

THE YEAR IN REVIEW

**Kaldor Centre Conference 2018
UNSW Sydney, 23 November 2018**

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I would like to acknowledge the Bedegal people who are the traditional custodians of this land. I would also like to pay my respects to the elders both past and present and extend that respect to other Aboriginal and Torres Strait Islanders who are present here today.

2018 will go down in history as a significant one for the protection of refugees and migrants – at least on paper. The adoption of two new instruments on people movement – the Global Compact on Refugees and the Global Compact for Safe, Orderly and Regular Migration – signals new moral and political undertakings by the world’s governments. They promise to respect the human rights of people on the move, to provide the conditions for them to live in safety and with dignity, and to empower them to enrich the societies in which they live. Such undertakings reaffirm the essence of the Universal Declaration of Human Rights, adopted 70 years ago.

However, in the current global political environment, commitments such as these could not be taken for granted. Indeed, 2018 was also the year that saw the on-going but escalating exodus of Venezuelans, fleeing for a combination of economic, social, political, and humanitarian reasons. Algeria deported thousands of migrants to inhuman conditions, often without examining their legal status or individual circumstances. Over 700,000 Rohingya refugees who fled violence in Myanmar remained in precarious conditions in Bangladesh, in dire need of humanitarian assistance and durable protection. Hungary enacted unprecedented legislation allowing the imprisonment of anyone assisting undocumented migrants, refugees, or people seeking asylum. In traumatic scenes, the United States separated more than 2,300 children from their parents as they sought to enter from Mexico. Later, the US confronted asylum seekers at the border with more troops than it had deployed to fight ISIS in Syria. Meanwhile, Italy closed its ports to boats rescuing asylum seekers and migrants in the Mediterranean, while some refugees on Manus Island and Nauru clocked up more than five years, stuck in limbo as part of Australia’s offshore processing policy. As UNHCR’s Assistant High Commissioner for Protection told the world’s governments this year: ‘We are facing a watershed moment where two sets of values have emerged in two distinct modes of discourse. It is difficult to reconcile how the positive developments of the past year have occurred alongside the seemingly endless volley of assaults on refugees.’

This backdrop makes it all the more remarkable that any new agreements were reached at all, let alone ones that reinforce the importance of existing international legal principles and recognize the positive contributions of refugees and migrants to our societies. It is of course lamentable that a number of countries, including Hungary, Austria, Israel, Poland, and two nations built on immigration – the United States and Australia – have indicated that they will not participate in the Migration Compact. Their myopic and inward-looking response panders to xenophobia rather than the obvious need to manage migration in a more cooperative, orderly, and humane manner.

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The Global Compacts on Refugees and Migration are intended to enhance international cooperation on human mobility, albeit within a framework that expressly recognizes ‘the primary responsibility and sovereignty of States’.¹ They grew out of the 2016 New York Declaration for Refugees and Migrants in which States:

- expressed profound solidarity with those who are forced to flee;
- reaffirmed their obligations to fully respect the human rights of refugees and migrants;
- pledged support to countries affected by large movements of people; and
- underlined the centrality of international cooperation to the refugee protection regime, as well as the burdens that large movements of refugees place on national resources, especially for developing countries.

The Refugee Compact focuses on enhancing more predictable and equitable responsibility-sharing when it comes to large-scale refugee movements and protracted displacement. It seeks to prevent displacement where possible, respond more effectively when people are displaced, and find solutions for those who need protection (including by supporting conditions for return, and expanding access to resettlement and other protection pathways). In the Compact’s own words, ‘it represents the political will and ambition of the international community as a whole for strengthened cooperation and solidarity with refugees and affected host countries.’² UNHCR believes that the Refugee Compact marks ‘an evolution in governance’ of refugee protection with the potential to make a real difference in the lives of refugees and their host communities.³ If it can, this will be a game-changer.

Whereas the Migration Compact was drafted by States themselves, the drafting of the Refugee Compact was led by UNHCR. However, it was still constrained by what States would agree to. UNHCR was therefore involved in a very delicate balancing act in discerning where it could push, and where it could not. As the Assistant High Commissioner for Protection explained, it was ‘a question of strategy ... [and] a conscious decision not to put up for discussion what is already international law and policy, which is why you see a fairly cautious approach on that.’⁴ In that sense, the Refugee Compact was building on a longstanding body of international law, not starting from scratch.

