BOAT PEOPLE: WHY ARE THEY A SOVEREIGNTY ISSUE?

Comparative study of Australia and USA

GLOBAL REFUGEE STUDIES

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ABSTRACT

The purpose of this research is to identify the reasons of States to reject the passengers of the boats approaching their land. By asking '*Why are Boat People a sovereignty issue'* we assume and build the whole research on conviction that Boat People are a sovereignty issue and we need to go into the depth of the reasoning behind this belief, supported by solid theoretical base. The term Boat People is not a novelty and has been used in relation of Vietnamese people or prisoners that were being disembarked on the shores of coastal countries. This term got our attention mostly because of the increasing numbers of boats transporting the passengers and the strongly opinionate medicalization this topic received. We believe that this group of people is particularly exposed to unfair treatment, because of the difficulty to enforce their rights due to still peculiar means of transport. We saw the need to examine the issue on a deeper level and refute the incomplete and often twisted picture offered by media, not providing a comprehensive understanding of what is happening on the boats at the sea.

The thesis is structured into several chapters, from which the biggest attention is drawn to the countries we chose as case studies and an analysis of their policies in relation to other components such as theoretical background and international treaties that are inseparable from the complexity of this issue. Therefore, the beginning of the research paper is dedicated to a global perspective of an issue that is later on reflected and implemented in specific cases of USA and Australia.

We built our research on a baseline specifying and clarification of terms we are using. In relation to our study, we use the term *Boat People* as a term covering the asylum seekers and refugees and we avoid elaborating on debate about the economic migrants, as that is not the main target group of our research. Our key concept is the sovereignty through which we explain the nature and characteristics of States chosen and that gives us perspective on their interactions and relation towards the international community.

Our research brought us to conclusions that sovereignty of States is a powerful tool in terms of securitization and performing the actions that benefit the self-interest of States. We express that current trends might have a worrisome implications on the future treatment of Boat People – asylum seekers and refugees. Such trends will need future

interventions of international community to avoid the degradation of humanity and the rights that were fought for with great dedication.

Key words: Refugees, Asylum seekers, Securitization, Sovereignty, Constructivism theory, Boat people.

ABBREVIATIONS

RC – Refugee Convention

WFP – World Food Program

UNHCR – United Nations High Commissioner for Refugees

UNICEF – United Nations Children Fund

WHO – World Health Organization

OHCHR – Office of the High Commissioner for Human Rights

UNDP – United Nations Development Programme

OCHA – Office for the Coordination of Humanitarian Affairs

IOM – International Organization for Migration

NGO – Non-governmental Organization

UNCLOS – United Nations Convention on the Law of the Sea 1982

IMO – International Maritime Organization

SOLAS – International Convention for the Safety of Life at Sea 1974

SAR – International Convention on Maritime Search and Rescue

US - United States of America

USCIS - U.S. Citizenship and Immigration Services

INS-Immigration and Naturalization Service

TABLE OF CONTENTS

1 INTRODUCTION

It is our opinion that, currently, we live in an era in which it is impossible to deny that the concept of asylum and the protection of refugees and asylum seekers are under heavy attack. Host countries, particularly the so-called developed countries are devoting enormous efforts in developing and adopting strategies that aim to discourage and prevent possible asylum seekers and refugees[1] with well-founded reasons to fear for their life, from reaching their territories. Or in other words,

"Asylum — that most traditional of remedies for refugees who escape persecution in their countries of origin and make their way to other countries — is under attack. Asylum countries around the world increasingly adopt strategies specifically designed to discourage and sometimes prevent would-be asylum seekers from accessing their asylum and other refugee status determination processes." (Legomsky, The USA and the Caribbean Interdiction, 2006, p. 677)

This opinion has been the result of our academic journey, especially during our studies in the current Master program, where we have been faced with the harsh reality of refugee regime. However, and despite the fact that the above mentioned perspective will always be our starting-point, our final research question was greatly influenced by more and more common news on the policies pursued by the Australian government towards refugees and migrants trying to reach the country by sea. The Australian events shed light upon the peculiar features surrounding the situation of the so-called "Boat People" and the way they are perceived by governments and also public opinion. Even though the numbers demonstrated by multiple reports carried out over the years show us a different and harsher reality, it seems that the majority of the Western world does not have a glimpse of what is happening out there, in the sea, inside extremely small boats overloaded with far too many people they are intended to carry:

"The arrival of boats carrying irregular migrants engenders extraordinary responses in

[1] Although "asylum seeker" and "refugee" are two terms with different definitions we decided to use both because we believe that in the boats we can find the two situations: people from countries where a humanitarian crisis has already been identified and people with isolated cases seeking protection. We cannot rule out the fact that within the "boat people" one can also find voluntary migrants whose main goal is simply to seek to get to a country with better living conditions. However they are not our research's primary target group, even though it is hard to distinguish between them, especially because migration policies have a tendency to deal with them only as illegal immigrants, without making the proper distinction between them (Crock & Ghezelbash, 2010) (Macklin, 2005)..

Australians – and in their politicians. This is so even though an average of little more than two 'boat persons' have arrived for every day since 1978. Always newsworthy, the stronger and more sustained the flow of boats, the more shrill the headlines and (it would seem) the more pronounced become the reactions from government. This is not a phenomenon unique to Australia, although it may reflect this island nation's long-held phobia about invasion by sea." (Crock & Ghezelbash, 2010, pp. 238-239)

In December 2014, António Guterres, UN High Commissioner for Refugees, expressed his concern about this topic by stating that "(…) some governments were increasingly seeing keeping foreigners out as being a higher priority than upholding asylum". During UNHCR's 2014 High Commissioner's Dialogue whose focus was "Protection at Sea", Guterres stated his opinion, saying that current practice "(…) is a mistake, and precisely the wrong reaction for an era in which record numbers of people are fleeing wars (…) Security and immigration management are concerns for any country, but policies must be designed in a way that human lives do not end up becoming collateral damage"[2].

The increased focus on this situation, by the media, human rights activist groups, international agencies, and politicians, brought our attention to this issue and fed our need to understand what makes this group so peculiar and renders them so vulnerable to such "attack" from governments. In addition, we not only want to understand and define what the "attack policies" are but also to identify the reasons that support them. Unfortunately, this phenomenon does not occur only in Australian waters but all over the world and at the borders of countries that so proudly advocate themselves as defenders of human rights, as recent tragic events in southern Europe have proved [3]. Hence, we faced the necessity to narrow down our field of research by determining which country or countries should be under our scope of analysis. As the Australian case was the one that brought us to the topic of "Boat People", a topic that had already been on our focus and sparked our interest, it made sense to use Australia as a case-study. However, we felt that limiting our research to just one case would be too restrictive and would not allow us to achieve a deeper understanding of the topic that we proposed ourselves to study. For this reason, we decided to opt for a synchronic comparison between Australia and United States of America. In other words, we want to analyze how and why these two different countries deal with the issue of arriving "Boat People" at their shores in the same timeline.

[2] In http://www.unhcr.org/

[3] We refer to the boat capsizing on the Mediterranean that occurred April 2015, where almost 700 refugees and migrants were reported to have lost their lives - http://www.unhcr.org/5533c2406.html

1.1. WHO ARE THE "BOAT PEOPLE"?

As stated previously, the occurrence of "Boat People" seems to be a more and more prominent phenomenon, probably due to the increasing attention it has been receiving from the media, government policies, and therefore from activist groups for human rights and aid agencies. But who are these "Boat People"? We can summarize by defining them as group of people trying to reach the shores of a country other than their own, by sea, usually in small boats, as observed on many accounts in newspapers. However, there is much more to take into account about this specific group than this poor definition. One of the major stereotypes surrounding this group and that affects it negatively is the tendency to consider them all as illegal migrants, due to "a great deal of confusion about the difference between 'asylum seekers', 'refugees' and 'migrants'" (McAdam & Chong, 2014).

Refugees are distinguished from other migrants based on the premise that "the former are compelled to migrate to escape a threat to life or liberty, whereas the latter choose to migrate for an array of non-urgent reasons" (Macklin, 2005), according to the Refugee Convention[4], which defines a refugees as a person with a "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion"[5], and attributes the refugee status to a migrant grounded on the reasons that led the individual to flee his/her own country. According to the Universal Declaration of Human Rights, one has also the right "to seek and to enjoy in other countries asylum from persecution"[6]. And under International Law, the countries that have signed the Convention are obligated to protect refugees (McAdam & Chong, 2014). An asylum seeker, in turn, is a person who is in search of protection as a refugee, for the reason that their claim has not yet been evaluated and determined by the official entities responsible for such work, meaning that an individual may or may not correspond to the definition of refugee, according to designated bodies for the evaluation of each case (McAdam & Chong, 2014). Before continuing our explanation we would like to stress that, among others, an essential criterion in granting the status of refugee to someone is that the individual in question

[4] 1951 U.N. Convention Relating to the Status of Refugees, *adopted* July 28, 1951. This is the key legal document that defines who is a refugee and their right and the signatory countries are expected to comply with certain legal obligations regarding non-nationals at or inside their borders. – in http://www.unhcr.org/3b66c2aa10.html

[5] Full definition can be found at 1951 U.N. Convention Relating to the Status of Refugees - in http://www.unhcr.org/3b66c2aa10.html

[6] Universal Declaration of Human Rights, art. 14.1 – in http://www.un.org/en/documents/udhr/

must find him or herself outside their country of origin or country of habitual residence (in case of statelessness) due to the fear of persecution[7] (Tsamenyi, 1983).

These two definitions could not be more different that the one which defines a migrant, who is someone that moves voluntarily to a foreign country for reasons of work, education or family and whose entry is solely dependent on the willingness of countries to admit them or not, since "countries have the discretion whether or not to admit someone as a migrant" (McAdam & Chong, 2014).

But, although the definition of refugee is the one generally adopted, the question of who is a "true refugee" and therefore entitled to obtain refugee status "remains a contested issue and one that is deeply implicated in political and ideological calculations" (Nyers, 2006). Refugees and asylum seekers are often perceived as 'economic refugees' or 'economic migrants' (McAdam & Chong, 2014). There are also other classifications of border-crossers (Macklin, 2005) such as the illegal immigrant (Haddad, 2008). For Emma Haddad (2008), there are classifications that contribute to this erroneous impression such as: "unauthorised or undocumented movements that use similar routes or using the services of the same smugglers"; a refugee movement that becomes a movement with a "mixture of motivations"; "or the undertaking of a secondary movement by the refugee", that can arise from economic or family reunification reasons (Haddad, 2008).

Throughout our research it has become obvious that one of the labels that mostly damages the image of refugees and feeds the hostility against them is how the "legal/illegal prefix (is) attached to migrants", something that finds its basis "not upon motive, but rather on the mode of entry" (Macklin, 2005, p. 366). For purposes of a better understanding, an 'illegal migrant' is someone that enters the territory of a state of which he is not a national without prior authorization, meaning that at the border they may be excluded, can face deportation and/or are legally perceived as criminals (2005).

For MacAdam and Chong (2014), the general hostility towards immigration flows, sometimes walking side by side with feelings of xenophobia and racism, can somehow explain the distrust felt by the public when it comes to refugees and asylum seekers. Politically, this has an enormous impact:

[7] This information can be found in Article 1A, paragraph 2, of the Convention and Protocol Relating to the Status of Refugees.

"The problem is that the issues underlying irregular and forced migration are very complex. (…) the 'message' of those pushing for harsh responses is simple and electorally very powerful. Undocumented arrivals are characterized as 'illegal' invaders who pose a threat to society. The binomial division of migrants (forced or otherwise) into 'legal' and 'illegal' strips asylum seekers of their stories and of their vulnerabilities. It also denigrates the compassionate response as folly, which is aligned in turn with 'threats' to national security." (Crock & Ghezelbash, 2010, p. 239)

Political speeches and attitudes lead us to believe that there is indeed an interest in making the public opinion confused about the 'who's who'. This is done by ignoring the motive the led an individual to move to another country, and instead focusing only on 'how' the border is crossed. And as result the asylum seekers and refugees turn into perfect scapegoats for anti-immigration sentiments, since *"in practice, states encourage convergence between these two schemes by making it virtually impossible for an asylum seeker to travel legally to a western nation."* (Macklin, 2005, p. 367)

Even though western nations are willing to accept a certain number of pre-selected refugees, the reality is that the overwhelming majority of asylum seekers reaching their borders come in a "spontaneous flow" of undocumented migrants, which translates into to a threat to "sovereignty-as-border-control" (Macklin, 2005) (Crock & Ghezelbash, 2010). Dealing with these flows from a sovereignty point of view can pose great problems to the refugee regime, as "situations of mass influx and politically sensitive individual cases neatly juxtapose sovereign self-interest and international legal principles relating to refugees and fundamental human rights" (Goodwin-Gill, 1986). And the use of 'non-entrée' strategies will most likely jeopardize the safety of 'real refugees' and their access to the state's refugee status determination process. According to Legomsky, however, "it might well be designed to accomplish that (2006, p. 686):

"The practical effect is to shut out refugees from full and fair refugee status determination procedures. The consequence is the loss of adequate protection, not only from refoulement, *but also from orbit, prolonged detention, and other deprivations. Nor, once interdiction has occurred, are alternative arrangements for refugee status determinations free of problems. Shipboard space is limited; space on Guantanamo is limited; other extraterritorial resources are constrained by the willingness of third countries to allow use of their soil; and even when these or other extraterritorial procedures are otherwise adequate, access to counsel or other assistance is typically problematic."* (Legomsky, The USA and the Caribbean Interdiction, 2006, p. 686)

And one of the examples of that strategy is the fact that nation-states such as Australia and USA have been interdicting boats on the high seas with the aim to prevent potential refugees from reaching their shores (Macklin, 2005). We feel it is fair enough to state that what makes the "Boat People" such a unique group it is that easiness of preventing their access to a state's territory. As demonstrated, there is an aura of misunderstanding around the definition of what constitutes a refugee, strongly perpetuated by the political community in an attempt to justify strategies of interception. This is done by labelling them as 'illegals' or 'false refugees' using their way of entrance as a reason. One could ask if that seems to present itself as a problem: One might ask, "Why don't the 'real refugees' seek to cross borders legally?" However, one needs certain legal documentation such as passports and visa to enter a foreign country and in many cases that is not possible to obtain, especially if people flee a country because of persecution or conflict-related violence. Some refugees are even stateless, as the case of the Rohingya in Myanmar/Burma shows[8]. They lack identity documents. On other situations, people are victims of persecution or nationals of countries with oppressive governments which causes the asylum seekers to have no means of acquiring the necessary documents to travel. In sum, asylum seekers face situations and circumstances that leave them without any means other than to travel by boat to a safer country. For that they see themselves targeted and with less and less access to a valid refugee status determination process (McAdam & Chong, 2014).

1.2. RESEARCH PROBLEM FORMULATION

This sub-chapter could well be an extension of the previous one, as our research is precisely based on the refugee-sovereignty nexus. Initial readings narrowed our understanding to one particular approach, and in the process of research one aspect was very repetitive: The will of governments to keep the refugees and asylum seekers away from the state's territories. This led us to the question of what are the motivating factors that drive these national policies of interdiction? As it has been stated above, refugees in general pose a threat to a state's

[8] This issue is related with reports suggesting that Indonesian and Malaysian governments have been pushing back boats carrying vulnerable people of the Rohingya ethnic group from Myanmar and Bangladesh. More information can be found at: http://www.unhcr.org

sovereignty, or to say it in the words of Australia's former Prime Minister John Howard: "We will decide who comes to this country and the circumstances in which they come"[9]. Thus, the approach to the thesis will center on the issue of "Boat People" as a threat to sovereignty. However, in order to achieve a more wide-ranging insight about this phenomenon, it became clear that it was of crucial importance to include an analysis of the topic from two different geo-political contexts, Australia and USA. The selection of these two countries was based on the fact that both of them present several similarities that we consider of great importance in order to achieve a comprehensive comparative study.

Both countries are liberal states. They are commonly referred to as belonging to the group of first-world countries, and they share historical references, such as mass migration in the early stages of their foundation of the nation states they are today. They are also seen as states that absorb permanent immigrants. Nonetheless, they bear their own idiosyncrasies, expressed in their national traditions, identities and, of great importance for this study, legal and political systems related to migration (refugees, asylum seekers, etc.). Hence, we believe that it is this combination of similarities and differences which will allow us to get a deeper and better understanding of this aspect of the political reality that surrounds "Boat People".

Why are the "Boat People" exposed to harsher policies?

We do not pretend to assert that the "Boat People" are the only group of refugees and asylum seekers that find themselves under political attack or stripped off their rights as human beings. However, because this group has been the sole focus of our research and analysis, we do feel comfortable enough to assume that they have been facing the emergence of new and more arduous barriers in order to prevent their access to request asylum and to a refugee status determination.

What are the differences between the policies regarding refugees arriving by boat in both countries?

Throughout this research we also intent to identify and understand the different policies that have been or are currently being implemented by the two governments, and what consequences those have regarding the destiny of the "Boat People, in order to gain a deeper

[9] John Howard, speech delivered at the Federal Liberal Party Campaign Launch, Sydney, 28 October 2001

comprehension about this phenomenon.

What are the reasons behind the political decisions which determine the refugee policies in both countries, more precisely the "Boat People"?

In order to analyze and understand why the "Boat People" seems to be a serious distress for these two countries, we believe it is of core importance to examine reasons behind these policies, which so strongly influence the national and political perception of refugees arriving by boat.

1.3. KEY CONCEPT: COMING FROM OUTSIDE THE BORDERS.

"Asylum requires, by definition, the crossing of an international border. If successful in their crossing, refugees became wards of an international refugee regime that relies on the endorsement, financial support, and refugee determination processes of individual nation-states." (Hyndman J. , 2000, p. 7)

Most people do not reflect upon their privilege of being fortunate to be born in or to belong to a state that provides and guarantees safety gives one the right to access to specific rights. For refugees and asylum seekers the reality is the opposite. A refugee status means not belonging to anywhere, once "c*onceptually the individual should belong to a state. Once she falls out of the state-citizen relationship, the individual becomes an international individual and ward of international community"* (Haddad, 2008, p. 3). For Turner (2010), by not belonging to any state the refugee becomes in a way the representation of the threat to the "established symbolic order." In other words, their existence "exposes (…) the constructedness of the relationship between people, place and identity" (Turner, 2010). For Agamben (2000), the political order of the nation-state does not incorporate space for the 'pure human'. Nation-state itself is a concept of sovereignty that finds its pillars in "nativity or birth", which can be translated into "nation". Hence, he defends that refugees are the result of the separation between these two concepts, "nativity" and "nation", therefore between human being and citizen:

"If the refugee represents such a disquieting element in the order of the nation-state, this is so primarily because, by breaking the identity between the human and the citizen and between nativity and nationality, it brings the originary fiction of sovereignty to crisis." (Agamben, 2000, p. 21)

Of course, over a period of almost two centuries, an increasing number of countries have shown a softer side manifested through a greater awareness of human rights and the subsequent adoption of international human rights norms, such as the international humans rights law, international humanitarian law, and humanitarian interventions. In the context of the refugee regime, this tendency might give the idea that we are actually achieving an international community with strong solidarity (Betts A. , 2009). But Betts also contests that "this characterization would be misleading and only captures one dimension of the relationship between sovereignty and refugee" (2009, p. 54). For him, the nature of this relationship cannot be seen at the light of the relationship between sovereignty and human rights, or as part of it. He goes on to explain that due to the "direct conceptual relationship" that exists between refugees and the international state system, different from the one existing between sovereignty and human rights, the refugee is at the same time an expression of state sovereignty and also "exists in a mutually constitutive relationship to the international state system" (2009, p. 54). In other words, the "refugee" has his origin in a state[10], however he is at the same time "outside" the scope of its protection as a result of the inability or incapacity of the latter to protect the "refugee", which in turn led him to be depended of the international state system. The refugee figure exists because the concept of state also exists.

