Response to Professor Catherine Dauvergne's " Challenges to Sovereignty: Migration Laws for the 21st Century"

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Professor Dauvergne has put before us some stimulating proposals about the new migration laws of first world countries, posing challenges to our traditional understanding of sovereignty. She urges that we inject further consideration of the rule of law to offset the unseemly emphasis on national interest. I have been asked by Kim Rubenstein to give "a 'world' response which naturally would involve commenting on Australia - but not necessarily purely Australia".

When the 1951 Convention Relating to the Status of Refugees was drafted, international travel was not what it is today. Australia happily participated in the formulation of the Convention, maintaining its White Australia policy, presuming that there would never be a need to admit non-white refugees to Australian shores, and initially stating reservations that ensured that refugees would not take Australian jobs.

When the Dutch relinquished West Papua to Indonesia in 1963, Australia for the first time confronted the reality of a land border with territory that could produce a steady refugee flow. Sir Garfield Barwick, Minister for Foreign Affairs, told parliament, "If any requests are received under the heading of

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In 1995 he was made an Officer of the Order of Australia (AO) for services to Aboriginal Australians, particularly as an advocate in the areas of law, social justice and reconciliation. In 1996, he and Pat Dodson shared the inaugural ACFOA Human Rights Award. In 1997, he was Rapporteur at the Australian Reconciliation Convention. During his involvement in the 1998 *Wik* debate, the National Trust named him a Living National Treasure and Paul Keating christened him a meddling priest. In 1998, the Council for Aboriginal Reconciliation appointed him an "Ambassador for Reconciliation". In January 2002, he returned from 18 months in East Timor where he was the Director of the Jesuit Refugee Service. He was awarded the Australian Humanitarian Overseas Service Medal for his work in East Timor.

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political asylum, they will be entertained and decided on their political merits from a very high humanitarian point of view in accordance with traditional British principles."[2] But he told his departmental officers that they "should not be too infected with the British notion of being a home for the oppressed".[3] Once these determinations were subject to judicial and parliamentary scrutiny, there was bound to be a problem - not of national sovereignty but of Executive accountability.

When the 1967 protocol was made, Australia agreed to recognise refugees beyond Europe. But Australia was still not minded to sign "because she was unhappy about allowing to stay within her borders, as the Protocol might well have required her to do, any number of Papuans or West Irianese who might take small boats from the southern coast of Papua to the Torres Strait Islands and claim they were refugees seeking asylum; as, indeed, a few West Irianese did some years later."[4] The Whitlam government acceded to the protocol in 1973 but with the rider that "The Government of Australia will not extend the provisions of the Protocol to Papua / New Guinea."

From the outset we Australians were adamant that we would not have the international community pressuring us in the unlikely event that there was ever to be a significant influx of boat people coming uninvited from our nearest neighbouring country seeking asylum. In our isolation, we could never contemplate ourselves being a country of first asylum. In the case of the East Timorese we had to concede that there was no intermediate country to which they could have fled. But then we engaged in the legal gymnastics of arguing they could have availed themselves of Portuguese protection while we negotiated rights to their oil and gas with the Indonesians. The seeds of the Tampa crisis are readily discernible in the initial compromises made by the international community in the negotiation of the Convention on Refugees finalised in 1951. The loopholes in the Convention were sure to cause problems even for an isolated country such as Australia. Professor Dauvergne observes that we are now in a time of moral panic. I would simply add that it is a panic that is unnecessary, overblown and of our own creation.

When the first wave of boat people arrived after the Vietnam War, their future status was a matter in the hands of the politicians spared from any scrutiny by the courts and without any comprehensive legislative scheme setting out procedures for their reception and assessment. There were no precedents and the policy about boat people would be made on the run as each wave

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[2] (1962) CPD 752 (HofR), 23 August 1962

[3] Quoted in Neumann, K, "Asylum Seekers and 'Non-Political Native Refugees' in Papua and New Guinea", *Australian Historical Studies*, No 120, October 2002, 359 at p. 364

[4] Charles A Price, "Australia and Refugees 1921-1976", May 1990, pp. 45-6 (unpublished manuscript)

arrived. Since 1985, the courts have been involved and parliament has been trying to reduce their room for any judicial margin of appreciation.

When an uninvited asylum seeker from a poor, unstable country turns up on the border of a rich democratic country which respects the rule of law, people of good will vehemently disagree about how best to strike the balance in treating the asylum seeker. When asylum seekers from as far away as Afghanistan and Iraq started arriving on the Australian shores by boat, most Australians endorsed the government's tough response in 2001. All of them were taken into detention. 97% of the Iraqis were later proved to be refugees.

