

To what extent does the securitisation of asylum seekers contribute to Australia's failure to meet its relevant international human rights obligations?

Introduction

Throughout the twentieth century, Australia had a proud tradition of welcoming persons seeking asylum, and afforded protection to many people fleeing persecution in their home countries. Large waves of refugees were humanely settled following major conflicts such as World War II, the Vietnam War and in the former Yugoslavia. Over the last two decades, however, there has been a clear shift by successive governments in the approach taken to persons seeking asylum in Australia, most notably, toward those arriving to Australian shores by boat. This shift has been orchestrated through policy and political rhetoric designed to gain popular support by creating fear and insecurity, based on a manufactured existential threat. This process is known as securitisation - a relatively new security discourse - that is, the process of constructing a threat in order to justify extraordinary measures.

This new discourse explains the shift in approach to asylum seeker issues and has ultimately resulted in Australia failing to meet its international human rights obligations. In this paper, an understanding of securitisation theory will first be established as well as the contesting security discourse of human security, which provides an alternative view to the prevailing approach. An analysis of the securitisation process in the Australian context will follow, specifically focussing on the period leading up to the 2001 federal election, as this snapshot provides a clear example of the securitisation process in practice. A particular focus on

policy and the use of language to legitimise the hardline approach is relevant here, as the securitisation process is largely based around the use of speech to construct norms, convince the audience (electorate), and justify certain actions. The concluding section will examine the manner in which these securitising policies have contributed, and continue to contribute, to Australia's failure to meet its international obligations.

Part 1

Securitisation theory

Recent theoretical and conceptual developments in areas such as human security and securitisation are particularly useful in any analysis of recent Australian policy regarding asylum seekers and, in particular, those arriving in Australia by boat.

Securitisation theory describes a process whereby an existential threat is identified and utilised to justify extraordinary measures. The term *securitisation* emerged from the Copenhagen School, which sought to explain the process in terms of language - as a speech act (Buzan et al 1998:24; McDonald 2008:566; Williams 2003:511). The main proponents of the Copenhagen School of securitisation describe the term as "the designation of an existential threat requiring emergency action or special measures and the acceptance of that designation by a significant audience" (Buzan et al 1998:27).¹ Buzan explains that there are several steps to a 'successful' process of securitisation, including

¹ Similarly, McDonald defines securitisation as "the positioning through speech acts (usually by a political leader) of a particular issue as a threat to survival, which in turn (with the consent of the relevant constituency) enables emergency measures and the suspension of 'normal politics' in dealing with that issue" (2008: 567).

identifying (and constructing) a threat, convincing an audience to accept the credibility of the threat, and the use of extraordinary measures in response to the alleged threat.

This theory is particularly useful in examining the changing policies and attitudes towards asylum seekers in Australia over the last two decades. It does not seek to provide commentary on any particular discourse relating to security or politics, rather it seeks to provide a “theoretical tool of analysis with which the analyst can trace incidences of securitisation” (Taureck 2006:55). The securitisation process has been evidenced in many policy areas, even more so since the attacks of 9/11, but none more so than that of immigration (McDonald 2008:565). This will be discussed in more detail below.

There are claims that the authors of securitisation theory oscillate from social constructivists to neo-Realists (Taureck 2006; Williams 2003). Elements of both theoretical traditions can be traced, however, it appears that securitisation theory helps to explain the construction of social norms as reinforcing a Realist, statist view of the world. The competing theories are not, therefore, necessarily mutually exclusive. The securitisation process is undoubtedly constructivist, as it “examines security practices as specific forms of social construction” (Williams 2003:514), however, in seeking to justify extraordinary measures as a result of an existential threat, it resonates to some extent with the older Realist tradition and echoes the ‘us’ and ‘them’ binarism prevalent in the work of Carl Schmitt (2003:514).

There is some criticism that the Copenhagen School's narrow focus on securitisation - in terms of language - ignores the importance of media footage, photographs and artworks. Williams argues that the increasing role of modern media and televisual communication necessitates a re-evaluation of the primacy of the speech-act in the theory posited by Buzan and Waever et al.² Images are particularly important during the part of the process where the 'securitiser' is trying to convince the audience of the alleged existential threat³. Williams, paraphrasing Risse, suggests that

Communicative action is not simply a realm of instrumental rationality and rhetorical manipulation. Communicative action involves a process of argument, the provision of reasons, [and the] presentation of evidence...[that is] a process of justification (Williams 2003:522).