In Emma Haddad's book "The Refugee in International Society: Between Sovereigns", the author has as starting hypothesis that "there is a fundamental and mutually constitutive link between the refugee concept and international society" and she refutes the assumption that refugees are a final product of a faulty international states system but rather an unavoidable outcome of the system itself (2008, p. 1). Haddad (2008) argues that the refugee is somewhere, some sort of a grey area, between "the international and the domestic", as they raise not only questions related to "belonging and identity" but also to "disciplinary distinction".

[10] We believe that even in cases of statelessness, the individual itself is in that situation due to precarious and faulty protection measures by the state.

"Within an international system made of dichotomies and grey area between the internal and external, the refugee brings to the fore the clash between pluralism and solidarism, communitarianism and cosmopolitanism, sovereign rights and human rights." (Haddad, 2008, pp. 2-3)

Theoretically, an individual is expected to belong to a state which should ensure her protection and the execution of her rights[11], however, the refugee figure comes and undermines this concept by falling outside the state-citizen nexus, by challenging the belief that "all individuals belong to a territory" (Haddad, 2008). In other words, what Haddad attempts to expose is that refugees are a feature of the international state system, a product of the modern state. It is implicit in the notion of sovereignty that every individual should be assign to a state, however, inevitably some fall outside this premise and the guarantee of protection. One might think that this is where international protection interferes to protect those that find themselves between borders, but Haddad presents a different perspective. For her the refugee phenomenon exposes the incapacity of individual states to protect their own citizens and the failure of the international states system to assign each individual to a state that will be accountable for her protection, as sovereignty corroborates a state's right to decide who will be accepted in their territory and therefore how they will protect: "the refugee brings to the fore the very tension between the state prerogative to exclude and the human rights imperative to include" (Haddad, 2008, pp. 65-70).

This means that if a refugee achieves to cross an international border and inter a territory other than her own, thus requesting asylum, will find her in the precarious situation of being depended of the willingness and availability of each individual sovereign state to protect (Haddad, 2008, pp. 74-75) (Hyndman J. , 2000, p. 7). Again, one might expect some sort of international enforcement that would prevent these situations and question the reason for the existence of so many international conventions and protocols with the aim of ensure human rights, but as Hyndman explains: "(…) the nation-state remains the main unit of international law and the primary site of enforcement in relation to regional and international agreements and civilian protection" (Hyndman J. , 2000, p. 7). Even though the concept of the refugee and the

[11] "Sovereignty is not merely a formal concept, but entails the duty to represent and protect all those who fall within the sovereign to fulfil these duties has the potential to produce refugees." (Haddad, 2008, p. 68)

'obligation' of binding to international norms when it comes to insure their rights and safety revels itself a challenge to sovereignty, the refugee also reinforces the sovereignty and the state system (Betts A. , 2009).

In sum, the refugee regime and the existence of refugees represent a threat to sovereignty, because it destabilizes the political order of the nation-state (Agamben, 2000) (Turner, 2010). The international states system is based on the premise that every individual should belong to a state, which in turn have obligations to their citizens. The refugee is the undeniable evidence of the failure of an individual state to its citizens and that tosses her into the grey area of 'not belonging anywhere' leaving her unprotected, dependent of the good-will of other individual states (Haddad, 2008), because ultimately that same sovereignty gives to each state the power to choose who they will accept and protect inside their borders (Hyndman J. , 2000). From this point of view, the refugee is nothing but an anomaly in the sense that she exists because of the international states system, being an unavoidable consequence of the sovereign state system and its failures. However, the irony is that at the same time it comes to reinforce these systems: "(…) the insider/outsider relationship created by refugees reinforces the social construction of the nation-state" (Betts A. , 2009, p. 56).

It is exactly this relationship between territory, state and rights from the perspective of sovereignty that we aim understand with the present thesis and its corresponding research question. And we have decided to do so by using the ontological position of constructivism. This particular position defends that "social phenomena and their meanings are continually being accomplished by social actors", indicating that social phenomena and categories cannot be understood merely as a result of social interactions but also as a product of a "constant state of revision". Therefore, for the Constructivism theory, categories such as organization and culture are not comprehended as "pre-given" notions, but rather as a result of a continuous social interaction (Bryman, 2012, p. 33). Bringing this academic position into the refugee regime context, it this theory as an approach that instead of "assuming that states' identities and interests are fixed (…) recognizes that states' identities are constituted and changed through their interactions with one another" (Betts A. , 2009, p. 32), and that "seeks to account for actors' identities, motives, and preferences", being the state a "social actor" (Shain & Barth, 2003, pp. 451, 457). Therefore, states' interests are a consequence of their identities which are, in turn, a result of social interaction (Betts A. , 2009), meaning that states do not maintain the same

interests or goals as they are influence by the outcome of other social interactions, as "states can be persuaded, through ideas or argumentation to view issues or problems differently and so change their behavior over time on the basis of holding different perceptions" (Betts A. , 2009, p. 32).

Furthermore, the use of the constructivist position throughout this thesis has the purpose of guiding us towards a deeper understanding of what motivates the governmental policies, namely from Australia and USA, regarding the refugees traveling by boat to their territories.

2 INTERNATIONAL LAW VS. DOMESTIC LAW

The increasing dilution[12] of state borders due to globalization and the expansion of Europe and International treaties and conventions have intensified the relationship between International Law and domestic legal systems. Today, International Law regulates a wide range of areas and affairs, which were formerly under the exclusive power of the State to decide upon. As it stands, the sphere of action of International law has widened in the past decades and seems to be increasingly important to maintain the balance of power between nations as well as make them comply with certain universal principles. In the forefront of this movement to universalize certain principles through International Law are the human rights movements, as can be demonstrated by huge strides made since the last half of the past century, with the creation of the Universal Declaration of Human Rights, amongst others[13].

It is a one of the basic principles of International law that when a State adheres to a convention or international treaty, its domestic law and practice must be coherent with the contents of the treaty or convention. This of course is variable – many treaties give only general guidelines for State parties to follow within their own discretionary powers. On the other hand, there are treaties that lay down very specific policies, through determined stipulations. In many cases, a convention that establishes ground rules on a more abstract level may pave the way for a more specific conventions or treaties.

A practical example of this would be the Universal Declaration of Human Rights[14] , which on its own established many important principles of International law, within the areas of human rights. Later on, based on article 14 of the UDHR, in 1951 the UN established the Convention Relating to the Status of Refugees[15].

In terms of how International Law is applied by State parties there are two diverging theories. On one hand, states can have a monism view of the application of International law to their own domestic settings. Essentially, they view International law and domestic law as a whole. That is to say, that monist States view domestic law as the result of converging national

[12] We use the term 'dilution of state borders' in a sense of open borders as a result of globalization
[13] In - http://www.law.yale.edu/documents/pdf/sela/XimenaFuentes__English_.pdf, p. 1.
[14] The Universal Declaration of Human Rights was adopted by the United Nations General Assembly in 1948, currently having been adopted by 48 countries. Can be seen: http://www.un.org/en/documents/udhr/
[15] Can be seen in - http://www.unhcr.org/3b66c2aa10.html.

laws with International Law and sources, such as Treaties, Conventions and any agreement the State may adhere to.

However, there can be a separation between sources – monist states may view different sources of International law as having varying degrees of immediate application. This differences separates States that are purely monist and States that are partially monist, with a dualist approach to what can be considered a minor International Law source. A monist state may consider a treaty as an inherent part of their legal system, but other international laws that derive from customary international law may not be considered as equally binding. Thus, the State will have to adapt whatever laws come from this secondary source through national legislation.

The difference between solely monist and partially monist States is that while international law that comes from a treaty is not translated into their domestic law, but simply added to it and automatically binds the State and its citizens, through the ratification of the convention, treaty or declaration, partially monist States will have a hierarchy of sources, requiring legislation to be bound to the stipulations of minor sources. So, monist States may also be dualists when it comes to other forms of International Law.

On the other hand, States may be dualist – unlike the former, dualist States are bound to International law through ratification, but they deem it necessary to translate International law into their own domestic law[16].

2.1 CONTEXT OF REFUGEE CONVENTION 1951 AND ITS EVOLUTION

The initial thoughts and the establishment of the international protection of refugees date few centuries back. The responsibility for the initiation lays with International Committee of the Red Cross and set by League of Nations (Jaeger, 2001).The World War I. was the main impulse for the first international committees followed by establishment of new treaties and agreements. League of Nations was first of such coalitions, starting its function after the World War I. Even though it didn't fulfill its purpose to prevent future wars, it established some good number of organizations and agencies, which United Nations took over after the World War II. (Jaeger, 2001).

[16] http://www.law.yale.edu/documents/pdf/sela/XimenaFuentes__English_.pdf

One of the organizations the League of Nations followed be UN established was IRO, in order to take care of the refugee situation after the war, and was not supposed to last more than 3 years. Later on it was apparent that this huge responsibility has to be carried on shoulders of international efforts. IRO was replaced by UNHCR that was given the task to provide international protection and make sure to provide durable solutions for the refugees, as well as for governments for achieving these goals (Feller, 2001).

Refugees were still non-citizens, but they were victims of the global issues that at that time, influenced everyone. Since the Refugee Convention was at its beginning, it was an important treaty that countries wanted to commit to. It was addressing issues that were not covered by any official documents before and the urge to protect the people who ended up in a life situation that was threatening and was caused by international or domestic conflicts (Feller, 2001). Even in the past there were groups of people, ethnic or religious minorities that were in danger in different parts of the world, usually in times of wars between and within the empires. This involved especially the Armenians and the refugees from Russia (Jaeger, 2001).

As mentioned before, the groups of disadvantaged people and minorities in need of protection have existed since ever. There was just no awareness of the responsibility it brought to other countries and the international community.

The Refugee Convention 1951 as we know it nowadays is a descendant of the Convention from 1933. Later events also specifically targeted refugees from other countries, as Germany and Austria, who had to leave their country because of their religious beliefs or racial origin (Jaeger, 2001). Nevertheless, there was still a number of people who were not eligible to obtain the status of refugee. That created a need to extend the mandate of UNHCR to protect persons who fall outside of the geographical ambit. That was a reason for establishing the Protocol 1967 to eliminate the limits of the geographically reasoned protection. Another document established, was OAU Convention that broadened the definition beyond the limits of generalized conflict and violence (Feller, 2001). OAU convention was a great input and broadening of the Convention 1951. It was more focused on the possible solution in handling the influx of refugees and it also introduced the burden-sharing approach to refugee assistance and protection.

The nature of the refugee regime changed in 1980s and 1990s. The number of refugees was escalating. It was not resulting from colonialism anymore, but rather it was cause by the

internal conflicts in the independent states. Human rights were abused massively during the wars, but in the 80s and 90s, long after the war, it became an intentional objective of military. Just from the mid-70s until the late 80s, the number of refugees jumped from a few million to some ten million of people. By the end of the 1995, there was 25 million needing protection (Feller, 2001).

The events that are known about the camps in many countries where the conditions are poor and the space is limited, were happening in similar way during the first wave of refugees. Camps were not equipped, or even built for such an amount of people and among the public, there was an increasingly strong picture of refugees being a threat and this was causing escalating violence, attacks and even rape of refugees (Feller, 2001). Some of the solutions mentioned above were implemented, but usually didn't have a lasting effect. In 70s, there was quite a high number of refugees who repatriated to their countries of origin, nevertheless, they were often returning to countries that were highly impacted by a weak infrastructure, unstable human rights situation etc. Refugees were often compelled to depart again from their home country, where they were deported to. The sudden complication was not only an issue in developing countries, who started to receive big flows of repatriating refugees, but some changes and reshaping of policies was needed also in a developed world. The structures were over-burdened and human trafficking and smuggling had its outburst.

2.2 THE LAW OF THE SEA

With boat people being out focus, the important documents are not only the international law, refugee convention and domestic law. One of the highest importance especially in this case, naturally interrelated to other previously mentioned treaties, is the law of the sea, and therefore the obligations and rights of the countries regarding the boats approaching their territory and also the rights of the boat people and the responsibility of the international actors and their ability and willingness to act.

The phenomenon of the boat people is not a novelty. A lot of wars 'produced' people who were in need to escape the danger or the persecution. In 1980s it was a mass exodus of Vietnamese people and in 1990s big numbers of people from Albania, Cuba and Haiti. Nowadays the term boat people is associated with the asylum seekers that are trying to reach the

lands through Mediterranean, Caribbean and Pacific regions. The boats are often over overcrowded and *un-seaworthy* and therefore are an important issue for States to handle, at the same time very difficult to tackle. In a difficult position are also international organizations, the shipping industry, and also the boat people themselves (UNHCR, Background note on the protection of asylum-seekers and refugees, 2002).

Helping the vessels in need is one of the oldest maritime obligations. It is stated so in several conventions including the United Nations Convention on the Law of the Sea 1982 (UNCLOS), International Convention for the Safety of Life at Sea 1974 (SOLAS), International Convention on Maritime Search and Rescue of 1979 (SAR) and the Convention on the High Seas 1958, which is an extent to the UNCLOS and what this Convention did not cover. All these treaties describe the obligation to "come to the assistance of persons in distress at sea" with further more emphasize that "This obligation is unaffected by the status of the persons in question, their mode of travel, or the numbers involved." (UNHCR, Background note on the protection of asylum-seekers and refugees, 2002, p. 2). Further on, the Art 98 of UNCLOS (1982, p. 56) states, that:

"Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighboring States for this purpose."

The responsibility of States is underlined by the further emphasis of the importance of the delivery to the place of safety that is further specified in the SAR document (International Convention on maritime search and rescue 1979). Even though the priority is to come to an aid and ensure safety, further steps and criteria of disembarkation are not thoroughly elaborated on. When it transpires that there are asylum seekers and refugees among the rescued, States question the extent of the responsibility they have in such instances. Therefore the action from States' side is often delayed, or blocked for the reasons of the potential strain on their asylum system, and the fear of taking the responsibility to be an encouragement of the irregular migration, eventually people smuggling (UNHCR, Background note on the protection of asylum-seekers and refugees, 2002).

The parties involved

The different parties involved have different responsibilities in the situations of rescuing the boats. The safety and health of the crew is a priority according to the Law of the sea (1982), nevertheless, often collides with interests of States and therefore the intensity of the situation increases. The main actors involved in the process, each having responsibilities and obligations are: the master of the ship, coastal state, flag state and the international agencies and the international community as a whole.

The main responsibility of the master of the ship is to provide assistance and/or rescue to the vessel. International maritime law does not specify any further responsibilities of the master of the ship. Nevertheless, by not providing the assistance, the master falls under the risk of being criminally liable for not following his/her duty.

The coastal states have an obligation to develop adequate search. However, further steps as disembarkation or landing is not within the scope of responsibilities of these States. As mentioned above, the UNCLOS convention (as well as emphasized in SAR (International Convention on maritime search and rescue 1979)) invites States to also cooperate with the neighboring states and that way ensure the rescue is provided.

The responsibility of the flag states is difficult at times, because of the possibility of so called registry under the *'flag of convenience'*[17] which means, that a ship can be registered under the flag of a different state from the ship's owners, usually with the intention to lower the costs (HG.org: Legal Resources, n.d.). Most of the time the responsibilities are assigned to flag states even though they might operate under the flag of another country. The difference in how to manage the vessel differ in accordance to whether it is a commercial vessel, or government, non-commercial vessel. In the case of the State vessels, such as national lifeboats, naval vessels, coast guard vessels, the responsibility would devolve on that particular State, and that especially in territorial waters (UNHCR, Background note on the protection of asylum-seekers and refugees, 2002).

International agencies involved in the situations of the rescue at the sea are International Maritime Organization (IMO), UNHCR and International Organization of Migration (IOM). IMO is mainly responsible for the development of the maritime law, making sure that the rules are followed and that States respect their obligations. IMO also provides technical advice and

[17] Available on: http://www.hg.org/article.asp?id=31395

puts emphasis on the safety aspects. IOM is the organization has a role in addressing issues regarding migration, ensuring the needs of migrants are met. UNHCR also provides an assistance on treatment of refugees and asylum seekers. The international community as a whole should be aiming for the development of responsibility-sharing mechanisms and ensure that except of the adequate response to such scenarios, also the prevention actions are part of the agenda (UNHCR, Background note on the protection of asylum-seekers and refugees, 2002).

The issue between these actors is complex. There is conflict of interest and also a conflict of the responsibilities. From the perspective of the master of the ship, the safety of the crew is a priority. The main concerns that might be a worrisome issue are the insufficient water supply aboard, exceeding the number of persons allowed on board, insufficient life-saving equipment, and risk of the safety of both the crew and passengers if any violence behavior occurs and threatens safety of the people aboard (UNHCR, Background note on the protection of asylum-seekers and refugees, 2002). These concerns can often be a first priority emergency, especially on the boats transporting large numbers of asylum seekers and refugees that are under a lot of pressure and not only because of fleeing their own country, but also because of the uncertainties that they experience on the boat and the fear of what is awaiting them once (if) they reach the shore. The severity of the events that can happen aboard often depends on the amount of time spent in waiting.

There are several considerations that come into play, from different perspectives of the actors involved. They might reflect in conflicting interests – due to formerly mentioned responsibilities of the master and the international community, but also States exercise their rights, trying to find solutions, particularly with the intention to dispose themselves of the responsibility to receive the passengers in their country. Therefore, each case need a thorough examination and analysis, to fully explore the interplay between everyone involved (UNHCR, Background note on the protection of asylum-seekers and refugees, 2002).

International law vs. maritime law

Certain discrepancies in regard to boat refugees occur not only on the level of the responsibilities of parties involved, but also in the law itself. There are several differences between international refugee law and maritime law in the question of the rescue of the passengers on the vessel.

Maritime law emphasized the importance of the aid to the vessel despite the nationality and the status of the persons aboard. On the other hand, international refugee law focuses on identification of the status of the persons aboard, which is an essential in order to decide whether the persons are eligible to be applying for the status of refugee according to convention. Nevertheless, the scenario of the persons being on the vessel complicates the process of recognizing the status of persons. Naturally, the master of the ship does not have the authority to determine who is an asylum seeker. Situation like that would require enabling prompt access to the authorities that could process such people. That obligation is assigned to States according to the RC 1951 which is requesting countries to provide access to asylum procedures. The responsibility of States was elaborated on in Executive Committee Conclusions of UNHCR's program (EXCOM Conclusions)[18], emphasizing the regulation of non-refoulement, no rejection at frontiers and also emphasizes the necessity of providing respectful treatment of the asylum seekers/refugees by respecting their fundamental civil rights that are internationally recognized. Also, repeatedly to Refugee Convention 1951, the requirement from States is to not to penalize persons even if the means of entry are unlawful according to the country's policies (UNHCR, EXCOM Conclusions no. 22: Protection of Asylum-Seekers in Situations of Large-Scale Influx, 1981).

Even though the sufficient argument of the countries in order to justify the refusal would be that not *everyone* or *anyone* is eligible to obtain the status of a refugee. While that is true, all the international treaties regarding the determination of the status of a refugee explicitly say that a person has a right to be granted fair treatment and the possibility to be processed and seek asylum. Also, as stated by UNHCR (Background note on the protection of asylum-seekers and refugees, 2002), in the past, there were some attempts to process refugees aboard, nevertheless, proved to be insufficient and rather problematic. Environment of a vessel does not provide satisfying space, privacy or access to translators in the same extend as it is possible on a dry land.

Who is responsible?

