The history of the ethical demands of migration and national border security in an island-nation continent – a perspective from Australia, the land downunder

The 2014 Keith Cameron Lecture

Prof Frank Brennan SJ

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Arriving by Boat

My great great grandmother Annie Doyle came from Muckalee down in Kilkenny. Widowed she probably had no option but to leave the farm she had shared with her husband. She and her five children including my great grandfather arrived at Hervey Bay in the British colony of Queensland on the *David McIver* in July 1863. I am one of those many Australians who is a descendant from Irish migrants who came to Australia in search of a better life. In early July last year, I was sitting alone on the shoreline at Urangan at the entrance to the vast Hervey Bay, 150 years to the day since the *David McIver* entered Hervey Bay carrying 404 immigrants, there having been only one death but also 9 births on the 107 day voyage from Liverpool.

Hervey Bay is a very expansive but shallow bay sheltered from the Pacific Ocean by the majestic Fraser Island. On 6 July 1863, the crew of the *David McIver* spent the day searching for a channel until it was anchored in 4 fathoms of water. Some of the crew then got into a small boat and made for the shore at Urangan close to where I was sitting 150 years later. They came ashore and found two Aborigines. I presume they were males. Those two Aboriginal men then without protest accompanied the crew in the boat and showed the crew the way to Captain Jeffrey's Admiralty Survey Camp. The *David McIver* was only the second migrant ship ever to come into Hervey Bay and here were two Aborigines happy to extend a helping hand to complete strangers who must have looked very strange indeed. One Aboriginal was then commissioned to send word to Maryborough 40 kilometres away. That Aboriginal walked and ran all through the night to bring word of these new arrivals. A pilot was then dispatched. Within 2 days, a steamer named *Queensland* arrived, towed the *David McIver* to White Cliff on Fraser Island, and then received the disembarking passengers to transport them up the Mary River to the port of Maryborough where they arrived on 9 July 1863. I know nothing more about those Aborigines who played

their part in the safe arrival and settlement of my forebears. I happily acknowledge my family's debt to them even 151 years later.

If my family were to arrive by boat in Australia today uninvited, they would be sent to Papua New Guinea or to a remote Pacific island Nauru, or sent back to where they came from. The debate and policy in Australia about modern day boat people is toxic. 151 years ago, the traditional owners helped my ancestors and their fellow passengers to find safe anchorage so that they might settle permanently calling Australia home. They extended the hand of peace and welcomed the stranger. Many on the *David McIver* were eligible for land grants from the newly established Queensland Government. That was the lure for their coming to the other side of the world. At an earlier time, they would have headed for the United States but I presume the civil war made that a less attractive option for a widow with five children. It's a matter of some pride for me that one of Annie Brennan's great grandchildren, my father, was one of the judges who just 22 years ago in the *Mabo* Case decided by the Australian High Court said that Aborigines had always owned the land which had been subject to those gratuitous land grants.

It is an ironic honour for me to deliver the Keith Cameron Lecture. I never knew Keith but know him to have been an esteemed Australian mining engineer and company director. For some years, he worked for Western Mining Corporation, and this brings me to the irony. Back in Keith Cameron's time, Bill Morgan was the CEO of Western Mining. In later years, Bill's son Hugh was CEO. Hugh was CEO when my father and his six judicial colleagues delivered the historic *Mabo* judgment. Hugh worked closely with Ray Evans at Western Mining. Ray was employed as an advocate for the mining industry. Both Evans and Morgan spoke very shrilly about the *Mabo* judgment claiming that I, being a son of Justice Brennan, had "played an extremely influential role in the campaign for Aboriginal land rights" during the seventeen years my father served on the High Court. I always regarded it as an excess of judicial scrupulosity that my father made a declaration from the bench at the commencement of the *Mabo* proceedings about my political and pastoral activities, giving any party an opportunity to express an objection. Of course none was proffered. Evans and Morgan were silent back in those days. But after the judgment was delivered, Hugh Morgan in a speech to the RSL Victorian Branch on 30 June 1993 suggested that there had been discussions between my father and me about the *Mabo* case "over a cleansing ale" before delivery of judgment. Ray Evans later wrote, "We [were] informed in the press that Justice Brennan was accustomed to discussing these matters with his son, Fr Frank Brennan SJ, 'over a glass of cleansing ale', but that is the only public record, to my knowledge of Justice Brennan's investigations into contemporary Australian values." On August 1994, I wrote to Mr Morgan informing him that his assertions were false and groundless.[1] I said I was

[1] On 4 August 1994, Hugh Morgan explained that the only basis for his groundless assertion was an article by Cameron Forbes published in the *Weekend Australian* on 20-21 February 1993. Forbes had only written: "I asked

"pleased to learn there are no press reports prior to your address of 30 June 1993 suggesting that discussions between Justice Brennan and myself were part of his investigations into contemporary Australian values informing his judgment in *Mabo*". So perhaps it deserves a Guinness that things are now so reconciled in Australia that I am able to be here this evening to honour one of the Western Mining Corporation's finest sons, Keith Cameron, without rancour, knowing that when business interests are affected, our politics can sometimes be very searing.

In response to the *Mabo* judgment, our then prime minister Paul Keating then did the fabulous job of delivering the 1993 *Native Title Act*, parliament's response to the uncertainties and possibilities opened up by the High Court decision. Three years later, Labor was out of office and the High Court expanded some of the uncertainties and possibilities of native title in the *Wik* decision. In 1998, the government of John Howard legislated its response to Keating's original Act and the High Court's more recent decision. It was a poisonous political cocktail – a 4-3 decision of the High Court being considered by an unsympathetic government and a Senate where the late Catholic Tasmanian Brian Harradine had the balance of power. One of Harradine's legal advisers was your esteemed visiting professor Jeff Kildea. Keating was most displeased with Howard's tinkering with his original legislation. He was also displeased with me for having publicly praised Harradine for improving significantly on Howard's original position. Keating branded me the meddling priest, a label I have happily worn these last 16 years, though I do have a preference for Kevin Rudd's more poetic descriptor. Rudd labeled me an ethical burr in the nation's saddle.

Stopping the Boats

It was Kevin Rudd who as Prime Minister decided in July 2013 that in future any asylum seekers arriving in Australia by boat would be sent to off-shore islands and never be permitted to settle in Australia. John Howard had been the first prime minister to enunciate this sort of policy in 2001 when he instituted the so-called Pacific Solution in response to the situation when 433 asylum seekers in distress had been rescued by the Norwegian ship *The Tampa.* The Australian government refused the captain permission to land the asylum seekers on Australian soil. The Australian navy transported them from the Indian Ocean to the Pacific Ocean. New Zealand agreed to take 150 of them. The rest were taken to Nauru for processing. John Howard later bluffed that none of these people would ever be allowed to settle in Australia. But his initial announcement contained an escape clause. He said that "those assessed as having valid claims from Nauru would have access to Australia and other countries willing to share in the settlement of those with valid claims".

Father Brennan what he thought of his father's judgment? Did he discuss Aboriginal affairs with him? `Over a barbecue and a cleansing ale and that sort of thing? I thought his judgment was very good.'"

Most of those on the Tampa who were proved to be refugees ended up winning permanent protection in Australia or New Zealand.

When prime minister for the first time, Kevin Rudd did away with the Pacific solution. Then the boats started coming again. When prime minister for the second time, Rudd resurrected the Pacific solution but without the Howard escape clause. He was adamant that those asylum seekers removed to Nauru and Papua New Guinea would never be permitted to resettle in Australia. Before the 2013 election, he challenged all of us do gooders when he said on national television:[2]

I think you heard a people smuggler interviewed by a media outlet the other day say that this was a fundamental assault on their business model. Well, that's a pretty gruesome way for him to put that, but the bottom line is this, I challenge anyone else looking at this policy challenge for Australia to deliver a credible alternative policy.

The challenge that I put out to anyone who asks that we should consider a different approach is this: what would you do to stop thousands of people, including children, drowning offshore, other than undertake a policy direction like this? What is the alternative answer?

He lost the election, handing the Abbott government his blueprint for stopping the boats. Tony Abbott adopted the Rudd solution without the Howard escape clause, and added his own suite of measures, including the promise to turn back boats to Indonesia when it was safe to do so. Rudd's challenge is still the ethical challenge confronting Australia. I look forward to hearing some Irish wisdom in response to the challenge.