It is during the "provision of reasons" and "presentation of evidence" steps that images and televisual material may be required to legitimise and justify the broader securitisation process. The Copenhagen School's definition of securitisation as a speech-act, narrowly interpreted, limits the kinds of actions that can contribute to the securitisation process. Visual material does aid this process and must therefore be incorporated into securitisation theory as a tool that will undoubtedly be utilised in any process of securitisation. Images such as photographs from the Tampa incident and television images of the 9/11 attacks were certainly utilised to gain public support for subsequent securitising policies (McDonald 2008:569). It is difficult to assess the impact of televisual material in

² Williams states, "the question of whether a theory so closely tied to speech for its explanatory and ethical position is capable of addressing the dynamics of security in a world where political communication is increasingly bound with images and in which televisual communication is an essential element of communicative action"

³ This part of the process is also discussed by Taureck. In particular, she argues that it is important to convince the relevant constituents that the threat and subsequent actions are justifiable (2006:55).

the securitisation process, however it is widely accepted as playing an important role (McDonald 2008; Williams 2003).

Buzan et al (1998:7) discuss the various sectors that may be susceptible to the securitisation process. These include military, political, societal, economic and environmental (1998:7). An examination will follow in part two, of the extent to which the Australian government has, since 2001, securitised the issue of asylum-seekers permeating the military, political and societal sectors.

Human Security

It is worth contrasting any discussion of the securitisation of asylum-seekers, which seeks to reinforce a statist approach to security, with an analysis focussing on the security of the individuals involved. In the context of asylum seekers, that includes the asylum seekers themselves and the individuals in the host country. This is a concept known as human security, and seeks to transform the perception of security as being solely in the domain of the nation-state to a broader conceptual understanding. Human security and securitisation are two contrasting theoretical areas within the broader security discourse.

The term 'human security' came into prominence as a result of the 1994 UNDP⁴ Human Development Report *New Dimensions of Human Security*. The concept is the subject of much debate as to its specific definition. Owen examines the "misguided dichotomy between broad and narrow security (2008:117). The narrow view of human security defines threats to a person's security as a

⁴ United Nations Development Project

physical (mainly violent) threat, while the broader view, such as described initially in the UNDP report lists threats to human security including “critical and pervasive environmental, economic, food, health, personal and political threats (Benedek 2008:9).

The broader view therefore does not prioritise violent threats over non-violent threats. Rather, it is, as Benedek summarises, “understood to mean the security of people against threats to human dignity” (2008:9). The transformation of the security paradigm from one that focuses on the security of the state to one that focuses on security of the individual is worthy of discussion, especially in light of the above analysis of securitisation theory. Furthermore, the emerging human security concept may go some way to explaining the very conscious securitising policies of certain nation-states, seeking to reinforce the notion of sovereignty, national identity and a statist view of security.

The concept of human security shifts the focus of security from that of the state to that of the individual (Benedek 2008:7; Owen 2008:115; ul Haq 1995:115). This was anticipated by Mahbub ul Haq⁵, as he predicted in 1995 that “security will be interpreted as: security of people, not just territory, security of individuals, not just nations” (1995:115). Although this prediction has yet to eventuate in its entirety, there is an increasing amount of material examining human security discourse. This concept potentially undermines notions of sovereignty and the role of the state in terms of security, which may limit the

⁵ Mahbub ul Haq is the founder of the UNDP Human Development Report and author of Reflection on Human Development.

potential for widespread support, however, the extent to which many issues impact across borders, such as poverty, conflict and the environment - often due to globalisation – should establish it as a relevant concept worthy of due consideration.

Human security is based on an individualistic approach to security and in its broader interpretation, is closely related to human rights and international development. These terms are occasionally used (mistakenly) interchangeably.

It is argued here that human rights and development require, as a prerequisite, human security as understood in the broader sense. Certainly several human rights such as food, health and education are also considered essential for human security, however not all human rights, if afforded, would necessarily prevent insecurity. Moreover, human development requires basic human security and human rights as a precondition, as many aspects of development are not seen as vital to survival, but rather to the improvement in quality of life. If the human security framework was utilised in the Australian Government's response to the asylum seeker issue, the human rights and needs of both the asylum seeker and the host population would be taken into account in developing a durable solution. Evidently this is not the case, as the response to the asylum seeker issue is a prime example of securitisation theory in practice, as will be discussed in part two.

In the Australian context, McDonald argues that the Howard Government “has represented, and attempted to construct support for, a statist, exclusionary and

militaristic conception or discourse of security” (2005:297). The Australian government’s response to the asylum-seeker issue is evidence of this approach, as it has been aimed at preserving the state - and the interests of the state - rather than the people in it. The Australian Government exaggerated the apparent threat posed to Australia by asylum seekers, emphasising the need for security *against* outsiders, not *for* them, to justify the use of military and other extraordinary measures in response.