According to the maritime law, the responsibility for admission (even if temporary), appertains to a State where the disembarkation or landing occurs. Situation as such usually happens at a coastal state, however, in cases when the request for the landing is clear,

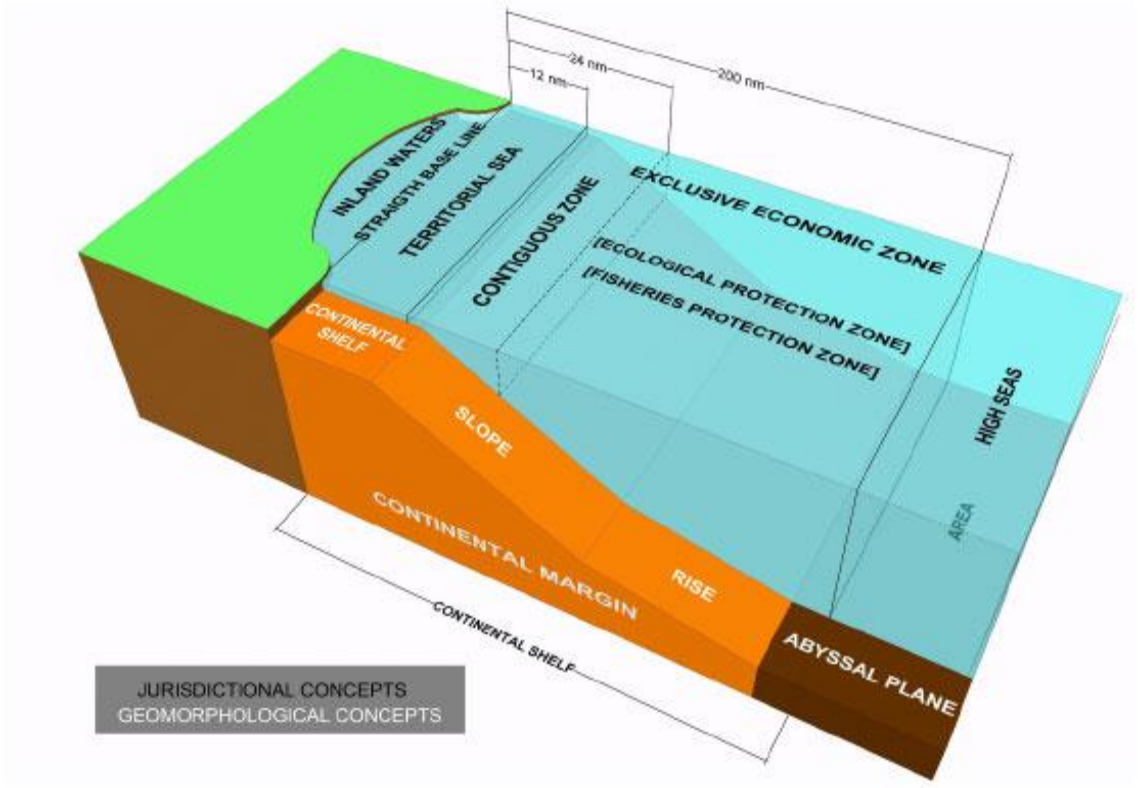
[18] (UNHCR, EXCOM Conclusions no. 22: Protection of Asylum-Seekers in Situations of Large-Scale Influx, 1981)

responsibility shifts to a flag State. In special cases, if necessary, the disembarkation can take place in a third, transit country.

Even though the UNHCR's regulations regarding the non-refoulement are clear, the specifications on the disembarkation and its process are not detailed. The most debated thing though is the difference of treatment between the refugees accessing the country 'legally' and those entering 'unlawfully'. Despite all possible doubts about the procedures, the most important thing is, that the right for rescue and protection applies to the refugees and asylum seekers rescued at the sea equally to asylum seekers accessing the country by any other means (UNHCR, Background note on the protection of asylum-seekers and refugees, 2002).

Geographical definition of the responsibility of the state at the sea

There are certain differences between the rights and the obligations of States on land compared to the waters. The seas and oceans can't be occupied in the same way as the land can be, therefore no State has a mandate to exercise any kind of control over them. Nevertheless, States always tried to have control over the navigation and maritime resources. Nowadays, some of the obligations and rights of the countries are applied to a certain degrees in situations of the control over the boats with people approaching their territory (Watch the Med: Rights at Sea, n.d.).



The picture above provided by the online mapping platform Watch the Med[19] is transparently showing the various zones and their linear definition. As we shortly outlined, States have certain rights, however only in defined distance from the shore. State's sovereignty (which we describe in the following chapter) applies to waters that are part of the country's territory. The *territorial waters* extend up to 12 nautical (unit especially used by navigators at the sea and in the air, also in polar exploration) miles. Countries can exercise some of their police functions (customs, immigration or health measure) within *contiguous* zone, which is not more than 24 nautical miles distant from the baseline (United Nations Convetion on the Law of the Sea, 1982,

[19] Available on: http://watchthemed.net/index.php/page/index/2

pp. Art. 33, 2.). Exclusive powers of exploring, exploiting, conserving and managing the natural resources apply to *exclusive economic* zone of max. 200 nautical miles. Beyond that zone, no state is allowed to exercise its sovereignty. That zone is called *high seas* and doesn't fall under the jurisdiction of any state[20].

The Law of the Sea, the International Law and the Refugee Law all support the need and the obligation to protect refugees and asylum seekers in the situations when their freedom and life is threatened. The matter of the boat people is of a concern because of its complexity and the controversy in response of the States involved (with Australia and USA being the focus studies). Even though the preservation of human life and the rights attributable to each individual is emphasized in these laws and treaties, there are also other actors aiming to preserve their rights. In the times of globalized world and no presence of any apparent global conflicts, states are accentuate the right to preserve itself and protect its sovereignty (United Nations Convetion on the Law of the Sea, 1982)[21]. That often happens in a contradiction to the treaties regarding the refugee issue and on the expense of rights of people escaping persecution. National security and sovereignty is becoming a priority and the guidelines of the treaties and conventions are not exhaustive enough to achieve the rightful outcome.

2.3 SOVEREIGNTY

In the chosen topic we consider important to explore the phenomenon of sovereignty. Its evolvement from the past to today underwent tremendous transition from the meaning of the term sovereignty, and its implementation in different parts of the world and at different times. Robert Jackson (2007) describes sovereignty as a 'global system of authority', meaning that as a system it crosses the cultures, languages and any other even existing groups or languages that divide people. Therefore every person can find themselves living in one or another sovereign state. Nothing in the world is 'outside'. Each part of the world is subjected to this global system in a separate state. Sovereignty gives states the benefit of political and legal independence as well as geographical independence, but also the supreme authority in the state. It is a concept involving both the state's internal system, such as rights and duties of both the state and citizens,

[20] UNCLOS (United Nations Convetion on the Law of the Sea, 1982), Art. 2, 3, 4, 33, 55, 56, 57, 88.
[21] Art. 25

as well as the determination of the relation between individual states. The idea is that the states work in cooperation towards peace and harmony, not otherwise, serving exclusively their own needs that would disadvantage the others. As Jackson (2007) describes, the meaning behind the term sovereignty and the term itself has nowadays various and often contradictory meanings. It is not the initial, historical perspective, but it is looked at through lenses of various theories and methodologies that evolved over time. Nevertheless, the initial idea of sovereignty is not solely vague philosophy. Its ideology was worked out by kings and other rulers since the 16th century, where the fundamentals for the formation of theories where established. The attempt of the theoretical explanation of sovereignty is to categorize it and be precise in defining what it really is and how is it being performed in reality. However, it is difficult to sum it up with simply a definition. It is a constantly changing and altering concept.

Since its existence, sovereignty in the history has developed different layers and new dimensions in each new era. The basic idea of sovereignty did not change tremendously over the centuries but rather it evolved to account for challenges and new political realities. There are also historical events that show how sovereignty evolved and was part of the authority performed in all kinds of bodies of authority. Being able to define sovereignty of state, it is important to emphasize which definition of state we are working with. We focus on the definition of state according to Robert Jackson (2007), who derives his thoughts from the conventional perception of state as a territory that is defined by borders and has a permanent population under authority of government. The factors that determine whether or not a state possesses sovereignty is *governmental supremacy* and *independence.* Those provide the authority at the national level, but also internationally. From the colonial times, a lot of populations did not have the experience of exercising power, but learnt to demand it, based on what was performed in the countries by the colonists, and the need of self-determination. Sovereignty did not have quite the same purpose compared to how we perceive it in relation to migration and the way states apply its authority in the cases of boat people. In the time of colonialism, populations of people had a need to free themselves from the dictation and direction that was set by the outside authority. Sovereignty partly implies the independence and the exclusion from the other (sovereign states). The authority is a green light for countries to exercise the power they have. Sovereignty brings also a great responsibility to protect people living within its own territory both from domestic and foreign threats.

In the case of Australia and its way to execute its power we can see that the idea of protecting what is 'ours' or what 'we are' is strongly applied in the case of (boat) refugees. Whether there are profound grounds on which Australia builds its suspicion, is questionable. As we are mentioning in the case of Australia, this need to protect its citizens is sufficiently used as means to stop the refugees from seeking asylum in the country. This proclamation of sovereignty was publicly announced by several ministers[22] – the right to choose who is going to enter the country. Not based on the factors and levels of need to be granted the asylum, but the categorizing is seemingly focused on the benefits Australia could possibly gain by receiving refugee people. According to Jackson (2007), power is not directly proportional to sovereignty. These states would be sovereign even though according to international measures and in comparison to other powerful states, they do not possess such responsibility for either enhancing or disturbing peace.

[22] John Howard, speech delivered at the Federal Liberal Party Campaign Launch, Sydney, 28 October 2001

3 THEORETICAL AND CONCEPTUAL FRAMEWORK

3.1 SECURITIZATION THEORY

The concept of security is a contested one as there is no unanimous definition. Its definition depends essentially on the referent object, source of threat and analytical perspective (Betts, 2009). Historically the term 'security' has been attributed to a specific area of action in which states defy each other's sovereignty through threat. However, the concept of 'security' has been evolving along the years:

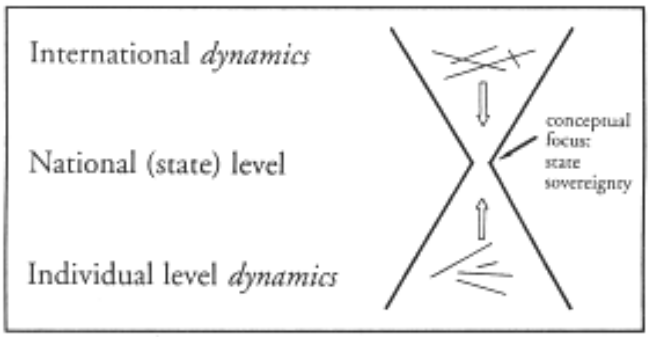
"In this process of continuous, gradual transformation, the strong military identification of earlier times has been diminished – it is, in a sense always there, but more and more often in metaphorical forms, as other wars, other challenges – while the images of 'challenges to sovereignty' and defense have remained central" (Wæver, 1995, p. 3)

This process of transformation which Wæver (1995) tell us about has nothing to do with a redefinition of the concept itself. In his opinion, the current tendency to do so leads to a wider concept and to the "cancelling out the specific field", reducing the concept to its "everyday sense". In other words, it is a question of mere semantics. Furthermore, he states that one can maintain the core features of the field of 'security' and follow its evolution by simply enlarging the security agenda to take in threats that are not limited to the military scope, such as: "(…) urgency; state power claiming the legitimate use of extraordinary means; a threat seen as potentially undercutting sovereignty, thereby preventing the political "we" from dealing with any other questions" (Wæver, 1995, p. 4).

Even though there are several different perspectives regarding the concept of 'security'. For instance the strategic studies tend to focus on the military sector of security, whilst the Realism and Neorealism have a different approach to the fact that historically it has been the most highlighted sector of 'security' (Wæver, 1995). And this happened due to the undeniable destructive force that military threat holds, owing to the ease with which a conquered state can be submitted to the conqueror state's impositions. However, such outcomes have been accomplished by other methods, which makes them a security issue, according to Jahn, et. al. (Wæver, 1995). Betts (2009) has defined 'security' as "an object's degree of vulnerability to a threat", comprising two main elements: a threat and a corresponding object, which in his words

can be "something or someone that is vulnerable to that threat". In other words, the referent object does not have to be imperatively a state and there is a wider range of threats than just military (Betts, 2009).

Hence, it means that an issue related with a political, economic or military sphere if perceived as a threat to the maintenance of a specific political order within a state becomes a security problem, i.e., a threat that disturbs the "self-determination and sovereignty of the unit", as it is of most importance the continuity of this "unit *as* a basic political unit", the sovereign state (Wæver, 1995). One can then understand the concept of 'security' as referring to the state, and therefore, national security, which is the relevant sector of 'security' to our research analysis. Wæver (1995) defines national security as being "fundamentally dependent on international dynamics", which for him it is not the same as a relationship amid national and international securities.



The hourglass in the figure above shows us what Wæver considers to be security: not a concept that can be separated in three levels but rather the point where the international dynamics and individual dynamics meet, at a state level (1995). Therefore, security can only be understood from a national perpective, according to Wæver, and sovereign authoriry is the the real basis that allows the achievement of peace, order and good governance in the international system (Haddad, 2008).

International migration has become one of the major concerns of the international security agenda, as governments of more and more Western countries have been connecting migration policy and national security and migration flows to international terrorism (Adamson, 2006). Adamson states that the relationship between international migration and national security

is determined by how the migration flows affect the interests of a state. The migration flows affect the interests of a state through "three core areas of national security concern: state sovereignty, or the overall capacity and autonomy of state actors; the balance of power among states; and the nature of violent conflict in the international system" (2006, p. 167). Several academics expose the attacks that occurred on September 11, 2001, as a turning point that placed international migration on the list of national security priorities[23] (Adamson, 2006), not only for the USA but also for the developed and developing world likewise (Betts, 2009). This perspective has had a harmful effect for the refugees and asylum seekers, because:

"(…) asylum seekers and refugees have been increasingly seen as a "threat". For example, the refugee admission quota for the USA was set at 70,000 for 2002 but only 30,000 were admitted. (…) In the aftermath of the attacks, policy and the media in the US and Europe focused on asylum and refugees even though the 9/11 attackers had entered the country on student visas rather than as asylum seekers." (Betts, 2009, pp. 75-76)

As such, security is a matter of defence against a threat, and one can argue that the way a threat is perceived can come in diverse forms and consequently will be dealt in different ways. For this reason, in the next subchapter we will pursue this matter and how it fits into our analysis, in accordance with our research question.

3.1 THE THREAT: OUTSIDERS

"Where the nation-state is based on civic ideas of national identity, the refugee is imagined as a threat to the security of its institutions, welfare system or resources. Where the nation-state is built on the ethnic grounds, the refugee is imagined as a threat to its dominant ethnicity, language or culture." (Haddad, 2008, p. 91)

International migration can present itself as a challenge to states' ability to maintain sovereignty across several areas, which in turn weakens the "very basis of their security", as the crossing-border flows of people, multiculturalism, capital, goods and ideas jeopardize the "notions of the territorial state as a bounded entity with a clearly demarcated territory and

[23] Nevertheless, Adamson (2006) alludes to the fact that a concern regarding the "relation between globalization, migration, and security" already existed previous to these events, in the policy world and security studies. Reaffirming this position there is also Castles (2006), who stresses that that migration as a security issue goes back to 1960's in Britain and the "political concern about 'unwanted' migration.

population" (Adamson, 2006). This notion is closely related to the traditional models of national security, which assign to the unitary national identity the source of national interests (Adamson, 2006). However it is important to point that this does not mean that states, nowadays, are not in control of their territories, but the opposite (Freeman, 2003), as it is the state the main responsible entity for the maintenance, control and protection of the borders (Macklin, 2005), and therefore the one that allows entrance or not to its territory, as well as the acquisition of rights and citizenship status (Adamson, 2006). Thus, states' migration policies in most cases aims to regulate entries, for instance through border control, and to define who is or is not eligible to be part of a polity, e.g. when detaining a certain citizenship.

Adamson (2006) tell us that, traditionally, national security is closely linked to national interests, which in turn are based on a state's national identity, according to social constructivists' approaches. Nowadays, it is the ideology of nationalism that offers a clear idea of national identity, granting "legitimacy on and brings cohesion to nation-sates", and international migration can present a threat to the cultural basis that sustains a state's identity[24] and lead "states to take up more liberal and expansive national identities" (Adamson, 2006). Seton-Watson defines a nation as a community of individuals linked among themselves by common notions such as culture, national consciousness and solidarity towards each other (Castles & Miller, 2009), which can go from a certain common ethnicity to a political and/or social order (Haddad, 2008). For Haddad (2008), national security is a notion that brings light upon the composition of states and when they are perceived in national terms it becomes easier to "imagine outsiders as a threat to national identity and security". Furthermore:

"(…) it was with the nationalisation of the state that sharp distinctions between insiders and outsiders began to be formulated and the concept of the refugee as one such outsider started to be consolidated. Accordingly, the refugee came to be perceived as a threat to the homogeneous nation-state and peace and stability both within and between states." (Haddad, 2008, p. 91)

[24] In regard to this point, it is interesting to point out that the threat that migration flow poses to national identity has historical roots, as many states have since ever created their migration policies based on national, racial, or ethnic criteria: e.g. USA during the 19th and beginning of the 20th centuries had racial restrictions on immigrants, and Australia's migration policies during much of the 20th century were based in the 'white Australia' policy (Adamson, 2006).

This feeling of mistrust in relation to foreigners can be based upon two reasons: the absence of strong bonds of trust and solidarity resulting from sharing common features or attributes (Gibney, 2004), which characterizes a community; and the fear felt by the states, its governments and public opinion of burden of its resources, welfare system, institutions or as a threat to the continuity of a dominant ethnicity (Haddad, 2008). During our research paper we have approached the concept of threat as closely related to the sense of privation or destruction of something that is considered valuable and important and it can go from physical survival to social or political order or even the notion of identity, and the source of threat can be one or more individuals, a particular group or other states (Williams, 2011). Thus, the solution to maintain national security would undergo the assimilation or elimination of the outsider (Haddad, 2008), which is not an easy task, according to Castles and Miller (2006):

"Immigration of culturally diverse people presents nation-states with a dilemma: incorporation of the newcomers as citizens may undermine myths of cultural homogeneity; but failure to incorporate them may lead to divided societies, marked by severe inequality and conflict." (Castles, 2006, pp. 41-42)

In order to answer our research question, why are the Boat People a sovereignty issue, we realized that analysing the topic from a security perspective would be the most relevant way to achieve our goal. One could debate about which perspective would be the most efficient to deal with this matter and which would have better long-term results for both sides, the immigrants including refugees and asylum seekers (since it is the last two our target group) and the host states. We could even embark in a more sociological approach with Barth's notion of identity and groups or Honneth's notion of recognition. However it is not our intention to follow this path and understand the issue of Boat People from that point of view. Our research brought us to the conclusion that it is not easy, if not impossible, to conceive the refugee regime in terms of sovereignty and attempt to understand it and at the same time separate it from states' security concerns.

For this reason, throughout this chapter we have attempted to present the concept of security that we believe best fits our research and analysis approach. Even though the notion of security can change accordingly to different theories or areas of study (Wæver, 1995), our main goal is to understand how states deal with the issue of Boat People, more specifically the

refugees and asylum seekers. This led us to opt for an analysis from the national security point of view and how it, in turn, perceives and deals with threats. So far we have explain how migration can present itself as a threat to the security of a state, by jeopardizing a state's national consciousness (Castles & Miller, 2009), in other words national identity, or weaken its resources (Haddad, 2008). In the following sub-chapter we will clarify, accordingly to our researches, how do refugees and asylum seekers, *a priori* a protected group, falls into the clutches of migration policies often restrictive, *a priori* a protected group, falls into the clutches of migration policies often restrictive.