While preparing this address in Boston, I thought back to my visit recently to the Martin Luther King memorial in Washington DC. That splendid memorial etches in stone many of King's great sayings, including: "We shall overcome because the arc of the moral universe is long, but it bends towards justice." At his swearing in to the Australian High Court last year, Justice Patrick Keane took some comfort that the Australian judiciary were not a social elite as in some other countries, being drawn from the egalitarian democracy shaped by those Australians of the Depression and War eras who provided selflessly and generously for the education of their children. He invoked King's remark about the arc of the moral universe and, with a touch of nationalistic pride, opined that it bends more sharply in that direction in our part of the southern hemisphere because of the egalitarianism of our forebears. Reflecting on the history of the ethical demands of migration and national border security in our island nation continent, I fear we may be losing some of that edge down under.

Do we have the right to stop the boats?

[2] Lisa Wilkinson on the *Today* program, 25 July 2013

The issue which confounds us tonight is working out what is ethical and what works when confronting an escalating flow of asylum seekers coming to our shores by boat without visas and risking their lives on perilous voyages. First world countries with maritime borders have been wrestling with this issue now for over thirty years. According to the United Nations High Commissioner for Refugees (UNHCR) there were 45.2 million forcibly displaced people worldwide at the end of 2012. This was the highest number since 1994. Of these, 28.8 million were internally displaced persons, 15.4 million were refugees and 937,000 were asylum seekers.[3] On the latest estimate, there are now 51 million displaced people in the world.

There is much confusion about the ethical and legal considerations which apply when asylum seekers present at the borders of first world countries. For example, in what, if any, circumstances does or ought an asylum seeker have the right to enter a country not her own in order to seek protection? To be blunt, no asylum seeker should be refouled or sent back to the country where they claim to face persecution unless their claim has been assessed and found wanting; while waiting, no asylum seeker has a right to enter any particular country. Should an asylum seeker unlawfully gain access to a country they should not be penalized for such an unlawful entry or presence provided only that they came in direct flight from the alleged persecution. All lawyers would agree with these blunt propositions. Some, especially those schooled in international law, would go further. They would point not just to a country's ratification of the Refugees Convention. But they would claim that those countries which have ratified the Convention against Torture and the International Covenant on Civil and Political Rights cannot refoule any person until there has been a determination of their claim that they face torture or "cruel, inhuman or degrading treatment or punishment". Some of these lawyers would then take the next leap in human rights protection to assert that all persons have a right to enter any state of their choice provided only they claim to face the risk of persecution, torture, cruel, inhuman or degrading treatment or punishment back home. They translate the right not to be refouled into a right of entry to any state unless and until the state determines that there is no real risk of any of these adverse outcomes. Either the state is able to determine all such claims at the border or else the state must grant entry at least for the purpose of human rights assessment.

At a 1938 conference in Switzerland, T. W. White, the Australian delegate, misjudged his present and future audience when he simplistically said that it would "no doubt be appreciated that as we have no racial problem we are not desirous of importing one". When the Universal Declaration of Human Rights (UNDHR) was being drafted after World War II, Australia was one of the countries that was very testy about recognising any general "right of asylum" for refugees. Australia conceded that a person had the right to live in their country; they had a right to leave their country; they had a right not to be returned to their country if they were in another country and

[3] See http://www.immi.gov.au/media/fact-sheets/60refugee.htm

if they feared persecution on return to their own country. But Australia believed people did not have the right to enter another country without invitation, having exercised the right to leave their own country, even if they feared persecution. In 1948 the drafters of the universal declaration proposed that a person have the right to be "granted asylum". Australia was one of the strong opponents, being prepared to acknowledge only the individual's right "to seek and enjoy asylum", because such a right would not include the right to enter another country and it would not create a duty for a country to permit entry by the asylum seeker.

During the preparations for the 1948 discussions, Tasman Heyes, Secretary of the Australian Department of Immigration wrote:

> If it is intended to mean that any person or body of persons who may suffer persecution in a particular country shall have the right to enter another country irrespective of their suitability as settlers in the second country this would not be acceptable to Australia as it would be tantamount to the abandonment of the right which every sovereign state possesses to determine the composition of its own population, and who shall be admitted to its territories.

John Howard was not the first Australian to proclaim that the Australian government would decide who came to Australia. Australia was on the winning side of the pre-Convention argument and was able to live with Article 14 of the UNDHR— that "Everyone has the right to seek and to enjoy in other countries asylum from persecution." You could ask for asylum. You were not guaranteed a favourable answer, but if you received an invitation to enter, you then had the right to enjoy your asylum.

Professor Guy Goodwin-Gill has observed that Article 14 does not create any binding obligations for states and it suggests "a considerable margin of appreciation with respect to who is granted asylum and what exactly this means".[4] The matter returned to the United Nations' agenda with the drafting of the *International Covenant on Civil and Political Rights*. The Australian government's 1955 Brief in preparation for the General Assembly pointed out that the Department of Immigration thought "any limitation of the right to exclude undesirable immigrants or visitors unacceptable". In 1960 the Russians proposed a general right of asylum. Australia maintained its resistance. No right of asylum was included in the covenant.

Now let's consider the letter and spirit of the Refugee Convention. The 1951 *Convention Relating to the Status of Refugees* does not confer a right on asylum seekers to enter the country of their choice or to choose the country which is to process their refugee claim. In fact it does not confer a right to enter any country. The primary obligations in the Convention when considering proposals for border protection and orderly migration are contained in Articles 31 and 33.

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[4] Guy Goodwin-Gill, "The International Law of Refugee Protection", in *The Oxford Handbook of Refugees and Forced Migration Studies*, 2014, p. 36 at p. 42

#31
The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

#33
No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

So a refugee or asylum seeker may be illegally present or may have entered a country illegally. The issue is whether the government may impose any penalty for the illegal entry or presence for which the refugee or asylum seeker is required to show good cause.

Much to the consternation of some refugee advocates, the Australian Government continues to claim: "International law recognises that people at risk of persecution have a legal right to flee their country and seek refuge elsewhere, but does not give them a right to enter a country of which they are not a national. Nor do people at risk of persecution have a right to choose their preferred country of protection."[5]

Australian governments (of both political persuasions, Labor and Liberal) have long held the defensible view: "The condition that refugees must be 'coming directly' from a territory where they are threatened with persecution constitutes a real limit on the obligation of States to exempt illegal entrants from penalty. In the Australian Government's view, a person in respect of whom Australia owes protection will fall outside the scope of Article 31(1) if he or she spent more than a short period of time in a third country whilst travelling between the country of persecution and Australia, and settled there in safety or was otherwise accorded protection, or there was no good reason why they could not have sought and obtained protection there."[6]

The right to "seek and enjoy asylum" in the international instruments must be understood as purely permissive. As noted by Justice Gummow of the Australian High Court:[7]

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[5] See http://www.immi.gov.au/media/fact-sheets/61protection.htm. Guy Goodwin Gill says in "The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement", (2011) 23 *International Journal of Refugee Law* 443 at p. 444: "It is not yet unlawful to move or to migrate, or to seek asylum, even if the criminalisation of 'irregular emigration' by sending states seems to be desired by the developed world. Even so, the range of permissible restrictions on freedom of movement and the absence of any immediately correlative duty of admission, other than towards nationals, make the claim somewhat illusory. Perhaps Article 13(2) of the 1948 Universal Declaration of Human Rights was just a political gesture; perhaps the world today has in fact moved closer to what was then the Soviet position, that the right to freedom of movement should be recognized as *only* exercisable in accordance with the laws of the state."

[6] *Interpreting the Refugees Convention – an Australian Contribution*, Department of Immigration and Multicultural Affairs, Canberra, 2002, p. 172

[7] *MIMA v Ibrahim* [2000] HCA 55 at 137–38. Justice Gummow adds, '[I]t has long been recognised that, according to customary international law, the right of asylum is a right of States, not of the individual; no

[The] right 'to seek' asylum [in the UDHR] was not accompanied by any assurance that the quest would be successful. A deliberate choice was made not to make a significant innovation in international law which would have amounted to a limitation upon the absolute right of member States to regulate immigration by conferring privileges upon individuals … Nor was the matter taken any further by the International Covenant on Civil and Political Rights … Article 12 of the ICCPR stipulates freedom to leave any country and forbids arbitrary deprivation of the right to enter one's own country; but the ICCPR does not provide for any right of entry to seek asylum and the omission was deliberate'.

