

Australia and asylum seekers: is a policy of protection in the 'national interest'?

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The stated objective of the *Migration Act 1958* (Cth) is 'to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens' (*Migration Act* s 4). In the context of Australia's refugee policy, the question arises as to what constitutes the 'national interest' in order to determine to what degree the provision of protection to asylum seekers is in the 'national interest'. The Australian Government's refugee policy represents a primarily realist interpretation of the 'national interest', in that its overriding priority is to maintain state control over population flows, including by those to whom Australia may owe protection obligations. This has led to the implementation of practices designed to regulate as far as possible the asylum intake, by deterring the entry of unregulated asylum seekers, that is, unauthorised arrivals and onshore applicants who seek protection in Australia.

In this article, I will examine the ways in which refugee policy in Australia represents an imbalance within the conceptualisation of the 'national interest', in terms of the current prioritisation of state control above Australia's human rights and humanitarian obligations to asylum seekers. I will argue that a refugee policy that is in the 'national interest' could, and should, incorporate a greater balance between humanitarian considerations and state sovereignty, thus serving both ends. In doing so, I will argue that the 'national interest' already contains elements of humanitarianism, and that what is required is a conceptualisation of the 'national interest' that recognises this. I will explain the realist and idealist definitions of the 'national interest' and how these can be used to characterise Australia's refugee policy, and I will give examples of the way that Australia's asylum policy manifests an imbalance between these two conceptualisations. I will argue that this imbalance is neither in favour of state sovereignty nor humanitarian concerns in relation to asylum seekers, and therefore does not serve the 'national interest'. I will examine ways in which the 'national interest' could be better served by a greater balance between these two, currently perceived as conflicting, priorities.

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Realist view of the 'national interest'

Realists use the term 'national interest' to refer to the interests of a state in keeping and increasing its power in relation to other states (Rourke and Boyer 1995: 22). To preserve itself, a state must protect its sovereignty (Miller 1986: 79). Sovereignty is consistently recognised as a fundamental element of statehood (James 1984: 2-3). If a state can safeguard its sovereignty, it can begin to attempt to expand its influence and power in the international system.

Realists assert that the preservation of sovereignty requires that key consideration be given to national security. Security will include the maintenance of some degree of control over a nation's territorial borders (Mathew 1994: 49). Control over borders is necessary to prevent unmanageable influxes of people from entering a country. What constitutes an unmanageable number of people will vary, depending on the capacity of the country in question.

Idealist view of the 'national interest'

Idealists essentially argue that respect for human rights is in the 'national interest' because it contributes to the continued development of the international community. They also contend that the observance of human rights and values, such as democracy and the rule of law, will be in a nation's interest, as these principles form the optimum basis upon which a nation is built. Finally, idealists recognise that human rights should be upheld by states because of their inherent value.

Idealists believe that ethical concerns should play a role in the formulation of the 'national interest'. They argue that it is in all states' 'national interests' to establish and maintain a stable international world order based on ethics and co-operation (Rourke and Boyer 1995: 15). Liberal institutionalists, for example, emphasise the significance of international institutions in the development and maintenance of international co-operation and ultimately of world peace (Martin 1995: 485). The observation of ethical standards and human rights is essential for the long term health of a state. Idealists do not see the survival of a state or the extension of its influence over other states as the key criteria for a state's success.

Idealists believe that equally important to a state's survival is its nature (Rourke and Boyer 1995: 16). A state that violates human rights or breaches its international legal obligations can survive in the international system and increase its power in terms of the influence it has over other states' behaviour. However, idealists question the value of a state which survives by such means. They also challenge the continued survivability of such a state, given the increasingly interdependent nature of societies and the pressure applied by domestic populations on states to create and maintain

states based on human rights and the rule of law (Rourke and Boyer 1995: 16; De Q Walker 1988: 127). States should be legitimated by their protection of human rights and other core societal values, rather than by their sheer capacity to survive in a conflictual state system. Such states would contribute to the evolution of an international state system based on co-operation and shared values rather than on mere power politics (Donnelly 1998: 26-27). These shared values would be embodied in international law.

