

# The Human Rights of Refugees

Julian Burnside

## The origins of human rights

It is not difficult to articulate the core elements of any human rights framework: we should acknowledge as inalienable rights those conditions that are generally regarded as indispensable for a decent human existence. Traditionally, human rights have not been seen to depend on, or arise from, membership of a particular society. They arise from the fact of being human.

The distinction is clearer when regard is had to the legal treatment of other creatures. We acknowledge the existence of other species, and the law protects them to some extent. But we recognise a difference of kind between human beings on the one hand and the rest of the sentient world. To give some simple examples, the laws of all civilized nations recognise a qualitative difference between killing a human and killing an animal; they recognise a qualitative difference between stealing property, however valuable, and kidnapping a person. It is the quality of humanness, then, that carries with it a set of unique considerations. In civilised society, these considerations are ultimately formulated as rights.

The origin of recognisable human rights discourse can be found in the second half of the 18th Century. Tom Paine published *The Rights of Man* (and was prosecuted for sedition); the American colonies declared their independence from Britain; the French rose up against the aristocracy.

In 1776 the American colonists signed the *Declaration of Independence*. Its opening words are as memorable as they are noble:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.

The French Revolution of 1789 proclaimed the fundamental humanitarian ideals of 'Liberty, Equality and Fraternity'.

Nevertheless, all too frequently, the history of human rights has been stained by hypocrisy. High ideals are voiced and approved, but then they are not matched by performance.

The ideals of the French Revolution were not evident in the Terror, which settled in blood the accounts of ages. One hundred years later, Captain Dreyfus was prosecuted in France for alleged espionage, but the prosecution was a monstrous fraud, driven by deeply ingrained anti-Semitism in the Army and the Church.

One hundred years after the American Declaration of Independence, the US Supreme Court had to interpret the words of the preamble to the US Constitution in a law suit brought by Dred Scott. He was a slave, but he had lived 13 years in a non-slave state. Relying on English precedents, he sued for a declaration that he was a free citizen of the United States. The Court held, by a 7:2 majority, that the words 'all men are created equal' did not refer to African Americans. The language of the judgment is shocking to modern ears:

The question before us is whether (African American slaves) compose a portion of this people, and are constituent members of this sovereignty? *We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for ... citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings who had been subjugated by the dominant race, and,*

whether emancipated or not, yet remained subject to their authority ...

They had for more than a century before been *regarded as beings of an inferior order and altogether unfit to associate with the white race* either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect ... (they were) bought and sold, and treated as an ordinary article of merchandise and traffic whenever a profit could be made by it. (emphasis added)

## The 20th century

In 1945, the Allied forces mounted the world's first prosecution of war criminals. Europe lay shattered and the world held its breath in horror as the first films of Belsen concentration camp were made public. In his closing address at the first Nuremberg trial, Robert Jackson, chief prosecutor for the United States, said:

It is common to think of our own time as standing at the apex of civilization, from which the deficiencies of preceding ages may patronizingly be viewed in the light of what is assumed to be 'progress'. The reality is that in the long perspective of history the present century will not hold an admirable position, unless its second half is to redeem its first.

In the aftermath of World War II, it looked as though the second half of the 20th century might, indeed, redeem the first. In 1948, the UN's *Universal Declaration of Human Rights* (the UDHR) set the content, pattern and standards for human rights thinking. The Declaration was adopted without dissent by every nation, from every region of the globe, as member states of the nascent United Nations. Its prefatory words set the tone:

Whereas 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,

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law ...

The Declaration articulated, in heady prose, the fundamental values of humanity, expressed as human rights and based upon a profound commitment to human dignity. Subsequently the *International Covenant on Civil and Political Rights* (1966) embodied as binding legal commitments most of the provisions of the UDHR. It makes great promises. Its signatories — almost every country in the world — promised each other to secure for their citizens the essentials of a decent and humane existence.

But the fine rhetoric did not prevent the genocide in Rwanda, the terrible ethnic cleansing in former Yugoslavia. It was powerless to prevent the stain of Apartheid in South Africa, the widespread disappearances and torture in Chile arranged by General Pinochet or the killing fields of Pol Pot's Cambodia.

