Introduction

International refugee law is a body of law with clear procedural and substantive content, not merely a set of ideals that can be cast aside in the interest of competing objectives, such as border control. It is an amalgam, based largely on the Refugee Convention and its Protocol, but with human rights law also as a major component. Certain parts of the international law of the sea, the law of State responsibility, and domestic and regional immigration laws also combine to make up what is known, collectively, as international refugee law.

The theme of my talk today is ‘connections and disconnections’. Besides the obvious relevance of this theme to an area of law concerned with displacement and movements between countries, it also reflects the nature of legal developments in this field. Despite the basic principles of protection, non-refoulement and safety at sea being affirmed as universal principles, there continues to be a profound disconnect between how refugee law is interpreted and applied in different parts of the world.

Today I have chosen to focus on a comparison of key developments in Australia and Europe in 2014, for two main reasons. First, because these areas are connected by common issues, including concerns about deaths at sea, regional cooperation and sharing the ‘burden’ of irregular migration. Secondly, though, because they are disconnected in the sense that Australian law moved in the opposite direction from European legal trends last year.

As I speak to three key developments – interception at sea, the return of refugees at or within the border, and fast-track processing – I hope to demonstrate the important effect that directly binding human rights instruments and courts can have on refugee law and practice.

The constraining role of European and international human rights law, and a greater respect more generally for international law in Europe, has led to developments in line with those seen within, for example, the UN and inter-American human rights systems. By contrast, in Australia, we are moving further and further out of line with international standards.

Interception at sea

Europe

On 17 July 2014, a new European Union regulation entered into force establishing rules for the surveillance operations of Europe’s external sea borders that are coordinated by Frontex, the EU’s external borders agency.¹

Regulation 656 was adopted in the context of increasing deaths at sea in the Mediterranean. It sets out comprehensive rules for the interception of vessels, search and rescue, and disembarkation of persons intercepted or rescued at sea. Both in its recitals and substantive articles it reaffirms the primacy of respect for human rights and international obligations in
all border surveillance operations at sea. In particular it demands that all sea operations be conducted in a way that ensures the safety of all persons involved, and that no person be disembarked in, forced to enter, or otherwise handed over to a country in contravention of the principle of non-refoulement. At a minimum, the relevant authorities must use all means to identify intercepted persons and give them an opportunity to express any reasons why disembarkation may constitute refoulement.

This Regulation demands a commitment to international law and the protection of asylum seekers which is entirely absent from the new rules governing sea operations introduced in Australia in December, in Schedule 1 of the Migration and Maritime Powers Act.

Australia

The purpose of Schedule 1 was to authorise actions similar to those undertaken by the Australian Government in relation to two boats carrying Sri Lankan asylum seekers in mid-2014, including the detention of asylum seekers at sea for several weeks. It expressly provides that a failure to consider Australia’s international law obligations – or, indeed, to act consistently with such obligations – will not invalidate the exercise of maritime powers, including powers to search and detain vessels, or detain or move people at sea.

The amendments authorise the detention of people and vessels at sea ‘for any period reasonably required’ to decide where they should be taken, or for the Immigration Minister to decide whether to exercise sweeping discretionary powers to detain people on the high seas and order that they be taken to any place of the Minister’s choice. These Ministerial powers are limited only by the requirement that ‘the Minister thinks that it is in the national interest’ for them to be exercised.

The law authorises the taking of people intercepted at sea to any country, regardless of whether Australia has an agreement or arrangement with that country for disembarkation, and ‘irrespective of the international obligations or domestic law’ of that country. These amendments are not tempered by any legislative requirement to identity intercepted persons or their protection needs, or to comply with Australia’s non-refoulement obligations. Moreover, they contain no requirement that safety at sea be a primary objective in all actions, and authorise a number of possible violations of the international law of the sea.

This new law could not be more different from the Regulation introduced in Europe just a few months earlier to deal with people arriving by boat across the Mediterranean, which is a far more serious issue than what we face in Australia, both in terms of the rate of arrivals and numbers of deaths at sea.