According to this reasoning, adherence to international law, in particular human rights law, is essential to the sustainment and development of the international community (Loescher 1993: 214). International law represents those values and norms that states share and consider as binding. Human rights treaties represent values which are shared by the members of the international community. The development of the international community fosters international co-operation and a preference for peaceful methods of negotiation and dispute resolution. It therefore ought to be in a nation's interest to comply with its international legal obligations and to contribute to the stability and development of the international community. The existence of the international community is also in states' interests because it provides states with a forum in which to assert their sovereignty.

Idealists seek to marry their concept of the 'national interest' with the realist imperative of state sovereignty. They emphasise that one of the main ways for a state to obtain recognition of its sovereignty is by adhering to state-based international organisations and treaties (James 1984: 2-3). Becoming a member of the United Nations (UN) symbolises a state's membership of the international community (James 1984: 2). Such intergovernmental organisations are arrangements between sovereign states. They thus reinforce the perception that sovereign states are the most important and most credible participants in international relations (Miller 1986: 81). It can therefore be in the interest of a state's sovereignty to participate in the international community and abide by the rules which bind it. These include international human rights law.

Human rights are also worthy of states' respect because of their inherent value. Quite apart from considerations of the 'national interest', human rights must be respected because they constitute rights that every human being possesses by nature of being human (Forsythe 1998: 510). They are essential for a person to live with a basic degree of dignity.¹ Human rights should therefore be respected by all entities, including states (Falk 1981: 44). This is in the interests of individuals, nations and the global community.

1 See for example the Universal Declaration of Human Rights.

Is a balance possible?

The realist view of the 'national interest' emphasises a state's concerns with security. In the asylum context, in order to maintain the security of the state and its domestic population, realists prioritise the preservation of state control over its borders over other considerations. Idealists, on the other hand, maintain that a state which endangers or breaches human rights in order to maintain control over its borders is not a state worth keeping secure.

Both schools of thought have advantages and disadvantages. The realist point of view is exactly that — realistic — in that it recognises that states exist in an anarchical system of states, in which the tenuous ideas of human rights and norms of state behaviour are still far from maturity. Therefore in such a context, it is necessary to protect domestic populations and so states maintain control over possibly destabilising influxes of asylum seekers. On the other hand, the idealists have a point. Would we want to live in a state that systematically violated the human rights of people seeking protection from persecution? Is that the sort of state system we want to preserve?

Realist concerns regarding the maintenance of control over the sanctity of borders are essential considerations in protecting a state from massive, destabilising population influxes. However, I argue that such concerns can be balanced with equally important human rights and humanitarian interests, because the continued development of the international community and respect for human rights are also essential to the nation's wellbeing. A state's approach to asylum seekers must therefore balance a realistic assessment of the state's capacity to assist, with its obligations to people seeking to engage the state's protection obligations. Such an approach could incorporate a degree of control over influxes, as well as a humanitarian approach to those who have arrived to seek protection. International co-operative efforts could be taken to address root causes of refugee movements, and assistance could be provided to states bearing the greatest burden of displaced persons.

Australia's 'national interest' — a place for human rights?

The Australian conceptualisation of the 'national interest' in the context of refugee policy can be characterised as primarily realist, with elements of the idealist perspective. According to former Australian Foreign Affairs and Trade Minister, Gareth Evans, the recognition of human rights as a component of the 'national interest' is the:

... extension into our foreign relations of the basic values of the Australian community —

values which are at the core of our sense of self and which a democratic community expects its government to pursue. It is proper, if for no other reason than to maintain our own sense of worth in pursuing ends that are inherently valuable, to seek improved standards world-wide in human rights and equal opportunity [and] to solve the world-wide problem of refugees ... In the longer term, the evolution of just and tolerant societies brings its own international returns — in higher standards of international behaviour, and in the contribution that internal stability makes to international stability and peace (Evans and Grant 1995: 33).

