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Sympathy as the Basis for a Moral Response to Asylum Seekers in Offshore Detention Centres

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--An appeal for the release of asylum seekers detained offshore for temporary protection

David Hume argued that sympathy is a very powerful principle in human nature, one which allows us to share the psychological state of another. It is also the basis of our rational moral judgments (Radcliffe 1994, Mari 1996, Hume 2012). How can we apply this principle with regard to asylum seekers detained offshore?

It seems clear that asylum seekers in Nauru face humiliating living conditions. They do not have their basic needs met, in terms of clothing and access to toilet facilities, and are exposed to criminal behaviour (2015). This is apart from the lengthy detention those people are experiencing. Aren't they human beings just like us? Could we be more sympathetic to their situation and do something? At least, the Australian government is still a responsible controller of the lives of the asylum seekers (2015), so it has to guarantee that basic human needs are satisfied in these detention centres, and also to guarantee that all cases are managed in a fair manner.

The High Court has just thrown out the challenge on the legality of off-shore processing centres (2016). It is well argued that the Court does not give permission for indefinite detentions (Doherty 2016), but rather, the Commonwealth is expected only to participate in that offshore processing regime if, and so long as, it serves the purpose of processing. Legal mechanism is a tricky and complex thing. Most likely we will have to wait for another legal case to challenge the lengthy detention and processing of the asylum seekers on these off-shore detention centres.

In Australia, the commonly used terms referring asylum seekers are "boat people" or "unauthorized arrivals", regardless of the fact that these are the most vulnerable ones desperately seeking help. Getting onto a boat means that they

gamble with their lives for hope. If there was any other option available to them, they would not gamble this way. They do not need further punishments to make their lives more miserable. They are human just like anyone of us. It is rather confronting to ask - why are these people being treated in such inhumane ways? The answer seems to lie within the political domain more than anything else.

The Australian government has a strong desire to guard its territory and is capable of doing so. Legally, the government might be allowed in doing so as a sovereignty state, it is expected to protect its own territory. However, empirical evidence shows that there are general false beliefs shared among the community and the Federal government, which are that asylum seekers are queue jumpers, illegitimate, non-genuine and even terrorists (Pedersen, Watt et al. 2006). In 2001, the Howard Government introduced the policy of “turning back boats”, and this policy was reintroduced by Abbott Government (2013). A dramatic change resulted, in that the number of boat arrivals dropped from thousands during 2009-2013 to a few hundred (Philips 2014). Similar boat returning policies have been adopted by different countries such as US, Thailand, Italy and Burma, but there are legal controversies arising (UNSW 2015). For instance, European Convention on Human Rights (ECHR) held that Italy had breached its obligation to protect the applicants from torture and inhuman or degrading treatment or punishment by turning back boats to Libya (2012).

As the Abbott government has successfully turned back the boats since 2013, it is highly questionable why the government persists with such tough treatments towards unauthorized boat arrivals? The hidden part of the story regarding the turning back policy worth noticing is that: it may not be as efficient as alleged and it is reasonable to assume that the government is likely to be using the indefinite detention and the obscure fate of these detainees in order to deter further asylum seekers.

According to the Minister for Immigration and Border Protection, Peter Dutton, there has been only one illegal entry vessel (with 157 unauthorized arrivals on

board, arriving in Australia in July 2014) since the policy of boat turn back began in December 2013 (DIBP 2015). Here, Mr. Dutton did not give details to the public regarding how these people came to Australian waters, since often these people are stopped before reaching Australian waters. The impression is that due to the fact that these people have reached Australian waters, so they should have to be kept in, under international legal obligations for the host country. However, the true story is much more complex. All the 157 unauthorized arrivals are Tamil asylum seekers and they had set sail from a refugee camp in India, and the Australian government negotiated with Indian authorities regarding the possible return of these people but were refused. Later, these people were taken to the Australian mainland and then transferred to the Nauru detention centre (UNSW 2015). Why did the Minister not give the full picture of the whole event? This rather shows that the government foresees the difficulty and risk of not being able to return these boats in similar circumstances, so it is aiming at using punitive methods to deter further comers, including relying on off-shore detention centres to counter the inefficiency of the boat returning policy.

