

The Decline of the International Refugee Regime:
Asylum Seekers and the Pursuit of Refugee Status in Canada and Australia

by

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BSc, University of Toronto, 2003

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Supervisory Committee

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Abstract

Many oppressed people wish to seek permanent refuge within the borders of affluent Western liberal democratic states such as Canada and Australia. Since the conclusion of the Second World War, the International refugee regime has established a global legal migration framework for contracting states such as Canada and Australia to grant admission to asylum seekers into each respective political community while retaining effective border control measures to maintain public safety. This thesis argues that the international refugee regime has suffered a gradual decline during the last two decades, especially during the post-9/11 era, primarily due to the dominance of the notions of national sovereignty and security in Canada and Australia. The author recognizes the importance of realpolitik and pays tribute to the concept of national sovereignty. However, he contends that the predominance and prevalence of the securitization phenomenon in recent years in both Canada and Australia, has given rise to a culture of suspicion which primarily perceives and publicly portrays asylum seekers as entities with ulterior motives. Such views have subsequently culminated in the normalization of national refugee determination policies which inherently favor the implementation of human containment measures such as arbitrary and indefinite detention and Temporary Protection Visas (TPVs); restrictive measures which inherently violate some of the core legal principles of the international refugee regime. The author recommends a return by both Ottawa and Canberra to a more balanced refugee determination system which is aligned with the 1951 Refugee Convention and 1967 Protocol and further explores several alternative solutions that may be employed by Canada and Australia to effectively manage asylum seeker populations in each country.

Table of Contents

Supervisory Committee	ii
Abstract	iii
Table of Contents	iv
Acknowledgments.....	v
Dedication	vvi
Introduction.....	1
Chapter 1: Seeking Asylum in Canada and Australia.....	8
Chapter 2: Canada vs the Asylum Seeker.....	24
Chapter 3: Australia vs the Asylum Seeker.....	52
Conclusion.....	81
Bibliography.....	93

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Dedication

To my parents

Introduction

A close examination of the dynamics of the current global migration patterns and refugee policies renders a peculiar and at times disturbing image of the condition of asylum seekers hoping for permanent settlement within the borders of various Western democratic states. Since the conclusion of the Second World War, Western states such as Canada and Australia—both the creators and signatories of the 1951 *Convention and Protocol Relating to the Status of Refugees* (1951 Refugee Convention) and the 1967 *Protocol Relating to the Status of Refugees* (1967 Protocol)—have advocated the protection of refugee claimants. In most instances, this protection has been granted to asylum seekers and refugee populations who may have resorted to illegal modes of travel to reach and cross the borders of these contracting states (Dauvergne, 2008: 50).

The 1951 Refugee Convention and the 1967 Protocol constitute the very foundations of what is commonly referred to as the *international refugee regime*. The 1951 Refugee Convention is a comprehensive document which released in 1951, advocated the proper and humane management and treatment of millions of displaced people or refugees across Europe. Subsequently, the 1967 Protocol, a supplementary document which in 1967 was added to the 1951 Refugee Convention, expanded the application of the Refugee Convention to displaced asylum seekers and refugees as they emerged after 1951 and originated from countries outside Europe (Gibney, Hansen, 2005: 72). Within the context of international law, the international refugee regime serves as the quintessential multilateral *legal* framework which facilitates the burden sharing of refugee populations amongst the community of signatory states and encourages contracting governments to coordinate and harmonize their national migration policies to actualize the humane treatment of asylum seekers and refugees.

At the outset and for purposes of clarification, an *asylum seeker* is a person who seeks recognition within the borders of a targeted destination country as a refugee. The term *refugee*, under the definition provided by the 1951 Refugee Convention (Article I, A[2]) and the 1967 Refugee Protocol (Article I [2]), is a person who has a well-founded fear of persecution for such reasons as race, religion, nationality, membership of a particular social group, subscribes to a particular political opinion, or even resides outside their country of nationality or habitual residence due to serious threats to their life, liberty and/or personal security (Convention and Protocol Relating to the Status of Refugees, 2010: 14, 46). The language used in both the 1951 Refugee Convention and the 1967 Protocol makes specific reference to the legal obligations which signatory states owe to refugees rather than asylum seekers. Curiously, within the legal framework of the international refugee regime, it is the *refugee* rather than the *asylum seeker* who is provided with certain legal rights to access the protection and hospitality of the recipient state, allowed freedom of movement across transnational borders, and permitted to take advantage of the provisions of health care and to lay claims to permanent membership. Yet, for asylum seekers who have not yet obtained the status of a ‘refugee’, such rights within the context of international law, for all intents and purposes, are non-existent. Paradoxically, the legal status of the asylum seeker within the context of international migration law, from the moment he or she encounters the recipient state, remains ambiguous since the asylum seeker has not yet assumed the role of a ‘refugee’. Hence, it is this uncertainty regarding the legal status of the asylum seeker within the current refugee determination systems in both Canada and Australia which this study endeavors to dissect. In short, I contend that the asylum seeker must be deemed by state authorities as a *potential refugee* rather than be perceived and portrayed as an entity that has abused the social and economic constructs of the recipient political community. To view asylum seekers as potential refugees

would lead to the entrenchment of a humanitarian rather than a securitized migration bureaucratic network that would seek to address asylum seeker/refugee issues within the parameters of the international refugee regime and also maintain and enhance public safety policy parameters.

Despite its humanitarian stipulations, the international refugee regime, ever since its emergence within the international arena, has also upheld the notion of state sovereignty, recognized the importance of the concept of national security whenever recipient states are faced with asylum seekers or potentially encounter a massive influx of asylum seekers, and has continued to relegate power to signatory governments as they attempt to contain and manage refugee and immigration populations (Loescher, 1993: 129-130). Ultimately however, the goal of the international refugee regime as a global refugee management system, has been to provide a humanitarian rather than a securitized systemic solution to solve refugee and asylum seeker issues—a goal which, during a period lasting more than two decades, has gradually and curiously been on the decline in both Canada and Australia. The influx of asylum seekers into Canada and Australia, has in recent decades, spurred decision- and policy-makers in both Ottawa and Canberra to gradually misalign their respective national asylum seeker and refugee policies with those humanitarian stipulations found at the core of the international refugee regime, and recalibrate their federal asylum seeker policies which mostly favor the notions of national sovereignty and public safety. This has culminated in the dissemination of a culture of suspicion within each national community—a culture which predominantly perceives and portrays asylum seekers as ‘bogus’ entities who may be seeking permanent resident status within either Canada or Australia for the sole reason of gaining economic benefits.

This study focuses on the illegality of certain restrictive policies and measures, which designed and currently implemented by both Ottawa and Canberra, seek to contain and manage asylum

seeker population in both Canada and Australia—policies and measures which I contend must be deemed as largely *illegal* and unethical. Throughout this study, I take an explicitly normative stance to scrutinize the refugee determination policies currently prevailing in both Canada and Australia. Being aware of the unconventionality of such an approach especially within the sphere of academic research, I nonetheless submit that the adoption of a normative framework to scrutinize the current asylum seeker and refugee policies in Canada and Australia is much warranted since the current restrictive policies in Canada and Australia primarily eschew the protection of the *individual* asylum seeker and instead favor the abstract notion of state sovereignty and national security. In short the he current treatment of asylum seekers, especially those that arrive by boat (maritime arrivals), by both the Canadian and Australian states, contravene the humanitarian norms and standards of international law (international refugee regime) as they relate to state hospitality and the humane treatment of outsiders.

To support this claim, I draw attention to the *arbitrary*, and *indefinite* detention of asylum seekers as well as the Temporary Protection Visa (TPV) regime in effect in both Canada and Australia—containment measures that are currently utilized by both Ottawa and Canberra to regulate asylum seekers' claims to refugee status but do inflict much harm upon the mental and physical well-being of these displaced members of the human family. It is in fact conceivable that some of the detention policies and practices pertaining to asylum seekers in both Canada and Australia are not entirely arbitrary, nor are they indefinite. However, as this study will clearly demonstrate, the practice of the detention of asylum seekers in Canada and especially in the Australian setting, is in the final analysis, arbitrary as most if not all asylum seekers, upon their arrival, are *collectively* detained as a group of illegal migrants and immediately placed at various detention centres until the conclusion of the refugee determination process. Similarly, the detention

of asylum seekers in Canada and Australia is indefinite as some asylum seekers are detained for prolonged and indefinite periods in both countries until the adjudication process pertaining to their identity and the circumstances of their particular case is reviewed and concluded by migration authorities. In chapters two and three, I support this claim by drawing attention to the numerous historical and recent detention practices of asylum seekers by the executive branch in both Canada and Australia, which despite certain regulatory measures and legal constraints—especially found in Canada—continue to detain asylum seekers on an arbitrary basis and for prolonged and indefinite periods. I support my argument by making reference to the recommendations and stipulations of the 1951 Refugee Convention and the 1967 Protocol, the International Covenant on Civil and Political Rights (ICCPR), the 1948 UN Universal Declaration of Human Rights, and refer to key decisions and conclusions reached by the UNHCR (United Nations High Commission for Refugees) Executive Committee (ExComm)—especially as they pertain to the detention of asylum seekers.

In citing human containment policies and the management of asylums seekers in Canada and Australia, I make reference to the sovereign power of the recipient state to restrict the freedom of movement of asylum seekers and impose detention upon such entities (Goodwin-Gill, McAdam, 2007: 462) as they penetrate the numerous barriers of transnational borders. The arbitrary and indefinite detention of asylum seekers by both Ottawa and Canberra must be conceptualized as an upshot of a general fear of outsiders in Canada and Australia and how these Western liberal democratic states continue to champion the realist principle of *raison d'état*. In this context, Catherine Dauvergne remarks:

There are calls in...Australia, Canada and elsewhere to alter the way refugees are treated, or even defined. The worldwide fear of terror has over-lapped and intertwined with the fear of illegal migration. The prosperous West is under siege, this popular refrain tells us...As globalizing forces challenge and transform sovereignty, so too is

the place of migration law in the nation altered. The response to this challenge among prosperous and powerful nations is to imprint even more strongly than before a sense of self—of identity and of essential ‘nationness’—onto the text of their migration laws. *Migration law is transformed into the new last bastion of sovereignty* [My Italics] (Dauvergne, 2004: 588).

Similarly, Maggie O’Neill points out that the arbitrary and immediate detention of asylum seekers who arrive by boats [in Canada and Australia] may also be due to how the receiving state may interpret such arrivals as a direct challenge to its national territorial sovereignty, public morality, decency, and way of life (O’Neill, 2010: 76-77). According to O’Neill “...it is in that ‘unauthorized’ border crossing that the very presence of the asylum seeker becomes deviant...triggers various processes of criminalization,” (Ibid., 76-77) and paves the path for the receiving state to attach less importance to upholding the humanitarian tenets of international migration law and adopt securitized measures such as arbitrary and indefinite detention which inflict immense harm on asylum seekers.

In Canada, the detention of asylum seekers is considered arbitrary insofar as it is indefinite as there is currently no maximum period of detention set out in law. In the second chapter, it will be shown that despite the mandatory and immediate detention of asylum seekers for a maximum period of one year as legislated by Bill C-31 *Protecting Canada’s Immigration System Act*—especially those asylum seekers who arrive on an ‘irregular’ basis (The Canadian Bar Association, 2012: 38-39),—asylum seekers, in many circumstances, have been held in Canadian detention centers for many years; in particular asylum seekers who are awaiting deportation (EIDN, 2014: 28). Circumstances for asylum seekers in Australia are substantially worse. In the third chapter, I demonstrate in detail how asylum seekers, upon or even prior to their arrival in Australia or on one of Australia’s excised territories such as Christmas Island, are captured by immigration authorities in collaboration with the Australian military, and either are immediately deported back to their

countries of origin or transition countries, or are detained for an indefinite period within one of the various detention facilities spread out across the Pacific Ocean outside the Australian mainland (Refugee Council of Australia, 2014). In the concluding chapter I will revisit the question at the core of this thesis: which is to establish the legality of the restrictive refugee policies that are currently in effect in both Canada and Australia. I will demonstrate that some of the primary factors which compel asylum seekers to seek refuge in Canada and Australia, are due to fleeing from the terrible effects of ongoing wars and regional/sectarian violence, political oppressive regimes, relentless abuse of basic human rights, and poor economic circumstances (Hatton, 2009: 209).

The general peace and economic prosperity, as well as certain personal liberties which are woven into the social fabrics of Western democratic societies greatly appeal to the minds and hearts of those individuals who long for general happiness and the freedom of thought as they reside under the tyranny of totalitarian and repressive regimes. For most asylum seekers, protracted wars and ongoing regional conflicts serve as daily push factors which contribute to the life-altering decision to migrate and to seek refuge within the borders of a foreign state. Such push factors must be taken into serious consideration by the decision- and policy-makers and migration authorities in both Canada and Australia prior to collectivizing and portraying asylum seekers in the public as people with dubious and unjustifiable claims to state protection; especially before subjecting these refugee applicants to arbitrary and prolonged periods of confinement.

Chapter 1

Separated by a large basin of water, the Pacific Ocean, both Canada and Australia share much in common as both nations proudly trace their cultural dispositions and linguistic and historical heritage to Great Britain and Westminster traditions. Since the birth of each nation and throughout their relatively young histories, both Canada and Australia have at times excluded migrants from gaining permanent membership in their respective community. Historically, both nations have primarily promoted their national identities within the international arena as migrant-based and migrant-welcoming nations and have succeeded in attracting a diverse array of migrants to construct the economic infrastructure and the social fabrics within each country (Watson, 2009: 8-9). In view of this historical development, the recent stringent policies and measures—such as the arbitrary and indefinite detention of asylum seekers and the imposition of TPVs—introduced and erected by both Canada and Australia to curtail the efforts of *asylum seeker migrants* from reaching each country's borders are most peculiar to say the least. By resorting to certain historical migration episodes in both the Canadian and Australian contexts, I will demonstrate the gradual decline of the legal and most importantly, humanitarian tenets of the 1951 Refugee Convention and the 1967 Protocol within both Canada and Australia's refugee determination regimes.

The detention of asylum seekers, which I will explore in more detail in the proceeding chapters, is considered arbitrary by international human rights treaties whenever the recipient state fails to 1) adhere to customary international law prohibitions, 2) does not review the legality and necessity to detain individuals (asylum seekers) in a democratic society, and 3) neglects to comply with accepted standards and norms of treatment which comprise of the prohibition on cruel, inhuman, or degrading treatment of families and children, as well as does not recognize basic procedural rights and guarantees when dealing with asylum seekers. In the concluding chapter, I will

demonstrate that there are indeed alternate solutions to detention, and Ottawa and Canberra's strict adherence to current detention policies and practices contravene the stipulations of the 1951 Refugee Convention and the 1967 Protocol. In view of the current stringent refugee policies in both Canada and Australia, it is of particular interest to note that migration and asylum seeker issues especially in these countries, especially prior to the conclusion of the Cold War and the onset of the global War on Terror in 2001, were *prima facie* interpreted and resolved within the framework of the international refugee regime. This approach to addressing global refugee issues by Western states such as Canada and Australia was mainly concocted to highlight the moral superiority of Western liberal democratic states and drew attention to the moral deficiencies and systemic political and social failures of the Soviet Union and other totalitarian states that were situated within this nation's sphere of influence. Thus, for Western states such as Canada and Australia, migration issues during the Cold War era were primarily embedded within the realm of *low politics* and off the security agenda which compelled both states to adhere to a humanitarian rather than a securitized migration policy paradigm (Watson, 2009: 15). Yet, as Rosemary Sales observes, since the dawn of September 11, 2001 terrorist attacks in the United States, the issue of seeking asylum has subsequently been shifted to the realm of *high politics* within the national security agenda (Sales, 2007: 214-215). With the disintegration of the Soviet empire and the Eastern Bloc in the late 1980s, and since the onset of the terrorist attacks of 11 September, 2001, both Canada and Australia along with most if not all Western democratic states, have deemed asylum seeker issues as high rather than low political issues; a perception which ultimately has resulted in stopping and deterring the flow of asylum seekers across the borders of these nations, but meanwhile has also caused immense suffering to countless *genuine* asylums seekers as they've sought permanent membership in either Canada or Australia.

Within the realm of refugee studies, the principle of hospitality is an important concept which deserves considerable attention. In this context, the concept of hospitality simply means the welcome of the foreigner (asylum seeker) by the receiving state and how the recipient state—especially if the state is a signatory state to the international refugee regime—must abide by the humanitarian principles as laid out within the framework of international law to deal with and treat asylum seekers in a humane manner. I contend that the legality of the restrictive policies which are currently implemented against asylum seekers in both Canada and Australia must also be measured against the universal principle of hospitality and the ‘do no harm’ principle—tenets which in essence outline the hallmark of the receiving state’s moral responsibility to provide shelter to seekers of asylum. The two principles of *hospitality* and *no harm* are enshrined within the 1951 Refugee Convention and inform the conclusions of the UNHCR ExComm. These two principles outline and dictate the legal and humane treatment of asylum seekers by the receiving state and must be utilized by both Ottawa and Canberra to effectively resolve the currently existing state-asylum seeker quagmire. As I will demonstrate in the following chapter, the 1951 Refugee Convention clearly mentions that no harm should befall refugee applicants by emphasizing the *non-refoulement* principle. In essence, the *non-refoulement* principle is a safeguard against the arbitrary expulsion of refugees (Convention and Protocol Relating to the Status of Refugees, 2010: 3) since refugees are persons who have a well-founded fear of being persecuted due to various reasons and may suffer persecution and serious harm, or even face death if they are returned to their country of origin. Thus, the UNHCR ExComm, during several key decisions, has noted with deep concern the degree of harm that may befall asylum seekers and refugees if: 1) they are subjected to the hardships of detention or similar restrictive measures due to their illegal entry (No. 44 (XXXVII) – 1986) (UNHCR.org), and 2) the receiving state expels, or *refouls*, and unjustifiably

detains refugees (No. 71 (XLIV) – 1993) (Thematic Compilation of Executive Committee Conclusions, 2008: 12), and 3) if children are detained on an arbitrary basis (No. 47 (XXXVIII) – 1987, [e]) & (No. 107 (LVIII) – 2007 – Children at Risk) (Ibid., 86).