Part 2

Asylum seekers in Australia - a brief history

Australia has traditionally been a nation willing to accept refugees in a tolerant and compassionate manner, for example post World War Two and after the Vietnam War (Clyne 2005:174; Schloenhardt 2002:55). Australia is also a signatory to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol. This convention bestows certain obligations on Australia in terms of their treatment of people seeking asylum in this country. In the last two decades, however, with an increase in asylum seekers arriving by boat, the Australian Government has introduced more restrictive and harsh conditions in aiming to deter these arrivals (Clyne 2005:174; Every & Augoustinos 2007:416; Scloenhardt 2002:54,58).

Stricter measures include the introduction in 1992 of mandatory detention for all asylum seekers arriving in Australia without a valid visa (Clyne 2005:174) and the establishment of the temporary protection visas which denied permanent residency to accepted refugees as well as several other rights

(Schloenhardt 2002:59). In particular, there is much literature examining the methods by which the Howard Government perpetuated the process of securitisation of the asylum seeker issue through a discourse founded on exclusion and ambiguity, as well as successfully relating the September 11 attacks and subsequent 'war on terror' with the asylum seeker issue in Australia (Clyne 2005; Every & Augoustinos 2008; Gale 2004; Mares 2002; Schloenhardt 2002; Welch 2004). The policies contributing to this securitisation process were politically very successful as it is widely accepted that they directly influenced the re-election of the Howard Government in the November 2001 election (Clyne 2005:174; Gale 2004: 321-322; Mares 2002:71).

This section will examine the way in which the Australian Government used exclusionary language and blurred the various asylum seeker debates into a binary, 'us' and 'them', discourse to justify the extraordinary measures introduced relating to asylum seekers. It will then describe the extent to which the Howard Government successfully merged the threat of terrorism with the threat of asylum seekers arriving by boat through the rhetoric of national security and militarisation of the asylum seeker issue. It will be argued that these policies contributed to the securitisation of asylum seekers in the Australian context, and were cynically exploited for political gain by the Howard Government.

Exclusionary language used to justify policy response

Despite the introduction of 'Immigration Reception and Processing Centres' (that is, detention centres) in 1992 under a Labor Government led by Paul Keating, it

is widely accepted that the significant shift in representing asylum seekers as a threat to Australia was perpetuated by the Howard Government (Clyne 2005:176; Every & Augoustinos 2007:411; McDonald 2005:303,305). This shift was characterised by a constructed fear of 'the other' (Clyne 2005:177,179; Gale 2004:322) and "anxiety about Islamic terrorism" (Every & Augoustinos 2008:564). These social constructions are prime examples of the securitisation process relating to the asylum seeker issue in Australia. In this section, the use of rhetoric and language, as well as specific policy initiatives, will be analysed in order to better understand the securitisation of asylum seekers arriving in Australia by boat, particularly from mid-2001 onwards.

It has been posited that exclusionary language, that is, language which purports to legitimate the construction and fear of 'the other', utilised so effectively by John Howard, was largely caused by the influence of Pauline Hanson in Australian politics throughout the late 1990s (Clyne 2005:177; Gale 2004:334). The revival of the asylum seeker debate was partly due to the increase in boat arrivals from 1999 (Schloenhardt 2002:58), and the exclusionary language surrounding the issue was also occurring in similar liberal Western democracies throughout the 1990s (Clyne 2005:175). However, the relatively small number of boat arrivals does not adequately explain why "the level of anxiety attached to the issue is totally out of proportion with the actual 'threat' posed by unauthorised migration" (Mares 2002:71).

The opportunity for many of the 'securitising' policies introduced by the Howard Government came with the rescue by the MV Tampa of 438 asylum seekers from

a sinking boat off the coast of Western Australia. This was followed two weeks later by the September 11 attacks and subsequently the 'children overboard' affair.⁶ These events provided the opportunity for Howard to revive his faltering popularity by asserting himself as a strong leader in a time of "national threat" (Clyne 2005:181). The use of the asylum seeker "threat" for political advantage will be examined more closely below.

The Tampa incident signalled a change in the Government's approach to asylum seekers arriving by boat in Australia. The Government refused to allow the Norwegian freighter, which had rescued 438 people, permission to land in Australian territory. Howard demanded that the Tampa either take the asylum seekers back to Indonesia or all the way back to Norway. Despite the fact that the Tampa was ill-equipped to transport so many people, the Australian Government refused to give any ground. This policy to refuse the Tampa permission to land displayed the Howard Government's determination to implement increasingly severe measures to curb the arrival of boats carrying asylum seekers. It also perpetuated the 'us' and 'them' discourse, which, as discussed earlier, had not been discouraged over the previous decade, in the media and also notably in Parliament. The Howard Government proposed a Border Protection Bill in 2001 which sought to allow Australian authorities, including members of the Australian Defence Force, to direct a ship in Australian territorial waters to leave, and if necessary, to detain the ship and force it to exit Australian waters.