This was recently affirmed by Australia's current Foreign Affairs Minister, Alexander Downer, in his address to the UN General Assembly regarding the importance of humanitarian intervention in human rights crises such as that occurring in East Timor (Press Release 1999: GA/9615). Downer's position implies that the preservation of the values of human rights, democracy and the rule of law is in the interest of the people who constitute the Australian nation, and therefore also in the 'national interest'. This is why Australia's treatment of onshore asylum seekers must adhere to human rights obligations under international law.

Evans argues that it is in Australia's 'national interest' to observe its international legal obligations and to actively participate in co-operative efforts aimed at resolving global problems (Evans and Grant 1995: 35). Australia would thereby recognise itself as a member of an international community of states, which are bound by the shared values enshrined in international law, and hold a common interest in resolving issues of international significance. Australia thus has an interest in observing its human rights obligations under international law and in participating in international co-operative efforts to address global humanitarian dilemmas, such as the growing number of refugees.

'National interest' and Australia's asylum policies

Australia's refugee and humanitarian program represents an attempt on the part of successive Australian governments to come to terms with what they have identified as the competing priorities of Australia's human rights and international law obligations to refugees, and its interest in controlling all population movements into Australia. The current balance strongly favours the realist priority of control, to the detriment of those seeking protection from Australia. The current government appears not to see these priorities as competing at all but consistently argues that it is not violating human rights or international obligations. In instances where a possible conflict could arise between the assertion of Australia's sovereignty over the asylum seeker intake and Australia's obligations to asylum seekers under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (Refugee Convention), current policies

demonstrate that the former has been consistently prioritised.

Australia has a multitude of measures in place to fulfil its obligations under the Refugee Convention. These include a multi-tiered decision making system for onshore applicants, a resettlement program for offshore asylum-seekers, and sub-categories for groups at particular risk. However, Australia's treatment of onshore asylum seekers has repeatedly been condemned, domestically and internationally, as unnecessarily harsh, approaching a form of regulation for regulation's sake, rather than genuinely required in the 'national interest'.

The need for tight state control over uncontrolled asylum seeker arrivals is frequently iterated by the Minister for Immigration, Indigenous and Multicultural Affairs, The Hon Philip Ruddock MP. Minister Ruddock makes regular statements regarding the need to maintain control over the intake and deter what he says are unregulated influxes, in order to maintain the integrity of the refugee program and Australia's capacity to provide protection to anyone at all (Media Release 2001: MPS046/2001). Ruddock, through his rhetoric, seeks to demonstrate that current differential treatment of asylum seekers is in Australia's 'national interest', because tight control, he argues, is ultimately the best way for Australia to fulfil its humanitarian obligations to 'genuine refugees'. This characterises maximum sovereignty over a nation's borders as essential to the fulfilment of humanitarian obligations, even where this may lead to the possible violation of Convention obligations and human rights of onshore asylum seekers.

The prioritisation of state control over Convention obligations is demonstrated through the increasingly differential treatment of onshore applicants, that is, those asylum seekers over whom the Government has not had the opportunity to regulate, and offshore asylum seekers, those whom the Government has regulated completely through its limited quota system for offshore applicants. In order to explain the Government's different levels of protection to on and offshore asylum seekers, we must look at the characteristics of each group and consider the implications. Offshore asylum seekers are open to close regulation. Australia can (and does) dictate the regions from where they come, and their number. Australia can plan resettlement services and to some extent, factor in the asylum seekers' impact on social services. The advantage to the Government of this policy is therefore that the intake of offshore asylum seekers is open to a high degree of control.

