Australia and the 1951 Refugee Convention

An analysis of incentives for non-compliance

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[1] Official government advertisement campaign for the Operation Sovereign Borders policy, 2016, http://www.border.gov.au/about/operation-sovereign-borders/counter-people-smuggling-communication

Abstract

In the world today, more and more states are carrying out policies displaying an ambiguous relationship with the obligations of international refugee law. Borders are increasingly being closed, while governments are each trying out individual solutions to the global refugee crisis. The consequences of this individualisation is yet to be seen, as are the changes that it will bring to the way states perceive international cooperation on refugee protection.

In this thesis I will explore the case of Australia and the country's cooperation on the 1951 Convention, as a relevant example of this increasing individualisation. Australia is currently carrying out asylum policies which have been heavily criticised by many international actors, including the UN. It has furthermore been brought to question, whether or not Australia is actually complying with the country's legal obligations of the 1951 Convention, even though the country is still a signatory to the treaty. This seeming paradox is what led me to formulate the following research question: *Is Australia complying with the 1951 Convention, and if not - then why?*

In order to answer my research question, I will be conducting library based research, as well as I will employ the international relations theories of constructivism and liberal institutionalism. Through the use of these theories, I will analyse what motives Australia might have for carrying out controversial asylum policies.

In the introduction chapter of this thesis, I will outline the most relevant aspects of Australia's current policies towards asylum seekers and refugees. Furthermore, I will provide an introduction to the history and purpose of the 1951 Convention as well as the role of the UNHCR. This is done in order to establish the context of this thesis, as well as answering the first part of my research question - whether or not Australia is actually complying with the 1951 Convention. In the last part of the introduction, I will conclude that the current policies of Australia has led to the country being in a state of non-compliance of the treaty.

The analysis of this thesis will be divided into two parts. The first part will consist of an

analysis of how Australia's domestic context could have influenced the country's non-compliance of the 1951 Convention. Throughout this part of the analysis, I will be employing the theory of constructivism. In this chapter I argue, that Australia's domestic preferences and national identity have had a significant impact on the policies, which Australia is carrying out towards unregulated arrivals of asylum seekers. It is argued that the asylum seekers are causing significant anxieties among the Australian population. This is related to Australia having a long history of feeling geographically and culturally isolated, leading to fears of people crossing the country's borders unregulated. This is accordingly argued, to have led to Australia having a strong national preference for controlled immigration.

In the second part of my analysis I will investigate the interstate cooperation on the 1951 Convention, in relation to providing asylum, and the role of the UNHCR in facilitating this cooperation. This is done in order to understand, how influences coming from the international context could have influenced Australia's non-compliance of the 1951 Convention. Throughout part two of the analysis, I will be employing the theory of liberal institutionalism. In this chapter I argue, that the commonplace use of deterrence strategies by states, in order to avoid the obligation of non-refoulement, has had a negative influence on Australia's compliance on the 1951 Convention. Furthermore, it is argued that the lack of enforcement mechanisms by the UNHCR, has played a role in enabling Australia to carry out policies in breach of the 1951 Convention, since the country fears no significant consequences to carrying out such policies. Lastly, the analysis will investigate what interests Australia might have in the existence of an international institution such as the UNHCR, and consequently in the provisions of the 1951 Convention. It is argued, that Australia displays an ambiguous relationship towards the obligations of the 1951 Convention, leading to the country carrying out controversial policies, while still being party to the treaty.

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1. Introduction

In the following introduction, I will outline the contextual background of this thesis. The first part will consist of an overview of selected aspects of Australia's recent history and policies with asylum seekers and refugees. The highlighted features have been chosen because they help to provide a valuable understanding of the current situation in Australia, in relation to the country's policies towards especially asylum seekers arriving by boat. Following this, I will provide an overview of the history and purpose of the 1951 Convention as well as the role of the UNHCR. The relationship between Australia's current asylum policies and the country's obligations under the 1951 Convention will lead to the introduction of my research question, and I will provide an explanation of the paradox which led me to formulate it. Finally, I will elaborate on how Australia is considered to be in breach of its obligations under the 1951 Convention by many academical scholars as well as international agencies, such as the United Nations (ABC news 2015).

To answer my research question, I will be conducting library based research, employing both primary and secondary sources. As I am examining the behaviour of Australia, in relation to the country's cooperation on refugee protection under the 1951 Convention, this has posed some methodological challenges that has influenced my choice of research method. When examining state behaviour, it is difficult to gain access to a first hand account on why, the state in question is behaving as it is, regarding a certain matter. I have therefore had to find relevant material showing examples of how Australia's policies in relation to the country's asylum policies can be understood. These examples I have derived from academic articles, public political statements, media coverage, law material on refugee protection, publications from the Parliament of Australia's website, statistical data, news articles and speeches from Australian politicians, which have been selected on the basis of their relevance for this thesis. Through this method I will systematically and objectively locate evidence relevant to my research question, in order to finally draw a conclusion.

1.1 An overview of Australia's recent history with and policies towards asylum seekers and refugees

<u>Australia's offshore and onshore refugee programs</u>

Australia is a signatory to both the 1951 Convention and its 1967 Protocol, and having signed the Convention in 1954, Australia is one of the first countries to be party to the treaty (Edwards 2003: 194). At the same time Australia has one of the largest resettlement programs in the world and since the Second World War more than 700.000 refugees or displaced persons have settled in the country (McKay et al. 2011: 113). An important part of Australia's asylum system consist of the difference between the country's offshore and onshore refugee programs. The offshore program concerns refugees who are outside of the Australian territory, and who are from there selected to be resettled in Australia (Hugo 2001: 27). Each year Australia receives about 13,500 refugees through the offshore program (Hugo 2001: 27). Part of the number consists of about 6000 places set aside for refugees who have been recognised by the UNHCR as having a protection need. The other part consist of the 'special humanitarian program' which is a number of places set by the Australian Government for people considered to be in need of humanitarian assistance and protection, such as people that are subject to significant discrimination amounting to violation of human rights in their home country (McAdam 2013: 438). While Australia's acceptance of refugees has contributed to its positive international humanitarian reputation, recent policies towards and treatment of asylum seekers has caused widespread national and international criticism (McKay et al. 2011: 114). This is among others related to the way the Australian Government has created policies which clearly distinguish the offshore refugee program, as described in the above, from what is known as the onshore program. I have chosen to highlight the difference between the onshore and offshore programs because it is central to the way, the Australian refugee and asylum seeker system works.

Australia's onshore program is made up by all spontaneous arrivals to Australia, who then claim asylum upon arrival. Mostly these arrivals have been asylum seekers arriving by boat without holding a valid visa, but a minority of the onshore program consist of other groups who enter Australia through some legal means, and then file for asylum later on because

circumstances in their home country have changed (Hugo 2001: 30). While the majority of refugees coming to Australia are received through the offshore program, the asylum seekers arriving boat have generally been subjected to a significantly higher amount of attention in the Australian society (Hugo 2001: 27). The boat arrivals are all subjected to mandatory detention, which is a policy that was introduced by the Keating (Labor) Government in 1992 in a response to a wave of Indochinese boat arrivals primarily from Cambodia (Phillips and Spinks 2013). Even if the asylum seekers arriving by boat are found to be genuine refugees, after an often lengthy status determination procedure, they are offered Temporary Protection Visas only, which are valid for three years. Meanwhile arrivals under the offshore program are granted permanent settlement status (Hugo 2001: 27).

According to McKay et al., refugees accepted under the offshore program are in Australia commonly perceived to be deserving of resettlement in the country, because they are seen to be following the 'correct' procedure for entry (McKay et al. 2011: 114). The authors argue that in contrast with this, negative media coverage, political discourses and the public rhetoric surrounding asylum seekers arriving by boat, imply that their claims are not legitimate, that they pose a possible threat to Australian identity and security and that they are in some way engaging in illegal behaviour by not following formal refugee processes (Mckay et al. 2011: 114). This general perception has to do with the way the allocation of spots in the humanitarian program works. This is because the more refugees who arrive onshore by boat or by plane, the fewer places remain for people to arrive through the special humanitarian program, which gives way to the notion, that the onshore arrivals are thus 'jumping the queue' (McAdam 2013: 439). It is important to note though, that this system is ultimately a creation of the Australian Government and that international refugee law does not work that way - a person either has a well founded fear of persecution or not, regardless of manner of arrival (McAdam 2013: 439). Nevertheless, according to McAdam this line between the 'invited' offshore arrivals and the 'uninvited' onshore arrivals has facilitated Australia's elaborate construction of Temporary Protection Visas (TPVs), migration excision zones and offshore processing arrangements, which I will elaborate on later in this introduction (McAdam 2013: 439).

The Tampa affair

A controversial aspect in Australia's recent history with immigration, which ended up having major consequences for the country's policies towards asylum seekers, was the Tampa affair, which occurred in 2001. The Norwegian cargo ship M/V Tampa was sailing towards Singapore, but changed its course to rescue 433 mainly Afghan people, who were on their way towards Australia, when their ship started sinking (Hugo 2001: 34). After rescuing the people, M/V Tampa set its course towards the Australian Christmas Island in order to receive aid (Mathew 2002: 661). The Australian Government though refused to accept the people into Australian territory, even though they all claimed to be asylum seekers. In response to the Tampa's course for Christmas Island, Australian Special Armed Services was ordered to board the ship and then effectively took control over it (Mathew 2002: 661). Hereafter negotiations with among others the Pacific Island of Nauru and New Zealand were quickly initiated. The Government of Nauru accepted to receive the main part of the asylum seekers in order to act as a processing centre, provided that all refugees would be settled in Australia or other countries, and that Australia would cover all costs (Mathew 2002: 661). Furthermore bilateral negotiations earned Nauru an aid package of $24 million AUD (Edwards 2003: 193). New Zealand accepted to receive 150 of the asylum seekers, primarily the ones in family groups, and to resettle the ones found to be refugees in the country (Mathew 2002: 661).

The Pacific Solution

In response to the Tampa incident, the Australian Government introduced several amendments to the country's Migration Act of 1958. The amendments were aimed at making it increasingly difficult for asylum seekers to reach the Australian territory. Furthermore, it had as a consequence that it reduced the rights and worsened the standard of treatment for the refugees and asylum seekers, who despite the increased difficulties managed to reach the Australian territory (Edwards 2003: 193). The new policy was dubbed the 'Pacific Solution', and it had several important elements. One of them was that the actions taken by Australia in relation to the Tampa incident was validated and that new border protection measures, including the power of interdiction at sea, was enacted (Mathew 2002: 663). This meant that in certain cases, most likely where there is suspicion of illegal immigration, a ship or an aircraft may be detained and brought somewhere else, either within the Australian territory or

to neighbouring territories. Furthermore, the legislation allows for the use of any executive power to protect the borders of Australia, including if deemed necessary, the ejection of persons who have crossed the borders (Mathew 2002: 663).

Another important element of the Pacific Solution was the formal decision to transfer all asylum seekers arriving by boat to offshore processing centres on Nauru and Manus Island in Papua New Guinea. Here they would be detained, while their claims were processed (Australian Human Rights Commission 2013). Moreover, the Pacific Solution contained the excision of all offshore territories, including Christmas and Cocos Island, from the Australian 'Migration Zone', which entered into force on 26 September 2001 (Taylor 2005: 59). The creation of these zones of exception meant that it became impossible for an asylum seeker to apply for a valid protection visa there, and hence to seek asylum (Mathew 2002: 664) These territories are known as 'offshore excised places' and in 2013 the Australian Government went even further and excised the remaining Australian mainland from the Australian Migration Zone. This excision means that there is now in effect nowhere, where it is possible for asylum seekers to apply for valid protection visas upon arrival to the Australian territory (Phillips and Spinks 2013).