Nation states which are signatories to these international instruments are rightly obliged not to expel peremptorily those persons arriving on their shores, legally or illegally, in direct flight from persecution. That is the limit of the legal obligation. So there may in the future be circumstances in which Australia would be entitled to return safely to Indonesia persons who, when departing Indonesia for Australia, were no longer in direct flight but rather were engaged in secondary movement seeking a more favourable refugee status outcome or a more benign migration outcome. We Australians could credibly draw this distinction if we co-operated more closely with Indonesia providing basic protection and fair processing for asylum seekers there. Until we do that, I fear there is no way of decently stopping the boats.

Is it legal to stop the boats?

Thirty-three years ago, US President Ronald Reagan frustrated by the flow of asylum seekers across the sea from Haiti signed Executive Order 12324 on the "Interdiction of Illegal Aliens". Reagan characterised "the continuing illegal migration by sea of large numbers of undocumented aliens into the southeastern United States" as "a serious national problem detrimental to the interests of the United States."

The Oxford don and guru of the international jurisprudence on refugee issues Guy Goodwin-Gill has opined that this Order became "the model, perhaps, for all that has followed"[8]. I think he is right. Following the military coup in Haiti in 1991, repatriations were suspended for 6 weeks. Then in May 1992, "President (George) Bush decided to continue interdiction and repatriation, but without the possibility of screening-in for those who might qualify as refugees".[9] When inaugurated as President in January 1993, Bill Clinton maintained the interdiction practice, putting paid to the claim that this was just the initiative of the Republicans. It turned out that both major political parties were committed to stopping the boats, doing whatever it

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individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national … Over the last 50 years, other provisions of the Declaration have [citing Brownlie] come to "constitute general principles of law or [to] represent elementary considerations of humanity" and have been invoked by the European Court of Human Rights and the International Court of Justice. But it is not suggested that Art 14 of the UDHR goes beyond its calculated limitation'.

[8] Guy S Goodwin-Gill, "The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement", (2011) 23 *International Journal of Refugee Law* 443

[9] Guy S Goodwin Gill and Jane McAdam, *The Refugee in International Law*, 3rd edition, Oxford University Press, 2007, p. 247

takes. Three decades later, it is the same situation in Australia with both sides of politics being committed to stopping the boats. The US Supreme Court described the matter thus:

With both the facilities at Guantanamo and available Coast Guard cutters saturated, and with the number of Haitian emigrants in unseaworthy craft increasing (many had drowned as they attempted the trip to Florida), the Government could no longer both protect our borders *and* offer the Haitians even a modified screening process. It had to choose between allowing Haitians into the United States for the screening process or repatriating them without giving them any opportunity to establish their qualifications as refugees. In the judgment of the President's advisers, the first choice not only would have defeated the original purpose of the program (controlling illegal immigration), but also would have impeded diplomatic efforts to restore democratic government in Haiti and would have posed a life-threatening danger to thousands of persons embarking on long voyages in dangerous craft. The second choice would have advanced those policies but deprived the fleeing Haitians of any screening process at a time when a significant minority of them were being screened in.

On May 23, 1992, President Bush adopted the second choice. After assuming office, President Clinton decided not to modify that order; it remains in effect today. The wisdom of the policy choices made by Presidents Reagan, Bush, and Clinton is not a matter for our consideration.

It took 15 months of concerted advocacy from human rights advocates to convince Clinton to institute refugee status determination interviews on board ship. In *Sale* v *Haitian Centers Council, Inc*, the US Supreme Court ruled that these harsh presidential practices were valid. Justice Stevens delivering the opinion of the Court said: "The President has directed the Coast Guard to intercept vessels illegally transporting passengers from Haiti to the United States and to return those passengers to Haiti without first determining whether they may qualify as refugees. The question presented in this case is whether such forced repatriation, 'authorized to be undertaken only beyond the territorial sea of the United States,' violates … the Immigration and Nationality Act of 1952. We hold that neither (the Act) nor Article 33 of the United Nations Protocol Relating to the Status of Refugees applies to action taken by the Coast Guard on the high seas." In relation to Article 33 of the Refugees Convention, the Supreme Court said:

The drafters of the Convention and the parties to the Protocol may not have contemplated that any nation would gather fleeing refugees and return them to the one country they had desperately sought to escape; such actions may even violate the spirit of Article 33; but a treaty cannot impose uncontemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of Article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.

In an uncharacteristic mode for the usually isolationist US judges, the Supreme Court in footnotes quoted many international law scholars including Guy Goodwin-Gill in support of this proposition. Goodwin-Gill had written: "A categorical refusal of disembarkation cannot be equated with breach of the principle of *non-refoulement,* even though it may result in serious consequences for asylum-seekers". They also quoted the respected A. Grahl-Madsen who had worked as an in house lawyer for UNHCR for many years. He had written: "*[Non-refoulement]* may only be invoked

in respect of persons who are already present—lawfully or unlawfully—in the territory of a Contracting State. Article 33 only prohibits the expulsion or return *(refoulement)* of refugees to territories where they are likely to suffer persecution; it does not obligate the Contracting State to admit any person who has not already set foot on their respective territories".

Goodwin-Gill has often pointed out that the Refugee Convention has a number of distinct features: as an international text, it must be interpreted in accordance with the general principles of international law; it is "a 'living instrument' to be interpreted in the light of present day conditions"; and it is "marked by the absence of an in-built monitoring system".[10] This helps explain why refugee advocates often speak of government policies being contrary to the spirit, if not the letter, of the Refugee Convention. That spirit is often enlivened by creative dialogue between UNHCR and the academy. In recent writings Goodwin-Gill has been more critical of those who bluntly espouse that an asylum seeker has no right of entry to a state of his or her choice when in flight from persecution. In his remarks to the 2012 American Society of International Law Conference entitled "International Norm-Making on Forced Displacement: Challenges and Complexity", he said:[11]

> Although some 148 states are now party to the 1951 Convention and/or the 1967 Protocol, there is no single body with the competence to pronounce with authority on the meaning of words, let alone their application in widely and wildly differentiated and evolving fact situations. In the first instance, it is therefore for each state party to implement its international obligations in good faith and, in its practice and through its courts and tribunals, to determine the meaning and scope of those obligations.

He added:[12]

> Interpreting the 1951 Convention presents the challenge of reconciling a 'living instrument' with consistency with international law. A good-faith interpretation of the treaty is called for, which reflects, if not the unknown intent of the drafters, then its object and purpose and the practice of states and their consent to be bound.

Following upon some Australian controversy about whether boat people had a right to enter Australia seeking protection, Goodwin-Gill published a spirited editorial in the *International Journal of Refugee Law* stating:[13]

> The persistent illusion of an absolute, exclusionary competence is still a matter of concern, however, because it tends to frame and direct national legislation and policies in ways that are inimical to international cooperation and, not infrequently, contemptuous of human rights. This persistence is all the more surprising, given what international law has achieved and what international organization has done to resolve or mitigate humanitarian problems.

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[10] Guy Goodwin-Gill, "The Search for the one, true meaning…", in *The Limits of Transnational Law*, Guy Goodwin-Gill and Helene Lambert (eds.), Cambridge University Press, 2010, 204 at pp. 206-7
[11] (2012) 106 *American Society International Law Proceedings* 439 at p 440
[12] Ibid at pp. 442-3
[13] Guy Goodwin Gill, Editorial: The Dynamic of International Refugee Law", *International Journal of Refugee Law* Vol. 25 No. 4 p. 651 at pp. 653-5

The history is important, and no international lawyer can avoid being an historian. This gives us the long view essential to understanding law in the relations of states, and enables us to counter misunderstandings dressed up as advocacy – to point out, for example, that no one in the Commission on Human Rights in 1947–48 ever suggested that a right 'to be granted asylum' (even if it were adopted, which it was not) meant that you could just turn up anywhere by boat and demand and get it. What history tells us, though, is that the French were not without reason to argue that a right to seek asylum would mean little if not linked to a right to be granted asylum. Equally, it shows that other states spoke for their time when responding that this was out of sync with contemporary international law, at least on the narrow, immigration issue of entry and residence. History, then and now, reminds us of the range of legal and practical matters which were left open, and which have since had to be resolved consistently with the general principles of the Declaration at large.

It does not follow, either logically or as a matter of fact, that because states declined to declare a right to be granted asylum in 1948, the individual in flight and at risk of persecution or other relevant harm necessarily has 'no right' to enter state territory at any time. The issue is often one of 'framing', for everything depends on context, and the question for international lawyers (and for governments, legislators, critics and commentators) is when and in the light of what obligations might circumstances requiring entry prevail.