3.2 THE ASYLUM-MIGRATION NEXUS

"The issue of asylum and refugees has effectively been 'securitised' in western societies. Immigration of any kind is linked to insecurity, and where this movement is seemingly illegal or out of control the security increases. Thus refugees are constructed as a high-level threat even though being an 'illegal asylum-seeker' or 'illegal refugee' is, of course, a misnomer." (Haddad, 2008, p. 194)

It is currently hard to deny that the refugee regime has been subject to repercussions due to the emergence of increasing "nexuses", linking it to several other issue-areas, as migration, development and security (Betts, 2009). One of the most often heard is the growing difficulty to distinguish refugee from economic migrant, the so-called asylum-migration nexus.

One might ask itself why this confusion has emerged since the dominant international and normative framework is based on the Refugee Convention definition of refugee that well differentiates those who fall into this same definition. For Castle (2002), it is the division between the North and the South that generates migration, a division between the industrial nations and the poor nations as Africa, Asia and Latin America. And as fragile economies walk together with the violation of human rights, the natural outcome is that people move across borders due to 'multiple reasons', and that is why it becomes difficult to separate economic migrants from refugees (2002).

Betts (2009) justifies the asylum-migration nexus as a result of globalization and the form that the latter has influenced the trans-border movement, which has led to a "blurring of the boundaries between these two areas". The interconnectivity and supra-territoriality emerged

from globalization has given space to the 'trans-world asylum seeker', as Betts (2009) denominates. In other words, globalization with new forms of travelling, trans-national networks and the spread of information has changed the nature of asylum, bringing it closer to other forms of human mobility, especially voluntary economic migration (Betts, 2009).

For Castles and Van Hear (2005) the asylum-migration nexus operates on three levels, which are routes, causes and policies. The first level has to do with the fact that refugees and asylum seekers often choose the same routes as economic migrants. And it happens due to the fact that states' migration policies prevents the refugees themselves to achieve its territories: "the restrictive policies of many Northern states have made spontaneously reaching the territory of Europe, Australia, or North America extremely challenging, even for refugees" (Betts, 2009). This means that asylum seekers and refugees are forced to make use of irregular channels, e.g. human smugglers, in order to cross borders. From the point of view of Macklin (2005), these policies not only have the goal to deter the asylum seekers and refugees but also to push them further into a situation that human smuggling networks, illegal ways of travel are the only option, turning them indistinguishable from other economic and voluntary migrants, and labeled as illegal.

The second level is related to the cause that leads an individual to become an asylum seeker or migrant. As it has been said before, the Refugee Convention has established very well the distinction between both and international refugee law itself it is based upon that distinction. However, the reality can be less clear, as many people flee situation that are not included in the definition of refugee, such as environmental disasters or economic reasons (Betts, 2009). We also must also consider that some refugees may hold different motives beyond a well-founded fear of persecution.

The third level and the one that has more interest to this study, has do with the increasingly undifferentiated policies being adopted to deal with refugees and migration flows. In other words: "Non-entrée measures and tighter border controls have been adopted in a blanket manner, which in practice makes it almost equally difficult for asylum seekers and other irregular migrants" (Betts, 2009, p. 161). The policies are nothing more than 'non-entrée' strategies aiming to discourage the current a possible future asylum seekers from obtaining refugee status inside the host countries (Legomsky, 2006). Furthermore, despite the fact that

policies of border control are not able to completely prevent entry, they can reduce the number and "consign a growing proportion of entrants to the illegal category" (Macklin, 2005).

However, what we seek to explain with this sub-chapter is that this misguidance has been influencing states and its migration policies, having direct impact in the refugee regime, and also been used to influence the public opinion to see the refugee as a threat. Terminology it is of great importance as it has the power to shape one's comprehension about a phenomenon (McAdam & Chong, 2014). As will further on be presented, in regard to this topic, Australia has been extremely effective on presenting refugees and asylum seekers as a threat. It was during John Howard's[25] term as Australia's Prime Minister that the spontaneous flows of asylum seekers were described as 'infectious disease', 'illegal immigrants' and 'queue jumpers', and seen as 'bogus', leading to the perception that asylum seekers can be divided into fake and genuine, illegal and legal, good and bad (Betts, 2009). Since an early stage of his term, Howard government recognized public anxiety over the boat people as a possible electoral vantage (Gibney, 2004). And the exploitation of public fears have led to the division between 'genuine' refugees, that come from refugee camps and entitled to be resettled in the country, and the "queue jumpers' coming by boat (McAdam & Chong, 2014).

> *"The legal consequences of categorization are very significant. Asylum seekers at the border are entitled to make a refugee claim. Illegal migrants are deportable. Refugees merit protection. Illegal migrants are criminals whose border transgression offends deeply held beliefs about border control as the instantiation of sovereignty. Illegal migrants' outlaw designation exceeds the particular violation of immigration law and assumes a kind of existential, totalizing character: they are known simply as 'illegals.' They are not merely people who have commit an illegal act; they* are *illegal." (Macklin, 2005, p. 367)*

In sum, there are several factors that contribute to the asylum-migration nexus, as the undocumented travel movements is a common denominator; but there are mixed motivations that push an individual to travel cross-borders - not only to flee persecution but also for economic or family reunification reasons. This 'mixture' has made it difficult to define 'who is who' and it has brought consequences for the refugee regime.

[25] John Howard was Australia's 25th Prime Minister, from 11 March 1996 until 3 December 2007. It was during his tenure that the participation of Australia in the fight against terrorism, after the 9/11 attacks on USA soil, became a major concern for the foreign and defence policies – in http://primeministers.naa.gov.au/primeministers/howard/.

Thus, the next chapter will be focused on a comparative analysis between Australia and USA and how each country have been reacting to the phenomenon of Boat People and what are the resulting policies.

4 COMPARATIVE STUDY: HOW AUSTRALIA AND USA DEAL WITH BOAT PEOPLE?

4.1 AUSTRALIA CONTEXT

…"for those who come across the seas, we've boundless plains to share" (From Australian anthem)

"If we Aboriginal People are true to our culture and spiritual beliefs, we should be telling the government that what they are doing to refugees is wrong. Our Aboriginal cultures do not allow us to treat people this way… Those people were out on the water. The old woman where I come from said: 'Look at this big river, where we're fishing, look at this big land.' There's room for all of us, if we learn to live simply, within out county's means… Cutting down on the way we live, saving the land and embracing other in need. Giving them refuge. This is a spiritual country and we are a spiritual people, we are ready to embrace other people in their need… Before Europeans came here, (illegally), in the Aboriginal world, we were all different, speaking different languages… Our religion and cultural beliefs teaches us that everyone is a part of us and we should care about them. We can't separate ourselves from other human beings – it's a duty." (Perera, 2002)

4.1.1 INTRODUCTION

Australia is a country of multicultural character and relatively satisfying economic comfort. With that said, a great question arises – why does this country have increasingly bigger struggle with the refugee issue? To explore that on a deeper level, we have to build the answer on the basis of colonial history as well as fluctuating cultural perceptions, influenced by globalization, therefore also increase of migration that undoubtedly had an impact on the national state of things. We believe that the colonial history of number of countries in the world effected the perceptions of what culture and nation means for each country and the individuals living within. Australia has a long history of migration that built the country to the shape it presents today. Despite this multicultural character, the practices of at least the past decade (and further ago) does not reflect this ideology in the same light anymore. Even though the government of Australia itself, and many ministers during their era tried to emphasize the 'good

deeds'[26]Australia did in the past and continues to do, it is in contradiction with the criticism from international voices. What importance they have and how Australia managed to elude the regulations and to pursue its own laws, is the question that lies behind our research.

In order to explore the issue to the deeper understanding, we decided to question and criticize Australia's practices by comparing them to the requirements set by UNHCR and rules and rights outlined in the Refugee Convention 1951 on protection of refugees.

On the one hand, the national reports on the numbers refugees that resettled in Australia and programs of integration for refugees produced by the Australian government often present an unfiltered, glorified picture of Australia being an example of hospitality, multiculturalism with a high level of acceptance and integration of 'others' coming into their country. Undoubtedly, many statistics show that Australia is one of few countries in the world that has received the highest numbers of refugees. (Australian government: How Australia Helps Refugees). Our intention is to question these statements and compare it with critiques of the gradually harsh policies in Australia in order to understand what lies behind. Australia has gained a reputation over the years of being a 'merciless ruler' unwilling to let anyone to invade the 'traditional Australian-ism'. The dynamics of the harshness were changing under different governments, but all have one thing in common: The rationales and reasoning can be traced back to the times of colonialism and to the development of stereotypes that frame culture and define multicultural society, and the notion of "us" and "them" carried out at a particular time.

4.1.2 ROOTS AND FURTHER EVOLVEMENT OF STRICT POLICY

The factors of the Australia's reaction towards migration and later (boat) refugees, varied and occurred at different stages of existence of Australia and immigration policies, depending on how the society was changing and what was the issue of that particular era, plus on what minister was in the lead of decision making processes at that time. The major factors modifying the

[26] By using the term 'good deeds' we refer to the events in the past, especially after the World War II. When Australia was one of the countries openly welcoming and rescuing refugees escaping from the zones still influenced by conflicts, or from the aftermath of the war. This fact seems to be an argument in some of the present debates on the level of acceptance of refugees in specific countries and the criticism that Australia, among few others, receives. (Hage, 2002); (Australian government: How Australia Helps Refugees)

reasoning behind the migration policies and public acceptance or rejection of migrants and refugees, were race, culture/multiculturalism and sovereignty respectively.

Australian history in this aspect is very closely associated with the term 'white paranoia' as Ghassan Hage thoroughly describes (2002). It has routes over 115 years back, but has shaped Australia in one way or another ever since, and influences the way migration is handled nowadays. 'White paranoia' had its peak in the time of federation in 1901 until the discussion about the multicultural policy[27] arose in the early 1970's, first mentioned by Gough Whitlam when his Labor government was elected. It did not just stop after the Indigenous population was decimated. The actual implementation and the change of the mindset was a more complex process. 'White paranoia" as such might have changed its form semantically, but its roots and ideas remained intact. Paranoia, according to G. Hage (2002, p. 419), is a "pathological form of fear based on an extensively fragile conception of the self as constantly threatened." Paranoia is also perceived as a fear without being exposed to a real threat, and therefore people perceive fear where it does not exist. This phenomenon existed during a time where it was subsumed under the concept of 'whiteness' or so called 'Europeanness'. Since Great Britain was a great colonizer, it displayed a lifestyle proclaimed to be 'right', which influenced states and societies under its rule. These statues brought certain privileges to those who belonged to this societal group which was generally possible only for the individuals of the "white race" (Hage, 2002). It not only reflected the class in any given society but it also promoted somebody to the 'best type of human being', which was not automatically available to lower European classes who were treated accordingly. Nevertheless, in other parts of the world, being White European was a guarantee of a higher status and position in a society.

This was such a strong concept that it determined the borders of the 'civilized world' (Hage, 2002). In that sense, the nation-states as we know them today did not exist or were not of strong importance. The paranoia-induced fear intoxicated societal structures and triggered a form of anxiety that led many to believe that they were losing the measure of distinction. As it seemed

[27] The multicultural policy was an initiation of Gough Whitlam, who was an important figure in the decolonization, diplomatic relations and peace. Even though the White Policy was forbidden in some aspects before Whitlam's government, it was not fully abolished and some of the discriminatory measure continued even after that. Some advantages that were granted to British and white migrants, were not provided to others. Whitlam's government ensured that the rights will be extended and they will include all other ethnicities. **Invalid source specified.**
Available on: http://www.whitlam.org/gough_whitlam/achievements/foreignaffairsandimmigration

natural for that era, benefits of higher society were available only for a limited number of people and for the rest it remained a desire and hope for the future where they could possibly reach it.

Australia generally gained the prestige of being white[28] outside of Europe and did not want to lose it by allowing the 'dangerous others' to infiltrate the identity of colonial society (Hage, 2002). This identity was built on the one main factor – being white. That was created by excluding everyone that was different, keeping the society ethnically clean. In other words, by allowing the 'others' to enter the 'pure' society, certain values would be distorted, and the blending would leave the formerly 'racially pure' white society stained (Hage, 2002). While the White Australian Policy was in force, the homogeneity of the population (white predominance) was increasing, which dominated until the 1960's when this strongly racial exclusion became internationally recognized as unacceptable. Also, the situation in Australia became particularly alarming because they committed themselves to a 1% annual population growth after the World War II (Hage, 2002). Immigrants from Britain were not enough to fulfill that aim and therefore there was need to gain over people from the other parts of the world. It became impossible to have the same strategy as before, because people of the 'British white' class were not enough to populate striving Australia. Therefore the requirements had to be adjusted and 'darker shades of white' obtained acceptance into Australian society (Casey & Sleeman, 1989).

The time period described here marked the beginning of a changing perception of the immigration debates. After World War II, it became unacceptable to exclude or include people based on racial preferences which were the results of an old, but widely recognized racial policy. At that time, the reason of the problem transformed its name and it became a *cultural issue*. The strongest concept that was about to be enforced was *assimilation* of the people coming in. Nevertheless, some countries/ethnicities/cultures remained marginalized groups who were perceived as being unable to assimilate, and therefore represented a threat to the Australian society. Those fears applied mostly to migrants from Asia, as the group considered most threatening (Casey & Sleeman, 1989). The post-World War II migrants were acceptable, but even here the concept of assimilation was not achievable the way it was intended. The idea was off the assimilation was to 'reprogram' the otherness and adjust fully to what Australian were

[28] During the colonization, the British whiteness was the goal many countries wanted to achieve, because it was associated with being of a higher class, enjoying the advantages of it. Australia was for certain time achieving this prestige even though it is not a European country.

like. In fact, the cultural distinction occurred to be more visible and hardly imaginable to be changed and merged into one, ideal culture.

As with post-war migrants, the special exception was used against the people from the former Soviet Union after its dissolution. They did not meet the characteristics to be determined refugee according to XX, because Soviet Russia did not exist anymore. However, they were in a situation of 'disadvantage' and therefore very vulnerable. To account for such groups, a special category was established called *Special Assistance Category*, in order to avoid people being exposed to the circumstances of a soviet regime, the disadvantages is cause and the possibility of statelessness (Betts K. , 2003, p. 174).

With the big influx of people into the country, culture and national identity transformed from Anglo-Celtic to a yet undefined phenomenon which brought about new questions the government, as well as for the public, and was requiring more and more attention. For the first time, in the 1970s, the term multiculturalism appeared as a way to describe the diversity that had not been experienced in Australia before. Multiculturalism was on the one hand perceived as a cultural government, on the other as a new national identity. The former was concerned mainly with socioeconomic issues, whereas the latter was describing the new lifestyle that was suggesting cultural pluralism or relativism, where two and more cultures can coexist without being superior to one another (Hage, 2002).

That gave rise to new debates, and created a new wave of even stronger paranoia in order to save the self. Even though being a multicultural society was becoming a new sign of prestige in the perception of the middle class in Australian which represented the majority of Australian society, it was the government that was enhancing the fears with the intention to evoke the stereotypical White Australia once again. The fear meant yet another cycle of repetitiveness from the past tendencies, supported by statements of ministers leaning towards the exclusion of others and promoting the return to 'traditional Australia'. Even if there might have been a possibility of Australians welcoming the changes, it was shattered by those who were building up the picture of Australia being a victim of invasive otherness, which after all was a 'conspiracy' created by governments and media to scare Australian citizens.

4.1.3 THE NUMBERS

Internationally, there are high numbers of people who are forcibly displaced and are searching for refuge. This number reached over 43 million people in 2009 worldwide (Phillips & Spinks, 2013), and is estimated to be the highest since the mid 1990ies. The numbers are still increasing and seem to continue to grow, caused by the destabilization in certain countries, especially those in the Middle East. It is no surprise then, that these countries are 'producing' the highest numbers of people seeking asylum in neighboring or other countries. They often undergo the danger of travelling by boat, and the insecurity of what awaits them 'on the other side'.

Countries often find themselves in a difficult position of trying to regulate the movements across their borders. At the same time, it is problematic to provide protection to people in need. Even though Australia alleges to struggle with a lot of boat arrivals, because it is only accessible through direct routes by sea for most asylum seekers, it is still not a country with the highest numbers of asylum seekers. The numbers of refugees received by their adjacent relatively poor neighbors are higher in comparison to more developed countries such as xxx. For example, in 2011, Australia reported about 4,500 boat refugees, while at the same time Pakistan hosted about 1.7 million refugees, and Iran over 850,000 refugees (Phillips & Spinks, 2013). As Phillips and Spinks (2013, p.6) point out sufficiently in their study, *"As government policy becomes more punitive, escalation of global conflict has forced many refugees to flee persecution, increasing pressure on countries such as Britain and Australia … Whilst migration is not a new phenomenon—on the contrary, both countries have long histories of immigration and settlement—the concept of 'asylum' has moved from a positive image of the 'settler refugee' to the refugee 'burden'".* Coming from a number of commentators, this poses the question of whether it is possible, or even more, if there is a need to focus more on protection and commitment to treaties and human rights rather than regulations and control of movements.

In the 1970s, the willingness to receive refugees was much higher than it is today. Most of these refugees were the result of wars and national conflicts. These events were global and had quite an impact on the creation of the 1951 Refugee Convention. The war crimes (mainly the World War II) were criticized and condemned by the international community, and many independent countries felt an obligation to help the 'victims'. As the number of refugees increased after the World War II, the attitudes towards them changed as well. Refugees became

people of concern and as a consequence, became more distrusted as 'genuine'[29] refugees. The hospitality that was shown by Australia after the WWII changed almost overnight. People were unsure about who they would let into their country. In 2001, 77% of the population supported Howard's government's decision to refuse access to Tampa, and 71% believed the boat people should remain in detention until any further assessments were made (Phillips & Spinks, 2013). The mandatory detention received a lot of criticism as many of the cases were wrongfully determined and many detainees were mistreated in the process.

The political interest was 1) to ensure that the people entering the country are genuine refugees, but also 2) to deport those who do not fall into that category. With the intention to avoid higher numbers of people coming by boats, Australia decided to receive more Indochinese refugees from the camps and take care of their resettlement. Between the 1990ies to mid-2000s, the scope of the measure of control widened to increase boarder checks, mandatory detention laws, and also engagement with the transit countries in the attempt to stop the smuggling (Phillips & Spinks, 2013). There was also an agreement between the Governments of Australia, Afghanistan and UNHCR that Afghan asylum seekers that failed to be recognized would be involuntarily returned back to Afghanistan. This harsh measure was applied increasingly in other cases "without sufficient opportunity to raise a protection claim" (Phillips & Spinks, 2013, p. 12).

Another strict policy that was supposed to serve as a discouragement of further boat arrivals was direct detention. Prior to 1992, detention was a necessary way to determine whether the refugees were genuine. The process of detention was extended after the Migration Reform Act 1992, when all unlawful noncitizens were detained. This particularly harsh treatment was meant to supposedly discourage boat arrivals. Naturally, these sanctions have a negative impact on the physical as well as mental health of detainees, especially children.

These new laws were introduced during the Howard government which refused to admit the findings of the bad health of the detainees until Howard himself was criticized and pressured to soften the detention policy. Even though the policy showed more flexibility, the main framework of detention and turning the boats around stayed unchanged (Phillips & Spinks, 2013).

[29] We refer to a genuine refugee according to the Refugee Convention 1951, therefore a person who is eligible to get an asylum.

