

The Oceanic Viking and Australia's Refugee Dilemma

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For several weeks in October and early November, Australian politics was dominated not by the economy or climate change, but by the conduct and fate of 78 Sri Lankan asylum-seekers aboard an Australian customs vessel, Oceanic Viking, outside the port of Tanjung Pinang in Indonesia. The incident exposed some of the fissures in international refugee law, as well as Australia's uneasy relationship with those who arrive by boat.

Rescued in Indonesian waters by an Australian vessel at the request of the Indonesian authorities, the asylum-seekers refused to disembark until certain demands were met concerning their conditions of detention and expedited resettlement. Coming on top of a spike in boat arrivals in Australia, the incident presented a test of the Prime Minister's stated policy of being 'tough but humane'. For the opposition, it offered an opportunity to distract public attention from their own internal divisions and electoral woes by accusing the government of dismantling the deterrence regime set up by the Howard government, replacing it with 'soft' policies that were acting as pull factors for the region's refugees.

The alternatives open to the government were far from clear. The policies of the Howard era had been rightly abandoned as ineffective or inhumane, or both. Temporary protection visas had perversely resulted in the arrival of more boats packed with those excluded from applying under the regular family reunion migration program. Offshore processing in Papua New Guinea and Nauru – the so-called 'Pacific Solution' – had lost the support of implementing agencies such the United Nations High Commissioner for Refugees (UNHCR) and the cooperation of the international community. The result was a costly and cumbersome program that failed even the government's own litmus test of excluding refugees from Australia. The only policy that arguably did work – turning boats around in Australian waters and the high seas – was such a blatant violation of refugee law that Australia's commitment to the 1951 Refugee Convention had been thrown into serious doubt. Moreover, as the Immigration Minister Chris Evans noted last year, it was abandoned once asylum-seekers began sabotaging their own boats in desperation.

Most pertinently, there had been a perceptible shift in the public mood over the past five years. As a result, few called for a return to the policies which had seen Australia become the international pariah of refugee law.

This failure to identify alternative strategies did not prevent resort to the populist language of fear and demonisation. Liberal use was made of the term 'illegal' by Prime Minister, an inappropriate and inaccurate label for those exercising the universally recognised right to seek asylum. The Opposition, meanwhile, returned fulsomely to the most persistent refrain of the past two decades, that of the jumper of the mythical refugee queue. It was an accusation used with particular vitriol against the presumptuous negotiators aboard the Oceanic Viking.

The image of asylum-seekers negotiating their demands with government officials conflicts with the acceptable construct of the passive refugee, unwillingly impelled by events, whose fate lies in the beneficent hands of the sovereign state. It is this projected passivity that allows the international

system, with its continuing adherence to the foundational principle of the sovereign power to exclude aliens, to accommodate the apparent pathology of unauthorised arrivals – those who cross borders without permission. From an international law perspective, it finds its manifestation in the weak principle that asylum is something that can be sought, but not demanded. From the standpoint of domestic policy, it is reflected in the emphasis given to the resettlement program as the avenue by which protection is provided to ‘genuine’ refugees – those waiting patiently in overcrowded and dangerous camps. Protection, in other words, is justified on condition that the refugee loses the capacity to decide his or her own fate.

The epithet ‘queue jumper’ strips the refugee of this passivity, overriding their victimhood and transforming the refugee into an existential threat, a person whose conduct is illicit if not technically illegal. In such a context, the line between asylum-seeker and people-smuggler – the new object of ethical impurity (may they ‘rot in hell’, said the Prime Minister) – became increasingly blurred as the standoff continued.

Nor was the confused political rhetoric assisted by the porous norms and mechanisms of international law. According to Professor Rothwell from the Australian National University, the law of the sea was clear about both Australia’s obligations to undertake a rescue-at-sea, and Indonesia’s obligations to receive the asylum seekers once they were rescued. By contrast, Professor Hathaway of Melbourne University insisted that Australia’s obligation under the Refugees Convention not to return an asylum-seeker to a situation which might result in refoulement, or forcible return, prohibited any agreement with Indonesia, which is not a party to the Convention. ‘You can only share obligations’, said Hathaway, ‘with someone who has them’.

As a human rights treaty, the Convention obligation of non-refoulement is triggered as soon as a person comes within a party’s jurisdiction, or effective control. The presence of asylum-seekers on an Australia customs vessel undoubtedly meets this test. As a result, Australia had an obligation to ensure that Indonesia upheld this basic principle.

But is Indonesia’s status as a non-party to the Convention a deal breaker? A non-binding political agreement with Indonesia about asylum-seekers should certainly be treated with caution, but should not to be discarded out of hand. What must be considered is Indonesia’s record, and Australia’s capacity to monitor compliance, so that the government can be satisfied there no substantial risk of refoulement. In this sense, it is telling that UNHCR, which is responsible for processing claims in Indonesia, has been hesitant in the past about concluding that Indonesia offers ‘effective protection’ to asylum-seekers. Similarly worrying were reports emerging towards the end of November of the forcible return to Afghanistan of asylum-seekers who had yet to have their claims assessed. With the additional problem of the notoriously poor conditions in the Australian-funded refugee camps in Indonesia and the years in which most detainees spend awaiting resolution of their fate, it is no wonder that the negotiations proved sticky.

Less well advertised were the simultaneous attempts being made by the Australian government to stem the flow from Sri Lanka itself. This is a similarly sensitive matter. Legitimate attempts to address the root causes of flight must be distinguished from illegitimate blocking of routes by which people seek protection. Questions can also be raised about the reliability of negotiating with a government which, having escaped the censure of the UN Human Rights Council in May for its indiscriminate bombing of civilian areas, was still under the spotlight for denying access to camps of internally displaced persons. By June, one of those camps, Menik Farm, had achieved the unenviable status as the world’s largest such camp in the world, housing – inadequately – over a quarter of a million people.

Encouragingly, the high level Australian delegation which visited in mid-November was able to

negotiate outside a narrow law-enforcement brief. In addition to gaining access to camps and discussing coordination under the Bali process for tackling transnational crime, the delegation raised camp conditions, access and freedom of movement, as well as a range of issues including reconstruction, emigration, aid, expedited resettlement, and even a post-conflict reconciliation process. Similar themes are being stressed by other international players in their negotiations with the Sri Lankan authorities.

Rather than falling back on the discredited policies and inflammatory rhetoric of the past, the Sri Lankan crisis can be seen as an opportunity to reshape the refugee debate. An approach that addresses rights, reconstruction, development and justice provides the seeds for an eventual solution consistent with principles of international law. Combined with an improvement of reception and processing capacities in countries like Indonesia, and a concerted commitment to more equitable burden-sharing arrangements, the Australian government could help lead the way in filling some of the gaps in the global refugee regime.

P.S.

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