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REFUGEES AND HUMAN RIGHTS – CHALLENGES FOR AUSTRALIA

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The global scale of forced human displacement

Forced human displacement means the involuntary movement of people from their locality or environment, or from their home, occupation or way of life. The scale of forced human displacement today is unprecedented. The United Nations High Commission for Refugees reported in 2016 that 65.6 million people were displaced by conflict or persecution. That number includes 22.5 million refugees, 40.3 million internally displaced people and 2.8 million people awaiting assessment of asylum claims in industrialised countries. These numbers are so huge that they are hard to imagine. It is easier to imagine the figure in relation to the number of students in a school. According to the UNHCR, one in every 113 people in the world today is displaced by conflict or persecution.

We need to add to these numbers those people displaced by environmental forces. Since 2008, an average of 22.5 million people have been displaced each year due to climate- or weather-related disasters. This category of displaced people is predicted to increase as climate change impacts worsen in severity. If the Earth experiences four degrees of warming by the year 2100, sea levels could rise high enough to submerge land that is currently home to between 470 and 760 million people. As the numbers of so-called ‘climate migrants’ increase, more of those affected will be forced across national borders.

Australia’s humanitarian program

In this article, we will consider those people who meet the definition of ‘refugee’ or ‘asylum seeker’.

Under international law, a refugee is

Any person who owing to a 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/her nationality and is unable, or owing to such fear, is unwilling to avail himself/herself of the protection of that country.

For a country like Australia to give protection to a refugee, its authorities must be satisfied that a person has fled their home country due to persecution. The persecution a person has suffered must have been directed against them because of one of the factors in this definition, for example because they are from a targeted race or political movement.

In Australia, we sometimes hear ‘refugee’ and ‘asylum seeker’ used as though they have the same meaning, but they do not. An asylum seeker is a person who has asked for protection as a refugee in a country other than their home country. While they wait for the outcome of their application, they are an asylum seeker rather than a verified refugee.

International human rights law protects both refugees and asylum seekers. According to the Universal Declaration of Human Rights,

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

and

Everyone has the right to seek and to enjoy in other countries asylum from persecution.

Student activities

1. What are some of the key reasons why people are forcibly displaced from their homes?
2. Explain the enormity of the refugee crisis around the world.
3. What new type of refugees is now a growing concern? What is causing this crisis and how big a problem is this likely to be in 2100?
The treatment of refugees and asylum seekers is a highly politicised issue in Australia. Sometimes the flow of people seeking protection to Australia is described as a ‘flood’ or a ‘wave’, and these terms give the sense that Australia deals with large numbers of incoming refugees. However, Australia’s contribution to the global refugee crisis is very minor when compared to the numbers of refugees being hosted by some poor and developing countries elsewhere on the globe.

Australia ranks 25th in the world for the number of refugees accepted and resettled (32nd in the world on a per capita basis). These rankings are based on the number of refugees resettled in Australia in 2015 – 9,399 people.

In comparison, the first ranked country for refugee resettlement – Turkey – received almost three million refugees in 2016. The graph below gives a sense of the scale of the global refugee crisis and Australia’s relatively minor contribution to refugee resettlement:

Refugees and human rights in Australia today

Australia’s treatment of refugees raises human rights concerns in several areas. These include:

1. Mandatory offshore detention of asylum seekers who try to reach Australia by boat.

   *This is a concern because asylum seekers are not committing a crime by trying to claim protection in Australia. It is a fundamental principle of human rights law that people should not be imprisoned without being charged or convicted of a crime. It is reasonable for a government to use short periods of detention to conduct checks on a person’s health and character. But detention becomes punishment if it continues for a long time or indefinitely. In Australian law, there is no limit on the time that people can be kept in immigration detention.*

2. Detention of child asylum seekers.

   *Detention is never in the best interests of children. Recent investigations have shown that mandatory immigration detention, both offshore and in Australia, causes severe mental, physical and emotional harm to children.*

In 2016, the ABC’s Four Corners program reported on conditions for children in detention on the Pacific island of Nauru. Australia established and continues to finance the detention centre there. Thirteen-year-old Misbah, from Burma, had been on Nauru for over three years. She revealed to Four Corners that her life in detention worsened the trauma she had run from in her home country:

*We ran away from Burma because of the raping, things in Burma that’s happening to the girls and burning houses, and stealing, and we came here, we came to Australia, we tried to get to Australia, and now we are here, the same thing happening, raping, stealing, killing.*

I’ve seen people, now people died, some people burn themselves, some people take too much medicine and died and some people say that they get harm – they get the Nauruan tried to harm them, to hurt them and many other things like, stealing, stealing, raping.