By contrast, the Migration Compact is in many ways the beginning for the global regulation of migration, ‘offer[ing] a 360-degree vision’.⁵ While it also draws on existing human rights principles, it is the first time that the world has adopted a comprehensive agreement on migration generally. It is therefore framed as ‘a milestone in the history of the global dialogue and international cooperation on migration’.⁶ It aims to foster ‘international cooperation among all relevant actors on migration, acknowledging that no State can address migration alone’,⁷ and seeks to build consensus on principles and practices to improve migration

¹ Refugee Compact, para 33; see also Migration Compact, paras 7, 15.

² Refugee Compact, para 4.

³ Volker Türk, ExCom Statement (4 October 2018) <http://www.unhcr.org/5bb49b2f4>.

⁴ Volker Türk in Charlotte Alfred, ‘UN Official: Refugee Compact Will Meet Fear and Ignorance with Facts’ (1 March 2018) <https://www.newsdeeply.com/refugees/community/2018/03/01/u-n-official-refugee-compact-will-meet-fear-and-ignorance-with-facts>.

⁵ Migration Compact, para 11.

⁶ Migration Compact, preambular para 6.

⁷ Migration Compact, para 8.

management and the rights of migrants. It calls for migration policies based on data and evidence, and points to the need to minimize the drivers and structural factors that force people to leave their homes in the first place. The Migration Compact affirms the importance of saving lives and establishing coordinated international efforts on missing migrants, and the need to strengthen the transnational response to people-smuggling and trafficking. It underscores the need to manage borders in an integrated, secure and coordinated manner, ensuring that migrants have proof of legal identity and adequate documentation, and that there are appropriate screening mechanisms in place. It addresses the importance of cooperation in the return and readmission of those who do not need international protection, or who do not have any other legal basis to enter and remain. It affirms that migrants should not be discriminated against, and that they should be able to access basic services and have decent work conditions. It encourages the use of flexible pathways for regular migration and recommends the mutual recognition of skills and qualifications.

Importantly, both compacts contain concrete frameworks for action to which States can be held to account, at least politically, through new formal review mechanisms. In the case of the Refugee Compact, there will be a Global Refugee Forum every four years (from 2019) at the Ministerial level, to announce concrete pledges and contributions towards the Refugee Compact's objectives and to consider opportunities for enhancing responsibility-sharing.⁸ There will also be an interim high-level officials' meetings every two years (from 2021), and new indicators to measure success towards the achievement of the Refugee Compact's four objectives.⁹

Progress on the implementation of the Migration Compact will be discussed in a four-yearly International Migration Review Forum (from 2022). A UN network on migration will work to ensure effective and coherent system-wide support to implementation, follow-up and review.¹⁰

At least on paper, these are all positive steps. Their practical effect will take much longer to ascertain. Neither compact is a treaty or creates any new legal obligations. The big question, therefore, is whether States will give effect to them so that they are able to create real change on the ground. As the Migration Compact acknowledges, '[o]ur success rests on the mutual trust, determination and solidarity of States to fulfil the objectives and commitments contained in this Global Compact. ... It is with this sense of common purpose that we take this historic step, fully aware that the Global Compact ... is a milestone, but not the end to our efforts.'¹¹

Domestically

What does all this mean for Australia's role, both on the international stage and at home?

During the drafting of the Global Compacts, Australia was an engaged and often constructive contributor. It took an active role in the process, which is why its withdrawal from the Migration Compact is both surprising and unfortunate. The Prime Minister, Home Affairs Minister and Foreign Affairs Minister are simply wrong when they say that the Migration Compact 'fails to adequately distinguish between people who enter Australia illegally and

⁸ Refugee Compact, para 17.

⁹ Refugee Compact, para 102.

¹⁰ Migration Compact, paras 45, 49.