In addition to the theme of state hospitality, the *do no harm* principle, which in essence prescribes a moral duty not to harm others and also not to benefit from the harm that may befall others (Linklater, 2002: 135), is a humanitarian tenet which must be adhered to by decision- and policy-makers in both Canada and Australia as each country designs and/or implements their respective migration policies to manage asylum seeker populations. Andrew Linklater asserts that the ‘do no harm’ principle presents us as the permanent members of the political community with an interesting dilemma: the idea that in a strictly universal sense, each member of the human family has the right to equal respect and fair treatment if and when they are at peril and seek the hospitality of the nation-state, and conversely, that our duties of consideration and care are applicable to and must be directed first and foremost towards the members of our own community (Ibid., 137). The latter concept, which Linklater refers to as *moral favoritism* is indeed an essential part of living in a community, however, serious ethical and legal issues arise when in seeking to do the best for our fellow-citizens, the members of the political community may in fact become indifferent to the basic needs of non-communal members (asylum seekers). Linklater’s caveat is that such a perception may eventually propel the permanent members of the political community to collude with one another to devise clever policies and modes of prevention against foreigners who may be in dire need of our assistance (Ibid., 150). Similar to Linklater’s analysis, Barry and Goodin’s argument is also worth noting as both scholars correctly emphasize that the protection of the political community by resorting to closed-border policies is, simply stated, *misanthropic*. Thus, Barry and Goodin note that a fear of outsiders may “quite naturally [lead] to the view that people’s

moral concern may legitimately stop with those physically near and emotionally dear to them” (Barry, Goodin, 1992: 9).

By setting a historical background related to several key migration and asylum seeker episodes in both Canada and Australia, and by making reference to the notions of state hospitality and the no harm principle, my aim is to illustrate the degree of legality of the restrictive migration policies and measures that are currently set against asylum seekers in both Canada and Australia—especially at the ‘moment of encounter’. By the term moment of encounter, I refer to how both Canada and Australia, during a period lasting more than two decades, commencing in the late 1980s and especially throughout the post-9/11 period, have publicly portrayed asylum seekers as entities who may upset the social equilibrium within each state by taking advantage of the liberties and social and welfare policies offered by each state, or at worst, pose a serious threat to public safety and national security. I contend that the negative portrayal of asylum seekers in the public realm by both Ottawa and Canberra in recent years, has given rise to and firmly established a highly securitized migration paradigm which consists of elaborate preventative policy measures in each state. Both states have achieved much success in linking the discourse of humanitarian migration to the notion of national security, and throughout the War on Terror era, have achieved remarkable results in neutralizing any possible resistance from the public and human rights organizations against the further securitization of humanitarian migration. In short, the post-9/11 period has further intensified the emergence of new social threats such as global terrorism, international unemployment and criminality, which have surprisingly ‘coalesced in the image of the migrant [asylum seeker]’ (Crepeau, Nakache, 2006: 4).

Throughout the post-9/11 period, the majority of decision makers in both Australia and Canada, have primarily taken firm and decisive actions to preserve the security of their respective

communities by highlighting the refugee ‘problem’. In Australia for example, the constant usage of alarmist language by politicians to vilify asylum seeker/refugee populations was—and continues to be—a political tactic which was/is effectively utilized by contending political parties to achieve short-term political gains. Newman and Selm for instance note that within the first 48 hours after the 9/11 terrorist attacks, the Howard-led Liberal party in Australia gained sufficient political advantages by demonizing refugees and asylum seeker populations and establishing direct links between terrorism and asylum seekers (Newman, Selm, 2003: 334-335). Thus, Australia’s defense minister, Peter Reith during the same period, warned that any unauthorized arrival of refugee boats on Australian territory “can be a pipeline for terrorists to come in and use [Australia] as a staging post for terrorist activities” (Ibid., 334-335).

A key argument that I wish to advance in this study is related to how both Ottawa and Canberra, for some years, have mostly undertaken to process asylum seeker applications seeking refugee status on a *collective* rather than on an *individual* basis. As I will demonstrate in the following chapters, this means that contrary to the guidelines of the 1951 Refugee Convention—which emphasize that asylum seekers should not be refouled or placed in detention centers on a collective basis—both Ottawa and Canberra have mostly neglected to conduct a proper and timely initial assessment of the identity and the particular circumstances of the individual asylum seeker as he or she seeks refugee status in Canada and Australia. A vivid example supporting this claim may be found in Australia as the Australian government, in late June 2014,—in clear defiance of Article 33 of the 1951 Refugee Convention which condemns the arbitrary *refoulement* of asylum seekers to their country of origin—assessed and rejected the Sri Lankan asylum seekers’ refugee claims at sea and returned these asylum seekers to Sri Lanka after the boat carrying asylum seekers was intercepted by Australia’s border patrol off the Cocos Islands in the Indian Ocean (CBC, 2014).

To date, there is no concrete evidence suggesting that the refugee claims launched by these asylum seekers from Sri Lanka were assessed on an individual or collective basis. Yet, the rapid response by which Australian migration authorities assessed and finalized the refugee claims of these Sri Lankan asylum seekers within the Australian border patrol boats, as well as the refoulement of these asylum seekers, is strongly indicative of the gradual entrenchment of a *collective* rather than an *individual* solution to processing the refugee claims of asylum seekers by the Australian government whenever asylum seeker boats are intercepted within High Seas or Australia's territorial waters. This is stark testament to how Canberra is now defiantly rejecting the humanitarian principles as outlined within the international refugee regime, is bypassing the *non-refoulement* tenet of the 1951 Refugee Convention, and instead is prioritizing the abstract notion of the nation-state over the welfare of the individual who has assumed the role of an asylum seeker. The aforementioned treatment of asylum seekers by the Australian government, which may plausibly become the norm in Canada and in amongst other Western states, is thus a flagrant violation of the core principles of international law, and as I have previously alluded to, is only possible if and when the recipient state publicly casts doubts and dispersions upon the true motives and intentions of asylum seekers. It follows that the stigmatization of asylum seekers and the policy roots of what Bourbeau has aptly called the *migration-security nexus* (Bourbeau, 2011: 106) may be traced back to the economic restructuring which took place in Europe as a result of the oil crises in the 1970s and 1980s (Casey, 2010: 22-23).

The 1973 oil crisis in particular served as a major impetus for Western states to introduce and implement severe restrictive migration policies against asylum seekers who sought to gain permanent status in these countries. During the 1970s, the sudden shift of migration paradigm in the European setting unleashed new socio-economic trends in the global supply and demand

dynamics of migration labor, altered public opinion and the national political rhetoric to rationalize and legitimize the onset of restrictive migration policies against asylum seekers across continental Europe, and moreover, greatly influenced the migration policies of other Western governments such as Canada and Australia to further constrain the influx of asylum seekers across their respective borders. Thus, the introduction of restrictive migration policies and the tightening of borders in Europe to impede the flow of asylum seekers which began in the 1970s and 1980s, essentially normalized the perception of asylum seeker-related issues through the prism of security rather than a humanitarian lens, and subsequently culminated in the construction of an array of bureaucratic and physical barriers in both Canada and Australia to impede the flow of asylum seekers into each country. The securitization of humanitarian migration during this period should also be perceived as having its origins in the ‘crime’ hypothesis, which essentially reasoned that certain numbers of immigrants were involved in criminal activity and that a highly securitized migration regime was the only tangible solution to combat those criminal elements amongst migrants (Bourbeau, 2011: 17). Throughout the 1970s and 1980s many elaborate measures were developed and implemented by both Canada and Australia to bring to fruition a migration-security matrix which was entirely predicated upon protecting the security of the nation (Ibid., 106). In Canada for instance, such measures encompassed deportations and removals of migrants and asylum seekers under suspicions by the government from Canada for security reasons (Ibid., 106), and in Australia, similar but more severe measures were employed which entailed the arbitrary and indefinite detention of asylum seekers upon arrival.

Following the migration saga in the 1970s and 1980s in Canada and Australia, the 9/11 terrorist attacks in New York and Washington further entrenched the negation of politicizing issues related to migration and paved the path for the governing elite to architect a *securitized* migration

paradigm that was designed to effectively address migration and asylum seeker issues without much expected contestation from human rights and/or refugee advocate groups. This rather sudden shift in migration policy paradigm essentially meant that migration problems, especially those pertaining to asylum seekers and refugees, would now need to be presented within the public realm as being both urgent and existential (Buzan, Waever, 1998: 29). It is not my intention to present an analysis of the theoretical nature of the securitization phenomenon. However, to have a clear understanding of what the term ‘securitization’ alludes to in the context of this study, I make brief reference to Buzan and Waever’s classic definition regarding the term *securitization* as it is lodged within a traditional military-political understanding of security. For Buzan and Waever, the term security is not strictly to be understood within the confines of survival; it also refers to the moment when an issue or a social phenomenon poses as an existential threat to a designated referent object which may be the nation-state, a territory, or a particular society (Ibid., 21). Hence, such a security dilemma which allegedly threatens (or is perceived to threaten) the social integrity of a political community is bound to give rise to a securitization process. For the purposes of this study however, the securitization of humanitarian migration in the Canadian and Australian contexts, simply means subjecting debates pertaining to asylum seekers and refugees to the realm of security, and to how asylum seekers are perceived by the political elite to be situated mostly outside the boundaries of politicization, and portrayed in the public as entities that continuously pose a serious existential threat to the social integrity and safety of the permanent members of the political community or designated referent objects.

In the second chapter, I analyze the recent actions and some of the policies of the current Canadian Conservative government as it seeks to address refugee claims launched by asylum seekers in Canada. The continuous linkage of asylum seeker/refugee issues with those issues

connected with the notion of public safety in Canada, has recently led to the introduction of harsh restrictive measures such as visa requirements, safe third country agreements, offshore processing and ‘non-arrival’ zones, withdrawal of socio-economic benefits, Temporary Protection Visas (TPVs), and prolonged and indefinite detention policies (Watson, 2009: 1). All these measures are publicly justified by Ottawa as being crucial and necessary as they would maintain and enhance public safety, proscribe social unrest and public disorder, enhance national sovereignty, and preserve the security of the political community. According to Ottawa’s current migration logic, such measures are also meant to minimize and prevent [bogus] asylum seekers from accessing and taking advantage of the protection regimes offered by the Canadian state (Watson, 2009: 1).

The recent alterations made to Canada’s refugee determination system, especially as of December 2012, is a vivid example of how asylum seekers wishing to claim refugee status in Canada will now encounter a robust refugee regime that will drastically limit the number of options available to those wishing to claim refugee status in Canada and/or petition a negative decision regarding their stay in this country. For instance, the arrival in August 2010 of the Thai cargo ship *MV Sun Sea* off the coast of British Columbia carrying 492 asylum seekers from Sri Lanka, provided the Harper government with a political ‘window’ to introduce the currently implemented controversial ‘anti-smuggling’ legislation—Bill C-31—which *inter alia* imposes a harsh 12-months mandatory detention period on asylum seekers as soon as they arrive in Canada and denies asylum seekers access to an independent review process of their refugee status application (The Global Detention Project, Canada Detention Profile, 2012: 1). Such unprecedented measures in Canada share much in common with the current restrictive measures in Australia which also punish asylum seekers—especially due to their mode of arrival via boats—by subjecting them to arbitrary and indefinite detention. It is indeed conceivable that in a manner much similar to the

Australian model, the current Canadian government may, in the not too distant future, seek to gradually align most if not all its asylum seeker policies with those of Australia and assign even longer or perhaps indefinite periods of detention to asylum seekers before finalizing the outcome of their applications. This claim may be substantiated by making reference to the former Immigration Minister Jason Kenny's fact-finding mission to Australia in 2010. Thus, while drawing lessons from the Australian jurisdiction to shape Ottawa's policies to crack down human smuggling operations, Mr. Kenny stated that "A close study of the Aussie experience would certainly be useful to us in framing our own response" (The Globe and Mail, 2012). Such statements bear testament to Ottawa's recent proclivities to further enhance an increasingly securitized migration regime in Canada which subjects asylum seekers to long-term periods of detention—a current practice which has raised serious debates and much concern amongst scholars, media, and human rights advocates regarding the egregious effects of prolonged detention upon the mental and physical health of an already traumatized population.

A further indication of Ottawa's lesson drawing efforts from Australia is the recent push by Ottawa to privatize the supervision of immigration detention facilities in Canada which no doubt provides immense monetary benefits to private prison operators (The Guardian, 2012). This is certainly a move in the wrong direction when it comes to managing asylum seeker populations. A prime example of how the possible privatization of federal detention centers may inflict immense mental and physical harm on asylum seekers may be found in Australia by examining the conduct of the security company called Serco—one of the key and most controversial security providers in Australia that manages the containment of asylum seekers across various detention facilities. Hence, the poor management of asylum seekers by Serco at various detention facilities located both within and outside Australia, as well as the bellicose behavior exhibited at times by the Serco

staff targeting the detainees, has throughout the recent years drawn much focus and criticism from various human rights groups, whistleblowers, academia, the national media, as well as from numerous members of the public (Ibid., 2012).

Following my analysis of Canada's current securitized migration regime, I will in the third chapter, explore the development of restrictive migration policies in Australia. I begin my analysis by examining the gradual transition of Australia's migration regime: from a rather hospitable refugee determination system in the mid-1970s, to a more rigid and currently closed-border refugee assessment regime, the origins of which could easily be traced back to the mid-1980s. I contend that the various methods and policy machinations employed and implemented by Canberra to prevent asylum seekers from reaching Australia's shores to claim refugee status defy the legal principles prescribed by the international refugee regime. In Australia, the usage of arbitrary and indefinite detention and TPVs for instance, continues to be implemented under the rationale of enhancing public safety and upholding national sovereignty when confronted by outsiders (asylum seekers). Being fully cognizant of the importance of matters related to national security as well as the protection and preservation of the political community as an inherent duty of the Australian federal government, I nonetheless in this chapter suggest the adoption of a less securitized migration regime by Canberra to effectively address the demands of refugee applicants. This contention is premised upon a more balanced and humane migration policy paradigm which is in alignment with the guidelines of the 1951 Refugee Convention and 1967 Protocol. I concede that Australia's migration regime must protect Australia's national sovereignty and safeguard the public from any potential threat(s) that may arise by non-permanent members originating from outside Australia's borders. However, I propose that Australia, as a contracting state to the international refugee regime, also has a moral and temporal duty to address the refugee claims of

genuine asylum seekers in a *humane* rather than a securitized manner. This may perhaps be accomplished by establishing an efficient wait-list processing system that would assess asylum seeker applications within a specified period without resorting to such highly controversial, illegal, and utterly costly tactics as the arbitrary detention of asylum seekers (especially women and children) in remote detention facilities mostly situated outside Australia. Thus, while protecting its national sovereignty and maintaining and enhancing border security and public safety measures, Canberra must make a conscious effort to fulfill its international humanitarian obligations to refugee applicants by establishing an efficient bureaucratic network that separates genuine refugee applicants from those that may pose a serious security threat to Australia's political community.

The immediate and arbitrary detention of asylum seekers by Canberra in recent years—especially maritime arrivals—moreover highlights serious problems in Australia as they relate upholding the rule of law and domestic constitutional norms. According to Thampapillai, the arbitrary detention of asylum seekers by the Australian government—especially outside of Australia's borders on the isolated islands of Nauru and Manus—seems to have created a constitutional dilemma in Australia. This has mainly been due to the breach of the *separation of powers doctrine* in Australia which pertains to the executive and judiciary branches of the Australian federal system of governance (ABC, 2012). In short, the 'separation of power doctrine' in the Australian context refers to Australia's constitution as it distinguishes between administrative detention ordered by the executive branch (federal government), and criminal detention authorized by the judiciary. In recent years the separation of power doctrine within the echelons of Australia's political framework has suffered much damage since Australia's executive branch during countless occasions, has surprisingly and intentionally made numerous attempts to usurp the detention powers of the judicial branch, and at times has acted in flagrant defiance of

anti-detention decisions issued by the judicial branch to limit or abrogate the indefinite confinement of asylum seekers in detention centers. Accordingly, the third chapter will make reference to the absence of legal concerns at the core of Australia's current refugee determination system by scrutinizing the recent reincarnation of the Howard era migration policies—such as the *Pacific Solution* and the recent *Pacific Solution Mark II (PSII)* (rightnow.org) or the *Second Pacific Solution*—by subsequent Australian federal governments.

One of the primary reasons why the selection and implementation of restrictive measures such as arbitrary detention is implemented against those arriving via unseaworthy vessels is due to lack of proper documentation which would easily and speedily verify the true identity of newly arrived asylum seekers. As Ophelia Field in her comprehensive study *Alternatives to Detention of Asylum Seekers and Refugees* reveals, during instances where no or false documentation is available the UNHCR accepts the use of detention on an 'exceptional' ground criterion in their guidelines (Field, 2006: 11). Yet, as I will clearly demonstrate in the concluding chapter, detention is not an absolute necessity in every case and state practices such as daily reporting requirements, release on bail, or surety to citizens of the community may act as appropriate containment alternatives that would proscribe any possible absconding by asylum seekers and restrict the movement of refugee applicants until the true identity of the *individual* asylum seeker is discovered and verified by state authorities (Ibid, 11).

An examination of the detention policy system in Australia clearly reveals the mode of arrival as a key factor which determines whether the asylum seekers' applications could be duly processed and rapid integration into community could be achieved, or whether asylum seekers will be sent to a detention facility. Further to the illegal nature of the arbitrary and indefinite detention of asylum seekers, there is also an ethical dilemma which lies at the core of such a treatment; this

study will also reveal that the method of arrival is a crucial triggering factor which seals the fate of asylum seekers and automatically subjects them to the harsh and inhumane conditions that prevail at most if not all detention facilities found in both Canada and Australia. It should be noted, that the imposition of penalties by signatory states such as Canada and Australia on asylum seekers and refugees due to their illegal mode of entry is condemned by Article 31 (1) of the 1951 Refugee Convention. And this stipulation must be upheld by the contracting state so long as the refugee applicant presents him/herself to state authorities without delay and demonstrates good cause for their illegal entry (Convention and Protocol Relating to the Status of Refugees, 2010: 14, 29). Historically, draconian restrictive policies in Australia, such as arbitrary and prolonged detention, have targeted the majority of asylum seekers arriving via boats. This conclusion which also seems to be commensurate with the available evidence from Canada, United States, and Italy (and other EU coastal nations), clearly demonstrates how the mode of arrival via boats is a decisive factor in the construction of a direct threat from foreigners to the receiving state (Watson, 2009: 143).

For those asylum seekers in search of a better and brighter future in Canada and Australia, the decision to migrate simply means not having access to proper documentation such as passports and visas to cross transnational borders and reach their desired destination country. Not possessing legal documents to travel across borders may cause those in search of asylum to resort to alternate means and modes of travel and rely upon the efforts of human smugglers to cross transnational borders to reach a desired destination country. This thesis does not condone the act of human smuggling and recognizes both the violation of state sovereignty due to illegal modes of arrival as well as the extreme dangers that genuine asylum seekers—especially those travelling by boats—may be exposed to. This notwithstanding, it is of interest to note the following argument by Casey as he states that the existing transnational borders of our age must be considered as “...the current

global version of the apartheid-era ‘pass system’...” (Casey, 2010: 41-42)—a system which places immense constraints on human movements, sustains human smuggling operations, and ultimately compels today’s asylum seekers to utilize such insidious and perilous means of travel out of sheer desperation to reach the borders of Western democratic states such as Canada and Australia.

