

Whose island home?

Art and Australian refugee law

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I Introduction

It is a truth too rarely acknowledged that there is no evidence to support the claim that refugees are a national security threat if they arrive by boat to seek asylum. Asylum seekers entering the Australian migration zone by boat are not an invading force, nor are they 'preparing, planning, assisting in or fostering the doing of a terrorist act'.¹ Seeking asylum is a human right.²

In Australia, accounts of how refugees came to be falsely conflated with national security typically begin with the 2001 'Tampa Affair'.³ We argue that a longer timeframe reveals socio-cultural norms, founded in British colonialism and Australian coloniality, that offer a fuller explanation for the bipartisan support of indefinite offshore detention.

We begin with the political narrative that is used to rationalise ever-harsher laws and allay concerns about human rights violations. This is followed by a brief survey of island prisons since 1788, sketching a history of banishment and isolation as punishment, to ask: is this how offshore detention is allowed to continue? To explore this possibility, we

place the foundational myth *terra nullius* at the intersection of law and culture, contrasting the role of colonial artists in furthering imperialism, with the ideal of art as a medium for truth, and law as a vehicle for justice.

II International and domestic law

The extent to which Australians endorse detention of asylum seekers arriving by boat is both contested and subject to dramatic shifts over time.⁴ Here, we proceed from the position that whether or not Australians believe or support this rhetorical nexus linking refugees to national security, it is not founded in fact.⁵

The universal right to seek asylum is codified in the Convention Relating to the Status of Refugees (*Refugee Convention*).⁶ The Menzies government ratified it in 1954 and passed the *Migration Act* in 1958. The Act has been amended over 100 times,⁷ which is often an indicator of highly politicised subjects. In particular, the politicisation of transport mode, is reflected in gradations of language. What are 'unauthorised maritime arrivals' in law⁸ are called 'illegal arrivals'

by ministerial direction⁹ and even ‘illegals’ in public discourse.

People who seek asylum after arriving by boat are now excluded from our refugee resettlement program, while our political leaders call Australia the ‘most successful’ multicultural/migrant country in the world.¹⁰ The public are also assured that our government is ‘absolutely confident’ of meeting international obligations.¹¹ How does this add up? Together, our domestic law and political rhetoric operate to authorise and rationalise practices that prima facie violate international law. We suggest the ‘confidence’ our political leaders proclaim turns on the wording of two *Refugee Convention* articles.

First, the *Refugee Convention* proscribes penalties for unauthorised entry (no visa) for those who come ‘directly from a territory where their life or freedom was threatened’.¹² In Australia — an island far from the violence that causes people to flee, including wars in which we participate — asylum seekers coming by boat tend to arrive via other territories.¹³ Secondly, article 33(2) qualifies the prohibition on refoulement where ‘there are reasonable grounds for regarding [a refugee] as a danger to the security of the country’. Here, narratives that frame refugees arriving by boat as a terror threat are used to maintain claims about abiding by international law.

Meanwhile, consecutive United Nations reports have found that Australia violates the rights of asylum seekers and refugees, such as ‘to be free from torture or cruel, inhuman or degrading treatment’.¹⁴ These findings are not contested by the government, but rather justified: ‘[t]he most humanitarian, the most decent, the most compassionate thing you can do is stop these boats’.¹⁵

This type of justification relies on an essentially utilitarian calculus. It says that the horrors of offshore detention for the few are necessary for the security of the many — a ‘greater good’ that hypothetically extends to deterring refugees from boarding unseaworthy vessels and potentially drowning. Yet this ‘security’ is achieved by real life ‘turnbacks’, which involve towing boats into international waters, an action likely to cause deaths at sea and in breach of the maritime duty to render assistance.¹⁶

III Island prisons

As mentioned, the refugee-terror nexus is usually traced to MV Tampa, a Norwe-

gian-flagged ship that rescued 433 Afghan refugees off the Western Australian coast. The then-Howard Government ordered SAS troops to forcibly transfer those rescued to a naval troop carrier and transported them to detention camps on the remote Pacific island of Nauru. A habeas corpus application initially succeeded, handed down on 11 September 2001 (Australian time).¹⁷ The government successfully appealed to the Full Court of the Federal Court, and a final attempt to see the initial order upheld by the High Court also failed.¹⁸

Analysing the case history, Head observes that:

as the Full Court deliberated, government leaders and media commentators applied intense pressure to the judges, arguing that the terrible events in the United States on 11 September 2001 made it essential for the government to wield wider powers. The Commonwealth Solicitor-General, David Bennett QC, told the court that North J’s decision could restrict the government’s ability to avoid such disasters as the attack on the World Trade Center. In the media, Defence Minister Peter Reith insisted that, if North’s ruling stood, it would open the floodgates for terrorists to enter the country on refugee boats. Without offering a skerrick of evidence, a junior minister, Peter Slipper, claimed there was ‘an undeniable linkage between illegals and terrorists’.¹⁹

