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FEAR AND LOATHING: THE THREAT OF ASYLUM SEEKERS AND TERRORISM

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‘You don’t know who’s coming, and you don’t know whether they do have terrorist links or not.’

Perhaps — but think about it! You probably don’t know who’s living down the street from you, or whether they have terrorist links or not. As human beings, asylum seekers are pretty much the same as existing citizens and residents of the country. Refugees arriving by boat are not much different from other refugees — such as those who arrive by plane — but the statement by former Prime Minister John Howard was only directed at so-called ‘boat people’. Evidence suggests that the idea that asylum seekers arriving by boat might be terrorists is no more likely than that the person down the street might be a terrorist.

Yet John Howard’s line implies that particular classes of refugees are inherently dangerous, and that there are definite links between refugees and terrorists.

Worries about security continue to linger in Australia’s
collective thinking on asylum seekers. In the final days of the 2001 election campaign, John Howard uttered a simple, yet layered statement; the apparent intent and/or effect – then and now – is to suggest that asylum seekers may be a real threat. It insinuates that we do not and cannot know who or what types of people come here to seek refuge, and that we therefore should fear this group of people.

Since 2001, the link between so-called ‘boat people’ and terrorism has come to take on a broader meaning within Australian political discourse. The imperative to ‘stop the boats’ continues as a constant in the political arena, almost a decade after Howard first spoke the words quoted above. In the 2010 federal election, Opposition Leader Tony Abbott’s line was ‘We’ll stand up for Australia. We’ll stand up for real action. We’ll end the waste, repay the debt, stop the new taxes and stop the boats.’ It continues to be implied that we must stop the boats for our own safety. Although direct references to ‘terrorists’ seem to have disappeared, continuing rhetoric against asylum seekers, from both the government and the opposition, presents a thin veneer over the continuing undercurrent of claims about threats to security and community safety.

The phony ‘threat’

This chapter will debunk the myth that asylum seekers represent a particular kind of threat to national security, and that harsh measures are required to discourage them from travelling to Australia in order to reduce the threat of terrorism. The truth is that Australia already has in place a robust set of laws to deal with any asylum seeker who might turn out to represent a threat to the community. It is also the case that Australia’s legal and administrative actions against asylum seekers since 2001 are, at best, questionable with regard to our obligations under the 1951 Refugee Convention and other international laws. In short, the alleged threat to national security has been overstated and owes more to political imperatives than to a careful analysis of the facts – even though the latter is said to form the foundation of good intelligence work. At the same time, the ‘tough on refugees’ policies promulgated by both sides of the political spectrum have effectively denied and negated the humanitarian principles that underlie the Refugee Convention.

Threat or no threat?

The overwhelming majority of asylum seekers represent no threat at all. And in the rare instances in which Australia’s security agency ASIO has deemed an asylum seeker to warrant an ‘adverse’ security assessment, genuine concerns remain about legality and procedural fairness. This relates to the manner in which decisions are made and the inability of the person concerned to either know or to challenge the evidence against them. Many of those who are detained, either as security threats or in the ordinary course of processing and admission, experience anxiety and depression in detention. Prolonged detention is part and parcel of the harsh treatment meted out by government. Yet it is evident that detention only adds to the mental distress and health problems faced by asylum seekers. It undermines a person’s ability to fit in and to integrate into the community when they are eventually released from detention.

Yet the threat narrative has a recognised political value. Recent political history has shown that the Howard government used it to great effect. By and large, the Coalition has carried on
this approach in opposition. In early 2013, the Shadow Minister for Immigration, Scott Morrison, responded to an incident in which a man on a protection visa allegedly indecently assaulted a female student in her dormitory. Morrison suggested that local residents should be informed when asylum seekers moved into their area. This was a response out of all proportion to the alleged act, when placed in context. Since November 2011 there have been 12 100 asylum seekers released into the community, of whom fewer than five have been accused of a serious offence—a rate of criminality that is 45 times less than that of the general Australian population.

Justifying harsh treatment

The viability of the threat narrative depends upon the existence of a cultural undercurrent of hostility to migrants and a lack of understanding in the community as to drivers of the asylum seeker phenomenon. Since 2008, approximately 30 000 asylum seekers have arrived in Australia seeking protection. The obvious question is: what could drive so many people to flee their home countries, to transit through other countries and to arrive in a place like Australia in order to seek long-term protection? The answer to that question lies within the debate over ‘push’ and ‘pull’ factors in asylum seeker policy. When the Howard government left office in November 2007 the number of boat arrivals coming into Australia had fallen to negligible levels. There were in fact just 110 boat arrivals in 2007.

Yet the spectre of boat arrivals between 2008 and 2012 has raised a perception in some quarters of the community that the Rudd and Gillard governments have been weak on border protection. Boat arrivals, officially referred to as ‘irregular maritime arrivals’, surged after late 2008. Many of the new arrivals have come from Afghanistan, Iraq, Sri Lanka and Iran. The acceptance rates for asylum seekers who enter Australia as irregular maritime arrivals are overwhelmingly high. For example, the Department of Immigration and Citizenship (DIAC) reported that in the 2010–2011 financial year some 90 per cent of Sri Lankan asylum seekers were granted protection visas. Similarly, 92 per cent of Iraqi and 94 per cent of Afghan asylum seekers were successful in gaining a visa. Asylum seekers also arrive in Australia by plane; this mode of entry has historically accounted for between 96 and 99 per cent of asylum applications, and even under the present circumstances, where boat arrivals have increased dramatically, only about half of all onshore asylum applications come from people who have arrived by boat. The acceptance rate for visa applicants who arrive by plane and seek protection is significantly lower than for those who arrive by boat.

