Securitising the Asylum Procedure: Increasing Otherness through Exclusion

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Under the Refugee Convention, states can exclude asylum seekers from refugee status if they have committed international crimes. This article shows that in the Australian jurisdiction Article 1F, otherwise known as the exclusion clause, has the potential to take on the burden of a national security provision from other articles of the Refugee Convention. Unlike its original intention to exclude those undeserving of international protection, the exclusion clause expands the intention to exclude refugees for the purposes of national security reasons. In the securitisation process, a state of emergency is enacted where it is necessary to suspend law by going above the normal rules and realms of governing.

This article analyses select cases from Australia such as *Dhayakpa v. Minister for Immigration and Ethnic Affairs* (1995) 62 FCR 556 and *Ovcharuk v. Minister for Immigration and Affairs* [1998] FCA 1314. These cases show how asylum seekers are constructed as security threats by the discourse of judges and tribunal Members. Constructing excluded asylum seekers as threats to the order, safety and even the morality of society dehumanises these refugees. By securitising the asylum procedure, this increases 'othering'. The danger is that the exceptional nature of the exclusion clause has the possibility of becoming the norm with 'genuine' refugees also being increasingly subjected to subpar fair trial standards. For example, there is an increased normalisation of

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indefinite detention for refugees that appear to be a security threat. We see the arbitrary character and indefinite nature of detention, the refusal to provide information and procedural rights and difficult conditions of detention, which can inflict serious psychological harm. Australia's restrictive policies and case law towards refugees and asylum seekers makes the jurisdiction particularly applicable to examine emergency laws and powers.

1. Introduction

In 2016, the UN Human Rights Committee condemned the indefinite detention by Australia of five asylum seekers who were incarcerated without charge for unknown security reasons (Human Rights Committee 2016). Between September 2009 and September 2010, these asylum seekers entered Australian territorial waters by boat. They disembarked at Christmas Island where they did not hold valid visas to enter Australia and were placed in immigration detention facilities for their arrival as an "unlawful non-citizen" in an "excised offshore place". The Department of Immigration and Citizenship recognised these asylum seekers as refugees who were unsafe if returned to their countries of origin. However, they were subsequently refused visas to remain in Australia following adverse security assessments made by the Australian Security Intelligence Organisation (ASIO). These asylum seekers were not given any reasons for the adverse security assessments made against them, nor were they able to challenge the merits of their security assessments within the administrative law structures. Under s.36 of the *Australian Security Intelligence Organisation Act* 1979, there could be no review of the facts and evidence for the decision since they were not citizens or holders of either a valid permanent visa or a special visa. The asylum seekers were kept in detention since they did not wish to return voluntarily to their country of nationality (Human Rights Committee 2016, 2). Since the detention was authorised by domestic law, there was no basis under Australian law to challenge inhumane or undignified treatment resulting from that "valid" law (Human Rights Committee 2016, 3). The following story paints the picture of the result of securitising the asylum procedure through the application of Article 1F. This article shows how the security lens spreads to affect not only those asylum seekers that have committed international crimes, but also other 'genuine' refugees who have had an adverse security assessment made against them.

Protecting Australian society from acceptance of refugees with criminal backgrounds has become a heightened issue of national security. An increased number of cases have emerged where asylum seekers are refused refugee status because there are 'serious reasons' to consider that they have committed international crimes. The exclusion

clause considers perpetrators of crimes against peace, war crimes, crimes against humanity, serious common law crimes and acts contrary to the purposes and principles of the United Nations, undeserving of protection (Zimmermann & Wennholz 2011, 583). Although they would normally qualify as refugees, these asylum seekers are excluded from protection under the Refugee Convention by Article 1F, otherwise known as the exclusion clause.[1] Moreover, the exclusion clause was designed to ensure that international framework would not stop serious criminals from facing justice. However, with more states employing universal jurisdiction and international justice mechanisms this reduces the role of the exclusion clause as a means to ensure fugitives face justice. In this light, the exclusion clause is an exception to human rights guarantees. As such, the UNHCR Guidelines have recommended that the exclusion clause should be interpreted with caution. Since these asylum seekers would otherwise be considered refugees who risk persecution, there could be serious possible consequences resulting from the exclusion for that individual (UNHCR Guidelines 2003, 502-503).

Before the terrorist attacks in September 11, 2001 the exclusion clause was rarely applied, but now it has become a regular occurrence in refugee determination hearings (Gilbert 2014, 2). Dyzenhaus believes that this link is related to the devotion to rethinking and strengthening of security legislation after September 11 (Dyzenhaus 2003, 2). Heightened security has not only been reflected by terrorism statutes but is also seen towards those in society who have fragile legal statuses (Gerard 2014; Hammerstad 2014). The potential danger of deciding exclusion clause cases through a security lens is that 'vague and political understandings of national security have given the executive wide scope to conveniently deal with those who are considered threats' (Dyzenhaus 2003, 2).