⁶ The 'Children Overboard' affair consisted of allegations by John Howard, Defence Minister Peter Reith, and the Immigration Minister Phillip Ruddock, that asylum seekers on board the sinking boat, the Olong, were throwing their children overboard, risking their children's lives in order to blackmail the government into letting them stay. The allegations were doubtful at the time they were made and were later proven to be false (Gale 2004:332).

The Bill also proposed that no directions given in relation to this legislation would be reviewable in any Australian court. These extraordinary measures would enable an increased executive power to refuse boats entry to Australia. This serves to represent asylum seekers as in some way a threat to the security and sovereignty of Australia, and, as will be discussed later, is potentially contrary to Australia's obligations under the 1951 Convention Relating to the Status of Refugees. The Bill allowing the removal of boats from Australian waters was defeated in the Senate (Mathew 2002:661), however many other 'securitising' policies were enacted at this time including the Excision Act⁷ and the Consequential Provisions Act.⁸

As previously mentioned, the influence of Pauline Hanson should not be underestimated in the asylum debate. The persistent claim by Howard during the 2001 election campaign, that "We decide who comes to this country and the circumstances in which they come" (quoted in Gale 2004:335) echoed earlier similar sentiments from Hanson (Clyne 2005:177). The use of exclusionary language was particularly evident in the wake of the 'children overboard' controversy. Amidst this controversy Howard, Defence Minister Peter Reith and Immigration Minister Phillip Ruddock launched an attack on the lack of values of these asylum seekers. Ruddock claimed that it was a "clearly planned and premeditated" (Mares 2002:72) attempt to gain access to Australia, while Howard stated: "I don't want in this country people who are prepared...to throw

⁷ *Migration Amendment (Excision from Migration Zone) Act 2001* removes territories from the Australian migration zone, including Christmas, Cocos, Ashmore and Cartier islands.

⁸ *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* establishes new classes of visas that aim to encourage people to apply for asylum from outside Australia.

their own children overboard” (Gale 2004:332). The language used here sought to strengthen the perception that these people were different, ‘alien’ and held values antithetical to that of most Australians.

This construction of an ‘us’ and ‘them’ paradigm was also conspicuous in the emerging use of the term ‘queue jumper’ to describe asylum seekers arriving by boat. This term was used effectively to portray the asylum seeker not as a person fleeing persecution, but as a person who had skipped ahead of the queue, unfairly, in order to gain asylum in Australia. This was paralleled by the increasing use of the terms ‘illegal immigrants’ and ‘unlawful arrivals’, which aimed at repositioning the asylum seeker as the threat, rather than the threatened. The ‘queue jumper’ rhetoric was used to demonise the asylum seekers arriving by boat by claiming that they were unfairly jumping the queue ahead of those that were waiting patiently in refugee camps for resettlement (Every & Augoustinos 2007:413). This was used to justify the hardline stance taken by the Howard Government. As Gale states: “This representational theme seeks to reconcile the apparent incompatibility of Australia being a compassionate nation and the policy of mandatory detention of asylum seekers, including children” (2004:330).

Simultaneous to the branding of asylum seekers as being ‘illegals’ and ‘cheats’, was the confusion of terms by both the media and politicians alike (O’Doherty & Lecouteur 2007:5). Mares notes,

The failure to distinguish between asylum seekers, refugees, and unauthorised migrants means that all are brushed with the same tar of distrust and illegitimacy and ultimately results in patently nonsensical constructions such as 'illegal asylum seekers' and even 'illegal refugees' (2002:73).

This 'blurring' of terms for different groups of people contributed to the broader binary paradigm discussed above as it sought to create a perception of an homogenous 'other' group, antithetical to 'us'. Attempts to mix terms were also a key feature of the conspicuous efforts to link the asylum seeker issue with the September 11 attacks and the subsequent 'war on terror'.

Linking September 11 attacks, war on terror and boat arrivals

The attacks on September 11, 2001 provided the opportunity for the Howard Government to introduce and justify their 'tough' policy response to asylum seekers arriving by boats (Clyne 2005:185; Every & Augoustinos 2008:576; Mathews 2002:661; McDonald 2005:305; Welch 2004:125). This was largely achieved by constructing a link between the terrorists committing the September 11 attacks and the people arriving here by boat. The connection by the Howard Government was made swiftly and unapologetically. Within 48 hours of the attacks the Defence Minister Peter Reith stated that boat arrivals carrying asylum seekers "can be a pipeline for terrorists to come in and use your country as a staging post for terrorist activities"(Mares 2002:71).