And while the resounding phrases of the UDHR were being crafted and polished, America was making a secret deal with Japanese war criminals. These men, doctors and scientists, had run the notorious Unit 731 in Harbin. There they performed medical experiments on untold thousands of Chinese civilians. These experiments, including vivisection of pregnant women, were as bad as anything done by Mengele in Auschwitz but they are less well known: the Americans granted the scientists privacy and immunity in exchange for the fruits of their condemnable and contemptible scientific experimentation on human subjects.

## Refugees

In the wake of the massive human migrations that occurred after World War II, the UDHR recognised, in Article 14, the right of all people to seek asylum in any other country they could reach in their desperation to flee persecution in their own. That right was recognised, presumably, because the world had come to recognise, with shame, the shocking fate of Jews, Gypsies and others under the Nazi regime. For Europeans, especially, it was not difficult to understand two essential features of refugee movement: first, that people who are persecuted will try to escape it; and second, that human movement from a place of oppression will generally impose a disproportionate burden on adjacent countries.

The Australian perspective was, necessarily, different. Australia is surrounded by an enormous moat. No refugees can come here on foot, and the sea journey is difficult and dangerous. But Australia had contributed very substantially to the creation of the UDHR — disproportionately for its modest population and relative unimportance back then — and it took its humanitarian obligations seriously.

In 1951, the *International Convention on the Status of Refugees* entered into force. It focused on European refugees. In 1967, a Protocol to the Convention was adopted that extended its reach to refugees anywhere. The Convention defines a refugee as a person who:

...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; ...

(It is worth noting that while we refer unselfconsciously to ‘climate refugees’, that expression is not accurate. A person who is unable to return to their country because it has disappeared

beneath a rising ocean is not a 'refugee' within the definition. Perhaps they should be.)

The central obligation of nations that have signed the Refugee Convention is to avoid *refoulement*, that is, returning a refugee (directly or indirectly) to a place where they may again suffer the persecution from which they fled. When the UDHR was adopted in 1948, and when the Refugee Convention was adopted in 1951, the concentration camps and the other horrors of Nazism were matters of recent memory. As those memories have faded in time and shed their intensity, so too have the humanitarian principles that underlie the Convention been undermined. The current mass migration and forced displacement of millions of people across Europe and Northern Africa provide one disastrous example. Regrettably, recent refugee policies adopted in Australia provide another.

Australia's treatment of refugees took its most serious turn for the worse in 2001. On 26 August 2001, the Norwegian cargo ship MV Tampa rescued the passengers of a small boat called the Palapa. The Palapa was breaking up in moderate seas in the Indian Ocean. The captain of the Tampa reckoned there might be 50 or 60 people on Palapa. As it happened, there were 438 of them, most of whom were Hazaras from Afghanistan.

The Tampa was denied entry into Australian waters; but, in defiance of then Prime Minister, John Howard, the Captain of the Tampa, for reasons of humanity, sailed into the waters off Christmas Island and, consequently, into Australia's legal and political history. The Prime Minister sent out the SAS who took command of the Tampa at gunpoint. Then there was a stand-off.

Several groups of lawyers brought proceedings in the Federal Court of Australia in Melbourne, challenging the legality of the government holding the people rescued by Tampa hostage on the ship's deck. Judgment in the Tampa case was handed down by Justice North at 2.15 pm (Melbourne time) on the 11 September, 2001. Just hours later, the attack on New York's twin towers

happened and the world looked very different. Suddenly, there were no terrorists, just Muslim terrorists. Suddenly, there were no boat people, just Muslim boat people. Suddenly, people fleeing persecution by sea weren't frightened humans escaping the Taliban: they were 'illegals'.

When Tony Abbott was Prime Minister, and Scott Morrison was Immigration Minister, the rhetoric of 'illegals' became increasingly strident and Mr Morrison started talking about 'border protection'. The 'Department of Immigration and Citizenship' was renamed, in Orwellian fashion, the 'Department of Immigration and Border Protection'. Segments of its staff were named the Border Force.