The world is experiencing the worst refugee crisis since World War II, since the world is at war (UNHCR 2014). It is lucky in a way for Australia that as an island country it is capable of controlling its border in an effective way, so to avoid the flood of refugees, as is the experience in Europe. Australia has endeavoured to show generosity toward those war refugees and increased its refugee intake for the year of 2015 directly recruited from refugee camps. This is such a contrast with the attitude of the country toward boat people, bearing in mind that most boat people are also genuine refugees, and about 88-100% of these asylum seekers who arrive by boat have been granted refugee status between 2008-2013 (DIBP 2013). No one is arguing that the country should be overburdened with refugees (Bertrand 1993).

At this moment, if the major concern for the Australian government is to guard its border rather than offer sympathy to refugees, it seems to be engaging in morally

deficient behaviour. There are no moral, legal or practical reasons to abuse those detained in the off-shore detention centres.

As far as the asylum seeker issue is at the concern, we expect Australia to act in a just and reasonable manner. We may even expect after the settlement of regional conflicts, those refugees or asylum seekers can go back home after being temporarily protected by the Australian government. But there should be no further punishments on these most vulnerable people.

The current legal framework is restrictive enough, which means “boat people” may only be granted a Temporary Protection Visa (TPV) for up to 3 years, after being screened and accepted for various other temporary visas. TPV is renewable after review but the holders are not eligible for application for permanent residency, and it is not possible to bring their families to Australia for reunion (UNSW 2015). All these conditions are restrictive enough. There is no need even to stop boat or asylum seekers from applying for this visa. Currently, detaining these people indefinitely on these islands seems to be an extreme response. No one is detained indefinitely on this earth except terrorists detained in Guantanamo Bay. Why do asylum seekers need to be detained for an indefinite period? The borders have been well fenced up by the government in most cases, but the unreturnable boats mean those people have nowhere else to seek protection, and so temporary protections should be issued by the government.

About 45 years ago, Australian Moral Philosopher Peter Singer wrote that “if it is our power to prevent something very bad from happening, without thereby sacrificing anything morally significant, we ought, morally, to do it. An application of this principle would be as follows: if I am walking past a shallow pond and see a child drowning in it, I ought to wade in and pull the child out. This will mean getting my clothes muddy, but this is insignificant, while the death of the child would presumably be a very bad thing” (Singer 1972). The current situation at the detention centre obliges us, as a moral duty, to help rather than seeing people suffering and dying through inhumane treatments at offshore detention centres. Their cases should be processed in a fair and reasonable manner without

additional delays and further punishments imposed. Now, it is the time to wet our suits to rescue fellow human beings suffering in detention centres.

References:

(2012). *Hirsi Jamas and Others v Italy*, European Court of Human Rights.

(2013). "Coalition Launches Operation Sovereign Borders." from <http://www.sbs.com.au/news/article/2013/09/18/coalition-launches-operation-sovereign-borders>.

(2015). Taking Responsibility: Conditions and circumstances at Australia's Regional Processing Centre in Nauru, Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru.

(2016). Plaintiff M68-2015 v Minister for Immigration and Border Protection [2016] HCA, High Court of Australia.

Bertrand, P. (1993). "An Operational Approach to International Refugee Protection." Cornell International Law Journal **26**(3): 495-504.

DIBP (2013). *Asylum Trends Australia 2012-13 Annual Publication*. Canberra, Department of Immigration and Border Protection.

DIBP (2015). Minister-OSB marks milestone-year with no boats, Department of Immigration and Border Protection.

Doherty, B. (2016). Nauru, Manus Ruling No Blank Cheque as Court Signals Limits to Detention. The Guardian.

Hume, D. (2012). A Treatise of Human Nature, Create Space Independent Publishing Platform.

Mari, T. (1996). "Natural Obligation and Normative Motivation in Hume's Treatise." Hume Studies **XXII**(2): 231-254.

Pedersen, A., et al. (2006). "The Role of False Beliefs in the Community's and the Federal Government's Attitudes toward Australian Asylum Seekers." Australian Journal of Social Issues **41**(1): 105-142.

Philips, J. (2014). *Boat Arrivals in Australia; A quick guide to the statistics*, Parliamentary Library Publications.

Radcliffe, E. (1994). "Hume on Motivating Sentiments, the General Point of View, and the Inculcation of "Morality"." Hume Studies **XX**(1): 37-58.

Singer, P. (1972). "Famine, affluence, and morality." Philosophy & Public Affairs: 229-243.

UNHCR (2014). World at War: Global trends forced displacement in 2014: 1-56.

UNSW (2015). Factsheet: Temporary Protection Visas.

UNSW (2015). Factsheet: Turing Back Boats.