on *refoulement*, that is, the prohibition on the return of asylum-seekers and refugees to where they face threats to their life or freedom. This prohibition includes rejecting asylum-seekers at the frontier.³⁶ Between May 2011 and May 2012, the UNHCR noted that incidents of *refoulement* had increased.³⁷

³⁴ *Ibid.*

³⁵ UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, para 31, <<http://www.unhcr.org/refworld/docid/3d36f1c64.html>>.

³⁶ *1951 Convention*, above n 13, art 33(1). See also, UNHCR, Executive Committee Conclusion No. 22 (XXXII) 1981, para II(A)(2).

³⁷ UNHCR, above n 6.

Measures adopted by states to deter entry, which James Hathaway terms ‘non-entrée policies,’³⁸ include sanctions imposed on carriers for transporting unauthorised arrivals, pre-inspection measures including requiring off-shore immigration officers to check documents prior to embarkation, and the imposition of visas. Interception/interdiction measures, push-backs, border closures, or laws purporting to remove or ‘excise’ territory from the application of national or international law, are at the more extreme end.

A recent rebuke to these exclusionary practices of states has come via the judiciary. The European Court of Human Rights held in *Hirsi v Italy* in 2012 that the Italian practice of ‘push backs’ in the Mediterranean to Libya – that is, the turning back of boats carrying asylum-seekers and migrants (in this case including 22 Somali and 13 Eritrean nationals) – was unlawful. Italy was held to be in violation of its obligations under Article 3 of the European Convention on Human Rights – the prohibition on *refoulement* to torture – because, despite credible information of risks of torture and ill-treatment in Libya, the Italian government continued to carry out its policy. It was also held to be in violation of the prohibition on collective expulsion and the right to an effective remedy.³⁹

Another case worth highlighting is that of *MSS v Belgium and Greece*, in which the Grand Chamber of the European Court of Human Rights held that states could not return asylum-seekers to Greece under the Dublin II regulation, which allows states to transfer asylum-seekers to their first country of entry into the European Union. The conditions in Greece were held to be in violation of the minimum standards required by the European Convention, and an obligation fell on Belgium to undertake investigations rather than merely assume safe conditions in another EU member state.⁴⁰ Finally, the European Court of Human Rights held that calling airports ‘international zones’ does not create a law-free space, and that international obligations continue to apply regardless of the label given to that zone.⁴¹ The jurisprudence on access to territory is, however, mixed.

³⁸ James Hathaway, ‘The Emerging Politics of Non-Entrée’, *Refugees* 91 (1992) 40.

³⁹ *Hirsi Jamaa and Others v Italy* (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012). See also, UN High Commissioner for Refugees, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of Hirsi and Others v. Italy* (March 2010) <<http://www.unhcr.org/refworld/docid/4b97778d2.html>>.

⁴⁰ *MSS v Belgium and Greece* (European Court of Human Rights, Grand Chamber, Application No 30696/09, 12 January 2011). See also, UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the case of MSS v Belgium and Greece* (June 2011), <<http://www.unhcr.org/refworld/docid/4c19e7512.html>>.

⁴¹ *Amuur v France* (European Court of Human Rights, Chamber, Application No 19976/92, 25 June 1996).

The United Kingdom's House of Lords in the *Roma Rights* case, for example, held that the principle of *non-refoulement* did not apply to persons of Roma ethnicity prevented by UK officials in the Czech Republic from boarding a plane to the UK where they wished to seek asylum.⁴² The Lords relied in part on the fact that the individuals had not yet left their country of nationality and so were not 'outside' it in order to be treated as refugees and for the obligations under the 1951 Refugee Convention to become activated.

Not dissimilarly, the US Supreme Court in the case of *Sale* found that the 1951 Convention obligation of *non-refoulement* did not extend to Haitian 'boat people' [who had fled Haiti following the military overthrow of President Aristide in the 1980s and 90s] on the high seas as they were not considered within the jurisdiction of the United States.⁴³ The Inter-American Commission on Human Rights, being asked to give an opinion on the same situation, decided that the US' practices interfered with the Haitians' right to seek asylum in other countries (that is, countries other than the US in the region) and, in pushing them back to their country of origin, violated a number of rights of the American Declaration on the Rights and Duties of Man.⁴⁴

V DETENTION AS DETERRENCE

The third area where numbers have had an impact that I want to flag is reception conditions, including especially detention policies and practices in light of the rise in the number of asylum-seekers.⁴⁵ There may be

⁴² *R v Immigration Officer at Prague Airport and Another, Ex parte European Roma Rights Centre and Others* [2004] UKHL 55: House of Lords (Judicial Committee) (9 December 2004) <<http://www.unhcr.org/refworld/docid/41c17ebf4.html>>.