When a new Labor Government came to power in 2007 it initially started dismantling many of the initiatives and policies of the Pacific Solution, including the Temporary Protection Visa system (Australian Human Rights Commission 2013). In 2012, despite promises of the opposite, the Labor Government though reinvigorated the Pacific Solution by reopening processing centres in Nauru and Papua New Guinea. The rhetoric was though shifted from 'stopping the boats' to 'saving lives at sea', but in the end it adopted many of the same controversial policies as the previous Howard (Coalition) Government. The idea was that the poor conditions in the detention centres, the lack of legal advice and review mechanisms, and the delayed resettlement of around five years would prevent asylum seekers from trying to reach Australia via boat (McAdam 2013: 439). The policy did though not have the intended effect, as proven by the numbers of boat arrivals still coming to Australia. In July 2013 the Labor Government therefore took it a step further and declared that asylum seekers arriving by boat would now be sent to Papua New Guinea for both processing *and* resettlement. In

other words, they would never have the opportunity to be resettled in Australia (Australian Human Rights Commission 2013).

Operation Sovereign Borders

The most recent event, which it is important to mention in relation to Australia's policies towards asylum seekers and refugees, is what is known as 'Operation Sovereign Borders'. When Tony Abbott and the Coalition Government came to power on 7. September 2013, the military led 'Operation Sovereign Borders' was swiftly introduced and the policy took effect on the same day the new government was sworn in. At almost the same time the Department of Immigration and Citizenship was renamed the Department of Immigration and Border Protection, which it is still called to this day (McAdam 2013: 440). Operation Sovereign Borders is premised on the idea that Australia is facing a border protection crisis amounting to a national emergency, and according to the policy the scale of the problem requires the discipline and focus of a targeted military operation (The Coalition's Operation Sovereign Borders Policy 2013: 2). Thus, one of the first actions of the new government was to appoint a three star general, Angus Campbell, to lead the operation (McAdam 2013: 441). An important element of Operation Sovereign Borders is the interdiction of boats at sea, which are then turned back, often towards Indonesia. Indonesia has objected strenuously to this policy, arguing that it is offensive and a threat to the country's sovereignty (McAdam 2013: 441). Furthermore, it has been argued that the policy contains major risks for potential asylum seekers on board, as the boats are often highly unseaworthy, as well as there exists a real danger that refugees may be returned to persecution or other forms of serious harm. This is because there exist no screening of asylum seeker claims in the process of turning the boats back (McAdam 2013: 441).

The reintroduction of Temporary Protection Visas

In 2013 the Coalition Government also reintroduced Temporary Protection Visas (TPVs) as another deterrent. The Australian TPV regime means that refugees who arrive by boat, or any boat arrival already in Australia awaiting the determination of their claim, will only be eligible for temporary protection. They will never be allowed to settle permanently in Australia or bring out their families and they will have to have their status reassessed every

three years. According to McAdam, no other country uses temporary protection in this way (McAdam 2013: 441).

In this part of my thesis, I have described some of the most important policies of Australia's recent history with asylum seekers. In the analysis, I will also introduce the element of how Australia's general history as a settler state and the particular kind of immigration system, which the country has carried out, is related to the country's current policies towards asylum seekers. Australia's history with immigration will be introduced there, as it is contributing with valuable insight into one of the analytical points of this thesis. In the next part of the introduction chapter, I will introduce some of the most important aspects of the 1951 Convention and the UNHCR. This is done in order to clarify the scope of the 1951 Convention as well as some key elements and to establish the role and protection responsibilities of the UNHCR.

1.2 The 1951 Convention and the role of the UNHCR

In the aftermath of the Second World War the world was faced with a refugee crisis unprecedented to that day. The issue became an important matter on the international political scene and the United Nations responded by creating a specialised agency to deal with the crisis, namely the International Refugee Organisation (IRO). In 1951 the IRO was replaced by a new agency, the Statute of the United Nations High Commissioner for Refugees (UNHCR), which was to be charged with providing international protection and seeking permanent solutions for refugees (Goodwin-Gill 2014: 2). Among others, the protection of the UNHCR is intended to ensure that no refugee in search of asylum is penalised due to mode of entry, discriminated against or refouled, that all refugees are subject to the full range of rights and benefits to which they are entitled, and that the human rights of all refugees are guaranteed (Goodwin-Gill 2014: 1). From the beginning UNHCR's protection responsibilities were intended to be complemented by a new refugee treaty. This led to the creation of the 1951 Convention Relating to the Status of Refugees (the 1951 Convention), which was finalised by the party states at a conference in Geneva in July 1951 (Goodwin-Gill 2014: 2). The Convention entered into force on 22 April 1954, and as previously mentioned

Australia is one of the first signatories to the treaty, having signed it the same year. The 1951 Convention was initially limited to protecting refugees in Europe in the wake of the Second World War, as it restricted the protection of the Convention to persons who became refugees due to events occurring in Europe before 1. January 1951 (UNHCR 2011). As a response to these limitations, in 1967 the Protocol Relating to the Status of Refugees was adopted with the purpose to remove the geographical and time limitations to the protection of the 1951 Convention, so as to be able to provide protection for refugees on a global scale (UNHCR 2011).

The 1951 Convention Relating to the Status of Refugees is a treaty, and as such it therefore falls under the Vienna Convention on the Law of Treaties, which confirms the principle of general international law, that a treaty 'shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose' (Goodwin-Gill 2001: 3). The intention of the 1951 Convention was to extend protection of the international community to refugees and to ensure that refugees are to be given 'the widest possible exercise of … fundamental rights and freedoms' (The 1951 Convention in Goodwin-Gill 2001: 3). As a treaty is supposed to be interpreted in good faith and in accordance with the ordinary meaning of the treaty, the 1951 Convention should therefore be interpreted an implemented in accordance with the above statement (Goodwin-Gill 2001). Furthermore, it is intended for the international obligations of the treaties to be incorporated into domestic law, so as to make sure that those who should benefit from the intentions of the treaty are identified and treated as specified by the obligations of the treaty (Goodwin- Gill 2014: 4).

As well as the key role to seek protection and permanent solutions for refugees, the UNHCR carries the responsibility to supervise the implementation of the 1951 Convention by the states who are party to the treaty (UNHCR 2011). This responsibility is outlined in Article 35 of the 1951 Convention and in Article II(1) of the 1967 Protocol (Kälin 2001: 616). In these articles it is also explicitly stated, that signatory states are expected to cooperate with the UNHCR in ensuring that the rights of refugees are respected and protected. Furthermore, signatory states are required to provide relevant information and statistical data on all policies

and actions relevant to the implementation of the 1951 Convention, the conditions of refugees and all laws, decrees and regulations which are or may be relevant to refugees (UNHCR 2010). Additionally, the UNHCR is mandated to, in cooperation with the Party States, to promote appropriate procedures to carry out the status determination process of asylum claims (UNHCR 2011).

Even though, the UNHCR has the power and responsibility to supervise and monitor the compliance of states in implementing the 1951 Convention, there is to this day no definitive enforcement of human rights, and at the global level standard settings for monitoring by international organisations such as the UNHCR depend mostly on the method of 'naming and shaming' (Brysk 2011). Some of the most common forms of trying to influence state behaviour by international organisations include bilateral diplomacy and sanctions such as trade and investment limitations and foreign aid conditionality. In the case of non-compliance of the 1951 Convention, these have though rarely been used (Brysk 2011). Only in cases of massive crimes against humanity can the United Nations Security Council (UNSC) or the North Atlantic Treaty Organisation (NATO), with a UNSC mandate, organise and authorise armed intervention against the violating authority, which is considered the ultimate enforcement of human rights (Brysk 2011).

To sum up the part on the international refugee regime and its importance for this thesis one could say, that the 1951 Convention remains to this day the only global legal instrument, which is tasked with providing international protection and durable solutions for refugees (UNHCR 2011: 2). The UNHCR is mandated to ensure that all party states to the treaty are implementing the provisions of the 1951 Convention. The UNHCR carry out this role through monitoring and supervision, but there are no significant enforcement of the treaty (Brysk 2011). Even though the signatory states of the 1951 Convention are obliged to aid the UNHCR in all implementing matters, the lack of actual enforcement may leave a gap for states to act otherwise. This might be problematic for the UNHCR in the agency's endeavour to seek protection and rights for refugees.

1.3 Research question

When examining the intention of the 1951 Convention, of ensuring that refugees are given the widest possible exercise of fundamental rights and freedoms, there appears to be a discrepancy between this intention and the current policies carried out towards asylum seekers in Australia. This seems a paradox, as Australia is a signatory to the 1951 Convention, and should therefore be expected to uphold the country's international obligations in relation to the treaty. This apparent paradox is what led me to formulate the following research question:

Is Australia complying with the 1951 convention, and if not - then why?

In the first part of the introduction chapter, I provided an overview of Australia's recent policies towards asylum seekers attempting to reach Australia by boat. Furthermore, I outlined the aim and purpose of the 1951 Convention and the protection responsibilities of the UNHCR. As mentioned, there appears to be a discrepancy between Australia's obligations under the 1951 Convention and the current asylum policies carried out by the country. In the following part of the introduction, I will examine this discrepancy in order to answer the first part of my research question, whether or not Australia is actually complying with the 1951 Convention.

1.4 Important elements of the 1951 Convention and how Australia is considered to be in breach of them

Even though Australia has a long standing tradition of refugee resettlement, events in the last decades have seen a change to the way the country's asylum policies are perceived internationally. In order to understand this, it becomes important to look at Australia's obligations under the 1951 Convention. The 1951 Convention is both a status and rights-based instrument and it contains a number of fundamental principles such as the principles of non-penalisation, non-refoulement and non-discrimination (UNHCR 2011). In this thesis I have chosen to focus especially on the principles of non-penalisation and non-refoulement, as

Australia's policies towards people attempting to seek asylum via spontaneous arrivals are considered to be in breach of these two fundamental parts (ABC news 2015) According to Edwards, the quality of asylum and the policies towards asylum seekers in Australia have changed dramatically to a degree, where it is now questionable whether or not Australia is actually upholding its international commitments (Edwards 2003: 193).

The principle of non-penalisation

The principle of non-penalisation is found in Article 31 of the 1951 Convention (UNHCR 2010). Its intention is to prohibit that signatory countries impose penalties on asylum seekers who enter without a valid passport or visa (McAdam 2013: 438). The provisions of Article 31 were created because the drafters recognised that refugees on flight are rarely in a position, where they can comply with the requirements for legal entry of a country, such as possession of national passport and visa (Goodwin-Gill 2001: 5). Although Article 31 describes that the benefit of immunity from penalties for illegal entry extends to 'refugees', according to Goodwin-Gil, as commented in a paper commissioned by the UNHCR, the provision would be devoid of all effect and meaning if it did not also include asylum seekers, at least until their status has been determined (Goodwin-Gill 2001: 8).

When looking at the meaning of the term penalties, and what it might constitute, it is not clearly defined in Article 31, but the drafters seem to have had imprisonment, fines and prosecution in mind (Goodwin-Gill 2001: 9). Administrative detention is allowed under paragraph 2, but here an important distinction has to be made between on the one side, detention which is carried out for the purpose of investigation of an asylum seekers status and claim, and on the other side detention as a penalty for illegal entry, which is clearly prohibited where entry is justified (Goodwin-Gill 2001: 9). In other words, being arbitrarily detained purely on the basis of seeking asylum and without a clear purpose and timeframe is definitely prohibited (UNHCR 2010). This is where it becomes relevant in relation to Australia and the country's policy of mandatory detention. At the heart of Australia's complex refugee protection regime, is a systemised distinction of rights and standards of treatment, based solely on mode of entry (Edwards 2003: 196). As described earlier in this chapter, this means that all asylum seekers and refugees arriving on boats are subjected to

mandatory detention and offshore processing in places, which have been highly criticised by the UN for poor living conditions, and a lack of transparency in the processing of asylum claims (ABC news 2015). Meanwhile, refugees arriving under the country's offshore program are not subjected to this treatment.

According to the UN Human Rights Commission, the prohibition on arbitrary detention includes detention which, although lawful under domestic law, is unjust or disproportionate. Therefore, in order for the detention of a person to not be arbitrary, it must be a reasonable and necessary measure in all circumstances (Australian Human Rights Commission 2013: 6). Under Australia's system of mandatory detention, the detention of an unlawful non-citizen is not based on an individual assessment concluding, that the particular person needs to be detained. Furthermore, asylum seekers who are detained cannot seek judicial review of whether or not their detention is necessary, and under the Migration Act there is no time limit on how long a person can be detained. These aspects of Australia's immigration detention regime can result in people being subjected to prolonged and indefinite detention, in breach of Australia's international obligations (Australian Human Rights Commission 2013: 6).

