

**National Identity Crisis:
The Politics of Constructing National Identity and Mandatory Detention
of Asylum-Seekers in Australia and Japan**

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I. INTRODUCTION

In an era marked by increasingly repressive policies regarding asylum-seekers, 2005 witnessed two seemingly unconnected countries – Australia and Japan – soften their laws on the detention of unlawful asylum-seekers.¹ Japan and Australia, however, are not so different: in response to the perceived threat to their national identities both countries have developed policies of mandatory detention for unlawful asylum-seekers. Through the use of immigration and citizenship laws, the Australian and Japanese governments have excluded asylum-seekers as the nations’ ‘other’, thereby justifying their detention. In examining how ostensibly different examples as Australia and Japan have developed similar refugee policies, universal elements of national identity emerge that can be used by refugee advocates worldwide.

Japan and Australia have undertaken an international obligation not to punish refugees for arriving unlawfully in their countries.² Under international law, the detention of an asylum-seeker is not considered punishment if such detention is deemed ‘necessary’ by the host state.³ In its recommended guidelines, the United Nations High Commissioner for Refugees sets out when, in its view, detention might be considered

1 In this article, the term ‘unlawful asylum-seeker’ denotes an asylum-seeker who has entered a country without a valid visa or passport.

2 Convention Relating to the Status of Refugees 1951, article 31(1).

3 Convention Relating to the Status of Refugees 1951, article 31(2).

necessary. For example, states may detain asylum-seekers to verify their identity, or to protect national security and public order. The guidelines suggest, however, that detention on these grounds is not to be automatic or prolonged.⁴

The detention of unlawful entrants is not uncommon. Many countries, including 'refugee friendly' countries such as Canada, Britain and Sweden, initially detain asylum-seekers who arrive unlawfully so as to ascertain their identity.⁵ However, these countries release asylum-seekers as soon as possible into the community to await the determination of their application for refugee status. By contrast, until recently Australia and Japan's laws were unique in that they mandated the detention of all unlawful entrants until they were either deported or their application for refugee status was approved.⁶ These laws, known colloquially as 'mandatory detention', permit the incarceration of asylum-seekers for indeterminate, often prolonged periods of time, on the basis of a person's mode of entry into the country.⁷ As such, many critics assert that Australia and Japan's mandatory detention laws are a form of punishment with the aim of deterring other asylum-seekers from entering the country unlawfully.⁸

In light of the recent changes to their mandatory detention policies, this paper critiques from a comparative perspective Australia and Japan's laws on refugees, immigration and citizenship. Despite being two of the most prominent countries that have adopted policies of mandatory detention, very little has been written comparing Australia's policies with that of Japan's. Many critics have, however, challenged independently the legitimacy of both Australia's and Japan's use of mandatory detention as a means of deterrence.⁹ This article does not traverse that well worn path; rather, it asks *why* the seemingly different Australia and Japan both seek to deter asylum-seekers using mandatory detention. An understanding of how these policies have developed and why they remain in force is necessary for those wishing to bring about changes to the way in which the Australian and Japanese – or any other – governments deal with asylum-seekers.

4 UNHCR, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999) <www.unhcr.org.au/pdfs/detentionguidelines.pdf> at 23 July 2005, [3].

5 A. NICHOLAS, Protecting Refugees: Alternatives to a Policy of Mandatory Detention, in: Australian Journal of Human Rights 6 (2002) 69, 73.

6 Immigration Control and Refugee Recognition Act articles 39-44 (Japan); Migration Act 1958 (Cth) s 189 (Australia).

7 AMNESTY INTERNATIONAL, Australia – a Continuing Shame: the Mandatory Detention of Asylum Seekers <http://www.amnesty.org.au/whats_happening/refugees/resources/library> at 2 June 2005.

8 See, for example, A. HELTON, The Detention of Refugees and Asylum-seekers: a Misguided Threat to Refugee Protection, in: Loescher / Monahan (eds), Refugees and International Relations (Oxford 1989) 135.

9 See, for example, P. MATHEW, Australian Refugee Protection in the Wake of the Tampa, in: American Journal of International Law 96 (2002) 661.

In exploring why Australia and Japan detain asylum-seekers, this article uses the concept of 'national identity' developed by sociologists. It posits that mandatory detention is the product of Australia and Japan's use of refugee and immigration law in the construction and perpetuation of their national identities. Modern nation states have had to create national identities as a means of drawing together otherwise unconnected people within artificial borders. The creation of a national identity requires not only constructing an idealised image of the nation, but also creating an outsider or 'other' that defines who the nation is not.¹⁰

Both Australia and Japan's criteria for defining their national identities have changed over time. Before WWII the Japanese government did not view ethnicity as a barrier to becoming Japanese. Currently, however, Japan's national identity is based on ethnicity such that everyone who is not ethnically Japanese is an 'other'.¹¹ By arriving unlawfully, asylum-seekers threaten Japan's image as an ethnically homogenous nation. For this reason the government has established a policy of mandatory detention to deter unlawful entrants. Similarly, although many assert Australia's national identity was originally based on the ethnicity of the white, European colonising community, it is now widely defined in terms of civic culture.¹² Like Japan, asylum-seekers are detained for their unlawful entry which threatens Australia's national identity as a democratic nation committed to the rule of law.

Australia and Japan are evidence of the fact that nation-states can change the criteria used to define national identities. Thus, it is possible for the Australian and Japanese governments to change the way in which each nation-state defines itself, such that asylum-seekers cease to occupy the role of 'other' in Australia and Japan's national psyche. However, as nation-states require an 'other' to distinguish its nationals from that of other nation-states, the acceptance of asylum-seekers may logically result in the marginalization of another group.

This paper begins in section two by examining Australia and Japan's obligations regarding detention of asylum-seekers under international law, and the way in which each country has used mandatory detention laws to deter people from seeking asylum. In exploring why Australia and Japan seek to deter asylum-seekers, section three sets out the theory of national identity as developed by social scientists. It then argues that, through the use of immigration and citizenship laws, Japan and Australia have used asylum-seekers to define their nation's identities. Section four discusses the possibility of removing asylum-seekers from the position of 'other' in Japan and Australia's

10 A. JORDENS, *Redefining Australians: Immigration, Citizenship and National Identity* (Sydney 1995).

11 S. BAILEY, *Japanese Laws and Politics Concerning Immigration (Including Refugees and Foreign Workers)* (1996) <<http://home.att.net/%7Esteve.bailey/japanimmigwordpad.html#section2>> at 10 July 2005.

12 See, for example, JORDENS, *supra* note 10, 1; D. MCMASTER, *Asylum Seekers: Australia's Response to Refugees* (Melbourne 2001) 6.

national identities. It concludes that as all modern nation-states require an 'other', asylum-seekers cannot simply be removed, but must be replaced by another group that will serve as the nation's 'other'. An understanding of the role of national identity formation in the detention of asylum-seekers in Australia and Japan will assist those wishing to change the way in which these, and other nation-states, deal with asylum-seekers.

II. INTERNATIONAL AND DOMESTIC LAW ON DETENTION

In 1951 the United Nations High Commissioner for Refugees (UNHCR) was established to oversee the protection of refugees world-wide and to ensure member state compliance with the obligations set out in the 1951 Convention relating to the Status of Refugees¹³ (Refugee Convention) and later the 1967 Refugee Protocol.¹⁴ These instruments provide a definition of 'refugee' and set out certain fundamental rights and freedoms of refugees that states are obliged to provide and protect. Whilst recognising refugees' right to freedom of movement, the Refugee Convention and Protocol allow for the administrative detention of asylum-seekers who have arrived in a signatory country unlawfully where such detention is deemed 'necessary'.¹⁵

With the increasing use of detention in one form or another by member states that receive asylum-seekers, the UNHCR sought in 1986 to provide guidance on this practice by developing guidelines outlining legitimate reasons for detention.¹⁶ In its guidelines, the UNHCR explicitly states that it considers the use of detention as a means of deterring other asylum-seekers illegitimate.¹⁷ This section reviews the case that Australia and Japan's policy to detain all unlawful asylum-seekers, combined with the length of detention and condition of detention centres, indicate the governments' aim of mandatory detention laws is to deter others from seeking asylum in these countries.

13 Convention Relating to the Status of Refugees, opened for signature 28 July 1951, General Assembly Resolution 429 (V) (entered into force 22 April 1954).

14 Protocol Relating to the Status of Refugees, opened for signature 16 December 1966, General Assembly Resolution 2198 (XXI) (entered into force 4 October 1967).

15 Convention Relating to the Status of Refugees article 31(1).

16 EXECUTIVE COMMITTEE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, Conclusion No. 44 (XXXVII) Detention of Refugees and Asylum-Seekers, 37th Session (1986) <<http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opedoc.pdf?tbl=PUBL&id=41b041534>> at 23 July 2005.

17 UNHCR, *supra* note 4.

Part A – International Law

The Refugee Convention and Protocol are the principal international instruments established to protect refugees and safeguard their rights.¹⁸ Both Australia and Japan are signatories to these instruments. Australia acceded to the Refugee Convention in 1954 and to the Protocol in 1973, whereas Japan signed the Refugee Convention and Protocol in 1981.¹⁹ In article 31(1) of the Refugee Convention, states undertake not to “impose penalties” on refugees “on account of their illegal entry or presence”. It is not clear from the terms of the Refugee Convention what constitutes a penalty. Article 31(2) permits states to restrict the movements of refugees when it is necessary to do so. In its guidelines, the UNHCR asserts that article 31 of the Convention applies not only to recognised refugees, but also asylum-seekers pending determination of their status on the basis that “recognition of refugee status does not make an individual a refugee but declares him to be one”.²⁰

In the view of the UNHCR, the detention of asylum-seekers is “inherently undesirable”.²¹ Furthermore, consistent with article 31 of the Convention, the UNHCR states that detention should only be used in cases of necessity,²² and should not be “automatic or unduly prolonged”.²³ The Commission suggests four exceptions to the general rule that asylum-seekers should not be detained, namely, if necessary to:²⁴

- (i) verify identity;
- (ii) conduct a preliminary interview with the asylum-seeker to identify the basis of the asylum claim;
- (iii) where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum;²⁵
- (iv) to protect national security and public order.²⁶

18 Other international agreements enshrine a freedom from arbitrary detention, such as article 9 of the Universal Declaration of Human Rights and article 9 of the International Convention on Civil and Political Rights.

19 United Nations Treaty Collection, Convention Relating to the Status of Refugees <<http://www.unhcr.ch/html/menu3/b/treaty2ref.htm>> at 14 August 2005; Protocol Relating to the Status of Refugees <<http://www.unhcr.ch/html/menu3/b/treaty5.htm>> at 14 August 2005.

20 UNHCR, *supra* note 4, [3].

21 *Ibid* [1].