The Howard Government explicitly sought to create the perception that asylum seekers were a security threat by linking them to the September 11 attacks. This is a prime example of the efforts to 'securitise' the issue of asylum seekers in order to justify extraordinary measures of mandatory detention, offshore

processing and temporary protection visas⁹. On the 26th and 27th September 2001, the Howard Government introduced 7 bills relating to asylum seekers. Many of these contributed to the securitisation of asylum seekers arriving by boat in Australia, in particular, the bills that sought to allow Australian authorities to board vessels and return them to sea if necessary, as well as the stricter measures permitted by the Minister relating to persons arriving with inadequate identity papers (Every & Augoustinos 2007:417; Mathews 2002:663-664). These policies contributed to the securitisation of asylum seekers arriving by boat and also to electoral success for Howard.

Indeed linking the September 11 attacks with border security, national security and boat arrivals was used to gain political advantage, as can be witnessed by the trends in the polls in Table 1 (page 28). Howard's campaign for the November 2001 election ensured that "the refugee 'crisis' was closely linked with the 'war on terror' following September 11" (Gale 2004:330). In the opening speech of his election campaign, Howard explicitly linked the September 11 attacks, border security, and refugees before reiterating his infamous catchcry "We will decide who comes to this country and the circumstances in which they come" (Howard 2001). In addition, only days before the election Howard was quoted in the Courier Mail stating that you "don't know who is coming and you don't know whether they do have terrorist links or not..." (Mares 2002:71). The conscious linking of asylum seekers and terrorists was accompanied by language that perpetuated the fears and anxiety about the unknown. It is particularly evident

⁹ Other measures introduced over these two days included, removed the right of appeal to the federal court, excised islands from Australia's migration zone,, and redefined persecution more narrowly (Every & Augoustinos 2007:417; Mathews 2002:663-664).

in that example when he stated, you “don’t know who is coming”, which can only seek to reinforce the fear of ‘the other’ as discussed in the previous section.

Exaggerating this fear was all part of the securitisation process, as the Howard Government successfully convinced the Australian public that their policies and extraordinary measures were justified, indeed necessary, to counter the threat posed to Australia by asylum seekers arriving by boat.

By intertwining the issues of asylum seekers with terrorism, the Howard Government was able to evoke national security and the security of individual Australians in designing policy around the asylum seeker issue. As Clyne states,

“The government has skilfully used language to project asylum seekers as unlawful and unlike ‘nice refugees’, violent and criminal with links to terrorism and drug trafficking, unfair to others, and a threat to the Australian nation” (Clyne 2005:186).

The successfully constructed threat of asylum seekers as potential terrorists allowed the government to deploy the military to combat this perceived threat. The use of the Special Air Services to deny the MV Tampa permission to land at Christmas Island and the subsequent use of the Navy to take the Olong boat back towards Indonesia, undoubtedly extraordinary measures, also served to propel the constructed perception of a threat (Every & Augoustinos 2007:417; Mares 2002:72).

Howard certainly appreciated the value and apparent saliency of presenting asylum seekers arriving by boat as potential terrorists to the electorate as it was

a major component of his success in the federal election in November 2001. The explicit link and its importance was also evidenced in a letter to voters prior to the election, as he wrote, “the tragic events of 11 September and the challenges to the integrity of our borders will require more resources – and stronger decisions” (Clyne 2005:186). The Howard Government successfully merged the threat of terrorism with that of asylum seekers arriving by boat; this was achieved largely through language and baseless rhetoric, however was evidently cogent enough to convince the majority of Australians of its validity and thus justify a hardline response. This is a prime example of the securitisation of the asylum seeker issue by the Howard Government.

Many commentators believe Howard exploited the events of these few weeks relating to asylum seekers for political advantage (Clyne 2005:174; Gale 2004: 321-324; Mares 2002:71-72; McDonald 2005:307). It is difficult to ascertain if the response to the asylum seeker issue and the link to terrorism was the sole reason for Howard’s jump in the polls, however it is worth noting that the Howard Government had been behind in the polls since January 2001, with support dropping to a low of 32.5 per cent in March. In mid October 2001, immediately following the ‘children overboard’ affair, the Howard Government was leading the ALP in the polls 49.5%-35%, a dramatic turnaround indeed. The negative ‘securitising’ rhetoric and policy was accompanied by a conscious branding of critics of the Howard Government’s policies on asylum seekers as ‘un-Australian’ or somehow sympathetic to the plight of terrorists. This was designed to marginalise the voices of any opposition and create the perception

that they are not concerned with the security of the country (McDonald 2005:307).

The dramatic increase in support for Howard in such a short period of time following the Tampa, September 11 and children overboard events would indicate that the fear of this constructed threat played an enormous role in his re-election in November 2001.

