

Excision crosses ethical border

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Why should 18 or so people, seeking protection from persecution and on a small boat within Australian territory, be allowed to disembark and make claims for refugee status?

To those with some knowledge of Australia's obligations and responsibilities under various human rights instruments, the issue may seem too elementary to warrant inquiry.

For those with a less legal bent, but with a sense of justice and common humanity, the answer may seem equally straightforward. Not so according to the Federal Government.

The events which began unfolding on Tuesday on Melville Island point to a radical shift in Australia's response to asylum seekers arriving on our shores.

These events mark a further – and alarming – twist in Australia's retreat from its commitment to compliance with the solemn protection obligations enshrined in international instruments, such as the 1951 Refugee Convention, to which we remain a signatory.

These days, talk of ships and asylum seekers is likely to stir memories of the dramatic events involving the MV Tampa in September 2001, during which 433 people seeking sanctuary were interdicted from Australian waters. They were then diverted to be detained and "processed" in poor Pacific nations.

Construction of the new so-called Border Protection strategy saw the urgent erection and implementation of the policy of "excision".

Put simply, parts of Australian territory that are commonly the first destination of asylum seekers arriving by boat were erased ("excised") from the "migration zone" – the area in which the Migration Act applies.

The intent and effect was that no person arriving undocumented in such places could make a valid application for refugee status (or any other visa) at all.

Until Tuesday, this new dehumanised zone – a place where international human rights are only respected in part, or not at all – applies to only a small amount of Australian territory situated off the far northwest coast of the mainland (Christmas and Cocos islands are cases in point).

The Government's application for "planning permits" to extend the "excision" and Border Protection program to allow the erasure of the entire expanse of northern Australia was rejected by the Senate last year. Most of Australia, at least on the statute books, remained unexcised.

This makes the events unfolding around Melville Island even more disturbing and controversial.

On Tuesday, as the boat carrying the asylum seekers approached Melville Island, the Government urgently "excised" by regulation – without parliamentary scrutiny – not only Melville Island, but a wide expanse of islands which form part of Queensland, Western Australia, the Northern Territory and the Coral Sea islands.

All to prevent 18 people seeking protection from doing so.

That this was not an isolated event or strategy by the Government is clear by what happened in other incidents in January this year.

Two African men who stowed away on a ship wanted to claim refugee status. The Department of Immigration had determined the two men should not be allowed to leave the ship while it was in Australia, so they would not be able to make applications for refugee status.

It was necessary for myself and another lawyer to board the ship and prepare and lodge applications for refugee status to force the decision to permit their release from detention on the ship and on to Australian soil to have their cases considered.

The second involved another foreign ship, berthed in Fremantle, with an Iraqi national on board who also wanted to apply for asylum in Australia. Again, it appears that the ship had been served with a departmental notice forbidding the release of the man from the ship.

It was necessary for a team of lawyers in Melbourne to appear before a Federal Court judge to seek an injunction to ensure that the ship did not sail without the Department of Immigration agreeing to allow the asylum seeker off the ship and on to Australian soil so that he could have his case for protection against Iraqi persecution properly and fully considered.

In the past, it appears that the Government's policy toward asylum seekers who arrive in Australia by boat undocumented has been to allow them to disembark and make applications for refugee status.

As I argued in *Eureka Street* magazine this year, this policy was unsurprising and certainly uncontroversial, given that the right to seek and enjoy asylum is contained in a number of human rights instruments – including, most notably, Article 14(1) of the Universal Declaration of Human Rights: "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

It also is clear that, as a signatory to the Refugee Convention, Australia's core obligation to any asylum seeker in its territory is to ensure that she or he is not expelled ("refouled") back to a situation of potential persecution. Other human rights instruments to which Australia is a signatory similarly prohibit states from placing people in situations of dire risk of human rights abuse.

As a matter of international principle, an asylum seeker who arrives in a territory seeking asylum has rights. The rights include consideration of whether or not she or he requires and deserves protection. Put simply, these rights are accorded on the assumption that the person may be a refugee; not that he or she is not a refugee.

Further, while states, as sovereign nations, clearly have the right to protect their territory, including their borders, the arrival of asylum seekers within those borders simultaneously invokes certain international responsibilities and obligations.

As observed by Professor Guy Goodwin-Gill, while it may be a fundamental principle of international law that sovereign nations are entitled to exclusive jurisdiction over their territory and persons therein, such authority also carries certain responsibilities.

They include the responsibility to guarantee and protect the human rights of those persons within the territory and under the state's authority. In order for the right to seek and enjoy asylum to be a meaningful right, it must include the right to make an application for asylum before any action is taken to remove the person from that jurisdiction.

These three recent events involving asylum seekers point to an alarming post-Tampa strategy of the Government, in which ships' captains will not be permitted to let people seeking asylum leave the ship while it is in Australian territory, regardless of whether it is an excised or non-excised place, and with the Government engaging in ad hoc shifting of our territory and borders to prevent applications for protection and refuge.

Many questions concerning international human rights law and the precise scope of protection guaranteed to asylum seekers under the Refugee Convention are complex.

They don't lend themselves to easy solutions. However, it does not matter whether the asylum seekers will ultimately be found to meet the UN definition of a refugee.

The critical point is that, in each case, they have an incontrovertible right to seek asylum in Australia and to have their cases fully and properly heard. The apparent decision to prohibit them from doing so is unambiguously in contravention of our international obligations and responsibilities.

Were all other countries to adopt such policies and practices, the international framework designed to protect refugees would be so seriously undermined as to be rendered meaningless. And from an ethical standpoint, such practices seem to have cast our country's commitment to justice, fairness and decency on to the high seas.

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