

Justice for Refugees AGM 22 November 2016

Empathy and Logic – why are they both missing from the asylum seeker debate?

The Hon Catherine Branson QC

Recent announcements concerning the planned resettlement of those refugees presently being held on Manus Island and Nauru, although they leave many questions unanswered, have resulted in my deciding to restructure my talk to you this evening. Rather than focusing, as I earlier intended to do, on the urgent necessity to find permanent solution for those presently held in offshore centres, I have decided to share my thoughts on some broader issues. None of them is particularly radical but nonetheless, each of them is, I think, worth exploring. What I have to say may not fully match the published title of this address.

I want first to invite you to view a short YouTube video. It concerns a man, a father, a husband, whose name is Naysir Ahmed. Naysir is presently living on Manus Island.

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I have played this video clip to add emphasis to the first point that I wish to make – that the asylum seeker debate is a debate about people, about individuals: parents, partners, children, siblings. Yet their voices are rarely heard in the debates concerning them. I therefore commend Daniel Webb from the Human Rights Law Centre and the few others like him who, at some personal risk, have sought to enable Australians to hear the stories of men who are living on Manus Island. You can find more of these stories on the website www.bringthemhere.org. Unless Australians can learn the personal stories of those affected by our policies on refugees and asylum seekers it will prove very difficult for any genuine empathy for their plight to develop.

The fact that the asylum seeker debate is a debate about individuals is important for many reasons. Perhaps the most important reason is that it is true as a matter of morality, also of faith if you are a person of faith, and of international law, that it is unacceptable to punish an individual solely to influence the conduct of others. In the words of the philosopher Immanuel Kant, ‘one cannot ever suppose a right to treat another person as a mere means to an end’. In the language of the great monotheistic faiths, ‘one should treat one’s neighbour as one’s self’ and ‘do to others as you would have done to you’. In the words of the UN Special Rapporteur on the Human Rights of Migrants ‘it is a fundamental principle of human rights law that one person cannot be punished only for the reason of deterring another’.

Recent Australian governments of both persuasions have been perfectly frank about offshore processing being intended to deter both asylum seekers and people smugglers. But there has been no genuine engagement with the ethical dimensions of the policies in question. To the extent that there has

been any real attempt to justify such harsh deterrent measures it has invoked the need to prevent deaths by drowning – but without any examination of the extent to which this objective has been achieved. Do we know, for example, whether those deterred from crossing the seas near Australia are instead crossing other seas or undertaking other highly risky journeys? Have we asked about the costs being paid in other ways by those facing persecution who have been deterred? These costs might be manifest in self-harm and suicide or ongoing despair and serious mental illness. How many of us, how many of our politicians, would be willing to spend the 26 years that on average displaced people spend in low income countries that offer few opportunities await resettlement?

There is a cost, I suggest, in Australia as a nation accepting ethically unacceptable governmental conduct. The normative force of important moral or ethical principles for Australians generally may be being undermined. There is already some reason to think that we may be becoming harder, less generous, as a nation. The UN Special Rapporteur on the Human Right of Migrants has recently observed (accurately I believe) Australia would be outraged if other countries were to treat our citizens, including children, in ways comparable to the ways in which we are treating refugees and asylum seekers who arrive by boat.

The second issue that I wish to raise concerns Australia's obligations under international law. Virtually all experts on international law acknowledge that Australia's treatment of irregular maritime arrivals is inconsistent with international law. If Australia abandons its obligations to respect international law in this regard, its complaints about other countries disregarding their obligations in other ways will carry limited weight. And Australia does wish other countries to respect international law and exhorts them to do so regularly – whether it be the human rights of the citizens of Burma, the right to a fair trial of those charged with offences by the PRC, or the right of freedom of speech in Russia. The truth is that in the modern globalised world it is critical that all states implement their international obligations, including humanitarian obligations, in good faith.

One way in which Australian governments tend to disregard International law is by eliding the distinction between migration law and refugee law. The most famous illustration of this was perhaps former PM John Howard's statement to the effect that we would decide who comes to this country and the circumstances in which they come. Present government policy is essentially to the same effect. Migration is the best way to deal with refugee problems but refugee law itself is not about migration; it is about the collective responsibility to protect. The Refugee Convention reflects an international consensus about who should be able to claim international protection. Once an asylum seeker is recognised as a person who is able to claim protection (i.e. as a refugee) an international protection system is triggered. At the heart of this system is the duty of the country in which they have sought protection not to return them to the place where they have a well-founded fear of persecution. The Convention recognises that asylum seekers will frequently have no way of obtaining a visa to enter a country from which they can claim protection. It is

not unlawful to enter a country under these circumstances. Nor is it lawful to prejudice an asylum seeker on the grounds of their means of entry. It is legally wrong, and I suggest, morally wrong, to draw a distinction between 'good' refugees who we invite in and 'bad' refugees who come by other means. This is a lesson that we should have learnt from WW2.

In short, to seek absolutely to control who comes to our country and the circumstance in which they come is to step away from the obligations Australia has voluntarily accepted by ratifying the Refugee Convention. Rather than doing this, Australia should be seeking to convince other countries in our region also to ratify the Convention and to share in the responsibility to protect those who have legitimate claims to protection.

The third issue that I wish to raise concerns the notion of crisis. The world is facing a significant challenge with 65 millions individuals currently displaced. However, Professor Stephen Castles of Sydney University, former Director of the Refugee Studies Centre of Oxford University, has pointed out that while the world's 'migration stock' is growing, it is not necessarily growing faster than the world's population - i.e. at about 3%. What is changing is the concentration of international migration to highly developed countries and the growth of emergency migration as a consequence of violence, persecution and environmental degradation.