Turn backs and returns from at or within the border

Global

In October, the Office of the High Commissioner for Human Rights published new ‘Recommended Principles and Guidelines on Human Rights at International Borders‘. This instrument reaffirms that ‘international borders are not zones of exclusion or exception for human rights obligations’, even in the pursuit of border control, and that States must respect, promote and fulfil human rights wherever they exercise jurisdiction or effective control, including at the border and extraterritorially. States must ensure that all measures
aimed at addressing irregular migration and border governance ‘are in accordance with the principle of non-refoulement and the prohibition of arbitrary and collective expulsions’ \(^ {\text{xv}}\) and do ‘not adversely affect the enjoyment of the human rights and dignity of migrants’ \(^ {\text{xvi}}\).

**Spain – Ceuta and Melilla**

At the borders of Ceuta and Melilla, two autonomous Spanish cities within the wider territory of Morocco, these principles are not applied. Spain has a long-standing and much criticised practice of what it calls ‘returns at the border’: immediate and forcible returns to Morocco of any person who succeeds in scaling the sets of parallel fences around these cities. Spain defends these returns on the basis that migrants are not ‘in Spain’ and therefore are not owed protection obligations until they have crossed a line of police officers. \(^ {\text{xvii}}\)

This view has not been convincing, either internationally or in Spain. For example, in September last year, a Melilla judge held that the Spanish border begins at the outside fence of the city, and that all areas between the fences are on Spanish territory. He held that a Guardia Civil colonel, in his capacity as ranking officer in Melilla, had violated national and international law for summary returns in June and August. \(^ {\text{xviii}}\)

In December last year, the lower house of the Spanish Parliament sought to give legal cover to the practice of on-the-spot returns. The new Citizen Safety Law established a ‘special regime’ for Ceuta and Melilla. \(^ {\text{xix}}\) Whereas migrants in Spain would otherwise have the right to be identified and have their protection needs assessed,

> “Foreigners detected at the territory border of Ceuta or Melilla, attempting to bypass border control in groups to cross the border illegally, may be rejected in order to prevent their illegal entry into Spain.” \(^ {\text{xx}}\)

The law is expected to be passed by the Senate early this year.

**Dublin Regulation cases**

Back on the European mainland, many decisions to send an asylum seeker back to a country they just came from are made in the context of the ‘Dublin’ system. The Dublin Regulation \(^ {\text{xxi}}\) establishes criteria for determining which European Union Member State is responsible for examining an asylum application lodged in the EU. The responsible State is usually the one where an asylum seeker first made his or her claim. \(^ {\text{xxii}}\)

In 2013 the Dublin Regulation was recast to address flaws in the system that were leading to a significant amount of litigation at the national and European levels. \(^ {\text{xxiii}}\) The recast Regulation applies to all asylum applications lodged from 1 January 2014. On 30 January 2014, the European Commission adopted an Implementing Regulation designed to further improve the efficiency and effectiveness of the system, including by laying down detailed rules on the preparation required of States prior to requesting another State to ‘take back’ an asylum seeker. \(^ {\text{xxiv}}\)

European case law throughout the year, which mostly concerned cases under the original Regulation, demonstrated the need for these legislative changes.
Harmonisation of asylum law and procedures at the national level continued to prove elusive. As just one example: in the case of *EM*, the Supreme Court of the UK held that asylum seekers do not need to prove 'systemic deficiencies' in the asylum system of the receiving State to prevent a return. Instead, Dublin returns must not take place where ‘there is a real risk that the person transferred will suffer treatment contrary to’ the prohibition on inhuman or degrading treatment in article 3 of the *European Convention on Human Rights*. ‘Systemic deficiencies’ may assist to establish this risk, but they are not a necessary condition. By contrast, in June the German Federal Administrative Court ruled that asylum seekers do need to prove ‘systemic deficiencies’ in the asylum procedure or reception conditions of the destination State in order to successfully prevent removal. The Court held that it is not sufficient for an asylum seeker to establish that they have an individual future risk or past experience of ill treatment, although these matters may be taken into consideration when assessing the existence of systemic deficiencies.

A significant number of cases challenging return decisions under the Dublin system also came before the European Court of Human Rights. Most of these cases involved claims that the return would expose asylum seekers to risks of inhuman or degrading treatment, usually because of the lack of appropriate reception facilities, or because deficient asylum procedures in the destination State could lead to the applicant being *refouled* to their country of origin.