Part 3

Impact of securitising policies on Australia's international human rights obligations

The final section of this paper will endeavour to unpack the impact that the policies leading to the securitisation of asylum seekers have also had in undermining Australia's human rights obligations. The socio-political construction representing asylum seekers, particularly those arriving by boat, as a threat to Australian national security, was developed through exclusionary rhetoric from both political and media sources, as well as associated policy and legislative initiatives. In the weeks following the Tampa incident and September 11 attacks, for example, seven pieces of legislation were enacted relating to asylum seekers. Persons arriving by boat during this time were to become the first of many to face the predicament of being granted refugee status by the Australian Government on the one hand, and receiving an adverse security assessment from the Australian Security Intelligence Organisation (ASIO) leading to uncertain futures, on the other. This issue has become particularly salient in

recent years with the increase in arrivals, particularly from LTTE (Tamil) controlled areas of Sri Lanka, some of whom face potentially indefinite detention.

There is evidence to suggest that the examples mentioned above may demonstrate the deficiencies in Australian domestic law, in terms of the implementation of its obligations under certain international treaties to which it is a party. In particular, this section will examine the notion of non-discrimination in differentiating between 'unlawful non-citizens' and 'lawful non-citizens', as well as the rights of asylum seekers to natural justice. It will be argued that particular rights of asylum seekers pertaining to these areas have been diminished as a result of the process that has also led to the securitisation of this issue. Furthermore, some aspects of mandatory detention may amount to arbitrary detention, which is prohibited under international human rights law, and the recent bilateral agreement with Malaysia may undermine Australia's responsibilities of *non-refoulement*.

Article 3 of the 1951 Convention Relating to the Status of Refugees (hereafter the Refugee Convention) entitled 'Non-discrimination', states that "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion, or country of origin" (Refugee Convention 1951:19). In 2001, there were no Australian embassies in Afghanistan, Iraq, Iran and Palestine (Clyne 2005:185). People seeking asylum in Australia would therefore be unable to obtain a valid visa prior to arrival in Australia. Australia's policy of mandatory detention for all 'unlawful non-citizens', that is, people who are not Australian citizens and who are in Australia without a valid visa, arguably

discriminates, however indirectly, against people seeking asylum from these particular states. The fact that these embassies did not exist also undermines the notion that these asylum seekers are in some way 'queue jumpers' by not going through the 'proper' channels, as they do not have access to proper channels.

Furthermore, Article 31 of the Refugee Convention stipulates that a refugee shall not be penalised "on account of their illegal entry or presence...provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence" (1951:31). Australia's policy requires the mandatory detention of all irregular maritime arrivals (IMAs), however this is not the case for 'lawful non-citizens', that is, people who are not Australian citizens but arrive in Australia with a valid visa and then seek asylum. These people are entitled to bridging visas, which enable them to stay in the community while their claims for asylum are being processed (O'Doherty & Lecouteur 2007:3). This demonstrates a clear violation of Article 31, as prolonged detention undoubtedly constitutes penalisation on the basis of the mode of arrival.

The fact that only asylum seekers arriving by boat are mandatorily detained prior to receiving a protection visa and other asylum seekers are not, demonstrates the inherent irrationality in the policies leading to the securitisation of the former group of people. Asylum seekers that have arrived here with a valid visa and subsequently apply for a protection visa are permitted to stay in the community even while their security checks are completed. It is difficult to ascertain why these people are not deemed such a threat to the

security and sovereignty of Australia as those arriving by boat. This is especially interesting considering that many more people that seek asylum in Australia arrive by plane than by boat, and they are also far less likely to be granted refugee status (Mares 2002:74). As Mares states, “the issue is framed almost entirely by the way in which a person came to Australia and not by the validity of their claims to protection” (2002:74). According to the Department of Immigration and Citizenship (DIAC) in the first six months of 2010, over 3000 people applied for protection visas who had not arrived by boat compared with fewer than 800 who arrived by boat (DIAC 2011:7).

Article 3, which aims to ensure refugees are not faced with discrimination is, admittedly, limited in scope. It lists the grounds on which discrimination is not permitted, including “race, religion and country of origin”. Despite this limited scope, the vast array of international human rights treaties that include principles of non-discrimination, such as the UDHR, ICCPR, ICERD, CRC and the ICESCR,¹⁰ substantially extend the guarantees against discrimination that are articulated in the Refugee Convention.

Certainly, there are many international and regional provisions prohibiting discrimination in regard to the protection of the law. Article 7 of the UDHR states that, “All are equal before the law and are entitled without any discrimination to equal protection of the law” (UDHR). Subsequent treaties seek to create legally binding provisions prohibiting discrimination in terms of protection of the law,

¹⁰ Universal Declaration of Human Rights, International Convention on Civil and Political Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Rights of the Child and the International Convention on Economic, Social and Cultural Rights.

including Article 26 of the ICCPR, Article 2(1) of the CRC and Article 5 of the ICERD. In particular, the ICCPR and CRC specifically state that “birth or other status” shall not be grounds for discrimination. Denying a person their human rights based on their mode of arrival is therefore arguably discriminatory, according to several points of international law.