During the Tampa litigation, the Howard government established the Pacific Solution. (The unhappy resonance with the 'Final Solution' might be explained by the fact that the Pacific Solution was put together very fast, in a toxic political environment.) The Pacific Solution was put together before September 11 changed our view of the world. Mr Howard made it clear that the mandatory detention system, and the iniquitous Pacific Solution, were designed to 'send a message'.

What does this mean? It means that we treat innocent people cruelly to deter others. Subjecting innocent people to cruel, inhuman and degrading treatment in order to shape the behaviour of others is impossible to justify. It is the philosophy of hostage-takers. Any society that is prepared to brutalise the innocent in order to achieve other objectives has stepped right into a moral shadowland.

On 3 February 2016, the High Court of Australia delivered judgment in a constitutional case, *Plaintiff M68 v Minister for Immigration and Border Protection*, which challenged the Commonwealth's legal right to fund offshore detention. On that decision rested the fate of 267 asylum seekers who were in Australia but faced being sent to Nauru if the challenge failed. Among the 267 people there were two groups: those who had been brought from

Nauru to Australia for medical treatment, and infants who had been born in Australia to women who had previously been on Nauru. By law, a baby born in Australia to an asylum-seeker mother, is not entitled to Australian citizenship. The court ruled for the government in a decision which, although it may have been technically correct from a legal point of view, lacked any moral foundation.

The conditions in which asylum seekers are held on Nauru have been trenchantly criticised by various Australian and international bodies. In its 2016 report, Human Rights Watch said this of Australia's treatment of asylum seekers:

In 2015, Australia's practices of mandatory detention of asylum seekers, abuses related to offshore processing, and outsourcing of refugee obligations to other countries were heavily criticized by United Nations experts, foreign governments, and even some Australian government-funded inquiries.

However, senior government officials dismissed such criticism and even attacked and tried to discredit institutions such as Australia's Human Rights Commission (AHRC) and the UN. The government has also instituted overly broad and vague counterterrorism laws and has done too little to address indigenous rights and disability rights ...

Australia outsources some of its obligations to asylum seekers and refugees to poorer, less well-equipped, and unsafe countries such as Nauru and Papua New Guinea (PNG).

An Australian Human Rights Commission (AHRC) report into conditions in Australian mainland immigration detention centres and facilities on Christmas Island in February found that mandatory and prolonged detention had profoundly negative impacts on the mental and emotional health and development of children. More than 300 children committed or threatened self-harm in a 15-month period in Australian immigration detention, and 30 reported sexual assault.

Following the report's release, senior government officials made personal and unsubstantiated attacks on the credibility and integrity of the president of the AHRC, Professor Gillian Triggs, including calling for her resignation. The chairman of the International Coordinating Committee, the UN body responsible for accrediting national human rights institutions, described these attacks as intimidating and as undermining the independence of the AHRC.

In March, the UN Special Rapporteur on torture, Juan Mendez, concluded that by failing to provide adequate detention conditions, end the practice of detaining children, and put a stop to escalating violence in processing centers, Australia was in violation of the Convention against Torture. Former Prime Minister Tony Abbott responded by stating that Australia was 'sick of being lectured' by the UN.

Former Save The Children workers on Nauru have said that children held in detention on Nauru face 'systematic violation'. Numerous medical and related organisations have said that the way asylum-seeker children are held on Nauru amounts to calculated child abuse.

On 12 June 2015, former PM Tony Abbott said:

What we are doing is saving life at sea. We are defending our national sovereignty, we are protecting our country from the evil trade of people smuggling, and by hook or by crook we will do what is necessary to keep our country safe and to keep this evil trade stopped.

*Plaintiff M68* was decided in the government's favour. So, here was the profound moral challenge: should women, children and Australian-born infants be sent to Nauru where, on all available evidence, the detention conditions in Nauru constitute child abuse? PM Malcolm Turnbull responded with fine rhetoric. In a doorstep interview on 8 February he said:

All of us are anxious, are anguished at the plight of children in detention. ... The one thing we know we

must do is manage our border protection policies, yes, with compassion, yes, with humanity, yes with a deep concern about children.

