

Imitation as flattery

The spread of Australia's asylum seeker rhetoric and policy to Europe

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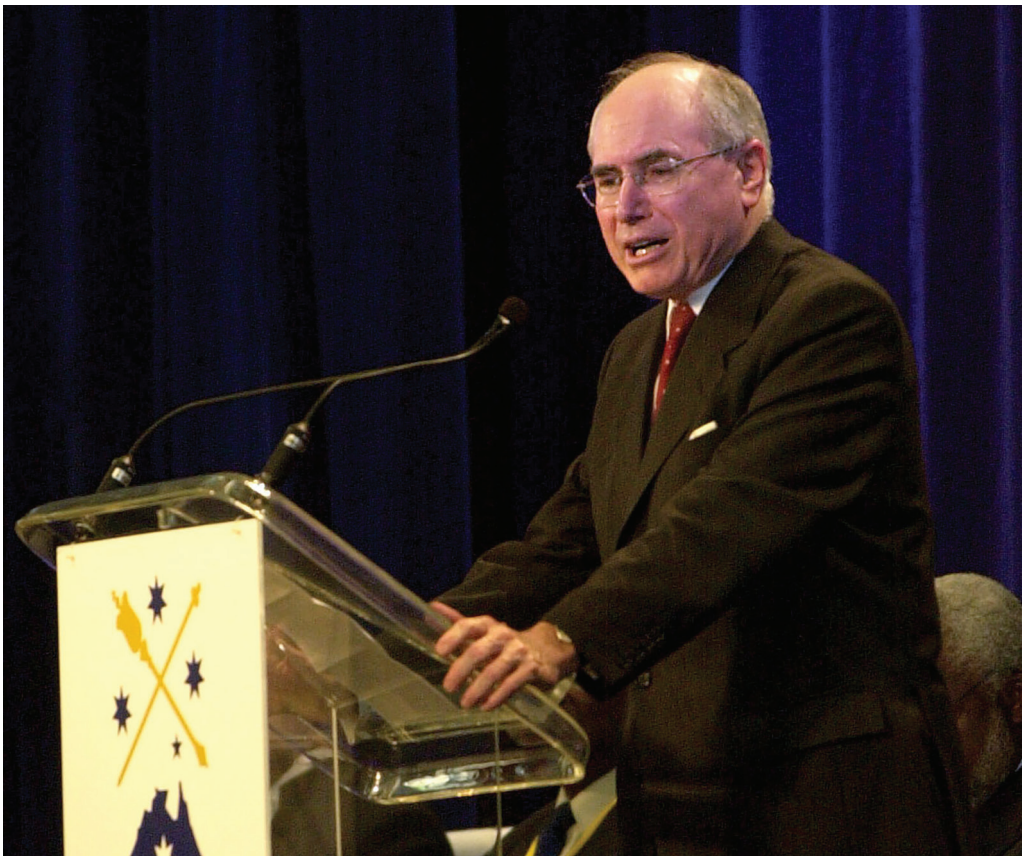
I Introduction: the Tampa Affair and emerging challenges to human rights

In August 2001, the Australian Government, a conservative coalition, was at risk of losing the election that was to be held later that year.¹ The governing Liberal-National Coalition had been trailing the opposition Labor Party in opinion polls for most of the year, in particular due to general dissatisfaction with the government's economic reforms and social policies.² Three months later, following an election that saw the Labor Party record its lowest share of the primary vote since 1934,³ the Liberal-National Coalition was still in power, and with an increased majority.

Boat people and the vulnerability of Australia's borders was a central theme throughout the election campaign, which was dominated by the leaders of the Liberal-National Coalition and the Labor Party. The minor parties ultimately played a relatively small role on polling day (none received higher than five percent of the primary vote in the House of Representatives,⁴ and none higher than seven percent in the Senate)⁵ but the shadow of

one particular minor party hung prominently in the background. In 1998, the One Nation Party, a right-wing nationalist populist party, had emerged as a genuine force in both state and federal politics in Australia, winning 22 percent of the vote at the 1998 Queensland state election⁶ and having a candidate elected to the Senate at the 1998 federal election.⁷ Its leader, Pauline Hanson, had famously stated in her maiden speech to Parliament on 10 September 1996: 'I will be called racist but, if I can invite whom I want into my home, then I should have the right to have a say in who comes into my country'.⁸ On 28 October 2001, less than two weeks before the election and in reference to recent changes made to Australian border protection laws following the Tampa affair, then Australian Prime Minister John Howard expressed similar, now equally famous, sentiments:

National security is therefore about a proper response to terrorism. It's also about having a far sighted, strong, well thought out defence policy. It is also about having an uncompromising view about the fundamental right of this country to protect its borders. It's about



Former Australian Prime Minister John Howard speaking on the removal of 438 refugees from the MV Tampa freight ship. Melbourne, 3 September 2001 (Julian Smith/AAP Image)

this nation saying to the world we are a generous open-hearted people taking more refugees on a per capita basis than any nation except Canada, we have a proud record of welcoming people from 140 different nations. But we will decide who comes to this country and the circumstances in which they come.⁹