In the case of access to courts and equality before the law, the tension between the human security and human rights of individual asylum seekers compared to the national security and sovereign rights of the state has been evidenced and highlighted in recent years.

Article 16 of the Refugee Convention states that refugees “shall have free access to the courts of law”(16(1)), and “shall enjoy...the same treatment as a national in matters pertaining to access to the Courts...”(16(2)). This is not the case for individuals who receive adverse security assessments. Every IMA and every refugee is the subject of a security assessment by ASIO before he/she is to be granted a protection visa. The avenues for review of an adverse security assessment are different for citizens and ‘unlawful non-citizens’. Australian citizens who receive an adverse assessment are able to seek a merits review with the Security Appeals Division of the Administrative Appeals Tribunal. Asylum seekers, however, even those already granted refugee status, are unable to seek this review under s36(b)(ii) of the ASIO Act 1979 (Cth).

Review rights have also been undermined by several legislative amendments in 2001 in the weeks following the Tampa incident and September 11 attacks.

These include the Migration Legislation Amendment (Judicial Review) Act 2001, which, among other things strengthens the protection of privative clause decisions from judicial scrutiny. This is an example of a broader trend where Governments seek to use administrative decisions in counter terrorism measures instead of taking traditional judicial avenues. This trend was noted by Rimmer, who posits:

The subject is ripe for critical assessment because of the temptation seen around the globe for the executive to use immigration law as a tool to combat suspected terrorism instead of ordinary criminal justice framework, especially administrative detention and deportation (2008:102).

This shift is indicative of the process of securitisation as discussed previously, as it supposedly supports the assertion of the importance of sovereignty and aims to justify extraordinary measures implemented by the executive.

A brief comparison of the use of 'national security' in immigration cases that do make it to the courts is useful in examining Australia's obligations in balancing the rights of the state with the rights of the individual. This tension was highlighted in various cases in New Zealand¹¹, Canada¹² and the United Kingdom¹³ over the last 15 years. These cases threatened internationally accepted and common law norms of natural justice and procedural fairness. These cases demonstrated the willingness of the executive to use immigration law and the defence of 'national security' in order to detain or deport individuals seeking asylum. In these cases, the executive (usually the Minister responsible

¹¹ Zaoui v Attorney-General (No 2) [2006] 1 NZLR 289.

¹² Charkaoui v Canada (Minister for Citizenship and Immigration) [2007].

¹³ Chahal v United Kingdom (1996) (European Court of Human Rights).

for immigration) exercised their discretion to issue orders denying asylum seekers an effective legal remedy to any adverse administrative decisions affecting them. This could be done by denying the affected person access to the case against them, and furthermore, by excluding them from being present at any hearing in matters that may affect them if the Minister deemed it in the national interest.

Without hearing the case against you, it is impossible to adequately defend yourself. One's right to hear the charge brought against them is a basic tenet of common law and is recognised in international law, particularly in Article 14 of the ICCPR. The United Kingdom, Canada and New Zealand have all established a role for Special Advocates, that is, a security-cleared lawyer who may represent a client excluded from a national security related hearing in which the government leads secret information. Although there are still criticisms about the effectiveness of this mechanism¹⁴, it seems that it can only serve to mitigate the lack of procedural fairness in these cases.

As of February 2011 there were 13 people being kept in detention that have been granted refugee status by DIAC but subsequently received adverse security assessments and were therefore denied a protection visa (Cannane 02.02.11). For these people, there is limited scope for redress. It is not required that individuals who receive adverse security assessments are told the reasons for the assessment, known as the statement of grounds. Australia cannot return

¹⁴ For example, the Special Advocate is unable to communicate with their client after receiving any classified information, and there is no guarantee that all of the relevant information will be provided.

these people to their country of origin as they have established that they have a genuine fear of persecution should they return (principle of *non-refoulement*), but they cannot be released from detention without being granted a protection visa, which they cannot receive if they receive an adverse assessment (Criterion 4002 of the Migration Act 1958). This predicament is not new. Indeed several persons who arrived by boat in 2001 and were transferred to Nauru as part of the 'Pacific solution' were deemed security risks by ASIO and were kept in detention for many years.

There is no clear solution for people caught in this bind. In the past, people originally denied protection visas based on an adverse security assessment have either been resettled in a third country¹⁵ or have subsequently been reassessed as no longer a security risk¹⁶. The group of people who are currently in this position in Australian detention centres therefore face indefinite detention unless they commit to voluntary repatriation, which, having established that they have a legitimate fear of persecution, is undesirable and ultimately unlikely.