But, if we make changes that have the consequence of giving the people smugglers a marketing opportunity — which they will take — they are very dangerous and agile criminals, and they use modern social media with an efficiency that is remarkable.

We have to be very careful, anything we do which gives them a marketing opportunity, they will use, and they will use it to get more vulnerable people on boats and more children and their parents will die by drowning at sea.

So, we have stopped the boats, and we are managing the caseload that we inherited from the Labor Party, but we have to do so — yes, with compassion, yes, yes with a passionate concern for those children. We are giving their parents every incentive to return to their country of origin, to go to settle in another country, because we know that if we give those people smugglers any marketing opportunity, let me tell you, they will use it. They will use it, and there will be more deaths at sea and more children put at risk ...

It is easy to be distracted by the silvered delivery and the polished rhetoric. The political reality, however, is that Turnbull has assumed the grim logic of 15 years of demonising boat people as ‘illegal’. And he has a party room rump that is hostile to him. Refugees suffer while he caters to their taste.

The worrying thing that underlies the Prime Minister’s seductive pretence at compassion is that he is prepared to send children to face terrible abuse in Nauru if that will reduce the possibility of other adults and children trying to escape persecution and reach the safety of Australia. The Prime Minister’s position (which is currently shared by the Labor Party) amounts to this: ‘We are so worried about you drowning, we will punish you if you don’t drown. That will persuade others to stay at home and face persecution in their own countries.’

What is now being steadily revealed is something that was always implicit in its mandatory detention and offshore processing policies: the idea of coming to Australia must be made to look worse than the prospect of facing the Taliban or ISIL.

Further, the Prime Minister apparently wants people to return to the persecution they have escaped ('We are giving their parents every incentive to return to their country of origin.') And he said we were giving people an incentive 'to go to settle in another country'. Australia has resettled only a small fraction of the benighted individuals imprisoned on Nauru and Manus Island, the significant majority of whom have been imprisoned on the island for more than three years.

In 2013, New Zealand offered to resettle 300 refugees as part of a two-year deal with Australia. But, in January 2016, New Zealand's Immigration Minister said Australia had not taken up the offer and the resettlement places had instead been given to Syrian refugees. Former PM Tony Abbott had scrapped the plan, saying the message to people smugglers had to be 'crystal clear'.

Turnbull, Abbott and Labor leader Bill Shorten all use the same logic: treat boat people harshly, to save them from unscrupulous people smugglers and the perils of the sea. If they are sincere, they betray an unhappy lack of logic and morality. Boat people do not commit any offence by arriving, without an invitation, to seek asylum. Calling them 'illegal' is simply false. They risk their lives at sea in order to escape something worse: over the past 15 years, about 90% of boat people have proved to be genuine refugees. After all, you don't risk your life at sea as a casual lifestyle choice.

And if a person is desperate to avoid persecution at home, and is aware that they would face years of persecution at Australia's hands if they try to come here, experience tells us that they will try to escape to some other place.

There is nothing surprising in the idea that people who genuinely fear persecution will run for their lives. It's what people do, if they can. Whether they head to Australia, or to Europe, or

somewhere else matters much less to them than getting away from the persecution.

The whole world was horrified by images of the corpse of three-year-old Aylan Kurdi after his family had fled across the Mediterranean. But those images demonstrated something we already knew: refugees perish in their attempt to find safety. If they die at the hands of their persecutors, or in the Mediterranean, or in a boat on the way to Australia makes no difference to them: they are still dead. The main difference is in us: our national conscience (such as it is) is seemingly untroubled by seeing the shattered boats, the broken corpses. And in order to ease our conscience, we deliberately treat survivors cruelly, as a warning to those who might look to us for kindness.

On top of this complete lack of logic, there lies a profound moral failing. Australia's policy on boat people, as articulated by Prime Minister Turnbull on 8 February, shows that we are willing to use individual, frightened human beings as subhuman instruments to help us achieve dubious policy outcomes. We are willing to sacrifice a few foreigners in order to achieve a domestic political objective. That approach exists at the frontier where utilitarian thinking meets totalitarianism.

Minds can differ about utilitarian logic. What it means, in short, is that you do that which produces the greatest good for the greatest number. Unfortunately, the result usually depends on the interests of the person who does the arithmetic.