3. Dehumanisation of refugees

   *Language has been used as a powerful tool to cause ‘moral panic’ regarding asylum seekers and refugees. This is very clear in the official categorisation of asylum seekers travelling by boat as ‘illegal’ or ‘queue jumpers’. These labels suggest several things that are not supported by evidence and permit the violation of human rights principles.*

First, these labels suggest that there are legal and illegal ways to seek asylum from persecution. This is not the case in international law.

Second, such language suggests that all people fleeing persecution in their home countries have access to a ‘queue’ which they can join to wait for refugee protection. For the vast majority of refugees, this is not the case.

Third, labelling vulnerable people in these ways dehumanises them and makes it easier to ignore the realities of their lives and the very challenging circumstances that force them to run from home. This sets an expectation that Australia does not owe protection to people who do not conform to our preferred mode of travel or arrival.
Challenges for future lawyers

Australia’s treatment of refugees and asylum seekers has attracted a lot of criticism from a range of international sources, including the United Nations. Several advocates from Australia and around the world have made complaints to the International Criminal Court, alleging that Australia is guilty of crimes against humanity in relation to its treatment of refugees.

There are many ways in which future lawyers can promote the equal rights of all people in Australia. For clients who are asylum seekers or refugees, it will be important for lawyers to be:

• Aware of cultural and language barriers that may limit people’s access to justice;
• Conscious of the challenges of dealing with government departments;
• Mindful that clients may have suffered considerable trauma that will have affected their mental and emotional wellbeing; and
• Willing to promote the development of Australian laws and practices that promote rather than violate human rights principles.

Suggested further reading

- Australian government Department of Immigration and Border Protection: https://www.border.gov.au/
- The Conversation: https://theconversation.com/au

Student activities

4. When will a person be recognised as a refugee?
5. What are the differences between refugees and asylum seekers?
6. Do people have a human right to seek protection from persecution? Explain.
7. Do you think Australia is accepting enough refugees in comparison to other countries? Explain.
8. Do you think there should be a limit on the length of time an asylum seeker can be kept in detention? Give your reasons. What do you think a reasonable time limit would be?
9. Explain why the labels ‘illegal’ and ‘queue jumpers’ are inappropriate for asylum seekers. What effects do you think these terms could have on the way asylum seekers are perceived and treated?
10. Do you think it is ever appropriate to detain child asylum seekers? Give your reasons.

11. Should Australia make changes to its current approach to refugees and asylum seekers? If so, what changes do you think are most needed?
12. How can lawyers assist refugees and people claiming asylum in Australia?
Notes


4 Convention Relating to the Status of Refugees (1951) 189 UNTS 137


THE STATE SOVEREIGNTY DILEMMA

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Sovereignty means the power to make decisions without interference from others. When this is applied to countries we get the notion of state sovereignty. This is essentially the principle that countries have the right to determine their own destinies or to make decisions without interference from other countries.

State sovereignty is the core concept of international law and the way that countries interact with each other. International law relates to those laws that apply to countries and their relationships with each other. International laws are fundamentally different from domestic laws. They are voluntary in nature and notoriously difficult to enforce. Domestic laws, on the other hand, are universal, meaning they apply to all. For example, we can’t make a decision whether or not to follow criminal laws. However, due to the principle of state sovereignty countries can elect to be bound (or to follow), or not to follow, international laws. This significantly reduces the effectiveness and the enforceability of international laws and yet it is the core principle of international law. Some international law experts therefore refer to the state sovereignty dilemma.

The development of sovereignty

It was through the Treaty of Westphalia of 1648 that sovereignty first became a legal concept. This treaty, which took five years of negotiating, ended the 30 Years War that had involved most of the European powers and ravaged Germany. The war and treaty greatly limited the power of the Holy Roman Empire that had ruled most of Central Europe throughout the medieval period. Power was gradually transferred towards the individual states and territories that made up the Empire – essentially granting them sovereignty.

Sovereignty, of course, still rested very much with the monarch, or sovereign. It was believed that monarchs derived their power directly from God. However, the concept of popular sovereignty began to emerge in the late 18th Century. Revolutions in France and the United States saw the notion of sovereignty lying with the people begin become more prominent.

With the development of nation states, governments claimed that they represented the will of the people and therefore had sovereignty. This concept still continues today with national governments claiming sovereignty in their dealings with countries. For example, in June 2017 United States President Donald Trump announced that the US would be withdrawing from the Paris Climate Change Agreement. In his speech announcing the withdrawal he stated:

“...exiting the agreement protects the United States from future intrusions on the United States’ sovereignty”.

(US President Donald Trump 1 June 2017).

Student activities

1. Write your definition of state sovereignty.
2. Explain how international laws differ from domestic laws.
3. Describe the historical development of state sovereignty.