The current international system relegates the final decision to include or exclude outsiders to sovereign states. Throughout the remaining chapters, I will endeavor to show that the decision to include or exclude in both Canada and Australia must be lodged within a mature, balanced, and most importantly, a legal refugee processing equation. A formula which firmly rooted within the framework of the 1951 Refugee Convention and 1967 Protocol, upholds and preserves the safety of the permanent members of the receiving political community, but yet aims to efficiently discharge the various humanitarian obligations that signatory states owe to genuine refugee applicants as they seek a better future for themselves and their progenies inside the borders of such liberal democratic states as Canada or Australia.

Chapter 2

Canada is internationally recognized as a nation that upholds its international obligation to refugees and asylum seekers and, historically, it is deemed as a multicultural society founded upon welcoming migrants and refugees. The history of refugee policies in Canada however is not without certain blemishes. A closer examination of Canada's migration policies and practices over the past few decades reveals an increasing tilt by Ottawa towards a more securitized rather than a humanitarian migration policy paradigm. Prior to and since the conclusion of the Second World War, Ottawa has employed various restrictive measures to limit the entry of migrants and refugees. Such restrictive tactics as racial quotas, refusing to take in Jewish refugees prior to the onset of the Second World War, and later during the early 1950s, the introduction of the comprehensive immigration act by Ottawa which outlined certain administrative practices to promote immigration to meet national economic objectives, all attest to the gradual entrenchment of a securitized migration establishment in Canadian society. In this chapter I investigate certain episodes in Canada's migration history. This will provide the necessary framework within which I will assess the legality of some of the currently imposed preventative measures such as Temporary Protection Visas (TPVs), but most importantly, the practice of arbitrary and indefinite detention which is currently in effect in Canada. Moreover, I will analyze to what degree the Canadian state has continued to adhere to the tenets of international law vis-à-vis the treatment of asylum seekers.

By the early 1970s and especially with the introduction of the 1976 Immigration Act, Ottawa began to relax some of its post-WWII strict migration policies against both regular and irregular migrants. This change in policy direction was mainly undertaken not only to fulfill Canada's national and international humanitarian obligations but also was meant to forge a strong national

economy by promoting Canada as a humanitarian state within the international arena (Watson, 2009: 44). By the late 1970s however, and especially throughout the 1980s, Canada's immigration and refugee determination system underwent a rather sudden alteration as the Canadian state implemented a series of robust national measures to deal more effectively with the management of migrants and refugees—especially asylum seekers seeking permanent residence in Canada. Ottawa's penchant for favoring closed-border policies during the 1970s and 1980s may be traced back to global geopolitical and economic uncertainties such as the oil crises in the early 1970s which continued to significantly alter the global supply and demand equilibrium of immigrant labor (Casey, 2010: 17-18) as well as the massive numbers of refugees produced in various regions in the world—especially in Indochina and the Middle East—due to protracted inter-state wars and regional conflicts. These events in combination with advances in transportation technology and the profitable expansion of people smuggling operations, significantly altered Canada's national identity in the realm of global migration dynamics from that of a resettlement state to a country of first asylum (Watson, 2009: 45, 54). In addition, amongst Western liberal democracies, Canada's shift away from being a policy innovator and humanitarian leader to being an adopter of a key set of restrictive asylum policies must be understood as a 'European turn in Canadian refugee policy' (Soennecken, 2013: 249). This 'Europeanization' of Canada's refugee policy system entailed a multifaceted transfer of 'restrictionist' asylum policies from the European Union (EU)—most notably the Dublin agreement which restricts the asylum seekers' freedom of movement—to Canada which has involved the transmission of ideas and knowledge through multiple actors and institutional arrangements that range from lesson drawing to coercive transfers (Ibid., 250-251).

With the dawn of the era of global War on Terror in 2001, the Canadian state actively sought to establish an uneasy policy equilibrium between enhancing its national security agenda and

protecting Canada from potential terrorist attacks, and that of its traditional mainly open-door policy-stance which mostly granted inclusion rights to asylum seeker and refugee populations. Since 9/11, Ottawa has increasingly adopted a political rhetoric which favors the further securitization of humanitarian migration in Canada and has increased federal funds towards the creation of border protection agencies such as the Canada Border Service Agency (CBSA) and the implementation of further preventative measures to halt and restrict the flow of asylum seekers into Canada. Canada's immigration and refugee determination system, especially during the post-9/11 period, has consciously if not overtly, linked the safety of its citizenry and the preservation of the Canadian state with that of being wary of 'strangers' or asylum seekers seeking permanent membership in Canada.

During the past decade, some of the preventative and punitive measures employed by Ottawa to halt the flow of asylum seekers have encompassed the usage of carrier sanctions, the implementation of TPVs, and the arbitrary placement of asylum seekers in various detention and maximum security facilities across Canada for prolonged periods (ABC, 2010). Ultimately, it is the last of these preventative measures—the arbitrary and indefinite detention of asylum seekers—that reinforces the theoretical cornerstone of this chapter and reveals the illegal nature of Canada's current refugee determination system. The arbitrary and indefinite detention of asylum seekers in Canada—and in Australia as I will demonstrate in the following chapter—exhorts us to launch a serious enquiry into how legal and ethical this questionable mode of human containment really is. To assess how the detention of asylum seekers in Canada has gained normalcy, it is imperative to examine some key migration historical events in Canada, which during the last two decades have contributed to the marginalization and arbitrary detention of asylum seeker populations in Canada. I begin my analysis of Canada's current refugee determination system by making reference to one

of the core principles embedded within the international refugee regime, *the non-refoulement* principle, which primarily advocates a humanitarian rather than a securitized response whenever a recipient state is faced with asylum seekers.

1951 Refugee Convention: Principle of *non-refoulement*

The 1951 Refugee Convention is a status and right-based instrument and is underpinned by certain fundamental principles such as non-discrimination, non-penalization, and most importantly, *non-refoulement* (Convention and Protocol relating to the Status of Refugees, 2010: 3). Deeply entrenched within the text of the 1951 Refugee Convention is the principle of *non-refoulement*, which in Articles 33(1) and (2), strikes a fine balance between the receiving state's moral obligations to safeguard and uphold the basic human rights of asylum seekers through the exercise of state hospitality, and concurrently recognizing the sovereignty rights of the recipient state to protect the political community from any possible threats that may arise from asylum seekers who may be a security risk to the welcoming society. According to Article 33 (1):

No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Subsequently, Article 33 (2) states:

The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds [My Italics] for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country (Convention and Protocol relating to the Status of Refugees, 2010: 30).

The language utilized in Articles 33(1) and (2) primarily favors the protection of the individual asylum seeker and inexorably leans towards a humanitarian rather than a securitized migration policy paradigm whenever a recipient state is confronted with the unauthorized influx of asylum

seekers. This conclusion is also supported when one examines a series of consecutive conclusions reached by the UNHCR Executive Committee (ExComm). For instance, in 1991, the ExComm laid strong emphasis upon the importance of the *non-refoulement* principle as a cardinal principle embedded within the international refugee regime (Goodwin-Gill, McAdam, 2007: 216). In addition, the ExComm conclusion in 2005 is important to consider as it prohibited the arbitrary removal of individuals due to the *non-refoulement* principle under human rights law. Ergo, the 2005 ExComm conclusion referred to complementary forms of refugee protection which in essence are international treaty obligations that prohibit the refoulement of individual asylum seekers who are outside their countries of origin—this protection also extends to asylum seekers who may in certain circumstances, not even fulfil the refugee definition as found within the 1951 Refugee Convention and/or the 1967 Protocol (Ibid., 217).

Conversely, Article 33 (2) also recognizes the importance of state sovereignty and matters related to national security vis-à-vis the illegal entry of asylum seekers. Article 33 (2) clearly stipulates that no refugee status may be conferred upon the asylum seeker by the authorities of the receiving state should there be *reasonable grounds* that may suggest that the asylum seeker may pose a security threat to the political community. Article 33 (2) therefore supports and recognizes the recipient states' sovereign right to determine whether an *individual* asylum seeker may be a security concern or whether the asylum seeker may be granted admission into the community or be refouled to his/her country of origin. An interesting and pertinent observation submitted by Loescher relates to how the principle of *non-refoulement* is interpreted and implemented by most Western governments and how this principle is deemed to apply by these states only to persons who meet the 'persecution standard' as found under the 1951 Convention (Loescher, 1993: 144). It is conceivable that Article 33 (2) may potentially be interpreted by most Western governments

such as Canada and Australia as a Convention stipulation which mainly emphasizes the sovereign powers of the receiving state and neglects to grant refugee recognition and permanent residency status to genuine asylum seekers who may be fleeing generalized violence from civil war and intercommunal strife (Ibid., 144). In short, such interpretations, are mainly possible due to the UNHCR's lack of ability to alter a signatory state's course of action related to its treatment of asylum seekers (Ibid., 144).

It must be stated that any conclusions reached or recommendations made by the UNHCR ExComm strictly contribute to the formulation of *opinion juris*, a sense of legal obligation with which states approach the problems of refugees. Thus, any conclusions reached by the UNHCR ExComm do not have the force of law and do not create any binding obligations on the receiving states as to how asylum seekers should be treated in strict accordance with the stipulations of the 1951 Refugee Convention in general and Article 33 (1) in particular (Goodwin-Gill, McAdams, 2007: 217). This notwithstanding, Article 33 of the 1951 Refugee Convention establishes legal and ethical guidelines for contracting states such as Canada to properly assess the claims to refuge launched by asylum seekers on an individual basis and in a timely manner. In short, by making reference to the principle of *non-refoulement*, Article 33 first and foremost draws attention to the proper treatment of asylum seekers in a humane manner prior to subjecting asylum seekers to arbitrary and indefinite detention.

1986 Maritime Arrivals: A Humanitarian Response

The arbitrary detention of asylum seekers did not really surface in Canada nor was it sufficiently captured by the national media until the mid-1980s. In some measure, the beginnings of Ottawa's adoption of harsh policy measures against asylum seekers could really be traced back to the 1986 unauthorized boat arrival off the coast of Newfoundland (Watson, 2009: 55). On August 11 1986,

152 asylum seekers from Sri Lanka were rescued by Canadian fishermen from life rafts which were set off by the vessel *Aurigae*. This episode in Canada's migration history is important to consider as it not only highlights the first large-scale unauthorized boat arrival since the early 1900s, but also clearly demonstrates how Ottawa engaged these asylum seekers in accordance with the humanitarian tenets of the 1951 Refugee Convention and upheld the cardinal principle of *non-refoulement*.

Ottawa's response to the arrival of the asylum seekers throughout this episode, was overall, consistent with the stipulations of Articles 33(1) and (2). Ironically however, the 1986 episode also triggered the gradual inception of what could tangibly be referred to as the erosion of the refugee regime in Canada. The 1986 episode led to much media coverage of the arrivals of 152 asylum seekers from Sri Lanka and ultimately set in motion the beginnings of the disfigurement of the image of the asylum seeker within the sphere of national consciousness in Canada. In addition, this episode identified the asylum seeker as an outside entity which could pose a plausible threat to Canada's public safety and identified the 'problematic' nature of Canada's asylum policies which urgently needed to be revamped (Ibid., 56). The arrival of the illegal Sri Lankan migrants during this period eventually triggered a national debate regarding the safety of Canada's political community and led to the re-evaluation of the federal government's response to asylum seekers and the implementation of emergency measures against asylum seekers. It was this 'problematization' of refugee arrivals and the federal government's perceived lenient response to asylum seekers in the aftermath of the 1986 episode, in combination with the arrivals of asylum seekers during the summer of 1987, which eventually spurred the introduction of more restrictive legislation in the form of Bills C-55 and C-84 (Ibid., 78). During the closing months of 1987, both Bills C-55 and C-84 were introduced by the federal government with the primary objective of

preventing any further abuse of Canada's refugee determination system and to limit or eliminate the success of human smuggling operations. Such reactionary measures employed by the Mulroney Conservative government primarily surfaced as the result of the sudden appearance of a boatload of 174 Sikh asylum seekers off the east coast of Canada during the summer of 1987 (Ibid., 61-62).

1987 Maritime Arrivals: A Securitized Response

Unlike the mainly hospitable response extended towards asylum seekers by Ottawa a year earlier, Ottawa during the 1987 episode, committed to resolving the asylum seeker issue by employing a securitized rather than a humanitarian policy formula. By citing a direct breach of Canada's national borders and portraying asylum seekers through the national media as 'bogus' refugees or a threat to Canadian state (Watson, 2009: 12), the Mulroney government passed emergency powers in Parliament which provided immigration officials with unprecedented power to detain all of the asylum seekers in an arbitrary manner. The detention of asylum seekers in this context was arbitrary since *all* asylums seekers were detained due to their mode of arrival and no individual assessment was initially performed which could reasonably—and in accordance with international law—establish if any one of these asylums seekers posed a security threat to the Canadian state (Ibid., 61-62). Thus, the detention of these Sikh asylum seekers during the 1987 episode seemed to have been used as a form of punishment which is a serious breach of international refugee processing norms (Ibid., 62) as it violated Article 31 (1) of the 1951 Refugee Convention.

Article 31 (1) *Refugees Unlawfully in the Country of Refugee*, is veritably one of the most crucial texts embedded within the international refugee regime as it clearly outlines the legal and ethical responsibilities, incumbent upon signatory recipient states, to protect asylum seekers from further harm:

The Contracting States shall not impose penalties, on account of the illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence (Convention and Protocol relating to the Status of Refugees, 2010: 29).

In addition, the arbitrary detention of asylum seekers during the 1987 episode also violated article 9 of the Universal Declaration of Human Rights which clearly rejects the arrest, detention or exile of individuals (ONHCR: Article 9). A closer review of the UNHCR Excomm's discussion regarding the arbitrary detention of asylum seekers reveals that the detention of asylum seekers during this episode was indeed arbitrary. This is due to several recommendations put forth by the UNHCR ExComm prior to the 1987 episode, the most important of which was the *UNHCR, No 36 (XXXVI) – 1985 conclusion* which expressed serious concerns regarding the arbitrary detention and refoulement of asylum seekers "...despite the development and further strengthening of established standards for the treatment of refugees" (UNHCR: 2008, 35-36). Throughout the 1987 episode, Ottawa's attempts to further securitize Canada's migration regime resulted in a full air and sea search for other asylum seeker boats and simultaneously invoked an emergency recall of parliament to implement a crackdown on asylum seekers and human smuggling operations (Watson, 2009: 62).

The 1987 episode also provided the federal government with a political window to prevent any possible court challenges against the use of extraordinary measures (Ibid., 66), and it led to the legalization of an array of unprecedented securitized measures which included searching without warrant the properties of people suspected of providing aid to human smugglers, the indefinite and arbitrary detention of asylum seekers, and neglecting the *non-refoulement* clause by turning asylum seeker boats to safe third countries without processing their claims to refuge (Greigo, 1992: 128). The introduction of extraordinary or emergency measures throughout the 1987 episode were

indicative of a successful securitization of the state-asylum seeker nexus in Canada where real political objectives to limit the influx of asylum seekers were achieved by Ottawa and existing normal practices were clearly violated (Watson, 2009: 28). A clear example of how the Canadian state violated existing normal practices when dealing with asylum seekers was the targeting of their mode of arrival as airlines were given authority to detain the passports of any would-be refugees (Ibid., 128). In sum, what makes this particular episode an interesting case study of law and ethics in Canada's migration history is how the Canadian government publicly justified its securitization efforts and the arbitrary detention of asylum seekers by collectivizing and problematizing the asylum seeker issue, and during the process, diverted the public's attention from sympathizing with asylum seekers to that of their 'illegal' mode of entry as well as their nationality and country of origin (Ibid., 61-62).

The Asylum Seeker and Detention in Canada: International & Domestic Laws

Strictly speaking, the detention of asylum seekers in Canada is none other than the confinement of individual asylum seekers in either prisons or prison-like settings. Goodwin-Gill's exploration of the word *detention* is worth noting here as it connotes the confinement of the individual in a prison, restricted area, or a close camp environment (Goodwin-Gill, 1986: 194). Detention, Goodwin-Gill observes is thus

...closely linked to pending criminal prosecution; on other occasions it may extend to any confinement in a pre-determined place under restraints which prevent detainees from pursuing their normal or wished for occupational and social activities (Goodwin-Gill, 1986: 194).

I shall further explore the rationale for and the egregious effects of detention in the following chapter. What is relevant at this juncture however, is how the Canadian government has recently adopted such controversial detention policies as the 12 month mandatory detention of asylum

seekers without providing any access to asylum seekers to seek independent reviews for certain categories of arrivals (Global Detention Project, 2012). Commensurate with Goodwin-Gill's observation of how the use of detention is closely linked to the criminal persecution of asylum seekers, the *Global Detention Project* also alludes to how Canada's detention practices compare unfavorably to those of other destination countries as it highlights Canada as one of only a handful of major industrialized nations which makes widespread use of prisons to detain asylum seekers where asylum seekers are constantly mixed with the regular prison population (Ibid., 2012).

A recent report released in June 2014 by the End Immigration Detention Network (EIDN) entitled *Indefinite, Arbitrary and Unfair: The Truth about Immigration Detention in Canada* corroborates the above findings regarding the unjust detention of asylum seekers in immigration prisons as well as the questionable adjudication and detention review processes that are currently in effect across Canada (EIDN, 2014). According to the EIDN report, Canada is one of few Western countries which does not have maximum detention length when it comes to detaining asylum seekers. Consequently, there are hundreds of asylum seekers—women and children included—who are currently languishing in indefinite detention, not only in the three designated immigration 'holding' centers across Canada, but also in 142 facilities which are mostly maximum security prisons (EIDN, 2014: 11). The number of migration detainees as well immigration enforcement costs as reported by the EIDN are staggering to say the least. In 2013 for instance, the EIDN reports that there were 7,373 -9,932 immigrants who spent 183, 928 days in jail (Ibid., 7)! Out of this total, there were 205 migrant children who were detained in 2013 (Ibid., 8) and the associated costs of spending on migration enforcement actually increased from \$91 million in 2010-2011 to \$198 million during the 2012-2013 period (Ibid., 11). Moreover, the EIDN report draws attention to some disturbing facts about the overall adjudication processes related to the

release of refugee applicants into Canadian society. The report refers to a direct correlation between the location of detention, the particular analysis and decision of each adjudicator, and the possibility of release from detention. In regards to adjudication decisions related to the release of asylum seekers into society, the EIDN research highlights systematic reductions in the release rates of asylum seekers, mainly due to the absence of policy directive(s) or political decisions which may impede the release of asylum seekers. Thus, the EIDN concludes that:

Any policy or decision to systematically reduce release rates would be political interference in the detention review process throwing the entire detention system's *fairness* and *integrity* [My Italics] into doubt (Ibid., 3).