Taken at face value, it is a logical proposition that lax immigration laws will act as an enticement to asylum seekers in an environment where the movement of people is globalised and where smuggling networks exist. That said, as the number of asylum seekers rose in 2009 the Rudd government responded with increasingly harsh measures. In early 2010 the Rudd government announced a processing freeze on Tamil and Afghan refugees. Similarly, more people were placed in immigration detention under Australia’s mandatory detention scheme. The notion that Rudd, and later Gillard, were ‘soft’ on asylum seekers is plainly incorrect. Prime Minister Julia Gillard herself has stated that conditions for asylum seekers in Australia are deliberately harsh. Ms Gillard said:
That’s why people aren’t able to work, and people are given the most basic of benefits – absolutely the most basic of benefits – the lowest benefit available in our social security system. And that, too, is done deliberately because we don’t want the degree of support to in any way be used by a people smuggler to spruik the benefits of getting on a boat.21

More importantly, the emphasis on ‘pull’ factors understates the importance of ‘push’ factors. The ‘push’ factor of ongoing violence and repression is one of the most important reasons driving people to seek asylum overseas. If we take Sri Lanka, Afghanistan and Iraq as examples, it is evident that the ongoing conflicts within these countries have forced – and will continue to force – people to flee for their own safety and security. Rising levels of violence in these countries coincide directly with the uptake of asylum applications in Australia.

Strangely, throughout this period, the fact that the Afghan asylum seekers were fleeing the very regime that Australia and the United States were then fighting in Afghanistan – and other war-torn and violence-riddled regimes – seemed to have been ignored in the conversation.

The political narrative: ‘We will decide’

The rise of Pauline Hanson in the late 1990s cut into the voting base of the Liberal Party. Her One Nation party campaigned heavily against boat people ‘coming in their thousands’, branding them as ‘queue jumpers’ and calling for the boats to ‘be sent packing’.22 At the time, the Liberal Party could not rely on One Nation preferences flowing to them and John Howard realised he needed to win back the primary votes he had lost to One Nation supporters.

John Howard had personally experienced (in Washington DC) the effects of 9/11, as he was in the United States at the time. It is understandable that the imagery of that day was burned into the consciousness of many Australians. A direct political link to Australia came in the form of comments by Peter Reith (the then Defence Minister) just 48 hours after the incident. He warned that unauthorised boat arrivals to Australia could be a ‘pipeline for terrorists’.23 This political turning point for the Howard government pivoted around the now infamous Tampa incident, in which Australia refused permission to enter Australian waters to a Norwegian commercial ship carrying refugees it had rescued at sea.

The MV Tampa incident

Much has been written about the August 2001 incident involving 433 asylum seekers rescued from their sinking wooden vessel by the Norwegian container ship MV Tampa.24 It might have been expected that the captain of the Tampa would be lauded for an act consistent with maritime law ‘rescue at sea’ responsibilities and reflecting humanitarian concern. But, in an unexpected turn of events, the Norwegian vessel, the parent company and the Norwegian government found themselves locked in a battle with the Australian prime minister, who was in the midst of the run-up to a federal election that was being fought on platforms of border security and refugees (themes which had assumed prominence given post-9/11 concerns around terrorism).

Responding to calls on 26 August for assistance from Australian search and rescue authorities, the captain of the Tampa
diverted his ship to pick up the refugees from their disabled and overcrowded vessel. He then sought medical and urgent assistance from Australia, as many of the passengers were unwell, including two pregnant women, 43 children, a number of barely conscious adults, and a man with a broken leg. Over the course of the next few days many of the refugees became very ill. A humanitarian crisis quickly enveloped the captain and crew of the *Tampa*, which, as a container ship, was unable to cope with the huge number of passengers.

The *Tampa* sought permission from the Australian government to unload the refugees at Christmas Island. The Australian government argued that the rescued asylum seekers were the responsibility of Norway or Indonesia and denied permission to enter Australian waters. An instruction was issued to the captain to take the refugees to a port in Indonesia. The captain insisted it wasn’t safe to travel back to Indonesia and, indeed, when he turned the vessel around to attempt to do so, many of the passengers became angry and unsettled and he feared for the safety of his ship and crew. The *Tampa* repeatedly sent messages to the Australian government regarding the deteriorating health of the passengers (the Royal Flying Doctor Service was prevented by the Australian government from providing direct medical assistance). The crisis escalated to a conclusion at the three-day point in the standoff when the ship sent a ‘mayday’ message and headed for the Christmas Island port, despite the closure of the port and the Australian warning to stay outside the 12-nautical-mile exclusion zone. The captain took this action on the basis that he had passengers requiring urgent medical assistance.

The response from Australia was swift and militaristic. After entering Australia’s territorial waters the *Tampa* was boarded by 45 members of the SAS. They demanded that the *Tampa* return to international waters before any medical assistance would be provided. Commentators later noted that this was in direct contravention of maritime law, since the number of persons on board meant the vessel was not seaworthy and could not lawfully sail. The captain did not concede and the incident was finalised through the transferral of the refugees to an Australian navy vessel which transferred them to detention facilities in Nauru.