Recently, the Australian parliament went one step further in pursuit of its ethically suspect, utilitarian agenda. On 20 May 2015, the Australian parliament passed the *Australian Border Force Act*. It includes secrecy provisions that have potentially very far-reaching consequences, but it is to be hoped that these provisions will be read down. The Act came into force on 1 July 2015.

Section 42 of the Act makes it an offence (punishable by two years' imprisonment) for an 'entrusted person' to 'make a record of, or disclose' protected information.

'Entrusted person' is widely defined, but it includes employees of companies that operate detention centres or provide services in detention centres, onshore or offshore.

In civil society, if a doctor becomes aware of an instance of child sex abuse, it is a criminal offence not to report it. But if the same doctor is working in an Australian detention centre, in Australia or offshore, and becomes aware of an instance of child sex abuse, it is a criminal offence to report it.

## Conclusion

The moral difficulty in all this is well captured in a short story by Ursula Le Guin, called 'The Ones Who Walk Away From Omelas'. It concerns an imaginary city called Omelas. In every way, Omelas is an apparently perfect society: it has beautiful architecture and music and poetry, all of its citizens live in harmony and happiness. But when children reach adolescence, they are allowed to learn the secret which supports the beauty and happiness of Omelas. In a dungeon under Omelas there is a child, held in darkness and misery, and on the misery of that child the happiness of Omelas rests. The young teenagers are taken to see the child, so they understand fully the misery of its plight. The story ends like this:

Often the young people go home in tears, or in a tearless rage, when they have seen the child and faced this terrible paradox. ... Their tears at the bitter injustice dry when they begin to perceive the terrible justice of reality, and to accept it. Yet it is their tears and anger, the trying of their generosity and the acceptance of their helplessness, which are perhaps the true source of the splendour of their lives. ... They know that if the wretched one were not there sniveling in the dark, the other one, the flute-player, could make no joyful music ...

At times one of the adolescent girls or boys who go to see the child does not go home to weep or rage, does not, in fact, go home at all. ... (They) go out into the street, and walk down the street alone. They keep

walking, and walk straight out of the city of Omelas, through the beautiful gates. They keep walking across the farmlands of Omelas. ... Each alone, they go west or north, towards the mountains. They go on. They leave Omelas, they walk ahead into the darkness, and they do not come back. The place they go towards is a place even less imaginable to most of us than the city of happiness. I cannot describe it at all. It is possible that it does not exist. But they seem to know where they are going, the ones who walk away from Omelas.

In like way, the most distressing aspect of the present political situation in Australia is that a majority of Australians seem to accept that grotesque violations of basic human rights are okay. Perhaps it is because they have been persuaded — by dishonest political rhetoric — that boat people are criminals from whom we need to be protected (15 years of calling boat people ‘illegal’, and renaming the Department ‘Immigration and Border Protection’ might do that).

But perhaps there is something darker going on. Human rights discourse really got going in the aftermath of the World War II. Most of the major international human rights instruments came into existence after 1945. When the concentration camps were opened, many people developed a sense that human rights mattered. But the mood shifted on 11 September 2001.

In the wake of September 11, the United States started using Guantanamo Bay as a place where it held people, indefinitely and without trial, because they were alleged to be enemy combatants, or terrorists, or otherwise undesirable. It soon became apparent that the CIA also used torture on Guantanamo detainees. While some people protested that the use of torture was completely unacceptable, the public at large, in the United States and in Australia, appeared to think that it was worth it if it got some useful intelligence (generally, it does not). Recently, Republican Presidential candidate Donald Trump announced publicly that he would reintroduce water boarding ‘and much worse’. He was applauded.

It is just possible that Australians no longer regard human rights (apart from their own) as having much importance any more. It is just possible that human rights will be airbrushed off the map of respectable ideas, just as spiritualism (1880s–1890s) was once taken seriously but is no longer mentioned.

In contrast, I live in hope that one day — in 10 or 20 or 50 years — people, having finally walked away, will look back and recall, in shock, that there was a time when Australian politicians were politically rewarded for their deliberate cruelty to refugee children.