Another example of the systemised distinction of treatment in Australia's refugee protection regime, which could amount to penalisation due to manner of arrival, is the fact that offshore refugees are granted permanent settlement visas while boat refugees are instead granted only Temporary Protection Visas. The Australian Human Rights Commission argues that the granting of protection to refugees on a temporary basis only, has a harmful impact upon the mental health of TPV holders. This is among others because it leads to a situation of unstableness and uncertainty about the refugees future (Australian Human Rights Commission 2013:19). At the same time the absence of the right to family reunion, combined with the effective ban on overseas travel, which the Temporary Protection Visas entail, means

that some people face prolonged and indefinite periods of separation from their families. This

has further serious impacts on many refugees mental health and wellbeing (Australian Human Rights Commission 2013:19). Refugees on permanent protection visas are not subjected to this treatment, and are allowed to live in Australia with the full rights of a

permanent resident (Department of Immigration and Border Protection 2016). Therefore, it is argued that by imposing this distinction of rights and standard of treatment, simply because of difference in mode of entry, Australia is in breach of Article 31 of the 1951 Convention, the non-penalisation provision (Edwards 2003: 197).

The principle of non-refoulement

The other important element of the 1951 Convention, which Australia's recent policies towards asylum seekers are at risk of breaching, is the principle of non-refoulement. Besides being featured in Article 33 of the 1951 Convention, the principle of non-refoulement is also a rule of international customary law (UNHCR 2010). This means, that it is binding for all states, whether or not they have signed the 1951 Convention and its 1967 Protocol. A refugee seeking protection must therefore not be prevented from entering a country in order to seek asylum, since this would amount to refoulement (UNHCR 2011). The principle of non-refoulement is so fundamental that no reservations or derogations may be made to it. It provides that no one shall expel or return ("refouler") a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom (UNHCR 2010). It is argued, that through Operation Sovereign Borders and the interdiction and turning away of boats at sea, Australia is at risk of breaching its obligations of non-refoulement under the 1951 Refugee Convention and international human rights law (McAdam 2013: 442). This is because the boats are turned back without screening the status of the people on board to see, if they hold a genuine refugee claim. This could risk sending many refugees back to areas where they might fear threats to life or freedom, since the Australian Navy has no clear processes in place to identify refugees (McAdam 2013: 442).

In August 2013, the United Nations Human Rights Committee issued a highly critical report which found almost 150 faults in Australia's treatment of refugees (McAdam 2013: 444). The Committee found that the arbitrary and indefinite nature of detention as well as the difficult physical and psychological conditions, and the government's refusal to provide the refugees with information and procedural rights, together inflicted 'serious psychological harm' upon the asylum seekers, which is in violation of international human rights law (McAdam 2013: 444). In order to justify its current asylum seeker and refugee policies, including the Temporary Protection Visa regime, mandatory detention, and the policy of turning away

boats, Australia has argued that such responses are necessary in order to combat people smuggling (Edwards 2003: 195). Following this, the intention of the policies is to make it as difficult as possible for people smugglers to have a business transporting people over the sea to reach Australian territory (Edwards 2003: 195). Furthermore, the policies have been argued to be fuelled by a desire to save lives, and to avoid people setting out on a dangerous journey, where they might be in danger of drowning (Dutton 2015b). According to the Protocol against Smuggling, this argument is though questionable, since it is here clearly stated that in attempts to combat people smuggling there can be no deviation from obligations and responsibilities under other international law, including in particular the 1951 Convention (Edwards 2003: 196).

Conclusion to part

Article 31 of the 1951 Convention prohibits penalisation of asylum-seekers based on mode of entry. Despite of this, a range of Australian policies on immigration such as the arbitrary detention, the introduction of the TPV regime and the 'criminalisation' in public media and political language has as a consequence, that asylum seekers arriving by boat are being punished or effectively 'penalised' for arriving or attempting arrival to the Northern shores of Australia via boat and without valid visas (Australian Commission of Human Rights 2013: 16). And even though the principle of non-refoulement prohibits states from returning refugees to territories where they might fear threats to life or freedom, the policy of turning away boats in Operation Sovereign Borders, without screening the status of asylum claims, is arguably in danger of breaching this principle (Australian Commission of Human Rights 2013: 16).

Additionally, despite the fact that it is a human right to seek asylum according to Article 14 of the *Universal Declaration of Human Rights* (UN 1948), the Australian political decision to excise its offshore islands, as well as then later on the Australian mainland territory, has made it effectively impossible to seek asylum in Australia via spontaneous arrival, as the excision makes it impossible to launch a valid visa. All these policies breach Australia's international human rights obligations in some way (McAdam 2013: 443). At the very least, they undermine the humanitarian object and purpose of the Refugee Convention, but they also violate concrete legal obligations – such as the individual right to seek asylum and the

attendant right not to be subjected to penalties for arriving without a visa, the right to be free from cruel, inhuman or degrading treatment, the right not to be arbitrarily detained, and the principle of non-refoulement (McAdam 2013: 443).

When looking at the first part of my research question, I can therefore conclude, that Australia's current policies towards asylum seekers makes the country in breach of the 1951 Convention. Even though Australia is thus considered to be in breach of the country's obligations in relation to the Convention, there seem to be no evidence of the controversial policies changing within the foreseeable future. This could be related to the fact that the policies are widely considered to be in accordance with the wishes of the majority of the Australian population. According to a national survey conducted in January 2015 by an Australian media research firm, it was found that 58 percent of Australians considered the country's position on asylum-seekers either appropriate or too soft; only 26 percent thought it too tough (The New York Times 2015). These opinions are also represented by the most influential political parties in the country, shown by the fact that changing Australian Governments from different political parties have all carried out similar policies, as mentioned earlier in the introduction. When quickly examined, this appears to be a paradox, considered the fact that Australia is still party to the 1951 Convention and should therefore be expected to uphold the obligations imposed on the country, through the treaty. In the following analysis I will therefore move on to examine the second part of my research question - how Australia's non-compliance of several important elements of the 1951 Convention can be understood.

2. Analysis

The following analysis will be split into two parts. The first part will consist of an analysis of how Australia's domestic context and national preferences could be argued to have influenced the country's controversial asylum policies. In the second part of the analysis I will investigate the international context surrounding Australia's non-compliance of the 1951 Convention. Here I will analyse how the interstate cooperation on providing asylum and the role of the UNHCR, could be seen to have influenced Australia's non-compliance of the

treaty.

The theoretical framework of the analysis will consist of the international relations theories of constructivism and liberal institutionalism. In the first part of my analysis I will employ the theory of constructivism and in the second part, liberal institutionalism. I have chosen to use both theories in order to answer my research question, as they each bring valuable insights which might explain different aspects of Australia's behaviour in relation to the country's non-compliance of the 1951 Convention. I argue, that using the theories together allows me to gain a more nuanced understanding of the matter, as they each have different focus points. The theory of constructivism will be used to analyse Australia's domestic context, as the theory is concerned with explaining the source of a states preferences. In my thesis I have therefore applied the understanding of constructivism, which incorporates the meaning and importance of non-state actors and domestic politics into the analysis of explaining international relations among states. This is important, as Australia's domestic context will come to play a significant role in answering my research question. The theory of liberal institutionalism will be applied to analyse the interstate cooperation on the 1951 Convention and the role of the UNHCR, and how this international context could have influenced Australia's non-compliance. I have chosen to apply the theory to the international context, as liberal institutionalism represents a 'black box theory' meaning that it looks to explain international politics only at the interstate level, where it brings valuable insight into what motivates states into international cooperation, such as cooperation on international refugee protection (Betts 2009: 32).

2.1 PART 1 - Perceptions, preferences and identity: Australia's domestic context

2.1.1 How onshore asylum seekers are perceived in Australia, and how this perception relates to Australian public political statements

As mentioned in the introduction, there is a general difference of perception in Australia, between refugees accepted under the offshore program, and asylum seekers and refugees

arriving to Australia via boat. It has been argued that this is because the refugees entering the country through the offshore program are perceived to be following the 'correct' procedure, while negative media coverage, political discourses and the public rhetoric surrounding asylum seekers arriving by boat imply, that these asylum seekers are on the contrary posing a threat to the Australian identity and security (McKay et al. 2011: 114). In the following chapter I will analyse what this threat more concretely are perceived to consist of, and how it relates to public political discourses in Australia. I will at the same time use the theory of constructivism to analyse, why this perception could be argued to have had an impact on Australia's international cooperation and compliance of the 1951 Convention.

In the understanding of Wendt, constructivism is a systems level theory in international relations, as well as the rationalist approaches are. This means, that it does not open up the 'black box' when it comes to explaining state behaviour. Therefore it also does not incorporate domestic politics or non-state actors into the analysis and understanding of state relations and behaviours (Betts 2009: 32). This is though a narrow understanding of constructivism, and other theorist have applied constructivism to analyse the meaning and importance of non-state actors in international relations among states (Betts 2009: 33). This is also the understanding, which I will be applying to this thesis. According to constructivism, actors follow a logic of appropriateness, where decisions are based on their perception of a situation and their role in it. Therefore, the way an issue is framed and inputs from both the domestic and international political processes, will be important in determining the final outcome (Kamis and Hasenclever 2011: 2). I argue that actors such as Australian politicians and the public rhetoric in Australian communities have the ability to influence the social context, in which state's preferences takes place. This means, that the way asylum seekers are perceived in the domestic social context, will have an effect on what Australia deem the appropriate way to act in relation to this group, also in an international context.

In order to understand, what the boat arrivals are seen to be representing one can look to a large research study conducted by McKay et. al., which seeks to establish the general community perceptions of asylum seekers in Australia. Here the authors found, that even though personal contact with asylum seekers was relevant when forming opinions about

them, it was not the most important thing (McKay et al. 2011: 113). What mostly influenced opinions and attitudes towards asylum seekers was the interplay between traditional Australian values and norms, the way these norms appeared to be threatened by asylum seekers, and the way these threats were reinforced both in media and political rhetoric (McKay et al. 2011: 113). Given this feature, it then becomes relevant to establish, what Australian values and norms the asylum seekers seem to be threatening, and how this is accordingly portrayed in the media and in public political statements. An important element found in the study was that the asylum seekers arriving by boat were seen to exploit Australia's democratic systems and processes, and the method of arrival of asylum seekers was highlighted as an example of how they did this. Furthermore, the use of people smugglers and boats to enter Australian waters were identified as an example of an 'illegal' act and accordingly the boats 'should be turned back' (McKay et al. 2011: 123.) This statement is also related to the previously mentioned notion, that the asylum seekers are perceived to be 'jumping the queue' by taking places from the special humanitarian program, through their onshore arrivals (McAdam 2013: 439). Other than that asylum seekers who arrive in Australia by boat were also perceived to be exploiting the Australian welfare system. Accordingly, a large proportion of the respondents of the study stated that asylum seekers are in Australia to receive welfare and other social benefits, and that they are therefore in Australia for their own economic gain, rather than for humanitarian or protection reasons (McKay et al. 2011: 123).

Furthermore the study identified that asylum seekers were perceived to be threatening Australia's values and culture. This was exemplified through the concern that asylum seekers were not willing to integrate into an Australian way of life, and respondents frequently used examples to highlight in what way asylum seekers were reluctant to assimilate. Common examples included the perception that asylum seekers were 'unprepared' to change their traditional dress, religious or cultural beliefs, and respondents stated that this reluctance to assimilate posed an extreme threat to Australian identity and nationhood (McKay et al. 2011: 123). Moreover and importantly, asylum seekers were perceived to threaten the security of individuals, communities and the nation. An example of this was the belief stated by many of the respondents, that asylum seekers threatened national border security through their method

of arrival, their use of people smugglers, and their perceived links with terrorists (McKay et al. 2011: 123).