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Factual scenarios are hugely diverse (which accounts for the difficulty of harmonizing refugee decision making across jurisdictions), but it can never be excluded that the state may well be required, as a matter of obligation, to allow an individual to enter its territory for the purpose of protection. To imagine that this is equivalent to granting asylum, as that is understood in the practice of states, is to miss the whole picture – one which is rich in its complexity, demanding more than the simple intonation of words like 'admission', 'entry', 'right', 'no right', without reference to protection and to context and meaning in international law.

In March this year, Goodwin-Gill followed up with a very spirited attack on the US Supreme Court's *Sale* decision:[14]

Nor do I think that the judgment of the Supreme Court in *Sale* counts for anything juridically significant, other than within the regrettably non-interactive legal system of the United States. Here, the Court ruled for domestic purposes on the construction of the Immigration and Nationality Act. What it said on the meaning of treaty was merely dictum and the Court was not competent –in at least two senses – to rule on international law.

At best, the judgment might constitute an element of State practice, but even here its international relevance can be heavily discounted. The Court failed, among others, to have regard to the binding unilateral statements made by the US when interdiction was first introduced, and the ten years of consistent practice which followed. And as any student of international law will tell you, practice and statements of this nature are highly relevant, particularly when against interest.

UNHCR, moreover, which is responsible for supervising the application of the 1951 Convention/1967 Protocol, protested the judgment at the time and has consistently maintained the position set out in its *amicus* brief to the Supreme Court (and in earlier interventions with the US authorities). Significantly, no other State party to the treaties has objected to UNHCR's position, though the forum and the

[14] Guy Goodwin-Gill, The Globalization of High Seas Interdiction–Sale's Legacy and Beyond, YLS Sale Symposium, at http://opiniojuris.org/2014/03/16/yale-sale-symposium-globalization-high-seas-interdiction-sales-legacy-beyond/

opportunity are readily available, such as the UNHCR Executive Committee, ECOSOC, or the Third Committee of the UN General Assembly.

Be all this as it may, Goodwin-Gill nonetheless concedes in his most recent writing: "The 1951 Convention does not deal with the question of admission, and neither does it oblige a state of refuge to accord asylum as such".[15] Goodwin-Gill's co-author Professor Jane McAdam, when recently explaining the extra-territorial effect of international obligations and the need for Australian personnel on the high seas to be attentive to the protection needs of asylum seekers before refusing them access to Australian territory, claimed:[16] "Only the United States has said that the Refugee Convention does not have that extra-territorial application and that's the basis on which the US justifies its interdiction and expulsion of Haitians and Cubans for instance. The US Supreme Court upheld that view but …., to borrow Guy Goodwin-Gill's language, the US Supreme Court was not competent in two senses of the word to rule on the international law obligations of the United States; and in any sense, they were really interpreting a domestic statute. UNHCR at the time and subsequently has spoken out very strongly that the US interpretation is wrong as a matter of international law, and not one country has ever contradicted UNHCR. In international law terms, that is a very strong tacit acceptance that UNHCR's position is correct and that the US is out there on a limb."

Whatever of US exceptionalism in international law, its approach has in fact given licence and a paradigm these last two decades to other first world countries worried about an influx of boat people. Australian governments of both political persuasions have adopted the jurisprudence of the US Supreme Court, and to date the Australian High Court has not begged to differ. It has been the domestic courts, as much as the international academy and UNHCR, which has reined in exclusionary states, ever so slightly. In forthcoming litigation in the Australian High Court, the Australian Human Rights Commission has submitted "that the construction given to Article 33(1) by the majority of the US Supreme Court in *Sale* v *Haitian Centers Council*, lnc is incorrect".[17]

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[15] Guy Goodwin-Gill, "The International Law of Refugee Protection", in *The Oxford Handbook of Refugee and Forced Migration Studies*, Oxford, 2014, p. 36 at p. 45

[16] Q&A Panel: The High Court and the Asylum Case, Kaldor Centre, University of New South Wales, 22 July 2014, at http://www.kaldorcentre.unsw.edu.au/node/348#overlay-context=events

[17] Australian Human Rights Commission, Proposed Submissions, *CPCF* v *Minister for Immigration and Border Protection,* High Court of Australia, 11 September 2014 p.8. The AHRC submission provides a novel approach to the historic interpretation of Article 33 when it states at p.3: "According to Goodwin-Gill and McAdam, the first reference in an international agreement to the principle that refugees should not be returned to their country of origin occurred in the 1933 Convention relating to the International Status of Refugees. Article 3 of that Convention contained an undertaking by States not to remove resident refugees or keep them from their territory 'by application of police measures, such as expulsions or non-admittance at the frontier (refoulement)' unless dictated by national security or public order. The language that ultimately formed the basis for Article 33(1) of the Refugees Convention was the product of an *Ad hoc* Committee on Statelessness and Related Problems appointed by the United Nations Economic and Social Council. A representative of the United States delegation on that Committee provided the following description of the key principle: 'Whether it was a question of closing the frontier to a refugee who asked admittance, or of turning him back after he had crossed the frontier, or even of expelling him after he had been admitted to residence in the territory, the problem was more or less the same .... Whatever the case may be ... he must not be turned back to a country where his life or freedom could be

Perhaps in the future, the Australian High Court might be convinced to follow more the jurisprudence of the European Court of Human Rights rather than the US Supreme Court, at least when interpreting Australian statutes which are arguably consistent with the fulfilment of Australia's international treaty obligations. In Europe, the focus has been on boats coming across the Mediterranean Sea. The European Court of Human Rights became apprised of the EU practices in the Mediterranean in the 2012 case of *Hirsi* v *Italy*.

The applicants in that case were eleven Somali nationals and thirteen Eritrean nationals who were part of a group of about two hundred individuals who left Libya aboard three vessels with the aim of reaching the Italian coast. On 6 May 2009, when the vessels were 35 nautical miles south of the island of Lampedusa, they were intercepted by three ships from the Italian Revenue Police and the Coastguard. The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli. On arrival in the Port of Tripoli, the migrants were handed over to the Libyan authorities. According to the applicants' version of events, they objected to being handed over to the Libyan authorities but were forced to leave the Italian ships. At a press conference held on 7 May 2009 the Italian Minister of the Interior stated that the operation to intercept the vessels on the high seas and to push the migrants back to Libya was the consequence of the entry into force on 4 February 2009 of bilateral agreements concluded with Libya, and represented an important turning point in the fight against clandestine immigration. The applicants complained that they had been exposed to the risk of torture or inhuman or degrading treatment in Libya and in their respective countries of origin as a result of having been returned. They relied on Article 3 of the European Convention on Human Rights which provides: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Court said:

> The Court has already had occasion to note that the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum seekers. It does not underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of economic crisis. It is particularly aware of the difficulties related to the phenomenon of migration by sea, involving for States additional complications in controlling the borders in southern Europe. However, having regard to the absolute character of the rights secured by Article 3, that cannot absolve a State of its obligations under that provision. The Court reiterates that protection against the treatment prohibited by Article 3 imposes on States the obligation not to remove any person who, in the receiving country, would run the real risk of being subjected to such treatment.

The Court ruled unanimously that the applicants were within the jurisdiction of Italy for the purposes of Article 1 of the Convention; that there had been a violation of Article 3 of the Convention on account of the fact that the applicants were exposed to

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threatened.'

the risk of being subjected to ill-treatment in Libya; and that there had been a violation of Article 3 of the Convention on account of the fact that the applicants were exposed to the risk of being repatriated to Somalia and Eritrea.[18]

I was interested to note that Lord Neuberger, the Chief Justice of the United Kingdom, was recently in Australia. He took the opportunity to express some forthright views about the European Court of Human Rights. He told the justices of the Victorian Supreme Court:

> I think we may sometimes have been too ready to treat Strasbourg court decisions as if they were determinations by a UK court whose decisions were binding on us. It is a civilian court under enormous pressure, which sits in chambers far more often than in banc, and whose judgments are often initially prepared by staffers, and who have produced a number of inconsistent decisions over the years. I think that we are beginning to see that the traditional common law approach may not be appropriate, at least to the extent that we should be more ready not to follow Strasbourg chamber decisions.

But in the end, he came down in favour of the general approach of the European Court, conceding that the UK's ratification of the Convention and the passage of its own Human Rights Act resulted in the courts being "pitchforked into ruling on the most contentious issues of the day" including asylum seekers' rights. He observed:

> The fact that "unelected" judges, especially foreign judges, are perceived to have been given powers which they previously had not enjoyed, coupled with the distaste in some political quarters for all things European, and the media's concentration on prisoners' votes and asylum seekers, has rendered the Convention something of a whipping boy for some politicians and newspapers. This appears to many people to be unfortunate. There are decisions of the Strasbourg court with which one can reasonably disagree, indeed with which I disagree. This is scarcely surprising; indeed, it would be astonishing if it were otherwise. However, to my mind, there are very few of its decisions which can fairly be said to be misconceived.