Finally, the release of detainees, according to the EIDN report, is inversely proportional to the number of review panels to which the immigration detainee is exposed to. Thus, if a particular detainee's case is reviewed eight times by a review panel, i.e. six months into an asylum seeker's detention period, the chances of the asylum seeker being released into Canadian society are significantly lowered or are altogether diminished (Ibid., 3).

The EIDN report further illuminates the existing legal gaps that are currently present between Ottawa's national refugee determination policies and the stipulations put forward by the 1951 Refugee Convention. The 1951 Refugee Convention not only aims to protect the lives and the personal safety of asylum seekers claiming refugee status in destination countries such as Canada, but it also seeks to preserve the very definition of what it means to be a refugee in today's modern international system. In short, the 1951 Refugee Convention emphasizes how important the notion of legality and ethics is whenever a state deals with asylum seekers. Harkening back to the arbitrary detention of asylum seekers by the Canadian state as sanctioned by Bill C-31, we are once more obliged to analyze the legality of the stipulations of this legislation as they run counter to the postulates of international refugee law, international human rights law, as well as the Canadian

Charter of Rights and Freedom. According to the April 2012 Amnesty International Report *Unbalanced Reforms: Recommendations with Respect to Bill C-31*, the arbitrary detention of asylum seekers or Designated Foreign Nationals (DFN) for a minimum period of one year is mandated by Bill C-31 (Amnesty International Canada, 2012). Yet, this period of detention is in contravention of international law as it does not abide by the requirements of the 1951 Refugee Convention and the 1967 Protocol which clearly stipulate that detention should not be indiscriminate, mandatory, and unreviewable. Similarly, in accordance with certain provisions found within the Canadian Charter of Rights and Freedom—under sections 7, 8, 9, 10, 12 and 15 which may have direct applications to Bill C-31—Canadian domestic law bestows fundamental protection to *all* adults and children who may be present within Canada's borders and inherently regards the practice of detention as an *exception* and not the norm and as an *unconstitutional* measure if resorted to on an arbitrary basis (UNICEF, 2012: 9).

The increasing utilization of arbitrary detention measures against asylum seekers by Ottawa in recent years may further be understood within the calculus of the two logics of security which are currently emerging in constructivist security studies. According to Bourbeau, in Canada there are currently two logics of security at play: the *logic of exception* and the *logic of unease* (Bourbeau, 2011: 132). The former, the logic of exception, alludes to the speech acts given by the political elite which legitimize exceptional policies, and in the face of a security or an existential threat, make it necessary to introduce drastic measures such as arbitrary and indefinite detention. This was clearly shown above as the 1987 arrival of Sikh asylum seekers and the securitization rhetoric by Ottawa throughout this episode triggered and legitimized the arbitrary detention of 174 Sikh asylum seekers off the east coast of Canada. Similarly, the logic of exception was clearly demonstrated during the debate leading up to and after the implementation of Bill C-31 which has

now increased the detention period of asylum seekers to one year and in certain cases may condone indefinite detention periods. The EIDN report for instance highlights that there are currently cases where asylum seekers have been held in indefinite captivity within detention centers across Canada for periods lasting anywhere between three to ten years (EIDN, 2014)! Subsequently, the logic of unease, according to Bourbeau has its roots in an "...understanding of securitization as routine practices of bureaucracies and security professionals in which technology and technocratic practices come to hold a prominent place [in society]" (Ibid., 131). According to Bourbeau's analysis therefore, when it comes to dealing with asylum seekers, both logics of security are currently present in Canada, however, certain elements associated with the logic of unease continue to dominate the national political rhetoric and discourse which deal with migration and asylum seekers issues (Ibid., 132).

Further to Bourbeau's logics of analyses, Goodwin-Gill observes that the very practice of the arbitrary detention of asylum seekers is inherently reflective of the presence of xenophobic and self-reservation sentiments (Goodwin-Gill, 1986: 194). For Goodwin-Gill, possible alternatives to the arbitrary detention of asylum seekers, and intelligent solutions to international refugee problems must therefore be found within the framework of the international society of states and the concept of 'burden-sharing' as well as the parallel developments of competent institutions that could examine the root causes of asylum seeker flows in the first place (Ibid., 194). The adoption of arbitrary detention measures must therefore be perceived as an illegal, unethical, and a convenient bureaucratic solution which adopted by the receiving state seeks to resolve the asylum seeker-state paradox.

In a liberal and democratic society such as Canada, the usage of arbitrary and indefinite detention as a practicable and rapid solution to solve asylum seeker problems must be perceived

as an outright rejection of basic human rights. The only scenario that may justifiably supersede Article 9 of the UN Universal Declaration of Human Rights and which may trigger the implementation of emergency measures to preserve public safety must comprise of an *actual* rather than an imagined existential threat from foreigners if and when they are perceived to harbor malice intentions towards the receiving state. This may only be possible if prior to the implementation of detention, each asylum seeker's case is closely examined and adjudicated without any possible biases and/or any political pressure, and every asylum seeker's identity is fully established prior to his/her release into Canadian society. Thus, as previously demonstrated and as will be shown in the next chapter, the arbitrary and indefinite detention of asylum seekers as solely premised upon their mode of arrival and countries of origin is an administrative convenience which inflicts much harm on asylum seekers. As Watson correctly observes, if detention is deemed absolutely essential by the receiving state, then detention must be for the 'shortest possible duration' and imposed strictly if and when the asylum seeker is seen by state authorities to pose an *actual* and serious danger to the public, may abscond, or if the identity of the asylum seeker has not yet been clearly established (Watson, 2009: 49).

International Law and Human Rights Norms: Treatment of the Asylum Seeker

The detention of asylum seekers in Canada—and in Australia as we shall see in the following chapter—is both arbitrary and indefinite, and inherently fails to adhere to the ethical norms and practices of traditional Western political and philosophical thought.. Canada's current long-term detention policies violate a number of international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) to which Canada is a party. The ICCPR expressly forbids the arbitrary arrest or detention of individuals (migrants) by declaring the following in Article 9 (1):

No one shall be subjected to arbitrary arrest or detention (UNHCR, 1966).

Furthermore, the ICCPR in Article 9 (4) clearly mentions that individuals are entitled to a court process to challenge the validity of their detention—this protection from arbitrary detention is extended to migrants by the chief interpretive body of the ICCPR called the Human Rights Committee (EIDN, 2014: 28). Commensurate with Article 9 of the ICCPR, Article 9 of the 1948 UN Universal Declaration of Human Rights also strongly condemns the practice of arbitrary detention by declaring:

No one shall be subjected to arbitrary arrest, detention or exile.
(The United Nations, 1948)

In addition, throughout the history of Western civilization, the practice of detention, whether arbitrary or not, is universally condemned. The *Magna Carta* of 1215, for instance, makes the proclamation that no free man shall be imprisoned without the lawful judgment of his peers or by the law of the land. Moreover, arbitrary detention was condemned throughout the conflict between the Crown and the Parliament of England in 1628 which abolished the power of the executive to detain arbitrarily, and similarly, article 7 of the French *declaration des droits de l'homme et du citoyen* composed in 1789, clearly stipulated that no one shall arbitrarily be accused, arrested or detained unless determined otherwise by the law. Last but not least, the 1791 U.S. Bill of Rights declares that no person shall be deprived of liberty without the 'due process of the law' (Goodwin-Gill, 1986: 195). Serious ethical and moral concerns arise if and when the sovereign power deems it essential to detain individual migrants and infringe upon their personal liberty—especially in an arbitrary manner. According to the EIDN report, in Canada, detention authorities violate the basic human rights of detainees and this is clearly evident in the following testimony provided by Nosakhare Osunbor, an immigration detainee. Osunbor observes:

When they were bringing me here to Lindsay [detention facility] they [immigration authorities] brought me here as a slave. They chained me with padlocks on my legs and my hands. They had handcuffs on my hands and legs with big padlocks. It looked like it was slave trade again when I watched slave trade movies that what it looked like (EIDN, 2014: 2).

Similarly, J. M. another immigration detainee remarks:

They [detention facility] don't have enough staff and so you get locked in inside the cell. Some days you got a whole two days locked in and they let you out for a few hours. That is really maximum security and that's for people who haven't committed any crimes...(Ibid., 2).

The detention of asylum seekers in Canada is especially disturbing as it pertains to women, and most importantly, children asylum seekers as they are detained in an arbitrary manner; a practice which violates the asylum seekers' basic human rights at the moment when such people are most vulnerable and are in need of assistance. Regarding the detention of asylum seeker children, the UNHCR ExComm, in its pronouncement *No. 47 (XXXVIII) – 1987* clearly condemns the exposure of refugee children to arbitrary detention and calls for immediate action to be undertaken by all states at both the national and international levels to prevent such actions which violate the asylum seeker's basic human rights and to assist such victims (UNHCR, No 47 (XXXVIII) – 1987, 2008: 36).

Harkening back to the 1987 episode, it must be stated that the securitization of Canada's migration system as a result of the 1987 arrivals and the federal government's portrayal of asylum seekers as a potential threat to the integrity of Canada's national security, on the whole did not meet with much success. From the outset, there were two factors which led to the successful 'desecuritization' efforts of the entire 1987 arrival episode which consisted of the inclusion of the sunset clauses during the legislation phase against the most draconian measures as well as the opposition Liberal party's control of the Senate. In addition, the desecuritization of the 1987 episode achieved further support from refugee advocate groups and various members of the media

which hampered the Conservative government's efforts to fully securitize Canada's migration regime (Watson, 2009: 67). Ultimately, such desecuritization efforts had a short life-span and starting in January 1989, Bills C-55 and C-84 came into full force which resulted in the revision of various immigration laws, altered the refugee determination system and the *modus operandi* of the Immigration and Refugee Board (IRB) (Bourbeau, 2011: 20), and gradually paved the path towards a full securitization of Canada's refugee determination regime. In short, Bill C-55 and in particular Bill C-84 *the Refugee Deterrents and Detention Act* (Greigo, 1992: 128) provided the executive government with much legal ground to confront asylum seekers without facing much contestation or any legal resistance from the judicial branch.

The Securitization of Canada's Refugee Determination System: 1987-1999

Following the 1987 episode, the year 1991 is considered a crucial date in Canada's migration history as Ottawa further strengthened the link between the issue of illegal migration and domestic security. With the publication of the *Foreign Policy Themes and Priorities* document in the same year, Ottawa albeit with some reservation, listed migration as a security concern and made reference to cooperative security efforts to be undertaken by states to contain irregular migration in conjunction with managing other problems haunting the international community such as drug trafficking, proliferation and global terrorism (Bourbeau, 2011: 20). In the aftermath of Bills C-55 and C-84 and the publication of the federal document in 1991, Ottawa in 1992, introduced additional restrictive revisions under Bill C-86 which further enhanced the securitization of humanitarian migration in Canada and justified its securitization efforts by citing the widespread abuse of the refugee determination system and an urgent and immediate need to assess each asylum seeker claim to refugee status in Canada (Greig, 1992: 138). It was not however until three years later that the federal government, this time led by the Chretien Liberal Party, made significant

strides in the further securitization of Canada's migration system. Primarily sparked by two murders which took place in Toronto that were alleged to have been committed by Jamaican immigrants already under deportation orders, Bill C-44 introduced certain amendments within Canada's Immigration Act that virtually targeted the refugee population in Canada. During this period, the media's intense focus on the deep flaws that existed within Canada's immigration system subsequently provided Ottawa with a much-needed political momentum to re-incorporate the provision of 'danger to the public' within the text of the Immigration Act. In contrast to the Liberal party's mainly open-door policy stance during the 1980s, especially throughout the 1987 episode, the Liberal party unexpectedly shunned its past public image of being sympathetic towards asylum seekers, and in so doing, pursued the same stringent migration policies advocated by the Conservative government led by Brian Mulroney during the previous decade. The inclusion of the provision of 'danger to the public' in Bill C-44 resulted in the loss of the right to appeal by a refugee applicant who had received a removal order by the Minister of Citizenship and Immigration if and when the Minister at his/her discretion deemed the particular individual as a security threat to public safety (Bourbeau, 2011: 20).

Yet, in a surprising move, the Chretien government by the mid-1990s, also made conscious efforts to desecuritize Canada's migration system—especially when it came to the arbitrary detention of asylum seekers. In 1996, Citizenship and Immigration Canada (CIC) embarked upon revising Canada's detention policy of asylum seekers, and by 1998, re-issued a new policy statement entitled *Detention Policy*. Commensurate with Article 31 (1) of the 1951 Refugee Convention which emphasizes that contracting states shall not penalize [asylum seekers] based on their mode of entry (Convention and Protocol relating to the Status of Refugees, 2010: 29)—as well as the UNHCR ExComm's conclusion *No. 44 (XXXVII) – 1986 – Detention of Refugees and*

Asylum-Seekers, which noted with deep concern the fact that a large number of asylum seekers throughout the world who are currently residing in detention (UNHCR, 2008: 134),—the *Detention Policy* document provided clear instructions to immigration officials to utilize detention as a last option and only resort to detention in circumstances when a particular asylum seeker posed a serious security threat to the Canadian state (Bourbeau, 2011: 22). The *Detention Policy* document in addition, advocated the exercise of ‘sensible risk management practices’ as well as sound judgment to be exercised by immigration officials when assessing individual cases prior to administering detention. This was a certainly a sensible policy approach by Ottawa to effectively manage the issue of illegal migration in Canada. Thus, the *Detention Policy* document recommended the assessment of an asylum seeker case on an *individual* basis and the final decision to detain or release asylum seekers into Canadian society was to be made within the parameters of the following prioritization criteria: 1) identifying safety and security concerns, 2) resolving any remaining identity issues related to a particular individual prior to eliminating security concerns and/or the subsequent administration of detention as a tangible solution, 3) supporting the removal of the individual asylum seeker if and when removal is imminent especially if a flight risk has been identified by authorities, and finally, 4) eliminating all concerns regarding a person’s identity (Ibid., 22).

1999 Maritime Arrivals: The Path towards Resecuritization

Despite the publication of the *Detention Policy* document, by the late 1990s, Ottawa’s larger refugee policy paradigm became increasingly subjected to neoliberalist influences (Soenneken, 2013: 259) and Ottawa once more adopted a securitized rather than a humanitarian approach to manage the influx of asylum seekers into Canada. What triggered the resecuritization of Canada’s migration system during this period was mainly due to the arrival of 599 asylum seekers aboard

four boats off the west coast of Canada which occurred over a twelve week period in the summer of 1999. This episode generated a robust and rigid securitized response from the Chretien government and resulted in the long-term detention of 429 (72 percent) of asylum seekers who arrived via the first boat and the almost complete and arbitrary detention of the remaining asylum seekers aboard the second, third, and fourth boats (Watson, 2009: 70). The 1999 maritime arrivals and the harsh treatment of asylum seekers by the federal government ultimately ensured the entrenchment of a securitized migration regime in Canada which was to be permanent, non-negotiable, and arbitrary whenever detention was considered as a solution to contain asylum seekers. Ottawa's decision to detain asylum seekers in 1999 was inconsistent with the basic principles of universal human rights and was also draconian in its scope of implementation. For instance, most asylum seekers whose identity could not immediately be verified were detained by Citizenship and Immigration Canada (CIC) in the remote community of Prince George which lacked full legal access and proper support from refugee advocates. In addition, what was most astonishing about the 1999 episode, was the unethical treatment of children by the CIC authorities as the children were handcuffed, shackled, treated as common criminals, were subject to 24-hour police surveillance, and were further denied access to legal counsel primarily due to the CIC's argument to learn as much detail about the asylum seeker's boat journey to Canada (Ibid., 71).

Overall, the 1999 boat arrivals brought to surface the existence of serious legal and ethical issues about how the federal government responded to asylum seekers as they reached Canada. Following the desecuritization episode of the 1987 Sikh boat arrivals, the 1998 introduction of the *Detention Policy* document, and the desecuritized measures made by the Chretien Liberal government to asylum seekers in a humane manner, (Bourbeau, 2011: 55), the 1999 boat arrivals episode is considered by many scholars to be a sudden reversion by Ottawa to adopt the closed-

border policies that were advocated and staunchly defended by the Conservative government in the late 1980s. Similar to the 1987 episode, a key issue throughout the 1999 episode which led to the arbitrary detention of asylum seekers was (and continues to be) the asylum seekers' mode of arrival. It was this mode of arrival by boats operated by human smugglers which triggered the implementation of extraordinary measures against asylum seekers which encompassed the initial detention of men, women, and children in a military gymnasium and barracks in Esquimalt (Victoria, Canada)—all of which were barbed wired, scanned with floodlights, and guarded by attack dogs and placed under 24-hour police supervision (Watson, 2009: 70-71). One of the key issues pertaining to the treatment of asylum seekers by Western liberal states, is the method by which asylum seekers arrive on the shores of countries such as Canada and Australia and how the mode of arrival is directly linked with how the image of the asylum seeker is constructed as a threat to national security, and ultimately, how the asylum seeker is treated by the recipient state. Thus, as Watson correctly observes, the irregular mode of arrival of asylum seekers seems to undermine the community's strength and measure of communal unity (Ibid., 143) which is essential to preserve the social status quo. The surprising and sudden implementation of draconian measures by the Canadian state against asylum seekers during the 1999 episode serves as a strong reminder about the tenuous nature of the current international refugee regime and reveals the supremacy of the powers of the sovereign state in today's international system—powers which when fully unleashed under the banner of national interest give rise to serious concerns about the treatment of asylum seekers in Canada.

2001: Normalization of a Securitized Response

Following the 1999 episode and the terrorist attacks of 11 September 2001, Ottawa opted to further enhance the securitization of Canada's migration system. Immediately following the 9/11

attacks, the U.S. government introduced the USA PATRIOT Act which not only implemented tough measures against individuals whom the government suspected of having possible links with terrorist organizations, but also increased the number of border control agents at the 49th parallel. In a similar fashion, the Canadian government, with the introduction of the *Immigration and Refugee Protection Act (IRPA)*, tightened its border security control measures and implemented indefinite detention as a pragmatic and effective solution to detain asylum seekers who did not possess official documents (Watson, 2009: 122-123). Hence, the 1999 episode in combination with the 9/11 terrorist attacks in New York, in essence crystallized the establishment of a security-migration paradigm in Canada which favored closed-border policies and recalibrated the identity of outsiders or asylum seekers as dangerous entities who could potentially jeopardize the safety of the Canadian public.