¹¹ Migration Compact, para 14.

those who come to Australia the right way, particularly with respect to the provision of welfare and other benefits'. The Compact does nothing of the sort. Likewise, the Home Affairs Minister's concern that the Compact would give Australian courts grounds to undermine the government's policy and let more refugees stay in Australia is a total red herring. The Migration Compact is not about refugees at all, and it is not an instrument that would bind Australian courts in any way. Not even international treaties can be directly invoked in Australian courts, so a non-legally binding instrument like the Migration Compact would have even less influence.

While the Refugee Compact is focused on large-scale refugee situations, which have never existed in this country, Australia can play an important role in providing support to host countries and durable solutions for refugees. We have history as a leader in this regard. Our partnerships in humanitarian assistance, development, technical and financial support are crucial, as is our commitment to on-going and enhanced resettlement. There is also an important opportunity to ramp up complementary pathways to admission, including family reunification, private or community sponsorship programmes, educational scholarships, labour mobility opportunities for refugees, and special humanitarian intakes (which is the subject of a new Kaldor Centre Policy Brief out next month).¹² In particular, Australia should leverage the existing goodwill of many in the private sector to improve and expand a community sponsorship model, learning lessons and effective practices from the 40-year-old Canadian scheme. As the Canadian Immigration Minister said when he spoke at UNSW earlier this year:

This program is transformative, not just for the refugees themselves but also for the sponsors Although legally they are only [required] to sponsor that individual for one year, the relationships that they form usually last much longer than that. Again, although legally only the sponsors are [obliged] to take care of them, we found that their neighbours and friends also take part in that experience and embrace these refugees Refugees are no longer an abstract [concept], they are real people that have become essentially part of their family. My predecessor ... used to say that he was the only immigration minister in the whole world that couldn't bring enough refugees to satisfy the Canadian demand for refugee sponsorship.

In Australia, though, 2018 has not seen many improvements for refugees and people seeking asylum. We have witnessed the steady, if not accelerating, deterioration of the mental and physical health of people on Nauru and Manus Island, described by experts as worse than they have seen in war zones or refugee camps around the world.¹³ Even the former head of Australia's Border Force, Roman Quaedvlieg, remarked on this. He described sites as 'reminiscent of the world's slums [he had] seen', with 'unsettling signs of the volatility of an incarcerated population ... and the omnipresent, but indefinable, sense of dread and foreboding'.¹⁴

In October, three government MPs called for the urgent removal of refugee children and their families from Nauru, thanks in large part to the tireless advocacy of many in this room. In the past few months, almost 100 children have been transferred from Nauru to Australia, while around 17 remain there with their families. Many are now living in detention centres or

¹² Refugee Compact, para 95.

¹³ https://www.refugeecouncil.org.au/wp-content/uploads/2018/09/Nauru_Manmade_Crisis.pdf.

¹⁴ Roman Quaedvlieg, 'Impressions of Nauru' (6 September 2018) <https://meanjin.com.au/blog/impressions-of-nauru/>.

hospitals, or under guard in hotels. The Refugee Council of Australia has expressed concern that some families have been separated as a result of the transfer process, with people left on Nauru or put into different detention centres or parts of Australia. There are no resettlement options available to these people at the moment, and the Australian government has indicated it might even send them back to Nauru. This is no solution.

Within Australia, far fewer asylum seekers are held in mandatory detention than just a few years ago, which is a positive thing. But we can't look at that in isolation: it's a result of the combined policies of boat turnbacks, offshore processing and the denial of resettlement in Australia that has led to this result, which are themselves inconsistent with international law. The 332 men who are detained (as at June 2018) have been in detention on average for over two years.¹⁵ Some have been detained for more than seven years. Many are unwell and face severe psychological distress.

Life for the 30,000 asylum seekers living in the community is not all that rosy either. In August, the government made significant cuts to social support, with about 60 per cent of asylum seekers losing their benefits of \$250 a week, casework support, and access to torture and trauma services – even if they do not have a job or other income. According to the Refugee Council of Australia, such cuts are likely to leave thousands of people hungry and homeless.¹⁶ In the UK, similar actions that resulted in asylum seekers becoming destitute were found to constitute inhuman and degrading treatment contrary to human rights law.