The theory of constructivism can be used to understand, why it matters for Australia, how an issue like asylum seekers are perceived and represented in a domestic context. And furthermore how this perception relates to the way Australia will act about the issue, both domestically and internationally. Constructivism is characterised as a social theory, meaning that its main concern is how to understand the relationship between actors and structures (Barnett 2014: 157). According to the theory, actors and structures mutually constitute and influence each other and both have the ability to continually change in this interplay (Hopf 1998: 172). Furthermore, constructivism brings valuable insight into explaining what constitutes the source of a state's preferences, and the crucial point of an analysis becomes to analyse why actors want what they want (Pouliot 2011: 1). Like liberal institutionalism, constructivism also assume actors to be self-interested, and that they will act on the basis of those interests. In constructivism, these interests are though considered not to be pre-existing, but endogenously defined through social interactions (Pouliot 2011: 1). In other words, interests are considered to be contextually defined and constructivism looks to especially norms, ideas and the role of argument and persuasion, when trying to explain the mechanisms through which state's preferences are created (Betts 2009: 86) In order to sum up one could say that constructivism is concerned with the relationship between actors and structures, which are considered to mutually influence each other. Furthermore, norms and ideas have the ability to change identities and interests of states, and through that change state behaviour, which might in turn change structures and vice versa.

As explained in the above, the general view of asylum seekers in Australia, is seen as something which threatens Australian values and identity. Furthermore it is established, that this opinion is also influenced by the way the asylum seekers are represented in the media and in public political statements. I argue, that this could be seen as an actor-structure relationship, where the community perceptions and public representations of asylum seekers are mutually influencing each other, and are thus creating a specific social understanding of asylum seekers and how they threaten Australian identity and interests. I will now look at how the issue

of asylum seekers arriving by boat has been framed in political public statements in order to establish, how this and the general public opinion could be seen to have mutually influenced each other. Afterwards, I will return to analyse why the meaning created in this domestic social context matter for Australia's behaviour in relation to compliance of the 1951 Convention.

As explained in the introduction, in 2013 the Australian Government launched a policy named Operation Sovereign Borders, in order to address the rising numbers of boat arrivals to the country. Soon after the introduction of the policy, the prime minister at the time, Tony Abbott, gave a speech at the Parliament House, which was specifically addressed those considering a boat journey to Australia. In this speech, the Prime minister stated:

> "So, I want to make it absolutely crystal clear today that this Government will never allow people who come here illegally by boat to gain permanent residency in Australia and my message to the people smugglers is: you should not come because you will not stay. I want to repeat that so that the message is loud and clear for the people smugglers and their potential clients: you should not come because you will not stay and the Government will be making further announcements shortly on additional measures that will ensure that this is the case" (Abbott 2013).

Here we see, that Tony Abbott is very explicit about the Government's standpoint, that asylum seekers attempting to reach Australia by boat will not be allowed to enter and subsequently never allowed to settle. The former prime minister uses the word 'illegal', when referring to the boat arrivals, and this matches the Australian community perceptions shown previously, about the manner of arrival of the asylum seekers being something, which are considered illegal and considered to exploit Australia's democratic systems and processes. Furthermore, the quote highlights another important aspect. In it we see, that Tony Abbott makes a clear connection between the people seeking asylum by boat and people smugglers. The one almost becomes interchangeable from the other, implying that by allowing boat arrivals to enter the Australian territory, the country would without question also be supporting people smugglers and allowing them into the country. This element is similar to the perception reflected in the study above, where asylum seekers were perceived to threaten the national border security and hence the entire nation, through their use of people smugglers. I ar-

gue, that this could be seen as an example of where the perceptions of the Australian community and representations in political discourses have mutually influenced each other in a structural interplay, in order to create a common understanding of how asylum seekers are considered a threat. This interplay creates a specific social meaning, building up a clear sense of what values and norms that are at stake and at risk, when dealing with boat arrivals.

Another example of a political element, which could have influenced community perceptions in Australia is related to the Operation Sovereign Borders policy paper. In this public policy paper, it is stated: "… a Coalition government will establish a military-led response to combat people smuggling and to protect our borders … [the] government will treat the border protection crisis as a national emergency and tackle it with the focus and energy that an emergency demands" (The Coalition's Operation Sovereign Borders Policy 2013: 2). The fact that Operation Sovereign Borders is led by the military and is premised on the belief that Australia is facing a border protection crisis amounting to a national emergency, could be seen to also affect the public opinion on the matter. In the Coalition's policy paper on the operation, the Coalition is arguing that the people smugglers are facilitating migration towards Australia amounting to a 'national emergency' and constituting a 'border protection crisis'. These statements can be analysed as an attempt to employ language, which is usually associated with the military and warfare, and to employ this language when speaking about the boat migrants and asylum seekers, in order to stress the seriousness of the situation.

Along these lines, in a speech from 2010, Tony Abbott made the following argument: "Still, in a world where crime and terrorism are international in scope and where every developed country's social security system is under pressure, a policy of benign unconcern about new arrivals would defy common sense" (Abbott 2010). In this statement Tony Abbott, besides referring to the strain that new arrivals would put on Australia's social system, also introduces terrorism as another threat, which arrivals such as asylum seekers are possibly bringing with them. This link with terrorism is also something, which was reflected in the general community perceptions as previously mentioned. According to Abbott, a government guided by common sense will therefore naturally have to be very concerned about the possibility of these arrivals, and it could be argued that creating policies such as Operation Sovereign Borders

in order to keep them away, will be the natural consequence of such a concern. Abbotts line of thought is not new in Australia. Former Prime Minister John Howard, who was leader of the Liberal Party before Abbott, observed that: ”...you have to be able to say that there is a possibility that some people having links with organisations that we don't want in this country, might use the path of an asylum seeker to get here” (Rajaram and Grundy-Warr 2004 in McNevin 2007: 623). McNevin states that Howard made these comments in relation to primarily Muslim boat migrants who came after the 9/11 attacks (McNevin 2007: 623). The author further argues that the consequence of such statements was an increase in the level of suspicion against Muslim Australians, which manifested itself in both verbal and physical attacks against them (McNevin: 624). Howard's statement can be interpreted as though he believes that terrorists or other criminals may use the same paths as asylum seekers. Therefore it can be understood in a similar way as the above quote by Abbott, where it is better to be very concerned about the arrivals of asylum seekers and possibly keep them out of the country, than to take them in and risk, for instance, a terrorist attack.

Finally, According to Clyne, leading politicians in Australia, such as Pauline Hanson from the One Nation Party, have presented the boat migrants as queue jumpers, which is a notion also mentioned in the introduction to this paper (Clyne 2005: 184). In order to elaborate on the topic, one can look to the following quote by Clyne, who explains how the asylum seekers are also in this way in opposition to Australian values: "Queue jumper' is a term that was used to unite various sections of the Australian population against the asylum seekers. Firstly, it distinguishes them from the 'Aussie battlers' who patiently wait their turn and work honestly and hard while other less deserving people get it for nothing" (Clyne 2005: 184). The quote highlights how the Australian political discourse often creates a distinction between Australians and asylum seekers. As explained in the introduction, the Australian Government differentiates between its offshore and onshore refugee programs. In accordance with the quote above, asylum seekers arriving by boat are generally perceived to be trying to 'jump the queue' or to cheat the system. It is their perceived attempt to cheat, which is used to differentiate them and set them apart from "ordinary" Australians. In the Australian political debates, politicians have also managed to successfully argue that it was those who patiently wai-

ted their turn, who were the ones really deserving of protection, whereas the queue jumpers were less deserving (McKenzie and Hasmath 2013: 421).

Through the examples above, I argue that there is a link between the way asylum seekers are often perceived by the Australian community and the way the same group is presented in public political statements in Australia. Using constructivism I argue, that this represents an example of an actor-structure relationship that has taken place within a domestic social context. Here it has made up a national Australian preference or perception of asylum seekers as being a group, which poses a significant threat to many elements of the Australian society. In other words, public opinion as well as political statements have in Australia mutually influenced each other, and this has created a national preference for being skeptical towards asylum seekers, due to the threats they represent to Australian values and national identity. According to constructivism, norms, identities, cultures, and narratives are all forms of intersubjective meanings that shape state preferences and identities and through that world politics (Pouliot 2011: 4). I argue, that the domestic context described in the above could be said to have had an effect on Australia's cooperation and compliance of the 1951 Convention, because the country's acceptance of asylum seekers is being challenged by the anxieties, which this group represents. In other words, the national identity and preferences of Australia could be argued to have a significant impact on the country's foreign policies, such as the international cooperation and compliance of the 1951 Convention.

2.1.2 Australia's extraordinary need for control in relation to immigration

In the previous chapter I analysed, how it could be argued, that a negative and apprehensive view on asylum seekers is part of Australia's domestic social context, and that this in turn could be argued to have had consequences for Australia's non-compliance of the 1951 Convention. In the following chapter I will now move on to analyse another central aspect of Australia's domestic context, which is playing an important role in explaining the national preferences of Australia, also in relation to the 1951 Convention. In doing this, I will be applying the theory of constructivism in order to clarify that it is not a given, how a state chooses to act in relation to a perceived threat. The way a state perceives an issue, and how

this issue relates to the state's sense of identity, will have an impact on the total outcome.

In the following, I will look to demonstrate how Australia's history with immigration could be argued to have had an influence on Australia's current and controversial policies towards asylum seekers. According to Hugo, Australia's history with refugees can be characterised as a love-hate relationship, both in terms of government policy and public support and attitudes (Hugo 2001: 35). On the one hand Australia has resettled more than 700.000 refugees and displaced persons under its offshore program, who have been given a great deal of government and community support. On the other hand the country is carrying out harsh and highly criticised policies towards asylum seekers and refugees arriving by boat, which research shows that a majority of the Australian population supports (McKay et al. 2011: 115). Hence, there is also no signs of the policies changing within the near future. This could be related to the fact, that Australia has a long history of selectivity and control in terms of the country's immigration policies (McKenzie and Hasmath 2013: 425).

Like the USA, Australia is a settler state, and almost half of the country's population is an immigrant or the child of an immigrant, which makes Australia one of the countries most influenced by immigration in the world (Hugo 2014: 868). Though according to Jupp, Australia differs from other settler states such as the USA and Canada. This is because, the majority of the immigration to Australia has been the product of conscious social engineering in order to create a particular kind of society, compared to the USA and Canada, where the role of the state was less apparent and private initiative more important (Jupp 2007: 5). This has had the consequence, that Australia and New Zealand remain the most British societies outside of Britain in the world, despite an increased multiculturalism during especially the last 50 years (Jupp 2007: 5). According to Jupp, immigration in Australia is still subjected to extensive and deliberate planning, in order to control population change. The foundation of this has been 150 years of Australian immigration policy that has rested on three pillars: the maintenance of British hegemony and 'white' domination; the strengthening of Australia economically and militarily by selective mass migration, and lastly the state control of both these processes (Jupp 2007: 5).

A clear example of the state controlled immigration to Australia was the creation of the 'Immigration Restriction Act' or as it is better known - the 'White Australia' policy (Jupp 2007: 8). The policy was introduced in 1901 and remained in force until replaced by the Migration Act in 1958, but the final remnants of the policy were not abolished until 1973 (McAdam 2013: 436). The 'White Australia' policy was adopted and implemented in order to secure and attract immigrant settlers from primarily Great Britain and North-Western Europe and exclude any other 'race' from immigrating to Australia, and it was used as an instrument of nation building in order to secure a culturally homogeneous society (Hugo 2014: 870). Most notoriously the policy was carried out through a dictation test which was used to exclude certain applicants. This was done by requiring them to pass a written test, which was conducted in an European language, that any unwanted immigrant would be unfamiliar with (Hugo 2014: 870). The 'White Australia' policy was extremely effective in its intent of sending the message, that 'coloured people' could not settle in Australia. By 1947 the non-European population, other than Aborigines, was measured to constituting no more then 0.25 percent of the total population. This meant that Australia had in effect become one of the 'whitest' countries in the world outside northwestern Europe (Jupp 2007: 9).