In the aftermath of the 9/11 attacks, the federal government introduced two key institutions which were entrusted with the sole mandate of managing migration and asylum seeker problems in Canada. To prevent any possible risks posed to the public by outsiders and to thwart any future terrorist attacks as a possible result of the flow of asylum seekers to Canada, Ottawa, immediately following the September 11 attacks, created the new Citizenship and Immigration Canada Intelligence Branch (CICIB). The CICIB served as the foremost centralized federal migration intelligence agency which integrated existing intelligence resources in the CIC which heretofore managed security in Canada, improved security measures, and built overall capacity (Bourbeau, 2011: 23). In addition, the CICIB enhanced security measures at Canada's ports of entry by placing more immigration officers at ports to screen refugee claimants more effectively and increased cross-border collaboration with the United States to introduce innovative strategies to address continental migration concerns. Shortly after the introduction of the CICIB, Ottawa created the

Canada Border Services Agency (CBSA) in December 2003 and entrusted the CBSA with the mandate to ‘...ensure Canada’s security and prosperity by managing the access of people and goods to and from Canada’ (CBSA, 2013). And in somewhat of a surprising move, to fulfill its mandate, the CBSA proceeded with amalgamating the various sections and departmental divisions located within the Customs program in Canada Customs and Canada Revenue Agency (CRA) that were involved in enforcing border security (Bourbeau: 2011, 23).

Overall, the 1999 arrivals and the 9/11 terrorist attacks in New York catapulted the sudden establishment of a highly securitized migration regime in Canada. At the core of the Canadian government’s post-9/11 institutionalized response is to be found a deeply entrenched securitized commitment which has recently culminated in the negation of some of the core humanitarian tenets found within Canada’s Immigration and Refugee Protection Act as well as the 1951 Refugee Convention. In general, the securitization of humanitarian migration in Canada simply means targeting human smuggling operations and demolishing their business model and preventing asylum seekers from jumping the migration wait-list queue.

Ottawa’s tough stance against illegal migration has recently been manifested within the legislative framework of *Bill C-31 the Balanced Refugee Reform Act*, which was introduced and implemented in February 2012. After much debate and criticism from the NDP opposition party, as well as the Canadian Bar Association and numerous other refugee advocate groups and organizations, Bill C-31 has legalized the biometric identification of people through the usage of fingerprinting and taking photographs of those who apply for visas to visit Canada. Moreover, Bill C-31 grants unprecedented powers to the Minister of Immigration to designate countries that he deems as being ‘safe’ or inherently non-refugee producing countries (CBC, 2012). Under Bill C-31, the assessment of asylum seeker claims to refugee status may now be linked to what country

the asylum seeker originates from, and not upon the individual claim to asylum submitted by the refugee claimant. According to the current Conservative government's Designated Country of Origin (DCO) List, if a claim to refugee status is launched by an asylum seeker who is found to originate from any one of the 25 'safe' countries in the European Union, or from Croatia or the United States, the asylum seeker will automatically be deemed as a 'bogus' refugee, his/her claim to refuge will be considered unfounded, and the application will be fast-tracked with no right to appeal to a new appeals body within the Immigration and Refugee Board (IRB) (Ibid., 2012). In addition, the wait time for bogus refugees to apply for permanent residency status in Canada under humanitarian and compassionate considerations has been increased to a full year by Bill C-31 and failed applicants could also be deported by the federal government prior to any court ruling on their particular case (Ibid., 2012). According to the former Minister of Immigration Jason Kenney, a key reason behind the introduction of such harsh measures found in Bill C-31, is the recent spike in Roma refugee claims from such states as Hungary and the Czech Republic. In the case of Hungary for instance, refugee claims from 2010 to 2011 doubled from 2,400 to 4,900, and this rise in refugee claimant numbers is one of the key reasons cited by the Conservative government to revamp Canada's refugee laws in order to effectively manage the influx of asylum seekers (Ibid., 2012).

The recent introduction of such harsh measures against asylum seekers and refugee populations in Canada is what the NDP immigration critic Don Davies has so aptly referred to as "...the rejection of good, sound legislation...[which] puts too much power in the hands of the minister" (Ibid., 2012). As some refugee experts assert, by granting such unprecedented powers to the Minister of Immigration, Bill C-31 in effect undermines and ignores some of the core humanitarian principles firmly lodged in the 1951 Refugee Convention which must be adhered to by Canada as

a contracting state, and furthermore, may jeopardize the very lives of genuine asylum seekers and refugees fleeing persecution. A disturbing example of the negative effects of Bill C-31 on the health of asylum seekers in Canada relates to asylum seekers who originate from Designated Countries of Origin such as Hungary. Thus, any asylum seeker arriving in Canada after June 30, 2012—when Bill C-31 came into effect—from any of the DCO countries who is in the wait-list queue waiting to have his/her case adjudicated to gain permanent refugee status in Canada, automatically loses his/her right to basic and/or even emergency health care services (Huffington Post, 2012). “Safe country is a very dangerous concept in the world of law,” observes Peter Showler, a former chair of the IRB and expert in refugee law at the University of Ottawa, “from virtually every country there are some people who are safe and some people who are not. If the minister removes [the advisory committee] then the danger is of arbitrary placement on the list and particularly for political reasons” (Ibid., 2012). In short, Bill C-31 fails to take into consideration Article 3 or the *Non-discrimination* clause found in the 1951 Refugee Convention which states that:

The Contracting states shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

(UNHCR Convention and Protocol relating to the Status of Refugees, 2010: 19).

As an interesting development pertaining to the loss of health care services for asylum seekers who may originate from ‘safe’ countries of origin, the Federal Court on July 4, 2014, released its decision which gave Ottawa four months to alter the federal cuts to the Interim Federal Health program (IFHP). In her 298-page decision, Judge Anne Mactavish ruled that the federal cabinet has the power to make changes to the IFHP, however, the changes subjected people (adult and children asylum seekers) to ‘cruel and unusual’ treatment—a treatment which declared judge Mactavish “...shocks the conscience and outrages Canadian standards of decency” (CBC, 2014).

In sum, Bill C-31 does not adhere to the stipulations of Articles 33 (1) which as previously mentioned, primarily focuses on the *non-refoulement* principle which prevents the arbitrary return of asylum seekers to territories where the asylum seeker's freedom or life may be in serious jeopardy. In this context, under Bill C-31, the Minister of Immigration, at his discretion and without judicial accountability, may arbitrarily *refoul* an asylum seeker simply due to the fact that the asylum seeker originated from one of the countries listed on the DCO, and not due to a proper and thorough assessment of the individual asylum seeker's identity as stipulated in 1951 Refugee Convention. The arbitrary and indefinite detention of asylum seekers highlights unresolved legal and ethical issues connected with the restrictive migration policies currently in effect in Canada and reveals how the notion of national security has, throughout the past two decades, superseded the notions of Canadian hospitality and the preservation of the fundamental human rights of the foreigner. As Goodwin-Gill points out:

Whatever the precise nature of the individual dimension, *nothing justifies differentiating between national and non-national in the matter of fundamental human rights* [My Italics] the right to life...the right to liberty and security of the person (including protection against arbitrary arrest and detention)...(Goodwin-Gill, 1986: 205).

A legal and ethical solution that would resolve the state-asylum seeker problem in Canada must encompass the assessment of the asylum seeker's claim to refugee status on an *individual* basis and within a timely manner. In fairness, in Canada, there currently exist bureaucratic and legislative safeguards which ensure the proper and timely identification of the asylum seeker—a practice which is premised upon individual attributes (Watson, 2009: 45-46). However, as this chapter has clearly demonstrated, such bureaucratic measures in Canada do not seem sufficient to eradicate the collective and arbitrary confinement of asylum seekers in detention centers which inflict much harm on asylum seekers.

As will be shown in the following chapter, asylum seekers seeking refuge in Australia encounter a much more robust and inflexible refugee determination system when compared to Canada. As an example to support this claim, the recent attempts by the former Kevin Rudd Labor government to revamp the 60-year-old 1951 Refugee Convention is both of interest and disturbing as the Rudd government made bold attempts to harness support from other nations (ABC, 2013) to alter international law and redefine the 1951 Refugee Convention as well as the humane treatment of asylum seekers! However, as I shall demonstrate in the next chapter, the coalition government currently in power and led by Prime Minister Tony Abbott has gone much further and has made unprecedented strides to make Australia's borders impervious to asylum seekers—especially to those arriving via boats. Due to the constant arrival of asylum seeker boats, the Abbott government, under the auspices of *Operation Sovereign Borders*, seeks to stop asylum seeker boats from penetrating Australia's geographic periphery. In addition, Canberra, under the banner of national security and under the pretext to preserve Australia's unique cultural homogeneity, has sought to prevent the flow of asylum seekers into Australia by enhancing Australia's asylum seeker detention policies, tightening the refugee processing rules for economic migrants, and widening greater regional cooperation with regional pacific nations such as Indonesia and Papua New Guinea to deter and detain asylum seekers. Goodwin-Gill observes that the validity of the state and the preservation of communal interest in the context of illegal migration, albeit important, must not instigate the implementation of such *wholesale restrictions* on personal liberty (Goodwin-Gill, 1986: 211). Nowhere perhaps is this maxim more relevant than when one examines the current harsh treatment of asylums seekers by Canberra—a treatment which will be the primary focus of the following chapter.

Chapter 3

Some of the toughest and most contentious migration measures against asylum seekers are to be found in Australia. Since the founding of the Australian federation in 1901 and the full implementation of the White Australia policy—which could be traced back to the early 1850s—the Australian federal government has sought to limit the influx of economic migrants as well as non-white populations into Australia (Department of Immigration and Citizenship, 2014). A brief analysis of the initial migratory patterns of Europeans during the eighteenth, nineteenth and twentieth centuries to the Australian continent reveals that most Australian residents originated from the United Kingdom and Europe, however, this migration dynamic was severely altered in the latter part of the Twentieth century starting with the massive influx of Vietnamese refugees via boats into Australia in the 1970s. The arrival of refugees from Southeast Asia, in combination with the arrival of numerous asylums seekers originating from various countries in the Middle East in later years has further intensified Canberra’s resolve to limit the flow of asylum seekers across Australia’s borders. In this chapter, I contend that Australia’s current securitized migration regime inherently fails to meet the legal standards prescribed by the international refugee regime. Throughout this chapter, I reveal why it is important for Canberra to establish a *balanced* migration regime which would properly address Australia’s national sovereignty and border security concerns and also uphold the basic principles of universal human rights as found at core of the 1951 Refugee Convention and the 1967 Convention to properly and effectively manage the claims to refuge launched by asylum seekers.

As one of the signatories to the 1951 Refugee Convention and the 1967 Protocol, it is simply astonishing to see how consecutive Australian governments have throughout many years continued to implement restrictive policies and measures to ‘protect’ Australia from the influx of asylum

seekers. To manage the flow of illegal migrants and achieve its border security mandate, Canberra since the late 1980s, has resorted to such preventative measures as the naval interception of boats carrying asylum seekers, carrier sanctions (which comprise of fines and other punishment on transport operators for carrying passengers without correct documentation) (Sales, 2007: 103), stationing Australian immigration officers in foreign airports to detect illegal migrants (Gibney, Hansen, 2005: 76), crackdown on various human smuggling operations originating from transition countries—including non-signatory states—such as Indonesia and Malaysia, off-shore processing models, and territorial excision measures (Tunstall, 2006: 147). However, in Australia, and somewhat similar to Canada, there remain two highly controversial preventative/deterrent measures which have heavily been relied upon by Canberra to combat the influx of asylum seekers: the use of Temporary Protection Visas (TPVs), and the arbitrary and indefinite detention of asylum seekers. I shall soon provide more detail about both these restrictive measures and how they are utilized by Canberra to combat the influx of asylum seekers. In short, TPVs grant temporary stay to asylum seekers in Australia yet also allow for the immediate deportation of an asylum seeker should the political and social circumstances improve in the asylum seeker's country of origin, while the latter measure, detention, is much more severe in its scope of implementation as it primarily targets asylum seekers arriving via boats, and in violation of the Refugee Convention, punishes asylum seekers due to their 'illegal' mode of arrival.

A key concern related to the current state-asylum seeker paradox in Australia is how Canberra distinguishes between those asylum seekers who reach Australia by boats (maritime arrivals) and those asylum seekers who arrive in Australia by airplane (air arrivals). In short, asylum seekers who arrive by plane are treated with much more hospitality and tolerance by the Australian government and immigration officials as opposed to maritime arrivals as they are immediately

transported to detention centers mostly located outside Australia's borders in remote locations. Canberra exercises a great deal of leniency when it comes to dealing with asylum seekers arriving by airplane. This may be due to the fact that asylum seekers arriving by planes, albeit also categorized as being 'illegal,' may in fact have arrived in Australia legally; as they may possess forged travel documents. In cases related to air arrivals, each asylum seeker's claim to refuge is assessed through Australia's refugee status determination and complementary protection system which operates under the auspices of the Migration Act (1958) (Australian Human Rights Commission, 2014). Thus, to assess the asylum seeker's claim to refugee status, Australia's Department of Immigration and Citizenship (DIAC) makes a primary and if necessary, a secondary assessment under the aegis of the International Covenant on Civil and Political Rights (ICCPR), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), or Convention on the Rights of the Child (CRC). If the asylum seeker's application to seek the protection of the Australian government is somehow rejected by the DIAC, the asylum seeker who arrived by plane continues, during the third stage of assessment, to retain the option of having access to independent merits review by the Refugee Review Tribunal (RRT) or in some cases the Administrative Appeals Tribunal (AAT) (Ibid). Circumstances surrounding the treatment of asylum seekers arriving by boats remain vastly different. Restrictive measures implemented against maritime arrivals seem to primarily be rooted within a commonly shared anxiety found amongst the majority of Australia's successive governments; an anxiety, which dating back to the 1970s, primarily stems from viewing maritime arrivals as a clear and present danger to Australia's national sovereignty and border security policies and subsequently has culminated in the normalization of processing asylum seeker claims to permanent refugee status at offshore locations outside mainland Australia.

Asylum Seekers and the Offshore Processing Model

By the early 2000s, in response to the influx of asylum seeker boats, the John Howard Liberal government introduced the controversial practice of processing the refugee claim applications of asylum seekers arriving by boats at offshore rather than onshore (within Australia) locations. This practice, which has since been labelled as the *offshore processing model*, has also included the excision of Australia's external territories from Australia's migration zone—a policy implemented by Canberra in 2001 as part of the *Pacific Solution* which was the Howard government's response to the Tampa incident in the same year. I shall soon expand upon the Tampa incident and the subsequent harsh treatment of asylum seekers by the Australian government during this episode. However, at this juncture, it is sufficient to point out that the Tampa incident ultimately resulted in the establishment of a punitive refugee regime in Australia—a regime which primarily targeted—and continues to target—maritime arrivals and essentially dictated that asylum seekers arriving by boats must be kept within the confines of detention centers in such remote locations as the islands of Nauru and Papua New Guinea while waiting for their applications to be reviewed by immigration authorities. In addition, the Pacific Solution imposed a restriction upon asylum seekers who were already granted refugee status by the Australian government, as they were temporarily settled in mainland Australia and were issued TPVs that were renewable and reviewable every three years (Amnesty International, 12).

In 2007, the Pacific Solution was abolished by the Kevin Rudd government and the offshore processing locations in both Papua New Guinea and Manus Island were shut down. Yet, the offshore facility in Christmas Island continued—and continues—to exist and was in fact expanded, and asylum seekers (both adults and children) have since been detained on Christmas Island on an arbitrary basis and for an indefinite period. During this period, to address the influx of asylum

seekers to Australia, the Rudd Labour government mainly upheld its pre- and post-election promises throughout the 2007 national election and replaced TPVs with Permanent Protection Visas (PPVs) (Amnesty International, 13). However, the Rudd government, despite its promising rhetoric, made prior to and during Labor's 2007 campaign, which emphasized the adoption of less securitized measures against asylum seekers, later resorted to implement a set of restrictive policies that were much similar to the policies of previous Australian governments. Specifically, the Rudd government targeted asylum seekers arriving from Sri Lanka and Afghanistan and suspended the processing of asylum seeker applications for a period of three to six months ostensibly due to a surge in asylum seeker boat arrivals from Sri Lanka and Afghanistan (Centre for Human Rights Education, 2011: 6).

In June 2010, the Rudd government was replaced with the Julia Gillard labour government. A key argument which was utilized effectively by the Gillard campaign during the 2010 elections, and which eventually contributed to Julia Gillard's ascendancy to the helm of political power in Canberra, was how the Rudd government was not able to adequately manage the surge of maritime arrivals. This factor, combined with the dismantling of the Howard government's Pacific Solution in 2008, as well as such remarks uttered by Prime Minister Rudd just prior to the 2010 election date that he would "not move to the right on the boats issue," were all decisive factors which opened up the political landscape for Julia Gillard (Quadrant Online, 2014). In August 2012 the Gillard government introduced a new preventative measure called a *Third Country Processing system*. This new restrictive model, which was condoned by the 'Expert Panel' to contain the flow of asylum seeker boats to Australia, was in essence the reintroduction of the Pacific Solution and was set in motion due to the drowning of a boatload of asylum seekers in June 2012 (Ibid., 14).

During this period, the Expert Panel's advice was primarily underpinned by the *No Advantage Principle*—the notion that asylum seekers should accrue no benefit from immigration authorities since they employed people smugglers to arrange their passage to Australia by boat rather than wait in another country to have their claims assessed (Australian Human Rights Commission, 2013). Under this new claims processing model the Gillard government processed the applications of maritime arrivals who possessed no valid visa at an excised offshore location (Christmas Island) or in one of the regional processing countries such as Nauru or Papua New Guinea (PNG). Approximately eight months later however, in May 2013, the Gillard government's Third Country Processing system was extended to apply to asylum seekers arriving by boats *anywhere* in Australia. This policy ensured that asylum seekers arriving by boats at any location in Australia were transferred to a third country at the earliest possible opportunity. This transfer to third countries meant that asylum seekers' claim to protection would be processed under the laws of the third country to which asylum seekers were transferred, and if their claims was successful, asylum seekers would then be resettled in these countries rather than being settled in Australia! The decision to transfer asylum seekers to third countries could only be reversed by the Minister of Immigration who may at his discretion have chosen to exempt the asylum seeker from such a transfer (Ibid., 2013). To this date, the offshore processing model continues to be a costly undertaking. According to Australia's Parliamentary Library Paper, the expenditure to conduct offshore processing has significantly increased in recent years, especially due to the re-opening of offshore processing centers in Nauru and Manus Island in Papua New Guinea. The Australian federal government in 2013-2014 allocated a budget of \$2.9 billion for offshore asylum seeker management as well as an additional \$405.9 million was added to manage and process asylum seeker claims in the Mid-year economic and fiscal Outlook (ABC, 2014).