In a decision Head describes as having ‘rewarded the government for thumbing its nose at the legal process’,²⁰ the High Court found the application had been ‘overtaken by events’.²¹

Offshore detention is not, however, merely a 9/11 politic. From ‘secondary’ punishment of convicts, banishing First Peoples in aid of ‘manifest destiny’ mythology, and ‘offshore detention’ today, the island prison is a prototype of the imperial ethno-state. On this view, the island prison sits on a continuum from British colonialism to Australian coloniality, from 1770 to the present. The model is marked by brutal structural violence and the epistemic dishonesty of formalism. Presumption of innocence and habeas corpus are discarded, by gubernatorial fiat in the colonies, and by the Parliament and courts today.

In this context, the camps on Manus and Nauru are not 'a new low' as is sometimes claimed, but a contemporary iteration of the foundational structure of the Australian state, the island prison. Having established its penal colony at Warrane (now Circular Quay) in 1788, the British authorities created second-tier island prisons for control of specific populations within the first year. In the harbour, a punishment site was set up on Mat-te-wan-ye (later Pinchgut Island, now Fort Denison). Another penal colony was built in the lands of the Palawa Peoples (then Van Diemen's Land, later Tasmania), and off Tasmania yet another was set up on Langeraroune (now Sarah Island).

As the colonisers spread out in what Professor Megan Davis, a Cobble Cobble woman, calls 'the pattern of killing that was the political economy of Australian settlement',²² the convict population declined. The island prison model shifted and was turned on First Peoples: Cape Barren for Palawa who survived the Tasmanian genocide; 'lock hospitals' on Dorre and Bernier islands off the West Australian coast; the eugenicist practices that created a population of over 50 different language groups on Palm Island, Queensland.

The colonisers hailed from island homes ravaged by waves of invasion and a culture defined by violence. In contrast, some 350 distinct First Peoples, who maintained international relations across the biggest island on earth, had 'invented society', their 'culture based on peace'.²³ The impossibly cruel and traumatic act of banishing survivors of violence to island prisons was done then — by colonial authorities who arrived by boat — to First Peoples, and is done now by Australian authorities to refugees who arrive by boat.

It is an Anglo-Australian weltanschauung that directs the fate of asylum seekers in boats at our borders. While the Commonwealth of Australia is a direct descendant of British imperialism and asserts a singular sovereignty, the law of the land and its sovereign custodians were not willed out of existence by imperial force.²⁴ As Professor Irene Watson of the Tangane-kald, Meintang Boandik First Nations writes: 'First Nations have grown from ancient treaties amongst themselves; those treaties acknowledge the ancient borders we care for and within which we belong.'²⁵ One fascinating illustration in

this context is 400 Aboriginal Nation passports issued to refugees on Manus Island.²⁶

iv Terra nullius

Despite being set aside by our highest court in 1992,²⁷ Australian cultural life retains multiple manifestations of terra nullius mythology. One example is the way colonial artists depicted First Peoples in the landscape as 'noble savages', a reductionist rendering that worked in tandem with scientific racism to rationalise colonial violence.²⁸

In *Picturing Imperial Power*, Tobin examines the role of art at the intersection of visual culture and political power.²⁹ Building on this, Macneil found a significant presence of Aboriginal people at first contact by colonial era artists was followed by their near absence by the mid-nineteenth century. In this way, colonial art sits alongside the physical world of dispossession by force and its intellectualisation, the evolutionary paradigm that posited Aboriginal people and their culture would 'disappear'.³⁰ The *Cornwall Chronicle*, reporting on works by colonial artist Robert Dowling in March 1857 illustrates this worldview: '[s]uch works of art as these become more valuable with age, even now these must be looked upon as historical paintings, of the primitive state of society in these colonies, banished by the light and progress of civilisation'.³¹

The move to federation was specifically buoyed by a nationalist mood of celebrating white settlers' triumph over a land and her people, reflected in the work of colonial artists: 'This exclusion of Aboriginal people from the conceptualisation of the Australian nation reflects the effectiveness with which a visual discourse of 'Australia' painted Aboriginal people out of existence'.³²

The colonial artist then 'painted in' white frontiersmen. Chillingly, Lehman has found 'there is a repeated absence of Aboriginal presence in Tasmania' where even artists who painted Aboriginal people into mainland scenes would omit Aboriginal people from Tasmanian landscapes.³³ Here again the artist reflects the acts of his compadres: even today, Tasmania is notorious for the most brutal forms of penalty and its genocidal 'Black Line'.³⁴

These themes are taken up by Australian artist Danie Mellor. In *Maba-I-Bala Rugby (Of Power in Darkness)*,³⁵ Mellor juxtaposes



Dora (Luke Cornish)

the coloured presence of Aboriginal people within a blue-and-white imperialist landscape that politically and artistically attempted to eradicate them, thereby reuniting First Peoples with their lands.