The Australian government’s actions in relation to the *Tampa* incident drew international condemnation, while garnering strong domestic support for a ‘tough on refugees’ approach. In the subsequent reaction of shock and horror over the 9/11 terrorist attacks in the United States, the alleged security threat from unauthorised boat arrivals, and the threat of terrorism, specifically, featured heavily in the political discourse in Australia. This discourse was central to the revival of the Howard government’s electoral fortunes.

**Win at all costs**

The *Tampa* incident was an interesting display of state power. The ship was sealed off from the outside world. A no-fly zone was imposed and the media denied access (largely via jamming the ship’s satellite phone). Media imagery of the incident was carefully controlled. In their thorough-going examination of the case, *Dark Victory*, David Marr and Marian Wilkinson report that the Australian Defence Signals Directorate (DSD) monitored conversations between the *Tampa*, its owners and their lawyers and any communication between the ship and outside parties, while ASIO was granted a warrant to collect foreign intelligence ancillary to the DSD.25
The Tampa incident marked the start of a full-blown strategy to repel what the Howard government deemed unauthorised boat arrivals at all costs. It demonstrated the lengths that the government was prepared to go to in order to prevent asylum seeker boats from landing on Australian shores; to do so would activate onshore refugee processing and determination under Australian law as it then stood. The incident illustrated the government’s depiction of refugee movements – a form of forced migration – as a security, sovereignty and border protection issue, rather than a humanitarian crisis.

The problem for aspirtant refugees is that this incident and the subsequent ‘Children Overboard’ (and SIEV X) incidents, cemented a dominant political narrative which established a binary class of refugees, while at the same time narrowing the meaning of the term ‘refugee’. As Michael Clyne has argued, a specific discourse and selective use of terminology has labelled the contemporary boat arrivals not as legitimate refugees but as ‘illegal refugees’ (a term that is in itself both contentious and highly prejudicial to public attitudes towards the people concerned). The use of such exclusionary language was no accident – it served a core political purpose. This was demonstrated in the Parliamentary debates around migration legislation, where both major sides of politics used inaccurate and misleading (but prejudicial) terms such as ‘queue jumpers’, ‘illegals’, ‘illegal arrivals’, ‘illegal refugees’. This was most starkly illustrated in the comment by the then Minister for Citizenship and Multicultural affairs:

The people on board MV Tampa are not refugees, they are occasional tourists, who have contracted criminal elements or crime gangs who are often involved in the transportation of drugs to our shores … It is offensive to those who are genuine refugees who have come to this country and experienced the generosity that this nation has without a doubt offered them.

So what was the cost of a ‘win the election at all costs’ mentality? The financial costs were significant, as was the assault on our international obligations. The personal burden carried by refugees whose lives had been endangered at sea or who were detained without charge or trial is also well documented. However, perhaps even more remarkable was the successful co-opting of Australia’s military leaders into a domestic political campaign, as Marr and Wilkinson note in reference to the Tampa incident:

Australian soldiers and sailors had been ordered to do some of the worst work of their lives out on the Indian Ocean. Their leaders had been drawn into the Coalition’s election strategy, compromising the political neutrality of the armed forces. Some of the most senior military men in the land were outwitted, outgunned and outmanoeuvred in a military campaign designed to re-elect the Prime Minister.

Political u-turn

The initial – and perhaps instinctive – Howard response to media calls to get even tougher on refugees (following a series of harsh measures) had, perhaps surprisingly, been quite different. In a mid-August interview with a Melbourne radio broadcaster – only a few days before the political opportunity afforded him by the Tampa incident – Mr Howard had clearly and unambiguously stated:
We are a humanitarian country. We don’t turn people back into the sea, we don’t turn unseaworthy boats which are likely to capsize and the people on them be drowned. We can’t behave in that manner. People say, well send them back from where they came, the country from which they came won’t have them back. Many of them are frightened to go back to those countries … You see the only alternative strategy I hear is really the strategy of in the sense using our armed forces to stop the people coming and turning them back. Now for a humanitarian nation that really is not an option.31

But things subsequently changed. Perhaps there was a whiff of an electoral opportunity in what was a tight electoral situation. The following month, just 48 hours after the 9/11 attacks in Washington and New York, the Defence Minister Peter Reith said in a radio interview that ‘you’ve got to be able to manage people coming into your country, you’ve got to be able to control that, otherwise it can be a pipeline for terrorists to come in and use your country as a staging post for terrorist activities.’32 Polling around this time suggested that there may be electoral advantage in exploiting a perception that so-called (and mistakenly called) ‘illegal immigrants … could be terrorists’.33

From here, it seems, an ugly form of politics took over. As the election date approached, radio ‘shock jocks’ were quick to get on the bandwagon, with top-rating Sydney breakfast host Alan Jones specifically asking ‘How many of these Afghan boat people are “sleepers”?’34 By the time of his official election campaign speech, delivered at the end of October 2001, John Howard’s rhetoric had changed markedly. The forcefully delivered line that ‘we will decide who comes to this country and the circumstances in which they come’ cemented in the public’s mind the links between refugees and terrorism that had been drawn.35 It was just a few days before polling day that John Howard told Brisbane’s Courier Mail newspaper ‘You don’t know who’s coming and you don’t know whether they do have terrorist links or not.’ Mr Howard said it was a ‘perfectly natural concern’ and there was ‘nothing alarmist or racist about that’.36 The rest is history. John Howard went on to win the 2001 election (and the next election).37