I will take you to just two cases in particular. In *Tarakhel v Switzerland*, the Court held that the proposed expulsion of a family of Afghan asylum seekers from Switzerland back to Italy could violate Switzerland’s *non-refoulement* obligations. Given the limited availability of child-appropriate accommodation in Italian reception centres, the Court concluded that the Swiss authorities could not return the family without first receiving individual guarantees from the Italian authorities that the family would be kept together in facilities adapted to the ages of the children. The Court found, however, that a more general suspension of transfers to Italy, as has existed in relation to Greece since 2011, was not warranted. The case of *Sharifi and Others v Italy* concerned a group of asylum seekers who entered Italy from Greece, and were immediately returned. The Court found Italy to be in breach of the prohibition on collective expulsion, and found that by indiscriminately and collectively expelling the applicants to Greece where asylum procedures are deficient, Italy risked indirectly *refouling* them back to Afghanistan.

**Australia**

Judgements of this kind, where the Court has an opportunity to explore the facts of transfers, reception conditions and asylum processes in depth, are unheard of in Australia, especially in relation to transfers to Nauru and Papua New Guinea.

**Fast tracking**

**Australia**

In Australia, Schedule 4 of the *Migration and Maritime Powers Act* introduced a new system for ‘fast tracking’ the review of certain protection visa applications that are refused by Immigration Department decision-makers. This system will apply to what the Government describes as the ‘asylum legacy caseload’, being around 30,000 asylum seekers who arrived
by boat without a visa between 13 August 2012 and December 2013, and who have not been sent offshore for processing in Nauru or Papua New Guinea.\textsuperscript{xxxiv}

Instead of full merits review by the Refugee Review Tribunal, ‘fast track applicants’ will only have access to a curtailed form of review, without a hearing,\textsuperscript{xxxv} before a new statutory body created by the Act (the Immigration Assessment Authority). This review is intended to be quick, but not necessarily fair or just, as it would have been before the Refugee Review Tribunal.\textsuperscript{xxxvi}

A subset of this group will not even have access to this curtailed form of review. ‘Excluded fast track review applicants’ include any person who:

\begin{itemize}
\item is considered to have arrived on a ‘bogus’ document ‘without reasonable explanation’;
\item is considered to have made a ‘manifestly unfounded claim for protection’; or
\item is considered to have come from a ‘safe third country’ or have access to ‘effective protection’ in another country.\textsuperscript{xxxvii}
\end{itemize}

Most of these key terms are not defined in the Act.

In addition, the Act confers on the Immigration Minister a further power to issue ‘conclusive certificates’ preventing any fast track decision from being changed or reviewed, on the basis that a change or review would be ‘contrary to the national interest’.\textsuperscript{xxxviii} This wholly discretionary power could potentially empower the Minister to prohibit merits review of all decisions refusing to grant a protection visa.

This fast track system is highly concerning, especially in light of the fact that decisions to refuse protection visas to people who arrive by boat are traditionally overturned at a rate of 70 to 80\%, and at times as much as 100\%, after independent merits review.\textsuperscript{xxxix}

\textbf{United Kingdom}

The Australian fast track system is modelled on the United Kingdom’s ‘Detained Fast Track system’, or DFT.\textsuperscript{xli} But that model is distinguishable from the Australian system in a number of important respects. It applies only to cases which can be decided quickly, includes an entitlement to funded legal advice and representation, ensures access to full review procedures (including judicial review), and provides that vulnerable asylum seekers – including children, families, pregnant women and victims of torture – are exempt.\textsuperscript{xlii}

Even despite these additional protections, though, various aspects of the DFT were struck down by UK courts in 2014.

In July, the High Court of England and Wales held that the DFT was not unlawful in its terms, but since detainees were not provided with legal assistance with sufficient time to prepare their claims, ‘the DFT as operated carry[ed] with it too high a risk of unfair determinations for those who may be vulnerable applicants.’\textsuperscript{xliii}

The legality of detention in the DFT system after an initial decision refusing asylum and pending an appeal to the tribunal was subsequently taken up on appeal before the UK Court of Appeal in December. The Court held unanimously that the policy of blanket detention of asylum seekers in the DFT pending appeal was unlawful.\textsuperscript{xliii} Delivering judgment for the
Court, Lord Justice Beatson found that this policy did not meet the required standards of clarity and transparency, because it emerged in such an ‘elusive’ way from the language of the DFT Guidance document that it could not be said that the policy had been clearly published.\textsuperscript{xliv}

On the basis of these findings it was not necessary for the Court to decide the further question of whether there was a lawful justification for the blanket detention of asylum seekers in the DFT pending appeal. Nevertheless, Lord Justice Beatson noted in \textit{obiter} that this practice was not justified and reasonable in most cases, unless it could be proved that there was a real risk of the asylum seeker absconding.\textsuperscript{xlv}

When the Australian fast track starts to operate this year, it will be interesting to see whether it is permitted to operate in a form that that has now been ruled unlawful in the UK.