Whether Australia has in recent years faced a 'crisis' of irregular maritime arrivals is essentially a matter of political determination. I suggest that there was no compelling case to so characterise the situation that we recently faced. Despite popular belief to the contrary, the largest number of boat arrivals Australia has received in recent years was in 2012-3 when 18,365 individuals arrived by boat to claim protection. I interpolate to give a sense of perspective that Europe is expecting approximately 900,000 asylum claims in 2016. As a publication of the Commonwealth Parliamentary Library updated to March 2015 makes plain, those who claimed protection from Australia after arriving by boat were found to be refugees at a much higher rate than those who arrived by plane. Since 2009 the top country of origin of those who arrived by boat was Afghanistan and between 96-100% of them were found to be refugees. The top country of origin of those who arrived by air was PRC and between 20-30% of them were found to be refugees. As the Lowy Institute for International Policy has stated: *'arguably Australia is worrying about the wrong asylum seekers. Whereas the majority arriving by boat are refugees, the majority of those arriving by air are not'*.

To place our refugee numbers in perspective, in 2015-6, 190,000 permanent visas were granted outside the refugee and humanitarian visa program with 13,500 additional refugee and humanitarian visas being issued (but not to people who arrived by boat) and allowance made for 12,000 Syrian and Iraqi refugees to be granted visas as selection and processing allowed. Significantly, the number of refugee and humanitarian visas granted by Australia has remained steady at about 6-10% for the last decade. It is interesting to note that in 1949 48% of all migrants to Australia were refugees. By the 1970s it was 25% while today it is less than 11%.

A report published by the late Professor Graeme Hugo reveals that while refugees may initially experience higher rates of unemployment and lower incomes than other migrant groups, this situation changes over time and they prove to be a net economic benefit. On average refugees have greater entrepreneurial skills than other groups (PM Turnbull might be expected to be impressed by this) and Prof Hugo pointed out that 5 of 8 of Australia's billionaires in the year 2000 were from refugee backgrounds.

My fourth point concerns cost. Detaining, turning back and processing asylum seekers has become Australia's fastest growing government program. Budget analysis shows that between 2013-2016 taxpayers will foot a bill of nearly \$10 billion although the true cost is likely to be much higher. This figure does not account for the cost of maintaining and defending our current deterrent approach. In one year (2014) Australia spent more than \$3 billion on offshore processing. That is the same amount to deal with a few thousand people as the UN spent looking after 50 million displaced worldwide at the same time.

Yet it seems to me that the greatest cost being paid by Australia for its present policy towards asylum seekers is one that cannot be quantified. I am thinking of the cost to our democracy. I have already mentioned the tendency to undermine public commitment to ethical behaviour and to the rule of law. Another aspect of policy in this area is increasing governmental secrecy. Despite the highly political nature of governmental policy and practice in the area of refugees and asylum seekers, the Australian Government is increasingly withholding much of the information that would enable informed debate about the need for and the implementation of the policy. As the High Court of Australia has pointed out in discussing the implied constitutional freedom of political communication, freedom to discuss political and governmental matters is indispensable to our democratic system of representative and responsible government.

The harm to our democracy is also manifest by significant restrictions on freedom of speech. For example, the Australian Border Force Act 2015 makes it an offence punishable by up to 2 years imprisonment for a person to disclose or record any information obtained by them in their capacity as an 'entrusted person', a term capable of being applied to a wide range of people who may work with irregular maritime arrivals. Medical practitioners have only recently been excluded from these provisions that the Law Council has criticised for discouraging legitimate whistle-blowers from speaking out publicly.

The potential also exists for the political discourse around asylum seekers to license xenophobia. In this context I note that the UN Special Rapporteur on the Human Rights of Migrants has recently felt the need to voice concern at an increase in xenophobia and hate speech in this country, despite Australia's rich history of migration. This, he said, has led to significant negative perceptions of migrants. He observed: "*Politicians who have engaged in this*

negative discourse seem to have given permission to people on the street to act in xenophobic ways and to allow for the rise of nationalist populist groups.”

So in conclusion, what can be done in this complex and troubling area of public policy? First, of course, Australia should meet those international obligations that it has voluntarily assumed. I don't propose to add to what I have already said on this issue. Second, we need to work cooperatively with the other nations in our region and internationally to find solutions to the international problems that flow from 65 million people being displaced in the world today with a significant proportion of them being in our region. Thirdly, if we wish to stop people travelling by boat to claim protection, we need to provide means for them to claim such protection closer to the places of conflict or persecution from which they are fleeing and to live with dignity while awaiting resettlement. We should also re-examine our own visa policies including the numbers of refugee and humanitarian visas that it is appropriate for us to grant each year. Additionally, we could think more innovatively about how we use visa categories other than the refugee and humanitarian categories to assist those who are seeking protection. Numbers of them might be found to have skills that would make the grant of skilled migration visas appropriate. Others might appropriately be granted student visas, together with help to meet the cost of their education, so that their lives are not simply placed on hold while turmoil in their own countries prevents their return.

Looking further into the future, we need to recognise that this is an issue that requires long-term international solutions; not quick fixes or mere deterrents. The world needs more comprehensive responses to human displacement. Perhaps even more critically, we need to address more effectively than we have done to date poverty, absence of human security, lack of respect for human rights and exposure to violence and corruption wherever they are found. Without a long-term strategy for reducing global inequality and enhancing human development we will never address the root causes of mass migration and displacement.