

## “The Refugees Convention 50 Years On”

*On 18 September 2003, Professor Robert Manne of the School of Social Sciences, La Trobe University, launched “The Refugees Convention 50 Years On”, edited by Castan Centre member Dr Susan Kneebone. This is a condensed version of Prof Manne’s full speech at [www.law.monash.edu.au/castancentre](http://www.law.monash.edu.au/castancentre).*

I think that the book, “The Refugees Convention 50 Years On”, is both genuinely outstanding and a scholarly work in the area of Refugee Human Rights. It is also extremely timely. I am very pleased to launch it and I am very pleased to wish it well. I am especially pleased that it is published under the auspices of the Castan Centre. Ron Castan was possibly the finest Australian I have ever met. This is a worthy book emanated by a spirit he would have understood and of which he would have thoroughly approved. In my reading, this book offers a genuinely sophisticated appraisal of the health of the UN Convention on Refugees with papers that were first presented at the time of the Convention’s 50<sup>th</sup> anniversary.

On the basic question of how healthy the Convention is, as I read it anyhow, the contributors are to some extent divided between those who, like Jose Gonzaga of the UNHCR, think there is a danger in present circumstances in encouraging any attempt to reform the Convention and those who are more hopeful that a substantial expansion, or at least some expansion of the Convention’s protective range, might be accomplished without detrimental effect. My political instincts are with Gonzaga and I think it will be a very major accomplishment if the Convention can be preserved in anything like its present shape and health.

Many of the contributors to this volume deal with the very intricate problems at the intersection of refugee administration and refugee law. Mary Crock addresses several questions, very practical questions, that exist in the way that asylum seekers have been treated in the past few years, especially in Howard’s Australia. Nick Poynder examines the question of how far other international conventions, for example the Convention Against Torture or the International Covenant protecting civil and political rights, are able to fill in the gaps left by the operation of the Convention. Savitri Taylor, a colleague of mine, is concerned with the subject of increasing importance to Australians, the legal and human rights of those asylum seekers Australia has decided to reject and repatriate.

Penelope Mathew is concerned with the ways in which the concept of the safe third country has insinuated itself

into the way Australia now treats those who seek asylum here. As she points out, the idea of the safe third country has a different meaning in the European context, where it was developed, than it does in Australia. As Penne explains, it is grotesque to impose such a view on an Afghan refugee who made it to Australia from the uncertainty and hopelessness of life in a Pakistani camp.

Susan Kneebone, the editor of this book, has contributed a fascinating chapter on the question of the protection of asylum seekers from non-state actors on the basis of recent cases. She documents the profound ambivalence of the contemporary Australian High Court in recent times when this question of protection from non-state actors has been raised. Kristen Walker addresses the gender and sexuality implications in the wording and application of the Refugee Convention. My colleague at Latrobe, Liz Curran, has provided a very judicious and a very humane summing up of all the contributions.

In many ways the most disturbing chapter in this book, and the one I want to say a little more about, is that written by Matthew Gibney. In particular, I am interested in what he understands to be the difficulties that have grown from what he calls the ‘democratisation’ of the asylum seeker issue throughout the Western world, particularly in the post-Cold War years, and especially as the numbers of asylum seekers have risen throughout the West. As I read it, at the heart of Gibney’s chapter on “The State of Asylum: Democratisation, Judicialisation and Evolution of Refugee Policy” is a paradox. As the legal protections of the asylum seekers have deepened in Europe at least, although not so much here in Australia, with the expansion of human rights law and the understanding of human rights, the exclusionary practices of these very same societies have become both more developed and more extreme. In so far as Gibney offers a solution, it is to encourage international lawyers to investigate the restrictive practices and thereby to try at least to humanize the legal mechanisms of the growing exclusionary regimes which he thinks will inevitably grow.

This book, and particularly Matthew’s essay, has thrown me into some thought. I would like to share with this audience some of the conclusions that I have arrived at recently as a consequence of the extremely harsh refugee regime which has been clamped down upon Australia both before and after the so called ‘Tampa crisis’.