In contrast, unauthorised arrivals are open to a far lesser degree of control. Australia cannot regulate their arrival, their numbers, their countries of origin, nor can Australia predict and plan for their impact on social services. The Australian Government has taken moves to prevent and deter unauthorised arrivals. Measures

have been introduced in the 'national interest', according to the Prime Minister, to curb what he states are influxes of unauthorised arrivals that could endanger Australia's security. They include advertising campaigns in source countries emphasising the dangers of a boat trip to Australia; and recent attempts to prevent arrivals who come by boat from entering Australian territorial waters, or being able to apply for protection even when in Australian territorial waters. Temporary Protection Visas (TPVs), visa limitations on family reunion, mandatory detention and the conditions of detention may also serve deterrent purposes. Inadequate access to legal advice, restrictions on the judicial review of decisions, and the denial of access to many onshore asylum seekers living in the community to social services and the right to work are some of the other measures taken by the current government to deter applicants from seeking protection on our shores.

The rhetoric used to justify these measures focuses on the need to maintain the sanctity of our borders, the integrity of the refugee and humanitarian program, and prevent the court system from being over-burdened by fallacious claims. Onshore applicants are characterised as 'queue jumpers', as somehow less deserving of Australia's generosity than those who are patiently waiting offshore to come into Australia in an orderly and most importantly, a well-regulated and planned fashion.² Examples of differential treatment include the mandatory detention of onshore asylum seekers who have arrived without authorisation, and the development of the temporary protection visa category and the restrictions on family reunion for holders of TPVs.

Several commentators have argued that this differential treatment goes so far as to breach Australia's obligations under the Refugee Convention. Various Articles of the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CROC) could be seen as breached by the TPV restrictions on family reunification, and mandatory detention has been rigorously criticised as violating the ICCPR and the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (Human Rights and Equal Opportunity Commission (HREOC) 1998). Whether or not Australia's policies actually breach its international obligations, it is clear that these policies represent a

2 I will not examine these examples in detail here, however there are many excellent discussions of differential treatment of onshore and offshore asylum seekers in Australia. See Nicholls G 'Unsettling Admissions: Asylum Seekers in Australia' (1997) 11(1) *Journal of Refugee Studies* 61-79; Joint Standing Committee on Foreign Affairs, Defence and Trade, Commonwealth Parliament of Australia, *A report on visits to immigration detention centres*, tabled 18 June 2001; Commonwealth Ombudsman, *Immigration Detention Centres Investigation* March 2001.

limited interpretation of Australia's obligations to asylum seekers in favour of tight state control.

Such control is arguably unnecessarily tight, given a realistic (rather than simply realist) appraisal of the threat which asylum seekers pose to the sanctity of our borders and the stability of our state. The Australian Government attempts to justify its strict detention practices to protect Australia from what it states are massive influxes of unauthorised arrivals (Ruddock 1999: MPS102/99). The Government contends that in the absence of such measures, the floodgates would be opened to 'hordes' of asylum seekers (Cronin 1993: 84; Hand 1992: 45; Inglis 1994: 18). It is said to be in Australia's interest to secure its borders against massive flows of uncontrolled migration (UNHCR 1995: 20).

It is entirely acceptable that a state should maintain control over its borders in order to protect a nation from population influxes that could potentially destabilise the nation's security and stability. However, the number of unauthorised arrivals to enter Australia is so small as to be relatively insignificant. In the year 2001-02 there have been 1212 boat arrivals by April 2002. In 2000-01 there were 4141, in 1999-00 there were 4175, and in 1998-99 there were 921 (DIMA 2001: Fact Sheet 81). While there has been an increase in recent years, these figures should be seen in the context of the global trends in asylum seeker numbers. UNHCR estimates its total population of concern to be about 21 million, and to have increased by 4 per cent in 2000 (UNHCR 2001: www.unhcr.ch). In the period January to June 2001, 7054 applications for asylum were lodged with Australia. This can be compared to 33,285 to the United Kingdom, 40,786 with Germany, 18,882 to Canada for the same period (UNHCR 2001: www.unhcr.ch). The number of boat people arriving in Australia seems almost negligible in the context of Australia's migration program, which numbers 85,000 in 2001-02, not including the 12,000 places in the refugee and humanitarian program.