\textbf{Concluding remarks}

In June last year, UNHCR reported that the number of displaced people in the world had exceeded 50 million for the first time since the Second World War.\textsuperscript{xlvi} In many parts of the world, refugees still need to wait years or even lifetimes to access durable solutions.

So perhaps this is another area of disconnect: between the reality of refugee movements in the present day, and the capacity of the law to respond to them. International refugee law continues to develop, but it has not stopped the exponential growth in the number of people to whom it applies.

UNHCR supervises the implementation of the Refugee Convention, but it cannot hear individual complaints like other UN treaty bodies, and there is no international refugee court. This does not mean, however, that there is an enforcement gap. International human rights law plays a major role, as seen from developments in Europe and the UN Committee Against Torture’s thorough examination and critique of Australia’s asylum policy in November last year.\textsuperscript{xlvii}

Most importantly in a country like Australia, where there is no regional human rights framework, court or parliament to act as a check on domestic law making, national decision-makers must act responsibly in interpreting international refugee law and deciding how it should be applied. In light of our steady departure from the practices of comparable jurisdictions, and given that immigration matters are increasingly governed by the discretionary and non-reviewable powers of an individual Minister, it is essential, now more than ever, that our courts, and independent government institutions such as the Human Rights Commission, be guaranteed their roles in ensuring that refugee law in Australia is in line with international standards.

Thank you.
Endnotes


ii Ibid., article 3.

iii Ibid., article 4.

iv Ibid., article 4(3).

v These actions were subsequently deemed lawful under Australian law by the High Court in its judgment last week in the case of CPCF: CPCF v Minister for Immigration and Border Protection [2015] HCA 1 (28 January 2015). This judgment does not, however, mean that these actions were necessarily lawful under international law, see for example: UNHCR, ‘UNHCR Legal Position: Despite court ruling on Sri Lankans detained at sea, Australia bound by international obligations’, 4 February 2015, http://www.unhcr.org/54d1e4ac9.html; Jane McAdam, ‘Our obligations still apply despite High Court win’, The Sydney Morning Herald, 30 January 2015, http://www.smh.com.au/comment/our-obligations-still-apply-despite-high-court-win-20150129-1316fm.html.

vi Migration and Maritime Powers Act 2014 (Cth), Sch 1, item 6 (inserting new s22A into the Maritime Powers Act 2013) and item 19 (inserting new s75A into the Maritime Powers Act 2013).

vii Ibid., Sch 1, item 12 (inserting new s 69A) and item 19 (inserting new s75F).

viii Ibid., Sch 1, item 19 (inserting new s75F(5)).

ix Ibid., Sch 1, item 19 (inserting new s75C(1)(b)).

x For more information, see the Kaldor Centre’s submission (together with Associate Professor Michelle Foster from the University of Melbourne) to the Senate Legal and Constitutional Affairs Legislation Committee on the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth), available at: http://www.kaldorcentre.unsw.edu.au/Submission_Legacy_Caseload.


xiii Ibid., Ch I, para. 1.

xiv Ibid., Ch II, para. 3.

xv Ibid., Ch II, para. 11.

xvi Ibid., Ch II, para. 5.


xviii Ibid.


xx Citizen Safety Law, first Final Provision (new). Unofficial translation by the author. The original reads: “Disposición adicional décima. Régimen especial de Ceuta y Melilla. Los extranjeros que sean detectados en la línea fronteriza de la demarcación territorial de Ceuta o Melilla mientras intentan superar, en grupo, los elementos de contención fronterizos para cruzar irregularmente la frontera podrán ser rechazados a fin de impedir su entrada ilegal en España.”