Notably, 2001 was also the year where border protection was a major election issue in Australia. The November 2001 election was contingent on two major events; the terrorist attacks of September 11 and the Tampa crisis where the Coalition government of Australia refused permission for a Norwegian freighter carrying 433 mainly Afghan asylum seekers to enter Australian waters. The issues of asylum seekers and terrorism became linked together as a part of the politics of the election (McAllister 2003, 448). The Australian government connected the events of September 11 and the Tampa crisis by stressing the need to screen asylum seekers for possible terrorist connections (McAllister 2003, 449). Border protection had a major influence on the election results, with the Coalition party ultimately benefiting from a tougher stance on terrorism and asylum seeker policies (McAlister 2003, 453-454).

[1] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1f.

This article deals in particular with cases from the Australian context. Australia's restrictive laws and policies of deterrence towards refugees and asylum seekers (See Gammeltoft-Hansen 2014, 577) make the jurisdiction particularly applicable to show what happens when securitisation affects the asylum procedure.2 It aims to show that the exclusion clause has taken on a security burden from other provisions of the Convention. Firstly, this article will examine how the asylum procedure has been securitised, and address the dangers of securitisation. Secondly, it will analyse original intention of the exclusion clause and its relationship with other clauses where asylum seekers are denied protection. Thirdly, it will undertake a case exploration of how the asylum procedure has been securitised through the construction of excluded asylum seekers as threats. The case examples in the article show that this threat can be to the order, safety and even international morality of the receiving state. Finally, the consequences of the securitisation of the asylum procedure will be examined, which sees subpar fair trial standards and a disregard for complementary protection obligations. Securitisation casts these refugees in the realm of 'the other' where they can be denied procedural safeguards. This section shows how this treatment becomes normalised to affect other refugees that have received adverse security assessments made against them by ASIO. Instead of being decided through the Australian court system, exclusion clause cases are now being decided by this security organisation. Overall, this article shows that Australian courts have moved further way from the humanitarian approached espoused by the UNHCR, which has noted that the exclusion clause must be 'viewed in the context of the overriding humanitarian objectives of the 1951 Convention' and 'should always be interpreted restrictively and be used with great caution.' (UNHCR Background Note on the Application of the Exclusion Clauses, 503).

2. Securitising the Asylum Procedure

A 'security' lens can be applied during court processes and procedures. Barry Bunzan, Ole Waever and Jaap de Wilde originally described securitisation in the Copenhagen School Securitisation approach (Bunzan, Waever and Wilde 1998, 46-87; Waever 1995, 46-87). These works view security as being about survival (Bunzan, Waever & Wilde 1998, 21). Usually, an issue is handled within the 'normal' political process and is politicised in parliament through legislation. As a result of securitisation, the issue is lifted from the normal rules and realms of

[2] Gammeltoft-Hansen describes Australia's refugee law and policy as one of deterrence and points to Australia 'excising' more than 3,500 islands from its migration zone, thereby precluding access to ordinary asylum procedures for people reaching these islands (Gammeltoft-Hansen 2014, 577).

governing to implement special measures (Bunzan, Waever & Wilde 1998, 23-26). The area of migration has been increasingly described in security terms, and as a result of the securitisation of migration legal rules can be lifted from the normal processes. For exclusion clause cases, as a result of identifying a security threat, emergency measures are enacted and the asylum seeker who would otherwise be considered, as a refugee is no longer afforded the protections of the Refugee Convention. We also see subpar fair trial standards being applied, such as excluded asylum seekers being subjected to indefinite detention and a disregard for the principle of complementarity protection.

The connection between the theoretical assumptions of securitisation and the practical judicial administration of migration is that the government and the courts and tribunals can have a similar agenda to determine excluded asylum seekers as threats. The securitisation of migration has broader political implications since 'the state, by determining who is a 'threat' shapes the political debate in terms of threat and survival' (Triandafyllidou & Dimitriadi, 2014, 8). Balzacq also emphasises the link between political dimensions and how it relates to administrative processes in migration law. Policy instruments and the discourse from administrative processes can mutually reinforce each other in the securitisation process. The choice of policy instrument is typically a locus of intense power games and on a general level discourse can either pre-date a policy tool or be a 'latent development' of the instrument (Balzacq 2007, 76-78). To that end, the Australian government's restrictive and deterrent migration policies can work with the language of courts and tribunals in the securitisation process.