It has been argued, that Australia's long tradition of exercising a high level of control of the immigration to the country is related to the country's geographical location and British culture. According to a research paper written by Worthington for the Parliament of Australia, the cultural practices and values of the primarily British colonising powers, continue to be assumed, by the majority of the population, to be providing the foundation of social cohesion for the country (Worthington 2001). According to the author, this is because, like the United States, the indigenous population never experienced a post-colonial emancipation, as was the case in for example Indonesia, Vietnam and India (Worthington 2001). However, unlike the United States, the Australian population is not large compared with the territory of the country. For a substantial part of Australia's short history, the European settlers in Australia felt themselves to be in a similar situation to the Europeans in South Africa, in being an island of European culture geographically isolated from the mother culture in Europe (Worthington 2001). According to the author, these feelings of geographical isolation may have contributed to the Apartheid regime in South Africa and the White Australia Policy in

Australia, and in other words of creating an early history of introversion and rejection of neighbouring cultures (Worthington 2001).

In accordance with this McAdam also argues, that as an island nation, Australia has long suffered a disproportionate anxiety about being 'invaded' from the sea. From the mid-19th century, there was a fear of 'yellow hordes' invading from the north, and she argues that it was this fear which led to the country's 'White Australia Policy', which was, as described, not totally dismantled until 1973 (McAdam 2013: 436). It is argued, that there is a link between this fear of invasion from the surrounding countries and the regional isolation from other European cultures (McAdam 2013: 436). Furthermore, it is argued that these features have contributed to the fears that asylum seekers present a threat not only to the integrity of Australia's borders, but to the national fabric as a whole, and politicians as well as certain elements of the media have supported this view (McAdam 2013: 436).

This long tradition of state controlled immigration and selectivity is important for this paper, as I will in the following analyse how Australia's current policies towards boat arrivals of asylum seekers may not be as controversial, despite the country's history as a settler nation, as one might think. I argue, that the negative view on asylum seekers attempting to reach Australia by boat, and Australia's current controversial policies to manage this group, are directly linked with the tradition of having a strong history and preference for highly controlled immigration. It could be argued, that the country's geographical position has played a significant role in allowing Australia to carry out these highly controlled immigration policies, since the country is surrounded by water and difficult to reach. According to McKenzie and Hasmath, Australia's geographical isolation has enabled the country to control anyone who comes in and out of its territory and under what circumstances. Furthermore, the authors argue, that this ability is what has led Australians to be uncomfortable with any boat people arriving unregulated on their shores (McKenzie and Hasmath 2013: 425).

In order to understand the extend of Australia's need for control in relation to immigration, one can look to a recent and interesting proposed policy, which was put forward by the Gil-

lard-led Labor Government in 2011. In this policy, the government proposed to swap 800 boat migrants, which were intercepted in Australian waters, for 4,000 refugees situated in Malaysia (McKenzie and Hasmath 2013: 425). The proposed deal was though never completed, as the Australian High Court ruled it unlawful (McKenzie and Hasmath: 426). The proposed policy appeared to contain the notable aspect that it is not so much the number of refugees, which matters for Australia, but rather the manner of their arrival. It could be argued, that the element of control provides the Australian politicians and public with a feeling that they are able to keep away threats. This allows the Australian Government to propose seemingly peculiar swap deals, because it reinforces Australia's sovereignty and perceived control over its borders. Therefore policy issues such as immigration, control and border protection are often merged in Australia. A clear example of this is, as mentioned in the introduction, that in 2013 the Ministry of Immigration and Citizenship was renamed the Ministry of Immigration and Border Protection (McAdam 2013b: 440). Along these lines, the Australian Government has also negotiated with the United States to accept the country's intercepted boat migrants from Haiti and Cuba in exchange for those intercepted in Australia (McNevin 2007: 625). In this context it also becomes relevant to talk about Australia's onshore and offshore refugee programs. It could be argued, that the entire system favours the controlled arrivals in the offshore program, who are coming mainly from the UNHCR refugee camps. Here, Australia has been able to exercise a high level of selectivity in terms of who are granted settlement status in Australia. Hugo argues, that through the offshore refugee program, Australia is seen as having control, and therefore the compassion and commitment to the program remains (Hugo 2001: 36). He further argues, that this is because the numbers to be accepted are fixed and the Department of Immigration and Multicultural Affairs plays a significant role in the selection of the refugee-humanitarian settlers, allowing for integration potential and compatibility with Australian values to be part of the selection process (Hugo 2001: 36).

Using the theory of constructivism one could argue, that Australia's preference for highly controlled immigration is part of a socially constructed world perception. This is because, according to constructivism, international threats are not self-evident physical facts but socially constructed realities (Pouliot 2011: 4). In relation to this, one could look to Wendt's fa-

mous statement, that 'anarchy is what states make of it' (Hopf 1998: 174). The statement refers to the constructivist assumption, that even though there may be no world government to elicit international stability and order, there is no causal link to the type of behaviour that states will adopt following this. In other words, even if international anarchy or a substantial threat really exists, states can adopt multiple different responses and behaviours in relation to it (Betts 2009: 32) As previously established, according to constructivism, what determines what response a state will adopt in relation to a matter will be intersubjective meanings such as norms, cultures, ideas, practices and narratives which shape state identity and in turn foreign politics. Furthermore, states will follow a logic of appropriateness, where decisions are based on their perception of a situation and their role in it (Kamis and Hasenclever 2011: 2).

I argue, that Australia's long tradition and history of exercising strong immigration control, and in turn the policies which Australia is currently carrying out towards asylum seekers, is not a given. It is instead the result of a socially constructed meaning influenced by Australia's geographical and cultural isolation, which has created a domestic preference, as argued also in the previous chapter, for being very skeptical towards arrivals of asylum seekers coming from the sea. This perception is based on the threat which Australia perceives the asylum seekers to represent. As constructivism argues, that a perceived threat is not a self-evident physical fact, but instead something which is socially constructed, I therefore argue that Australia has created a social reality in which asylum seekers pose an existential threat, because they challenge the country's ability of being able to sovereignly control everyone who enters the country. This social reality has been shaped through structures in Australia's domestic social context, which has influenced the country's preferences and perceived identity. As a states' national identity is in turn also what shapes its international behaviour, I therefore argue that this existential need for control of Australia is crucial to understanding the country's behaviour and partial non-compliance of the 1951 Convention. In the following chapter I will return to this point in, in order to elaborate on it.

In order to exemplify, how the need for control has become part of Australia's identity, one could look to the following quote by Prime minister Malcolm Turnbull on 24. November 2015 in a speech dealing with national security in the wake of the Paris terror attacks:

> "In addition to being the most successful multicultural society in the world, Australia, as an island continent, has some natural advantages over Europe, which is currently facing the uncontrolled movement of hundreds of thousands of people. Unlike the Europeans we are in control of our borders. For example, people who successfully enter Greece are moving at will throughout much of the EU. We are an island nation. The people smugglers' business model has been broken. The boats have been stopped." (Turnbull 2015).

Here we see, that Turnbull highlights how Australia is a country, which is in control of its borders. Furthermore, Turnbull relates this to the fact that Australia is an island nation, so it becomes clear that both are very distinct features of Australia, compared to for instance Europe, which is according to Turnbull facing the uncontrolled movements of hundreds of thousands of people. According to McKenzie and Hasmath, an expectation has emerged that the Australian government can, and should, control all movements of people across Australia's borders, and this ability has led the Australian public to accordingly develop a strong support for controlled and managed migration (McKenzie and Hasmath 2013: 428). Asylum seekers challenge the view that the government controls exactly who may enter the nation, and by arriving by boat they do so in a visible way that can fuel public debate over the issue (McKenzie and Hasmath 2013: 428). Furthermore, opinion polls have shown that when an increase in boat migrants occur, the public becomes more sceptical towards migration in general, and therefore also in the Governments' ability to manage migration (Hugo 2014: 885). This gives the Australian Governments' strong incentives to enact 'tough' policies (Hugo 2014: 885).

I argue, that the anxieties caused by asylum seekers, which are reflected in both general community perceptions and public political statements, are directly linked to Australia's extraordinary need for control over the country's borders. The asylum seekers arrive unregulated and this causes concern and apprehension in a state, which has a history of feeling both geographically and culturally isolated, and in turn as a state in need of strong border protection. Australia, could be said to have historically relied on its geographical

isolation in order to carry out a high level of control of the immigration to the country. Using constructivism I have argued, that the perceived threat of asylum seekers are not a self-evident fact, but a socially constructed meaning, which has led to Australia understanding itself as a nation in need of very strong border protection. Furthermore, I have argued that this domestic preference is a core part of Australia's perceived identity. The unregulated arrivals of asylum seekers therefore pose a significant threat to Australia, which could be directly linked to the controversial and harsh policies, which the country is currently carrying out towards this group. The socially constructed reality of Australia is, that the country is sovereign in determining exactly who is allowed to enter the country and in what way.

Furthermore, I have argued that the fact that Australia has been built on highly regulated migration means, that there is concern amongst political leaders that illegal entry of asylum seekers could undermine public support for immigration in general. These concerns give the Australian Government strong incentive to take controversial measures in order to maintain control over whoever enters the country. Therefore I argue, that it is actually not strange for Australia, to be carrying out harsh policies towards boat arrivals, despite being an immigrant and settler nation, as the country has always carried out policies that have clearly favoured a high level of control on the arrivals to the country. I argue, that the majority of Australia's history with immigration has been characterised by selectivity and control, meaning that this is clearly a strong national preference for Australia.

2.1.3 How the refugee influx has changed to Australia, since the country signed the 1951 Convention

In the following chapter I will further explore how Australia's extraordinary need for control in relation to immigration is related to the country's skepticism and non-compliance of the 1951 Convention. I will analyse, how it could be argued, that the fact that Australia signed the 1951 Convention in 1954 is an element which might have influenced the country's per-ception of being party to the treaty. In conducting this part of the analysis, I will be applying the theory of constructivism.

As described in the introduction, Australia ratified the 1951 Convention in 1954. According to Millbank, in a research paper written for the Parliament of Australia, much has though changed in the world since then. The author argue, that the Convention-based asylum system may have operated well enough until the end of the Cold War, but that it was not designed with today's mass refugee outflows or migratory movements in mind (Millbank 2000). Furthermore, the author argues that the fact that the Convention was developed in and for a different time, makes it unlikely that many Governments would have signed up to the Convention today (Millbank 2000). In the case of Australia, I argue that this aspect is relevant to look at in relation to the country's strong national preference for immigration control. This is because, it was not until the late 1980s, due to an increasing number of boat arrivals, that the government's ability to control its borders came under threat (McKenzie and Hasmath 2013: 425). It is argued, that this change was furthermore what led to significant changes to Australia's immigration policy in order to establish effective legislative mechanisms for managing unregulated immigration (McKenzie and Hasmath 2013: 425). And as established in the introduction, many of these recent changes to Australian asylum policies has left the country in breach of its obligations under the 1951 Convention.

In order to understand the change in Australia's immigration policies one can look to the theory of constructivism. As already mentioned, constructivist theory believes that states interests are a product of their identities, and that these identities are created through social interaction. The belief that states identities and interests are continually being formed through interactions means that states identities and preferences can change - they are not fixed (Betts 2009: 32). Following constructivism I argue that Australia's preferences in relation to compliance of the 1951 Convention has changed, because the country has developed a new perception of the implications of being signatory to the treaty. I argue, that because of the change in boat arrivals coming to the country, the legal obligations of the treaty has carried with it consequences for Australia, which were not there, when Australia signed the treaty in 1954. This could have led Australia to perceive the international cooperation on the treaty differently, than the country did, when it first signed it. When asylum seekers began arriving by boat to Australia's Northern shores, the obligations of the treaty suddenly proposed a threat to the country's interests and identity, especially the socially constructed need for

control over immigration.