During the last ten years of government responses to asylum seekers in Australia, there has been a pattern common to elected government ministers regardless of what party they belong to. In that time, every Minister for Immigration whether from the Left of the Labor Party or from the centre of the Liberal Party has caused controversy and upset with every major legislative change he has made. Surveying the situation in other first world countries such as the US, the UK and Germany, and studying the present European exercise to harmonise asylum law and policy, one can appreciate that a plaintive recitation of the UN conventions and human rights instruments does not actually get us far in resolving the modern problems and predicaments - though everyone gives notional assent to all of them. Even the beleagured UNHCR trying to consolidate its funds and mandate in changing times looks set to give at least notional assent to the UK's proposed variant on our Pacific solution. This Blair/Blunkett model would process asylum claims in transit camps or in the regions of origin, with the manifestly unfounded claimants who spontaneously arrive being sent to processing camps on the fringes of the EU. The Netherlands, Denmark, Spain and Portugal have already indicated interest.

For those turning up uninvited, no country has yet found the right balance between detention for removal and liberty for processing of claims nor between judicial supervision of the decision making process and unfettered executive action which is quick, fair and efficient. No country has yet found a way to discriminate fairly between two types of person who arrive uninvited at the border:

?? the asylum seeker who had no option but to engage a people smuggler, transiting through various countries to find the first available place where the family might feel secure, finding protection, being guaranteed that they will not be sent back home to face persecution;
?? the asylum seeker who had protection available to self and family in a country closer to home, but who cleverly took the opportunity of flight from

persecution to look further afield and seek a migration outcome in a country where life would be much better for the family.

Understandably governments want to clamp down on the so-called secondary movement of the second type of asylum seeker. Refugee advocates do not want that clamp down to result in punitive action against the first type of asylum seeker.

The political compromises forged at the time of the 1951 Refugee Convention and the moral certainties in refugee discourse before the end of the Cold War and before September 11 no longer provide the answers. In Australia, there have been ten years of mistrust between governments of each political persuasion and refugee advocates. Courts have often been caught in the middle of the crossfire. I agree with Professor Dauvergne that "the strong links between migration provisions and the notion of sovereignty have led to courts showing remarkable deference to executives in areas of immigration rule making".

Any nation state wanting to maintain its sovereignty and anxious to uphold the international order of a United Nations consisting of nation states will need to play its part in assisting those persons who flee from the territory of their nation state having been persecuted by their own government. If these persons were not to be given protection by other nation states, they would have no self-interested reason to respect or uphold the sovereignty of other nation states and there would be a real difficulty in upholding the moral legitimacy of sovereign nation states. Providing protection for refugees is a responsibility to be shared by all sovereign nation states if the collective sovereignty of nation states is to continue with some moral basis.

The special case for the international obligation to protect the refugee has been made out by accepting the need to acknowledge the sovereignty of the nation state. International acknowledgement of this sovereignty could not be given unless there was some fallback mechanism for providing protection to those persons singled out and persecuted by the government of the nation state on account of their religion, race, nationality, political belief or membership of a particular social group.

Many of those who flee across borders will seek and find protection in the country next door. Others will need to go further afield to find that protection. Whenever there is a major crisis, the victims will scatter to the four winds and refugees can be expected to turn up in countries near and far. Fifty years on since the Convention was finalised, international travel has changed. Those fleeing persecution may now have more options available to them. This creates the new problem of secondary movement. Though governments ought to have

no objection to refugees who are fleeing directly from persecution, they have understandable concerns about those refugees who see their moment of flight as an opportunity to seek a more beneficial migration outcome for themselves and their families.

Given the wide gap between the first and the third world, it is not surprising that some people fleeing persecution will look further afield for more secure protection together with more hopeful economic and educational opportunities. Having the status of refugee has never been accepted as a passport to the migration country of one's choice. Then again, the international community has never been so callous or shortsighted as to say that during a mass influx one has access only to the country next door in seeking protection even if you have family, friends or community members living in a more distant country.

The responsible nation state which is pulling its weight will not only open its borders to the refugees from the adjoining countries but will expect some flow over from major conflicts wherever they might occur. It is no surprise that Afghan and Iraqi refugees have turned up on the doorstep of all first world countries in recent times. With the ease of international travel and the services of people smugglers, it has become very difficult to draw the distinction between refugees who are coming directly from a territory where their life or freedom has been threatened and those refugees who, having fled, have already been accorded protection, but have now taken an onward journey seeking a more beneficial migration outcome. First world governments say they cannot tolerate the latter because they would then be jeopardising their own migration programs and weakening their borders every time there was a refugee producing situation in the world no matter how close or how far it occurred from their own shores.

When mass movements occur during a conflict, it is necessary for governments to co-operate, ensuring that adequate protection can be given to persons closer to their home country before then closing off the secondary movement route except by means of legal migration. When countries of first asylum are stretched and unstable, other countries must be prepared to receive those who travel further seeking protection rather than simply imposing further burdens on these hapless countries of first asylum. Professor Dauvergne reminds us, "For poor nations situated in places where refugees flow over their borders, the notion of sovereignty is so severely constrained by the North’s bankers and arrangers that the additional constraint the Convention might represent is a trifle."