The court system can create legal borders, which can be strategically used to exclude people from legal rights and procedures. Basaran writes that 'liberal democracies that continue to operate under the rule of law and value of legal rights restrict or even suspend fundamental rights at the same time for a specific category of people at specific places' (Basaran 2008, 339). In exclusion clause cases, courts can work with policy instruments to interpret the exclusion clause from a security perspective. As a result, the protections of the Refugee Convention are suspended for excluded asylum seekers who have been categorised as threats. Although courts and tribunals are still functioning under the auspices of merits and judicial review, giving the asylum seeker a legal status, they also excise the protections of the law through exclusion. We see not only the increased number of excluded asylum seekers but also more broadly an example of the issue of the securitisation of asylum procedure.

The consequence of adopting a security lens through the application of the exclusion clause is 'othering'. The concept of 'othering' has been generally used as a term, which concerns the consequences of racism, sexism and class (or a combination hereof). 'Othering' also includes the process of identity formulation related to symbolic degradation (Jensen,

2011, 65). Particularly, when 'othered' the one that is not the self becomes devalued and dehumanised through the discursive process, changing one into the 'other' (Jensen 2011, 65). In the context of the exclusion clause, this article describes 'othering' as shifting the lens to view excluded asylum seekers as security threats to society. In other words, the construction of the asylum seekers as a security threat leads to 'othering', where they are cast in the light of 'the other' who can be 'justifiably' denied protection under the Refugee Convention and other fair trial standards. 'Othering' as this article describes results in the denial of the safeguard of rights. Jenkins, in her article entitled 'Bare Life: Asylum-Seekers, Australian Politics and Agamben's Critique of Violence', frames refugees as the 'obvious other' in the context of the arbitrary denial of procedural safeguards to non-citizens who are threats (Jenkins 2014, 2). In other words, the process of 'othering' occurs where these excluded asylum seekers are being included in the national court process to determine whether they are a security threat, only to be excluded from protection and have fair trial standards withdrawn.

Agamben provides a theoretical explanation for the dangers of constructing these asylum seekers as security threats. The exclusion clause can be seen as the exception to the Refugee Convention, where these are asylum seekers who would otherwise fall under the protection of the Convention. These exceptional circumstances of asylum seekers who have committed international crimes are marked by the concentration of power by decision makers and the reduction of law (Agamben 2003). This concentrated power determines whether emergency action needs to be taken. The idea is that the security of society is at stake so there is 'no choice' but to exclude these asylum seekers from the protection of the Refugee Convention. In that sense, we see the judge or tribunal member decide whether the refugee is a security threat that needs to be excised from the protection of the Refugee Convention. Therefore, in a 'crisis' such as the emergency of excluding asylum seekers who have committed international crimes, the language of necessity and exception need to be studied.

However, what appears to be a factual determination of whether the asylum seeker has committed an international crime is actually an exercise of concentrated power to determine which emergency is a fact. What we see is the indiscrimination between fact and law where the decision makers have the power to influence facts for the purpose of securitisation. When judges and tribunal members use language, which reflects that these excluded asylum seekers, are dangerous and necessary to exclude, less emphasis is placed on the legal text. This is particularly the case where the decision maker includes a securitisation lens instead of just determining as stated by Article 1F that there are "serious reasons to consider whether the refugee has committed an international crime". This results in the weight of the Refugee Convention being diminished and the inclusion of an interpretation by

the judge to determine which refugee should be excluded as a security threat. This article argues that a securitisation approach to the application of Article 1F signals the reduction of a humanitarian approach. As such, we see that subpar fair trial rights for excluded asylum seekers and 'genuine' refugees are also permissible through this securitisation lens. The problems arise when the emergency is socially constructed for political purposes rather than Article 1F being applied restrictively with caution.

In exclusion clause cases we see the 'other' created through discourse of court and tribunal decisions, which construct the asylum seeker as a threat that should be excised from protection. The case examples in the article show that this threat can be to the order and safety of the receiving state, and even to international morality. The Copenhagen Securitisation approach is useful as a lens to bring to light the process, which leads to 'othering'. The Copenhagen Securitisation approach studies the language and discourse decision makers use to construct threats in emergency and exceptional circumstances (Bunzan, Waever & Wilde 1998, 23-26). Therefore, securitisation should be seen as refugees being socially constructed as threats (Waever 1995, 55). In this light, when there is an existential threat this comes with a special demand to combat that threat (Bunzan, Waever & Wilde 1998, 25).

Australian case law shows the connection between the political dimension of interpreting Article 1F through a security lens and practical judicial administration. This article puts forward that securitisation leading to 'otherness' can be perpetuated through the discourse of tribunal members and judges characterising these asylum seekers as security threats. The cases this article examines, discuss how the discourse of judges constructs asylum seekers as security threats to society, order and safety, and even morality. The *travaux préparatoires* shows the original intention of the exclusion clause was be determine whether the refugee was worthy of protection. This article shows that this expansion has expanded to accommodate a security lens.