22 For a discussion of what is meant by the term ‘necessary’, see UNHCR, *supra* note 16.

23 UNHCR, *supra* note 4.

24 *Ibid* [Guideline 3].

25 The UNHCR insists, however, that asylum-seekers who were unable to obtain travel documentation in their country of origin should not be detained solely for that reason. UNHCR, *supra* note 4, [Guideline 3].

26 According to the UNHCR this exception may only be invoked where there is evidence to show that the asylum-seeker has criminal antecedents and/or affiliations that are likely to pose a risk to public order or national security should she/he be allowed entry. *Ibid*.

The guidelines provide that the detention of asylum-seekers as part of a policy to deter future asylum-seekers is “contrary to the norms of refugee law”, and should not be used “as a punitive or disciplinary measure for illegal entry or presence in the country”.²⁷

Part B – Australia’s Laws on Mandatory Detention

Australia has both an on-shore and off-shore refugee and humanitarian program with a combined intake of 13,000 people per annum.²⁸ The off-shore and humanitarian program enables asylum-seekers to apply for resettlement in Australia from overseas.²⁹ This program is part of Australia’s migration system. By contrast, the on-shore system governs persons who seek asylum upon arriving in Australia.³⁰ Australia’s laws distinguish between on-shore applicants who arrive using valid passports and visas, and applicants who do not possess such documentation. All asylum-seekers who arrive without valid documentation are detained until their application for asylum is accepted or rejected by the authorities.³¹ The application and appeal process is complex and often lengthy; asylum-seekers are often detained for months, sometimes years.³² The decision to detain asylum-seekers is not reviewable by Australian courts.³³ Some critics argue that Australia’s laws on detention contravene article 31 of the Refugee Convention because the laws go beyond mere administrative detention when it is deemed necessary.³⁴ That is, they create a situation of ‘mandatory detention’. By contrast, those who arrive in Australia on valid visas may apply for asylum without being detained and are free to live in the community while their application for refugee status is being processed.³⁵ Thus, critics assert detention of unlawful entrants is a policy aimed at both punishing those who arrive without valid travel documentation and a form of deterring those asylum-seekers who intend to come to Australia by unlawful means.³⁶

27 *Ibid.*

28 DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AND INDIGENOUS AFFAIRS, Fact Sheet 60, Australia’s Refugee and Humanitarian Program (2005).

29 THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, Australia’s Refugee and Humanitarian System: Achieving a Balance Between Refuge and Control, Joint Standing Committee on Migration Regulations (1992) 1.

30 *Ibid.*

31 Migration Act 1958 (Cth) ss 178(2), 196(1).

32 AMNESTY INTERNATIONAL (AUSTRALIA), Mandatory Detention of Asylum Seekers (2005) <http://www.amnesty.org.au/resources/fact_sheets/mandatory_detention_of_asylum_seeker_s_-_fact_sheet> at 30 August 2005.

33 Migration Act 1958 (Cth) s 183.

34 AMNESTY INTERNATIONAL (AUSTRALIA), Mandatory Detention of Asylum Seekers, *supra* note 32.

35 MCMMASTER, *supra* note 12, 59.

36 A. SCHLOENHARD, To Deter, Detain and Deny: Protection of Onshore Asylum Seekers in Australia, in: International Journal of Refugee Law 14 (2002) 302, 316.

In 1992 Parliament enshrined Australia's policy of mandatory detention in the *Migration Reform Act 1992* (Cth) which amended the *Migration Act 1958* (Cth) (Migration Act). Under sections 189 and 196 of the Migration Act, immigration officials must detain all non-citizens who are unlawfully in Australia until they either deport the unlawful entrants or grant them permission to remain in Australia.

In 2001, the Australian government passed amendments to the Migration Act to enact its 'Pacific solution' policy.³⁷ These amendments prohibit asylum-seekers who arrive in prescribed parts of off-shore Australian territory from making applications for Australian visas. Instead, the government takes asylum-seekers to either Nauru or Papua New Guinea to detain them whilst authorities assess their claims for asylum.³⁸ In a radio interview in 2002, the Prime Minister John Howard spoke of the success of the Pacific solution in deterring asylum-seekers, stating:

far from being a failure, [the Pacific solution] has made some contribution towards the slowing down in the number of people who are coming to this country. In the long run, of course, the answer is to get a situation where people don't endeavour to come here illegally in the first place.³⁹

Mandatory detention and the Pacific solution policy have received much domestic and international criticism.⁴⁰ Dissatisfaction with the government's policies regarding asylum-seekers can also be found within Prime Minister John Howard's own Liberal Party. Recently, 'rebel' members of the Liberal Party unhappy with the Prime Minister's policies on mandatory detention introduced two private members' bills into the House of Representatives.⁴¹ If passed, these bills would have brought Australian law into conformity with the UNHCR guidelines by permitting the detention of asylum-seekers only when necessary, for example, to verify a person's identity. Wishing to retain mandatory detention, Prime Minister John Howard negotiated a compromise with the rebel Liberal Party members culminating in the *Migration Amendment (Detention Arrangements) Act 2005* (Detention Act).

37 *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth); *Migration Legislation Amendment Act, No. 1, 2001* (Cth); *Migration Legislation Amendment Act, No. 5, 2001* (Cth); *Migration Legislation Amendment Act, No. 6, 2001* (Cth); *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth).

38 *Migration Act 1958* (Cth) s 198A.

39 Transcript of Neil Mitchell interview with PM John Howard, Radio 3AW (25 January 2002) <<http://www.pm.gov.au/media/Interview/2002/interview1484.cfm>> at 26 February 2007.

40 See, for example, MATHEW, *supra* note 9, 66; AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals* (1998) <http://www.hreoc.gov.au/pdf/human_rights/asylum_seekers/h5_2_2.pdf> at 11 June 2005.

41 *Migration Amendment (Act of Compassion) Bill 2005* (Cth), *Migration Amendment (Mandatory Detention) Bill 2005* (Cth).

In section 4AA of the *Detention Act* the government affirms the general principle that “a minor shall only be detained as a measure of last resort”. In addition, the Act grants the Immigration Minister the discretion to make a determination that a detainee is to reside at a place other than a detention centre, if it is considered in the public interest to do so.⁴² In its Explanatory Memorandum, the government indicated that it would only use this power when families are involved and would impose unspecified, unlimited conditions upon release.⁴³

Although under the *Detention Act* more people have been released from detention, many have criticised the practical effect of the *Detention Act* as it appears that it contains “no extra compulsion or mechanisms to force the government to do anything they don't want to do”.⁴⁴ Indeed, Prime Minister John Howard acknowledges that these changes are merely “mandatory detention system with a softer edge”.⁴⁵ In effect, the Australian Government is still aiming to deter people.

Part C – Japan's Laws on Mandatory Detention

A year after signing the Refugee Convention and Protocol in 1981, the Japanese government amended its 1951 Immigration Control Law to insert provisions relating to the recognition and acceptance of refugees, including the incorporation of the Convention's definition of a refugee.⁴⁶ The Act was renamed the Immigration-Control and Refugee-Recognition Act (Japanese Immigration and Refugee Act).⁴⁷

Article 61 of the Japanese Immigration and Refugee Act incorporates the government's policy of mandatory detention.⁴⁸ Under this article, immigration authorities had the power to detain any non-Japanese citizen arriving in Japan without valid documents, including asylum-seekers.⁴⁹ The government granted immigration examiners a discretionary power to permit provisional release based on factors such as the strength of an asylum-seeker's claim, his or her financial situation, or character. However, refugee advocates report that, with few exceptions, immigration examiners would deny provisional release until the asylum-seeker had been detained for over a year.⁵⁰

42 Migration Act 1958 (Cth) s 197AB.

43 Explanatory Memorandum, Migration Amendment (Detention Arrangements) Bill 2005 (Cth), 2.

44 SENATOR A. BARTLETT, MP Confident Party will Approve Detention Deal, in: ABC News Online (18 June 2005) <<http://www.abc.net.au/news/newsitems/200506/s1395071.htm>> at 16 August 2005.

45 S. MAIDEN, Changes to Ensure a Fairer Future, in: The Weekend Australian 18-19 June 2005, 6.

46 Convention Relating to the Status of Refugees article 2(3)-2.

47 *Shutsunyū-koku kanri oyobi nanmin nintei-hō* [Immigration-Control and Refugee-Recognition Act], Law No. 319 of 1951.

48 Immigration-Control and Refugee-Recognition Act article 2.

49 Immigration-Control and Refugee-Recognition Act article 24(3).

50 World Refugee Survey 2003 (2003) <http://www.refugees.org/data/wrs/03/country_reports/EA2JapanToVietnam.pdf> at 14 June 2005.

Recent amendments to the Japanese immigration law that came into effect in May 2005 were ostensibly an attempt at overhauling Japan's strict laws on mandatory detention.⁵¹ Article 61-2-4 of the Japanese Immigration and Refugee Act provides that asylum-seekers who have arrived unlawfully in Japan, rather than be detained, may be granted a provisional stay visa if they meet certain requirements. The two main requirements are:⁵²

- (i) asylum-seekers must submit an application for refugee recognition within six months of their arrival in Japan; and
- (ii) asylum-seekers must have entered Japan directly from a territory where he/she has suffered persecutions.

These amendments appear to be a positive step toward the abolition of mandatory detention. However, whether the availability of provisional stay visas will result in a change in the practice of detention remains to be seen. The Ministry of Justice has issued guidelines on the recent amendment that impose further conditions on asylum-seekers wishing to apply for the provisional stay visas.⁵³ The guidelines do not specify what the "various conditions" are that an applicant will be subject to, although the Ministry expressly prohibits successful applicants from working whilst their application is being determined.⁵⁴

Further changes to the Japanese Immigration and Refugee Act mean that asylum-seekers face fines of three million yen, or imprisonment of up to three years if they arrive in Japan 'secretly' (*himitsu ni*) or with forged documents.⁵⁵ Asylum-seekers will also be subject to these punishments if they fail to renew their provisional stay visas, which are valid for one month only, or if they engage in any work.⁵⁶

The government's prohibition on asylum-seekers working, combined with the increase in fines and unspecified conditions placed on provisional stay visas leads some to question whether the changes are a serious attempt by the Japanese government to avoid detaining asylum-seekers.⁵⁷ Indeed, before the Japanese government amended the Japanese Immigration and Refugee Act, the UNHCR issued a critique of the proposed

51 Immigration Control and Refugee Recognition Act, Law No. 66 of 2005.

52 *Shutsunyū-koku kanri oyobi nanmin nintei-hō no ichibu o kaisei suru hōritsu* [Law for Partial Amendment of the Immigration Control and Refugee Recognition Act], Law No. 73 of 2004, article 61-2-4.