First world countries now have to put up legal barriers to mass population flows across their borders. They have set up a virtual offshore border which

cannot be crossed except with computer checked approval. In the past, the tyranny of distance was enough to keep such flows well at bay. To do this responsibly, the international community must continue to work co-operatively providing protection in countries which otherwise would become transit countries through which the refugees would travel seeking protection ultimately on the shores and borders of the first world.

With declining birth rates, most first world countries now need migrants if only to help them maintain their national living standards and to provide services and care for the aging population - and thus the competition described by Professor Dauvergne as "the pursuit of the best and the brightest". She tells us, "Canada and Australia have been, with their points systems for identifying and categorizing economic migrants, at the forefront of attempting to recruit migrants to fuel the national economies."

Any first world country that is a net migration country should include some offshore refugees in their annual migration intake. As well as accepting some offshore refugees for resettlement, first world countries should also provide assistance to those less wealthy countries that carry more of the burden of refugee protection on account of their proximity to refugee producing countries.

All countries, regardless of their wealth, stability or migration needs, need to process the asylum claims of those persons in their territory who claim to be fleeing persecution back in their own country. It is an absolute obligation on all countries who have signed the convention that they not send back (*refoule*) *bona fide* refugees in their territory. Countries such as the United States have continued to process their onshore asylum claims while at the same time maintaining their offshore annual refugee quota. The US guarantees UNHCR that it will take 70,000 offshore refugees a year regardless of the number of onshore asylum seekers it processes, that usually being about 60,000 a year. Australia used to take the same approach. Now Australia has decided to tie its onshore caseload to its offshore quota such that for every person who gets recognised as a refugee in need of protection on shore there is one less place for refugees offshore. This way, government has been able to argue that by getting tough on asylum seekers trying to reach Australia without a visa, it is able to make more places available to the refugees in greatest need identified by UNHCR and Australian field offices around the globe. This nexus of the offshore and onshore components has allowed the government to appear firm but fair, seeking a maximum outcome for the refugees in greatest need. This is a moral calculus completely of the government's own construction.

In a democracy, government should craft a migration and refugee program that is acceptable to the people. Often the people can be led by their community and political leaders to accept that it is in the national interest to be more welcoming rather than less, more generous rather than less. But selfish national interest can be readily exploited by popular politicians who then exacerbate the gap between rich and poor nations. As Dauvergne reminds us, "Migration laws at this point in time reflect one of the paradoxes at the centre of globalization: for those with more, globalization makes more available, for those with less, there is less. Inequalities are increased, exclusions are underscored."

Especially since the destruction of the World Trade Centre, citizens in democracies are suspicious about newcomers to their societies. There is a need for increased security. Anyone arriving without a visa, without identity documents, and in the hands of a people smuggler must expect to be subject to heightened scrutiny. Each country still needs to do its part in providing protection for the refugees of the world. Our elected leaders do not help refugees or the polity when they stigmatise persons as unlawful non-citizens when they may indeed be refugees. They may even be refugees in flight entitled to seek entry. In a 2002 Federal Court decision, Justice Merkel had the opportunity to observe the unhelpfulness of some of the public political language used in these situations. "Unlawful non-citizens" may have every lawful entitlement to enter under international law.[5]

These reflections are sufficient to highlight the complexity confronting any government wanting to exercise responsibly the sovereign right of determining who comes and goes in the community of the nation state, and under what conditions. Net migration countries have a little more latitude to respond to the humanitarian challenges, as do wealthy countries, and as do democratic countries with a sound human rights ethos. Then again, as we resident Australians know even better than Professor Dauvergne, democratic countries seized by fear of outsiders and wealthy countries wanting to maintain their distance from the poor and net migration countries wanting to use migration for

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[5] *Al Masri* v *Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 1009 (15 August 2002) para 61: "The Refugees Convention is a part of conventional international law that has been given legislative effect in Australia. It has always been fundamental to the operation of the Refugees Convention that many applicants for refugee status will, of necessity, have left their countries of nationality unlawfully and therefore, of necessity, will have entered the country in which they seek asylum unlawfully. Jews seeking refuge from war-torn Europe, Tutsis seeking refuge from Rwanda, Kurds seeking refuge from Iraq, Hazaras seeking refuge from the Taliban in Afghanistan and many others, may also be called "unlawful non-citizens" in the countries in which they seek asylum. Such a description, however, conceals, rather than reveals, their *lawful* entitlement under conventional international law since the early 1950's (which has been enacted into Australian law) to claim refugee status as persons who are "unlawfully" in the country in which the asylum application is made."

business and skills development may become more isolationist and less humanitarian.