The rise of international law

While sovereignty can be traced back to the 1648 Treaty of Westphalia, international law really became a significant force in the twentieth century, especially in the period following World War Two. This rise of international law and the conclusion of the most destructive war in history is no coincidence. Increasing the interrelationships between nations was seen as a key step in enhancing peace.

The emergence of the United Nations following the war led to increased formality around international law-making. There are key treaties, the 1969 and the 1986 Vienna Conventions, which define international law and outline the processes for engaging in international treaties and agreements.

By the turn of the 21st Century, it was estimated that there were more than 100,000 international agreements in effect (Hathaway, 2008). These agreements cover virtually every aspect of the modern world, ranging from regulation of trade, military affairs, international diplomacy, the environment, cultural affairs, slavery, torture and many more.
Throughout the second half of the 20th Century many countries gave up aspects of their sovereignty as they sought out opportunities to move closer to each other. The most notable example of this is the United Nations and its various organisations. By joining the UN countries, nations in a sense give up at least some of their sovereignty by agreeing to be bound by the rules of organisation, but of course they can reassert their sovereignty by withdrawing from the organisation.

Some countries have gone further and formed, what are sometimes referred to as supra-national organisations and are typically regionally based. The European Union is by far the best example of this. When nations join the European Union they give up considerable sovereignty in favour of the European Parliament but in return receive many benefits around trade, security and diplomatic ties.

Post Westphalia – the decline of the nation state?

Michael Santoro (2010) describes what he calls a post-Westphalia environment. This is where businesses and organisations are beyond the power of any one country. Large transnational corporations operate globally and often use their global power to circumvent the power of governments. This environment poses a significant threat to the sovereignty of countries.

While large companies have always held enormous power, the rise of large technology companies in the last 20-30 years and more significantly web-based firms have radically altered the relationship between companies and countries. For example, Facebook has come under intense criticism for the way it uses complex corporate arrangements to avoid national laws and taxation. In 2014, for example, it was reported that Facebook paid £4327 (or around $10,000) tax for all its operations in the United Kingdom, despite a revenue of more than £105 million and paying its top staff more than £35million in bonuses above their normal salaries (Stewart, 2015).

Facebook has also been the subject of legal action in Europe over privacy. France, Belgium and the Netherlands recently announced that Facebook has broken privacy laws in their countries and Spain and Germany have ongoing investigations. France issued Facebook with a fine of €150,000 (around $175,000) the highest possible fine at the time. France is now looking to change their laws to implement fines of up to 4 per cent of a company’s revenue. Facebook issued a statement saying it “respectfully disagreed” with the decision and that as its European branch was based in Ireland it should only have to comply with Irish law (Feik, 2017, p.27). In other words Facebook refused to accept the sovereignty of France in regards to this issue.

A resurgence and growing dilemma of State Sovereignty

While much of the second half of the 20th Century saw many countries gradually reducing their sovereignty in favour of inter-governmental organisations the trend is beginning to reverse. This resurgence in the ideas of state sovereignty is closely linked with a rise in nationalism.
Nationalism
The concept of nationalism is a relatively modern one. It emerged in the late 18th Century at the time of the French and American Revolutions. During the 19th and 20th Centuries it was one of the most significant political forces globally.

Nationalism can be simply defined as people identifying themselves by the nation state in which they live or have heritage from. For example, identifying yourself as Australian or Japanese.

Brexit
Brexit is the term used to describe the political movement that emerged for Britain to leave the European Union (EU). Britain joined the EU in 1973. Since its formation the EU has sought to create greater unity across Europe by establishing commons laws around trade, human rights, employment and migration that apply across all member states.

In June 2016, Britain held a referendum around its membership of the EU. In a shock result 51.9 per cent of voters voted to leave the EU. This has now prompted Britain to begin moves to exit the EU. Britain remains divided on the issue. Many in Scotland, which voted very strongly to stay in the EU are again seeking to become independent of Britain so as to remain part of the Union.

Much of the debate relating to Brexit centred around the idea of sovereignty. ‘Take Back Control’ was the main slogan of the pro-Brexit supporters. M. Gordon in the Kings Law Journal has described the whole Brexit debate as “...sovereignty hysteria...” that reflected a misunderstanding of the notion of sovereignty (p.334). This can be seen in the confusion around parliamentary sovereignty which is the role and indeed right of the UK Parliament to make decisions in the national interest of the UK and national sovereignty, the relationship the UK has with the EU.

Many people in the UK have come to confuse these two concepts and treat them the same. Consequently, there was a sense, at least amongst those who supported Brexit, that the UK was no longer in control of its own decision-making and that the EU was now sovereign over the UK. In this sense, we can make an argument here that nationalism became the dominant thinking leading to the UK withdrawing from the EU.