The policy of mandatory detention has come under much international scrutiny in recent years. Indeed it was a major source of criticism by many countries in Australia's Universal Periodic Review (UPR) in February 2011. Aside from the ethical issues involved with mandatory detention policy, it also potentially constitutes arbitrary detention, as each individual is not assessed as to the

¹⁵ Such as Mohammed Sagar from Iraq, who was detained from 2001 to 2007 before being resettled in Sweden. Sweden did not deem Sagar a risk to security at all.

¹⁶ Such as Mohammed Faisal from Iraq who was detained from 2001 to 2006 until he was reassessed and "without explanation, the threat to national security had seemingly vanished" (O'Shea 2011).

merits of their detention. The right not to be arbitrarily arrested or detained is enshrined in Article 9(1) of the ICCPR. As recently as May 23 2011 the High Commissioner for Human Rights, Navi Pillay, stated “when detention is mandatory and does not take into account individual circumstances, it can be considered arbitrary and therefore in breach of international law” (quoted in Thompson 24.05.11). Moreover, if a person is detained under the Migration Act, their release cannot be granted by a court, unless for purposes of deportation or if the person has been granted a visa (Migration Act s196(3) 1958). This appears to directly contravene ICCPR Article 9(4), which states that,

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

The Human Rights Committee supported the view that Australia was perhaps violating the human rights of asylum seekers in detention when they noted that,

It is not enough that detention is merely compliant with domestic law [but requires substantive review procedures and]...Australian courts do not have this power of substantive review and release (Human Rights Committee 2004).

It is clear that there are several tensions between Australian policy relating to asylum seekers and the international obligations it has signed and to which it has agreed. Obligations relating to non-discrimination, equal access to the courts, non-penalisation based on mode of arrival, and mandatory detention, to name the most conspicuous examples, indicate that Australia is in breach of some of its international human rights obligations.

Conclusion

It has been argued that securitisation theory provides the necessary framework for examining the processes and policies relating to asylum seekers, particularly in the last decade. A human security approach is inadequate as the security of the asylum seekers is continuously neglected in favour of the security of the host population. If a human security approach were to be utilised, perhaps a more durable and human response would occur, with Australia more able to uphold its human rights obligations. As evidenced above, the Howard Government intentionally constructed the concept of the asylum seeker arriving by boat as being a threat to the Australian people, their way of life, and their sovereignty. This was done through the persistent use of exclusionary language and the exploitation of the fear of 'the other'. It was perpetuated by the constant linking of asylum seekers arriving by boat with the September 11 attacks and Islamic terrorism and resulted in tremendous political advantage, whether this was the prime motive or not. The important role that politicians have played in constructing the threat was noted by Navi Pillay, the High Commissioner for Human Rights, as she stated, "I urge the leaders of all Australia's political parties...to break this ingrained political habit of demonising asylum seekers" (quoted in Thompson 24.05.11). Several policies initiated through this securitisation process have created some controversy over Australia's potential violation of asylum seekers' human rights. Particularly, the excising of territories to diminish the rights of arrivals due to "offshore" processing, which limits access to courts and right of review, as well as the legislation that enabled the government to refuse access to boats and to tow them back to sea, have been areas of concern. The policy of mandatory detention has been used to help

present asylum seekers as a security threat and suggests they need to be segregated from the rest of society. It has also come under scrutiny from the international community for being both arbitrary and inhumane.

It is clear that the socio-political securitisation of asylum seekers arriving by boat has enabled successive governments to implement and justify disproportionately harsh policies. It has been used to gain political advantage and has arguably led to the failure of Australia to meet several of its international human rights obligations.

Appendix

Table 1: Key Events

1992	Detention centres established by the Labor Party under Keating.
1999	Rise in numbers arriving by boat.
Aug 26th 2001	Roy Morgan poll*: ALP 43.5 Coalition 37.5
Aug 26th 2001	MV Tampa rescues 438 people from a sinking boat.
Sept 2nd 2001	Roy Morgan poll*: Coalition 42 ALP 39
Sept 11 2001	Attacks in the US.
Sept 26th 2001	Howard Government introduces 7 bills relating to asylum seekers over a two-day period.
Early Oct 2001	Children overboard affair
Oct 13th 2001	Roy Morgan poll*: Coalition 49.5 ALP 35

Nov 10 2001	Howard gets re-elected.
January 2011	Universal Periodic Review of Australia
January 2011	Approximately 900 people in detention centres who have been deemed genuine refugees but are awaiting their ASIO security assessment before they can be granted a visa.
February 4 2011	<ul style="list-style-type: none"> - Total number of asylum seekers in detention = 6659. - Over 50% of these people have been in detention for longer than 6 months. - 25 of these people have been in detention for more than 2 years.

*source: Roy Morgan polls <http://www.roymorgan.com/news/polls/Trends.cfm>.

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