53 A Guide to the Procedure for Recognition of Refugee Status <<http://www.immi-moj.go.jp/tetuduki/nanmin/pdf/English.pdf>> at 25 July 2005.

54 *Ibid* [Guideline 4].

55 Immigration-Control and Refugee-Recognition Act article 70.

56 Immigration Control and Refugee Recognition Act article 70.

57 "Diet Cracks Down on Overstayers, Widens Door for Refugees", *The Japan Times*, 28 May 2004, <<http://www.japantimes.co.jp/cgi-bin/makeprfy.pl5?nn20040528a1.htm>>; S. FURUYA, Implementing International Refugee Law Through a National Legal System: Practice in Japan, in: *The Japanese Annual of International Law* 47 (2004) 1, 26.

changes and found that a strict application of the amendments “would be at variance with the 1951 Convention, as the proposed conditions may become, in some cases, a form of penalty in the sense of Article 31 of the 1951 Convention.”⁵⁸

Given the reluctance of immigration officials to exercise their power to grant asylum-seekers provisional release visas, the situation for detainees is unlikely to change substantially.

III. NATIONAL IDENTITY

Despite recent changes, the Australian and Japanese governments are intent on retaining mandatory detention as a means of deterring asylum-seekers. This section contends that Japan and Australia detain all asylum-seekers who arrive unlawfully because they pose a serious threat to the identities of these countries. Part A of this section introduces the theoretical framework of national identity and explains that all nation-states need an ‘other’ so as to identify what the nation is not. Parts B and C explore the development and perpetuation of Australia and Japan’s national identities through the use of immigration and citizenship laws that distinguish between ‘us’ and ‘them’. By arriving unlawfully and evading the governments’ immigration checks, asylum-seekers challenge the governments’ control over the presence of ‘others’ in each country and in this way threaten their respective nations’ identities.

Part A – Theory of National Identity

Modern social science and humanities have established that national identities are constructed by nation-states for the purpose of creating a collective consciousness of the people who live within a defined geographical space.⁵⁹ National identities are used to delineate ‘us’ and ‘them’; that is, who is a national of a nation-state and who is not. The dichotomisation between ‘us’ and ‘them’ is critical to the existence of nation-states as it “ensures the continuity of the group as a form of social organisation”.⁶⁰

58 UNHCR, UNHCR’s Comments on the Bill to Reform the Immigration Control and Refugee Recognition Act of Japan (2004).

59 S. TASCONE, Refugees and Asylum-Seekers in Australia: Border-Crossers of the Post Colonial Imaginary, in: Australian Journal of Human Rights 8 (2002) 125, 126.

60 A. TRIANDAFYLIDOU, National Identity Reconsidered: Images of Self and Other in a ‘United’ Europe (2002) <www.iue.it/Personal/Strath/archive/archive_seminars/stranger_spr02/abstract/Chapter2Trianda.doc> at 22 August 2005.

The creation of nation-states and national identities

The theory of national identity and nation-state was first put forward by Hans Kohn in 1945 in his book *The Idea of Nationalism*.⁶¹ National identity theories have since become mainstream in sociological circles, with prominent writers such as Benedict Anderson and Ernest Gellner in particular adding to the literature in this field.⁶² Despite their differences, these theorists all view nation-states as modern constructions.⁶³ Nations, as social groups that share a common identity based on a shared ethnicity, language, culture or religion are not new. However, the idea that each nation should have its own sovereign territory, ruled by the state (a political institution with the highest authority) is said to have come about in the early nineteenth century.⁶⁴

Today, the nation-state exercises sovereignty over a clearly defined and demarcated territory. However, before the creation of nation-states, dynasties existed whereby sovereignty emanated from a centre, and its borders were “porous and indistinct”.⁶⁵ Consequently, pre-modern empires such as the Ottoman Empire were able to “sustain their rule over immensely heterogeneous, and often not even contiguous, populations for long periods of time”.⁶⁶ There is no clear formula of social conditions that prompted the shift towards nation-states in the nineteenth century.⁶⁷ Rather, each nation followed its own path to become a nation-state.

The world, however, was not divided neatly into separate territories for each nation. Some nations, like the Hmong, are spread across numerous nation-states. Many nation-states are home to large numbers of different nations living within their borders. For example, China, Vietnam and the Philippines are home to over fifty distinct peoples.⁶⁸ Thus, no nation-state is entirely homogenous – that is, consisting of a population that shares such common traits as ethnicity, culture and religion. Although some are more homogenous than others, all nation-states contain minorities.

The legitimacy of nation-states, however, is premised on “the self-identification of a community of people who see themselves as having an observable sovereignty and identification of a political unit housing a culturally homogeneous group”.⁶⁹ In other

61 H. KOHN, *Age of Nationalism: the First Era of Global History* (New York 1962).

62 B. ANDERSON, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London 1983); E. GELLNER, *Nations and Nationalism* (Oxford 1983).

63 M. NIKOLAS, *False Opposites in Nationalism: an Examination of the Dichotomy of Civic Nationalism in Modern Europe* (1999) <<http://www.nationalismproject.org/articles/nikolas/title.html>> at 30 July 2005.

64 E. KEDOURIE, *Nationalism*, in: Fowler, *A Durable Concept: Anthony Smith's Concept of 'National Identity' and the Case of Wales*, Paper presented at the Making Politics Count conference, University of Aberdeed (2002) 1.

65 ANDERSON, *supra* note 62, 19.

66 *Ibid.*

67 NIKOLAS, *supra* note 63.

68 VERVOORN, *Re Orient: Change in Asian Societies* (Melbourne 1998) 21.

69 NIKOLAS, *supra* note 63.

words, a certain degree of homogeneity of the people is essential for a cohesive nation-state. Homogeneity is artificially constructed through the use of national identities that prescribe what it is that distinguishes the members of a particular nation-state from non-members. In this way, nation-states create national identities based on what Benedict Anderson has called an ‘imagined community’, for nation-states are distinguished “not by their falsity/genuineness, but by the style in which they are imagined”.⁷⁰ National identities are integral in promoting and perpetuating the legitimacy of the nation-state, because they identify the real or imagined commonalities that unite the people.

Criteria used to define a nation’s identity

The two main criteria used to define a nation’s identity are ethnicity and civic culture. Although once perceived to be mutually exclusive, these two criteria are now thought to be “collaborators in the journey towards nationhood and in the pursuit of the establishment of a nation-state”.⁷¹

A national identity based on ethnicity prescribes membership determined by descent. Nationality is not voluntary. Rather, by birth and native culture, nationality is considered an inherent characteristic defined by descent as opposed to choice.⁷² National identities based on a civic culture require a group of people to be joined in a community based on respect for the rule of law.⁷³ Membership in a civic culture is voluntary; people can choose which nation-state they wish to be a citizen of. The sovereignty of the people is located in the citizens themselves who possess a single political will. The people are ruled by a government that respects the law, rather than existing above it.⁷⁴

‘Ambiguous inclusion’ and ‘unambiguous exclusion’

Whichever criterion is used to define a nation-state, it will not encompass every national, for no nation-state exists without minorities. However, by using a process of ‘ambiguous inclusion’ and ‘unambiguous exclusion’⁷⁵ nation-states can create a national identity that draws on commonalities of its nationals. Ambiguous inclusion requires the dissemination of invented traditions and national stereotypes that can be read in multifarious ways. In this way, ambiguous traditions and stereotypes serve to both unify the nation-state, whilst sustaining differences within the national groups. Anderson’s ‘imagined communities’ can therefore be maintained by people’s “diverse and complicated readings of ideological constructions of national identity”.⁷⁶

70 ANDERSON, *supra* note 62, 6.

71 NIKOLAS, *supra* note 63.

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

75 J. IWABUCHI, *Complicit Exoticism: Japan and its Others*, in: *Continuum: The Australian Journal of Media and Culture* 8 (1994) 1, 2.

76 *Ibid.*

Ambiguous inclusion is counterbalanced by ‘unambiguous exclusion’, that is, the process of defining clearly what it means to be a non-citizen. Although a nation-state may be populated by people from diverse ethnic and cultural backgrounds, citizens will be united if non-citizens or ‘others’ can be identified, as “[p]urity cannot mark itself through itself. Only impurity marks purity”.⁷⁷ The critical factor for defining the national group is “the social boundary which defines the group with respect to other groups ... not the cultural reality within those borders”.⁷⁸

The control and regulation of a nation-state’s borders is integral to the maintenance of national identity. A nation-state’s borders “actualise the limits of [its] identity and its geographical integrity; the two are not separatable [sic]. Within them is contained the imagined community”.⁷⁹ Laws on nationality and citizenship delineate the boundaries of membership by setting out who is, or who may become, a member of a nation-state and who is an alien. In a similar fashion, it is through the use of immigration law that governments control who may legally enter a nation-state, whether as a temporary visitor or as a permanent resident. Immigration law is “particularly complicit”, Connal Parsley insists, “as a referential and textual strategy” in continually reinforcing who ‘the people’ of a nation-state are.⁸⁰ It is at its borders that a nation-state’s identity can be “regulated and performed against the relief of the otherness which lies outside its claimed territory”.⁸¹ Immigration law protects a nation-state’s borders, and therefore its identity, by regulating the entry and exit of citizens and ‘others’. Asylum-seekers, and other people who arrive in a country unlawfully, directly challenge a nation-state’s sovereignty over its territory and the state’s ability to preserve a ‘safe space’ “within which identity can be handed on and ‘practiced’”.⁸² The threat to a nation-state’s identity is amplified if the border-crossers pose a threat of invasion.

Part B – Japan’s National Identity in its Immigration and Citizenship Laws

Japan’s national identity has been constructed and perpetuated by reference to ethnicity.⁸³ Thus, all those who are not ethnically Japanese are ‘others’. This is evidenced in its laws on citizenship and immigration that draw the boundaries of Japanese and non-Japanese based on ethnicity. Through its laws, the Japanese government can control the presence of ‘others’ in Japan and ensure that Japan’s national identity – the myth of Japan as a homogenous nation-state – is not undermined by large numbers of ethnic

77 *Ibid* 3.

78 *Ibid* 2.

79 TASCAN, *supra* note 59, 126.

80 C. PARSLEY, Performing the Border: Australia’s Judgment of ‘Unauthorised Arrivals’ at the Airport, in: *The Australian Feminist Law Journal* 18 (2003) 55, 61.

81 *Ibid* 62.