Australia does not have a *Human Rights Act*, and it is not accountable to any outside judicial body like Strasbourg. This may help to account for Australia's less nuanced approach to "stopping the boats". In Australia, the Executive finds itself freer from judicial constraint. Mind you, the Australian High Court flexes its muscle from time to time. Just last week, the court unanimously struck down the government's latest

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[18] In a separate judgment, Judge Pinto de Albuquerque joined issue with the US Supreme Court. He said: "It is true that the statement of the Swiss delegate to the conference of plenipotentiaries that the prohibition of *refoulement* did not apply to refugees arriving at the border was supported by other delegates, including the Dutch delegate, who noted that the conference was in agreement with this interpretation. It is also true that Article 33 § 2 of the UN Refugee Convention exempts from the prohibition of *refoulement* a refugee who constitutes a danger to the security of a country "in which he is" and refugees on the high seas are in no country. One might be tempted to construe Article 33 § 1 as containing a similar territorial restriction. If the prohibition of *refoulement* were to apply on the high seas, it would create a special regime for dangerous aliens on the high seas, who would benefit from the prohibition, while dangerous aliens residing in the country would not.

"With all due respect, the United States Supreme Court's interpretation contradicts the literal and ordinary meaning of the language of Article 33 of the UN Refugee Convention and departs from the common rules of treaty interpretation."

attempt to avoid giving permanent protection visas to asylum seekers proven to be refugees who also pass the requisite health and security checks.[19]

The Law, Politics and Morality of Stopping the Boats

Permit me to be so bold, being a Jesuit and a lawyer, to suggest that domestic judicial review and public moral argument posited on religious conviction are two necessary devices for reining in the executive government responding to populist sentiment to secure the borders and stop the boats. It is the judicial method which permits fine consideration of the claims of those who present at our borders, rather than more broad stroke governmental decisions to punish those who present at our borders in order to send a message to other intending asylum seekers and to give a preference to those asylum seekers chosen by government rather than those who self-select by presenting themselves at the border. It is the religiously based moral argument which augments the secular liberal approach within the nation state. The secular liberal finds it hard to formulate an argument for universal care extending beyond the injunction for government to care for their own citizens maintaining the security of their borders. At the very least, the secular liberal should concede the assistance which might be obtained from the religious practitioners who profess the dignity of all human persons, and not just those holding passports for nation states living in peace and with economic security.

Having offered some observations about the effects of the judicial method, I now turn to the effects of religious discourse in the public square, convinced that such discourse can often augment, consolidate and extend the protection of the human rights of those whose interests do not coincide with those of the majority in a nation state.

Marking the 60th anniversary of the UN Declaration of Human Rights, the late and revered Seamus Heaney wrote:

> Since it was framed, the Declaration has succeeded in creating an international moral consensus. It is always there as a means of highlighting abuse if not always as a remedy: it exists instead in the moral imagination as an equivalent of the gold standard in the monetary system. The articulation of its tenets has made them into world currency of a negotiable sort. Even if its Articles are ignored or flouted—in many cases by governments who have signed up to them—it provides a worldwide amplification system for the 'still, small voice'.

[19] *Plaintiff S4-2014* v *Minister for Immigration and Border Protection* [2014] HCA 34 (11 September 2014). The plaintiff had no visa permitting him to enter or remain in Australia. On arrival in Australia, at Christmas Island, the plaintiff was lawfully taken into immigration detention where he was held for two years while being assessed for a protection visa. The department determined that the plaintiff was "grant ready". "That is, the department determined that the plaintiff was a refugee and satisfied relevant health and character requirements for the grant of a protection visa." The Minister then decided not to grant a protection visa but rather another short term visa which would then preclude the grant of a permanent protection visa. The Court ruled that the grant of this visa was invalid as its grant would have undermined the whole legislative purpose of the two year detention, namely assessment for a permanent protection visa.

Religious leaders have a capacity to contribute to that amplification of the still, small voice, as of course do international lawyers. The concept of human rights has real work to do whenever those with power justify their solutions to social ills or political conflicts only on the basis of majority support or by claiming the solutions will lead to an improved situation for the mainstream majority. Even if a particular solution is popular or maximises gains for the greatest number of people, it might still be wrong and objectionable. There is a need to have regard to the wellbeing of all members of the human community, and not just those within the preferred purview of government consideration.

Lampedusa continues to be a beacon for asylum seekers fleeing desperate situations in Africa seeking admission into the EU. Lampedusa is a lightning rod for European concerns about the security of borders in an increasingly globalized world where people as well as capital flow across porous borders. That's why Pope Francis went there on his first official papal visit outside Rome. At Lampedusa on 8 July 2013, Pope Francis said:

"Where is your brother?" Who is responsible for this blood? In Spanish literature we have a comedy of Lope de Vega which tells how the people of the town of Fuente Ovejuna kill their governor because he is a tyrant. They do it in such a way that no one knows who the actual killer is. So when the royal judge asks: 'Who killed the governor?', they all reply: 'Fuente Ovejuna, sir'. Everybody and nobody! Today too, the question has to be asked: Who is responsible for the blood of these brothers and sisters of ours? Nobody! That is our answer: It isn't me; I don't have anything to do with it; it must be someone else, but certainly not me. Yet God is asking each of us: 'Where is the blood of your brother which cries out to me?' Today no one in our world feels responsible; we have lost a sense of responsibility for our brothers and sisters. We have fallen into the hypocrisy of the priest and the levite whom Jesus described in the parable of the Good Samaritan: we see our brother half dead on the side of the road, and perhaps we say to ourselves: 'poor soul…!', and then go on our way. It's not our responsibility, and with that we feel reassured, assuaged. The culture of comfort, which makes us think only of ourselves, makes us insensitive to the cries of other people, makes us live in soap bubbles which, however lovely, are insubstantial; they offer a fleeting and empty illusion which results in indifference to others; indeed, it even leads to the globalization of indifference. In this globalized world, we have fallen into globalized indifference. We have become used to the suffering of others: it doesn't affect me; it doesn't concern me; it's none of my business!

Here we can think of Manzoni's character – 'the Unnamed'. The globalization of indifference makes us all 'unnamed', responsible, yet nameless and faceless.

It is all very well for the Pope to say these things. But who is listening? And even if they are listening, who is taking any notice? Should anyone other than Catholics bother taking any notice? Those of us who profess to be Christian living behind secure national borders buttressed by wealth and the rule of law being shared only by the citizenry have been wrestling with the gospel imperatives of justice and compassion expressed in the parables of Jesus such as the parable of the Good Samaritan. The Oxford academic John Finnis reminds us that "neither atheism nor radical agnosticism is entitled to be treated as the 'default' position in public reason,

deliberation and decisions. Those who say or assume that there is a default position and that it is secular in those senses (atheism or agnosticism about atheism) owe us an argument that engages with and defeats the best arguments for divine causality."[20] Though it might be prudent and strategic to suggest that religious accommodationists carry the onus of persuasion in a public square with a secularist prejudice, might there not be a case for arguing that the representatives of the more populist, majoritarian mindset in the public square need to be more accommodating of religious views?

Finnis, a Catholic but making a point equally applicable to all faith communities, says, "Outside the Church, it is widely assumed and asserted that any proposition which the Catholic Church in fact proposes for acceptance is, by virtue of that fact, a 'religious' (not a philosophical, scientific, or rationally grounded and compelling proposition), and is a proposition which Catholics hold only as a matter of faith and therefore cannot be authentically willing to defend as a matter of natural reason."[21] For Finnis, much of what John Rawls in his *Political Liberalism* describes as public reason can be equated with natural reason. Whereas Rawls would rely only on an overlapping consensus not wanting to press for objective reality of right and wrong, Finnis would contest that the only content of an overlapping consensus would be that which can be objectively known through natural reason.