Howard would have been well aware that the One Nation Party had the potential to split the conservative vote, and in particular that support for One Nation could damage the support of the Coalition partner, the National Party. One Nation might not have been in government, but its populist agenda was highly capable of shaping the response of the major parties on potentially divisive issues, such as asylum seeker boat arrivals and border protection, that stirred feelings of protectionist nationalism in elements of the Australian electorate.¹⁰

Returning to August 2001, this approach of the Australian government to border security was demonstrated when a boat carrying 438 asylum seekers became stranded in international waters approximately 140 kilometres north of Christmas Island.¹¹ The asylum seekers were rescued by MV Tampa, a Norwegian freighter. Following the rescue, the captain of the Tampa set course for Christmas Island to safely offload the asylum seekers. The Australian government refused the Tampa permission to enter Australian territorial waters, claiming that the Australian government had no responsibility to the asylum seekers as the rescue had occurred outside of Australia's designated search and rescue region.¹² Ultimately the asylum seekers were offloaded onto an Australian naval vessel and transferred to Nauru, where most of them were held in detention camps as part of what would become known as Australia's 'Pacific Solution'.¹³

ii Entry prevention and deterrence: the Pacific solution

Australia's Pacific Solution was targeted at unauthorised boat arrivals and included three key elements: one, the excision of territory for immigration purposes; two, the interdiction of asylum seekers arriving by boat; and three, the establishment of processing facilities in countries in the Pacific region.¹⁴ The *Migration Amendment (Excision from Migra-*

tion Zone) Act 2001 (Cth) allowed for the excision of certain offshore territories (including Christmas Island) from Australia for migration purposes, meaning that persons entering Australia in such territories were considered not to have entered Australia for the purpose of applying for a visa, thus leaving them outside of Australia's refugee protection system and without access to Australian tribunals.¹⁵ Under the Pacific Solution, those asylum seekers intercepted by Australian naval operations were transferred to processing facilities on Manus Island (Papua New Guinea) and Nauru, where they were detained while they awaited processing and repatriation or resettlement.

The Pacific Solution has continued in various forms for the majority of the years since its inception and has been the subject of sustained critique from the United Nations, human rights organisations, scholars and other experts, all of whom point to its failure to comply with international human rights law.¹⁶ Of particular concern is the use of mandatory detention, which has been repeatedly found by the United Nations Human Rights Committee to be in breach of art 9(1) of the *ICCPR*,¹⁷ as well as the increased risk of refoulement¹⁸ that this policy entails. International pressure has not dissuaded Australia from its course of action, nor has domestic pressure by a range of non-governmental organisations, experts, and even from some within the government's own ranks. The policy enjoys the support of both major political parties, and even the one short-lived attempt to relax the policy, by a Labor government in 2008, 'did not abandon the policy completely, however, maintaining the legislative provisions underpinning the strategy'.¹⁹ Domestically, boat arrivals remain a politically divisive issue, and notions of human rights appear to have little currency. Paradoxically, Australia continues to pride itself on its strong commitment to human rights and was in 2017 elected uncontested to the United Nations Human Rights Council, an indication, according to then Australian Foreign Minister Julie Bishop, that Australia is seen as a 'principle and pragmatic voice when it comes to human rights'.²⁰

iii Transfer of language and of policy: from Australia to Europe

It seems odd that a country can detain highly vulnerable people, including children, on

remote Pacific islands in conditions that have been condemned by the United Nations,²¹ whilst simultaneously receiving the blessing of the international community to take up a key role in an inter-governmental body that is 'responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them'.²² In the European context, rather than being chastised for its refusal to honour its international obligations, Australia's approach is being lauded through imitation, that most sincere form of flattery. Language focused on 'stopping the boats' and 'breaking the people smuggler's business model' that is very familiar to Australian ears began to emerge in Europe following the large influx of asylum seekers to that continent in 2015.²³ At the regional level, Frontex, the EU agency responsible for the EU's external borders, describes its tasks in the following terms: 'Frontex, the European Border and Coast Guard Agency, promotes, coordinates and develops European border management in line with the EU fundamental rights charter and the concept of Integrated Border Management'.²⁴ The agency's executive director, Fabrice Leggeri, stresses that '[f]undamental rights are integrated into Frontex operations from their inception, ensuring that all those fleeing war and persecution are able to apply for international protection'.²⁵ This language remains milder than that of the Australian government, which describes its own response to unwanted migration by boat, Operation Sovereign Borders, as a 'a military led border security operation' aimed at 'protecting Australia's borders, combating people smuggling in our region, and preventing people from risking their lives at sea'.²⁶ Nevertheless, Australian inspired language and rhetoric has gradually begun to emerge at the European Union's upper levels. In May 2015, just a few months into the so-called 'European Migrant Crisis', the European Commission, the EU's executive, phrased its response in terms of the perceived need 'to try to halt the human misery created by those who exploit migrants',²⁷ choosing to frame the issue both in terms of the need to combat the actions of people smugglers as well as 'the duty to protect those in need'.²⁸ More recently, statements that set a clear border control agenda that is less grounded in ideas

of rights have become more commonplace. In June 2018, the European Council, made up of the leaders of the EU member states, declared the following:

In order to definitively break the business model of the smugglers, thus preventing tragic loss of life, it is necessary to eliminate the incentive to embark on perilous journeys. This requires a new approach based on shared or complementary actions among the Member States to the disembarkation of those who are saved in Search And Rescue operations. In that context, the European Council calls on the Council and the Commission to swiftly explore the concept of regional disembarkation platforms, in close cooperation with relevant third countries as well as UNHCR and IOM. Such platforms should operate distinguishing individual situations, in full respect of international law and without creating a pull factor.²⁹

Here the language of rights is relegated to a secondary position, not even explicitly identified but (presumably) included under the broader notion of 'international law'. Rather than a focus on protection, there is a preference to remove incentives for movement, encapsulated in the idea of 'regional disembarkation platforms' in third countries that draw a clear parallel to Australia's Pacific Solution.³⁰ Whilst overall Europe appears still to be clinging to notions of human rights and dignity in its response to asylum seekers, it is showing clear intent of replicating Australian policies that have inflicted high levels of harm to asylum seekers through their preference for punishment and deterrence over protection and dignity.

iv Conclusion: the failure and future of human rights

The core human rights message, as enshrined in the *UDHR*, claims that 'the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.³¹ This message, as a starting point, seems no less relevant now than it was in 1948. The message is clear, digestible, and seemingly requires little by way of elaboration or explanation. In spite of this apparent simplicity, since 1948 a language of human rights has developed that has become the domain of experts. Select

committees, expert bodies, working groups and roundtables have spawned a proliferation of treaties, declarations, recommendations and other documents. At a time when the language of human rights is being challenged and overshadowed by that of border control, human rights language finds itself in a struggle to remain relevant. The language of law has permeated the language of rights to the point that for many this language has become difficult to penetrate. Koskenniemi refers to a 'process of endless narration'³² that brings with it a risk that 'the domination of the Western academy will see to it that the stories everyone hears will perpetuate precisely the kinds of hierarchy that rights-languages on its best days was expected to dismantle'.³³ Nevertheless, even such a critical assessment of the language of human rights allows scope for the possibility that the message is sound, and that the failure can be found in the delivery. According to Falk, 'the power of rights needs to motivate its varied constituencies by both the urgencies of its cause and the genuine, although not assured, possibilities of

producing improvements in the human condition'.³⁴ A human rights regime that creates or enables division fails to achieve its fundamental purpose, and an exhaustive re-evaluation of the human rights project's present state is needed before its future can be reimagined. Lessons learnt from the Australian context can help to rebuild an approach to human rights that is relevant in the prevailing security-driven climate, and can empower those in various parts of the world to work towards safer and more sustainable paths to protection for asylum seekers than those that currently exist, or are being contemplated. □

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- 8 Commonwealth, Parliamentary Debates, House of Representatives, 10 September 1996, 3862 (Pauline Hanson) <http://parlinfo.aph.gov.au/parlInfo/download/chamber/hansardr/1996-09-10/toc_pdf/H%201996-09-10.pdf;fileType=application%2Fpdf#search=%22chamber/hansardr/1996-09-10/000%22>.
- 9 John Howard, 'Election Speech' (Speech, Federal Liberal Party Campaign Launch, 28 October 2001).
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- 15 Ibid 117.
- 16 See, eg, Hilary Charlesworth et al, *No Country is an Island: Australia and International Law* (UNSW Press, 2006); Louise Chappell, John Chesterman and Lisa Hill, *The Politics of Human Rights in Australia* (Cambridge University Press, 2009).
- 17 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 9(1) ('ICCPR'). UN Human Rights Committee cases addressing Australia's mandatory detention policy include: Human Rights Committee, *Views: Communication No 560/1993*, 59th sess, UN Doc CCPR/C/59/D/560/1993 (3 April 1997) ('A v Australia'); and Human Rights Committee, *Views: Communication No.1069/2002*, 79th sess, UN Doc CCPR/C/79/D/1069/2002 (29 October 2003) ('Bakhtiyari and Bakhtiyari v Australia').
- 18 Article 33(1) of the *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) and its *Protocol Relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967) states that: 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. Similarly, Article 3(1) of the *Convention against Torture and Other*

Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) provides that '[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' The prohibition of *refoulement* is also grounded in a range of international human rights treaties, such as the *ICCPR* (n 17) arts 6–7, and the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 3.

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33 *Ibid.*

34 Richard A Falk, *Achieving Human Rights* (Routledge, 2009) 38.

Increasing support
to refugees and
asylum seekers



General Practitioner Katherine Lazaroo treats an asylum seeker's child at the Asylum Seeker Resource Centre in Footscray, Melbourne, 17 May 2002 (Julian Smith/AAP Image)