How is the recent brutal episode in our national life to be explained? I think it is perhaps best to begin with the gradual transformation across the Western world in attitudes towards refugees. The end of the Second World War was a highly unusual moment in history. It was a time when reflection on the disasters that had engulfed Europe between 1914 and 1945 led to a series of Western initiatives to construct a new world order based upon the rule of international law. One of these

institutions was the UN Convention for the Protection of Refugees. As I understand it, the Refugee Convention was founded in recognition of the suffering which was caused during the Second World War by the political persecution and the displacement of millions of human beings. It was also based on the recent memory of the experience of the Jews of Europe who in so many cases unsuccessfully sought refuge from a Nazi state before the final solution of the Jewish question had been put in place. After the end of the Second World War it became a fundamental feature of what I would call ‘civilized opinion’ that never again would those fleeing persecution be abandoned by the world to their fate.

As it turned out, the Cold War, with its immense ideological struggle between two contending ways of life, provided a capricious political climate for the protection and humane treatment of refugees. Because of the nature of this struggle, those who fled from communist regimes, who voted (as it were) with their feet, in general received a warm welcome in the West. In Australia it was not only refugees from Western Europe who were welcomed. The contrast between the way in which the Fraser government responded to the Vietnamese refugees and the way in which the Howard Government 20 years later responded to the refugees from Saddam Hussein’s Iraq or from Afghanistan and the Taliban could hardly have been more stark. This contrast points to a profound shift in attitude to refugees in the post-Cold War era not merely in Australia but across the Western world.

In the contemporary West there is now an overwhelmingly negative pre-occupation with the movements of peoples from the Third World to the First. In this post-Cold War atmosphere of Western self absorption, there is growing hostility even to those who are fleeing. The post war ethic about the requirement for the humane treatment of refugees is increasingly under threat, perhaps lethally so with regards to Muslim refugees, but not only to them, since September 11.

One of the most obvious consequences, and here I am coming close to Gibney’s argument, of this transformation of public sensibility is the gap that is growing between the letter of refugee law and the spirit in which it is applied in almost every country in the West. Those adhering to the Convention are obliged to make an assessment of the claim for protection for every asylum seeker who arrives at their border. Western states, however, try to prevent the arrival of asylum seekers by setting up protection claim assessment procedures in such a way that they will, the states hope, act as a deterrent to future potential applicants.

In no country has the gap between the letter of the law and the spirit in which it is implemented grown wider or faster than it has in Australia since the arrival of 9000 or so asylum seekers from Central Asia and the Middle East. These people fled from conditions comparable to those which caused refugee exoduses from fascist or communist regimes in earlier eras and yet we treated

such people with indifferent carelessness at best and callous cruelty at worst. In spite of this, it proved near impossible to generate critical public discussion over the Howard Government’s argument that the more generously a Western country treated the asylum seekers, the more the people smugglers would target that country and the larger the number of asylum seekers who would then arrive. Was it not possible, I wondered, to argue that the apparent inhumanity of our policy was more a consequence of this simple, brutal, political realism than of say racism or moral callousness or hardness of heart? Eventually, I stopped writing papers on this topic as there was no echo, no public response.

Unhappily, in the light of what has happened since the Tampa crisis, political reality is no longer a plausible interpretation of Australian asylum seeker policy. Since the Spring of 2001, large numbers of asylum seekers have been successfully deterred by military means from coming to Australia by boat. Since that time then there has been no ‘problem’ of new asylum seekers. Nonetheless, no mercy has been shown to those who have the misfortune to have chosen Australia after 1999 as a place where they once hoped to find a new life. Like many Western states, Australia has sought to convince those asylum seekers whose claim for refuge were rejected to return to their homelands. Unlike other Western governments, however, through its, I think unique, temporary protection visa system, it is trying to convince those accepted as genuine refugees to return to post-war Afghanistan, and soon it is going to be the same with post-war Iraq. This government will not be ‘relaxed and comfortable’ until the overwhelming majority of those who arrived in Australia by boat between 1999 and 2001 have been sent home.

It has been a very dark and difficult time for asylum seekers and, in my opinion, it has been only the law that has offered some people at least a fragile hope and fragile protection. I have never had more respect for the capacity of the law to fight against a vicious government and vicious administration than I have had over the last few years. The gains have been small but at least there have been some small wins.



*Susan Kneebone and Robert Manne with contributors to ‘The Refugees Convention 50 Years On’*