A key argument put forth by a number of Western industrialized states, such as Australia, in defense of maintaining and enhancing their respective restrictive and/or draconian measures against asylum seekers, has revolved around the mass influx of asylum seekers into Western states. This fact which is substantiated by the UNHCR's report *Asylum Trends 2012: Levels and Trends in Industrialized Countries*, indicates that a total of 15,800 asylum claims were indeed launched in 2012 alone; a figure which is equivalent to a rise of 37% increase in asylum claims in comparison with the 2011 figures (UNHCR, 2012). However, in the context of Australia, the situation regarding how many asylum seekers in actuality choose Australia as their destination country is somewhat different. According to the 2012 UNHCR report, asylum levels in Australia between 2001-2010, when compared to asylum levels launched in 44 industrialized countries during the same period, across various countries in Europe as well as in Canada and the United States, continue to remain surprisingly low (Ibid., 8).

Furthermore, the logic behind Canberra's further securitization claims relates to how maritime arrivals may potentially jeopardize public safety in Australia. Since the events of 9/11, Canberra has allocated sufficient energy and governmental resources to impede the flow of asylum seekers who may potentially possess a significant security risk to Australia. In the current era of global social and political upheavals and uncertainties heavily imbued with national security concerns, it must be admitted that this is in fact a laudable undertaking by Canberra to ensure that Australia is not targeted by criminals and/or terrorists seeking to reside in Australia as asylum seekers. But this has proven to be a misguided basis for policy. As a precautionary measure and prior to possibly granting permanent residency status to any asylum seeker who arrives by boat in Australia, each asylum seeker undergoes a rigorous analysis by ASIO (Australian Security Intelligence Organization) (Refugee Council of Australia, 2014); thus, if an asylum seeker should receive an

adverse security assessment by ASIO, the asylum seeker may then not be granted permanent status in Australia and may in fact be deported or refouled to a transition country or country of origin. It must be noted however that thus far few asylum seekers have received an adverse security assessment by ASIO, and since 2009, ASIO has issued adverse security assessments to only 63 maritime arrivals, whereas in contrast, during the period 2009-2012, a total of 9,636 asylum seekers who arrived by boats passed ASIO's security assessments prior to being granted protection visas. Subsequently, less than one percent of maritime arrivals who arrived between 2009-2012, received an adverse security assessment (Ibid). Hence, this lays to rest one of the foremost claims made by Canberra throughout the past few years pertaining to the potential security risks that asylum seekers in general pose to Australia's public safety and the need to sustain the arbitrary and indefinite practice of detaining asylum seekers at the moment of arrival.

Michael Humphrey reminds us that such containment policies advocated by industrially advanced nations such as Australia that belong to the G8, in reality, trump the basic human rights of the individual (asylum seeker) and uphold the supremacy of the sovereign state (Humphrey, 2003: 7). Humphrey asserts:

The assertion of 'border protection' over the 'protection' of individuals is happening through the collective action of governments to 'harmonize' their asylum and migration policies and to enact laws against 'people smuggling' in international criminal law through the UN Convention on Transnational Organized Crime (2000). Refugee flows are being portrayed as the product of international organized crime (Ibid., 7).

Humphrey's keen observation regarding the current global state-asylum seeker dynamics draws attention to the recent harmonization of anti-asylum seeker policies amongst the majority of Western liberal democracies and informs us how this anti-illegal migration policy harmonization, has in recent years, given rise to the arbitrary and indefinite detention of asylum seekers—a practice which as alluded to earlier, clearly defies Article 31 of the 1951 Refugee Convention

which recognizes that asylum seekers may at times resort to illegal modes of travel to preserve their life and liberty, and that their claim to refuge must not be disqualified by recipient states due to their illegal mode of entry (Humphrey, 2003: 8).

Asylum Seekers and the Temporary Protection Visa (TPV) Regime

By analyzing the TPV regime in Australia, my aim is to show how the implementation of the TPV contradicts the stipulations of the international refugee regime and moreover inflicts much harm upon the well-being of asylum seekers. To impede the success of refugee applicants from gaining permanent status in Australia, Canberra, on 13 October 1999, introduced the implementation of Temporary Protection Visas (TPVs) which was meant to deal with asylum seekers whose applications for refugee status in Australia had ostensibly been approved by the Department of Immigration. The implementation of TPVs basically meant that Canberra, in lieu of granting permanent refugee status to asylum seekers and providing them with socio-economic rights and benefits such as traveling abroad and financial assistance from government, gave asylum seekers a three-year temporary entry visa option which meant that after the conclusion of the three-year period, the refugees once more had to reapply for permanent status (Watson, 2009: 131).

Since its introduction in 1999, the TPV policy has imposed severe restrictions upon refugees by limiting their access to social programs, reducing the possibility of family reunifications, and eliminating the option of exiting Australia with no possibility of re-entry (Goodwin-Gill, 2001: 24). In short, TPVs are designed to make Australia a less attractive destination country for asylum seekers to travel to (Watson, 2009: 136) and punishes asylum seekers due to their mode of entry. TPVs appear to deny further rights to asylum seekers as found within the 1951 Refugee Convention such as a Convention travel document found under Article 28 and the overall enjoyment of Convention rights on a non-discriminatory basis (Goodwin-Gill, 2001: 23-24).

Similarly, the UNHCR Excomm in its *NO. 49 (XXXVIII) – 1987 – Travel Documents for Refugees* decision has also urged all contracting states to the 1951 Refugee Convention and the 1967 Protocol to take legislative and administrative measures to effectively implement provisions to issue, renew and extend travel documents and grant visas to holders of Convention Travel Documents (UNHCR, 2008). In sum, TPVs encourage asylum seekers to seek refuge in Australia through the proper channels of state-sanctioned resettlement programs and dissuade asylum seekers from seeking assistance from human smugglers to reach Australia. However, the imposition of TPVs in reality criminalizes refugee flows due to their illegal status and champions the protection of the state over and above the protection of the individual asylum seeker (Humphrey, 2003: 39).

By 2001 the notion of protecting Australia's national borders from the constant onslaught of illegal maritime arrivals had captured much attention in the Australian public realm. The election strategy in 2001 for instance was heavily saturated with ideas which related to protecting Australia's borders against foreigners or 'queue jumpers' who seek to gain entry into Australia (Ibid., 31). It was not until the 9/11 terrorist attacks in the United States however, that the governing Liberal party led by Prime Minister John Howard successfully portrayed asylum seekers as an existential threat to Australia's public safety. During the early 2000s, the singular migration incident which triggered the further securitization of humanitarian migration in Australia was the rescuing of 438 Afghan asylum seekers by the Norwegian freighter *MV Tampa* from a sinking vessel in the waters between Indonesia and Australia. Throughout this episode, which later came to be known as the *Tampa crisis*, the Howard government took decisive steps to prevent the *Tampa* from offloading its human cargo of mostly traumatized asylum seekers on the shores of Christmas Island (Australian territory) and ordered the Special Air Service Regiment (SASR/SAS) to board

the *Tampa* to secure the foreign vessel. During this crisis, the Howard government staunchly refused to allow the asylum seekers to land on Australian soil, and after many hours of standoff, Canberra finally permitted an SASR physician to examine the asylum seekers. Prior to the arrival of the SASR physician the *Tampa's* master had warned the Australian authorities that he had a serious medical crisis on board; a report which was later found out to have been publicly misrepresented by the Prime Minister's Office. The terrible medical conditions of the asylum seekers onboard the *Tampa* was later corroborated by the SASR doctor who reported that at least ten asylum seekers were unconscious and some were suffering from dehydration, exhaustion, diarrhea, dysentery, and scabies, and that there were also two pregnant women suffering from stomach cramps whom the male crew could not examine (Tauman, 2002: 465). Rather than improving the condition of asylum seekers detained on the *Tampa*, extensive media coverage portrayed the entire *Tampa* incident as a national security issue. In short, the Australian media and key political figures in federal government employed securitizing language to deny assistance to the asylum seekers (Watson, 2009: 98). These events combined with the terrorist attacks of 11 September, 2001 in New York, culminated in the further criminalization and securitization of Australia's refugee determination system and normalized the usage of mandatory detention and strict visa control and carrier sanction policies (Ibid., 96, 13) to combat asylum seekers as they drifted towards Australia's shores.

One of the most astonishing revelations about the *Tampa* crisis was how the John Howard government sought to achieve political gains by highlighting the dangers that asylum seekers would pose to Australia's public safety. For instance, the former second-in-command of the SAS counter-terrorism squad, MP Peter Tinley, has confessed that the immediate militarization of the entire *Tampa* affair by deploying the SAS troops to deal with the asylum seekers was a 'complete

overreaction'. Tinley observes that "...PM John Howard viewed the SAS [deployment] as something that would resonate politically to the message of border security" (ABC News, July 2013). To date, former Prime Minister John Howard continues to assert that his government's 'tough' stance against asylum seekers during the *Tampa* incident was simply to uphold Australia's national interest by averting the influx of potential terrorists into Australia. Canberra's offshore processing model, which arguably originated from the *Tampa* crisis and encompasses the immediate detention of asylum seekers arriving by boats, is a clear indication of the existence of strong links between the asylum seeker issue in Australia and the global (Australia's) War on Terror. Hence, as Vice Admiral Chris Ritchie, the retired Commander of Australian Theatre with the Royal Australian Navy (RAN) observes, the choice to travel to Australia, especially via unseaworthy vessels, "... seem[s] to...be a funny way to get to Australia if you were a terrorist. There are other easier ways to get into Australia than [risk] spend[ing] six months in [detention center in] Nauru" (ABC, 2013).

Immediately following the *Tampa* episode the Howard government introduced a series of astonishing measures that forcefully directed asylum seekers to third states that were non-signatories to the 1951 Refugee Convention, and in 2001, instituted the *Pacific Solution* which encompassed a set of restrictive measures to detect and intercept asylum seeker vessels by RAN and to redirect these vessels to third states for processing asylum seeker claims (Watson, 2009: 102). The *Pacific Solution* was in addition supplemented by the *Border Protection Bill (2001)*, which much similar to Canberra's response during the 1992 episode, resulted in a major shift in legal power from the judicial to the executive branch, and during the process, provided the Prime Minister with unprecedented powers to bypass the pronouncements of the judicial branch as well as the stipulations of the 1951 Refugee Convention and turn asylum seeker vessels away from

Australia's shores (Amnesty, 2007). Overall, the *Pacific Solution* was Canberra's initial attempt to curb the flow of asylum seekers to Australia by resorting to a military rather than a humanitarian *modus operandi* and culminated in the enforcement of the naval blockade known as *Operation Relex* which in essence militarized the civilian Coast watch system in Australia at an enormous cost of \$20 million per week (Watson, 2009: 102-103).

In the early 2000s and throughout the entire duration of the *Pacific Solution*, there were two asylum seeker boat episodes which highlight the importance of legal and ethical issues as recipient states deal with and treat asylum seekers: 1) the Suspected Illegal Entry Vessel IV (SIEV IV) incident which occurred on 6 October 2001, where the Howard government publicly claimed that during their rescue by the Australian Royal Navy (ARN) asylum seekers deliberately threw their children overboard (ABC Blog, 2011), and 2) the SIEV X disaster, which unfolded a few days later on 19 October 2001 (Sievx.com) and resulted in the drowning of 352 asylum seekers including many women and children (Watson, 2009: 102-103). Both of these incidents occurred soon after *Operation Relex* was launched and both boats carrying asylum seekers were portrayed from the outset by Canberra as an existential threat to Australia's national security. The SIEV IV incident, which was eventually dubbed as the 'Children Overboard' affair by the Australian national media, attracted much media attention during the early stages of the operation primarily since the Howard government accused asylum seekers of throwing their children into water. In general, the encounter between SIEV IV, a rickety boat filled with asylum seekers heading for Christmas Island, and HMAS *Adelaide* which detected and rescued the occupants of SIEV IV, was utilized effectively by the Howard government to once more gain political success during the 2001 election campaign.

According to one eye witness account, Laura Whittle, who served as an ARN gunner with the HMAS *Adelaide* at the time of the rescue, no children were in fact thrown overboard by any asylum seekers and at no stage during the rescue, did Ms. Whittle witness any such acts performed by asylum seekers—even while the SIEV IV was sinking (ABC, 2004)! Breaking her silence a few years after the alleged ‘Children Overboard’ affair, Ms. Whittle has also alluded to an incident when a man held out a small girl as he wanted to get the child to safety in the ARN inflatable boat (ABC, 2004). This revelation of course refutes the claim made by the Howard government which alleged that children were indeed deliberately being thrown into the ocean by asylum seekers. In view of Ms. Whittle’s testimony, it is also of interest to note how declassified documents published in 2002 have further revealed how the Howard government aimed to exclude foreigners from gaining entry into Australia by closing Australia’s borders to incoming asylum seekers by implementing the fullest possible deterrence measures inherent in the jurisdictional parameters of Operation Relex—a prime example of this was when the government put pressure on the RAN to ensure that SIEV IV would not be allowed to land on Christmas Island (The Sydney Morning Herald, 2002).

In hindsight the SIEV IV boat occupants were much fortunate than their asylum seeker counterparts who in October 2001 embarked upon a tragic journey to reach Australia in an unseaworthy, dilapidated, small wooden fishing vessel, which was later labelled by Canberra as SIEV X. 421 souls sailed to Australia from Indonesia and most of them perished in the deep shark-infested waters inside Australia’s aerial border protection surveillance zone (Sievx.com). Throughout the SIEV X incident the Howard government took drastic measures to prevent asylum seekers from entering Australian waters, and by utilizing the logic of abolishing the business models of human smugglers to secure Australia’s borders, Canberra assigned a new role for the

Australian Defense Forces (ADF) to combat asylum seekers. The role assumed by the ADF throughout *Operation Relex* and during the SIEV X tragedy, was simply that of a ‘forward deterrence strategy’ which meant that the ARN now had jurisdiction to operate outside of Australia’s waters to turn back asylum seeker boats to their port of departure (Parliament of Australia, Senate Committees, Chapter 2). The logic here was to prevent asylum seekers from reaching Australia’s shores at any cost. And in the case of SIEV X, the cost was the loss of hundreds of lives.

In the aftermath of the SIEV X tragedy, the Australian government claimed that it had little to no knowledge about SIEV X’s intention to sail to Australia with its human cargo of asylum seekers, otherwise the government announced, it would have prevented this tragedy from unfolding had it been privy to the location and intention of the SIEV X occupants. What is intriguing about this claim however, is how during the Senate Committee hearings, which after the SIEV X incident investigated to determine the causes that led to this tragedy, it was eventually revealed that the early claims from defense witnesses regarding how little intelligence was gathered about SIEV X were at odds with the “...volume of intelligence gathered on the vessel during Operation Relex” (Ibid., Chapter 8.9). Moreover, Section 9.145 of the Senate inquiry further revealed that Canberra not only may have had foreknowledge of SIEV X’s departure from Indonesia, but also may have been keenly aware of the impending danger which awaited the occupants of SIEV X as they set out on their fateful journey. Thus, the Senate Committee declared that it:

...finds it extraordinary that a major human disaster could occur in the vicinity of a theatre of intensive Australian operations [stretching from Christmas Island to Ashmore (S.2.3)] and remain undetected until three days after the event, without any concern being raised within intelligence and decision making circles (Parliament of Australia, Senate Committees, Section 9.145).

The SIEV X incident and the Senate Committees' findings are mentioned here simply because they expose an astonishing and painful truth about Canberra's possible awareness of the existence and intentions of the SIEV X asylum seeker boat and the sinking of this unseaworthy vessel prior to, during, and immediately after the tragedy began to unfold. This claim is further substantiated by several survivors after they were rescued by Indonesian fishing boats. SIEV X survivor Ahmed Hussein (person 17) an Iraqi asylum seeker, in a video statement, has put forth the testimony that after the sinking of SIEV X, two 'large [Australian] ships' were sighted by SIEV X occupants/survivors but they did not attempt to rescue the survivors who were afloat in the ocean! In addition, Hussein testifies that during the night, two ships also "turned their flood lights and projectors on the people" but once more no attempts were made by the ships to rescue the drowning victims! Hussein makes the following remarkable statement after he and the remainder SIEV X survivors were rescued by Indonesian fishing boats:

We asked them [the Indonesian fishing rescue boats] about the ships that we saw the day before, they told us that they were Australian border protection ships (navy ships) (cries of support of this statement were heard from other survivors on the video). These Australian navy ships, has the Australian government given orders not to rescue us? Not even the children? (Sievx.com).

Once more, the loss of human life during the SIEV X incident attests to the predominance of the notion of national sovereignty and matters related to state and border security in Australia whenever asylum seeker issues are dealt with. A bitter reminder about Australia's disregard for not only its humanitarian obligations to asylum seekers in accordance with the international refugee regime, but also a vivid demonstration of how the notion of state sovereignty and border security trumps Australia's maritime obligations to render assistance to those in danger at sea as outlined under Chapter V - Safety of Navigation (Regulation 10) of the *1974 International Convention for the Safety of life at Sea* (IMO, 2014).

However convincing Canberra's rationale may be to protect Australia from the onslaught of asylum seekers by targeting various human smuggling operations, it is important to remember the circumstances within which most asylum seekers normally find themselves—in either their countries of origin or in transition countries—which compels them to undertake perilous journeys in the hope of obtaining refuge in Australia. Most, if not all asylum seekers, flee their countries of origin out of sheer desperation due to regional and sectarian conflicts, risk their lives as well as the lives of their family members by travelling to transition countries, endure harsh and perilous living conditions, and finally choose to man unseaworthy vessels with the mere hope of reaching the borders of a Western liberal state such as Australia. As Ahmad Al-Zalimi an Iraqi refugee and survivor of the SIEV X tragedy reminds us:

Nobody would come on these [unsafe] boats and risk their lives if the conditions they were leaving behind were not worse than the conditions on the boat (Special Broadcasting Service, 2014).

There is much truth in this claim. Yet, it would seem that such realities do not inform the national discourse related to the asylum seeker issue in Australia and moreover are not taken into serious consideration by Canberra; a lack of consideration which continues to give rise to the design and implementation of restrictive refugee policies in Australia and sustains the egregious practice of arbitrary and indefinite detention of asylum seekers.

Asylum Seekers and Detention in Australia

Since 1989, the arbitrary and indefinite detention of asylum seekers in Australia has been a highly controversial state practice which is continuously resorted to by Canberra to contain asylum seeker populations after they've succeeded in reaching Australia's borders. A prime example highlighting the inception and normalization of arbitrary detention in Australia dates back to the early 1990s and relates to how Canberra responded to the arrival of 56 Chinese asylum seekers

who arrived undetected at the northwest coast of Australia's mainland in 1992. The 1992 episode is important to mention here as it established a precedence for the successful securitization of humanitarian migration and the immediate implementation of extraordinary measures in Australia which were legitimized by Canberra by making reference to keeping Australia safe and preserving the fragility of Australia's natural ecology against the sudden and intrusive presence of outsiders (asylum seekers) (Watson, 2009: 83, 85). Intense media coverage of this particular event combined with the unrelenting support of the opposition party, provided the Keating government with the necessary impetus to completely reform the refugee determination process by introducing the controversial practice of the 'mandatory and non-reviewable detention' of asylum seekers arriving by boats (Ibid., 86), and imposing executive restrictions upon any judicial review of the Department of Immigration's negative decisions as they related to the status of asylum seekers in Australia (Goodwin-Gill, 2001: 23).