As a final note to this part it should be mentioned, that according to constructivism international institutions, such as the UNHCR, have the ability to play a significant role in influencing ideas, norms and perceptions of states, such as the ones guiding Australia's asylum policies, through for instance argumentation or persuasion (Betts 2009: 86). As mentioned, constructivism believes state identities to be continually formed through social interactions. The element, that states interests and identities are not fixed and can be changed, opens up whole new perspectives in world politics, which takes into account norms and ideas (Checkel 1997: 473). It has the consequence that states can be persuaded through argumentation or ideas to view issues differently, meaning in turn that their behaviour over time might change, because of their new perceptions (Betts 2009: 32). This opens up a whole new perspective in international politics, where norms and ideas of international institutions have the ability to constitute state interests and identities and in turn change state behaviour (Checkel 1997: 473). This means, that the UNHCR should in theory be able to persuade Australia through argumentation or ideas, to comply with the obligations of the 1951 Convention.

I though argue, that in the case of Australia, the influences coming from the country's domestic social context seems to be a lot stronger in guiding the country's actions on asylum seeker policies, than the influences coming from international institutions such as the UNHCR. This is exemplified through the following quote by Tony Abbott from a news article on 9 March 2015, when Tony Abbott was still Prime minister. The article was written after the UN had published a report in which Australia was criticised for violating the rights of asylum-seekers to be free from torture and cruel, inhuman or degrading treatment, through the treatment on the offshore processing centres on Manus Island (BBC News 2015):

> "When asked about the UN's findings, Mr Abbott told reporters: "I really think Australians are sick of being lectured to by the United Nations (…) We have stopped the boats and I think the UN's representatives would have a lot more credibility if they were to give some credit to the Australian government for what

we've been able to achieve in this area"'" (BBC News 2015).

Here we see that the preference of carrying out harsh policies towards asylum seekers, such as the Operation Sovereign Borders, in order to stop the arrival of boats to the country, seems much more imperative for Australia, than changing the controversial policies because of the critique and arguments coming from an international institution like the UN. This is further highlighted by the fact that the Australian Government publicly rejected the report and its conclusions (BBC News 2015). Furthermore, it seems that the rhetoric of the UN is not perceived to be influencing Australia at all, as Abbott specifically points out how he feels the UN should instead have given Australia credit for what the country has accomplished through its policies. In this case it could further be argued, that the method of 'naming and shaming', as a monitoring and enforcement mechanism of international institutions such as the UN and the UNHCR, does not seem a very successful strategy in making a state such as Australia comply with its international treaty obligations.

In this chapter I argued, how Australia's perception of being a signatory to the 1951 Convention and the obligations, which this entails, could be seen to have changed since the country signed the treaty in 1954. This I argued, was due to the fact that Australia did not experience a challenge in managing the country's immigration and borders until significant arrivals of asylum seekers in the 1980s, which changed the country's perception of the consequences of part taking. I argue, that this change in circumstances and the consequences, which it has brought upon Australia's ability to manage the country's borders, could have influenced the country's view on being party to the treaty. In my research question I set out to answer, why Australia is currently not complying with the 1951 Convention. Using constructivism it could be argued, that the idea of being a nation in control of its borders has become more vital to the country's perceived identity, than the idea and preference of being a country upholding all its international treaty obligations. This is supported by my findings previously in this thesis, establishing control over the country's borders as an existential preference and idea of Australia. In order to sum up this entire first part of my analysis I argue, that Australia's domestic preference of being a nation in control of its borders has become part of the country's national identity. Based on this perceived identity and the ideas

and norms which it entails, it could be argued, that Australia does not find it the most appropriate or important response, to change the countries current asylum policies in order to comply with the 1951 Convention, despite critique from international institutions such as the UN. The discrepancy between the perceived consequences of fully complying, and through that possibly allowing higher numbers of asylum seekers into the country, is simply too great from the strong domestic preference of Australia, of being able to carefully manage whoever is to enter the country.

2.2 PART 2 - Interstate cooperation on the 1951 Convention and the role of the UNHCR: The international context

In the first part of my analysis I investigated, how Australia's domestic preferences and national identity have played a significant role in answering the question, of why Australia is currently not complying with the 1951 Convention. In the following chapter I aim to investigate elements of the interstate cooperation on the 1951 Convention and the role of the UNHCR, in order to answer my research question. Throughout part two of the analysis, I will be employing the theory of liberal institutionalism.

2.2.1 Neo-refoulement and the practice of deterrence policies

According to Hyndman and Mountz, more and more states today are conducting what the authors refer to as externalisation of asylum or 'neo-refoulement'. The term refers to a new strategy conducted by signatory states of the 1951 Convention, in order to circumvent the responsibility of non-refoulement (Hyndman and Mountz 2008: 250). More specifically the strategy consists of states returning asylum seekers and other migrants to transit countries or regions of origin, before they reach the sovereign territory where they could have made an asylum claim (Hyndman and Mountz 2008: 250). The authors highlight especially Australia and the European Union, as places where the strategy is openly and commonly being employed (Hyndman and Mountz 2008: 250). Interestingly, the authors also draw attention to the strategy of neo-refoulement as part of a new phenomenon, where asylum is increasingly moved from the legal domain to the political domain. In the legal domain international in-

struments to protect refugees are in place, compared to the political domain, where migration flows are preferably managed in regions of origin, and asylum becomes part of a state-centric international relations discourse where the topic is highly securitised (Hyndman and Mountz 2008: 252). I argue, that in the case of Australia, especially the Operation Sovereign Borders could amount to what the authors refer to as neo-refoulement. This is because the policy entails the turning away of boats, before they reach Australian territory. Furthermore, the excision of the Australian territory from the country's migration zone has legally removed the territory in which asylum seekers could have upon arrival made a valid asylum claim. This excision could be argued to also constitute a strategy of neo-refoulement.

In order to understand why states might have an interests in employing a strategy of neo-refoulement one could look to the nature of asylum as a mean of refugee protection. According to Betts, asylum holds a strong legal and normative framework, especially in relation to the principle of non-refoulement (Betts 2009: 87). In a research paper by Gammeltoft-Hansen this is further elaborated on, as the author comments that the principle of non-refoulment is considered an exceptional limitation of the sovereign right of states to turn back aliens to their country of origin (Gammeltoft-Hansen 2014: 576). Australia's current policies towards asylum seekers all have in common, that they aim to reduce or eliminate the possibility of spontaneous arrivals seeking asylum in Australia. It could be argued that since asylum holds a strong legal framework through the principle of non-refoulement, carrying out a strategy of neo-refoulement becomes a successful approach in circumventing the granting of asylum, as imposed by Australia's legal obligations.

Gammeltoft-Hansen further comments that the last 25 years have seen a move towards increasingly restrictive refugee policies in both traditional and new asylum countries, leading to a general tightening of asylum systems and border control (Gammeltoft-Hansen 2014: 576). The author states that deterrence policies, similar to what Hyndman and Mountz describes as a strategy of neo-refoulement, have been introduced legally or physically in order to prevent refugees from accessing asylum (Gammeltoft-Hansen 2014: 576). According to the author, the deterrence policies lead to the question whether or not international refugee law, such as the principle of non-refoulement, is actually constraining states prerogative to

control entry into their territory. This is accentuated by the fact that states have argued, that neither the principle of non-refoulement nor other norms under international refugee law apply, when refugees are intercepted outside the state's territory (Gammeltoft-Hansen 2014: 578). According to Gammeltoft-Hansen, the majority of signatory states do accept the 1951 Convention as legally binding, but the political drive towards development of the treaty and increased legalisation is not present. Furthermore, even though many governments are still proclaiming rhetorical support for the refugee regime, and many states have reaffirmed the importance of the 1951 Convention, this formal support does not necessarily lead to political practice (Gammeltoft-Hansen 2014: 578). Thus leading to examples such as deterrence policies, where governments have responded to international norms and laws by adopting policies specifically designed to avoid or circumvent legal responsibility (Gammeltoft-Hansen 2014: 580).

The theory of liberal institutionalism holds valuable insight into analysing, why it might matter for Australia's compliance of the 1951 Convention, that more and more states, including Australia, are employing strategies such as neo-refoulement or deterrence policies. According to liberal institutionalism there is a significant amount of international cooperation taking place in the world, which is not explainable simply through the role of a hegemony Betts 2009: 25). This is relatable to the creation of the UNHCR and the 1951 Convention, which was established through the cooperation of multiple states and the UN, and which have managed to make a difference in providing protection for refugees ever since. There is though difficulties to making this cooperation possible. This is because liberal institutionalism perceives anarchy to be an underlying force in the international system, since there is no central authority, which can force states to comply with international agreements (Hellmann and Wolf 1993: 7). Following this, international cooperation then naturally becomes difficult, since anarchy allows states to defect from international agreements (Hellmann and Wolf 1993: 7). Furthermore, liberal institutionalism considers states to be rational self-interested actors, who are trying to promote their national interest, and who are operating in a world where international cooperation between states only takes place, if the states have significant common interests (Keohane and Martin 1995: 39). According to the theory, states will act on the basis of a rational cost-benefit analysis in order to achieve the most desirable outcome (Betts 2009:

86). Following this, cooperation among states will only occur, if states perceive themselves to be gaining more or equal to what other states are gaining from cooperation (Betts 2009: 86). Therefore, it will be negative for cooperation and often lead to collective action failure, if a state perceives other states to be free-riding. This is because no state has the incentive to be the provider and all states have an incentive to free-ride, in order to avoid costs (Betts 2009: 26).

According to liberal internationalism, international institutions such as the UNHCR come to play a very important role in determining under which circumstances interstate cooperation is possible. This is because liberal institutionalism considers institutions to play a key role in overcoming collective action failure among states (Keohane and Martin 1995: 45). According to the theory, international institutions have the power to mitigate fear of 'cheating' or free-riding and through that make it possible for mutual cooperation to occur (Keohane and Martin 1995: 45). International institutions do this by facilitating interaction and sharing and providing valuable information among states, offering opportunities for issue linkage, heightening transparency and reducing the ability of actors to defect from international agreements by among others monitoring compliance (Krasner 2000: 3). By normalising rules and regulations, international organisations has the ability to promote an environment of trust, because each state is aware that other states' incentives are affected in the same way (Hellmann and Wolf 1993: 8). Therefore, international institutions enhance a state's capacity to predict the behaviour of other states. By following the rules and standards of international institutions, states signal their willingness to continue patterns of cooperation, and therefore reinforce expectations of stability (Hellmann and Wolf 1993: 8).

Using the theory of liberal institutionalism, an argument could be made, that the usage of deterrence policies of states to circumvent their legal obligations of the 1951 Convention and the principle of non-refoulement, could be seen as an example of states 'cheating' in order to avoid the costs, which the granting of asylum would have entailed. And at the same time, the commonplace usage of these strategies could be argued to have created an unstable environment, where states do not perceive it a given, that other states will follow the rules and legal obligations set by the UNHCR and the 1951 Convention. It could be argued, that this has cre-

ated a situation, where states do not perceive it a stable environment of cooperation, and that this has lessened the perceived gains attributed to complying with the legal obligations of asylum. Therefore a case has arisen, where several states will feel the need to employ strategies to avoid being a main provider of asylum, as they perceive that other states would not be contributing equally. At the same time, it appears that the UNHCR has not managed to create an environment of trust, where states feel that they are mutually benefitting from the cooperation on the 1951 Convention. Given the widespread and more and more commonplace usage of deterrence policies, it could be argued that the UNHCR has not been able to mitigate fears of free-riding on the area of providing asylum, hence leading to a situation, where more and more states perceive other states to be defecting from cooperation, leading to the state in question to do the same. For the UNHCR, this unstable environment would accordingly lead to a situation, where the organisation is finding it difficult to prevent states from applying deterrence policies and carrying out strategies of neo-refoulement in order to circumvent their legal obligations, because states do not perceive it to be the most rational and beneficial thing to fully cooperate.

I argue, that this perceived insecurity related to the cooperation on international refugee protection via asylum could have effected Australia's non-compliance of the 1951 Convention. Since deterrence policies have become a commonplace strategy of states, this could give Australia incentive to also carry on with the countries own deterrence policies, such as Operation Sovereign Borders. I argue, that given Australia's already strong national preference for controlled migration, the country will not find it a rational response to make it easier for refugees to seek asylum upon arrival to the country. Especially not, since many other states are increasingly carrying out restrictive policies in this area. Therefore Australia could end up being a main provider of asylum, which I argue that the country would perceive as a great cost and therefore undesirable. Especially since the rational interests for Australia is to be able to exercise strong border and immigration control, and to have as few uncontrolled arrivals coming to the country as possible.