The decisions, which exclude asylum seekers, are made through the Australian administrative process for protection visas. This process begins through the regular refugee status determination procedure with a decision by a delegate of the Minister for Immigration and Home Affairs (Lindsay 2005, 55). A Tribunal Member of the Administrative Appeals Tribunal (formerly known as the Refugee Review Tribunal) or the General Division of the Administrative Appeals Tribunal (AAT) can review the merits of the decision of the Minister's delegate. In the case of merits review, the Administrative Appeals Tribunal conducts a complete rehearing of the applicant's case. This includes an informal hearing, which reviews the correctness of the delegate's decision and gives the applicant the opportunity to discuss material that was not presented before the delegate (Lindsay 2005, 57). The next level of appeal is to the judicial review system to the Federal Circuit Court of

Australia, Federal Court of Australia and High Court of Australia respectively. These courts can determine whether the administration has made a jurisdictional error. If such an error were found, this would mean that in law, the administrative decision was not regarded as a decision at all. A jurisdictional error can include an error in procedural fairness, the identification of the wrong issue, an error where there is new evidence on appeal, and an error where Tribunal made an unreasonable decision, which resulted in the Tribunal exceeding its jurisdiction. If a jurisdictional error is found, the matter will be remitted to the Tribunal to hear the case again (Lindsay 2005, 61-65). Concerning, is that the administrative law process, and its comprehensive appeals process, is being denied to Article 1f cases, now that ASIO is determining the cases.

3. Securitisation through exclusion from protection

The exclusion clause is part of Article 1 of the Refugee Convention, which defines the term 'refugee'. In defining who is a refugee, Article 1F of the Refugee Convention states that the provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

a. he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
b. he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
c. he has been guilty of acts contrary to the purposes and principles of the United Nations.

In Australia, Article 1F has been adopted under the Section 5H(2) of the *Migration Act 1958* (Cth) where a person is not considered a refugee if the Minister has serious reasons for considering that:

a. the person has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
b. the person committed a serious non-political crime before entering Australia; or
c. the person has been guilty of acts contrary to the purposes and principles of the United Nations.[3]

[3] Legislation in Canada and the UK as a part of the European Union, have also incorporated Article 1(f). The domestic laws incorporating Article 1(f) for Canada and the European

Article 9 of the Refugee Convention contains a derogation clause, which presupposes that there may be circumstances, which warrant and justify contracting states withhold all or certain components of refugee status (Davy 2011, 781). The article permits state parties to suspend rights across the Convention in a state of emergency[4]. Historically, provisions in international treaties such as Article 4 of the International Covenant on Civil and Political Rights 1976 and Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 have allowed for states to maintain their sovereignty and suspend the protection of basic rights in times of emergency. The drafters of these treaties were aware that crises could provide reasons for governments to enhance their powers, dismantle democratic institutions, and repress political opponents. However, they also accepted that sovereign nations have a responsibility to protect their citizens and domestic institutions.[5] It assumes that there may be circumstances, which warrant justifying that contracting states can withhold refugee status. Similar to these international treaties, Article 9 (or the Provisional Measure) of the Refugee Convention is meant to operate as an equivalent emergency clause. Article 9 states that:

> Nothing in this Convention shall prevent a Contracting State, in time of war, or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in this case in the interests of national security.

Generally in international law the term 'provisional measures' is regularly used to limit the duration of measures applied, often to preserve the rights of the states (Davy 2011, 781). Article 9 does not specify what is considered a provisional measure or which core rights are to be considered non-derogable. However, the measures have been characterised by these four broad elements which are not present in Article 1F:

> First, the measures are bound to certain situations (*i.e.* war or other grave and exceptional circumstances). Secondly, the measures are supposed to serve particular public interests (*i.e.* the interest of national security). Thirdly, the measures are first applied on account of nationality and they must—at some point—be individualized, *i.e.* directed against defined individuals on account of an individualized threat. Fourthly, the measures are limited in time:

Community are Section 19(1)(j) of the *Immigration Act 1976* and Article 12(2) of the Directive 2011/95/EU respectively.

[4] Wouters 2009, 42 as cited by Edwards 2012, 622.

[5] Nowak 2005 as cited by Helfer & Fariss 2011 at 676.

> they may be applied only pending the determination of whether the person is in fact a refugee (*i.e.* a 'true' refugee) (Davy 2011, 781).