Several attempts to decrease the number of boats coming to the shores of Australia did not succeed to the extent initially intended. Temporary protection visa were introduced in October 1999during Howard's Government. A lot of people were able to obtain permanent visa, based on temporary visa (Phillips & Spinks, 2013). It did not constitute, however, a durable solution, because under the temporary visa family reunification was not included. Consequently, many women with children joined the boats to reach another country.

For better illustration, it is vital to having a look at boats arrivals between the years 1967 to 2013. The first report of boat arrivals is dated 1989, peaked in 1999, and then started to decrease until 2008. From seven boats in 2008, it increased to 60 boats during the year 2009. The highest number in these statistics (Phillips & Spinks, 2013) is reported in 2012 where the number grew tremendously – 278 boats appeared in the international waters with the attempt to access Australia. Considering the global trend of armed conflict and the vulnerable situation in the Middle East and Afghanistan, the numbers will most likely stay high, if not increase in the upcoming years.

The main focus of governments over the years was and still is to ensure that the boat people are genuine refugees and to be prompt in distinguishing those who are not. The policies implemented had the primary goal of protecting the borders before protecting refugees. Keeping the boats from entering and depriving the genuine refugees from applying and seeking refuge is certainly not a sufficient effort to protect those who are in an urgent life situation.

4.1.4 International Law & Refugee Convention vs. Migration Act Australia

The main focus of this paper, and the questions that led us in our research is why are the boat refugees so easily targeted, prevented from entering the shore of the country approached (in this case Australia and USA), and what is done by the national governments to block the entry of the refugees, especially those coming by boat. In the sources we used and included, we can see a good amount of evidence about the number of boat entry attempts and the number of people received or denied.

In general debates on migration and refugees in Australia, we often cannot see the distinction between the various groups of asylum seekers[30] and therefore it is difficult to see whether the policies described apply to specific groups and whether or not the rules differ in each case. In many cases the situation was handled in a debatable way, violating both International Law and fundamental human rights.

As defined in the 1979 Refugee Convention, a refugee has the 'right to seek protection from persecution':

"Any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his/her nationality and is unable, or owing to such fear, is unwilling to avail himself/herself of the protection of that country" (Refugee Convention, 1951).

There is an additional Protocol (1967) that was established as a response to the situation that occurred after the wars (mainly World War II) and there was a need to complement the Convention due to the increasing displacement of people (Refugee Protection: A Guide to International Refugee Law, 2001). Australia is signatory to both and therefore is obliged to grant this right to the people in a life threatening situation.

Despite the obligations towards the Convention which is the basic ground for dealing with refugees, Australia has its own national Migration Act dating from 1989, according to which the minister can decide who can be granted the status of refugee and what conditions have to be met in order to be granted this right. Such a process can make it more difficult to fit into the category outlined by the minister, unless the person fulfills the exact requirements of the definition. And even then, the national laws and organizations involved in the asylum process are able to change the decision on the basis of further investigation of the individual cases of the refugees.

As mentioned before, the 1951 Refugee Convention provides a basis for signatory countries from which they are meant to build their national policies. Even though the RC is an essential tool, it is getting many critiques for various reasons. Chief among them is the point of time the Convention was drafted which is often perceived as outdated. Despite the critiques (also

[30] We talk about various groups of refugees in terms of differences in the conditions for obtaining the protection. The people coming into the country are seen as one group, but not all are necessarily gaining status of genuine refugees – genuine according to RC 1951.

from Australia, which is to be mentioned later on), it is an ageless[31] document that provides the definitions and responsibilities of states in cases of people experiencing torture and persecution. When it was created, it called other nations into action, demanding them to protect and provide help to those who are experiencing injustice in various forms. As nation-states developed and globalization flourished, migration changed into something perceived as a great problem for many countries, because of the flow of 'illegal' migrants, smugglers and the expansion of human trafficking (UNHCR, The Wall Behind Which Refugees Can Shelter, 2001). Despite the changes that took place over time and the criticism the Convention has received since, people seeking refuge will be dependent on this treaty as long as any changes will be made, or as long as RC will be complemented by another document. There is no doubt about the fact that RC helped 50 million people so far and provided them with asylum (UNHCR, The Wall Behind Which Refugees Can Shelter, 2001).

Initially the RC was established in a very urgent situation, when the consequences of World War II influenced the whole world. It was necessary to mobilize people into action and to realize the importance of protecting those who are not protected by their own governments. Going through changes, as mentioned before, the possibility of movement (migration) increased. Subsequently, the complexity of the question of how to regulate the expanding influx of various categories of migrants of whom not all could or certainly did not fit the characteristics of the status of refugee (UNHCR, The Wall Behind Which Refugees Can Shelter, 2001) grew.

In consideration of our choice of focus, we need to focus on asylum system of our case studies, including the organizations included in the process and policies ruling in the system. In the beginning as well as throughout the process, there are several agents that oversee each case of an individual arriving to Australia. At the arrival of the refugees in Australia, there is the Department of Immigration and Citizenship (DIAC), whose task is to determine who is refugee and to recognize those that fall under the definition. As mentioned previously, the persons who committed a war crime, or performed other actions that would be colliding with the aims of UNHCR and Human Rights, are not eligible to receive protection defined under the Convention. Australia is aware of this option, to which as a preventive measure it created the Australian Security Intelligence Organization (ASIO), which is to enhance national security (Saul, 2012). In

[31] By using this expression we emphasize the importance of implementing RC into national policies. It is receiving critiques, however, to this day it is a main guideline for the refugee situation worldwide.

its role, ASIO detains refugees when suspicion of any kind occurs according to which the person must stay in protracted detention. This is called *administrative detention*; the process of identifying a person. It becomes problematic when detention is prolonged for no obvious reasons and the persons of concern are not informed.

In addition to ASIO, there is a number of other institutions[32] that have a voice in migration processes and decisions making regarding the validity of the refugee status of a person. Courts in the case of Australia do not have the authority to intervene and influence or evaluate the decisions regarding these cases. There are few areas that are supposedly exposed to a threat of the influx of refugees: Australian national security is obliged to prevent the possibility for the Commonwealth and its people to become intimidated. There is also a bigger picture and that is the international initiative to suppress terrorism, to which Australia feels the responsibility to act against. Australia determines the definition of security from a wide angle. That includes protection of its people from "domestic or external

(i) espionage;
(ii) sabotage
(iii) politically motivated violence
(iv) promotion of communal violence
(v) attacks on Australia's defense system; or
(vi) acts of foreign interference." (Saul, 2012, p. 9)

This definition sets certain specifications. However, they are not explicitly provided to those who were refused the protection based on these reasons. Australia is marked by unreasonably protracting detentions that are supposedly based on security risks, but never proven to be reasonable. The system ensures detention but lacks a fair process for arriving refugees.

We are applying the logic that is used regarding the measures of detention as a pattern used in case of boat refugees. Detention is supposed to be performed just in case of serious security risk, which is compliant with international objective standards, that would recognize the reasons for detention as reasonable (Saul, 2012). In the case of boat refugees, the offshore arrivals are exposed to more invasive security measures than any other group of asylum seekers.

[32] DIAC, as standing for Department of Immigration and Citizenship, Administrative Appeal Tribunal (AAT), Independent Merits Review (IMR), Refugee Review tribunal (RRT), Refugee Status Assessment (RSA), International Covenant on Civil and Political Rights (ICCPR), Australian Human Rights Commission (AHRC).

The government of Australia has been greatly criticized for the harsh treatment, protracted detentions and double standard policies for various groups of refugees reaching the shores of the country. It lacks a solid reasoning for many of its decisions and the ways the law is being applied. The detention measures, even though not directly related to the focus of the paper, reflect the general mindset of policy makers and the shortcuts they take by creating new regulations and organizations that ensure the 'elimination' of the 'unwanted' while indirectly suggesting that the new, more specific categories should ease the process of recognizing who has the right to the status of a refugee. Detention is also applied in the situations of boat refugees, who are considered as unlawful entrants into the country (even though the unlawful entry is still a topic of debates in case of refugees). Despite the critiques, the detention is not prohibited, but is limited to a certain amount of time, even if the entry is classified as unlawful according to domestic law.

It is important to clarify the status of persons entering the country, especially given the means of transport which often implies the severity of the situation asylum seekers are fleeing from. Even if they apply for the release from detention they are refused on the ground of the circumstance of entry which shows the level of distrust they receive:

"The distinction between undocumented arrivals and those who become illegal after entry has resulted in the absurd situation where refugee applicants are categorized according to how they entered (or did not enter) the country. This statutory categorization determines…whether the applicant will be detained… It is inequitable and arguably disadvantages those potentially most in need of protection (i.e. those not able to use regular modes of travel)" (Reilly, 1995).

The identification is crucial for the refugees as well as for the country of entry. The detention followed by removal is, according to UNHCR, the last resort in fighting the possible threat refugees might present. That threat is also specifically designated as a situation in which the refugees represent a threat in the present or future, specifically for Australia. Threats in the past or in another country are not a valid and sufficient reason for expulsion of refugees (Saul, 2012). The 1979 Refugee Convention sets the rules that determine if refugees are denied the status of refugee. However, the assessments by Australia's ASIO are not authorized under the Refugee Convention.

Even though states are obliged to protect refugees, they are not required to allow everyone on their territory, according to the Convention. Once a foreigner enters the country, it is

a state's right, based on *sovereignty*, to not allow the person on their territory. An exception in this general rule is that when it concerns refugees, the country is not allowed to return this person to the country of origin where he/she might face persecution from various reasons. That applies regardless of the way the person entered the country – whether it was legal or illegal entry in terms of the country's immigration rules (Refugee Protection: A Guide to International Refugee Law, 2001).

There are certain exceptions in who is to be granted protection, and there are certain categories of people that do not fit into the definition. The persons of concern are those who have a criminal background, more specifically those who violated international law or acted against human rights law which puts them in a category of a possible threat and therefore they are not considered to be the ones in need of protection. As outlined before, the measures to identify the persons of concern and possible threat vary from country to country. There are few categories that represent questionable cases in whether the protection applies to their situation. What follows is a case study of Australia and its national system and regulations which determine who will or will not be allowed into the country.

The refugees and humanitarian applicants (those who do not satisfy the definition of refugees but are still in need of protection) are divided into two categories: onshore and offshore applicants. The majority of detained refugees are offshore applicants, those who entered illegally, without any visa or documents. The Migration Act specifically describes when and how the power to detain can be performed[33] (Reilly, 1995).

[33] "(a) "prohibited entrants" – s. 88 of the Act enables an authorized officer to keep in custody any person who is on board a vessel when that vessel arrives in Australian waters, being a stowaway or any other person whom the officer believes would become an illegal entrant if the person were to enter Australia. The prohibited entrant may be detained until the vessel departs, or until the person is granted an entry permit, or such earlier time as the officer directs.

(b) "undocumented airport arrivals" – s. 89 of the Act enables an officer to keep in custody a person who is on board an aircraft in the same circumstances as those delineated in s. 88 above. The person may be detained at the airport or another place until the person is removed from Australia or is granted an entry permit,

(c) "unprocessed persons" 0 s. 54B to s. 54H of the Act refers to people who have travelled to Australia in a boat or have disembarked at an airport. When an officer supposes that the person would upon entry to Australia become an illegal entrant and that it is not possible to decide whether to grant the person an entry permit, the person becomes an "unprocessed person" and may be taken to a "processing area". The unprocessed person may be kept in a processing area until granted an entry permit. A prohibited person must be removed from Australia as soon as practicable.

(d) 'designated persons" – s. 54J to s.54U refers to people who arrive in Australian territorial water after 19 November 1989 and before 1 November 1993 without visas, who are in Australia, and who have not presented a visa or entry permit. Such persons are referred to as "designated persons". They must be kept in custody and may only be released for the purposes of being removed from Australia, or when granted an entry permit. They may only be removed upon request, if they do not apply for en entry permit or if refused an entry permit. The

The Migration Act defines the boats as 'unauthorized maritime arrivals'. This term replaced the former term of 'offshore entry person'. Sections 46A and 46B prevent the unauthorized maritime arrivals from access to valid application processes (1 Protection Visas, 2015). Refugee Convention 1951 addresses this issue very specifically in Article 31 regarding refugees unlawfully entering the country of refuge. The Convention encourages the contracting states not to apply restrictions or impose penalties based on their illegal entry or presence, as long as they present themselves to the authorities with no delays. The importance is placed on the protection of persons who might be fleeing from threats to their lives and freedom. Therefore the examination of their status and providing them necessary facilities and the admission to the country they reached (or another country) are of the utmost importance.

In reality, unfortunately, many states do impose penalties and they apply actions that are unlawful and contradictory to the Convention they subordinated themselves to. The case of the offshore entrants is alarming, because they are deprived off the right to access any facilities, services, and are not provided with any legal advice and legitimate process.

Nevertheless, the Refugee Convention also outlines the already mentioned sovereignty of states, which gives them the authority to decide whether the person/people wanting to enter the country are undesirable. Art 31§1 (Refugee Convention, 1951) explains further the impact of the decision of a state to label the foreigner as undesirable. The options of such a person are limited and most likely end up crossing the borders of another country-ies illegally or they escape into hiding. The detention of refugees who have reached Australian territory is meant to be a warning for future refugees attempting to leave their countries in the hope to resettle in Australia.

This implies that current refugees serve as tools to lower the influx of future refugees. Not only does this strategy lack potency, it also overlooks the basic human rights of refugees (Reilly, 1995). As we can see in the case of detention of refugees, the aim is to create a disconnection from the receiving society by isolating them. This results in restriction of

designated person class appears to include boat arrivals who have not entered Australia as well as boat arrivals who have entered undetected. "Designated persons" are prohibited from applying for release from custody.

(e) "illegal migrants" – s.92 of the Act enables an officer to detain in custody an illegal entrant. The illegal entrant must be brought before a prescribed authority [magistrate] within 48 hours. The prescribed authority may order the release or authorize a person to be detained for no more than 7 days. The Minister or Secretary [in practice, a compliance officer] may order the release of a person in custody anytime.

(f) "deportees" – s.93 of the Act enables an officer to detain any person against whom a deportation order has been issued. Although a prescribed authority may not order the release of a deportee, the Minister or Secretary has a discretion to order a deportee's release (Reilly, 1995).

information on both sides and creates fear of each other and the perception that there is undoubtedly a reason for the distinguishing between 'us' and 'the others'.

In the context of information in previous chapters, the Australian government (increasingly in different eras) was creating new ways and sets of rules that could possibly restrain the influx of boats from coming. The well-known case of *Tampa* from August 2011[34] resulted in the 'Pacific Solution', the border protection measures that were implemented in the 1958 Migration Act. The Christmas, Ashmore, Cartier and Cocos Islands were excised from the migration zone. Therefore, it was impossible for the asylum seekers to make a valid application since the jurisdiction of Australia was not involved in that matter (Phillips & Spinks, 2013). The cases were not handled by Australian Law, therefore the claimants had no access to legal help.

Nevertheless, this concept is an irony when we recall the origins of Australians, who are descendants of first boat people and therefore the reluctance of receiving the boat people nowadays is a paradox.

4.1.5 THE ROLE OF UNHCR

UNHCR is a non-political organization that has an irreplaceable role in the refugee situation. Starting out as a small agency, goals and plans were not fully formulated, but over the years, the expansion meant a tremendous increase of staff members, offices in 120 countries and an annual budget of US$ 1 billion (Refugee Protection: A Guide to International Refugee Law, 2001). It has a mandate to provide protection to refugees and other groups that are not included in the refugee definition (e.g. humanitarian refugees). The mandate was an expansion of the responsibility entitled to UNHCR by the General Assembly, when the need to include certain groups occurred necessary. Therefore, the persons of concern are not only the refugees defined according to Convention, but also: *"persons fleeing conflict or serious disturbances of the public*

[34] The *Tampa* incident is dated to 26th of August 2011 when Australia Government sent a plea to nearby vessels to conduct search and rescue mission. Tampa was a Norwegian ship that responded to this call. Tampa discovered a vessel Palapa that was headed to Christmas Island with 483 refugees onboard. The captain, Arne Rinnan took them as far as it was possible until the Australian government forbid them to enter their territorial waters. Tampa struggled with overload and other issues and sicknesses onboard. Finally on 3rd of September, asylum seekers were transferred to Nauru. From this number, 131 of them ended up in New Zealand, and rest was scattered. This event resulted in Boarder Protection Bill, which was a turning point in the system away from legal system to military and government officials. That also gave the Prime Minister right to turn the boats around (Gentry, 2007). Available on: http://www.amnesty.org.au/refugees/comments/how_tampa_became_a_turning_point/

order (i.d., refugees under the OAU Convention and Cartagena Declaration definitions), returnees (i.e., former refugees), stateless persons, internally displaced persons (in some situations)" (Refugee Protection: A Guide to International Refugee Law, 2001, p. 23). Even though it is not in our interest to focus on all the categories mentioned, it is of a high importance to emphasize that UNHCR has a wide focus and has clear definitions of the people who are entitled to be granted protection.

UNHCR's work is to ensure that protection is provided also by encouraging countries to share the influx of refugees. In particular, UNHCR emphasizes the importance of countries in close proximity – mostly geographically- to the countries of origin of refugees. This can be done in various ways; whether the support is financial or material, states are called out on their ignorance towards the people affected by various conflicts and disadvantages they face in their country of origin (Refugee Protection: A Guide to International Refugee Law, 2001). Nevertheless, the suggestions for states to get involved is something that UNHCR is not fully able to enforce, despite the fact that the countries are signatories to the Convention and thereby obliged to follow the sets of regulations.

The system of protection is complex and often involves more than just one institution that administers the case or that has a certain level of responsibility. Undoubtedly, there is not a lack of institutions, whether governmental or independent, to ensure that protection will be delivered fairly and that all aspects are considered with the utmost equity. The Executive committee of UNHCR was established in order to not only advice, but also to approve the programs proposed by the UNHCR. The Committee consists of member states and holds regular annual meetings. The parliaments of the member countries constitute a partnership. Its main liaison is the Ministry of Foreign Affairs of each respective country. However, as the scope of the issue widened and the responsibilities were cross-cutting increasingly into more areas, it was necessary to involve departments of interior matters, justice, immigration etc. (Refugee Protection: A Guide to International Refugee Law, 2001). The main partners include but are not limited to WFP, UNICEF, WHO, UNDP, OHCHR, OCHA, and IOM. They were established to contribute to UNHCR's goal to provide help and protection in various ways; either by providing legal advice, food and nutrition, human rights issues, or development activities etc. Furthermore, the existence of NGOs in the respective countries support the ambitions of UNHCR, but those are usually

dependent on external support, which is often not satisfactory and causes the organizations to struggle to work towards the vision of comprehensive support and protection.

According to a guide to international refugee law regarding the refugee protection (2001), states can adopt more inclusive refugee criteria than those known from the Refugee Convention. Nevertheless, the countries are still obliged to recognize refugees according to existing criteria outlined in xx and to ensure the security for persons by granting them asylum or assisting with repatriation in the country of origin or a third country.

4.1.6 MEDIA AS A TOOL OF SECURITIZATION (FORMING PUBLIC OPINION)

What makes the situation of the boat refugees more difficult is also the interpretation and labelling of such people not as people who are in need, but as people who are 'invading' Australia. These notions are commonly triggered by governments as well as by the interpretations of the media, addressing refugees to be 'queue jumpers, disease carriers and illegal immigrants' (Perera, 2002). The intentions to make connections and linkages with religious issues and terrorist groups all around the world are often very successful and blind-folding people with regard to the refugee issue, enhancing the fear of the 'outsiders' based on assumptions and generalizations.