Case(s) in Point: Sri Lankan refugees

Sri Lanka is a particularly useful example with regard to the myths surrounding the security threat that asylum seekers are said to pose to Australia. As a case study, Sri Lanka illustrates the existence of the ‘push’ factors driving refugee claims, as well as the complexity of the issues surrounding ASIO’s assessments of individual refugees. There are currently only around 50 people in total who have been recognised as refugees but are still detained because they have been characterised by ASIO as a security threat. Many of these are Sri Lankan Tamils. By and large they are detained because they either fought for or had dealings with the Tamil Tigers during the Sri Lankan Civil War.38 In part, this represents a blind spot in Australia’s refugee laws in that we do not have a clear framework for dealing with former combatants, even though we know that many of them will be genuine refugees.

In Sri Lanka, Tamils are a minority population who have traditionally lived in the north and north-east of the island. The majority of Sri Lankans are Sinhalese Buddhists, and there is also a small Muslim minority. However, post-independence
in 1947 a series of increasingly racist laws disenfranchised the Tamils. There were also a number of communal riots in which the security forces did little to protect Tamil civilians from violence at the hands of Sinhalese rioters. After attempts at a political resolution failed, segments of the Tamil population eventually took up arms against the majority Sinhalese government in the late 1970s. Small skirmishes ensued, leading to the Black July riots of 1983 in which an estimated 3000 Tamils were killed by Sinhalese mobs, aided and abetted by the police and army. Thereafter, a fully fledged civil war broke out between the Liberation Tigers of Tamil Eelam (‘Tamil Tigers’) and the Sri Lankan government. The resulting war left well over 100,000 people dead.

Over the course of the war the Sri Lankan Army committed a number of atrocities against Tamil civilians, including rape, murder, torture, disappearances and the destruction of property. These crimes drew many Tamils to the insurgency. Notably, the Tamil Tigers had a substantial number of female fighters, and strict rules of conduct and respect between the genders. This was in part a response to the Sri Lankan Army’s use of rape as a weapon of war.

The Tamil Tigers styled themselves as the standing army of the Tamil people. In truth, while they enjoyed the support of large parts of the Tamil community, both in Sri Lanka and overseas, they also exercised power in the areas that they controlled with a degree of repression. Nevertheless, between 1990 and 2008 the Tamil Tigers crafted an effective de facto state in the north of Sri Lanka. This included a police service, a judiciary, and health and education systems. This meant no Tamil in LTTE-controlled areas could avoid having dealings with the Tamil Tigers. In the last stages of the war the Tamil Tigers kept some 300,000 Tamil civilians under their control. These people were not free to leave the war zone and were denied the chance to flee to safety.

It is thought that the leader of the Tamil Tigers, Velupillai Prabhakaran, believed that though his troops were outnumbered and outgunned, if they kept a large civilian population with them the international community would be forced to intervene in order to save lives. Such an intervention, like those which occurred in Libya and Kosovo, would have allowed the Tigers to regroup and fight again. Prabhakaran gambled on the international community, and lost badly. Tamil civilians and fighters paid the price. The United Nations has reported that an estimated 40,000 or more Tamil civilians died in the last stages of war, due to targeted bombings by the Sri Lankan military.

After the surrender of the Tamil Tigers, some 250,000 people were taken into camps.

Having defeated the Tamil Tigers, the Sri Lankan government, led by President Mahinda Rajapaksa, enjoyed immense popularity among the majority Sinhalese. Yet Rajapaksa’s regime has proved to be both corrupt and repressive. As the legitimacy of the regime depends upon its defeat of the LTTE, the Rajapaksa government has maintained a military occupation of Sri Lanka’s north. In effect, Tamil civilians in the former conflict areas are still vulnerable to the repression that they suffered during the war years, but with the absence of any organised fighting force.

Consequently, a substantial number of Tamils have fled. Since late 2008, over 140,000 Tamils from the conflict areas have fled from Sri Lanka to India, Canada, the United Kingdom, Australia, Malaysia and a host of other countries. Notably, the Tamils who fled from Sri Lanka to India – where there is a very substantial Tamil population – have been unable to gain
citizenship and permanent protection in that country. Similarly, a number of the transit countries offer only temporary respite and no path to long-term survival.

Choices available to refugees

We can glean a number of observations from the Sri Lanka case study that are relevant to our analysis of the security fears surrounding asylum seekers. First, many of the individuals in the conflict areas of Sri Lanka had little choice but to deal with the Tamil Tigers. The Tamil Tigers were effectively the governing authority in parts of northern Sri Lanka. Second, given the war crimes committed by the Sri Lankan Army, many Tamil civilians may have had valid reasons for joining or assisting the Tamil Tigers. It is not against public international law for a community to rebel against systematic oppression and violence. Third, there is no reason to suggest that the Tamil Tigers ever did or would carry on a military struggle in Australia. Notably, the one prosecution in Australia of three men suspected of financing the Tamil Tigers was less than successful. Fourth, the Rajapaksa government is a repressive regime. In order to maintain its legitimacy with the majority of Sri Lankans, it tends to inflate the threat of the Tamil Tigers, but in the five years since the end of the war it has been quite clear that the Tamil Tigers were well defeated.