82 TASCAN, *supra* note 59, 126.

83 J. LIE, *Multiethnic Japan* (Cambridge 2001) 125.

minorities. The reason for the government's detention of asylum-seekers is two-fold. Firstly, it might be said that Japan has an 'invasion complex' and has sought to control its borders since as early as the sixth century. Asylum-seekers attack the modern nation-states' need for controlled space. Secondly, by side-stepping the legal methods Japan has put in place to control the presence of 'others', asylum-seekers who arrive unlawfully "interrupt unified meanings of nation, and the choices a nation has to maintain these unitary meanings".⁸⁴ Their entry challenges the government's ability to preserve Japan's national identity – that is, to preserve its ethnic homogeneity. Thus, asylum-seekers are detained for being border-crossers of territorial *and* imaginary space.⁸⁵

Forming Japan's national identity

In 1639 the Japanese *bakufu* (a system of military government) enacted a series of measures known collectively as the *sakoku* (closed-country) policy. For two hundred years no Japanese left the country, and only a few foreign traders were permitted to enter and conduct business in a single outlying port – Nagasaki.⁸⁶ In 1853, however, American Commodore Matthew Perry and his naval squadron forced the beginning of Japan's opening to international relations and trade.⁸⁷ The *bakufu* embraced the opening of Japan once it became clear that "without opening their country to the technology of the foreigners, they would be powerless to expel them".⁸⁸ This new encounter with the West "accentuated the sense of Japanese identity that superseded differences among the Japanese".⁸⁹ Indeed, scholars at this time noted "the idea of nations (*kokumin*) is a relative one. Only in coming into contact with foreign countries does that idea first develop".⁹⁰ Japan's population at this time was by and large ethnically homogenous. However, the Japanese national identity was not at this time defined by reference to ethnicity. Shortly thereafter, Japan's imperialist expansion meant that other ethnicities had to be incorporated into the Japanese national identity. Consequently, as Japan's territorial borders expanded, the borders of its identity expanded also.

After annexing Hokkaido in 1873 and Ryukyu (Okinawa) in 1879, the Meiji government pursued an aggressive policy of *yamatoka* (Japanisation) to transform the indigenous, non-ethnic Japanese population of the Ainu and Okinawans into Japanese citizens.⁹¹ Thus, despite being ethnically different, the government believed these minorities could be transformed into Japanese citizens by enforcing on them such things

84 TASCAN, *supra* note 59, 128.

85 *Ibid.*

86 R. MASON / J. CAIGER, *A History of Japan* (North Melbourne 1997) 205.

87 *Ibid* 262.

88 M. BORTHWICK, *Pacific Century: the Emergency of Modern Pacific Asia* (Boulder 1998) 159.

89 LIE, *supra* note 83, 120.

90 *Ibid.*

91 *Ibid* 91.

as Japanese education, language, religion, clothing and surnames. After consolidating its territorial claims over Hokkaido and Okinawa, Japan expanded its sovereignty in progressive steps over Taiwan, Korea, Manchuria and South East Asia. After its occupation of Korea, the Japanese government attempted to Japanese Koreans because, in the words of a Japanese bureaucrat at the time “Koreans are Japanese Sinified, we can peel off the Sinification and make them into Japanese as they originally were”.⁹² Ethnicity, it seems, was not a barrier to becoming Japanese whilst the Japanese government was pursuing a policy of Imperialist expansion.

The use of ethnicity to define Japanese national identity is thought to have only come about in the 1960s. Japan’s rapid postwar construction and economic growth lent itself to Japanese scholars recovering confidence in their society. Correspondingly, they began once again to consider Japanese identity.⁹³ Scholars sought reasons for Japan’s economic ‘miracle’ which could not be explained because it did not match Western experiences of modernisation.⁹⁴ Ethnicity was seized upon by writers at this time as the critical factor that distinguished Japan from other nation-states, and thereby could explain the country’s phenomenal post-war economic success. *Nihonjin-ron* (a genre of literature consisting of theories of ‘Japaneseness’) began to reemerge, stressing Japan’s ethnic homogeneity as the driving force behind Japan’s economic success.⁹⁵ Although many immigrants (mainly labourers from the former colonies of Taiwan and Korea) who came to Japan during the Second World War remained in Japan after the end of the war, the belief in an ethnically homogenous Japanese society persisted. This belief was aided by the geographical isolation of the Ainu and Okinawans. Further, the employment discrimination of Koreans and Chinese ensured that most Japanese were unlikely to encounter large minority groups.⁹⁶

The catalyst for the government’s use of ethnicity in forming Japan’s national identity was the government’s desire to resurrect Japan’s economy after the Second World War and join the international world order. As Margareta Nikolas posits in her article ‘False Opposites in Nationalism’,⁹⁷ nation-states that define themselves by reference to ethnicity are those that have had to initialise quickly the process of modernisation to keep up with the developments of other nation-states.⁹⁸ To achieve modernisation and become equals in the modern civilization, the Japanese were forced to unite as a group that would be recognised as a nation-state. Lacking institutions or other tools that may unite the population, the Japanese identified themselves using their “own unique

92 M. ISODA (1993) 119 in: *Ibid* 123.

93 IWABUCHI, *supra* note 75, 8.

94 *Ibid.*

95 *Ibid.*

96 LIE, *supra* note 83.

97 NIKOLAS, *supra* note 63.

98 *Ibid.*

characteristics that set them apart from foreigners in order to assert their sovereignty”,⁹⁹ their ethnicity.

The perpetuation and preservation of Japan’s national identity in its immigration and citizenship laws

In Japan, ethnicity, as the main criteria that distinguishes ‘Japanese’ from ‘others’, is reiterated in Japan’s citizenship, immigration and residency laws. Japanese citizenship law is based on the concept of *jus sanguinis* – or citizenship by decent. Thus, anyone who is not ethnically Japanese does not automatically receive Japanese citizenship (regardless of being born in Japan). Under the Nationality Law of 1950, the Japanese government permits foreigners to apply for Japanese citizenship.¹⁰⁰ However, to be eligible for naturalization foreigners must fulfill certain criteria. For example, an alien must have lived in Japan for at least five consecutive years,¹⁰¹ must be “of upright conduct”,¹⁰² and must be able to “secure a livelihood by one’s own property or ability”.¹⁰³ In addition, foreigners wishing to naturalize must produce, among other things, information about overseas and Japanese connections, photographs of their family home, neighbourhood and work, and successfully complete a *sokô chôsa* (good behaviour survey). According to a recently naturalized foreigner, the good behaviour survey is essentially a test of assimilation:

This is the biggest hurdle because it is so arbitrary. The Justice Ministry will visit your house, look at your decor, open your refrigerator, even check your children's toys. They will talk to your neighbors to find out how ""Japanese"" you are.¹⁰⁴

Merely obtaining citizenship does not, however, make a foreigner Japanese in the minds of ethnic Japanese. In Japan, many regard *shimin-ken* (citizenship) as a foreign concept, whereas *kokuseki* (nationality) is a native concept.¹⁰⁵ Nationality is seen as a matter of fate, passed on by birth, whereas citizenship “strikes many Japanese people as superficial because people can choose and change it”.¹⁰⁶ In this way, the nation’s identity is “permanent and homogenous. In the dominant way of thinking, nationals share descent; others are foreigners forever”.¹⁰⁷ Consequently, as the nation’s identity is premised on ethnicity, a non-Japanese citizen will still be considered an ‘other’ in Japan.

99 *Ibid.*

100 *Kokuseki-hô* [Nationality Law], Law No. 147 of 1950, article 4.

101 Nationality Law article 5(1).

102 Nationality Law article 5(3).

103 Nationality Law article 5(4).

104 D. ALDWINCKLE, *Turning Japanese Part 2* (2001) <http://www.tabunka.org/newsletter/truning_2.html> at 1 October 2005.

105 LIE, *supra* note 83, 144.

106 *Ibid.*

107 *Ibid* 145.

The government's efforts to keep foreigners out, and thereby reiterate Japan's national identity as an ethnically homogenous nation, are evident in the fact that Japan, as a policy "does not accept immigrants".¹⁰⁸ The Immigration Control Law was modeled on US immigration law, but unlike the US law it was "not designed to encourage migrants to settle in the country".¹⁰⁹ Indicative of the government's policies at the time is the fact that despite there being a visa category for permanent residents under the Immigration Control Law, no foreigner was ever granted permission to enter Japan as a permanent resident.¹¹⁰ Currently, under the Japanese Immigration and Refugee Act the Minister of Justice has the power to grant permanent residence status to a foreigner living in Japan if they satisfy a number of criteria. For example, under article 22 of the Japanese Immigration and Refugee Act permanent residence is permitted only when a foreign national has established a permanent base of livelihood and when it is deemed that their permanent residence will be "in accordance with the interests of Japan".¹¹¹ As one commentator states, this latter requirement is a "catch-all phrase that leaves great discretion in the hands of the Ministry of Justice".¹¹² Not surprisingly therefore, although any foreigner (except one on a tourist visa) may apply for permanent residency status, "rarely is it granted if the alien is not the spouse or child of a Japanese citizen".¹¹³

Japan's immigration laws further reinforce ethnicity as the distinguishing characteristic of the Japanese in the special treatment given to *nikkei-jin* (people of Japanese decent living overseas). During the bubble economy of the 1980s, Japan suffered from a labour shortage.¹¹⁴ Although an obvious solution might have been to encourage migrant labourers from nearby Asian countries, there was a "strong cultural preference – which was translated into policy – for ethnically Japanese migrants".¹¹⁵ Whilst the government, and the public believed that importing foreign workers would result in "a growth in crime...and pollution of the Japanese cultural landscape", it was thought that *nikkei-jin* (mostly from Brazil and Peru) would, by virtue of their Japanese ethnicity, be able to speak Japanese and act according to Japanese customs and values.¹¹⁶

108 H. ODA, *Japanese Law* (London 1999) 434.

109 C. KASHIWAZAKI, *Japan: From Immigration Control to Immigration Policy?* (2002) <<http://www.migrationinformation.org/Profiles/display.cfm?ID=39>> at 17 May 2005.

110 A. KONDO, *Development of Immigration Policy in Japan*, in: *Asia and Pacific Migration Journal* 11 (2002) 415, 423.

111 *Immigration-Control and Refugee-Recognition Act*, article 22(2).

112 BAILEY, *supra* note 11.

113 *Ibid.*

114 Y. ISHII, *The Residency and Lives of Migrants in Japan Since the Mid-1990s* (2005) <<http://www.japanesestudies.org.uk/articles/2005/Ishii.html>> at 15 September 2005.

115 T. TSUDA, *Japanese Brazilian Return Migration and the Making of Japan's Newest Immigrant Minority* (27 January 2004) UCLA Centre for Japanese Studies <<http://www.international.ucla.edu/japan/article.asp?parentid=6996>> at 19 September 2005.