2.2.2 The lack of enforcement mechanisms by the UNHCR

In the previous chapter I analysed, how Australia's non-compliance of the 1951 Convention in the shape of deterrence policies such as Operation Sovereign Borders, could be linked to a perception, that other states are conducting similar strategies and that no state, including Australia, then wants to be the 'main provider' of asylum. Therefore it also becomes more desirable for Australia to accordingly free-ride or defect from cooperation. According to liberal institutionalism, international institutions such as the UNHCR might hold the key to overcoming this collective action failure on the compliance of the 1951 Convention. As mentioned, it appears that the UNHCR in the case of the frequent use of deterrence policies by states, have been unable to mitigate the fear of free-riding, leading to a state of collective action failure in preventing these policies. According to liberal institutionalism, international institutions do though have other means of facilitating cooperation among states. In the following chapter, I will therefore elaborate on what role and influence the UNHCR could have on Australia's current asylum policies. In conducting this analysis, I will be applying the theory of liberal institutionalism.

According to liberal institutionalism, states will act on the basis of a 'logic of consequences' (Kamis and Hasenclever 2011: 2). This relates to the mentioned aspect, that liberal institutionalism believes states to act on the basis of a rational cost-benefit analysis, depending on the possible consequences that an action might entail. These consequences are furthermore related to the boundaries, which are being set by international institutions. (Kamis and Hasenclever 2011: 2). According to liberal institutionalism, international institutions overcome collective action failure by setting rules and requirements that actors are expected to abide by, but they also monitor and enforce these rules, and deal out punishments for failing to comply with the agreed terms (Janik and Sterling-Folker 2011: 3). This reduces the incentives for all actors to free-ride, since there are known consequences to non-compliance, like sanctions or institutional shunning (Janik and Sterling-Folker 2011: 3). According to liberal institutionalism, even though it can be difficult for institutions to actually enforce the given punishments, just the fact that they exist, will dissuade some states from non-compliance (Janik and Sterling-Folker 2011: 3).

An argument could be made, that Australia also perceives there to be some consequences to the country's non-compliance of the 1951 Convention. As mentioned previously in this thesis, the Australian Government has managed to make a continuous link between the country's Operation Sovereign Borders policy, and the fight against people smuggling. Furthermore, the policy has been announced as an attempt to save lives at sea, through stopping asylum seekers from attempting the journey to Australia. This link is exemplified through the following quote by Minister for Immigration and Border Protection, Peter Dutton, in a press conference from January 2015:

> I am very pleased that another six months has now passed without another successful people smuggling adventure to Australia. We have had great success due to the enormous efforts of the men and women involved in Operation Sovereign Borders. (…) we have stopped people drowning at sea, we have stopped the boats and it is the absolute resolve of this Government that that policy will continue (…) (Dutton 2015b).

Here we see, that Peter Dutton draws a direct link between stopping the boats, and stopping people smuggling adventures to Australia. Furthermore, Operation Sovereign Borders is credited with the direct effect of stopping people from drowning at sea. Liberal institutionalism considers international institutions to facilitate interstate cooperation partially through the ability to carry out sanctions, such as international condemnation and shunning. One could argue that the link, which the Australian Government has managed to make between policies such as Operation Sovereign Borders and fighting people smuggling and saving lives at sea, is an example of a way to soften the rhetoric surrounding the policies. Through this, the Government could be argued to be directing the focus of attention away from the controversial aspects of Operation Sovereign Borders, so as not to be subjected to international shunning by the UNHCR and other international actors. According to liberal institutionalism, Australia could then be argued to be factoring the risk of international shunning into the logic of consequences, which is driving the country's actions. The negative cost of being internationally shunned, does though seem to be of minor consequences to Australia actually changing any of its asylum policies, as I will elaborate on in the following.

As mentioned in the introduction, the UNHCR has the power and responsibility to supervise

and monitor the compliance of states in implementing the 1951 Convention. There is though at the same time no definitive enforcement of the obligations of the treaty. This means that monitoring of state compliance by the UNHCR depends mostly on mechanisms such as international critique and condemnation. Traditionally, international institutions will also employ enforcement mechanisms and sanctions like trade and investment limitations and foreign aid conditionality, in order to facilitate interstate cooperation. In the case of non-compliance of the 1951 Convention, these have though rarely been used by the UNHCR (Brysk 2011). Furthermore, according to Janik and Sterling-Folker international institutions help to solve collective action dilemmas, especially in areas which doesn't involve security issues (Janik and Sterling-Folker 2011: 1). As mentioned previously, the issue of asylum has been increasingly moved from the legal domain to the political domain, where the topic is mainly characterised as a security concern. I argue, that this could further complicate the role of the UNHCR in facilitating international cooperation on asylum, because the area of refugee movements and international migration in general have been heavily securitised. Furthermore, according to Mathew, only very few steps can be taken by an individual or a state in order to counter Australia's breach of the 1951 Convention (Mathew in Moloney 2012). Mathew states, that the only complaint mechanism that's included in the convention is the ability for one state to pursue a case against another state before the International Court of Justice. However, the author argues, that this complaint mechanism has never been used before, as "states just don't have an interest in complaining about other countries" (Mathew in Moloney 2012).

Following liberal institutionalism, international institutions uphold compliance and prevent free-riding partially by also monitoring and dealing out punishment for states, who do not abide by the agreed terms of a matter of cooperation. In the case of the UNHCR, the possibility of employing strategies of punishment, in order to make states comply with the 1951 Convention, becomes difficult as the organisation has a weak mandate for actual enforcement. It could be argued, that state compliance of the 1951 Convention thus rests on other incentives and arguments than the fear of punishment. Given the fact that liberal institutionalism considers states to be rational, self-interested actors, who are guided by a logic of consequences and a desire to promote their own interests, I argue, that the lack of

enforcement of the 1951 Convention, is relevant to answering my research question. If Australia perceives there to be no significant negative consequences to non-compliance of the treaty, this element will be factored into the total cost-benefit analysis of Australia, when the country is deciding on which policies to carry out in relation to asylum seekers. I argue, that besides being internationally criticised, Australia does not perceive the UNHCR to be able to carry out punishments, which would have significant negative consequences for the country, compared with the gains the country is receiving from limiting access to asylum. Furthermore it could be argued, that Australia also perceives it unlikely, that any other state will carry out sanctions, which could amount to serious consequences for the country.

As a state will, according to liberal institutionalism, always be guided towards promoting its national interests, this is accordingly what Australia is doing by not complying with the 1951 Convention in relation to the country's asylum policies. And as there is only limited consequences to carrying out these strategies, the UNHCR is not playing the role of a constraining element, which might have mitigated or changed the actions of Australia. This is related to the fact that liberal institutionalism considers the norms of international institutions to mainly constrain and regulate behaviours, because state identity pre-exists structures - it is already given and cannot be affected by exterior influences (Pouliot 2011: 5). Meaning that according to liberal institutionalism, as states identities are exogenously given, they cannot be changed, and if international institutions wants states to comply on a matter, which is in conflict with the interests of the state, they will have to use methods such as enforcement.

2.2.3 States create international institutions for self-interested reasons

In the following part of my analysis, I will investigate Australia's interest in the existence of an institution such as the UNHCR to see, whether or not this could be argued to be affecting the country's non-compliance of the 1951 Convention. According to liberal institutionalism, states create and willingly submit to international institutions, which possess collective goals and which have established means to achieve them (Janik and Sterling-Folker 2011: 1). Therefore, states can be said to have created international institutions relating to forced migration for reasons of mutual self-interest (Janik and Sterling-Folker 2011: 1). Thus,

international organisations can often overcome the obstacles to international cooperation, because states generally attach significant meaning and importance to the existence of these international organisations, and they will therefore often act to preserve them (Hellmann and Wolf 1993: 8).

An argument could be made that there exists an area, where Australia might perceive it beneficial to increase cooperation on asylum, and hence where the country would perceive a value in the existence of the UNHCR; namely in the area of controlled migration and quota refugees. Given Australia's continuous support for the country's offshore program, it could be argued, that the country might perceive an interest in increasing the number of controlled arrivals through this program, if it meant the decrease or elimination of uncontrolled onshore arrivals. This argument is reflected in the following quote by Millbank, where the author discusses some of the beneficial outcomes for Australia, if the country was to withdraw from the cooperation on the 1951 Convention: "In theory, withdrawal from the Convention would free up a considerable amount of money which could be redirected to countries of first asylum. It would also enable Australia to recommit to a sizeable offshore refugee resettlement program" (Millbank 2000). Here we see, that the author considers it a positive outcome, if Australia would be able to direct more financial aid to countries of first asylum. It could be argued, that this is probably also because it would, in theory, mean fewer uncontrolled arrivals to Australia. Furthermore, the author draws a picture of Australia as having an interests in increasing the number of the country's offshore program. This point is supported by the fact that the Australian Government in September 2015 announced that it would resettle an additional 12.000 Syrian refugees, on top of the humanitarian intake the country was already receiving through its offshore program that year (The Guardian 2015).

Both aspects reflect the argument, that Australia generally perceive it a rational response to contribute to refugee protection in the form of asylum, when the country is in control of the arrivals. This means that Australia under certain conditions finds itself open to receiving more refugees, when it is guided by the selectivity and control of the country's offshore program. Here a link could be made to liberal institutionalism, which highlights issue linkage as a way for institutions to facilitate international cooperation. I argue, that providing refugee pro-

tection through controlled arrivals and quota programs, as well a directing financial aid to countries of origin and first asylum, are areas where the UNHCR would be able to establish issue linkage between the interests of the UNHCR and Australia. In these areas the rational interests of Australia and the protection responsibilities of the UNHCR might be able to meet, leading to better cooperation on refugee protection, though within a specific and limited area. In other words, based on Australia's specific national interests it could be argued, that the country would be more inclined to cooperate on the 1951 Convention through taking higher numbers of quota refugees, if it meant receiving less spontaneous arrivals and having to provide asylum through those means.

Besides the areas of refugee protection via controlled arrivals such as quota programs and financial aid to country's of origin, I though argue, that Australia's perception of the importance of the UNHCR and the provisions of the 1951 Convention is not as great, as it maybe was, when the country first signed the treaty. This could be related to a previous element of this analysis, describing how the refugee influx have changed to Australia since the country signed the treaty. As mentioned, Australia did not experience any significant challenges with controlling the country's borders from asylum seekers until the 1980s. Therefore, the obligation of the 1951 Convention, of providing asylum to refugees arriving spontaneously to the Australian territory, did not really present itself until then. And as Australia is still facing a refugee influx to the country, the issue has remained on top of the political and public agenda. The anxieties, which the uncontrolled arrivals of asylum seekers represent, could have led to a general state of apprehension towards the obligations of cooperating on the 1951 Convention, and thus changed Australia's interest in being party to the treaty.

According to Charlesworth et al. a negative view of international law such as the 1951 Convention has been particularly influential in Australia over the past decades, and has now become part of mainstream Australian politics. The authors further comment, that the apprehension about international law seems part of larger anxieties about threats to Australia coming from the outside (Charlesworth et al. 2003: 464). I argue, that this point is directly linked with Australia's anxieties about unregulated arrivals of asylum seekers crossing the

borders of the country. The authors further elaborate, that international law has become a charged and politicised field in Australia which is a regular subject of debate in the popular press (Charlesworth et al. 2003: 464). According to the authors there is a fear that international law, like the 1951 Convention, undermines Australian sovereignty or the capacity to govern the country as desired (Charlesworth et al. 2003: 424). This could be argued to represent a general fear, that cooperating internationally on refugee protection via compliance of the 1951 Convention, might bring with it consequences that would threaten Australia's interests and national identity.