The position that asylum seekers face is that serious ongoing conflicts within their home countries makes survival there increasingly difficult. These threats to safety and security can linger even after the formal end of a conflict, and where international intervention is ongoing. Having made the decision to flee, asylum seekers are then faced with the reality that many transit countries are not signatories to the Refugee Convention and will not offer any prospect of long-term residence or citizenship. Likewise, the UNHCR-run refugee camps are poorly maintained and offer little real security. The quest to reach a final destination where there is the prospect of genuine refuge as afforded to asylum seekers under international law is understandable under these circumstances.

The legal narrative: humanitarian obligations

The protection of refugees under Australian law is governed by the Migration Act and the Refugee Convention. The Refugee Convention does not have direct effect in Australia’s domestic laws. However, as Australia is a party to the Convention, the relevant provisions of the Migration Act, dealing with the detention, processing, acceptance or exclusion of offshore arrivals, are designed to implement Australia’s obligations under the Convention. Consequently, there exists within the Migration Act, insofar as it relates to refugees, a legal framework of protection.

Given the wording of particular provisions of the Act, its relationship with the Convention is quite important. It provides that a refugee to whom a protection visa may be granted is a non-citizen to whom Australia owes protection obligations under the Refugee Convention. In turn, the Refugee Convention defines a refugee as being a person who:

owing to 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 nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country;
or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.51

Clearly, according to the Migration Act and the Refugee Convention, it is not a crime to seek asylum.52 Any person with a genuine fear of persecution in their home country can legally seek protection in a Convention country. However, even where a person has been assessed to be a refugee there is no obligation on any nation to provide them with a protection visa.53 All states retain the sovereign right to determine how non-citizens may enter their country.

In two important recent cases, a majority of the High Court of Australia accepted that the Migration Act operates on the basis that Australia has protection obligations to individuals. In Plaintiff M61/2010 v Commonwealth of Australia, the High Court stated:

[Read as a whole, the Migration Act contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol … [The Act] … proceeds, in important respects, from the assumption that Australia has protection obligations to individuals. Consistent with that assumption, the text and structure of the Act proceed on the footing that the Act provides power to respond to Australia’s international obligations by granting a protection visa in an appropriate case and by not returning that person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason.54

This statement was again endorsed by the High Court in the M70 case, which knocked down the so-called Malaysia Solution.55 Under the Malaysia Solution the Gillard government had sought to transfer a group of asylum seekers to Malaysia, in exchange for a larger group of asylum seekers who were held by Malaysia. The High Court struck down that plan on the basis that the Gillard government could not guarantee the safety of the asylum seekers in Malaysia. In M61, two Tamil applicants successfully challenged the Commonwealth’s failure to consider their rights under the Migration Act owing to their having arrived in an area excised from Australia’s migration scheme.

Limitations on protection

The implementation of Australia’s obligations under the Convention is limited by specific provisions that have been designed in the post-Tampa environment. For example, an amendment to the Migration Act narrowed the scope of the Act so as to exclude persons who have not taken all steps possible to avail themselves of the right to enter and live in third countries where they do not have a well-founded fear of persecution.56

There are also provisions of the Migration Act that establish character test provisions robust enough to exclude from Australia anybody who poses a threat to the nation or to individuals and communities within it.57 For example, the Minister has the power to cancel or reject a temporary safe haven visa for reasons such as the likelihood that the applicant might:

(i) engage in criminal conduct in Australia; or
(ii) harass, molest, intimidate or stalk another person in Australia; or
(iii) vilify a segment of the Australian community; or
(iv) incite discord in the Australian community or in a segment of that community; or
(v) represent a danger to the Australian community or to a segment of that community.\(^5^8\)

The character test requirements are qualified by the obligation of a ‘non-refoulement’ obligation to not remove a person to whom refugee protections are owed to a country where that person has a well-founded fear of persecution.\(^5^9\) The High Court has accepted in the M61 and M70 cases that Australia’s non-refoulement obligation informs the interpretation of the Migration Act.\(^6^0\) Accordingly, a person who successfully claims asylum as a refugee, but who fails the character test, cannot be returned to their home country if there is a real possibility that they will come to substantial harm. In such circumstances, another safe country must be found if Australia will not accept the refugee. This was the central issue that arose in another case: M47 v Commonwealth.

The ASIO case

The case of M47 v Commonwealth has come to be known as the ‘ASIO case’.\(^6^1\) In this case, a Tamil asylum seeker was found to be a genuine refugee but was also assessed by ASIO to be a potential security threat. The man in question had been an intelligence officer for the Tamil Tigers. However, he had left the Tamil Tigers and had subsequently refused to rejoin the organisation. In the aftermath of the civil war he genuinely feared reprisals from both the Sri Lankan government and former Tiger combatants.