⁴³ *Chris Sale, Acting Commissioner, Immigration and Naturalization Service, v Haitian Centers Council, Inc.*, 509 US 155; <<http://www.unhcr.org/refworld/docid/3ae6b7178.html>>. UNHCR, *Gene McNary, Commissioner, Immigration and Naturalization Service, et al. (Petitioners) v. Haitian Centers Council, Inc., et al. (Respondents). Brief Amicus Curiae of the Office of the High Commissioner for Refugees in Support of Respondents*, October 1992, <<http://www.unhcr.org/refworld/docid/3f336bbc4.html>>.

⁴⁴ The American Commission found that the United States' interception practices prevented the Haitian asylum-seekers from seeking asylum 'in other countries' in violation of the right to asylum; and they also found violation of the rights to life and liberty under the Inter-American Declaration on the Rights and Duties of Man: *The Haitian Centre for Human Rights v United States, Case 10.675, 10.675*, Inter-American Commission on Human Rights (IACHR), 13 March 1997, <<http://www.unhcr.org/refworld/docid/3ae6b71b8.html>>.

⁴⁵ For example, Council of Europe Member States have 'significantly expanded their use of detention as a response to the arrival of asylum seekers and irregular migrants': see, Parliamentary Assembly, Council of Europe, Doc. 12105, 11 January 2010, *The detention of asylum seekers and irregular migrants in Europe*, Rapporteur Mrs Ana Catarina

multiple explanations for this rise, but the speed with which detention policies, once thought settled, are reinvigorated when faced with a rise in asylum figures or a sudden influx, is worth exploring.

Yet, the empirical evidence tells us that the prospect of being detained does not deter irregular migration, nor discourage persons from seeking asylum.⁴⁶ In fact, as the detention of migrants and asylum-seekers has increased in a number of countries, the number of individuals seeking to enter such territories has also risen, or in the very least has remained constant.⁴⁷ Globally, migration has been increasing regardless of governmental policies on detention.⁴⁸ Except in specific individual cases, detention is generally an extremely blunt instrument of government policy-making on migration. This may be explained in part by the complexity of the choices and the mixed motivations of many migrants, which can likely have little to do with the final destination country's migration policies. The University of Sydney's Stephen Castles has noted that:

Migration policies fail because policy makers refuse to see migration as a dynamic social process linked to broader patterns of social transformation. Ministers and bureaucrats still see migration as something that [can] be turned on and off like a tap through laws and policies.⁴⁹

Nonetheless, migration policies can have an impact on where, how or the routes taken to seek asylum. The prospect of being detained in one country may influence an individual's final destination choice, the timing of one's movement, or the route or manner of entry. This points to the need, at a minimum, to regionalise standards and practices on asylum. For other asylum-seekers, detention is accepted as a necessary evil to seeking asylum, and therefore does not act as a deterrent at all. And for others still, they may be unaware of the detention policies of their destination

Mendonça, para 1 (referring in particular to the UK, France and Italy) <<http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12105.pdf>>.

⁴⁶ Alice Edwards, 'Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants' (UNHCR Legal and Protection Policy Research Series PPLA/2011/01.Rev.1, 2011) <<http://www.unhcr.org/refworld/docid/4dc935fd2.html>>.

⁴⁷ Migration into Europe has surged despite policies on detention: European migration figures have increased from an estimated 49 million in 1990 to 58 million in 2000 to 70 million in 2010: United Nations, Department of Economic and Social Affairs, Population Division (2009). *Trends in International Migrant Stock: The 2008 Revision* (United Nations database, POP/DB/MIG/Stock/Rev.2008), <<http://esa.un.org/migration/index.asp?panel=1>>.