Jeremy Waldron who is now the Chichele Professor of Social and Political Theory at Oxford recently published an article entitled "Two-way Translation: The Ethics of Engaging with Religious Contributions in Public Deliberation". He joins issue with John Rawls' assertion that the responsibility falls on the religious speaker rather than the secular listener to translate his propositions and his moral passion into language comprehensible to those who profess nothing more than the tenets of public reason. He quotes the German philosopher Jiirgen Habermas who insists that any "requirement of translation must be conceived as a cooperative task in which the nonreligious citizens must likewise participate." Discourse in the public square is a two-way street. Thus there is a place for Pope Francis to be prophetically declaiming the moral turpitude of present state practices at Lampedusa. There is a place for the Australian Catholic bishops to be prophetically declaiming the moral turpitude of present state practices on Christmas Island, Nauru and Manus Island. If only the Abbott government with its disproportionate number of Jesuit alumni Cabinet ministers would listen! There is a place for church leaders drawing on their religious tradition trying to call political leaders and the public back to values, policies and laws which resonate more with the tenets of religious faith. Following Habermas, Waldron states:[22]

> It is not only speakers who bear a burden of civility; the audience does too. The speaker must strain to convey his points in ways that will communicate as much of their content as he can to those who do not share his faith or the biblical or theological resources he is drawing on. But the listener has a similar

[20] J Finnis, *Religion and Public Reasons*, Oxford University Press, 2011, p. 45
[21] Ibid, pp. 114-5
[22] (2012) 63 Me*rcer Law Review* 845 at pp. 863-4

responsibility. He must strain to listen and try to understand what is being said, and, if necessary, draw on resources in his own background (even aspects of his background that he has repudiated) or resources in the culture that he has access to, to get a bearing on what is being said, and what is being argued.

Certainly, it is not appropriate -it is not civil- for secular citizens to strain not to understand what is being said to publicly burnish their own credentials as non-believers. It is not appropriate for them to block out or refuse to employ available resources for making sense of what is said, because of their own resolve to purge religion from their lives. Or rather, a person can do that; people do not have the obligation to listen to and grapple with everything that is said in public discourse. But then, if they do turn a deaf ear, for whatever reason, to some of what is being said, they can hardly complain about the incivility of the speaker.

The migration and asylum debate is one debate in which the voice of church leaders needs to be heeded and in which we need to have due regard for political deliberation. It is also a debate which can be properly conducted only with institutional safeguards, those checks and balances ensuring appropriate consideration of the balance between the public interest and the dignity of every person, including the person presenting at the national border in flight from persecution. This cannot be done without adequate supervision by the domestic courts. It is a debate which requires strong political virtue in national leaders, opinion makers and public advocates. It is a debate which requires a honed ethical inquiry into the ends to be achieved, given the vast numbers of people seeking protection and the heightened need to secure national borders. For example, it is not an ethical irrelevance that for every person who gains protection at the border in Australia, that is one less place available in the annual immigration intake for a person in great humanitarian need who does not have the resources to get themselves to the border. In what circumstances are we entitled to be cruel to the person on our doorstep so as to be kind to the person in greater need on the other side of the world? In what circumstances are we entitled to be kind to the person on our doorstep, absolving ourselves from responsibility for the person in greater need in a remote refugee camp where the human rights violations are horrendous? It is facile to suggest that there is some simple mathematical answer to these political and ethical quandaries. In his inaugural lecture at Oxford, Professor Waldron spoke about *political* political theory and the need to be "focusing on issues of institutions as well as the ends, aims, and ideals of politics, like justice". He observed:[23]

The deliberative and deliberate processes of a free society slow things down; their articulated and articulate structures stretch things out; they cost money for salaries and furniture and buildings; they provide an irritating place for the raising of inconvenient questions; at their best they respect the dignity of the poorest he or the poorest she that is in England by providing a place for their petitions to be heard. The political institutions of a free society sometimes even require the government to retire from the field defeated, when its victory, in some courtroom or legislative battle, was supposed by political insiders to be a foregone conclusion. I think all of this is to be valued and cherished.

Waldron is adamant that students of politics need to study both institutions and the

[23] "*Political* Political Theory: An Inaugural lecture", *The Journal of Political Philosophy*: Volume 21, Number 1, 2013, p.1 at p. 23

character of those who inhabit them: “They should understand something of political virtue and the demands that the requirements of good government make on the character of those who take on responsibility for public affairs”. We need to improve both if we are to get better ethical outcomes for laws and policies affecting those who present at our borders seeking protection whether it be from persecution, torture, cruel or inhuman treatment.

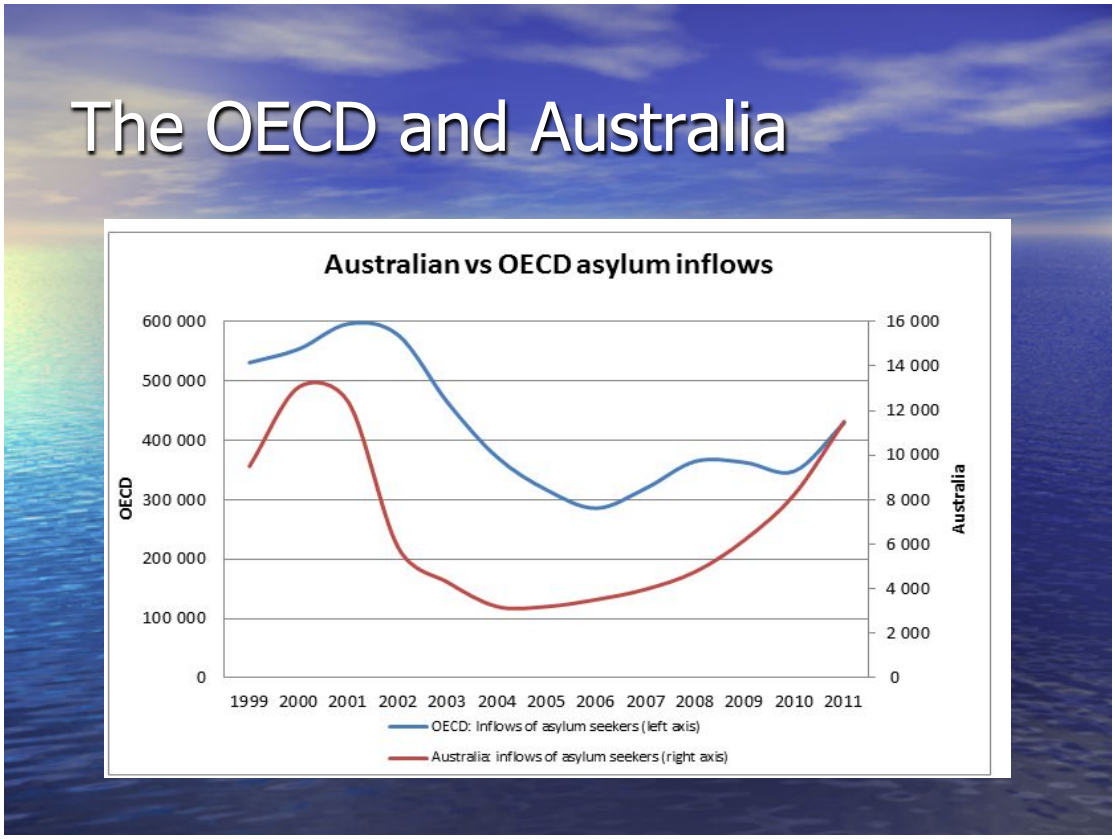
Assessing the Australian Measures to Stop the Boats

On 8 September 2014, Zeid Ra’ad Al Hussein, the new UN High Commissioner for Human Rights addressed the opening of the UN Human Rights Council’s 27th session. I am well used to this UN body giving more than warranted attention to Western countries and their human rights violations. It is no surprise when they single out the United States for attention. But it is not often that Australia warrants a billing, especially in a high commissioner’s first speech to the council. Hussein said:

I must emphasise that the detention of asylum seekers and migrants should only be applied as a last resort, in exceptional circumstances, for the shortest possible duration and according to procedural safeguards. ***Australia***'s policy of off-shore processing for asylum seekers arriving by sea, and its interception and turning back of vessels, is leading to a chain of human rights violations, including arbitrary detention and possible torture following return to home countries. It could also lead to the resettlement of migrants in countries that are not adequately equipped.