After the Second World War, overwhelmed by an influx of people claiming refugee status, severe measures were taken such as internment to ensure there was no threat to national security. In the 1940s some Allied countries were afraid that they might have taken in 'dangerous bogus refugees' who supported the axis powers. For situations such as war, grave and exceptional circumstances, Article 9 provided a *carte blanche* that contracting States could introduce measures of control to contain the threat of national security. If contracting states decided to do so, the duties under the 1951 Convention would not bind them (Davy 2011, 781). Article 9 also expressly gives the contracting state measures which are 'essential to National Security' in response to war or other grave circumstances (Davy 2011, 781). The term 'national security' is rarely defined, with some flexibility of the interpretation left to national governments. However, national security is considered to be a very high-ranking public interest, encompassing political independence, territorial integrity and the functioning of government or other vital public institutions (Davy 2011, 795). For example, in the case of *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2001] 3 WLR 877, the House of Lords expressly stressed indirect threats to security of the United Kingdom caused by modern terrorism as falling under Article 9 (Davy 2011, 795).

However, the security burden of Article 9 has shifted to also include Article 1F where states can exclude asylum seekers applying for refugee status. Instead of Article 9 being the emergency clause, Article 1F also acts as a quasi-permanent emergency measure and a 'national security' provision. Perhaps this shift has occurred due to the high bar, which needs to be met for Article 9 to apply such as the inflexibility of the definition of 'national security'. As a result of excluding asylum seekers from protection for reasons based on national security, Article 1F has also been used as a suspension clause. Therefore, Article 1F functions to suspend rights across the Convention for asylum seekers who are a security threat.

Scholars argue that the original purpose of Article 1F was to deem that some persons who face a real chance of being persecuted were nonetheless underserving of international protection (Hathaway and Foster 2014, 524). The drafters were persuaded that if states parties were expected to admit serious criminals as refugees they would simply not be willing to be bound to the Convention (Hathaway & Foster 2014, 525). The categorical nature and systemic purpose of Article 1F is said to make it clear that Article 1F is not the basis for excluding a specific person seeking protection who is adjudged to pose a risk to the receiving state. Therefore, the general purpose is not the protection of society of refuge from dangerous refugees rather it is to exclude from the

beginning those who are not genuine refugees.[6] As a result, this article argues that Article 1F is different to Article 9 because exclusion should be considered different from suspension. In other words, the purpose of suspension is to suspend the rights of the Convention in times of national security and exclusion to exclude refugees who are not considered deserving of protection.

Further, the purpose of Article 1F was not intended to allow the *refoulement* of a genuine refugee to his or her native country. This is the case even if he or she poses a danger to the security of the country of refuge or to the safety of the community. Under the provision for *non-refoulement,* Article 33 states that:

> (1) No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> (2) The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of a country in which he is, or who, having been convicted by a final judgment of a particular serious case, constitutes a danger to the community of that country.

Although similar to Article 1F, Article 33 and Article 1F are to be distinguished as serving two different purposes. According to a UNHCR Statement, 'unlike Article 1F, Article 33(2) does not form part of the refugee definition and does not constitute a ground for exclusion from refugee protection.' Specifically, the UNHCR articulates that 'while Article 1F is aimed at preserving the integrity of the refugee protection regime, Article 33(2) concerns the protection of national security of the host country.' [7] The UNHCR further recommended that a 'decision to exclude an applicant based on a finding that s/he constitutes a risk to security of the host country would be contrary to the object and purpose of Article 1F and the conceptual framework of the 1951 Convention.'[8] Moreover, it is problematic to apply to Article 1F(a) as a security clause because this article is written in the past tense with wording such as 'has committed' and 'has been guilty.' This hints that the article applies to international crimes that have been committed in the past. If the asylum seeker poses a security risk, this finding would be in relation to crimes that are committed in the future. In contrast, Article 33(2) uses wording such as 'reasonable grounds for regarding as a danger to the security of a country in which he is (…)' This wording looks toward the future

[6] Hathaway and Foster 2014, 529 citing *Pushpananthan v. Canada* (Minister of Citizenship and Immigration) [1998] 1 SCR 982, para 58.
[7] UNHCR Statement on Article 1F 2003, 8 as cited by Hathaway & Foster 529-530.
[8] Ibid.

conduct. This confuses Article 1F(a) with Article 33(2), which looks at the future risk and is written with the future tense. The purpose of Article 33(2) is to expel and withdraw protection from *refoulement* from recognised refugees who pose a danger to the host state in the future.

This view is supported by the *travaux préparatoires* which indicated that the legislative history of Article 1F showed that the signatories to the Convention wished to ascribe special meaning to the words 'purposes and principles of the United Nations' in the context of the Refugee Convention. The general tone of the Convention is that 'refugee law ought to concern itself with actions which deny human dignity in any key way, and that the sustained or systematic denial of core human rights is the appropriate standard' (Hathaway 1991, 108). Therefore, the purpose of Article 1F is to define who is a refugee in light of the human rights object and purpose of the Convention (*Pushpanathan v. Canada*, paras.55, 57-58). Justice Bastarache, in the case of *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982 agrees, reasoning that the general purpose of Article 1F is not aimed at the protection of society:

> Thus, the general purpose of Article 1F is not to the protection of the society of refuge from dangerous refugees, whether because of acts committed before or after the presentation of a refugee claim; that purpose is served by Article 33 of the Convention. Rather, it is to exclude *ab initio* those who are not *bona fide* refugees at the time of their claim for refugee status. Although all of the acts described in Article 1F could presumably fall within the grounds of *refoulement* described in Article 33, the two are distinct. (*Pushpananthan v. Canada*, para 58).