During this episode, Section 54R of the *Migration Amendment Act (1992)* not only defied the detention parameters recommended by the 1951 Refugee Convention as well as the conclusions of the UNHCR ExComm, but also forbade any Australian court from challenging the authority of the executive branch to release asylum seekers from detention (Watson, 2009: 89). Once more, by making reference to Article 31 (1) of the 1951 Refugee Convention, it is clear that the international refugee regime forbids the imposition of penalties due to unauthorized entry:

The Contracting States shall not impose penalties, on account of their (asylum seekers) illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence (Convention and Protocol relating to the Status of Refugees, 2010: 29).

Thus, it is clear that the 1951 Refugee Convention forbids contracting states (such as Australia) to penalize asylum seekers due to their illegal mode of entry by detaining asylum seekers on an

arbitrary basis (Ibid., 3). In addition, to comprehend the harmful impact of detention upon the physical and mental well-being of asylum seekers—especially the detention of women and children—it is also important to examine the UNHCR’s definition of what detention in this context really means. Thus, detention is:

The deprivation of liberty or confinement in a closed place which an asylum-seeker is not permitted to leave at will, including, though not limited to, prisons or purpose-built detention, closed reception or holding centres or facilities [My Italics] (UNHCR, 2012: 9).

The 1992 episode and the introduction of draconian measures by the Australian government was deemed by the Australian Committee on Human Rights to have been a clear breach of Article 9 of the 1966 International Covenant on Civil and Political Rights (ICCPR66) which clearly stated that there should always be a presumption against detention and that viable alternatives to detention—which I will explore in some detail in the concluding chapter—must first be considered (Goodwin-Gill, 2001: 53). The 1992 case is a great example of how certain policy measures, previously not utilized in dealing with asylum seekers, are suddenly deemed essential to alleviate an existential threat to a referent object—Australia’s political community. In hindsight, the 1992 episode set the stage for how the Australian government would continue to manage asylum seekers populations in Australia and by the end of the 1990s, the draconian measures introduced during the 1992 episode had gained much momentum and intensity in the fight against asylum seekers.

The indiscriminate practice of arbitrary and indefinite detention is utilized by Canberra as a potent policy tool not only to contain foreign populations in detention camps but also to *deter* potential asylum seekers from seeking a journey to Australia. It is important to recognize that in Australia the arbitrary detention of asylum seekers is also *punitive* as it is meant to discipline asylum seekers if and when they undertake an illegal journey to reach Australia. In this context, an immigration detention center must be understood as none other than an ‘Immigration

imprisonment', or as Khosravi has astutely observed, detention is to be perceived as a 'pre-modern prison' facility for asylum seekers (Khosravi, 2010: 101). According to Khosravi, the modern immigration detention center is a facility where asylum seekers are punished for their choice of illegal movement across international borders. Moreover, the detention of asylum seekers functions as a potent 'removal system' which regulates the 'national purity' of the sovereign state by confining non-citizens to mandatory and [indefinite] confinement. It thus follows, contends Khosravi, that the permanent member of the political community knows the reason(s) for his or her punishment in a detention facility, while the asylum seeker detainee can be held for no legitimate reason and with no associated time limit for the detention. And while the imprisonment of the citizen is meant to discipline and normalize the behavior of the individual, the detention of the non-citizen (asylum seeker) is geared to expose him/her "...to abandonment or even death" (Ibid., 101).

The arbitrary placement of asylum seekers in detention centers for indefinite periods outside Australia's borders with the objective of processing their refugee applications (offshore processing) at such locations as Christmas island, in surrounding regional countries such as in Malaysia, Indonesia, Papua New Guinea, and in remote and desolate locations such as on the islands of Nauru and Manus, is inherently a violation of the most fundamental tenets of universal human rights. The refoulement of asylum seekers arriving by boats off Australia's shores to the aforementioned locations is commonly labeled by many scholars, refugee advocates, and especially Amnesty International as the *Second Pacific Solution* which continues to be ardently defended by Canberra as the most humane response to nip the human smuggling operations which assist asylum seekers to reach Australia's shores in the bud. A key restrictive measure located at the core of the Second Pacific Solution, is once more, the arbitrary and indefinite detention which

detains asylum seekers both within Australia and on the island of Nauru. According to Amnesty International, the indefinite detention of asylum seekers in these [and other remote locations] is a clear violation of Australia's and Nauru's humanitarian obligations under the 1951 Refugee Convention and other similar international human rights law and standards (Amnesty International, 2013). The forcible transfer of asylum seekers by the Australian government to the island of Nauru and the harsh living conditions prevalent at these detention facilities, have compelled most asylum seekers, out of sheer desperation, to return to their countries of origin and risk facing political persecution and possible death rather than continue to endure the hardships and bitter and demeaning living conditions found at detention facilities. Amnesty International's Pacific Researcher Kate Schuetze observes:

It's shocking that dozens of asylum-seekers held in Nauru have...applied to return to the very countries they fled from and despite the fact that they may have a well-founded fear of persecution – no doubt the prospect of indefinite detention and prolonged separation from their families loomed large in their 'choice' to return...Amnesty International considers that returns in such circumstances may amount to *constructive refoulement* [My Italics] (Amnesty International, 2013).

When discussing the arbitrary practice of detaining asylum seekers, the main point of contention is whether the use of detention by the receiving state may be justified and considered legal and ethical and what harmful consequences may ensue as a result of implementing this controversial preventative/containment measure. Goodwin-Gill observes that detention may be utilized by the receiving state when the asylum seeker is perceived by the authorities to abscond or if the refugee applicant is considered to pose a clear and imminent danger to public safety and/or to national security (Goodwin-Gill, 2001: 41). Thus, some of the issues that may compel the receiving state to be suspicious of asylum seekers and which may possibly justify the implementation of arbitrary and indefinite detention, contends Goodwin-Gill, may bear close associations with national or international tensions, racial origins, religious convictions, and/or

political tensions with neighboring states (Ibid., 41). However, as previously alluded to and as I will shortly demonstrate by making reference to the currently implemented *Operation Sovereign Border (OSB)* mandate, the arbitrary and indefinite detention of all asylum seekers (especially maritime arrivals) in Australia seems to bear direct connections with the asylum seekers' irregular mode of arrival. The currently existing human smuggling operations—originating mostly from such countries as Malaysia and Indonesia—which make it possible for asylum seekers to penetrate Australia's aquatic and terrestrial periphery, are strongly condemned by the executive branch in Australia which automatically trigger the utilization of detention as the most practical and potent state policy tool to halt and deter the influx of asylum seekers into Australia.

Throughout recent years the continued usage of fraudulent documentation by asylum seekers—especially those seeking entry into Australia via boats—has compelled the Australian government to portray asylum seekers as queue jumpers, people who undermine consent in polity, and as potential agents of insecurity such as criminals and/or terrorists (Nyers, 2003: 1070). This commonly propagated perception of asylum seekers as illegal and potentially dangerous migrants in Australia, in combination with the asylum seekers' illegal mode of arrival, has resulted in the automatic detention of asylum seekers and has consequently inflicted much physical and psychological harm on asylum seeker detainees—especially on women and children. The sheer frustration and hopelessness of asylums seekers in Australian detention centers—especially those detention centers outside Australia's borders such as on the remote island of Nauru and Manus island in Papua New Guinea—due to harsh living conditions and lack of knowledge about when the asylum seekers' applications would be processed by the immigration department, has forced many asylum seekers to resort to protests and commit various acts of violence. The ultimate goal of such acts of violence however, must be understood as a desperate plea by asylum seekers to

simply be heard and noticed by the Australian authorities and also the asylum seekers' wish to have some inkling about what future awaits these unfortunate detainees beyond the barbed wires of the detention centers.

In recent years, countless protests by asylum seekers against detention center operators and overseers have been launched accusing detention authorities of treating asylum seekers like criminals (ABC, 2012). There are countless reports of violent acts committed by asylum seekers which include the setting of detention centers on fire (ABC, 2011) and protesting on roof tops (ABC, 2010). Further reports reveal self-harm behaviour by asylum seekers who sew their lips together (ABC, 2010), swallow light bulbs—which occurred when a Kurdish man who was extremely depressed due to the length of his detention (ABC, 2012)—and numerous suicide attempts by depressed asylum seeker detainees (ABC, 2012); especially by asylum seeker children (ABC, 2013). In addition, the detention facilities in Papua New Guinea have been described by detainees as being 'intensely hot, filthy and mosquito-infested', and have given rise to recent reports and various testimonies by detainees alluding to alleged brutality directed towards asylum seeker detainees by detention center guards. A recent incident of such brutality pertains to a violent episode which erupted in February 2014 at the Manus Island detention centre. At what was reported by The Sydney Morning Herald (SMH) as an 'incendiary pre-riot meeting' that was held by detention centre authorities about two hours prior to the eruption of violence, the detention centre authorities hoped to placate the detainees by repeatedly telling the detainees that they would remain in Manus Island's overcrowded detention centre indefinitely and that asylum seekers must behave themselves properly as both good and bad behaviour would be taken into consideration during the refugee status determination process. The meeting of course did not achieve its goal to pacify the detainees and ultimately served as a tragic catalyst for the violence which eventually

erupted at the centre and culminated in the the murder of 23-year-old Iranian asylum seeker Reza Berati by Manus Island detention centre guards (SMH, 2014).

One of the most pressing concerns related to the offshore processing model and prolonged detention is the mental and health problems which children asylum seeker detainees continue to experience. Simply stated, the "Detention of asylum seeker children and their families" observes Peter Morris from the Australian Medical Association observes "is a form of child abuse" (Ibid., 2011). Some of the ethical issues emanating from this egregious form of child abuse are due to depriving children of the opportunity to live and grow in a natural environment without any undue restrictions upon their freedom of movement and their mental and physical developments. Placing minors in a detention facility for prolonged periods, even under adult supervision such as under the protection of parents or state authorities—in case of the absence of parental guidance and protection—is wholly incommensurate with established universal human rights standards. In addition, the detention of minors at Australia's detention facilities inherently deprives children of having adequate access to UNHCR fair procedures for a timely review of their detention status (Goodwin-Gill, 2001: 40).

Asylum Seekers and Naval Interception at Sea

Canberra's *collective* approach to solving the state-asylum seeker paradox has recently invoked the introduction of Operation Sovereign Borders (OSB), which forcefully implemented by the Tony Abbott Coalition government, is but a reincarnation of the Howard era Pacific Solution. As per the Abbott government's numerous press conference announcements, the ultimate goal of OSB—which was implemented on September 18, 2013 just eleven days after the Abbot government secured political victory (ABC, 2014)—is to *halt* the flow of asylum seekers arriving by boats to Australia via relying upon a decisive military solution. It is of interest to note that OSB

in general is a civilian law enforcement operation, however, the Abbott government, in implementing its strategy to stop asylum seeker boats, has increasingly adopted a military structure, language, and methodology (Ibid., 2). This premeditated strategy to stop the flow of asylum seeker boats to Australia, and the refouling of asylum seeker boats to their original points of departure in transition countries, is a serious contravention of Australia's humanitarian obligation to asylum seekers as found within the previously mentioned text of Article 33 (1) of the 1951 Refugee Convention. Exact details of what is occurring at operational levels since the OSB's implementation has been difficult to discern due to deliberate attempt by the Abbott government to maintain absolute silence about the nature of ongoing operations which have thus far given rise to news 'blackouts'; blackouts which were recently blasted and surprisingly labelled by the opposition Labour party as being akin to an 'Stalinist' silence (ABC, 2014: 4, 27)! Yet, OSB has been publicly confirmed by Immigration Minister Scott Morrison as a military-led border security operation (ABC, 2013) and some of the details of OSB are clearly divulged in the publicized document entitled *The Coalition's Operation Sovereign Borders Policy (July 2013)*.

This policy report, released prior to the Tony Abbot and his coalition government's ascendance to political power, views and portrays the asylum seeker issue as an existential and immediate problem which threatens Australia's national sovereignty and security. Moreover, the report, in clear defiance of Australia's humanitarian obligations under the international refugee regime, puts forth an array of solutions that would halt asylum seeker boats from negotiating or penetrating Australia's borders. The report's most conspicuous recommendations are as follows: 1) Treating the border protection issue as a *national emergency problem*, 2) Conducting the effective management of asylum seeker boats under the direct supervision of a 3-star senior military commander, and 3) Eliminating domestic bureaucratic channels dealing with migration issues and

minimizing Australia's international obligations as outlined within the framework of the international Refugee Convention (The Nationals, 2013). In addition, to prevent the further deterioration of Australia's national sovereignty as a result of unauthorized asylum seeker boat arrivals, the Abbot government has resorted to an imaginative array of offshore communication and advertisement activities, which under the jurisdiction of OSB Joint Agency Task Force (JATF) and in cooperation with regional Pacific governments—such as Malaysia, Indonesia, and Sri Lanka,—targets asylum seekers in source and transit countries. Two such advertisements, which translated into various languages, are clearly meant to dissuade potential asylum seekers from undertaking a marine journey to Australia, and in a language that boldly contravenes the 1951 Refugee Convention vividly warn asylum seekers by issuing such statements as: *“If you go to Australia without a visa you won't be settled there”* and *“No Way you will not make Australia home”* (Customs.gov.au).

A recent incident which attests to how this threat is carried out in full force by Canberra is related to the harm which was inflicted on asylum seekers by the Australian Navy as some asylum seeker passengers that were picked up in Indonesian waters by the Australian Navy, according to one account, were punched by navy personnel and were in some instances forced to hold onto the hot metal pipes coming out of the boat's engines (ABC, 2014). In addition, under the aegis of OSB, the return of asylum seekers—especially to Indonesia—not only violates Australia's commitment to uphold Article 33 of the 1951 Refugee Convention, but most importantly has, once more given rise to serious ethical concerns regarding the safety of asylum seekers. There have been incidents in the past where asylum seekers/human smugglers, especially when faced with being turned back to Indonesia, have attempted to sabotage their boats to render their vessels as unseaworthy so that it would be impossible for RAN boats to tow the vessel back to Indonesian

waters. Canberra's strategy to address this issue has been to return asylum seekers to Indonesia via commercially available 'orange lifeboats' (ABC, 2014). Such tow-back attempts by Canberra to refool asylums seekers back to Indonesia via seaworthy vessels may perhaps be considered a humanitarian effort. However, a closer examination of this initiative reveals that Canberra can only legally turn back asylum boats within 24 nautical miles of the Australian coastline—an area defined as the *contiguous zone*—and that there is no legal consensus regarding whether asylum seeker boats can in fact legally be forced back once they are in international waters (Ibid., 26). In addition, Australia cannot turn back asylum seeker boats to Indonesian waters without Indonesia's permission as any act contrary to this would constitute a serious breach of Indonesia's sovereignty; despite this fact, such tow backs to Indonesia's waters have recently been authorized by Canberra which has subsequently led to the straining of relations between Canberra and Jakarta (Ibid., 14).

To paraphrase Wilsher, OSB must be understood as a blunt and unprecedented anti-asylum seeker instrument which clearly announces that the liberty interests of asylum seekers are either non-existent or cannot outweigh the territorial sovereignty interests of the Australian state (Wilsher, 2004: 922). In addition, it is of interest to note that the RAN assets and equipment engaged in *Operation Resolute* to support OSB has been an expensive undertaking by Canberra. In 2013, the Abbott government allocated \$9.9 million dollars to the Defense department to carry out Operation Resolute, however, an unofficial analysis conducted in July 2013, by James Brown, a former Australian Army officer and military fellow at the Lowy Institute for International Policy, has estimated the cost of Operation Resolute at \$262 million (ABC, 2014). In addition, in 2013-2014, Customs and Border has provided a more detailed breakdown regarding the costs associated with this agency's air and sea surveillance operations which were budgeted at \$324 million (Ibid., 11).

The choice for asylum seekers to move to a destination state such as Australia via the assistance of human smugglers, with the expectation of possibly having to endure terrible living conditions prevalent at various detention centers within Australia and in remote regions outside Australia's borders, is difficult to comprehend. As members of Western liberal democratic societies, it behooves us to reflect upon the profound decision which asylum seekers make to travel to destination countries such as Australia. There are numerous testimonies given by asylum seekers, especially those originating from war-torn and politically unstable countries such as Iraq, Afghanistan and Iran, which allude to extenuating circumstances and bona fide social and political push factors that compel asylum seekers to uproot themselves and their families from the land of their ancestors and assume enormous financial and personal risks to reach the borders of Western liberal states such as Australia—and Canada for that matter. One such moving account is provided by the Iraqi asylum seeker Ahmad Hussein (one of the few survivors of the SIEV X tragedy) which clearly highlights the unstable and intolerable social and political conditions that are currently prevalent in post-war Iraq—all of which caused Hussein to travel to and seek asylum in Australia. Hussein's testimony draws attention to the inherent uncertainties and difficulties that are encountered by most if not all asylum seekers which compel asylum seekers to seek alternate (illegal) means and modes of travel to reach Australia:

What had we done to be oppressed in Iraq, we went elsewhere, we could not live, we came here [Australia] and we are unwelcome. What can we do, one year and one month waiting for a reply from the United Nations, I waited with my family of 15. I went to the United Nations, they told me to find a way to get to Australia, anywhere I went in Indonesia, I get told to find a boat to Australia, the UN guards, the UN officials, everyone talks of finding a way to Australia (Sievx.com).

The above testimony is certainly revealing and most disturbing as it draws attention to serious ethical and bureaucratic deficiencies that may be present throughout the various divisions and branches of the UNHCR bureaucratic edifice that bear responsibility for addressing the refugee

claims of asylum seekers—especially in transition countries situated in Southeast Asia. It may be surmised that such encounters between asylum seekers and UN officials may veritably push asylum seekers to have no choice but to seek the assistance of human smugglers to reach Australia. Yet, for years the national discourse in Australia regarding illegal migration and a torrent of widespread criticisms by consecutive Australian governments pertaining to the arrival of asylum seekers, have surprisingly failed to take into account the severe hardships and psychological traumas which asylum seekers—specifically maritime arrivals—endure before and during their arduous journey to Australia.