That was especially the case after the events of 9/11 when Prime Minister Howard referred to the population of Australia as *Anglo-Australian*s. During the same time, he 'defended' Islamic Australians by stating that they have the same place in the community as anyone else *if* they show commitment and loyalty to the country, which according to Suvendrini Perera (2002) implies that they have to deserve the place in the community while to the other Australians it is given. Such language showed the tendency towards securitization of a new era of dichotomy between a pre- and post-9/11 world. It permeated different levels and areas of society through manipulation by government and subsequently the media. In the words of the Minister, it is the sovereign right to choose who the country receives and under what conditions it will do so. The hesitation to receive refugees no matter how they enter the country is justified by the fear of losing the identity and exposing its citizens to a danger created by the new-comers who are expected to be the reason of increased criminality. With these and other threats, Australia keeps the boats offshore with the intention to prevent facing the differences the

refugees bring to the country of entry. Often it results in assumptions about the loss of identity and culture. However, all of that was initially created by the boat people first resettling in Australia, from which nowadays Australia's non-Aborigine population descends.

4.1.7 DEBATES ON OBSOLESCENCE OF REFUGEE CONVENTION

The debates regarding the 1951 Refugee Convention evolve around its effectiveness and impact several decades since it was established. It is assumed to be an *"outdated, unworkable, irrelevant, or an unacceptably complicating factor in today's migration environment"* (Feller, 2001). According to Erika Feller (2001), it was not created as an instrument of migration control. It has an impact on the migration, but it clearly specifies a particular category of persons. Border control, deportation or turning boats around is not a sign of deficiency of 1951 Refugee Convention, but rather an inability of states to establish sufficient measures of control without violating the Human Rights.

Adrienne, Millbank (2000), for Social Policy Group, stated some major issues that Australian government is handling the flows of refugees and the problems arising from that. The fact that the issues and the increasing pressure on borders is an obvious and current circumstance, makes certain countries, including Australia, question and criticize the mandate of the 1951 Refugee Convention. Millbank (2000) emphasizes that the nature of world changed and therefore the Refugee Convention is not able to keep up with the current demands and problems that were not experienced before. Further on, the criticism is directed to inability of the Convention to address the financial, social and political burden of the states and supposedly takes no account of the impact. On one hand, there is a demand for a more precise specification from the UNHCR, on the other hand it is accompanied with fear of extra obligations required from states on top of the Convention-based asylum. This article also states that the illegal entry of refugees undermines the public support for immigration. Statements as such express certain implications that are addressed towards mainly UNHCR and Refugee Convention, holding them responsible for the poorly handled refugee situation, protracted detention and returned boats. Not only are these measures an initiative of Australian government, but also the reality of the events is partially twisted by media (the previous chapter).

However, Refugee Convention has certain shortfalls: despite the flexibility and possibility of expansion, the RC has gaps that at the time of formation of the treaty were not yet a controversy that needed an attention and solution. Those are progressively questions of gender, asylum or burden sharing. As is known, the formulation of the definition of the status of a refugee clearly says that an individual has 'the right to seek asylum', which automatically implies that the person doesn't have the right to be granted asylum, therefore the governments frequently interpret this a their right to withdraw this notional right of the person suffering the persecution to receive the protection by any means (UNHCR, The Wall Behind Which Refugees Can Shelter, 2001).

Although certain specification of the situations that were not imaginable at that time, RC provides sufficient grounds for those who justify for obtaining the protection. One of the main and rising matters is the inability of states to share the burden of refuges coming into the developed world. To argue this, it is eminent that the countries that are still in the phase of ongoing development are burdened greatly and greater that the countries of the 'western world', yet do not have the same opportunity to speak out and expect prompt answers to solve this situation.

The rule of *non-refoulement* is compulsory to all the states, even if they are not signatories of the Convention. They are obligated to ensure that the protection is maintained whether in the country where the application process took place, or a third country. This speaks for the importance of providing the protection to the people in need, and emphasizes the responsibility of all, but especially signatory states of the Convention.

The *argument* about the definitions and various interpretations of the procedures according to RC: As a result of certain flexibility and openness to wider scope of the target refugee group, providing the benefit of choosing the specific characteristics of refugees that are welcome on the national level by ministers carries likewise a space to open criticism, which is especially a case of particular phrasings. That we can see in the Australia's situation, where as many other states, the debate about who is actually the addressee of the points made in the RC. The argument revolves around the fact that it was initially aimed at the individuals not the whole, big groups of 'blurred cases'. That underlines the decisions and installation of certain organizations on national level, whose role is to decide who conforms and who is out of scope of the very distinct definition. Australia has adopted this interpretation of the law and thus,

obtaining a status of refugee is not automatic simply as a result of the national conflict in the country of origin. The standard of proof that the threat is of a personal and direct character is higher than the requirements of the RC (Dicker & Mansfield, 2012).

In many countries, such as Australia, the standards of 'well-founded' fear vary and receives different level of importance. The definition includes more specific characteristics, but as stated in the Refugee Convention, many countries adopted the concept of persecution in a stage where it does not involve the action yet, but is a possible threat to an individual. Unfortunately, Convention, doesn't cover this fully, therefore the answer is relying on the judicial view which is that *'persecution connotes the injurious and oppressive action'*[35] (Refugee Convention, 1951).

The importance of RC is often questioned and its deficiency is criticized. Nevertheless, Convention still carries a lot of weight and importance in the 20th century. Even though the characteristics and patterns of migration have changed, and despite the fact that the complexity of people entering mostly countries in the Northern hemisphere is enormous, it is a document upon which many individuals who genuinely suffer from persecution and violence in their countries of origin depend on in the hope of safe escape and perhaps a better life in a new country. Many concerns are related to the human trafficking and increasing numbers of smugglers transporting persons by the sea to a new country, which are though, unfortunately, an unavoidable 'side-affect' of globalized world, open borders, but often the only hope for the persons fleeing from the country where they face persecution. The mean of entry of these persons is debated and especially spotted by the authorities for being untrustworthy. However, we also believe that these means of transportation and entry should be considered as mostly the ones of last and desperate attempt to escape the situation, given the cost and low safety of this way of escape, with no warranty of success (Feller, 2001).

All in all, Australia's reputation regarding the treatment of refugees and asylum seekers was criticized number of times and government's decisions were and are proving right to these critiques. Those are not only concerning the boat people, but it also involves the asylum seekers and the refugees independently of the means of transport and independently of whether they are approaching the country or they are already on the land of Australia.

[35] Introduction of Refugee Convention: Commentary by Paul Weis

The response of Australian government to the refugee situation is in many cases pushed into extremes and is an example of misuse of the sovereignty that the state possess. One of the strategies of Australia was the excision of some of the islands, and that resulted in increased attention of the people smugglers. At the same time, critiques from Australian ministers and migration politics was directed to the captains of the boats transporting the refugees, referring to them as to people's smugglers and rescuing the boats as an assistance to illegal migration (UNHCR, Background note on the protection of asylum-seekers and refugees, 2002). Nevertheless, as we emphasized in chapters before, the means of transport, or possible smuggling should not exclude the asylum seekers from seeking the asylum in the country they are approaching. This thought is supported in the Protocol against the Smuggling of Migrants by land, Sea and Air. It is a comprehensive legal instrument which states that being smuggled is not deprivation of the rights regarding the protection and assistance measures. Art 19 says there is no conflict between international refugee law and international law to combat crimes. Likewise, the Human Rights Law supports disembarkation/rescue regardless the legal status or the circumstances in which they were rescued. (UNHCR, Background note on the protection of asylum-seekers and refugees, 2002). Therefore the responsibility to protect and provide assistance is a must and should be fulfilled in respect to the Convention and other attributable laws. Even though the question of who is eligible for protection became a controversial issue also because of the increase of the migration, the sovereign right of states to choose who is welcome and who will not be provided the benefit of going through the process of seeking the asylum.

There are few recent events in Australian politics that significantly marked the situation of refugees and asylum seekers. Known for the harsh treatment and getting rid of the responsibility, Australia toughened its approach and resulted its struggle in solutions that are *beneficial* for their national security. The world is observing the events with a large portion of criticism and despise, however, not only Australia, but other parts of the world likewise are hostile towards the other, unknown threatening groups of people. The values of protecting humanity are being overruled by individualism and own prosperity.

A short example[36] of the twisted strategies Australia has, however not directly connected to the boat refugees, is the isolation and 'getting rid of' the refugees coming to Australia, or

[36] Available on: http://time.com/3443252/australia-asylum-seeker-refugee-cambodia/

already present in Australia. The recent and striking even from September 2014 is the agreement between Australia and Cambodia to ship refugees over to the already impoverished Cambodia.

This was not a difficult task to do, because more than the absurdity of such a decision, the promise of the financial benefit appealed to the leaders in Cambodia. We are talking about benefit of 35 million USD plus other allegorical blank check to cover the expenses of resettling the 1,233 mainly Middle Eastern asylum seekers. What we can see here is that Australia is willing to pay a tremendous amount of money to Cambodia, which is unable to possibly handle the responsibility and also carries a bad reputation for the treatment of refugees. The question here outstands: Why is outsourcing refugees away from Australia a better option, while at the same time costs Australian government millions of dollars? Does this act reflect the financial burden the refugees would represent if they had a chance to resettle in Australia? We consider these facts as a support for our theoretical focus meaning that the interventions into the refugee system reflect the already criticized intolerance and violation of treaties, in the name of protecting the national security.

What Australia doesn't realize yet is that they might be closing the door to themselves from the international help in case of possible future emergencies (Neubauer, 2014).

4.2 USA CONTEXT

The United States of America, as we know it nowadays, was built on the grounds of massive immigration from several parts of the world which led to the creation of a multicultural country, and the several conflicts that happened since its proclamation as a state have contributed to it, is common knowledge. However this is not the issue that we desire to analyse, but rather is the feature that made us choose USA in this comparative study. Our aim is to analyse how USA has been dealing with the issue of refugee and asylum seekers coming to the country by boat, the so-called Boat People. In other words, we are in search for answers regarding to what are the policies of the USA in relation to this specific group and what have been the reasons behind them. According to Holman, since the end of the II World War, no other Western country has received as many refugees as the US, and only from 1946 to 1994 the country has allowed access

to permanent residence to almost 3 million refugees and asylum seekers (Gibney, 2004). However, during the decade of the 1980's the flux of asylum claims was not constant, experiencing declines and increases in the numbers, only to reach a peak in 1996 (Wasem, 2011). Without specifying the reason behind it, the same author (2011) also indicates that from the very next fiscal year, 1997, "affirmative asylum cases decreased by 79% and defensive asylum claims dropped by 53% by FY2009". This trend has worsened since the nineteenth century and early twentieth century, explains Bohmer and Shuman in his book Rejecting Refugee: Political asylum in the 21st century (2008). The authors explain that: "(…) the US has moved from being a nation that welcomed the huddled masses with open arms to one frantically trying to keep its borders secure by allowing only a select few to enter. Every applicant for immigration or asylum is a potential terrorist" and "we keep tightening the law to make it harder and harder for asylum seekers to be successful in their claims" (2008, p. 11).

In fact, one hundred years ago the category political asylum was not needed due to the fact that one did not have to give a justification for an admission claim, and in fact until the 1920's, one only had to have a reasonable heath condition to be accepted into the country[37]. And albeit the existence of that category nowadays, it seems it us used only in extreme situations, as if it is a preventive and security behaviour to avoid opening the "floodgates to all the miserable, needy" (Bohmer & Shuman, 2008).

Thus, immigration and asylum, despite its protective character recognized at an international and normative framework level, it has become associated with security issues. And the US is no exception in this current trend to consider asylum as a component of security, as it is within the scope of action of Homeland Security, one of the US government departments (Betts A. , 2009). As it has been said before, refugees and asylum seekers have been gradually associated with terrorism, and therefore to be seen as a potential source of threat to the national and economic security, an idea fuelled by political rhetoric and the media, especially after the 9/11 events (Betts A. , 2009). This off course has led to the subjection of refugees and asylum seekers to a rough and endless process where they have to prove repeatedly that their claims are real and they have fled persecution, and it is not just an attempt to enter the country in search of a

[37] Unfortunately, this rule did not apply to everyone, being the Chinese nationals an exception as a result of a special racist exclusion statute in 1882, and the Japanese nationals by treaty (Bohmer & Shuman, 2008).

better life, and that they are not a case of "bogus" asylum seeker (Bohmer & Shuman, 2008). The quote below was drawn from a report aimed at US Congress:

"Because 'fear' is a state of mind, assessing the merits of an asylum case rests in large part on the credibility of the claim and the likelihood that persecution would occur if the alien returned home. These two distinct concepts – the credibility of the claim, or 'credible fear', and the likelihood that persecution would occur, or 'well-founded fear' – are fundamental to establishing the standards for asylum. A third dimension that overlays these concepts is the matter of 'mixed motives' for persecuting the alien." (Wasem, 2011)

Nevertheless, how the United States deals with migration asylum movements has always been a target for discord and under constant attack, for different and often opposing reasons. Some might advocate that there is a "peculiarly American sensitivity to immigrants in need" while others consider that the acceptance of refugees is not for humanitarian reasons and solidarity, but more as something deeply related with US foreign policy (Gibney, 2004). As for example, when granting refugee admissions to individuals fleeing from communist regimes, as a technique that would "contribute to the overarching objective of damaging and ultimately defeating Communist countries" (Newland, 1995), while denying it to the ones coming from 'friendly' dictatorial regimes (Joppke, 1997). Newland (1995) actually states in her work the existence of this correlation, giving the example of US discouragement policies towards political refugees coming from Chile escaping from Pinochet's regime after 1973, and Salvadorans, Guatemalans and Haitians seeking to flee from right-wing dictatorships.

There is no doubt that the evolution of the US refugee and asylum policy have been greatly influenced by the country's foreign policies, but not every academic share the same opinion regarding its dimension. For instance, Gibney (2004) believes that it has been often exaggerated, and gives the example of Reagan administration's decision to interdict the entrance of Cuban anti-communist refugees despite the fact they fact they were coming from a communist denominated country and the tense diplomatic relations between the two countries. He points out that the refugee and asylum policy has been shaped not only by ideological and strategic considerations but has been also by a several number of actors with a wide range of objectives:

"Empowered or weakened by specific events, the Executive, the courts, ethnic organisations, special interest groups within and without Congress, and the American public at large, have all struggled to influence the composition and volume of refugees and asylum seekers

arriving in the US. Notwithstanding its distinctive status as a super power, US policy and law relating to refugees has, as in other liberal democratic states, been shaped as much by domestic political considerations as foreign policy calculations." (Gibney, 2004)

In order to better understand asylum in US, the next subchapter will address the more recent history of the asylum practice and law in the country. The subchapters that follow will be related to the different refugee groups characterized for trying to reach the US territory by sea in illegal boats.

4.2.1 REFUGEE AND ASYLUM LAW AND PRACTICE IN THE USA

Since the colonial era, US has been a safe and welcoming destination for many religious and political dissidents from around the world, however it has not been always this way and it was only after the entrance of the country into the II World War that the story of modern American refugee policy began (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009). Right before the beginning of the conflict, in 1932, and despite the existence of warning signs of what was happening in Nazi Germany, President Herbert Hoover stated that due to the spread of democratic values in foreign countries, political persecution no longer presented itself as a problem and there was no need to continue providing asylum in the US. And during the war, with undeniable proof that European Jews, among other groups, were being victims of a relentless persecution, the American public opinion opposed to their admission as refugees, with 83 per cent of Americans opposing to admitting Jewish refugees in 1939 (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009). And the fear was one main reason: "Among the reasons for the resistance were the Depression and the accompanying fear of competition for jobs, a fear that the refugees would hold subversive political views, and anti-Semitism"; eventually this general picture began to change, being accepted more and more refugees over time and development of the war and at its end, as was the case elsewhere.

After the end of the II World War, and facing the fact that local integration and repatriation was not a suitable solution for all, the resettlement in countries outside Europe became more and more the only viable answer to deal with this situation. Therefore, by the late 1945, the US Executive adopted a favourable idea of accepting in the country these displaced

persons, mainly due to an inevitable recognition of the situation and pressure from domestic Jewish organizations (Gibney, 2004).

Curiously, and again according to Legomsky (2009), the US has never ratified the 1951 Refugee Convention, only "binding itself derivatively" in 1968 with the ratification of the 1967 Refugee Protocol.

But one must acknowledge that there was a specific group that the US admitted in large numbers: refugees from communist countries[38]. Albeit during the Cold War all countries showed a sympathetic behavior towards refugees fleeing from communist countries, it seems like none of them took it as seriously as the US:

"While all Western countries gave special preference to refugees from communist countries during the Cold War, no country knit together its definition of a refugee with escape from communism as tightly as the US. Before 1980, refugees from non-communist countries (with the sole exception of the Middle East) had no status under US law. Even after a more neutral definition was legislated in 1980, Haitians, El Salvadorans and others from US-backed regimes found themselves unlikely to be granted refugee status." (Gibney, 2004)

For this purpose legal mechanisms were created and employed, which encompassed a number of *ad hoc* statutes and a statutory device titled 'parole'[39], that allowed the Attorney General to admit temporarily an individual in the US for humanitarian grounds, as well as the 1965 statute which permitted that "up to 6 per cent of the general visas could be allocated to those who were fleeing persecution in either a 'communist-dominated' country or a country in the Middle East" (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009). However, in 1996 the Congress prohibited the use of the parole provision, leading to the absence of a statutory authority with the ability to admit in the US individuals that face others life threating situations other than persecution or torture (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009).

With time the limitations of these legal mechanisms became hard to overlook and gave place to the pressure to build a more comprehensive refugee policy, leading to the Refugee Act

[38] It is worth noting that refugees from the Chinese People's Republic were not included in this group (Newland, 1995).

[39] "The term 'parole' is more familiarly used to denote one's early release from criminal incarceration, but in 8 USC s. 1182(d)(5)(A) Congress used the term more broadly to describe the government's grant of permission to a non-citizen to enter US territory for special compassionate reasons." (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009)

of 1980, with the purpose to include the US obligations under the 1967 Refugee Protocol into US domestic law, altering in several ways the Immigration and Nationality Act[40]. And for the first time it was established the US statutory definition of refugee, moving closer to the definition contained in the Refugee Convention as expanded by the 1967 Protocol (Gibney, 2004). This change led to the creation of a programme focused in the resettlement of refugees coming from the overseas, with the specific provision of *non-refoulement* to the refugees arriving US shores on their own, accordingly to the 1951 Convention and 1967 Protocol (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009). However, despite the changes made with the Refugee Act of 1980, US tendency to react to the question of communism persisted, favoring the refugees and asylum seekers coming from countries with this political overview and relegating to second place all the others:

"Even after enactment of the generic provisions of the Refugee Act of 1980, and continuing until a few years after the end of the Cold War, US refugee policy was famously preoccupied with communism. Refugees from communist countries were liberally admitted, while refugees from other totalitarian regimes enjoyed only rare success." (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009)

4.2.2 US LEGISLATIVE FRAMEWORK

In "Refugees, Asylum and the Rule of Law in the USA", Legomsky (2009) explains that due to the Refugee Act of 1980, the US has the biggest offshore permanent resettlement programme for refugees among the all the countries in the world and the details of this admission programme is included in the Immigration and Nationality Act[41]. This implies that the US President, after accessing with the Congress, and before the start of each fiscal year, determines the maximum number of refugees and asylum seekers that can be admitted in the following year, in accordance also with the regions and countries of origin. For instance, for the FY2014 the ceiling for admission of refugees from Latin America and the Caribbean is 5.000, from which the vast majority is intended to Cubans nationals processed through the in-country program[42]. The process then becomes the responsibility of the Secretary of Homeland Security, who will decides how many will be admitted, within the limits already stipulated by the President. In

[40] 8 USC ss. 1101 et seq.
[41] 8 USC s. 1157.
[42] U.S. Department of State - http://www.state.gov/j/prm/releases/onepagers/228695.htm

order to be admitted one must meet a number of criteria, among them the refugee definition that governs asylum and is not already resettled in a different place[43]:

"Those who are found to meet the refugee definition (the same definition that governs asylum, as discussed later) and who are not 'firmly resettled' elsewhere are then admitted on the basis of published priorities that change from time to time. Common factors include the urgency of the person's plight, the location of close family members, and various foreign policy factors." (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009, p. 126)

Even though it is not possible to state that the number of refugee admission has been unswerving before, the 9/11 events contributed to its reduction (Betts A. , 2009), intensifying the nexus between the refugee and criminality, labeling them as 'foreign terrorist' (Macklin, 2005). As well as the harsher policies aimed to make harder for foreigners to enter into the country (Gibney, 2004). One of the consequences, and based on claims of national security concerns, then US Attorney General John Ashcroft used his statutory authority to subject asylum seekers traveling by sea to expedited removal[44], together with the reduction of the opportunities for independent review of asylum decisions by instructing the Board of Immigration Appeals[45] to dismiss a backlog of 56.000 cases within six months (Macklin, 2005). The expedited removal is above all a border procedure intended for non-citizens that reach the ports of entry lacking proper entry documents or under suspicion of fraud, and from the point of view of the restrictive policies it has the advantage of reduce procedural rights and mandatory detention (Legomsky, 2006). In 1980, the UNHC expressed its concern with the growing tendency of states to detain and expel the asylum seekers, and one year later the Executive Committee issued a report with detailed recommendation on how to protect and treat refugees in case of mass scale influx (Goodwin-Gill, 1986). But gradually it has been changing and since then the numbers have been increasing (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009).