ASIO assessed the man, known as M47, as a security risk in 2009 and again in 2011. At the second interview he was allowed to have a lawyer with him and he was informed of the general nature of the allegations against him. However, he was not informed of the specific incidents or information that was alleged to substantiate his negative assessment. In making their assessment, ASIO relied on a regulation made under the Migration Act that effectively provided that an adverse ASIO assessment means a visa applicant cannot be granted a visa.\(^6^2\)

M47 and his lawyers challenged the validity of the regulation under which he was found to be a security threat. It is a general rule of law that regulations must be consistent with the legislation under which they are made and cannot go beyond the scope of the legislation. The relevant provisions of the Migration Act provided that the Minister was to review any decisions relating to adverse security assessments. However, under the regulations the decision was effectively made by an ASIO officer. Moreover, given the secrecy surrounding the assessments, the Administrative Appeals Tribunal – which has the power to review such decisions – could not effectively review them because the relevant information was suppressed. A majority of the High Court found that the regulation that ASIO relied upon was invalid because it exceeded the parameters of the Migration Act.

Questioning the threat narrative

A number of the findings in the M47 case directly challenge the threat narrative advanced by some politicians and media commentators. For instance, it was explicitly conceded by the Australian government that there was no evidence that M47 had engaged in war crimes.\(^6^3\) There was no evidence that he intended
to continue the Tamil insurgency in Australia, or that he would harm others in the country.64 In short, there was little evidence on the public record that he presented any threat at all.65

Some pertinent points need to be made about the ASIO assessments scheme. First, there are legitimate concerns regarding the veracity of information supplied to ASIO by foreign governments. Asylum seekers have been the subject of adverse security findings based on information supplied by their home countries, when their home countries may have a vested interest in designating them as security threats. The earlier discussion of the situation in Sri Lanka is a case in point. Second, there has been a lack of procedural fairness in the way in which the scheme has been run. Given the secrecy that naturally applies to security screening, asylum seekers who have been adversely assessed may not have been afforded the opportunity to challenge their assessment.66 Third, there have been instances where asylum seekers who have been assessed as a security risk by Australia have been safely admitted to other countries and have posed no problems in those countries.67 Fourth, there is no reason to suggest, without more evidence to the contrary, that a former insurgent or combatant in a civil war or other conflict would wish to carry on that struggle in Australia just because they participated in that struggle in their home country.

More generally, despite the populist concern and rhetoric, there is nothing to suggest that anyone who comes from a country racked by conflict represents any greater terrorist, security or criminal threat that those already living in Australia. In fact, the evidence suggests that most refugees who flee violence and war – whatever the context – just want to get on with their lives in peace.

Stopping the next wave

It seems ironic that a relatively ‘new’ country founded on migrants (both legal and illegal) has a long history of latent fear of the next wave of immigrants. Historians have noted that Australia has never really faced the challenges of people fleeing persecution and poverty in the way the more geographically accessible nations of the Americas, Continental Europe and the United Kingdom have done.69 In fact, Australia has always tightly controlled who were regarded as ‘genuine’ refugees, and during the post–World War II period of the White Australia Policy, this tended to be defined by Australian officials sent to Europe to carefully choose ‘suitable, white refugees’. Refugees were circumspectly selected and, ever since, Australians have seen ‘genuine’ refugees as those who wait patiently for us to come and collect them from far-away camps.69

Following the Vietnam War, Australia took many tens of thousands of Vietnamese refugees who arrived through formal processing channels, although public opinion polls at the time recorded negative attitudes on the part of Australians towards those who arrived by boat. By 1992, despite total boat arrivals for the entire decade of the 1980s numbering only a few thousand, Australia had introduced mandatory detention, which saw refugees detained for the entire time it took officials to determine their claim for refugee status. This was at odds with the practice in other Western nations, which detained refugees only for the length of time required for health, identity and security checks.70

Despite mandatory detention breaching a number of internationally recognised Conventions, polling figures and analysis show that the introduction of mandatory detention and the
general policy of ‘getting tough’ on border protection issues was immensely popular with the electorate.\textsuperscript{72} Polls showed an increasing trend in opposition to boat arrivals of asylum seekers over time.\textsuperscript{73} By the late 1990s, polling showed the average Australian overestimated by 70 times the number of boat people arriving each year in the country. Politicians across the country also engaged in persistent low-level abuse of boat people as ‘queue jumpers’ for not waiting in foreign camps and ‘illegals’ for arriving without formal papers.\textsuperscript{73} Thus it is clear that the seeds of any politically motivated reversion to a ‘tough on refugees’ approach are cast into fertile soil.

Fear of the other

What drives this fear of the ‘other’ in nations that in many other respects would be regarded as humane and compassionate? As noted sociologist Zygmunt Bauman has observed, the refugee, asylum seeker or impoverished exile is the personification of the ‘resented stranger’ in a globalised world.\textsuperscript{74} Tribal wars and massacres, the proliferation of guerrilla armies, the hundreds of thousands who are chased from their homes and forced to escape their own borders through civil wars or external campaigns waged within sovereign nations – all of these result in the mass production of refugees. For Bauman, refugees are stateless but in addition they are ‘hors du nomos’ – they are outside law, not the law of a particular country but outside law as such. They are ‘outcasts and outlaws’, the outsider incarnate of an entirely novel kind, the products of globalisation, a type of ‘human waste of the global frontier’.\textsuperscript{75}