In contrast, the Australian Department of Immigration stated that 'the inclusion of Article 1F in the Refugee Convention serves two interrelated purposes. These are to: protect the public safety and security in receiving countries; and [to] preserve the moral integrity of the international protection regime' (Department of Immigration and Multicultural and Indigenous Affairs 2002, 23).[9] In light of the original intention of Article 1F shown in the *travaux préparatoires*, the interpretation of the Australian government is a securitised interpretation because its wording points to the protection of public safety and the security of the country of refuge. The result is that Article 1F has taken on a security character instead of Article 9, the national security suspension clause which suspends rights in times of emergency, and Article 33, which is related to the *refoulement* of refugees in light of future acts. The interpretation of Article 1F by the Australian government reflects the link between the political dimension and the

[9] As cited by Hathaway & Forster, 2014 at 529.

securitisation lens by showing how a security framing can be used by the Department of Immigration.

4. Securitisation in Case Law

The case *Dhayakpa v. Minister for Immigration and Ethnic Affairs* is an example of the construction of asylum seekers as a security threat. Here, we see the decision maker interpreting Article 1F as an article 'protective of the order and safety of the receiving state'. In this case, Justice French of the Federal Court in reviewing the decision of the Tribunal's approach to Article 1F decided that:

> (...) The exemption in Article 1F(b) however, *is protective of the order and safety of the receiving state.* It is not, in my opinion, to be constructed so narrowly as to undercut its evident policy. The fact that a crime committed outside the receiving State is an offence against the laws of the State does not take it out of the ordinary meaning of the words of Article 1F(b). Nor does the fact that the crime has subsequently been punished under the law of the receiving State. The operation of the exemption is not punitive. There can be no question of twice punishing a person for the same offence. *Rather that it is protective of the interests of the receiving State. The protective function is not limited according to whether or not the punishment has been inflicted in Australia or elsewhere.* Nor on the language of the Article or its evident policy, is it necessary that the disqualifying crime have any connection to the reason for seeking refuge [emphasis added] (*Dhayakpa v. Minister for Immigration and Ethnic Affair,* para 29).

Despite the *travaux préparatoires* stating that the general purpose of the Convention is not for the protection of society from dangerous refugees, this paragraph shows the judge constructing the excluded asylum seeker as a security threat. This quote shows that the 'protection of the order and safety of the receiving State' is the reason for exclusion. The Judge interprets Article 1F as having a protective function to exclude asylum seekers.

This security interpretation of Article 1F was affirmed by the Full Federal Court in the case of *Ovcharuk v. Minister for Immigration and Affairs* [1998] FCA 1314. In this case, the Full Federal Court referred to the same paragraph in *Dhayakpa v. Minister for Immigration and Ethnic Affairs* when determining that a charge or conviction did not need to be required to determine that 'serious reason for considering that a person "has committed" a specific type of crime.' Justice Whitlam also agreed that the policy of Article 1F has a protective role in the order and safety of the receiving State:

> Counsel for the appellant criticize French J's identification of the "evident policy" of Article 1F(b). They say his description of that policy reflects that which his honour earlier noted (at 564) was set out in the 1992 UNHCR Handbook. However, his honour expressly observed subsequently (at 565) that the Handbook is not a document, which purports to interpret the Convention. *In any event, I respectfully agree with French J that the transparent policy of Article1F (b) is to protect the order and safety of the receiving State.* That is why para (b) deals with topics that are very different to paras (a) and (c) in Art 1F [emphasis added] (Reasons for Judgment of Whitlam J).

Moreover, to determine the meaning of Article 1F, Justice Sackville of the Full Federal Court stressed the French representative's view at the Conference of Plenipotentiaries of the Statutes of Refugees and Stateless Persons held in Geneva in July 1951. Noting competing views from the UK, Netherlands and French representatives, the judgement emphasised the view of the French representative, choosing only to quote the French representative's point of view:

The minutes record this contribution from the French representative (at 19):

> To understand the French point of view, it was necessary to imagine oneself in France's situation - that of a country surrounded by States from which refugees might *pour in, some of whom might commit crimes*. The definition of the term 'refugee' should therefore contain a clause designed to protect his country, to enable it to exercise the right of asylum it had always so liberally granted, without thereby having to grant to the persons enjoying that right the status of refugee. Unless such provision was made, entry would be permitted to refugees whose actions might bring discredit on that status" [emphasis added] (Reasons of Judgment of Sackville J).