⁴⁸ Ibid.

⁴⁹ See, eg, Stephen Castles, 'Towards a Sociology of Forced Migration and Social Transformation' (2003) 77(1) *Sociology* (2003) 13, 12.

countries, or have little or no say about their journey or their final destination.⁵⁰

Of course, it is incumbent upon me to point out that detention policies and practices which are mandatory, indefinite or aimed to deterring persons exercising the right to seek asylum are unlawful as a matter of international law.⁵¹ Apart from the legal arguments, however, there is a growing body of evidence to show that of asylum-seekers and persons awaiting deportation released into the community – in alternative to detention programmes – 90 per cent and more of persons regularly comply with all legal requirements relating to their cases, when they are released to proper supervision and facilities.⁵² There is even evidence to support a correlation between persons who have had their cases rejected through a final procedure released to alternatives to detention and higher voluntary departure rates.⁵³ Treating asylum-seekers with dignity and humanity has a lot to do with it,⁵⁴ as does a sense of procedural fairness.⁵⁵

Furthermore, alternative options present significant cost savings to governments,⁵⁶ whereas some governments have been forced to pay out millions of dollars in compensation while others face unpredictable compensation bills for their unlawful detention policies.⁵⁷ While it needs to be acknowledged that large-scale irregular migration can affect the efficient operation of national asylum procedures, detention is not a cure-all and really is not a cure-at-all. The damaging psychological and

⁵⁰Cathryn Costello and Esra Kaytaz, 'Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva' (UNHCR Legal and Protection Policy Research Series, PPLA/2013/02.Rev.1, June 2013) <<http://www.unhcr.org/51c1c5cf9.html>>

⁵¹UNHCR, *Guidelines on the Applicable Criteria and Standard Relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012) <<http://www.unhcr.org/refworld/docid/503489533b8.html>>.

⁵²Edwards, above n 46

⁵³Ibid.

⁵⁴Ibid.

⁵⁵Costello, referring to social scientific research on why individuals comply with the law in other fields, above n 50.

⁵⁶See Edwards, above n 46.

⁵⁷The UK, for example, has paid out at least £2 million to 112 individuals where it has been proven that immigrants have been wrongly held: see, Medical Justice, *Review into ending the detention of children for immigration purposes: Response by Medical Justice* (July 2010) <<http://www.refworld.org/pdfid/4d63b1872.pdf>>. According to Medical Justice, the £2 million does not include the costs of legal advice, court costs, etc. Successful litigation in Hong Kong forced the Hong Kong Government to change its detention policy and has, for example, given rise to over 200 pending compensation claims: Interview with Barnes and Daly, Lawyers (Hong Kong, 15 September, 2010). South Africa's Lawyers for Human Rights has also lodged 90 separate reviews of detention in South Africa: Statement, K Ramjatham-Keogh, LHR, 17 November 2010. For some of the cases see LHR, *Monitoring Immigration Detention in South Africa*, Annex, September, 2010.

physical effects of detention are well-known, even for persons who presented no symptoms prior to their incarceration. An interesting study by the Jesuit Refugee Service-Europe found that the negative effects of detention on mental health manifested around the three month mark, making everyone ‘vulnerable’ in detention. Such research questions whether ‘vulnerability’ categories capture all those who will eventually be affected by detention, often in irreversible ways.⁵⁸

VI DURABLE SOLUTIONS

The final area I want to discuss is that of durable solutions. From the perspective of persons born in danger zones, one is more likely to be a refugee in 2012 than in 2011, yet less likely to find a durable solution than in the 1990s. There has been a collective failure to move towards solutions in many areas. The High Commissioner for Refugees continues to stress that solutions ultimately lie in the political arena, through the resolution of conflict – a task which is beyond the mandate of humanitarian actors.⁵⁹ Forms of self-reliance and local integration, let alone naturalization as previewed by Article 34 of the 1951 Convention, remain elusive in many parts of the world. In fact, local integration has almost become a taboo word in the debates of the UNHCR’s Executive Committee, the organisation’s 87 member oversight and advisory body. Yet, the focus on voluntary repatriation as the only solution is neither realistic nor viable. On the resettlement front, while the number of countries offering resettlement has risen from 14 to 27 over the last seven years, the number of actual places remains around 80 000 annually, and the ability to service the ‘pipeline’ has been affected by crises in different regions. Resettlement did however benefit refugees from 77 countries of origin in 79 countries of asylum in 2011, including 8 out of 10 major refugee-hosting countries (excluding Germany and the United States).