They are resented and greeted everywhere with rancour and spite. They are out of place everywhere except in places that are themselves out of place – the ‘nowhere places’ that appear on no maps that ordinary tourists use on their travels. And once outside, indefinitely outside: a secure fence with watchtowers is all that is needed to make the ‘indeterminateness’ of the out of place hold forever.\textsuperscript{76}

This fear of the other is just one part of the contestable space in which refugees and boat people find themselves. The other is as fodder for the ruthlessness of political expediency. Australia has seen governments of both persuasions use the concept of security and national threat to justify various versions of territorial protection, particularly in recent times.\textsuperscript{77} Bauman notes that governments and various public figures have actively cooperated in the ‘aiding and abetting of popular prejudices’ about asylum seekers as a substitute for grappling with more genuine sources of existential uncertainty that ‘haunts their electors’.\textsuperscript{78}

Asylum seekers have ‘replaced evil-eyed witches and other unrepentant evildoers, the malignant spooks and hobbgoblins of former urban legends’.\textsuperscript{79} Through application of policy and direct legislative intervention, Australian borders have been policed against the threat of the other. Asylum seekers have been politicised and relegated to the ‘nowhere space’ that Bauman so eloquently describes. From here, we find it easy to forget – or ignore – that they are human beings in need of care, protection and safe haven.

Some have noted a seeming inverse proximity relationship. That is, while displaced persons remain at a distance, compassion and sympathy can be harnessed and those peoples are often appropriately judged to be victims of circumstance. However, once they have the temerity to set out for our shores – or, worse,
to arrive – the fact that they display resilience and independent agency is seen as a threat.

National insecurity

The political language that surrounds refugees and asylum seekers in Australia oscillates between two core ideas, both based on mistaken assumptions. The first is a traditional idea that Australians on the whole seem to be comfortable with. It depicts refugees as helpless victims without hope or entitlement, leading them to be passive recipients of the generosity that we may choose to bestow, and for which they are expected to be grateful. African victims of starvation or Asian victims of natural disasters, crowded into refugee camps, fit this bill nicely. The second core idea, which has become prominent in recent years, is that asylum seekers who arrive by boat as ‘queue jumpers’ pose a threat to Australia’s security. They are not passive; they display ‘a disagreeable degree of self-will … willing to take action to address their situation, arrive uninvited’.80 They are consequently represented as a threat and are often perceived in harshly negative terms. At best, these are people who need to be protected from their own desperation by being prevented from boarding rickety boats and thereby drowning at sea. No further generosity is to be afforded them. These are the people who, in the populist political narrative based on fear and insecurity, ‘might be terrorists’.

The threat narrative insinuated by Pauline Hanson, taken up with gusto by the Howard government and extended through the Rudd and Gillard prime ministerships, is overstated and misleading. In fact, in 2008 a Parliamentary Committee found that of the 72,000 visa security assessments done by ASIO over the 2007–08 period, only two people were found to be security risks.81 Similar figures have been found in other reporting years. Since the number of asylum seekers found to be potential security risks is exceedingly small, there is little reason for the exaggerated security fears that exist in relation to asylum seekers.

Moreover, while it is necessary for Australia to have laws in place to safeguard its national security, valid concerns have been raised about the way in which these laws are designed and administered. The effective narrowing of the way Australia treats its signatory obligations represents a backward step. The generation of policies motivated by political expediency rather than humanitarian obligations has seen the altruistic yet practical aims of the Refugee Convention take a back seat for the last two decades. Yet, as Zygmunt Bauman notes, while we may seek to secure our borders to keep refugees out, the real thing we seek is to fortify our own ‘shaky, erratic and unpredictable existence’.82 But this is unlikely to work. The hopes our politicians link to ‘tough’ new measures against refugees may provide some immediate political relief but it is likely to be short-lived, as our hopes for secure lives are dashed, our international reputation shredded and our own humanity diminished.83

2 ‘The terms ‘asylum seeker’ and ‘refugee’ are sometimes used interchangeably, as may be the case in this chapter where the discussion relates to attitudes towards or treatment of ‘asylum seekers and/or refugees’, for example. In terms of status, an asylum seeker is an individual who seeks international protection as a refugee, but for whom this claim has not yet been determined. A refugee is an individual recognised as such under the 1951 Convention relating to the status of refugees; see J. Phillips (2013) Asylum Seekers and Refugees: What Are the Facts? Background Note,
Parliamentary Library, Department of Parliamentary Services, Canberra, p. 2.


4 In preparation for the 2013 election, the language used by the Coalition opposition continued to imply a security threat from refugees: ‘We will deliver stronger borders – where the boats are stopped – with tough and proven measures!’ Liberal Party of Australia (2013) Our Plan: Real Solutions for all Australians: The direction, values and policy priorities of the next Coalition Government, p. 5. At the same time, the governing Labor Party’s policy of being tough on refugees arriving by boat ‘has matched, if not exceeded, the Coalition’s lack of humanitarianism when it comes to refugees, not to mention the disregard for international laws Australia has signed up to’: Peter Van Onselen, ‘Horrid policy ditches Labor’s principle of equal opportunity for asylum-seekers’, The Australian, 24 November 2012.