The emphasis on the French representative's view affirms the security lens applied when determining the character of Article 1F. The language by the French delegate paints an image of refugees as a threat which should be combated for they might "pour in, some of whom might commit crimes" and should be defended against. Further, the Tribunal Member in the case of *N1998/532 v. Minister for Immigration & Multicultural Affairs* adopted the reasoning of Justice French in *Dhayakpa v. Minister for Immigration and Ethnic Affairs*. In the reasons for decision Tribunal member stated:

> *The purpose of Article 1F* is found both in a commitment to the *promotion of international morality* and the pragmatic recognition that states are unlikely to agree to be bound by a regime which requires them to protect *undesirable refugees*. In Ovcharuk (supra) it was held that the purpose of Article 1F(b) is *to protect the order and safety of the receiving State*. Each of these elements is to be taken into

> consideration by the Tribunal [emphasis added] (*N1998/532 v Minister for Immigration & Multicultural Affairs*, para 97).

This is an example of how the security purpose of Article 1F(b) has now spread from the interpretation of Article 1F(b) to include the whole of Article 1F. The security lens in *Dhayakpa v. Minister for Immigration and Ethnic Affairs* was adopted in *N1998/532 v. Minister for Immigration & Multicultural Affairs.* Where the previous case dealt with only Article 1F(b), this case referred to 'the purpose of Article 1F.' The common law system where subsequent cases reaffirm the reasoning in previous ones helps to spread the security lens. We see language describing excluded asylum seekers as 'undesirable' and the emphasis on the 'promotion of international morality.' The choice of this language is a reflection of the otherness that securitisation can perpetuate. Otherness involves the dehumanisation and degradation of the asylum seeker. This case is a reflection of otherness as these asylum seekers are dehumanised by their construction as undesirable and not of the international moral standards to which the country of refuge proscribes. This affirms the superiority of the country of refuge as having a higher moral standard and places the identity of the excluded asylum seeker as subordinate (Jensen 2011, 65).

5. Perpetuating otherness through exclusion

The danger is that securitisation can lead to subpar fair trial standards for these asylum seekers now that they have been constructed as a security threat and such can be 'othered'. Excluded asylum seekers who are faced with torture or the death penalty arguably should fall under international obligations of complementary protection. Therefore, an excluded asylum seeker should not be sent back to the country where he or she faces persecution (McAdam 1, 2005). However, Australia's *Migration Act* was amended to include s.197C, which states that Australia's *non-refoulement* obligations are irrelevant to the removal of unlawful non-citizens (*Migration and Maritime Powers Legislation Amendment Act*, 2014). Asylum seekers excluded under Article 1F are considered non-citizens and can be removed regardless of international obligations or whether they would be persecuted upon return.

Also concerning is that recently Australia has been substituting or overlaying its own 'national security' test for the exclusion of asylum seekers instead of applying Article 1F (Saul 2013, p.33). Australia has been relying on the *Australian Security and Intelligence Organisation Act* 1979 to carry out adverse security assessments to exclude asylum seekers who have committed international crimes (Juss 2017, 156). Australian court decisions have legitimised the power ASIO to make security assessments. ASIO was also given powers to interpret detention

provisions of the *Migration Act 1958*.[10] Moreover, in May 2014 the Australian Parliament passed the Migration Amendment Bill 2013, which introduced s.36, which means that to be granted a protection visa the applicant must not have been assessed by ASIO to be directly or indirectly a risk to security.

This treatment spreads to other recognised refugees who have been detained after receiving adverse security assessments. Between January 2010 and November 2011, ASIO issued an adverse security assessment to 54 refugees. None were excluded pursuant to Article 1F of the Refugee Convention – some were placed in indefinite immigration detention, whereas others were released into the community (Saul 2012, 686). These refugees were not given a statement or reasons explaining why the adverse assessments were made. Concerning is that no merits review tribunal was made available to contest the accuracy of the assessments. The refugees continued to be held in detention pending their removal from Australia in absence of a valid visa. However, Australia has recognised these people as refugees and could not return them for complementarity protection reasons as they had not been excluded under Article 1F or the exception to *non-refoulement* under Article 33(2). The result has been lengthy and potentially indefinite administrative detention. Three of the detainees are dependent minor children of refugee parents and one child was born detention and has spent his life of more than two years there (Saul 2012, 688). In 2012, Saul, on behalf of five refugees from this group, made a complaint to the UN Human Rights Committee that 'genuine refugees' with adverse security assessments made against them were also placed in indefinite detention without trial. The Committee condemned the indefinite detention of these recognised refugees who had been illegally detained from 2009-2015 because ASIO had made an adverse security assessment against each of them. The Committee was particularly critical of the arbitrary character and indefinite nature of detention, the refusal to provide information and procedural rights, and difficult conditions of detention, which can inflict serious psychological harm (Human Rights Committee 2016).