Meanwhile, numerous protracted displacement situations remain unresolved, causing individuals to seek their own solutions. In 2011, there were 7 million refugees living in protracted exile, the highest figure in 10 years, along with 27 million internally displaced persons, in 25 different countries. A quick statistical comparison paints the picture: 9 million refugees returned to their homes between 1991 and 1996,⁶⁰ amounting to nearly 2 million persons per year. In 2011, the global voluntary repatriation figure stood at only 197 000, the lowest in 20 years.

⁵⁸ Jesuit Refugee Service (JRS), *Europe: Becoming Vulnerable in Detention* (June 2011) <<http://www.unhcr.org/refworld/docid/4ec269f62.html>>, refers to stress, insomnia, depression, fear, worsening self-perception and self-worth, etc. The study focused on the views of detainees themselves.

⁵⁹ UNHCR, above n 10.

⁶⁰ Gil Loescher, Alex Betts and James Milner, *The United Nations High Commissioner for Refugees* (Routledge, 2008) 48.

The argument that the 1951 Convention does not deal with solutions, and that this is an inherent flaw, is however over-stated. In fact, in addition to the reference to ‘assimilation and naturalization’ in Article 34 of the 1951 Convention, the treaty provides, as already mentioned, an incremental increase in rights-enjoyment based on length of stay. It thus already provides for the parameters for local integration, and self-reliance. These provisions include the right to access wage-earning and self-employment. A serious problem with the recognition of such rights is that a large number of governments retain reservations to the right to work provisions, while in Africa and elsewhere, camp confinement policies are still commonplace, thus denying any meaningful existence for refugees; and surely compelling refugees to move outwards and onwards.

While offering resettlement places is a tangible expression of responsibility sharing with the countries that host the bulk of the world’s refugees, and it has been instrumental in addressing some protracted refugee situations, the numbers remain modest. It must not be used to shift, rather than share burdens, but lead to leveraging of protection and solutions for those who are not resettled.⁶¹ Sharing responsibilities by means of resettlement should not be seen just as a matter of offering places to, and recording numbers of refugees resettled but also about the very individuals and their families, as well as the wider community receiving them.

Finally, facilitating refugees’ access to labour markets and labour migration schemes outside their first country of refuge would be an important addition to the more traditional durable solutions.⁶²

VII CONCLUSION

There is no doubt that there are many grave humanitarian situations around the world. So how we engage with the numbers on forced migration is important.

How do we keep the humanitarian side of the refugee problem on the international agenda, amidst growing concern over irregular migration, security, the economy, and other issues that I have not even touched on –

⁶¹ UNHCR, *Summary Conclusions of Expert Meeting on International Cooperation to Share Burdens and Responsibilities* (28 June 2011) <<http://www.unhcr.org/refworld/docid/4e9fed232.html>>.

⁶² UNHCR and the International Labour Organization (ILO), with the support of the 2012 Chair-in-Office of the Global Forum on Migration and Development (GFMD), co-organised a workshop on *Labour Mobility for Refugees* in Geneva on 11 and 12 September 2012: UNHCR and ILO, *Summary Conclusions* (September 2012) <<http://www.unhcr.org/refworld/pdfid/508e4fa72.pdf>>.

such as displacement related to climate change? How can we keep the numbers in perspective – on the one hand, using them to prompt the international community into action that is commensurate with the actual problems on the ground, and on the other hand, managing the scaremongering that such numbers provoke in national political debates?

First, it is important to recognise that national security and economic issues were also factors at issue during the drafting of the 1951 Convention, and the drafters were conscious of them. The Convention does not ignore these issues, but in fact accommodates them, including by creating a regime in which rights would accumulate the longer the refugee resided in the territory. It also contains provisions in respect of persons ‘undeserving’ of refugee protection in the form of the exclusion clauses in Article 1F, which excludes from protection those persons for whom there are serious reasons for believing they have committed war crimes, crimes against humanity or serious non-political crimes. The refugee concept must be interpreted in line with its plain meaning, and in light of its object and purpose. The size of a persecuted group is not a relevant criterion in qualifying for refugee status.