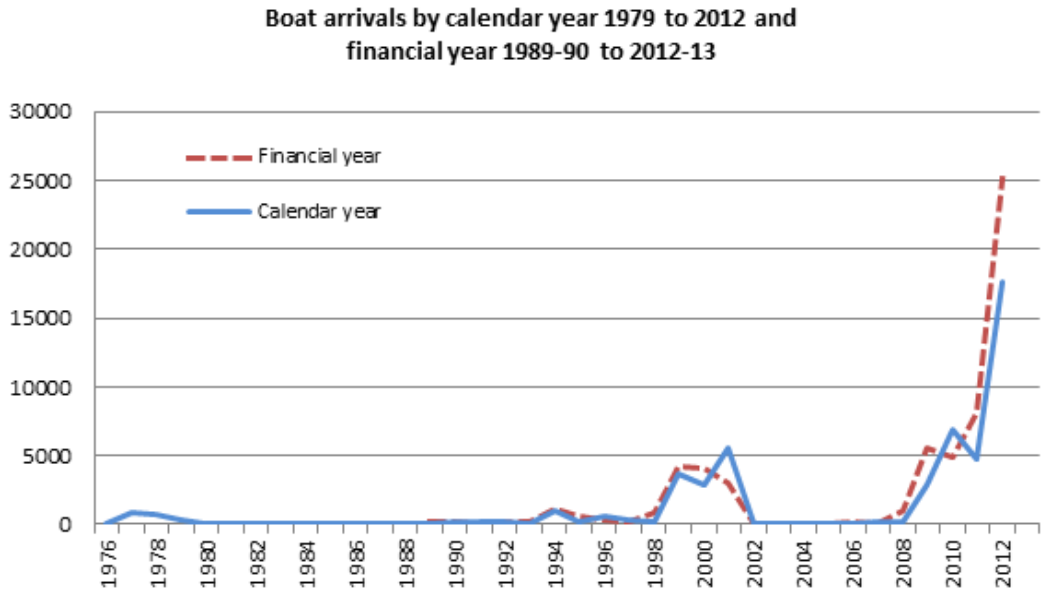
After surveying recent American abuses he observed:

The treatment of non-nationals must observe the minimum standards set by international law. Human rights are not reserved for citizens only, or for people with visas. They are the inalienable rights of every individual, regardless of his or her location and migration status. A tendency to promote law enforcement and security paradigms at the expense of human rights frameworks dehumanises irregular migrants, enabling a climate of violence against them and further depriving them of the full protection of the law.



Last year, one of our Australian universities hosted a national asylum summit. The opening keynote address was delivered by Jeff Crisp, the Head of the Policy Division and Evaluation Service of UNHCR in Geneva. Jeff provided a graph to show that the ebb and flow of asylum seekers coming to Australia fairly well tracked the ebb and flow internationally. Jeff's graph of "Australia vs OECD asylum inflows" cut out at 2011. The rate of boat arrivals had escalated to Australia from 2011 to mid-2013. By then the red line was well off the graph. In financial year ended 30 June 2013, "25,145 people have arrived on 394 boats - an average of over 70 people and more than a boat a day" as Scott Morrison, Tony Abbott's then Shadow Minister never tired of telling us. Except for Sri Lankans, most of those arriving by boat came not directly from their country of persecution but via various countries with Indonesia being their penultimate stop. There was an understandable bipartisan concern in the Australian parliament about the blowout of boat arrivals to 3,300 per month. An arrival rate of that sort (40,000 pa) would put at risk the whole offshore humanitarian program and distort the migration and family reunion program. Thus the need to ensure that those risking the perilous sea voyage were in direct flight from persecution being unable to avail themselves adequate protection or processing en route in Indonesia. If they were able to avail themselves such services in Indonesia, the Australian government would be entitled to set up disincentives and to return them safely to Indonesia. If that number were in direct flight from persecution, the Australian government would be justified in setting up measures providing only temporary protection and denying family reunion other than on terms enjoyed by other migrants. But I don't think that would be necessary. I have never understood why the less than honest asylum seeker arriving by plane, having sought a visa not for asylum but for tourism or business,

should be given preferential treatment over the honest asylum seeker arriving by boat who says, "I am here to seek asylum."



Some people argue that it is immoral for nations now to maintain sovereign borders and that we should permit the free flow of people much as we allow the free flow of capital and produce in an increasingly globalized world. In my own Catholic tradition, Pope John XXIII used to argue for a right to emigrate to the country of one's choice. It is not a right which has been espoused by any subsequent pope.

I accept the moral propriety of nation states maintaining secure borders and insisting on the need for an ordered migration program while playing their part providing protection for people in direct flight from persecution. Australia being a net migration country is well positioned to contribute to the protection mandate. If the rate of boat arrivals in 2012-2013 had continued to escalate at the rate it was, all humanitarian places in the annual allocation would by now have been taken up by the boat arrivals. If the flow was unabated, there was even the possibility down the track that the entire migration program would be filled by boat arrivals.

The new Australian government is almost suggesting that there has been an ethical dividend delivered from the harsh policies. The Australian Minister for Immigration, Scott Morrison, told the National Press Club in Canberra on 10 September 2014: "In 2012/13 there were just 503 places provided in our special humanitarian programme. This year there are 5000. Overall, our refugee and humanitarian programme will deliver 4400 places to those affected by the conflicts in Syria and Iraq this year alone. This is made possible by our border success. No longer are places in this programme being taken by those who have come illegally by boat." Mind you, these 4400 places

come from the already reduced quota of the special humanitarian program. There has been no increase to the number of humanitarian places on offer in this year's migration intake.

Both sides of Australian politics are now committed to stopping the boats, stopping the drownings, and having additional places available for offshore asylum seekers chosen by the Australian government and not self-selected by those with access to people smugglers. Only the minor parties (Greens, Palmer United and DLP) express ethical objections to this calculus in the Australian Parliament. The Abbott government was elected a year ago with a strong mandate to stop the boats. For the moment, the government is not much interested in public discussion about the ethics of the policy. It is more a matter of "whatever it takes". The government needs to engage the community about the ethical bottom line for long term detention and banishment of refugees to countries such as Nauru and PNG. We need to ensure a fair go for all – those on boats, those stranded in remote camps, and those trapped in transit countries.

Is there a more decent way of stopping the boats?

In the medium term, I think the only way to stop the boats ethically is to negotiate a regional agreement with Indonesia and Malaysia. This would take a considerable period of time, a good cheque book, and a strong commitment to detailed backroom diplomatic work avoiding the megaphone diplomacy which has marked this issue of late. In the short term, the boats can be stopped only with some sort of "shock and awe" campaign. Can such a campaign be ethically justified? Sadly in Australia at the moment, that is not a question with any political traction. In recent months, there have been two deaths of persons held in detention on Manus Island in Papua New Guinea. The PNG government is showing no indication of delivering on its previous commitment that those asylum seekers taken to Manus Island and proved to be refugees would be resettled in PNG enjoying all rights guaranteed by the Refugee Convention. The shock and awe campaign may be truncated not because it is judged unethical but just because it does not work and it is not cost efficient.

I want to outline the contours for a better approach in Australia. Outlining these contours, I want to defend the Refugee Convention while urging caution about invoking it as trumps in moral or political discourse or even in legal discourse about decisions of ultimate courts of appeal. I want to urge that Australian political leaders of every ilk maintain a commitment both to the Convention and to onshore processing with minimal detention and adequate rights to work and welfare while awaiting processing in the community. Hopefully any changes adopted can be worked against a backdrop of our providing at least 20,000 humanitarian places a year in our migration program, at least 12,000 of those being for refugees.

Boats carrying asylum seekers from Indonesia to Australia could legally be

interdicted by Australian authorities within our contiguous zone (24 nautical miles offshore from land, including Christmas Island). The passengers could be offloaded and taken to Christmas Island for a prompt assessment to ensure that none of them fit the profile of a person in direct flight from Indonesia fearing persecution by Indonesia. Pursuant to a regional arrangement or bilateral agreement between Australia and Indonesia, Indonesia could guarantee not to refoule any person back to the frontiers of a country where they would face persecution nor to remove any person to a country unwilling to provide that guarantee. Screened asylum seekers from Christmas Island could then be safely flown back to Indonesia for processing.

With adequate resourcing, a real queue could be created for processing and resettlement. Provided there had been an earlier, extensive advertising campaign, Indonesian authorities would then be justified in placing any returned boat people at the end of the queue. Assured safe return by air together with placement at the end of the queue would provide the deterrent to persons no longer in direct flight from persecution risking life and fortune boarding a boat for Australia. In co-operation with UNHCR and IOM, Australia could provide the financial wherewithal to enhance the security and processing arrangements in Indonesia. Both governments could negotiate with other countries in the region to arrange more equitable burden sharing in the offering of resettlement places for those proved to be refugees. Australian politicians would need to give the leadership to the community explaining why it would be necessary and decent for Australia then to receive more proven refugees from the region, including those who fled to our region fearing persecution in faraway places like Afghanistan.

Indonesia would need to enhance its own border protection regime making it more difficult for asylum seekers in Malaysia who are not in direct flight from persecution in Malaysia to enter Indonesia. The safeguards negotiated in Indonesia and any other country in the region to which unprocessed asylum seekers were to be sent would need to comply with appropriate minimum standards.