116 *Ibid.*

Consequently, in 1990 the government amended the Immigration Control and Refugee Recognition Act (formerly the Immigration Control Law) to permit second and third generation *nikkei-jin* and their spouses settlement in Japan.¹¹⁷ By virtue of their blood-line, *nikkei-jin* received special treatment as immigrants. Unlike other foreigners in Japan, *nikkei-jin* were automatically granted permanent resident status and were unrestricted in the type of work they could undertake.¹¹⁸

The development of Japan's mandatory detention laws

Japan perpetuates its national identity through its citizenship, immigration and residency laws by distinguishing between those who are ethnically Japanese and those who are not. Through these laws, the Japanese government can keep the presence of 'others' in Japan to a level that does not threaten Japan's national identity as an ethnically homogenous nation-state. The detention of asylum-seekers, however, is not only because they are not ethnically Japanese. It is also because the unlawful arrival of asylum-seekers evokes the Japanese fear of foreign invasion, and directly challenges the Japanese government's ability to preserve Japan's national identity as one of ethnic homogeneity.

The Japanese government's detention of asylum-seekers who arrive in the country unlawfully without proper documentation is partly explained by Japan's age-old invasion complex. Japan, an island nation physically located next to rivals such as China, Manchuria, Russia and Korea, has since as early as the sixth century, feared invasion. In the sixth century, Japan's first recognizable government – the Yamato state – stationed armies to guard the north coast of Kyushyu against the possibility of a Korean or Chinese attack.¹¹⁹ Later, in 1274, Japan's fears were actualized when Mongol chieftain Kublai Khan's armies invaded Japan. Although the Mongols were eventually defeated by a typhoon (*kami kaze*) which killed tens of thousands of men, "fear that they would return lived on".¹²⁰ Six hundred years later Japan was, in the traditionalist's mind, again 'invaded' after a two hundred year 'closed country' policy by American Commodore Matthew Perry. This fear of invasion has been present throughout Japan's history.

It is not surprising then, that Japan's first *en masse* arrival of asylum-seekers evoked, once again, a fear of invasion in the minds of the Japanese public. In his article 'Imposter Refugees, Illegal Immigrants', Yasuhiko Saito compares the arrival of Indo-chinese 'boat people'¹²¹ to the arrival of Perry's Black Ships:

117 KONDO, *supra* note 110, 422.

118 W. HERBERT, *Foreign Workers and Law Enforcement in Japan* (London et al 1996) 122.

119 MASON / CAIGER, *supra* note 86, 46.

120 *Ibid* 36.

121 'Boat people' was the colloquial name given to Indochinese asylum-seekers that fled Vietnam in the 1970s after the collapse of the South Vietnamese government. The term is now used to denote any asylum-seeker that arrives in a country by boat.

Now, more than 130 years later, an affluent and still relatively insulated Japan is being visited by another onslaught of ships: small boats overflowing with refugees landing along Japan's southwestern islands. These boats are unarmed and in no way come close to Perry's formidable armada, but they are just as demanding in their insistence that Japan open its doors once again.¹²²

Japan had no comprehensive laws dealing with refugees until 1982 because there were so few people who sought asylum in Japan. There was no understanding of the term 'refugee' which was not legally defined until 1981. Thus, there were no legal or institutional frameworks with which to deal with asylum-seekers on a large scale. Consequently, when Vietnamese boat-people began arriving on Japan's shores from mid-1975 after the fall of Saigon, the Japanese government dealt with asylum-seekers on an ad hoc basis. Each asylum-seeker was granted a *tokubetsu kyoka* (Special Landing Permission) under article 12 of the Immigration Control Ordinance, allowing the boat-people to remain in Japan for up to thirty days.¹²³ At this time, Japan was under increasing international pressure to accept its share of the hundreds of thousands of Indochinese who sought asylum in Vietnam's neighbouring countries. The Japanese government, however, claimed that Japan had "special social conditions" that prevented it from accepting a further intake of refugees. Namely, that Japan is a "monoethnic society" and as a result has a "lack of experience on the part of the Japanese in dealing with other ethnic groups".¹²⁴

It was not until Japanese Prime Minister Fukuda's meeting with United States President Carter that he announced the decision to resettle Indochinese refugees. Ryuji Mukae believes this concession to be a typical example of Japan's *omiyage gaikô* (souvenir diplomacy).¹²⁵ That is, Japan, aware of President Carter's emphasis on human rights diplomacy, orchestrated the resettlement plan as a means of avoiding embarrassment by President Carter pressing PM Fukuda to open Japan's doors to the refugees.

Japan's resettlement plan, however, imposed strict requirements on asylum-seekers and as a result did not quell international criticism. To qualify for resettlement, asylum-seekers already in Japan had to be Vietnamese (not Laotian or Cambodian) and either:¹²⁶

- (a) a spouse, child or parent of a Japanese citizen or of a lawful resident foreigner with a stable livelihood in Japan;
- (b) a person who has a secure guarantor in Japan; or
- (c) a spouse, child or parent of a person who meets the requirements of (a) or (b).

122 Y. SAITO, *Imposter Refugees, Illegal Immigrants*, in: *Japan Quarterly* 37 (1990) 84.

123 R. MUKAE, *Japan's Refugee Policy: To Be of the World* (Fucecchio 2001) 104.

124 *Ibid* 109.

125 *Ibid* 106.

126 *Ibid* 107.

Although asylum-seekers abroad were also allowed to apply for resettlement in Japan, the conditions were so strict that it was “virtually impossible for Vietnamese abroad to apply”.¹²⁷ Despite the restrictive provisions, the Japanese public remained opposed to the resettlement on the basis that non-Japanese would not integrate well into Japanese society. According to academic Koichi Koizumi:¹²⁸

The source of such opposition was to be found within the fabric of its social and economic history. Firstly, Japan’s past is predominantly one of geographical isolation, very little influenced by other nations. This is demonstrated, for example, by the fact that the Japanese are of single ethnic origin and their single language owes very little to any other. Immigration of other nationalities into Japan has been severely restricted. These factors taken together have represented formidable barriers to the integration of foreigners in Japan.

Eventually, however, strong pressure from other nation-states compelled the Japanese government to liberalise its policy on refugee resettlement. In April 1979 Cabinet approval was given to set a resettlement goal of 500 (to be increased at a later date) and to allow resettlement of non-Vietnamese asylum-seekers.¹²⁹

In 1981 the Japanese government ratified the Refugee Convention and Protocol.¹³⁰ The government believed that by becoming a party to the Convention it would have more autonomy over determining whether to accept refugees and, subsequently, would avoid international criticism regarding refugee intake.¹³¹ The following year, the government enacted the Immigration-Control and Refugee-Recognition Act to enshrine Japan’s obligations under the Convention in domestic legislation. Although the government has used the Refugee Convention’s definition of a ‘refugee’, between 1982 and 2003 Japan recognised only 305 asylum-seekers as refugees – an average of only fifteen refugees per year.¹³² The fact that Japanese Sadako Ogata was United Nations High Commission for Refugees from 1999 to 2001 ostensibly made little difference to Japan’s intake of refugees.¹³³ In its submission to the United Nations Economic and Social Council, the human rights organization Japan Fellowship of Reconciliation in-

127 *Ibid.*

128 K. KOIZUMI, Refugee Policy Formation in Japan: Developments and Implications, in: *Journal of Refugee Studies* 5 (1992) 123, 125.

129 *Ibid* 128.

130 United Nations Treaty Collection, Convention Relating to the Status of Refugees <<http://www.unhcr.ch/html/menu3/b/treaty2ref.htm>> at 5 August 2005; Protocol Relating to the Status of Refugees <<http://www.unhcr.ch/html/menu3/b/treaty5.htm>> at 5 August 2005.

131 MUKAE, *supra* note 123, 144.

132 *Nanmin nintei shinsei oyobi shori-sû no sui’i* [Number of applications and recognised refugees], Ministry of Justice (31 December 2004) <<http://www.moj.go.jp/PRESS/050224-1/050224-1-1.html>> at 19 August 2005.

133 UNHCR, ‘Don’t Be Bureaucratic’ Departing Ogata Tells UNHCR, (20 December 2000) press release, <<http://www.unhcr.ch/cgi-bin/texis/vtx/news/opedoc.htm?tbl=NEWS&page=home&id=3ae6b81a0>> 7 October 2005.

sisted that the Japanese government has put in place restrictive measures on the recognition of refugees, such that it has “kept its door for the asylum-seekers closed tight with a narrow slit for the exceptional entry”.¹³⁴

The Japanese government does not detain asylum-seekers who arrive with valid passports and visas as it is through its visa system that it maintains control over the presence of ‘others’ in Japan. In this way, the Japanese government ensures that its national identity of a homogenous nation is not undermined by the presence of large ethnic minority groups. Asylum-seekers who arrive unlawfully, however, are detained as the government fears an invasion of non-Japanese that will disrupt the belief in a homogenous Japan. The unlawful entry of asylum-seekers challenges the government’s ability to control the population of ‘others’ and therefore is a direct threat to the nation’s identity.

Part C – Australia’s National Identity in its Immigration and Citizenship Laws

Australia’s immigration laws and policies have played a major role in the construction of the nation’s identity by determining not only who is an Australian, but more importantly by defining formally who Australia’s ‘other’ is. Australia’s national identity was originally defined by reference to the colonizing community’s ethnicity,¹³⁵ but with the political embracing of ‘multiculturalism’, the nation’s identity is currently defined by its ‘civil society’.¹³⁶ The change in the criteria used to define Australia’s national identity can be seen in the development of Australia’s laws on immigration and citizenship that have gradually expanded the borders of who is included as an Australian.

With the government’s embracing of ethnic diversity in Australia, however, it became increasingly unclear how to distinguish Australians from others. Although Australians were now theoretically defined as a people committed to the rule of law and democracy, these criteria proved ineffective in unifying the nation. Consequently, in an effort to strengthen Australia’s national identity, the Australian government identified asylum-seekers as Australia’s new ‘other’. For by their unlawful entry, asylum-seekers threaten the ‘imagined community’ of a democratic, law-abiding nation.

The development of Australia’s national identity

Australia’s national identity as a nation-state began to be shaped from 1788 when Australia was colonised by the British. Unlike other British colonies, Australia was deemed to be settled rather than conquered because the land was considered to be

134 Economic and Social Council, E/CN.4/Sub.2/2003/NGO/45 (30 July 2003).

135 D. BROWN, *The Politics of Reconstructing National Identity: a Corporatist Approach*, in: *Australian Journal of Political Science* 32 (1997) 255, 264.