The US Law also contemplates other provisions which allow aliens arriving spontaneously to the country, the offshore refugees, to apply for asylum or/and *non-refoulement*,

[43] Detailed information regarding the process of admission of refugees can be found in: U.S. Citizens and Immigration Services: http://www.uscis.gov/humanitarian/refugees-asylum/refugees/united-states-refugee-admissions-program-usrap-consultation-worldwide-processing-priorities; U.S. Department of State: http://www.state.gov/j/prm/ra/index.htm

[44] Notice Designating Alien Subject to Expedited Removal Under Section 235(b)(1)(A)(iii) of the Immigration and Nationality Act, 67 Fed. Reg. 68924 (Nov. 13, 2002) - http://www.gpo.gov/fdsys/granule/FR-2002-11-13/02-29038

[45] BIA is responsible for hearing appeals from first level asylum decisions, in order to prevent that someone is sentenced to unfair removal (Macklin, 2005).

that unlike Australia (Kneebone, 2009) has no impact on the number admitted in the asylum programme, neither the other way around (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009). The implementation of the *non-refoulement* provision in the US, which is one of the international obligations the Refugee Convention and "lies at the heart of refugee protection" (Macklin, 2005), led the Congress to create a measure called 'withholding of removal' for those who fail to receive asylum. This measure has the purpose to prevent the return of an asylum seeker to the country of origin where she/he is a victim of persecution, but does not allow the refugee's permanent admission to the US (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009). However, there may be situations where exceptions[46] to the principle of *non-refoulement* can be applied but only if the refugee poses himself as serious danger to the national security of the hosting country (Macklin, 2005).

Another alternative the applicant may face is the removal to a third safe country, as for example the case of the agreement between the US and Canada, called 'Canada-US Safe Third Country Agreement', which is part of a group of measures brought up after the 9/11 events, also known as 'Smart Border Action Plan", based on the Dublin Convention. This agreement designates as 'third country' a state that the asylum seeker has crossed to reach either the US or Canadian soil, and as 'safe' signifies that it is expected that that country will provide protection to the asylum seeker, in accordance t the 1951 Refugee Convention and 1967 Protocol, , and will fairly adjudicate asylum applications (Macklin, 2005).

[46] Exceptions to the principle of *non-refoulement* on "Note on Non-Refoulement (Submitted by the High Comissioner:
"12. While the principle of non-refoulement is basic in character, it is recognized that there may be certain cases in which an exception to the principle can legitimately be made. Thus Article 33(2) of the 1951 Refugee Convention provides that:
"The benefit of the present provision [i.e. Article 33(1) referred to above] may not however be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."
13. Such exception based on factors relating to the person concerned does not figure in the other instruments – either universal or regional – mentioned above. Provision is, however, made for certain other general exceptions, viz: "over-riding considerations of national security or in order to safeguard the national security or protect population,"[1] "in order to safeguard national security or protect the community from serious danger".[2]
14. In view of the serious consequences to a refugee of being returned to a country where he is in danger of persecution, the exception provided for in Article 33(2) should be applied with the greatest caution. It is necessary to take fully into account all the circumstances of the case and, where the refugee has been convicted of a serious criminal offence, to any mitigating factors and the possibilities of rehabilitation and reintegration within society." - http://www.unhcr.org/3ae68ccd10.html

Both countries are aware of their legal obligations, as signatories of the Refugee Convention, to protect refugees and asylum seekers on their territories as well as the duty of *non-refoulement*. For Macklin (2005), this agreement is basically an attempt of policing the borders, and from this point of view, the asylum seekers and refugees, even those that successes in obtaining a refugee status, represent a failure to perfect border control and *non-entrée* policies:

"While such policies can never entirely succeed in preventing entry, they may reduce numbers, and they can and do consign a growing proportion of entrants to the illegal category. As the number of illegal increases, so does the public clamor for more restrictionist measures, which further augments the illegal population. Refugees do not cease to enter, but they decreasingly enter as refugees." (Macklin, 2005, pp. 369-371)

The provisions mentioned above represent part of the Congress's efforts to adapt US domestic law to the obligations under the Refugee Convention. However, there is still some of the Convention's provisions that have not been implemented, as the US government have unhesitatingly maintained that "the Convention is not self-executing", meaning "there is no domestic enforcement mechanism in the USA for the non-implemented provisions" (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009).

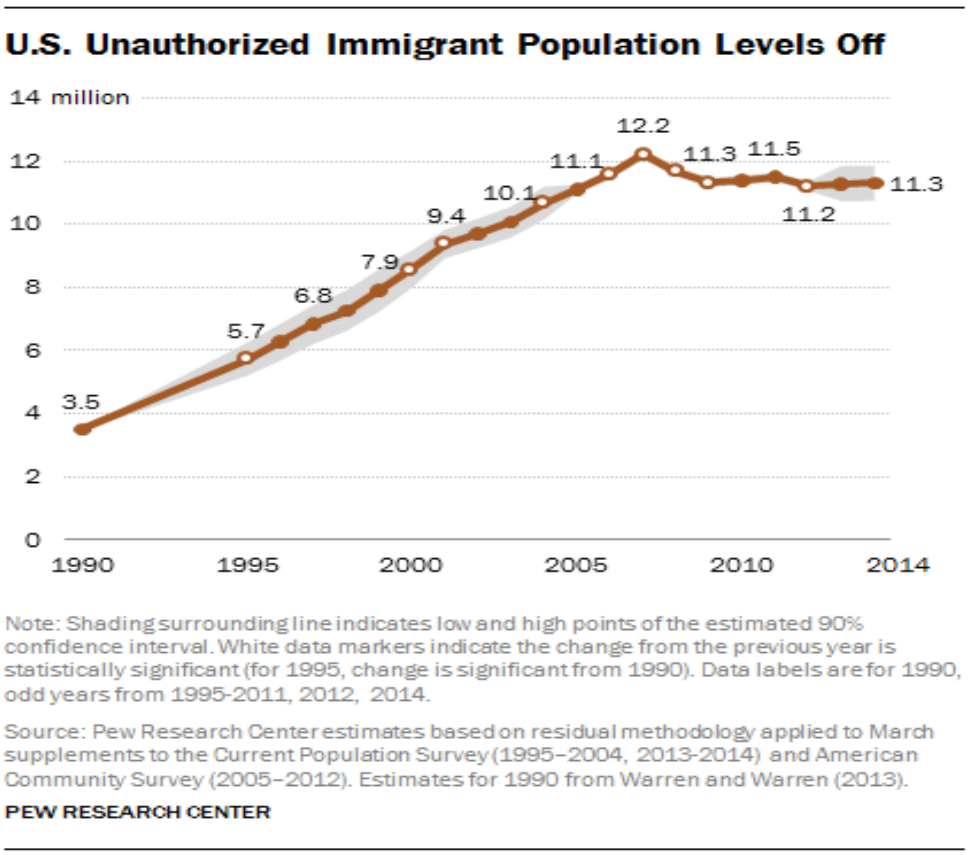
4.2.3 IS THERE AN ABUSE OF THE US ASYLUM SYSTEM?

As stated before, the asylum system in the US is not decoupled from the immigration regulation processes, and is also perceived as a security issue, involving government departments as Homeland Security (Betts A. , 2009). The 1980 Refugee Act, which gave rise to original version of the current asylum system, is nothing less than an amendment to the Immigration and Nationality Act, which continues nowadays to regulate immigration. The Act itself was created with the intent to "amend the Immigration and Nationality Act to revise the procedures for the admission of refugees, to amend the Migration and Refugee Assistance Act of 1962 to establish a more uniform basis for the provision of assistance to refugees, and for other purposes"[47]. And it was the first of most important reforms to be done to the refugee provisions within the US immigration law in almost three decades (Kennedy, 1981). Legomsky (2009) addresses a truly

[47] In: http://www.gpo.gov/fdsys/pkg/STATUTE-94/pdf/STATUTE-94-Pg102.pdf

pertinent question by pointing out that the asylum seekers and refugees arriving the US territory are, analytically, non-US citizens with the aim to be able to enter the country and obtain the status and the possibility to stay in the country, by proving that they meeting the criteria stipulated for this purpose, as other non-citizens on the basis of family ties, employment skills or other valued attributes. However, one cannot deny or turn one's face to the features that make refugees and asylum seekers a unique group, which distinguish them from other migrants. And the distinction lies in the fact that their migration is forced or involuntary nature, but nevertheless the fact that they do not hold US nationally and for the reasons that led them to seek entrance in the asylum country makes them the subjects of immigration policy. It is important to remind that many times the decision to cross borders is not only limited to persecutory motives, but also family reunion or the desire to create a good economic life in the hosting country (Haddad, 2008), the so-called 'multiple reasons' (Castles, 2002). From a functional perspective, they also experience "many of the same cultural challenges, have many of the same desires, and wrestle with some of the same government officials and institutions", just as other immigrants (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009). But their challenges do not stop there, as from a public perception point of view the asylum system is associated with illegal migration, and what underlies this type of thinking is the concern that the asylum seekers and refugees are abusing and manipulating the system, the same way they fear it from other non-citizens as undocumented migrants, cases of overstayed visas and violation of the immigration law (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009).

The US is not an exception and as in the rest of the world the debate surrounding the immigration has been monopolized by the question of illegal immigration. And unfortunately the numbers can support this concern. Krogstad and Passel (2015), in their latest article bring us the numbers for unauthorized immigration in the US in the year 2014. Just in the past fiscal year there were 11.3 million unauthorized migrants, which according to the authors make 3.5 per cent of the nation's population. The figure below was withdrawal from the same article and allows us to have an idea on how the number of illegal immigrants evolved over the past 14 years.



There are various reasons that public and political opinion use to sustain this concerns regarding the undocumented, unauthorized or illegal migrants, as we had already noted earlier, with special focus on the chapter related to safety. Economically, we suspect it is hard to account how many unauthorized immigrants work in the US and what is their real impact in the country's economy. Yet, Krogstad and Passel (2015) study states that undocumented immigrants compose up to 5.1 per cent of US labor force and that "there were 8.1 million unauthorized immigrants working or looking for work in 2012". But there is the fear that the presence of illegal immigrants, willing to work at low wage in unskilled labor will have a negative impact in the wages and working conditions in the US (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009). Other reason has to do with fiscal issues, as make use of services provided by the government such as highways or schools and are eligible for emergency. It is a unclear issue their fiscal impact, once they pay taxes (federal and state taxes, gasoline taxes, sales taxes and even when renting housing or owning property), but are illegible for all other forms of public

assistance, beyond the one already mentioned (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009).

Nevertheless, the main objection to illegal migration is not economically related, but rather connected to the public opinion resentment regarding the "large-scale violations of the law" practiced by the outsiders (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009). This is much related to a feeling of national impotence and inability to control its own borders due to the constant spontaneous flows of non-citizens, i.e. a violation of American sovereignty (Macklin, 2005):

"Violations of border laws are especially resented because the ethic with which Americans have grown up is that the nation has a right to decide who may enter and remain in US and who may not. Illegal immigration denies that fundamental sovereign right." (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009, p. 142)

Or as stated by James Clad, in Gibney's work:

"The US has the sovereign right, if it constitutionally reflects the majority view, to exclude others from coming here. It is that simple; it is that awkward. The essence of sovereignty remains the power to exclude" (Gibney, 2004)

We have no doubt that public opinion and reaction are greatly influenced by this uneasiness and concern about the violation of immigration law, of US domestic law, and it can result in opposition to more humane measures and an increase of support for the restrictionist speech (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009). And the response, from the Congress, has been in part the adoption of deportation proceedings, the so-called removal, for those who enter or remain in the US territory unlawfully. The other response, and more recent, has been the use of criminal justice system to deal with cases of illegal entry, tightening border control, alongside with other measures as federal-state collaborative enforcement projects, punishment for employers and landlords of illegal immigrants, among others. Furthermore, the 9/11 events paved the way for deep concerns about terrorism, resulting in the development of a wide range of strategies linked to detention, intelligence gathering and tightening of the criteria for admission (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009). It is no surprise that these shifts of perception of events and lived reality in the

US would eventually have an impact in the asylum system and how refugees and asylum seekers are seen by the political community and public opinion:

"Given the long-standing public angst over illegal immigration, it is not surprising that some would view the asylum process chiefly as a law enforcement problem. Nor can it be denied that some finite number of asylum seekers lack reasonably arguable claims and attempt to play the system. But there has always been a great deal of difference of opinion as to how large that number is. There are at least two incentives to manipulate the asylum process. One is the hope that the application will be granted; the other is that certain interim benefits typically attach while the claim is pending. The challenge has been to prevent asylum abuse without negating the exercise of one's right to apply for asylum in cases that might well be meritorious. But if the rule of law is to be taken seriously, and if public antipathy towards asylum is to be overcome, then refugee advocates need to acknowledge and address the public's legitimate concerns over asylum abuse." (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009, p. 144)

4.2.4 DETERRENCE AT THE SEA

Asylum has become a great concern to the majority of the Western world in the recent years, and as Western nations devote much of their efforts to reconcile protective measures towards the refugees and asylum seekers with their own national self-interests, they have, nonetheless been "tempted to adopt a series of problematic strategies" (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009). These strategies most often they have the sole purpose of preventing access to the asylum system, together with tough measures of discouragement, and they include:

"(...) filing deadlines; presumptions that certain countries of origin or certain third countries are 'safe'; expedited removal and other accelerated procedures; preventive detention while the asylum claims are pending; criminal prosecutions of asylum seekers for irregular entries; denial of permission to work; punishing individuals and/or their representatives for filing asylum claims later found to be 'frivolous' or 'manifestly unfounded'; pre-inspection at foreign airports; visa requirements combined with sanctions on commercial carriers who permit improperly

documented passengers to land; and the interdiction of vessels on the high seas." (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009, p. 145)

It is the last measure, mentioned above, "the interdiction of vessels on the high seas" that it is important for our analysis. This interdiction has been the target of extensive use in many parts of the Western world, from the EU, especially Italy and Greece, to Australia and the US is no exception. The main goal of this interdiction measure is to intercept vessels at sea that might carry potential entrants from reaching their borders by turning them away before them can succeed or either destroy these same vessels and return its occupants to their country of origin. This does not only bear the severe consequence of damaging asylum seekers and refugees chances to apply for protection, as it has become an intentional resort to prevent the Boat People from entering into the host countries asylum system (Legomsky, Refugees, Asylum and the Rule of Law in the USA, 2009).

In the past years, US Coast Guard intercepts decrepit vessels not only from Haiti and Cuba, but also Dominican Republic and even China as part of the interdiction program that aims to avoid the individuals on board from setting foot in US soil, which allows them to claim asylum (Macklin, 2005). Actions that assert US's "right to board and destroy vessels on the high seas anywhere in the world" (Legomsky, 2009). However, one must acknowledge that in many forms the US asylum system comprehends provisions that go beyond the Refugee Convention and Protocol. Its statutory refugee definition applies not only to those fleeing persecution but also IDP's and people that have suffered persecution in the past and there is no longer a well-founded fear of future persecution (Legomsky, 2009). But these 'good deeds' should not take responsibility away from the interdiction measures used throughout the various governments, nor either for the attempts to justify its implement. It is often justified as effective response to the increase of human smuggling and trafficking, to stop illegal voluntary migratory movements, reduces the costs of asylum processes, saves lives and helps in the control of the problem of housing mass influx arrivals (Legomsky, 2006).

The best-known cases of US interdiction at sea has been related to Haiti and Cuba asylum seekers, where the latter has been subject to a fluctuation on the policies applied in them. Therefore, the next two subchapters will be dedicated to an analysis of both cases.

4.2.5 HAITI

The movement of Haitian asylum seekers arriving the US by boat began as early as 1963, and the numbers became significant in the 1970s, reaching its dramatic peak between 1980 and 1981. The reasons for this mass influx of new arrivals were mixed, going from political persecution to poverty or, in some cases, both (Legomsky, 2006).

The reaction of the US government to this phenomenon, at the time President Reagan's term, was to reach out for an agreement with the Haitian government, authorizing this way the US Coast Guard to patrol the body of water between Haiti and Cuba and to board on the vessels on the High seas and conduct interrogations to passengers and crew. If the US officials discovered that there was any kind of violation of US or Haitian law they had permission to send the boat back to where it came. However, there was the US promise that those who were found to be a refugee would not be sent back, which included a program guidelines of the former INS to guarantee it (Legomsky, 2006).

According to Legomsky (2006), in his article "The USA and the Caribbean Interdiction Program", the Haitian interdiction program brought up serious concerns, and to consolidate these concerns there was a study, conducted by the former Lawyers Committee for Human Rights, which stated that between 1981 and 1990 the US interdicted 364 Haitian vessels, returned more than 21,000 individuals, and among all of then found only six passengers with claims strong enough to allow them to have full asylum hearings. And given the high number of cases of violation of human rights by the Haitian government it is extremely odd that the cases of recognized refugees could be so low, which raises doubts about the interviews being carried out inside the vessels (Legomsky, 2006). Other dark moment of the US behavior towards Haitian vessels, occurred after President Jean-Bertrand Aristide was overthrown by a military coup in September 1991 and encouraged a new wave of refugees fleeing persecution, torture and other forms of violence just for their political opinions. This pattern suggested that the main reason for the outflow was political persecution rather than economics, however the US government denied it and continued with interdiction policies. Nevertheless the US had temporarily ceased the repatriations to Haiti. In its place, the US Guard Coast started to transport the occupants to the US Naval Base at Guantanamo Bay, in Cuba, for preliminary screening of those who claim to be

to be refugees. After a while, the US government was forced to change course, as the Naval Base facilities reached its full capacity to maintain the boat people inside (Legomsky, 2006):

"President George H. W. Bush issued Executive Order 12807, declaring that US non-refoulement *obligations under the 1967 United Nations Protocol Relating to the Status of Refugees do not extend outside US territory and that, consequently, all passengers were to be returned to Haiti unless the Attorney General chose, in his or her unreviewable discretion, to grant them refugee status. The result was that all screening was eliminated; no refugee status determinations were made before repatriating intercepted Haitians."* (Legomsky, 2006)

This action demonstrated the US unwieldiness to comply with the *non-refoulement* policy after thousands of Haitians fled to US (Pizor, 1993). Before, with his precedent, the President Reagan, had instituted an interdiction program aiming the to stop Haitian vessels on international waters before they could reach US territory, however this program complied with the 1951 Convention's, "because the United States arranged to return all of the migrants to Haiti, with the exception of those Haitians determined to be refugees", as a result of the previous agreement (Pizor, 1993).