We all know that it doesn't have to be like this. It shouldn't be like this. When the Canadian Immigration Minister talked to us earlier this year about people seeking asylum in *his* country, he said:

Lucky for us, we have held firm on the notion that we can both apply Canadian law – to make sure that we respect Canadian law and process everyone fairly and equally, [and] make sure that we can protect the safety and security of Canadians – while at the same time staying true to our commitment to the Geneva Convention and other commitments that Canada has signed to make sure that people who are fleeing persecution and who claim asylum in our country, at least have the opportunity to be given a fair hearing, so that they can then make their case. If they then are able to establish in front of an independent body that they deserve refugee protection, then they get to stay.

In Australia, we have moved far away from this position in political rhetoric, in law, and in practice. Let's re-imagine how it could be, with a bit of leadership, commitment, and follow-through. Here's what we need to do.

We need to return to complying with our international legal obligations and ensure that they are fully incorporated into domestic law. We need to provide reception conditions that give people seeking asylum access to medical care, employment, education, and such other assistance as will enable them to live in dignity in the community pending the determination of their claims. We need to provide a fair, efficient and transparent system for processing asylum claims by well-trained decision-makers – harking back to the days when our system was held up as a model of best practice.

¹⁵ <https://www.refugeecouncil.org.au/getfacts/statistics/aust/asylum-stats/detention-australia-statistics/>.

¹⁶ Refugee Council of Australia, *Cuts to Support for People Seeking Asylum*, Factsheet, August 2018, https://www.refugeecouncil.org.au/wp-content/uploads/2018/06/SRSS_factsheet_twopage.pdf.

We need to create safe and legal pathways to protection, while also addressing the root causes of displacement. We respect the principles of family unity and the best interests of the child, recognizing that mutual support among family members is critical to people's resilience, including their integration and success in new communities. We need to invest in settlement and integration. This requires a commitment to education, training, skills transfer, and recognition of qualifications for refugees, and the promotion of business partnerships to facilitate employment opportunities. This is a key step in paving the way for long-term success – for all of us – by investing in refugees as people, and enabling them to acquire the skills and resilience to contribute to our communities, whether they be here in Australia, back in their country of origin, or in any other country in which they may one day live.

As UNHCR's Assistant High Commissioner for Protection reminded the world's governments this year, human dignity must be front and centre when it comes to refugee protection. Dignity is 'central to the progressive development and implementation of law and standards for refugee protection', and is 'the antidote to dehumanization', which 'prevents us from seeing the other as a human being with rights, needs, and dignity ... desensitizes and numbs our conscience [and] enables easy slippage into mistreatment and policies of cruelty, as it prevents empathy and compassion from shaping the response.'¹⁷ 'Just as to deny one person's dignity is ultimately to deny our own', he said, 'the responsibility to ensure one person's dignity is the responsibility of us all.'¹⁸

Since 1945, Australia has played a key role in providing protection opportunities for refugees – both by resettling people in need from overseas, and, for many years, by enabling people seeking asylum to apply for protection in Australia. Refugees have helped to make this country what it is today. The success of earlier programs, including post-war nation-building labour schemes which gave displaced people from Europe the chance of a new life, means that Australia can have confidence in the positive contributions that refugees will make when offered opportunity and hope. Providing a welcoming, secure and respectful environment for refugees results in benefits for everyone and a stronger, more socially cohesive Australia. As the Canadian Immigration Minister has pointed out: 'Talent is more mobile than ever, investment is more mobile than ever. People want to go to where they're accepted and included'. Surely, Australia has the confidence and the ability to see this vision realized once again.

Finally, 2018 marks the Kaldor Centre's fifth birthday. I am honoured to have had the opportunity to establish and lead such a committed and capable team. It's our people who make the Centre what it is, and I would like to thank our researchers – Professor Guy Goodwin-Gill, Dr Claire Higgins, Dr Sangeetha Pillai and Madeline Gleeson – and our professional team of Frances Voon, Kelly Newell and Lauren Martin – for their outstanding work and collegiality. I would also like to thank the Law Faculty, UNSW and of course Andrew and Renata Kaldor for enabling us to exist, and all of you for your support in so many ways.

Finally, I would like to wish our American guests a very happy Thanksgiving!

¹⁷ Volker Türk, ExCom Statement (4 October 2018) <http://www.unhcr.org/5bb49b2f4>.

¹⁸ Ibid.