136 *Ibid.*

“practically unoccupied without settled inhabitants or settled law”.¹³⁷ Aborigines were not recognised as a civilized people so Australia was declared to be *terra nullius* (land belonging to no-one).¹³⁸ Thus, even at this early stage an ‘other’ was created so as to both distinguish and unify the colonising community. Whilst pursuing a policy of exclusion of Aborigines, the British government actively encouraged the emigration of white British convicts and free settlers. The original construction of Aborigines as Australia’s ‘other’ ensured that Australia’s “national identity was formed on the foundation of an Anglo-Celtic heritage”.¹³⁹

In 1900, the Parliament of the United Kingdom passed the Commonwealth of Australia Constitution Act 1900 (the Constitution) which came into force upon Australia’s federation on 1 January 1901. The Constitution gave the Commonwealth Parliament powers to make laws for the peace, order and good government of the Commonwealth with respect to, *inter alia*:

- naturalisation and aliens;¹⁴⁰
- the people of any race, other than the aboriginal race in any state, for whom it is deemed necessary to make special laws;¹⁴¹ and
- immigration and emigration.¹⁴²

Consequently, the new Commonwealth Parliament was empowered to pass laws to regulate who could come to Australia, and thereby who could become British citizens (it was not until 1948 that Australian citizenship was created).¹⁴³ Entering the twentieth century Australia was essentially a “homogenous society of British extraction”.¹⁴⁴ The first 1901 census of 3.8 million showed 78% of the population was born in Ireland or the United Kingdom.¹⁴⁵

Convinced of its vulnerability as “a remote and lightly populated outpost of [the] Empire in close proximity to Asia”, the Australian government “legislated boldly to preserve their racial identity”.¹⁴⁶ It is noteworthy that the very first statute the Commonwealth Parliament passed was the Immigration Restriction Act 1901 which embodied

137 *Cooper v Stuart* (1889) 14 AC 46.

138 P. HAVEMANN (ed), *Indigenous Peoples’ Rights in Australia, Canada, & New Zealand* (Oxford et al 1999) 130.

139 MCMASTER, *supra* note 12, 5.

140 Australian Constitution s 51(xix).

141 Australian Constitution s 51(xxvi). This section was amended in 1967 to remove the reference to Aborigines (No. 55, s2).

142 Australian Constitution s 51(xxvii).

143 Nationality and Citizenship Act 1948 (Cth).

144 L. WONG, *Ethnicity, the State and the Public Agenda*, in: M. Muetzfeldt, (ed) *Society State and Politics in Australia* (Sydney 1992) 304.

145 DEPARTMENT OF IMMIGRATION, MULTICULTURAL AND INDIGENOUS AFFAIRS, *Immigration: Federation to Century’s End 1901-2000* (2001) 18.

146 J. LACK / J. TEMPLETON, *Bold Experiment: a Documentary History of Australian Immigration Since 1945* (Melbourne et al 1995) xiii.

what came to be known as the ‘White Australia’ policy.¹⁴⁷ The Immigration Restriction Act was an essential tool of the government’s early formation of Australia’s national identity as it delineated Australia’s ‘other’ through restrictions on immigration and citizenship based on ethnicity. The White Australia policy was initially developed to preserve the homogeneity of the settling community by curtailing the number of Chinese immigrants.¹⁴⁸ Chinese ‘coolies’ first arrived in Australia in 1848 to work on the Victorian goldfields. By 1861 their number had grown to 55,000, causing apprehension among white settlers of an invasion by the ‘hordes from the north’.¹⁴⁹ Stemming the tide of non-European immigration was deemed necessary on the basis that:

...the white population isn’t large enough to be a very extensive parent to the Eurasian mongrel...and Australia thinks highly enough of its British and Irish descent to keep the race pure.¹⁵⁰

To maintain a white, mainly British society, Parliament imposed a European language dictation test that effectively shut out most races other than Europeans.¹⁵¹

The Immigration Restriction Act not only restricted the immigration of non-Europeans, it also denied citizenship, welfare and the right to vote to all non-Europeans residing in Australia.¹⁵² Citizenship requirements were further delineated in the Nationality Act 1920 (Cth), later replaced by the Nationality and Citizenship Act 1948 (Cth) which created Australian citizenship.¹⁵³ Under the Nationality and Citizenship Act, Britons could be naturalized as Australian citizens after one year of residence in Australia. Conversely, several restrictions were placed on non-Britons wishing to apply for naturalization. For example, such migrants were required to:¹⁵⁴

- be of “good character”;
- have resided in Australia for five years; and
- have “adequate knowledge of the English language”; or, in the absence of such language skills, to have resided in Australia for twenty years.

Non-Europeans could not become Australian citizens at all.

Due to low birth rates in the 1930s and losses sustained in the Second World War, Australia experienced labour shortages in the post-war period.¹⁵⁵ At the same time,

147 N. PASTERGIADIS, *The Invasion Complex in Australian Political Culture*, in: *Thesis Eleven* 78 (2004) 4, 11.

148 MCMASTER, *supra* note 12, 5.

149 *Ibid* 40.

150 *Bulletin*, 22 June 1901, in: *Ibid* 41.

151 J. JUPP, *From White Australia to Woomera: the Story of Australian Immigration* (New York 2002) 9.

152 MCMASTER, *supra* note 12, 41.

153 NATIONAL ARCHIVES AUSTRALIA, *Research Guide on Citizenship*, <http://www.naa.gov.au/Publications/research_guides/guides/citizenship/pages/chapter2/a.htm> at 12 August 2005.

154 Nationality and Citizenship Act 1948 (Cth) s 12.

155 WONG, *supra* note 144, 305.

there were new fears of an Asian influx. As a result, Arthur Calwell, the first Minister for Immigration, adopted the slogan ‘populate or perish’ to support his new immigration program that aimed to promote economic development and strengthen national security by increasing the population.¹⁵⁶ At this time, however, Australia still identified itself as a white, predominantly British nation, and sought to restrict immigration accordingly. In November 1966, Calwell proclaimed “it is my hope that for every foreign migrant there will be ten people from the United Kingdom”.¹⁵⁷

The Immigration Restriction Act was replaced by the Migration Act 1958 (Cth) that, aside from discarding the dictation test, left the White Australia policy largely untouched. Under the Migration Act, Ministerial discretion was used as the preferred strategy of exclusion which in the early years of the operation of the Act led to a “virtual prohibition of non-white immigration”.¹⁵⁸ At this time, Australia, like Imperialist Japan, adopted a policy of assimilation in an attempt to absorb the growing ethnic diversity in Australia and promote social cohesion.¹⁵⁹ By the late 1960s, however, it became increasingly obvious that such a policy was “unworkable, unsatisfactory to the immigrants, and was thus recognised as unjust”.¹⁶⁰ As a result, significant changes were set in motion to dismantle the White Australia policy. In particular, a new category of immigrant was established, namely, ‘Distinguished and Highly Qualified Asians’.¹⁶¹ Under this new category, the government permitted the permanent settlement of professionally qualified, English-speaking Asians who had been offered a job in Australia. The Immigration Minister, however, stressed that although the number of Asian immigrating to Australia would be “somewhat greater than previously, [it] will be controlled by the careful assessment of the individual’s qualifications, and the basic aim of preserving a homogenous population will be maintained”.¹⁶²

Unlike Japan which remains to this day one of the most ethnically homogenous nations in the world, Australia’s migrant population was becoming increasingly visible.¹⁶³ As ethnic groups grew in number, they began to make demands for better treatment under the law.¹⁶⁴ Immigrants were empowered in their struggle against policies of assimilation and discrimination by an “arsenal of international norms” contained in

156 MCMASTER, *supra* note 12, 43.

157 *Ibid.*

158 *Ibid.* 47.

159 *Ibid.* 139.

160 WONG, *supra* note 144, 308.

161 MCMASTER, *supra* note 12, 48.

162 COMMONWEALTH DEPARTMENT OF IMMIGRATION, Australia’s Immigration Policy, 7 in *ibid.*

163 For statistical data on the ethnic makeup of Australia’s population, see DEPARTMENT OF IMMIGRATION, MULTICULTURAL AND INDIGENOUS AFFAIRS, *supra* note 145.

164 L. WONG, Ethnicity, the State and the Public Agenda, in: M. Muetzelfeldt, (ed), *supra* note 144, 308.

international treaties to which Australia had become a party.¹⁶⁵ Sensing growing social unrest, the government removed the last vestiges of the White Australia policy from legislation in 1973. Instead, the government indicated a new commitment to the “avoidance of discrimination on any grounds of race or colour of skin or nationality”.¹⁶⁶ In this way, the shift to ‘multiculturalism’ and ethnic diversity was the government’s attempt to “preserve the moral order and unity of society”.¹⁶⁷ According to David Brown:¹⁶⁸

The more the state elites became aware that the society within the state’s boundaries was not an integrated or assimilated cultural community, the more they have felt impelled to cover their nakedness with the new emperor’s clothing of multicultural nationalism.

Initially, however, multiculturalism was seen as undermining national unity and “an obstacle to the development of a ‘common Australian culture’”.¹⁶⁹ As a result, the government insisted in its 1989 National Agenda for a Multicultural Australia that multicultural policies were to “be based upon the premise that all Australians should have an overriding and unifying commitment to Australia” and required “all Australians to accept the basic structures and principles of Australian society e.g. the Constitution and the rule of law”.¹⁷⁰ Thus, whilst ethnicity was to be ‘celebrated’ in Australia, the government considered ethnic ties as secondary to a greater allegiance owed to the state.¹⁷¹

According to Brown, however, the government’s attempts to unify Australians under the banner of ‘civic culture’ have not been entirely successful. The inability of the government to draw on a common history or establish ambiguous national symbols and myths to which all ethnicities can relate has led to a weakening in Australia’s national identity.¹⁷² Although all Australians were theoretically united as a ‘civil society’, the problem became one of disseminating this view of the nation’s identity throughout the people. For example, during Australia’s bicentennial celebrations, appeals to the con-

165 B. BRODY, *Opening the Door: Immigration, Ethnicity, and Globalization in Japan* (New York et al 2002) 107.

166 MCMASTER, *supra* note 12, 49.

167 WONG, *supra* note 144, 308.

168 BROWN, *supra* note 135, 268.

169 PAPASTERGIADIS, *supra* note 147, 10.

170 WONG, *supra* note 144, 308.

171 Multiculturalism as a unifying element in Australia was the theme of the National Multicultural Advisory Council’s May 1999 Report *Australian Multiculturalism for a New Century: Towards Inclusiveness* <http://www.immi.gov.au/multicultural/_inc/publications/nmac/chapt_2e.htm> at 10 September 2005. In this report, the Council maintained that “[multiculturalism] should emphasise the things that unite us as a people – our common membership of the Australian community; our shared desire for social harmony; the benefits of our diversity; our evolving national character and identity”. *Ibid* at [2.1].