Following liberal institutionalism, states create and submit to international institutions for their own benefit. Therefore, it could be argued that for states the relevance of an international institution depends on whether or not the institution is facilitating some form of gains, which the state would not otherwise have been able to achieve. It could be argued, that if a state does not perceive an international institution to be promoting the interests of the state, then the state will loose motivation to fully cooperate to preserve the existence and goals of the institution. In relation to this, it could be argued that the strong anxieties which uncontrolled arrivals of asylum seekers represent to Australia, have changed the country's perception on whether or not it is ultimately a gain for the country to cooperate on the 1951 Convention, as it is today. This argument is reflected in the following quote by Koser, in a research paper from the Australian Lowy Institute for International Policy:

> "Australia's signature on 22 January 1954 brought into force the 1951 UN Convention relating to the Status of Refugees. It is now time for Australia again to take the lead, by pressing for a review of the 1951 Convention and the international protection system of which it is a cornerstone. While the Convention itself has, by and large, stood the test of time, its implementation is failing: failing Australian national interests " (Koser 2015: 2).

In the quote we see that the author considers it time for Australia, to press for a review of the 1951 Convention because the implementation of the treaty is failing Australia's national interests. In the paper, the author further highlights the legal obligation to consider any application for asylum made on the territory of a country, even if the applicants enter without authorisation, as one of the main concerns of being party to the treaty (Koser 2015: 5). This asser-

tion is supported by Millbank, who argues that withdrawal from the Refugee Convention would enable Australia to develop and regularise, on its own terms, more transparent and understandable criteria and provisions for dealing with onshore asylum seekers (Millbank 2000). The difference between the two statements is, that Millbank takes the consequences of the obligation of providing asylum even further, into a question of whether or not Australia should actually withdraw from the cooperation on the 1951 Convention. Both statements though reflect the general argument, that Australia on the area of asylum policies, perceives its national interests to be in conflict with the provisions of the 1951 Convention. Millbank though further goes on to comment, that withdrawal from the treaty might not provide an immediate practical solution for Australia (Millbank 2000). According to the author, this is because asylum from political persecution and the principle of non-refoulement have become part of international customary law, meaning that the government and the judiciary would still have to process and deal with asylum claims (Millbank 2000). Furthermore, the author comments that withdrawal from the 1951 Convention could be portrayed as Australia rejecting international standards, and as accordingly directing the asylum seeker burden elsewhere. According to the author, staying in the system could make it easier for Australia to retain its influence in international forums and to play a role in reshaping the international protection framework (Millbank 2000).

I argue, that the question of whether or not it would be in Australia's interest to withdraw from cooperation on the 1951 Convention reflects the ambiguous relationship, which Australia has with both the 1951 Convention and the UNHCR. It could be argued that this ambiguity has led to Australia, on the one hand, still perceiving an interest in being party to the treaty while, on the other hand, carrying out policies which are in breach of the obligations of the Convention. This statement is reflected in the following quote by Charlesworth et al., which describes Australia's relationship with international treaties such as the 1951 Convention:

> "It should be noted that the executive's willingness to enter into international treaties is not necessarily matched by an interest in fully implementing treaty obligations. For example, Australia is a party to the six major United Nations human rights treaties and yet has failed to implement many of their provisions. For this reason, Australia can be described as 'Janus-faced' with respect to particular

treaties: the international face smiles and accepts obligations, while the domestic-turned face frowns and refrains from giving them legal force" (Charlesworth et al. 2003: 436).

In the quote we see, that the authors highlight how Australia is domestically failing to implement several provisions of international treaties such as the 1951 Convention, while at the same time still being party to the treaties, and through that proclaiming support for their obligations. Following institutional liberalism, the ambiguity of this behaviour could be interpreted as though Australia is in a state of indecisiveness as to whether or not, it is in the country's interests to fully support the existence of institutions such as the UNHCR and consequently the 1951 Convention. It could be argued, that the rational response of Australia therefore becomes to still be party to the treaty, but to adopt only the policies which makes sense for the country, in accordance with Australia's domestic interests. Furthermore, as there has yet been no significant consequences to this strategy, it is likely that Australia will thus continue carrying out asylum policies, which are in breach of the country's obligations under the 1951 Convention.

3. Conclusion

In this thesis I first of all set out to answer, if Australia is currently complying with the obligations of the 1951 Convention. In the introduction of the thesis I reached the conclusion, that the divergence between Australia's current asylum policies, and the intentions and obligations of the 1951 Convention, is currently so great that the country must be considered in a state of non-compliance of the treaty. Especially the principle of non-penalisation was highlighted as being breached through the distinction of rights and standard of treatment, of refugees in Australia's onshore an offshore programs, simply because of difference in mode of entry. The difference of treatment was exemplified through the Australian policies of mandatory and arbitrary detention, and offshore processing of asylum seekers in the onshore program, as well as the granting of Temporary Protection Visas only. Furthermore, the principle of non-refoulement was considered breached through the policy of Operation Sovereign Borders and the turning away of boats, before screening asylum claims and refugee status on the people on board. Through this policy, it was argued that Australia risks sending refugees back to areas, where they might face threats to life and freedom.

Following this, I then subsequently set out to answer the second part of my research question; how Australia's non-compliance of the 1951 Convention could be explained. In order to do this, I conducted an analysis split into two parts. The first part consisted of an examination of how important elements within Australia's domestic context, could have influenced the country's controversial policies towards asylum seekers. Throughout the first part of my analysis I employed the theory of constructivism, in order to answer my research question.

First of all it was argued that, in Australia, there exists a general perception of asylum seekers as being a group, which poses a significant threat to many elements of the Australian society. Furthermore, it was established how this understanding is represented in both general community perceptions and public political statements in Australia. Through constructivism it was argued, that public opinion as well as political statements have mutually influenced each other, and this has created a national preference for being skeptical towards asylum seekers, due to the threats they represent to Australian values and national identity. I furthermore con-

cluded, that this national preference could be argued to have had an influence on Australia's cooperation and compliance of the 1951 Convention, because the country's acceptance of asylum seekers is being challenged by the anxieties, which this group represents. Due to this domestic preference it could be argued, that Australia is acting in accordance with its domestic audience, in carrying out harsh policies towards asylum seekers.

Secondly, I analysed how it could be argued that the anxieties, which asylum seekers are causing in Australia, are directly linked to Australia's extraordinary need for control over the country's borders. Through an examination of Australia's history with immigration it was argued, that Australia has a history of feeling culturally and geographically isolated. This has accordingly led to the country being in favour of strong border control and highly regulated immigration. As the asylum seekers arrive unregulated by boat to Australia's Northern shores, this causes concern and apprehension in a state, which has a history of feeling both geographically and culturally isolated, and in turn as a state in need of strong border protection. Using constructivism, I furthermore argued that the perceived threat of asylum seekers are not a self-evident fact, but a socially constructed meaning. This has led to Australia understanding itself as a nation in need of very strong border protection, and this domestic preference has become a core part of Australia's perceived identity. Therefore I also concluded, that it is actually not strange for Australia to be carrying out harsh policies towards asylum seekers, despite being a settler nation, since the majority of Australia's history with immigration has been characterised by a strong preference for selectivity and control.

Thirdly, I argued that Australia's perception of being a signatory to the 1951 Convention could be seen to have changed, since the country signed the treaty in 1954. This I argued, was due to the fact that Australia did not experience a challenge in managing the country's immigration and borders until significant arrivals of asylum seekers in the 1980s, which changed the country's perception of the consequences of part taking. Following this I argued, that this change in circumstances and the consequences, which it brought upon Australia's ability to manage the country's borders, could have influenced the country's view on being party to the 1951 Convention. Furthermore, through the theory of constructivism, it was argued that the idea of being a nation in control of its borders has become more vital to

Australia's perceived identity, than the idea and preference of being a country upholding all its international treaty obligations. Based on this national identity and the ideas and norms which it entails, it was argued, that Australia does not find it the most appropriate or important response, to change the countries current asylum policies in order to comply with the 1951 Convention, despite critique from international institutions such as the UN. The discrepancy between the perceived consequences of fully complying, and through that possibly allowing higher numbers of asylum seekers into the country, is simply too great from the strong domestic preference of Australia, of being able to carefully manage whoever is to enter the country.

The second part of my analysis consisted of an examination of the interstate cooperation on the 1951 Convention in relation to providing asylum, and the role of the UNHCR in facilitating this cooperation. This was done, in order to understand how influences coming from the international context could have influenced Australia's non-compliance of the 1951 Convention. Throughout part two of the analysis, I employed the theory of liberal institutionalism.

First of all I analysed, how a strategy of neo-refoulement, and other deterrence policies, could be argued to be employed by many signatory states, in order to circumvent the obligation of non-refoulement. I furthermore analysed, how the employment of these strategies could lead to a state of insecurity, where states do not perceive it a given, that other states will comply will the obligations of the 1951 Convention. Following liberal institutionalism this was highlighted as possibly leading to a state of collective action failure, since no state will have the incentive to be the main provider of asylum. The commonplace usage of deterrence strategies, could therefore have an effect on Australia's compliance on the 1951 Convention, since Australia has, in accordance with its domestic preferences, also no incentive to be a main a main provider of asylum. This could give Australia incentive to also carry on with its own deterrence policies, such as Operation Sovereign Borders.

Secondly, I argued that the lack of enforcement of the 1951 Convention, is relevant to answering my research question. As the UNHCR has a weak mandate for actual enforcement of the

1951 Convention, it was argued, that this could have a negative effect on Australia's compliance of the 1951 Convention. I argued, that besides being internationally criticised, Australia does not perceive the UNHCR to be able to carry out punishments, which would have significant negative consequences for the country, compared with the gains the country is receiving from limiting access to asylum. If Australia perceives there to be no significant negative consequences to non-compliance of the treaty, this element will be factored into the total cost-benefit analysis of Australia, when the country is deciding on which policies to carry out in relation to asylum seekers.

Thirdly I analysed, what interests Australia might have in the existence of an international institution such as the UNHCR. This was done using the theory of liberal institutionalism, which claims that states create international institutions for self-interested reasons. It was argued, that besides a possible interest in increasing the cooperation on quota refugees and financial aid to country's of origin and first asylum, Australia is showing an ambiguous relationship towards the country's obligations of the 1951 Convention. This was exemplified through the fact that Australia is domestically failing to implement several provisions of the 1951 Convention, while at the same time still being party to the treaty, and through that proclaiming support for its obligations. Following liberal institutionalism, the ambiguity of this behaviour could be interpreted as though Australia is in a state of indecisiveness as to whether or not, it is in the country's interests to fully support the existence of institutions such as the UNHCR and consequently the 1951 Convention. Following this I argued, that the rational response of Australia therefore becomes to still be party to the treaty, but to adopt only the policies which makes sense for the country, in accordance with Australia's domestic interests. Furthermore, I concluded that as there has yet been no significant consequences to this strategy, it is likely that Australia will continue carrying out asylum policies, which are in breach of the country's obligations under the 1951 Convention.

In order to sum up I argue, that what has significantly governed Australia's actions into a state of non-compliance of the 1951 Convention, is the country's strong domestic preferences for controlled immigration. The interstate cooperation on asylum, and the practice of deterrence policies, have acted as an additional motivator for Australia, to carry out restrictive and

harsh policies towards asylum seekers. Furthermore, the role of the UNHCR, has acted as an additional facilitator, as the institution has not been able to carry out actions, which could have had a mitigating or constraining effect on Australia's non-compliance of the 1951 Convention. I argue, that neither through a logic of appropriateness, as represented by constructivism, or a logic of consequences, as represented by liberal institutionalism, is Australia finding it the most logical response to comply with all obligations of the 1951 Convention. This is argued to be because, asylum seekers represent a direct threat to the highly regulated conduct of Australia's migration programs, because they come uninvited and yet mandate consideration as a result of Australia ratifying the Refugee Convention. The arrival of of boat migrants and asylum seekers has demonstrated, how Australia's options for dealing with 'illegal' arrivals of asylum seekers are constrained by the country's obligations under the 1951 Convention. This has led Australia to join other countries in openly questioning the obligations of 1951 Convention, as well as carrying out policies that are in breach of the treaty.

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