There have also been problems with way ASIO has been politically influenced. This year, ABC News leaked a sensitive cabinet document from 2013 named *Transitional arrangements for current permanent Protection visa applicants* where the former immigration minister agreed that the Department of Immigration and Border Protection should intervene in ASIO security checks to try and prevent asylum seekers from being granted permanent protection visas. When faced with up to 700 asylum seekers who 'must' be granted permanent protection under existing legislation, the former immigration minister

[10] Saul 2012, 689 citing *Plaintiff M47/2012 v. Director-General of Security* (2012) 292 ALR 243; *Plaintiff S138/2012 v. Australian Security Intelligence Organisation* [2012] HCATrans 128 (30 May 2012).

agreed that his secretary should write to the director-general of security to request ASIO delay security checks. This would mean that people close to being granted permanent protection would miss the application deadline. The former minister also agreed to reissue an order to the Administrative Appeals Tribunal to hear cases in a particular order to further slow down processing (ABC News, 2018; Minister for Immigration and Border Protection, 2013).

Also concerning is that the security body has been denying these asylum seekers access to legal representation. The Inspector General of Intelligence and Security found that ASIO were not offering all refugees the right to a lawyer in their interview. Asylum seeker service group, the Refugee Advice and Casework Service said the majority of its lawyers had been denied entry to the interviewing process. The inquiry determined that the ASIO officers had no legal basis to exclude lawyers from interviews (Inspector General of Intelligence and Security Annual Report 2011-2012, 29; Kaldor Centre, 2016).

Although asylum seekers excluded by Article 1F are able to have some form of legal status in order to appear before courts and tribunals these decisions are now made by a security intelligence organisation that does not give reasons for its decisions. Asylum seekers that have committed international crimes become further excluded from the political community and are therefore unable to access fair trial rights. The inability to access rights begins from the asylum seeker being a non-political subject and who ends up in a camp (See Rancière, 2004). These aggressive discourses, which characterise asylum seekers as national security threats and other refugees, are also viewed through this security lens. Bypassing legal standards becomes the norm to the point where the exception grows.

The danger of the securitisation of the exclusion clause is the expansion of this space, which normalises subpar fair trial protections. In the cases of ASIO determining Article 1F cases rather than the court system, this shows that the area of excluding asylum seekers who have committed international crimes has entirely fallen into the security realm. Where an officer of an intelligence security organisation decides the fact of who is a threat that should be excised, this results in the reduction of law. The exclusion clause becomes a space where the acceptance of low fair trial standards is increased. This reflects Dauvergne's argument that, '[t]he increasing hostile public and political discourse towards refugees and asylum seekers has penetrated the doctrine of refugee law itself' (Dauvergne 2013, 79). The result of securitisation has been 'othering', where we see subpar fair trial standards such as protracted detention without charge, which has led to serious mental health issues and lack of legal representation. It may no longer seem exceptional that we see the children of refugees who have been excluded for adverse security assessments being held and born in detention facilities.

6. Conclusion

The above cases have shown when applying the Article 1F in exclusion clause cases, judges and tribunal members have constructed asylum seekers as 'security threats'. Discourse in these judgements and decisions have described these asylum seekers as threats to the order, safety, and even the morality of society. Originally, the purpose of Article 1F was to determine those who were unworthy of protection. However, by applying a security lens to these cases this means that Article 1F takes on a security burden from other clauses of the Refugee Convention such as Article 9 and Article 33. This article argues that this change in lens leads to 'othering' where excluded asylum seekers are constructed as threats which should not be protected under the Refugee Convention and are also subjected to subpar fair trial standards.

Overall, this article has made the claim that these security acts are not always positive. There is the danger that these subpar fair trial standards become normalised for not only excluded asylum seekers but also other refugees. This is a result of the reduction of law, which accompanies decision makers being given unfettered power to determine which asylum seekers are a threat and should be excluded. These asylum seekers can be excised from the protection of the Refugee Convention and other fair trial norms. Securitisation as a lens expands spatially to affect other refugees as subpar fair trial standards are normalised. We see complaints from the Human Rights Commission of refugees also being subjected to indefinite detention where there has been an adverse security assessment made against them by ASIO. This has led to a lengthy, arbitrary in character and indefinite nature of detention, a lack of legal representation, the refusal to provide information and procedural rights, and difficult conditions of detention, which can inflict serious psychological harm. The result of an insistence on protecting our society from loosely defined security threats is at the expense of the law, which is at core of our own social fabric, which we are ironically trying to protect.

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