Canberra's inflexible asylum seeker policy to make Australia's national borders impervious to asylum seekers without much regard for humanitarian issues and the welfare of asylum seekers, brings to light the existence of major ethical deficiencies that are embedded within Australia's current refugee determination system. A central argument presented in this chapter has been to highlight the importance of a legal and ethical imperative which must inform Canberra's asylum seeker policies that would also lead to the proper fulfillment of Australia's legal obligations to asylum seekers as a signatory state to the 1951 Refugee Convention and the 1967 Protocol. In the final analysis, the prevalence of strict migration policies such as the arbitrary and indefinite detention of asylum seekers is symptomatic of an insular and parochial perception of daily political and social realities. A perception which ultimately fails to take into account the changing currents of today's rapidly evolving global social and political dynamics, which due to recent discoveries and advancements in social media technologies, transcend the current limitations of transnational borders that restrict the freedom of movement of those searching for liberty and the pursuit of happiness.

Conclusion

The search for permanent refuge in Canada and Australia is not an easy endeavor for asylum seekers in today's complex global social order. Overall the situation for both asylum seekers and Canada and Australia as recipient states is a desperate one. For asylum seekers it is an unceasing struggle to obtain permanent membership status in either Canada or Australia, whereas for both Ottawa and Canberra, it is the preservation of national sovereignty and security, and communal cohesion as well as cultural and traditional homogeneity within each respective political community which is of paramount importance. There are, as many scholars such as Gibney have demonstrated, robust associations between human rights violations, violence within many countries of origin, and many cases of refugee flight (Gibney, 2000: 15). The arduous and perilous journeys undertaken by most if not all asylum seekers, especially those arriving on Canada and Australia's shores via boats with the assistance of human smugglers, is looked upon with much disdain by both Ottawa and Canberra and most Western liberal democracies. Throughout the past two decades, the mode of arrival or the method of travel undertaken by asylum seekers to reach Canada and Australia's borders has provided the necessary impetus for Ottawa, and especially for Canberra, to devise ingenious policy measures and formidable barriers around their geographical peripheries to halt and deter the influx of non-nationals into their respective national communities.

There is no doubt that the dawn of the global War on Terror in 2001 has given rise to numerous episodes of regional sectarian violence, all of which continue to serve as tangible push factors that motivate and compel asylum seekers to seek shelter outside the borders of their countries of origin in such destination countries as Canada and Australia. Throughout this study, my aim has been to demonstrate how Ottawa and Canberra, throughout a period lasting more than two decades, have dealt with the inclusion or exclusion of asylum seekers within each nation, and most importantly,

how legal and ethical the various modes of prevention devised by each state have thus far been. My goal throughout this study has been to examine the legality of the current asylum seeker policies in both Canada and Australia. To do this I relied upon the lens of international law or the international refugee regime and juxtaposed and compared the validity of the practice of detaining asylum seekers in both Canada and Australia with a number of stipulations as found within the contextual framework of the 1951 Refugee Convention and the 1967 Protocol as well as some of the conclusions reached by the UNHCR ExComm.

A central theme to which I alluded to throughout this study was the immediate need in both Canada and Australia to establish a balanced migration paradigm. A paradigm which is legally and ethically pragmatic and progressive in its scope of implementation as it seeks to properly address the public safety requirements of both the Canadian and Australian states, but most importantly, also aims to fulfill each state's humanitarian obligations to asylum seekers in accordance with the legal pronouncements of the international refugee regime. Accordingly, a key issue identified in this thesis was the increasing normalization of a curiously paradoxical *legal vacuum* which currently prevails within the asylum seeker policy design parameters found in both Canada and Australia. The legal vacuum which as I have noted, is related to how both Ottawa and Canberra have for some time continued to portray the asylum seeker issue in the public realm as an existential problem which continues to jeopardize the national security and public safety of each nation-state and has thus far triggered the automatic detention of asylum seekers as soon as they arrive in Canada or Australia. In this context, I have argued that there is an immediate and urgent need to re-evaluate the current migration policies which are currently in effect against asylum seekers in both Canada and Australia—policies which are heavily tainted with various permutations of state security and less concerned with realizing the notions of hospitality and do-

no-harm principle that are woven into the very theoretical fabrics of the 1951 Refugee Convention and the 1967 Protocol.

In short, the legal void currently present within Canada and Australia's migration framework, to paraphrase Nussbaum, is to be understood as the logical outcome of a strict communitarian perspective which prioritizes allegiance to a particular form of government or a temporal power rather than devising migration policies that would recognize what Nussbaum aptly has termed as a *moral community* amongst the human family that would in essence embrace the 'humanity of all human beings' (Nussbaum, 1996: 7). Moreover, as Nussbaum correctly observes, prior to devising uncompromising migration policies to keep outsiders from seeking refuge within the confines of our national borders, it is morally incumbent upon us—as permanent members of leading industrialized nations amongst the community of states—to recognize the worth of each human being as the moral equal of every other human being which would in turn impose *regulative constraints* upon our political actions and aspirations (Ibid., 133).

As members of Western democratic states, we would do well to remember that migration to a destination country for asylum seekers is an exception and not the norm, and most people if left to their own devices, would not choose to move away from family, friends, and the sanctuary of their homeland (Casey, 2010: 28). In this context, a key moral obligation which we owe to asylum seekers (especially to maritime arrivals) as a recipient nation, is to be cognizant of and give credence to, the numerous sufferings and countless abuses which the majority of asylum seekers continue to endure in their countries of origin, and en route to a destination country at the hands of human smugglers, police and other officials, and also at the hands of their employers—if and when asylum seekers spend extended periods in transit countries (Amnesty International Publications, 2013). One of the key issues which both Ottawa and Canberra have aimed to resolve

is the eradication of human smuggling operations that provide the travel means for asylum seekers, especially those undertaking boat journeys, to reach Canada and Australia. Such efforts by both Ottawa and Canberra are indeed laudable since in most cases asylum seekers constantly face coercive tactics by human smugglers to extract maximum returns for services rendered. Such coercive tactics utilized by human smugglers may further include paying the balance of the money owed after the completion of the journey to the destination country, cutting off all means of communication with friends and family members, confiscating travel documents, and abducting the family members of asylum seekers if they should choose not to move forward with the perilous sea journey—especially to Australia (Ibid., 26-27). In addition, asylum seekers and undocumented migrants are prone to extortion and detention and are exposed to exploitation and other human rights abuses in transit countries at the hands of police and other officials who demand payments to release asylum seekers from detention. Most importantly however, the absence of any refugee protection measures in some transit countries such as Thailand and Malaysia that are non-signatories to the 1951 Refugee Convention are detrimental to asylum seekers. Both Thailand and Malaysia lack any refugee laws or formalized asylum procedures and this renders asylum seekers as vulnerable entities with little or no protection against being arrested, detained and/or to possess any rights to work (Ibid., 27).

Despite the numerous dangers and hardships endured by asylum seekers in both transit countries and en route to Canada and Australia, most asylum seekers out of sheer desperation, choose to seek the assistance of human smugglers and embark upon perilous and uncertain journeys to reach Canada and Australia to obtain safety for themselves and their families. Thus, both Ottawa and Canberra's efforts to eradicate the various human smuggling operations may be deemed commendable as such anti-smuggling operations may preserve the lives of asylum seekers

and deter them from undertaking perilous sea journeys to Canada or Australia. This notwithstanding, it is of particular interest to also note the recommendations submitted by the *UNHCR (EXCOM) Conclusion No.58 (XL)* which focuses on the irregular movement patterns of asylum seekers from a country in which they already have found protection to popular destination countries such as Canada and Australia. Thus, the *UNHCR EXCOM Conclusion No 58 (XL)* recognizes that during extenuating circumstances, asylum seekers may resort to irregular manners to travel to destination countries and that asylum seekers may find themselves in circumstances that may compel them "...to have recourse to fraudulent documentation when leaving a country in which [their] physical safety or freedom are endangered" (Goodwin-Gill, 2001: 30-31).

In view of the UNHCR ExComm's recommendation and the numerous hardships and trauma suffered by asylum seekers, it is only logical to presume that contracting liberal democratic states such as Canada and Australia would indeed heed the UNHCR ExComm's recommendations and adhere to the stipulations of the 1951 UN Refugee Convention and 1967 Protocol. Both states are signatories to these documents and in accordance with the language of the Convention both states have consented to recognize a refugee as a person who 1) has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular group, or political opinion, 2) is either outside the country of his/her nationality or is stateless, and 3) is unable to avail himself/herself of that country's protection or is unwilling to do so due to such fear. Thus, in accordance with the stipulations of international law (international refugee regime), a refugee applicant is fully entitled to being protected by the receiving state as soon as the above conditions are present—albeit the receiving state still retains much discretion before recognizing a person's refugee status. It is also worth mentioning that even though the recipient country may not grant refugee status to an asylum seeker and not deem the asylum seeker as a *Convention Refugee*, the

UNHCR nonetheless continues to designate those persons whose life may be in danger as *Mandate Refugees* and recommends protective measures to be bestowed upon asylum seekers by the recipient state (Amnesty International Publications, 9).

Despite Canada and Australia's affirmations of the veracity of the tenets of the 1951 Refugee Convention and the 1967 Protocol which emphasize the protection of the individual asylum seeker, we have in recent years, seen a significant entrenchment of the securitization of humanitarian migration in both national settings. A securitization phenomenon which champions the predominance of the notion of border security and the protection of national sovereignty, which pushed to the extreme, have contributed to the gradual decline of the very concept of what it means to be an asylum seeker or a refugee in today's multipolar and technocratic international system—not only in Canada and Australia but also within the context of the majority of Western industrialized countries. Yet, there is an exception to the rampant existence of closed-border policies that are found amongst most if not all Western democratic states, and this exception is to be found within the recent hospitable attitude extended to asylum seeker (resettled refugees) by the Swedish government. Contrary to Canada and Australia, or the EU nations' migration policies pertaining to the welcome and treatment of asylum seekers, the Swedish government, in a surprisingly liberal fashion, has utilized an open-door policy to integrate resettled refugees from Syria into the Swedish community as a national priority. This approach is certainly reflected in the recent statement made by Sweden's immigration minister, Tobias Billstrom, as he stated that "Those people [asylum seekers] who do arrive to the shores of the EU...have to be looked after. We [the EU countries] have to show solidarity, offer them a legally safe asylum procedure." Accordingly, since 2012, the Swedish government has resettled at least 14,000 asylum seekers from Syria—a count which is 10 times higher than the 1300 asylum seekers which Canada

has vowed to absorb during 2013 and 2014 (CBC, 2014). This welcome of the asylum seeker by the Swedish government is but an exception to the norm found amongst the family of Western democratic states. By far, the most painful, inhumane, degrading, and punitive restrictive measure employed against asylum seekers in Canada, and especially by the Australian government, is the arbitrary confinement of asylum seekers in detention facilities. The arbitrary and indefinite detention of asylum seekers is an unscrupulous practice and if the imposition of detention is absolutely necessary, states must not detain asylum seekers with common criminals and must allow asylum seekers to have access to UNHCR or national refugee assistance agencies during their period of detention (Watson, 2009: 50-51).

The detention of asylum seekers in Canada, and within and outside of Australia's national boundaries, stands in direct contravention of the recent guidelines submitted by the UNHCR. The 2012 report *Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Alternatives to Detention (2012)* (UNHCR, 2012), and the recommendations of the *UNHCR Executive Committee (EXCOM) Conclusion No.58 (XL)—1989*, both emphasize the incontrovertible fact that any detention of asylum seekers must be premised upon an *individual* and not on a *collective* basis, and that detention can only be resorted to if and when it is deemed by state authorities as being absolutely "...*necessary* [my Italics], reasonable in all the circumstances and *proportionate* [my Italics] to a legitimate purpose" (UNHCR, 2012: 21). The necessity test and specifically the general principle of proportionality requires the establishment of a mature balance between the importance of respecting the human rights and the personal liberty of the individual asylum seeker versus the public policy objectives of the receiving state which comprise of limiting and/or denying the right of entry to foreigners (UNHCR, 2012: 21). In short, these tests place the onus upon state authorities as they are to conduct a thorough and

unbiased assessment of each asylum seeker's application to refugee status, and most importantly, consider less restrictive and coercive measures as legitimate and humane alternatives to detention (Ibid., 21).

There are in fact alternatives to detention. Prior to relegating asylum seekers into arbitrary detention, state authorities have several containment measures at their disposal to effectively manage asylum seeker populations. Some of these measures include: 1) Imposing reporting conditions on asylum seekers, 2) Employing tactics such as directed residence requirements, 3) The use of guarantors/sureties, 4) Release on bail/bond, 5) Community supervision arrangements, and last but not least 6) An open or semi-open reception of asylum centers. These alternatives to detention, which must duly and sequentially be considered by immigration authorities prior to detaining asylum seekers, are outlined by the *UN General Assembly Resolution 44/147, 15 December 1989* (Goodwin-Gill, 2001: 40) and clearly endorsed and stipulated by the *UNHCR Detention Guidelines: Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum Seekers and Alternatives to Detention (2012)* (UNHCR, 2012: 41-43). The *UNHCR Detention Guidelines (2012)* draws particular attention to the ethical imperatives associated with the humane treatment of asylum seekers and emphasizes the principle of *Minimum Intervention* (UNHCR, 2012: 23) which essentially points to the receiving state's moral responsibility to protect the well-being of the asylum seeker and design effective management solutions to resolve asylum seeker issues—while exercising due diligence to uphold the basic human rights of asylum seeker children, pregnant women, the elderly, and persons with disability and those experiencing trauma (Ibid., 23).

The countless stipulations and ceaseless recommendations uttered and cited by the UNHCR and the 1951 Refugee Convention place strong emphasis on the ethical and moral obligations

which are owed to asylum seekers by recipient liberal democratic states. In contrast to the forces and values of universalism and solidarity which motivated asylum and refugee processes during the Cold War period—which in essence demonstrated the moral inferiority of communist countries (Rudge, 1998: 7),—the current sentiments directed towards outsiders as shared amongst the majority of Western industrialized nations such as Canada and Australia seem to revolve around a rationale which is mostly characterized by exclusivity and inhospitality towards outsiders. As leading nations spearheading the development and evolution of an international society of states, the ruling elite in Western liberal democracies owe certain obligations to the permanent members of their political communities, however, they must also recognize that any continued adherence to inflexible border policies designed to prevent outsiders or asylum seekers from negotiating their borders, may pose a significant threat to the economic prosperity of their respective political communities. In this context, Casey's observation is most poignant as it draws attention to the fact that continued adherence to closed border policies may eventually pose an impending threat to the economic base of Western liberal states and would result in an unprecedented shortage of human labor and a demographic deficit that would depict record low birth and increasing life expectancy rates (Casey, 2010: 32).

It is also essential to realize that a crucial factor that may potentially unravel the very fabrics of Western liberal democratic states, due to their continuous usage of closed border policies, may in fact be connected with a *social* rather than a purely economic calculus. In his famous essay *On Liberty*, John Stuart Mill warns against the perils that await any society which isolates and encapsulates itself by rejecting the influx of outsiders—whether migrants or asylum seekers/refugees—into the national community. Mill cites the rapid fall of the Chinese civilization in the Nineteenth century as a primary example which must closely be studied. In portraying China

as a civilization with remarkable achievements, Mill's shrewd observation relates to how in contrast to all its social and scientific accomplishments throughout the centuries, China by mid-nineteenth century, had morphed into a complacent nation-state primarily due to having isolated itself from outside influences. Mill's solution to the Chinese social predicament was to highlight the importance of the presence and the welcome of the foreigner (Gray, 1998: 80). Notwithstanding the economic advantages which Mills may have envisioned for the British Empire and Western powers as a result of having access to the vast natural and human resources found in nineteenth century China, Mill's idea here is crucial to heed as it hints at how cross-cultural integration, state hospitality and the welcome of the foreigner proscribes social complacency and replenishes the cultural roots of the political community. Similarly, Loescher's observation pertaining to the efficacy of promoting open societies in the modern international system is worthy of serious consideration. Loescher writes:

It is simply not possible in an age of globalization to wall out the world's dispossessed. Placing unduly harsh restrictions on the movement of people will simply lead to greater isolation and deprivation and pose yet new threats to regional and international security. It is also the case that if states remain indifferent to the plight of the world's refugees, the social and political fiber of their own societies will suffer. *The way states deal with refugees speaks volumes about their human rights health and their tolerance for ethnic and racial minorities* [My Italics] (Loescher, 2001: 380).

In addition to cultural stagnation and an almost irreversible toll on the mental and physical health of asylum seekers, closed border policies such as the arbitrary and indefinite detention of refugee applicants are also a costly and mostly ineffective means of solving the asylum seeker-state dilemma. Both Ottawa and Canberra may accrue tangible monetary benefits by resorting to detention as an absolute last measure; a policy which would culminate in saving billions of dollars that are currently spent annually on the detention and deportation of undocumented migrants, and monitoring and controlling people smuggling operations (Ibid., 33). The arbitrary detention of

asylum seekers and various other border control strategies are a costly undertaking to say the least. Overall, an estimated amount of US \$25-30 billion a year is spent each year by the 25 richest nations on immigration enforcement and asylum processing which is equivalent to almost two-thirds of what is annually spent on development aid (Ibid., 33)!

Throughout this study, I have endeavored to demonstrate that there is in fact much value in belonging to and being a permanent member of a particular political community. The existence of the political community undeniably provides the permanent member with a fertile evolutionary niche within which man's sociable characteristics are adequately developed and the nourishment of the individual personality is properly captured. Outside the realm of the political community and within the international sphere, it is arguably the sovereign right of every state to exercise either inclusion or exclusion rites whenever outsiders are encountered. However, despite such truths pertaining to everyday realities of residing within the political community, I have also sought to demonstrate the urgent need for the realization of an ethical migration framework in both Canada and Australia which seeks to address the current condition of the asylum seeker. A framework which adheres to the *balanced* tenets of the international refugee regime (1951 Refugee Convention and 1967 Protocol) and lays clear emphasis upon the value of the *individual* human being—who having assumed the role of the asylum seeker—is inherently worthy of the care and hospitality of the recipient state, but also recognizes and respects the sovereign right of the recipient state whenever asylum seekers are encountered. In Canada and Australia, the gradual diminishment in recent times of the fundamental tenets of the 1951 Refugee Convention is in direct correlation with our national obsessions pertaining to matters of security, and moreover, is a stark testament to a convenient and unmethodical approach to public policy analysis and problem solving.

In his *On the Basis of Morality*, Arthur Schopenhauer writes:

...the ultimate and true explanation of the inner nature of the totality of things must necessarily be closely connected with that concerning the ethical significance of human conduct (Schopenhauer, 1965: 41).

Schopenhauer's timeless and in-depth observation of the human condition is indeed applicable to solving the current asylum seeker-state riddle in both Canada and Australia. In the final analysis, the problem concerning the proper management of asylum seeker populations, at its core, may be construed as an ethical one and it is this truism that must inform the design of migration policies that deal with refugee applicants in both Canada and Australia. Policies that would not only serve to protect the cherished political communities in both countries, but also in demonstrating hospitality to outsiders, would affirm the value of the individual human being and pay homage to every man, woman and child as permanent members of the human family.

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