In the short term, Australia should escalate its diplomatic efforts with Indonesia to stem the flow of boats and to win agreement to the safe return by air of all asylum seekers interdicted within the contiguous zone or inside Australia's territorial waters once they have been screened out from having any protection claim against Indonesian persecution. Such efforts would need to include commitments to capacity building, countering corruption, and a review of the aid budget. Both governments need to have an incentive to stop the boats. Australia and Indonesia should then join a regional initiative aimed at:

- Setting down a regional principle of non-refoulement
- Setting down regional principles for denying entry and returning asylum seekers no longer in direct flight from persecution to the safe transit country they have just departed

- Setting down regional principles for processing and protection with certification by UNHCR
- Setting quotas for resettlement places for proven refugees who are processed in the region.

Then, and only then, might Australia have some prospect of achieving the policy goal of hermetically sealed borders and ordered migration flows, while honouring the letter and spirit of the Refugee Convention in a region where our neighbours are not much interested in signing the Convention but like us are committed to sharing the burden of extending compassion to those in direct flight from persecution. Then, and only then, might we stop the boats once it is known that it is a waste of money to take to the high seas only to be told: "Please get back to where you already had a realistic opportunity for protection and processing; but if you are in direct flight from persecution, you are welcome here!" There would be no need to try unprincipled, unworkable deterrents like offshore processing in Nauru or Manus Island or offshore dumping in Malaysia or Cambodia. Unless we wrestle with these complexities, we risk a populist response to all asylum seekers, including those in direct flight from persecution: "Get back to where you once belonged!" The challenge confronting Australia is modest compared with so many other countries which do not boast the advantages of which we dare to sing: "Our home is girt by sea; Our land abounds in nature's gifts"; "For those who've come across the seas we've boundless plains to share."

Any country is entitled to maintain an ordered migration program, securing its borders appropriately. A nation like Australia should maintain a migration program with balance between business migration, family reunion, and humanitarian needs. All nations should permit persons in direct flight from persecution to enter their territory for the purposes of assessment and temporary safe haven. All nations which are signatory to the Refugee Convention should abide its terms. It should be conceded by legal purists that strict and complete compliance with the letter and spirit of the Refugee Convention is possible only when the receiving country is a developed country with a robust rule of law. Legal purists should also concede that such compliance renders the Refugee Convention unattractive to a range of countries, especially in South East Asia, and renders Convention compliant solutions possible only in a minority of cases. Political pragmatists should concede that a country's signature on the Refugee Convention is not a sufficient condition for sending refugees for resettlement, especially when the signature was obtained as part of a UN nation building exercise (eg. Timor Leste and Cambodia).

Australia could return to a pre-1996 situation, severing the nexus between successful onshore asylum claims and the quota for offshore humanitarian places. While the nexus is maintained, the ethical argument cannot focus only on the plight of those seeking access onshore to Australia. It must also take into account the plight of those refugees who have no access to long distance travel to seek asylum. Australia should

maintain a special quota for refugees fleeing from countries where Australia has committed troops in war, and the quota should be maintained for twice the period Australians fought there. Australian political parties should adopt the targets set two years ago by the panel set up to review Australia's asylum policies – 20,000 humanitarian places per year, with the prospect of an increase to 27,000 by 2017.

Australia needs to work with Indonesia and UNHCR in the first instance, and then with Malaysia to provide the circumstances in Indonesia and Malaysia where asylum seekers can be provided with an acceptable level of protection and processing (approved and supervised by UNHCR), thereby warranting the classification of further movement as secondary movement, permitting interception on the high seas followed by safe and dignified return to the last port of call.

Australia's "shock and awe" measures instituted by prime ministers Rudd and Abbott since July 2013 have achieved their objective in that the boats have all but stopped and the border with Indonesia is now secure. There is no ongoing justification for the long term detention of asylum seekers (including unaccompanied minors) on Nauru and PNG. There should be an appropriate burden sharing arrangement with Australia accepting ultimate responsibility for those refugees who cannot be resettled elsewhere. If the Australian "shock and awe" measures are to be maintained, they should be mandated by Parliament either by legislation or by the tabling of designations which are disallowable by either house of parliament. Defending the present scheme in the High Court the Commonwealth in May 2014 said "that it is for the Minister **and for the Parliament** to decide, subject to political accountability, whether or not a designation should occur and be allowed to operate in accordance with the scheme". The newly constituted Australian Senate should be given the opportunity to scrutinise and debate the scheme. This is a sensible democratic precaution, given that the scheme will be the subject of a royal commission and compensation payments some day.

If the shock and awe measures are to be maintained, the Australian Army (acting much like peacekeepers at the invitation of the host government) rather than an admixture of corporations and NGOs should be responsible for the security and safety of detainees. There is no justification for denying work rights or an adequate level of welfare assistance in the community for those onshore asylum seekers awaiting determination of their claims.

Does the Refugee Convention help us find the answer to stopping the boats decently?

In the toxic refugee debate in Australia, I have come to see the Refugee Convention as something of a straw man, perhaps even a distraction. Without key countries in the region being signatories, without any reporting mechanism, and without any authoritative curial interpretative body, the Convention to some extent means

whatever we want it to mean. Or it means what esteemed international lawyers would want it to mean. We all go off on one of two tracks: the legal purists think it provides a comprehensive code for refugee protection and judgment of the practices and policies of the political pragmatists; and the political pragmatists think it provides a convenient cover for arrangements like off-shore processing, opting out of permanent resettlement, and protracted detention.

We have reached the stage in Australia that government is able to claim that holding 157 asylum seekers (including children) on a navy ship on the high seas for a month is consistent with the Refugee Convention. Rather than arguing the toss on the Convention, perhaps we are better off in and out of court arguing that such a wanton exercise of extra-territorial executive power without parliamentary warrant is unconstitutional, especially given the absence of any legislative authorisation for the deprivation of liberty for no purpose authorised by statute. Our Australian sense of legal formalism about the Refugee Convention has reached the stage that our government proposes sending 1,000 asylum seekers to Cambodia for processing and resettlement, on the basis that Cambodia is a signatory to the Refugee Convention. In Cambodia, there is no adequate legal safety net. On 12 September 2014, Vivian Tan, the regional spokesperson for UNHCR told a church news agency:[24]

> UNHCR is not party to this bilateral agreement in any way. We are deeply concerned about the precedent being set by this type of arrangement that in the first instance, transfers asylum-seekers who have sought Australia's protection to Nauru, in conditions that have previously been described as harmful, then relocates refugees recognized in Nauru to Cambodia. Asylum-seekers should ordinarily be processed, and benefit from protection, in the territory of the state where they arrive, or which otherwise has jurisdiction over them.

We are in the realm of morality and politics, not law. The international law is not helping. Rather it is providing the warring parties with their own rationale for their intractability, avoiding the need for moral and political engagement.

We will only return to a decent asylum policy in Australia if we get three things right as Waldron indicated in this inaugural political theory lecture at Oxford: the values of our political leaders, the structures of our political institutions, and the ends of our society including justice and compassion for all including those who present at our borders by boat, without visas, while seeking asylum. We need to work on all three. Robust judicial review by the domestic courts and moral advocacy by community leaders including Church leaders are necessary parts of the resolution of the issue. International lawyers also have their place and I applaud their dedication and professionalism, while pleading that international law not be invoked to pre-empt deliberation about either morality or politics. If discussion about the spirit of the Refugee Convention is not a distraction, it may simply be a proxy for those who prefer to formulate their moral criteria and political preferences with concepts drawn

[24] "UN refugee agency slams Cambodia-Australia deal", UCANEWS, 15 September 2014

from international law. Such discussion has its place but it is no substitute for, and neither does it trump, community discussion about right and wrong and domestic court analysis of legality and illegality. Only so much can be achieved by translating discussions of what is morally acceptable or politically achievable into learned deliberations on the spirit, rather than the letter, of unenforceable international human rights instruments, especially one that is as porous, partial in coverage, and lacking in authoritative curial interpretation as the Refugee Convention.

Considering again my indebtedness to those two Aborigines who met the *David McIvor* 151 years ago, I owe it to all my fellow Australians to agitate these issues of law, morality and politics here in Ireland so that back in Australia, the homeland which, in my religious tradition, was known as the Great South Land of the Holy Spirit, we might continue to sing: "Our home is girt by sea; Our land abounds in nature's gifts"; "For those who've come across the seas we've boundless plains to share." I hope Keith Cameron would agree.