172 BROWN, *supra* note 135, 267.

stitution and federation as unifying symbols to portray the authenticity of the nation sounded “a bit too dry”.¹⁷³ Due to the inability to define the nation through ‘ambiguous inclusion’, the government focused its efforts on securing a “suitable threatening ‘other’”.¹⁷⁴ Asylum-seekers emerged as a new ‘other’ in Australia’s national psyche because their illegal entry challenged the national identity of Australia as a democratic and law-abiding nation-state. The mandatory detention of such illegal entrants was thus justified, not because of asylum-seekers’ ethnicity, but because of their mode of entry.

Demonising asylum-seekers / legitimising mandatory detention

Despite the gradual development of non-racial immigration and citizenship laws from the 1970s, the Australian government made major shifts away from accepting and accommodating asylum-seekers.¹⁷⁵ In contrast to Japan, the Australia government was initially accepting of the 1970s Indochinese boat-people. However, from the 1980s asylum-seekers were portrayed by the government and by the media as ‘economic refugees’ and ‘queue jumpers’ set to invade Australia.¹⁷⁶ The tightening of Australia’s laws on asylum-seekers since the 1980s combined with growing fears of invasion have gradually shifted asylum-seekers into the realm of ‘other’ in the Australian psyche. As a result, the government has been able to maintain its laws on the mandatory detention of asylum-seekers, for “once the other is constructed in the position of debasement, abjection and evil...they are excluded from the field of human values, civic rights and moral obligations”.¹⁷⁷

As with Japan, unlawful immigration was largely unknown in Australia until 1975. Consequently, no formal infrastructure existed to deal with asylum-seekers; rather, they were dealt with on an individual basis under the Minister for Immigration’s discretionary power to grant entry permits.¹⁷⁸ Australia’s first *en masse* arrival of asylum-seekers were the Indochinese who arrived by boats after the end of the Vietnam War. Between April 1976 and June 1979, 2,011 boat people landed in Australia and almost 10,000 more were accepted in Australia’s off-shore settlement program.¹⁷⁹ Acknowledging Australia’s obligations as a part to the Refugee Convention, the government announced that it was “committed to the most effective role in refugee settlement, in the belief that

173 *Ibid* 264.

174 *Ibid* 267.

175 E. PEYSER, Pacific Solution? The Sinking Right to Seek Asylum in Australia, in: Pacific Rim Law and Policy Journal 11 (2002) 431, 436.

176 T. ROD / R. BRUNTON, Who Gets to Stay? Refugees, Asylum Seekers and Unauthorised Arrivals in Australia (Canberra 2002) 14.

177 PAPASTERGIADIS, *supra* note 147, 12.

178 Migration Amendment Act 1979 (Cth) s 4.

179 MCMMASTER, *supra* note 12, 70.

there was a community willingness to assist the disposed and displaced from overseas".¹⁸⁰

The government's resettlement goals were aimed at off-shore refugees, however, not those who arrived unlawfully. Although most of the boat people were granted refugee status or permanent residence without being detained, the government commenced a policy aimed at deterring others from seeking asylum in Australia by unlawful means. In the Migration Amendment Act 1979 (Cth), the government repealed the discretion to grant entry permits after arriving in Australia,¹⁸¹ imposed accommodation and deportation charges on the asylum-seekers,¹⁸² and criminalised the carriage and employment of unauthorised non-citizens.¹⁸³

Between 1982 and 1989 few asylum-seekers arrived in Australia unlawfully. However, the Cold War and the subsequent change in governments of many of the former countries in the Soviet Bloc, combined with the human rights violations in the People's Republic of China, occasioned a new wave of boat-people seeking asylum in Australia.¹⁸⁴ In November 1989, 26 Cambodian asylum-seekers arrived on Australia's shores, followed shortly by the arrival of a further 119 in March 1990.¹⁸⁵ Together, the asylum-seekers were detained from the time of their arrival until the government rejected their applications for refugee status in April 1992.¹⁸⁶

Before the government rejected their applications, refugee lawyers pushed for the release of fifteen of the Cambodian asylum-seekers who had been in detention for over two years. However, fearing a judicial attack on its detention policies, the government enshrined mandatory detention in the Migration Amendment Act 1992 (Cth) and stipulated in the Act that no court was 'to order the release from custody of a designated person'.¹⁸⁷ Since 1992, all asylum-seekers who have arrived unlawfully in Australia have been detained under the Migration Act.

The mandatory detention regime has not been without its critics.¹⁸⁸ However, successive governments since 1992 have sought to justify and legitimize mandatory detention by once again drawing on public fears of invasion. The plight of genuine asylum-seekers has also been overshadowed by the rise in unauthorized boat-people

180 MACKELLAR, MINISTER FOR IMMIGRATION AND ETHNIC AFFAIRS, Refugee Policy and Mechanisms, Ministerial Statement, Parliamentary Debates, 24 May 1977.

181 Migration Act 1958 (Cth) s 6(5).

182 Migration Amendment Act 1979 (Cth) s 12.

183 Migration Amendment Act 1979 (Cth) ss 9, 17, 19.

184 For more information on the effects of these events on the increase in boat-people seeking asylum in Australia, see SCHLOENHARDT, *supra* note 36.

185 MCMMASTER, *supra* note 12, 73.

186 *Ibid.*

187 *Ibid.*

188 See, for example, AMNESTY INTERNATIONAL (AUSTRALIA) *supra* note 32; MATHEW, *supra* note 9.

who, although they may be suffering hardship in their home country, are not fleeing from persecution.

In 1999 Australia witnessed the highest number of unauthorised boat-people since the Indochinese refugees in the 1970s.¹⁸⁹ The Department of Immigration and Multicultural Affairs detained 3,617 asylum-seekers in 1999, over three times the number detained in the 1998-99 financial year.¹⁹⁰ Newspapers increased public anxiety over the growing numbers of unlawful entrants with headlines such as ‘Boat People Flood Feared’ and ‘Invasion’.¹⁹¹ In addition, Minister for Immigration Phillip Ruddock “fanned the panic with talk of ‘a national emergency’, and in one press release he invoked the language of war referring to an ‘assault on our borders’”.¹⁹² Thus, despite their relatively small numbers, the unlawful entry of asylum-seekers evoked, once again, Australia’s fear of invasion.

Amidst these fears, the government promoted support for its mandatory detention laws by branding asylum-seekers as ‘queue-jumpers’ and ‘economic refugees’.¹⁹³ Although the government has an offshore resettlement program that currently accepts around 13,000 asylum-seekers and refugees per year,¹⁹⁴ many asylum-seekers attempt sea voyage to Australia to claim onshore protection.¹⁹⁵ As the government decreases the number of refugees it accepts in its annual off-shore quota by the number of asylum-seekers who arrive unlawfully in Australia,¹⁹⁶ boat-people who apply for asylum onshore have been branded ‘queue jumpers’. In Australia, where fairness is “promoted as a major theme within political culture”,¹⁹⁷ reports of asylum-seekers paying to jump the queue has caused anger in those who perceive a lack of fair treatment. Some asylum-seekers have been further demonized by the government and the media for their association with ‘people smugglers’ who charge asylum-seekers for the passage to Australia. If asylum-seekers have the money to pay for a passage to Australia, they are branded ‘economic refugees’ who are not fleeing persecution; they are merely seeking a better life.

189 SCHLOENHARDT, *supra* note 36, 52.

190 *Ibid.*

191 Sun Herald and Sunday Telegraph, 11 April 1999, Sydney Morning Herald, 12 April 1999 in MCMASTER, *supra* note 12, 281.

192 P. MARES, *Borderline: Australia’s Response to Refugees and Asylum Seekers in the Wake of the Tampa* (Sydney 2002) 28.

193 See, for example, COMMONWEALTH OF AUSTRALIA, Senate (25 November 1999) 10644, Senator Schacht; 10659, Senator McKiernan.

194 DEPARTMENT OF IMMIGRATION, MULTICULTURAL AND INDIGENOUS AFFAIRS, *supra* note 28.

195 PEYSER, *supra* note 175, 454.

196 HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, *Face the Facts: Refugees and Asylum-Seekers* <http://www.hreoc.gov.au/racial_discrimination/face_facts/res_htm.htm> at 7 June 2005, 3.

197 K. GELBER, *A Fair Queue? Australian Public Discourse on Refugees and Immigration*, in: *Journal of Australian Studies* 77 (2003) 23, 25.

Every time an asylum seekers [sic] pays a people smuggler tens of thousands of dollars to successfully [sic] jump the queue, a refuge who has been waiting in appalling conditions in an African camp misses out. Why should someone with cash to pay a people smuggler be allowed to take the place of someone who has no money and is in even more of a desperate situation?¹⁹⁸

In this way, the language of ‘queue jumpers’, ‘people smugglers’ and ‘economic refugees’ served to cloud public opinion for genuine asylum-seekers. By dehumanizing asylum-seekers in this way, and by drawing on the public’s fear of invasion, the Australian government was able to shift unlawful asylum-seekers into the realm of ‘other’. By identifying asylum-seekers as Australia’s ‘other’, the government strengthened Australia’s new national identity as a democratic nation committed to respecting the rule of law.

IV. NATIONAL IDENTITY CRISIS

National identities are constructed by modern nation-states for the purpose of identifying real or imagined commonalities that unite a population. Although certain criteria, such as ethnicity and civic culture, are used to define who is a member of a nation-state, it is the interaction with ‘others’ that delineates the boundaries of the ‘in-group’. Two very different countries – Australia and Japan – have, over time, changed the criterion used to define their national identities. Although currently Australia’s national identity is premised on civic culture and Japan’s national identity on ethnicity, both nation-states have relegated unlawful asylum-seekers to the realm of ‘other’. In doing so, the Japanese and Australian governments have attempted to legitimise the mandatory detention of asylum-seekers. It is axiomatic then, that those people wishing to abolish the practice of mandatory detention must ‘humanise’ unlawful asylum-seekers such that they are no longer seen as a threat, and are accepted into the in-group. Whilst the seemingly disparate Australia and Japan evidence that a nation-state’s in-group and out-group can be changed, if asylum-seekers are included in the national identity, another group will be marginalised so as to take their place as ‘others’.