Second, policy making on displacement matters needs to be grounded in empirical research and sound analysis, and not hyperbole. Politicians, egged on by media, fuel an increasingly xenophobic and racist climate in many parts of the world. Refugees and asylum seekers are increasingly perceived by states as destabilizing to their national borders and security, as criminals and terrorists and, collectively as threats to international peace and security.⁶³ The UNHCR itself is at times guilty of relying too heavily on statistics to focus attention on the size and scale of the problem, and to call for donations to respond appropriately, but this can have the adverse effect of evoking fear, that in the end leads to more restrictive asylum policies. Psychological studies have shown that the media can create biases and fears which are not grounded in reality and that ‘our expectation about the frequency of events [is] distorted by the prevalence and emotional intensity of the messages to which we are exposed.’⁶⁴ While one must acknowledge that there are very real challenges to governments in managing irregular migration, as well as the impact non-protection-related irregular migration has on national systems, a balance needs to be struck to ensure that those in need of international protection are able to access it.

⁶³ Alice Edwards and Carla Ferstman, ‘Humanising Non-Citizens: The Convergence of Human Rights and Human Security’ in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law Policy and International Affairs* (Cambridge University Press, 2010).

⁶⁴ Quotation referring to the work of Paul Slovic in Daniel Kahneman’s *Thinking, Fast and Slow* (Farrar, Straus and Giroux, 2011).

Third, '[a]sylum is a policy area that, by its very nature, demands inter-state cooperation.'⁶⁵ The 1951 Convention acknowledges in its preambular paragraphs 'that the grant of asylum may place unduly heavy burdens on certain countries'⁶⁶ and further that 'a satisfactory solution ... cannot ... be achieved without international co-operation'.⁶⁷ The UNHCR has been working to achieve progress in this area. In 2010, for example, the High Commissioner for Refugees called for a 'new deal' on responsibility and burden-sharing.⁶⁸ In 2011, the Division of International Protection convened an expert meeting with states in Amman, Jordan, in which regional mechanisms and forums were again found to be a central feature of modern burden-sharing responses. Regional processes have in the past proved instrumental, albeit not without the support of both regional and global powers. In this region, one can recall the Comprehensive Plan of Action for the Indo-Chinese refugees in the 1970s and 1980s.

Today, the Bali Process, the Almaty Process and other regional forums are important places to discuss international migration trends which also have protection and refugee dimensions. Regional instruments have also proven effective, including in Africa, Latin America, and Europe; as have more flexible means of implementation. Africa, for example, practices *prima facie* recognition of refugee status, in which persons from specific countries in conflict are declared to be refugees without cumbersome and costly assessment processes. Other regions, and in response to particular crises have used humanitarian or temporary protection arrangements, again permitting entry and sanctuary; while accelerated procedures for manifestly unfounded or clearly abusive cases, with due process guarantees, have been implemented in individualised refugee status determination procedures, and are a modern feature of asylum systems today. The UNHCR has also embarked on discussions on how to ensure refugees are able to access international migration policies and labour markets,⁶⁹ and that planning for durable solutions is on the table at the start of any emergency, rather than only at the end.

The important point in all of these approaches is that international solidarity and burden- and responsibility-sharing initiatives, while being fundamental to the protection of refugees on political and humanitarian

⁶⁵ H el ene Lambert, 'Transnational Law, Judges and Refugees in the European Union', in Guy S. Goodwin-Gill and H el ene Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (Cambridge University Press, 2010) 1.

⁶⁶ *1951 Declaration*, above n 13, Preamble.

⁶⁷ *Ibid.*

⁶⁸ UNHCR, *UN Refugee Chief Uses Oxford University Speech to Call for International Action on Global Refugee Crises* (13 October 2010) <www.unhcr.org>.

⁶⁹ UNHCR and ILO, above n 62.

levels, need to be underpinned by the principles of the 1951 Convention and other human rights standards. Asylum figures need to be kept in perspective, and challenged whenever they are exaggerated or manipulated for political gains.