By seeking to deter asylum seekers from coming to Australia in a situation of global increase in the numbers of the total population of concern to UNHCR, Australia is simply decreasing its share of the burden, exacerbating the problems in the long term. The increasing complexity and volume of the refugee situation means that all states must increase their commitment accordingly, rather than attempting to shunt away asylum seekers who ultimately may have nowhere else to go. Refusing entry to asylum seekers simply shifts the burden to other states, many of which have less capacity to assist than Australia. (In fact, the majority of the world's refugees are supported by the developing world.) (UNCHR 2001: www.unhcr.ch).

In order to be in the 'national interest', asylum policy must give proper weight to

Australia's human rights obligations. A balanced approach might include both international and domestic efforts which acknowledge a state's obligations to asylum seekers as well as the need to share internationally the burden of resolving the refugee dilemma. A state should participate in international efforts to share the burden of assisting refugees and address the root causes of refugee flows. At the same time, it should observe its obligations to those asylum seekers who are already at its borders. It would never be in a state's long term interests simply to refuse aid to all asylum seekers. Such a rejection would merely shift the burden of the refugee dilemma to other states and would only worsen asylum seekers' desperate humanitarian plight. A better approach therefore would be to admit such displaced persons into relative safety, while also enhancing international co-operative efforts so that no single state would have to bear the burden of a large influx of refugees alone. Thus Australia's 'national interest' would be best served by observing the rights of those people who seek asylum in Australia, as well as actively participating in international efforts to resolve the global refugee dilemma.

The restrictive measures which Australia has implemented in response to the perceived threat asylum seekers pose to Australia's security erode the principles of international burden-sharing and co-operation which characterise the international community. They potentially violate Australia's human rights obligations to asylum seekers under international law, as do the other aspects of Australia's treatment of onshore asylum seekers which have been discussed in this paper.

Conclusion

The 'national interest' has been defined by realists in terms of power relations and the importance of sovereignty. In contrast, the idealist perspective focuses on the importance of ethical concerns. I have argued that the 'national interest' should incorporate an understanding of the importance of human rights. In relation to asylum seekers, a state must balance its interest in maintaining the sanctity of its borders with its human rights obligations to people seeking asylum. States must therefore attempt to share the international refugee burden rather than simply shifting it from one state to another. The latter occurs when states employ restrictive asylum policies without considering the international or humanitarian implications of their actions.

I would like to end with a few tentative recommendations for the future of Australian asylum policy. Australia's approach to onshore asylum seekers could be altered to respect asylum seekers' human rights while also taking into consideration Australia's legitimate concerns regarding sovereignty and maintaining the sanctity

of its borders. Australia should address the issues pertaining to asylum seekers both at the international and domestic levels.

Australia should increase its engagement in international co-operative efforts to address the cause of refugee flows and to localise uncontrolled migration. Such measures might include enhancing the United Nations High Commissioner for Refugees' (UNHCR) resources so that it can cope with the 50 million displaced persons who currently come within its mandate. Regional initiatives could also be useful. Australia could provide humanitarian assistance to those countries in the Asia region which traditionally produce asylum seekers. It could also contribute to UN human rights monitoring programs and humanitarian intervention efforts to prevent refugee-producing situations from occurring at all.

On a domestic level, Australia could reform its practices so that they did not breach international law. Australia's treatment of unauthorised arrivals can be seen as violating these people's rights in the apparent attempt to protect Australia from 'floods' of asylum seekers. Such fears are largely unfounded. Indeed, measures such as arbitrary detention and bungled attempts to remove asylum seekers from Australian territorial waters damage Australia's international reputation as well as cast into doubt the moral legitimacy of the government of the day. Reform of the onshore asylum process therefore must be undertaken in order to protect the rights of asylum seekers and the interests of the Australian nation. ●

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