In Japan, the use of ethnicity as the defining characteristic of Japan’s national identity ensures that all foreigners are ‘others’. The popular belief in Japan as an ethnically homogenous nation-state ensures that even migrants who are not ethnically Japanese but were born and raised in Japan are nevertheless considered to be ‘others’. Conversely, ethnic Japanese who were born and raised without connection to Japan are viewed, at least in part, as ‘insiders’. Asylum-seekers are detained because their illegal entry

198 DEPARTMENT OF IMMIGRATION, MULTICULTURAL AND INDIGENOUS AFFAIRS, Labour Must Decide on Illegal Immigrants, media release, 4 November 2003 <http://www.minister.immi.gov.au/media_releases/media03/v03003.htm> at 13 July 2005.

threatens the Japan's national identity by challenging the government's ability to keep control of foreigners in Japan and maintain Japan's ethnic homogeneity. However, recently Japanese and foreign scholars have begun questioning the truth of Japan's ethnic homogeneity. The Japanese government's estimation of the number of non-Japanese living in Japan in 2005 is over 1.5 million in a country of 127.5 million.¹⁹⁹ Although still relatively small in comparison to ethnic Japanese, the growing population of 'others' in Japan makes the claim of monoethnicity "increasingly implausible".²⁰⁰ One commentator, Betsy Brody, insists that Japan is facing a 'crisis of multiculturalism' as the government is having to:

reconcile traditional Japanese ideas of ethnic membership with the reality of a large population of culturally different 'co-ethnics' and changing international expectations regarding the rights and treatment of such minority groups.²⁰¹

It is possible that, like Australia in the 1970s, Japan will be forced to acknowledge the existence of 'others' and consequently cease to use ethnicity as the defining characteristic of Japan's national identity. As a result, the Japanese government may abolish mandatory detention as asylum-seekers would no longer pose a threat to Japan's national identity.

Australia is evidence, however, that acknowledgement of ethnic heterogeneity does not mean that asylum-seekers will not be detained. In Australia, the political embrace of multiculturalism has meant that ethnicity is no longer the defining characteristic of what it means to be Australian. The initial criterion of 'civil society' was too ambiguous to unite the people of Australia. Thus, the government began a process of alienating asylum-seekers as 'economic refugees' or 'queue-jumpers' who offend the nation's sense of fair play. By arriving illegally and taking the place of off-shore applicants, unlawful asylum-seekers threaten the imagined community of Australia as a democratic, law-abiding nation-state.

Whilst they do not end the mandatory detention regimes, the recent changes in Australia's and Japan's laws evidence that many people oppose mandatory detention as an abuse of asylum-seekers' fundamental human rights.²⁰² However, it is not simply a matter of removing asylum-seekers as 'others' from the nations' psyche. National identities require an 'other' or 'others', thus, another group will almost certainly take the place of asylum-seekers. Currently, terrorists seem the most likely alternative.

Since the attacks on Washington and New York on 11 September 2001, Australia, Japan and other countries around the world have developed counter-terrorism laws so as

199 MINISTRY OF INTERNAL AFFAIRS AND COMMUNICATIONS, Statistics Bureau, Population Estimates by Age (5-Year Group) and Sex (1 May 2005) <www.stat.go.jp/english/data/jinsui/tuski/zuhyou/15k2-1.xls> at 6 October 2005.

200 LIE, *supra* note 83, 5.

201 BRODY, *supra* note 165, 107.

202 See, for example, AMNESTY INTERNATIONAL, *supra* note 7; SCHLOENHARDT, *supra* note 36.

to strengthen national security against the threat of terrorism. In its 'war on terror', the Australian government appears to be adopting a similar approach to its policies of deterrence aimed at unlawful asylum-seekers. In addition to establishing a 'preventative detention regime', PM John Howard has vowed to "continue to work on visa and citizenship security".²⁰³ In particular, the newest package of proposed counter-terrorism laws will extend the waiting period for those wishing to obtain Australian citizenship to three years, and enable security checks of citizenship applications such that citizenship may be refused on 'security grounds'.²⁰⁴

The new fear of terrorism, however, may not replace asylum-seekers as the new 'other', but rather reinforce the perceived need for detaining asylum-seekers as unlawful entrants. Just two days after the September 11 attacks, Minister for Defence Peter Reith insisted that the Australian government had to be allowed to prevent unlawful asylum-seekers from entering Australian waters because "otherwise it can be a pipeline for terrorists to come in and use your country as a staging post for terrorist activities".²⁰⁵ Indeed, as academic Savitri Taylor posits, the September 11 attacks have blurred the distinction between asylum-seekers and terrorists, and have "created an environment in which border control measures can be passed off as part of the 'war against terrorism'".²⁰⁶ Thus, as long as unlawful asylum-seekers are linked to terrorist activities, it is unlikely that efforts to soften attitudes towards asylum-seekers will be successful in redefining the nation's identity so as to include them.

V. CONCLUSION

Under the Refugee Convention and Protocol, nation-states are permitted to restrict the movements of asylum-seekers. The UNHCR's guidelines clarifies that this allows 'administrative detention' for purposes such as verifying a person's identity or to conduct preliminary interviews. However, the indiscriminate detention of all asylum-seekers who arrive unlawfully without valid passports or visas in Australia and Japan is not 'administrative detention'. Instead, the Australian and Japanese governments have developed mandatory detention regimes specifically aimed at deterring unlawful asylum-seekers. Japan and Australia seek to deter unlawful asylum-seekers from their shores because asylum-seekers threaten their national identities.

203 *Ibid.*

204 *Ibid.*

205 "Australia Links Asylum Policy to US Attack", BBC News, 13 September 2001. <<http://new.bbc.co.uk/1/health/world/asia-pacific/1542029.stm>>; I. KHAN, Trading in Human Misery: a Human Rights Perspective on the Tampa Incident, in: Pacific Rim Law and Policy Journal 12 (2003) 9, 10.

206 S. TAYLOR, Australia's Response to Asylum-seekers in the 'Age of Terrorism', Project SafeCom Inc. <www.safecom.org.au/asylum-terrorism.htm> at 6 October 2005.

All nation-states require national identities to draw together people who are otherwise unconnected, thereby legitimising the sovereignty of the nation-state. Immigration, citizenship and refugee laws are integral in the formation of national identities as it is through these laws that a government delineates who is a member of the nation-state and who is an 'other'. Although before WWII ethnicity was not seen by the government as a barrier to becoming Japanese, currently Japan's national identity is defined according to ethnicity. Thus, anyone who is not ethnically-Japanese is considered to be an 'other'. Asylum-seekers are detained in Japan because their unlawful entry threatens the Japanese national identity as an ethnically homogenous nation by challenging the government's ability to control 'others' in Japan.

Conversely, whilst ethnicity was the essential characteristic of colonial Australians, over time the Australian government accepted ethnic diversity and sought to change from ethnicity to civic culture as the defining criterion of Australia's national identity. Asylum-seekers are detained in Australia because their illegal entry threatens Australia's imagined community of a law-abiding, democratic nation-state based on fairness.

If mandatory detention is to be abolished, asylum-seekers must be removed from the position of 'other' in the nations' psyche. In the past, both Australia and Japan have changed the categories of 'us' and 'them' in defining their national identities. Thus, Australia and Japan show that these categories can be manipulated again so as to include asylum-seekers. However, as modern nation-states construct an 'other' to distinguish its nationals from that of other nation-states, the acceptance of asylum-seekers will logically result in the marginalisation of another group.

The divergent examples of Australia and Japan show how 'others' can be manufactured to solve the nation-state's identity crisis. The very nature of nation-states and national identities necessitate discrimination of some group. Those nation-states whose identity is based on ethnicity seek to control the unlawful entry of non-ethnic entrants, whereas nation-states of more diverse ethnic makeup may seek to reinforce their identities by demonising unlawful entrants as 'others'. Who a government permits to enter its territory is a matter of sovereign discretion. However, for state parties to the Refugee Convention and Protocol, this discretion is limited by the obligations imposed by these instruments, such as the obligation not to punish refugees for their unlawful entry. Consequently, unlawful asylum-seekers are 'off-limits' in modern nation-states' continuous struggle to create or preserve unity through national identity.

ZUSAMMENFASSUNG

Im Jahre 2005, mitten in einer Zeit, die durch eine immer repressivere Politik gegenüber Asylbewerbern gekennzeichnet ist, wurden in zwei Ländern, die scheinbar in keinem engeren Zusammenhang miteinander stehen, in Japan und Australien, die gesetzlichen Vorschriften über die Inhaftierung illegal eingereister Asylbewerber gemildert. Die zwei Länder sind in dieser Frage jedoch nicht so verschieden voneinander: Beide haben als Antwort auf eine wahrgenommene Bedrohung ihrer nationalen Identitäten Maßnahmen zur zwangsweisen Inhaftierung illegaler Asylbewerber eingeführt. Die Ausländer- und Staatsbürgerschaftsgesetze wurden von der japanischen und der australischen Regierung dazu eingesetzt, die Asylbewerber als „die Anderen“ aus der jeweiligen Nation auszuschließen und ihre Inhaftierung zu rechtfertigen. Untersucht man, weshalb zwei scheinbar so verschiedene Länder wie Australien und Japan in Flüchtlingsfragen derart ähnliche politische Maßnahmen entwickelt haben, stößt man auf universell gültige Elemente nationaler Identität, die für Flüchtlingsanwälte auf der ganzen Welt hilfreich sein können.

Vor dem Hintergrund der jüngsten Änderungen der gesetzlichen Vorschriften zur zwangsweisen Inhaftierung setzt sich der vorliegende rechtsvergleichende Artikel kritisch mit den australischen und japanischen Ausländer- und Staatsbürgerschaftsgesetzen auseinander. Um Änderungen in der Behandlung von Asylbewerbern durch die Regierungen dieser beiden – aber auch anderer – Länder herbeiführen zu können, ist es notwendig zu verstehen, wie die derzeitige Politik entstanden ist und warum sie noch immer verfolgt wird.

Der Beitrag untersucht zunächst die Verpflichtungen, die Australien und Japan nach internationalem Recht im Hinblick auf die Haft von Asylbewerbern eingegangen sind, und in welcher Weise jedes Land die Anwendung der Gesetze zur zwangsweisen Inhaftierung als Mittel zur Abschreckung weiterer Asylbewerber eingesetzt hat. Zu der Erklärung, warum Australien und Japan Asylbewerber abzuschrecken suchen, wird im dritten Abschnitt die von der Sozialwissenschaft entwickelte Theorie der nationalen Identität vorgestellt. Nach dieser Theorie dienten Asylbewerber in Japan und Australien der Definition der nationalen Identität; dies wurde durch die Ausländer- und Staatsbürgerschaftsgesetze erreicht. Der vierte Abschnitt untersucht, welche Möglichkeiten es gibt, Asylbewerber aus der Rolle „der Anderen“ für Japans und Australiens nationale Identität zu befreien. Die Autorin kommt zu dem Schluß, daß alle modernen Nationalstaaten „Andere“ brauchen; es sei daher nicht möglich, Asylbewerber von dieser Rolle zu befreien, ohne sie durch eine andere Gruppe in der Rolle „der Anderen“ zu ersetzen. Das Bewußtsein, daß die Inhaftierung von Asylbewerbern in Australien und Japan eine Rolle in der Entwicklung der jeweiligen nationalen Identität gespielt hat, sei für all jene hilfreich, deren Anliegen es ist, den Umgang mit Asylbewerbern in diesen beiden wie auch anderen Staaten zu verändern.

(Übersetzung durch d. Red.)