Paris Climate Agreement
In 2016, 197 countries agreed to make changes to help reduce the impact of climate change. As of July 2017, 153 countries had ratified the Agreement (including Australia), meaning that they had passed legislation through their own parliaments to enforce the Paris Climate Agreement.

The United States is the biggest producer of the greenhouse gases that are the cause of climate change. In 2016, the then President of the United States, Barak Obama signed the agreement but it was not ratified by the US Congress. In June 2017, the new President, Donald Trump, announced that the US would withdraw from the Agreement.

In making the announcement he cited sovereignty as one of the key reasons for his decision. “Our withdrawal from the agreement represents a reassertion of America’s sovereignty” he said in an address to the media. He later said in the same speech that the Agreement would “…weaken our sovereignty…”.

Some have argued that like the sovereignty debate with Brexit, Donald Trump has misunderstood the difference between parliamentary sovereignty and national sovereignty. In the debate following the announcement one Harvard Professor, Joyce Chaplin, pointed out that it was at the Treaty of Paris in 1783 that formally ended the War of Independence, under which the United States was formally recognised as a sovereign country. Therefore, she argued America’s sovereignty is in fact enshrined in international law.

The interesting thing about the debate around the Paris Climate Agreement is that while there is much talk of the Agreement impinging on sovereignty the Agreement is by its nature rather weak. Like much international law

Student activities
11. What is Brexit?
12. Describe the role of sovereignty in the Brexit debate.
13. Differentiate between parliamentary and national sovereignty.

Student activities
7. What is a supra-national organisation?
8. Explain what is meant by a post-Westphalian environment?
9. Explain how Facebook and other large corporations can be seen as a threat to state sovereignty.
10. What is nationalism? Why do you think this could be responsible for the resurgence of the ideas of state sovereignty?
it relies on good will and countries voluntarily meeting their obligations. There are no real mechanisms to punish countries that do not comply.

In essence then the Paris Climate Agreement was symbolism in many ways but by participating in the Agreement countries at least demonstrate a commitment to meeting the climate change challenge. There is also the impact that the US withdrawal will mean to the attitudes of the other 197 countries that have signed. “It may be rational for some nations to sacrifice for the greater good when they believe that everyone will do likewise” writes Travis Rieder from John Hopkins University (Rieder et al, 2017). However, the power of collective actions relies on everyone being seen to “pull their own weight” and if the US demonstrates no commitment by placing its own sovereignty over the wider global good then the effectiveness of the Agreement is diminished as a whole.

Somaliland

Somaliland occupies a slice of Somali territory on the southern shores of the Gulf of Aden. It has virtually all the hallmarks of a country. A functioning government, police force, military and the region is generally peaceful. This is all very different to Somalia, which is one of the most lawless countries in the world. However, Somaliland is not a country despite calling itself one; to the rest of the world Somaliland is a self-governing autonomous region within Somalia.

Severe drought has ravaged Somaliland

Source: http://www.flickr.com/photos/oxfameastafrica/5758386784/

The situation in Somaliland is dire because they are not receiving assistance from the central Somali government as a result of their self-declared independence. Yet as they are not recognised as a sovereign country, they are also unable to access the same degree of support as other countries might. For example, UN agencies tend to deal with national governments. They are also unable to obtain the types of low interest loans that countries often receive in emergencies.
In Conclusion

This paper began with the notion that state sovereignty can be seen as a dilemma. On one hand all international law hinges around this one fundamental concept. No country can be forced into international law because of state sovereignty. Equally countries must respect each other’s sovereignty and this is a crucial part of modern diplomacy. However, sovereignty can also hinder engagement - it can be seen countries “giving up control” to some higher authority. We have seen in both Great Britain and the United States the power of this resurgence. However, in many respects sovereignty has not been the issue here, instead it has been the catch cry of nationalism and has been used as a reason to withdraw from the international community. Equally a dilemma exists around the growth of large corporations that may see themselves beyond the sovereignty of individual countries. Thus state sovereignty is a dilemma but it continues to be cornerstone of international relations.

Student activities

14. Using the Paris Climate Agreement as an example explain why it is important that countries participate in international agreements.

15. Outline the location of Somaliland.

16. Describe the issues facing Somaliland.

17. Analyse the impact of state sovereignty on Somaliland.

18. Why do you think neighbouring countries to Somaliland may be reluctant to recognise it?

References


Student activities

19. Should sovereignty only come when other nations agree to recognise a country? Justify your response.

20. Using the internet conduct research into the debate around the Paris Climate Agreement in the United States. Prepare an outline of the arguments for and against the participation of the US in this Agreement.