The line from colonial to contemporary displacement can also be seen in the work of Australian street artist Luke Cornish (ELK), who uses stencil art to highlight the plight of refugees and to remind us of the fragility of memory.³⁶ In *The Sea*, Cornish reminds audiences of the plight of displaced persons in conflict zones. While victims of war and catastrophe, from Syria or Yemen, scroll regularly across our screens, most touch our thoughts for a very short time. We may feel simultaneously sad and lucky to be living in Australia: comfortable, safe and secure. How do the narratives offered by the political leadership, messages that promotes refugees as terrorists, take root in the public mind in this context? More recently, Cornish has been the subject of controversy for his 'Not Welcome to Bondi' mural depicting 24 Australian Border Force officers standing in a line to represent the 24 suicides that have occurred in Australian detention facilities since 2010 — a mural that faced a conservative backlash and was eventually defaced.³⁷

Just as quickly as images of war and destruction appear, they disappear. The starving children that captured our attention are replaced with an emerging conflict, a new disaster in another part of the world, perhaps one we cannot locate on a map. Our attention shifts and we see a decontextualised horror, not knowing the history, background or reasons for what is going on.

v The art of memory

If the colonial artist erases First Peoples from depictions of their lands, the law underwrites that removal by force. Similarly, law provides a set of tools to counter regimes that perpetuate exclusion and persecution; while the work of artists can provide alternative entry-points to public engagement with complex histories that transcend the boundaries of the legal fraternity.

This becomes critical in our contemporary society, where the apparent permanency of institutional cruelty meets a fragile and fracturing human memory. In a world of distractions, our memories can disappear very quickly. The important role of the

artist and their art in our world are not simply an aesthetic intervention — art and artists present us with dimensions that no other medium possesses. To complete this paper, we present three such dimensions.

The first is art as a mirror, reflecting our failings and triumphs, or who we are in visual terms. Syria is not only far removed from most Australian lives, it is a conflict with generational roots, understood by Syrian migrants here, but not by our elected leaders who lack the skill, will or political capital to effect an intervention. In *The Sea*, Cornish presents a series of burnt out buildings which confront us with more than the war in Syria — they reflect the failing of our political system and futility of still, after all these years, trying to present war as a solution.³⁸

A second dimension is that art confronts our forgetfulness. While we struggle not to lurch from distraction to distraction, artists act as an external conscience, never permitting us to forget. Like Picasso's *Guernica*,³⁹ the images Cornish presents are designed to represent the humanity of those who are otherwise too easily removed from our memories.

Beyond being a mirror on the world, the final dimension is art turning its lens into ourselves. From the way Mellor replaces First Peoples into colonial portrayals of Australian flora to Cornish creating and curating images of refugees who stare relentlessly back at viewers, we are compelled to think about ourselves: whether our own fortune, our own families, or our own culpability in maintaining a colonial system is constructed on invasion and maintained by exclusion.

Picasso proclaimed that 'painting is not done to decorate apartments. It is an instrument of war'.⁴⁰ But art can also be an intervention, one that leaders rarely mobilise, and their sponsors do not care to underwrite. This is because art and artists expose the best and the darkest elements of our society, and the failings that lead to conflict, loss and displacement. At the same time, art at its best is integral to celebrations of community and to communicating empathy, a medium that transcends the rigidity of institutions and restores our humanity.

vi Conclusion

This article seeks to shed light on how Australia's offshore detention regime has

been allowed to continue, as well as offer some hope for bringing it to an end, from a number of different angles. We do this not least because the problem seems intractable, suggesting the need for multi-variant and less conventional viewpoints. The horror of indefinite detention on island prisons established by Australia on Manus and Nauru is not only authorised by domestic law, it is legitimised by narratives that resonate a white Australian hegemony of fear and isolation that is constitutive of the nation state. This is why we must look beyond the law of the coloniser to the law of the land, and beyond political culture to the arts, for hope of a moral resolution. ¶

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Protesters from Whistleblowers, Activists and Citizens Alliance block entry to Australian Border Force headquarters. The group supports refugees detained on Manus Island. Melbourne, 10 November 2017 (Tracey Nearmy/AAP Image)