In 1993, with the case *Sale v. Haitian Centers Council*, the US Supreme Court maintained the non-screening policy, agreeing with the US government that the article 33 of the 1967 Protocol or the US implementing legislation was going against the *refoulement* of refugees in the High Seas (Legomsky, 2006). President Clinton finally ended the non-screening policy in 1994, after several attempts to end the dictatorial regime lived in the Haiti. The US entered in agreements with Jamaica, Turks and Caicos Islands to conduct refugee status determinations in their territories, and with the UNHC present to monitor the hearings, as well as other agencies (Legomsky, 2006).

In October 1994, and after a help from the US the former President Aristides returned to the country's command, which led to the release of the Haitians detained in at the Guantanamo and their involuntary repatriation to the Haiti. However, even after the Haitian president return the human rights situations was not much better than before and the root problems remained. (Legomsky, 2006).

In 1998, and after the US Congress had granted special forms of relief to nationals from countries as Guatemala, Nicaragua, Cuba, Soviet countries and Eastern countries. President Clinton issued a 'deferred enforced departure', in other words, "a form of temporary relief, for

those Haitians who had been paroled into the United States or had applied for asylum before 1 December 1995" (Legomsky, 2006).

4.2.6 CUBA

Since the 1960s, the US immigration policy towards Cuba has been one of extreme generosity in welcoming its nationals as political refugees, even in an illegal situation, and has worked to their professional and social inclusion in the US (Masud-Piloto, 1996).

This attitude from the US government is one of the first signs of its preference towards the Cubans nationals and its political intentions regarding the political regime lived in Cuba, a communist dominated country and its relation to the Cold War:

"U.S. preferences regarding political relations between the Cuban citizens and Fidel Castro's regime were defined in the early 1960s, mainly for foreign policy motives. After a short period of nonintervention in Cuban politics, and at the initiative of the president (...), the United States adopted a series of measures designed to overthrow Castro and to prevent revolutionary extension or contagion in Latin America. U.S. policy regarding Cuba was to promote both 'voice' against the Cuban regime and 'exit' from the island." (Colomer, 2000, p. 426)

This preference contrasts with other US immigration and asylum policies regarding other South American and Caribbean countries (Colomer, 2000), such as Haiti, as it was showed in the previous subchapter, coming from nations with regimes friendly to the US (Newland, 1995). However, this migration policy, influenced by US foreign policy, with time produced an outcome that was not in the best interest for the US. When opening the borders to the Cuban asylum seekers, it also set a precedent to new arrivals from other countries close by, rising concerns regarding illegal immigration and feeding an increasingly aggressive public opinion about the issue of immigration in the US (Colomer, 2000).

But the first "large-scale US interdiction effort" (Legomsky, 2006) occurred in 1980 with the 'Mariel' exodus. In the beginning the Cubans refugees were welcomed to the US and given political asylum and President Carter itself affirmed that his "heart went to the freedom-loving Cubans", however the US could only receive 3,500 Cuban refugees (Colomer, 2000). As the number of Cuban refugees increased, with the permission of Fidel government as retribution to US foreign policy (Colomer, 2000), the Coast Guard responded by interdicting as many vessels

as possible and sending the occupants back to Cuba (Legomsky, 2006). After an incident where two Cuban jet aircraft destroyed a Royal Bahamian Defense Force Patrol that was aiding vessels, President Carter presented a five-point program to end the Cuban exodus, which included the punishment of boaters transporting the refugees and that for that moment on the latter would be considered simply as entrants in the US (Colomer, 2000). The Mariel boatlift permitted the entrance of around 125,000 Cubans in the US and "much political turmoil" (Newland, 1995).

A second Cuban exodus, by boat, happened in 1994 and the Coast Guard was called to interdict the vessels (Legomsky, 2006). The fall of communist regimes in the Eastern Europe and the end of the Soviet Union had a dramatic impact in the Cuban economy, leading to a massive outflow with US as destiny (Colomer, 2000). By then, the Cuban nationals that succeeded in reaching the US shores were generally admitted and in the majority of the times granted with permanent residence status, under the Cuban Adjustment Act of 1966. However, after 1994, US immigration policy towards the Cubans foreigners changed and they began to interdict the vessels and transporting the occupants to Guantanamo Naval Base (Legomsky, 2006). It was the result of President Clinton announcement, indicating that Cubans rescued at sea would no longer be allowed to enter the US, but rather would be taken to the Naval Base and "with that, he ended the 28-year-old policy of automatic political asylum for Cubans and with it the implication that all Cubans are subject to persecution" (Newland, 1995). Later in the same year, US and Cuba governments came to an agreement, with the aim to "prevent unsafe departures". However, the US agreed it would continue to issue visas, up to the number of 20,000 per year, to Cubans that wishing to immigrate legally to the US (Newland, 1995). Furthermore, this agreement produced an outcome worth noting: Cubans, from that time on, would be treated like any other immigrant within US territory (Colomer, 2000). However, it still remains the 'wet foot/dry foot policy', meaning that all the Cubans that are not interdicted at sea and sent to Guantanamo to prove they have real reasons to claim asylum, are generally allowed to remain in the country (Legomsky, 2006).

4.3 CONCLUSION

It is true that the US refugee policy in many ways offers protection that goes beyond what is required by international law and in the Western world is the country that offers more

permanent resettlement to overseas refugees, under its offshore program. And the US statutory definition of refugee covers more situations than the one defined by the 1951 Refugee Convention (Legomsky, 2009).

However, during our research we were faced with certain inconsistencies in US asylum policy. It is a fact that US is a country with a long history of migration and therefore it had to adapt to different times and events. But one would expect that the historical past would have a positive impact in the willingness of the state and its people to accept those in need, the refugees and asylum seekers. For several times the US has adopted a posture of unwillingness toward the reception of refugees, as for example before and during the II World War and it was only due to international pressure it opened its borders. Other circumstance where this tendency is demonstrated was during the US reluctance in binding itself to the 1951 Refugee Convention, only becoming a signatory in 1968 with the 1967 Protocol Relating to the Status of Refugees.

Throughout this chapter it is possible to acknowledge that the US has failed in several occasions to comply with the international law, and more important with its obligations regarding the protection of refugees and asylum seekers. That has been done by including its asylum regime under immigration provisions, which inevitably leads to the subjection to the same restrictive policies, as the expedited removal and detention measures while processing asylum claims. And the discouraging polices towards the refugees trying to reach the US by boat, with the Coast Guard instructed to intercept the vessels and send them back to the country of origin. The US also failed to comply with its obligations towards the refugees by showing preference for certain refugees over others, as the examples of the Haitian and Cubans proved. Many scholars share the opinion that the evolution of the US refugee and asylum policy has been greatly influenced by the country's foreign policies, due to the fact that there was a bigger willingness in receiving and resettle political refugees from communism dominates countries and not towards those coming from friendly regimes, even when it was evident that persecution was happening.

It has become clear to us, that the decision to receive refugees and asylum seekers is a sovereignty issue for the US, as it was stated by Legomsky (2009) and Gibney (2004), as the US has a sovereign right to choose who enters its borders. And that same attitude is also applied to the Boat People that seek for protection within US borders. With the exception of the Cuban

nationals, even if they succeed to reach land they will be dealt with as illegal migrants, as security breach.

5 RECOMMENDATIONS

Throughout our research and analysis we experienced the complexity of the issue we have chosen to focus on. Even though the problem of the (boat) refugees and the outstanding question of how to resolve it in the best way is on agenda of many countries, possibility of finding the right and the least harmful outcomes seems to be a challenging task, especially with rising migration and a vivid struggle of states to regulate the influx of people across their borders and on the other hand struggle of the international community to ensure that the values and dedication to protect those in need will remain part of the practice of all States signed under the Convention.

Our argumentation is clearly inclined towards the conviction that the utmost priority in cases 'nations vs. boat refugees' is to ensure that individuals seeking asylum and refuge will meet justice and their requests will be evaluated fairly. We believe that bringing migration to an end is a concept that is not an option, because it would leave the need of certain individuals to be protected, unmet. In a globalized world with open borders, states must find a solution deeper and more mature than simply disposing themselves of the responsibility in this international matter. Both of our cases – USA and Australia, are examples of developed countries with a rich history of migration. One would think that a status of *'melting pots'* speaks for itself and that the policies are coherent with the meaning of the phrase. Nevertheless, with more thorough study we discover that the opposite is true. The aspiration to learn what is the reason and root of the rejection and in some cases even hostility towards the refugees and asylum seekers brought us to the history of the countries chosen as case studies and helped us to understand the thinking behind the policies based on the experience and practices in the matter of migration in the past and the evolution of governments and their mindsets up until today.

A struggle to provide durable solutions that would be benefiting all parties involved is challenging not simply because of the national policies of the countries, but more because of an involvement of international treaties, conventions and laws, that are not always in line with each other and do not have the same objectives in the question of how to deal with the refugee issue.

The category of the boat refugees is particularly complex, because of its dependency upon the Law of the Sea (United Nations Convetion on the Law of the Sea, 1982), and the rules and specifications of the procedures tend to blur more than the situations of refugees entering the

country onshore. To achieve any progress and solutions, the international co-operative framework would have to be implemented and pursued. In the history of Vietnamese boat people for example, the mechanisms established in order to support the rescue were the Disembarkation Resettlement Offers Scheme (DISERO) and the Rescue-at-Sea Resettlement Offers Scheme (RASRO). The schemes included "agreement of the coastal States to allow disembarkation, agreement of the coastal States to provide temporary refuge and open-ended guarantees from contributing third States that those rescued would be resettled elsewhere" (UNHCR, Background note on the protection of asylum-seekers and refugees, 2002). Those initiatives were somehow effective, however not durable, as the nature of migration changed and movements were characterized by mixed flows where the determination of their status was a necessary procedure. Because of these changes, States became reluctant to receive refugees, and the mistrust turned into restriction in policies and practices.

From the international perspective, the initiatives are directed mainly towards the solutions that would influence well-being of nations, strengthening assistance to first countries of asylum (UNHCR, Background note on the protection of asylum-seekers and refugees, 2002). What is less discussed is the other side effected by the policies established. Even though, mostly in alternative media sources, the criticism is speaking very strongly against, States (not only our case studies, but European countries and elsewhere) are inclining towards the opposite and they request clearer definitions and implementation of additional restrictions (Millbank, 2000).

On the other hand, UNHCR's concerns are addressed towards refugees and the issues of their rights, non-refoulement, access to procedures, conditions, balance between the responsibilities and initiatives of States and those of international organizations. The balance is usually a ground where the debates occur and where refugees start to lose the 'status' of being a priority. The Background note on the protection of asylum seekers and refugees (UNHCR, 2002), provides few suggestions and emphasize need to ensure that certain steps will be followed and all parties involved will be included in the processes. It also expresses the importance to implement preventative measures in form of public campaigns that could possibly prevent un-seaworthy vessels from sailing and could help to fight smugglers. However we believe that preventative measure might not be a sufficient tool to protect asylum seekers and refugees as for many of them it is the only possible means of transportation in case of emergency exile. Therefore the policies and conditions must be set in a way that will not deprive them the right to

receive the protection they are entitled to. That needs to be done on base of mutual efforts where states will be transparent, share and discuss the practices and exchange an information in order to identify a good practice. Relation of the states and UNHCR in terms of observance of the Refugee Convention 1951 needs to be discussed and adjusted where possible gaps and discrepancies occur.

6 CONCLUSION

Throughout our master thesis we focused on the specific group of disadvantaged individuals, so-called Boat people, and we did so in each chapter of the research with the intention to understand the complexity and to be able to analyze and synthesize the information we gathered. Behind the research question itself: '*Boat people: Why are they a sovereignty issue?*' we saw a need to unfold particular elements of the issue: who are boat people and how are they related to sovereignty of states and what sovereignty means nowadays in current practices of states and how does it reflect into the actions governments initiate.

Resulting from world-wide discussions about the impact of migration and controversies it triggers in different parts of the world, we decided to commit this research to exploring two particular countries that are significant actors in refugee regime and countries that are unfortunately being connected to some of the worst examples of the treatment of (Boat) refugees. This research is a response to our curiosity about where are the current policies headed to and what impact will they have on the national order of things and what on the other hand, will be an answer of the international community to the controversial events and statements of the governments of USA and Australia.

Background of the focus chosen derives primarily from the own interest in refugee policies and its improvement, undoubtedly supported by the increasing importance the migration is subjected to and the attention it attracts from media, through public opinion to influence of elections and subsequently the decisions of government in power.

We divided thesis in different chapters in a sense that would thematically cover the whole issue. However all the chapters are interrelated as all cover the same focus, but approaching it from different angles. Even though we clearly specified and understood the definition of a *refugee* and an *asylum seeker*, we realized that the transparency of the terms theoretically is not translated into the practice, or is often found insufficient in each particular situation. Despite the obligation to protect refugees and emphasizing this value as a priority that, firstly promoted by UNHCR, was converted into the initiatives of independent sovereign states by signing the Refugee Convention 1951, 21st century brings new complications into the phenomenon of migration and refugee regime. Throughout our research we gained a confirmation that the obligation to protect changed its nature over time and became a hardly bearable burden for states

to fulfill to its best. We tried to clarify the differences between the different types of immigrants and give reasoning to the motivations of refugees and asylum seekers to choose boats as means of transportation and eliminate the assumptions that coming by boats should exclude them from the right to seek asylum, as they are entering 'illegally'.

We discovered past issues of both countries regarding migration and the reasoning that was changing over time, although mostly evolving around racial issues, culture, religion and national security. Those are undoubtedly underlying the statements of States simply saying that huge overflows of migrants are burdening their system. This is being done on regular basis by manipulation and confusion that goes back and forth from media to public opinion and to government.

In order to avoid building up our argumentation on unsolid ground, it was of the utmost importance to include the main documents that has the intention to protect refugees and at the same time were looking for the differences or similarities in national laws regarding migration, including refugees and asylum seekers.

We came to a conviction that avoiding the existence of refugee issue is an impossible task, as we stated in the chapter outlining the key concept, due to the developed international system, which is a reason and a source of existence of migration, which makes refugees also a 'product' of this system. The fact that the borders and territories naturally developed is not something to be changed or disregard. The development yields possibilities and advantages, but also opens the door to illicit activities to which smuggling can be counted. However, development brings also the responsibility to not punish actors that are unwillingly a 'byproduct' of open borders.

As we could observe by studying the two cases of Australia and USA, the responsibility to protect is overruled by sovereignty. Citizenship is prioritized over humanity and seen as a problem that needs to be eliminated, even though the reason is States themselves. We've examined the topic and our research question in the theoretical framework of the securitization theory, through which we analyze the incentives of State to implement strict policies. The main factor here is the national security of States that is determined by the nature of migration flows and affects the relationship to international migration. As both of our cases are sovereign states with determined boundaries, international migration represents a threat to everything that is defined within their borders. By the defining borders, culture and national consciousness, the

implication is that the international migration is a possible threat leading to disorder in the country.

The mistrust towards the 'other' is translated into the various reasons in different countries. In Australia, the history is leads us to understand the evidence of strong White Policy, which was a racial issue, related to the status of the country on an international level. This underwent a transformation throughout the history, but remained as a bottom line and background of the harsh policies.

In the times where the groups of people forcibly displaced did not fall under the protection and the protection measures were insufficient, the efforts of States were primarily focused on ensuring establishment of such treaties. Nevertheless, the increasing differences between states, industrial development and economic issues cause for these efforts to change and indirectly transfer into the reluctance of States to receive more people and increasingly isolate themselves from the responsibility.

The relation of the refugees and States public is informed about the possible threat refugees represent and therefore the public opinion is formed and partly manipulated towards the hostility. What is not presented so openly and with a transparency is the violation against refugees in terms of human rights and obligations according to the Refugee Convention and International Law States are committing lacking the sense of humanity and responsibility to rescue, doing so freely with no trace of sanction from the international community.

In the research we conducted we certainly see some limitations and possibilities of further research. There are certain areas that we briefly outlined because in order to include all aspect, however in order not to lose the focus, we did not elaborate further on that. The study could reach more comprehensiveness with more detailed comparison with different groups of refugees that are also subjected to unfair treatment. Counter theories would also bring a certain perspective and trigger deeper debates on this so complex issue.

The topics related, that could be a suggested subject of a further research would be a more thorough examination of the role of UN and how its competences translate into the refugee issue nowadays. We used an examples of the events that were controversy, however, the input from UN and interventions in a form of sanctions of States misusing their power were absent. We believe that the international treaties and laws are not outdated, nevertheless the nature of

migration flows change over the time and needs further specification especially regarding Boat refugees. That could help to clarify the correlations between all the actors involved.

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Appendix: Boat arrivals since 1976 by calendar year[48]

Year	Number of boats	Number of people
1976		111
1977		868
1978		746
1979		304
1980		0
1981		30
1982-88		0
Year	**Number of boats**	**Number of people (excludes crew)**
1989	1	26
1990	2	198
1991	6	214

[48]Retrieved from: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1314/BoatArrivals

1992	6	216
1993	3	81
1994	18	953
1995	7	237
1996	19	660
1997	11	339
1998	17	200
1999	86	3721
2000	51	2939
2001	43	5516
2002	1	1
2003	1	53
2004	1	15

2005	4	11
2006	6	60
2007	5	148
2008	7	161

Year	Number of boats	Crew	Number of people (excludes crew)
2009	60	141	2726
2010	134	345	6555
2011	69	168	4565
2012	278	392	17 202
2013 (to 30 June)	196	407	13 108

Boat arrivals since 1976 by financial year[49]

Year	Number of boats	Number of people
1975–76	1	5
1976–77	7	204
1977–78	43	1423
1978–79	6	351
1979–80	2	56
1980–81	1	30
1981–82 to 1988–89	0	0
1989–90	3	224
1990–91	5	158
1991–92	3	78

[49] Retrieved: Ibid. The source of numbers is DIAC as well as ministerial and departmental press releases. Figures are not precise in a sense that some of them don't include the crew numbers, or the deaths on the boats. Not all the releases provide these numbers and not all of the boat arrivals are subjected to ministerial releases.

1992-93	4	194
1993-94	6	194
1994-95	21	1071
1995-96	14	589
1996-97	13	365
1997-98	13	157
1998-99	42	921
1999-00	75	4175
2000-01	54	4137
2001-02	19	3039
2002-03	0	0
2003-04	3	82
2004-05	0	0

2005-06	8	61
2006-07	4	133
2007-08	3	25

Year	Number of boats*	Number of people (excludes crew)*	Number of people (includes crew)**
2008-09	23	985	1033
2009-10	117	5327	5609
2010-11	89	4730	4940

Year	Number of boats	Crew	Number of people (excludes crew)
2011-12	110	190	7983
2012-13	403	423	25 173

Year	Number of boats	Number of people
1976		111
1977		868
1978		746
1979		304
1980		0
1981		30
1982-88		0
Year	**Number of boats**	**Number of people (excludes crew)**
1989	1	26
1990	2	198
1991	6	214
1992	6	216
1993	3	81

1994	18	953
1995	7	237
1996	19	660
1997	11	339
1998	17	200
1999	86	3721
2000	51	2939
2001	43	5516
2002	1	1
2003	1	53
2004	1	15
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