xxi Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin II Regulation), recast as Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (Dublin III Regulation). The recast Regulation is available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0031:0059:EN:PDF.
An analysis of the applicant may be deported').
judgment is available here: http://www.ecre.org/topics/areas-of-work/protection-in-europe/10-dublin-regulation.html.
Ibid. per Lord Kerr (Lord Neuberger, Lord Carnwath, Lord Toulson and Lord Hodge agreeing) at [58].
Ibid. at [63] (‘When one is in the realm of positive obligations… the evidence is more likely to partake of systemic failings but the search for such failings is by way of a route to establish that there is a real risk of article 3 breach, rather than a hurdle to be surmounted.’).
BVerwG 10 B 35.14, para. 6 (‘…an asylum seeker can counter a return to the Member State that has responsibility for him or her under the Dublin II Regulation, with regard to inadequate reception conditions for asylum applicants, only by pleading systemic deficiencies in the asylum procedure and reception conditions, and… it is not relevant whether in individual cases, below the threshold of systemic deficiencies, there may be inhuman or degrading treatment… [S]uch individual experiences must instead be incorporated into the overall assessment of whether systemic deficiencies are present in the state to which the applicant may be deported’).
Tarakhel v Switzerland, ECtHR, Application No. 29217/12, 4 November 2014.
See MSS v Belgium and Greece, ECtHR, Application No. 30696/09, 21 January 2011.
Sharifi and Others v Italy, ECtHR, Application No. 16643/09, 21 October 2014.
Migration and Maritime Powers Act 2014 (Cth), Sch 4, item 1 (inserting new definition of ‘fast track applicant’ into the Migration Act).
Ibid., Sch 4, item 21 (inserting new s473DB).
Review by the new Immigration Assessment Authority is intended to be ‘efficient, quick, free of bias’: Ibid., Sch 4, item 21 (inserting new s473BA). By contrast, the Refugee Review Tribunal seeks to provide a mechanism of review that is ‘fair, just, economical, informal and quick’: Migration Act, s 420(1).
Migration and Maritime Powers Act, Sch 4, item 1 (inserting new definition of ‘excluded fast track applicant’).
Ibid., Sch 4, item 21 (inserting new s473BD).
For more information, see the Table on page 10 of the Kaldor Centre’s submission on the Migration and Maritime Powers Bill (at note 10 above).
See the Kaldor Centre’s submission on the Migration and Maritime Powers Bill (at note 10 above), p. 10.
R (Detention Action) v Secretary of State for the Home Department [2014] EWHC 2245 (Admin) at [220]. Earlier in the judgment, Ouseley J had noted that: ‘[a}s I have gone through the various stages of the DFT process, I have commented on what appear to me to be remediable deficiencies which together fall short of showing that the detention is unlawful or that the process contains so high a risk of an unfair decision that it is inherently unlawful. At each stage, however, it has been the prospective use of lawyers, independent, giving advice, taking instructions having gained the client’s confidence, which has seemed to me to be the crucial safeguard, the crucial ingredient for a fair hearing, whilst maintaining the speed of the process, but which can protect against failings elsewhere, and avoid an unacceptably high risk of an unfair process’ (at [95]). The full judgment is available here: http://www.bailii.org/ew/cases/EWHC/Admin/2014/2245.html. See also the related case of R (Detention Action) v Secretary of State for the Home Department [2014] EWCA Civ 1270, in which
the Court of Appeal dismissed an appeal requesting an order prohibiting the processing claims in the DFT until necessary steps were taken to remove the unacceptable risk of unfairness for applicants.

\textit{R (Detention Action) v Secretary of State for the Home Department} [2014] EWCA Civ 1634, per Beatson, Floyd and Fulford LJJ (available at: \url{http://www.bailii.org/ew/cases/EWCA/Civ/2014/1634.html}).

Ibid., at [70].

Ibid., at [96].


UN Committee Against Torture, \textit{Concluding observations on the combined fourth and fifth periodic reports of Australia}, UN Doc. CAT/C/AUS/CO/4-5, 23 December 2014, \url{http://docstore.ohchr.org/Services/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsoQ6oVJgGLf6YX4ROs1VbhjPhQXE%2b0WWmlrYFRkrdSVDi646fTx7wQu2ScGTgf%2bJVP%2bu4P9Ry9gI0FCClCBVuKEcWc%2fik%2fXTL4sM%2bWHDa%2fd}. 

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