7 The process of ASIO undertaking security assessments is designed to provide a mechanism to include security considerations in regular government decision making in relation to areas such as the granting of visas. An adverse assessment means that ASIO has recommended that a certain ‘prescribed administrative action’ (such as the granting of a protection visa) be taken or not taken: see ASIO (undated) ‘FAQs: Answers to your frequently asked questions’ <www.asio.gov.au/about-asio/faq.html>; B. Saul (2012) ‘Dark Justice: Australia’s Indefinite Detention of Refugees on Security Grounds under International Human Rights Law’, Melbourne Journal of International Law vol. 13, no. 2.


14 For example, an early action of the incoming Rudd government in 2007 was to abolish the Howard government’s policy of issuing refugees with temporary rather than permanent visas: see Department of Immigration and Citizenship (2011) ‘Fact Sheet 68 — Abolition of the Temporary Protection Visa (TPV) and Temporary Humanitarian visas (THVs)’ <www.immi.gov.au/media/factsheets/68tpv_further.htm>.

15 This is DIAC’s preferred term: see Phillips (2013) Asylum Seekers and Refugees, p. 4.


20 This claim has continued to be used with great political effect by the Coalition Opposition. For example, the Shadow Leader of the
Spooked

House, Mr Christopher Pyne, referred to the government’s measures as acting as a ‘sugar’ that attracts asylum seekers: see Christopher Pyne, ‘Government has only itself to blame for the boats’, The Australian, 27 December 2011.


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32 Transcript, Radio interview with Derryn Hinch.


34 Fran Kelly, ‘Howard’s electoral fortunes turn around’; P. Mares (2003), ‘What Next for Australia’s Refugee Policy?’ in M. Leach and F. Mansouri (eds), Critical Perspectives on Refugee Policy in Australia, Deakin University, Geelong.


37 Border protection and terrorism were significant issues in shaping the election outcome: see McAllister (2003) ‘Border Protection, the 2001 Australian Election and the Coalition Victory’; Minn’s (2005) ‘We Decide Who Comes to This Country’ – How the Tampa Election was Won’.

38 Under the rules of public international law, a civil war is recognised as a non-international armed conflict. Provided that the hostilities reach a certain threshold of intensity and the rebels are sufficiently organised, they are recognised under international law as insurgents and not as mere terrorists. The Tamil Tigers were a genuine insurgency, though they also committed numerous acts of terror within Sri Lanka. International law also sets rules on the conduct of hostilities. For a discussion of the rules of war under international law, see C. Gray (2000) International Law and the Use of Force, Oxford University Press, London. Both the Tamil Tigers and the Sri Lankan Army breached these rules by directly targeting civilians.


44 An account of the considerations that inspired resistance can be found in Nirmal De Silva (2011) Tamil Tiggers, Allen & Unwin, Sydney.

45 A detailed and impartial account of the crimes committed by the Tamil Tigers is available from the Sri Lankan NGO group ‘University Teachers for Human Rights’; see also Narayan Swamy (2010) The Tiger Vanquished.


50 This included male and female fighters of the Tigers. Some of these fighters had been forcibly recruited in the last stages of the war. Subsequently, credible allegations of rape and murder were levelled against the Sri Lankan Army. It has been reported that a number of female fighters were gang raped and murdered after the surrender: see United Nations, Report of the Secretary-General’s Panel of Experts; see also US Department of State (2009) ‘Report to Congress on Incidents during the Recent Conflict in Sri Lanka’; Channel Four, ‘Sri Lanka’s Killing Fields’ <srilanka.channel4.com>.


52 Article 1A(2).

53 The right to seek asylum is recognised under Article 14 of the Universal Declaration of Human Rights.

54 Minister for Immigration and Multicultural Affairs v Khatwar (2002) 210 CLR 1, [42].

55 Plaintiff M702011 v Minister for Immigration and Citizenship (2011) 280 ALR 18, [44] and [90].

56 Subsections 36(3), 36(4) and 36(5) of the Migration Act.

57 For example, sections 500A and 501 set out grounds upon which asylum seekers can fail to satisfy the character test. The character test provisions are also reflected in the Refugee Convention itself. Article 32 of the Convention permits a member state to expel a refugee on the basis of public order and national security.

58 Subsection 500A(1)(c). Notably, all of these considerations fall within the broad rubric of Article 32 of the Refugee Convention.

59 Article 33 of the Refugee Convention contains the non-refoulement obligation.

60 Refugee Convention, Article 33.


62 See the explanation of adverse security assessments in note 7.

63 M47, [16].

64 If M47 had in fact represented such a threat, the Commonwealth could have expressly relied on s500A(1)(c) of the Migration Act. No evidence was presented in the M47 case that the plaintiff presented any such threat. In cases such as that of M47, it is likely that the adverse security assessment relates to past conduct: see Saul (2012) ‘Dark Justice’, p. 706.

65 The outcome of the M47 case caused a rethink of the way in which security assessments are undertaken and administered. In the aftermath of M47 a review system, headed by a retired Federal Court judge, was put in place, in order to make the security assessment scheme fairer and more effective: see ABC News online, ‘Government to allow reviews of ASIO assessments,’ 15 October 2012 <www.abc.net.au/news/2012-10-15/government-to-allow-reviews-of-asio-assessments-4314652>.


67 This concerns Mohammad Sagar. He was found to be a security risk by ASIO but was later resettled by the UNHCR to Sweden: see Joint Standing Committee on Migration Report, Immigration Detention in Australia: A New Beginning, ‘Criteria for release’, p. 40.


