Australia's Asylum Policies and Their Discriminatory Treatments against Unauthorized

Maritime Arrivals

by

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ABSTRACT OF THE THESIS

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The Australian government has long been criticized for its harsh treatment and

policies towards boat people, legally known as "unauthorized maritime arrivals." This

paper focuses on several of Australia's asylum policies in the period of 1989 to 2011 to

understand why they have implemented discriminatory treatments and policies towards

boat people. These programs include the Mandatory Detention Program, Pacific Solution

program, Temporary Protection Visa, and Australia-Malaysia People Swap. The year

1989 is particularly significant for Australia, as it marked the implementation of the

Migration Legislation Amendment Act 1989 which allows authorized officers to arrest

and detain anyone suspected of being an 'illegal entrant'. These policies are seen as

controversial and discriminatory in a way that differentiates the *mode* of arrivals of

asylum seekers regardless their valid claims for protection. Those who arrive by boat are

considered less deserving of protection than others. Harsh official treatment toward boat

people is intended to punish those who already violated the law by illegally crossing the

border and, importantly, to send a message intended to stop those who plan to make a

similar journey to Australia.

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Chapter 1

Introduction

The Australian governments have long been criticized for its harsh treatments and policies towards boat people, legally known as unauthorized maritime arrivals.[1] This thesis analyzes Australia's asylum policies, focusing on unauthorized maritime arrivals in order to understand Australians' perception of boat people and its relationship to their sense of security and national identity, as well as the theoretical analysis on the implementation of these policies. The paper will describe several of Australia asylum policies in the period of 1989 to 2011. The year of 1989 is significant because in this particular year Australia's treatment towards boat people changed which determined the future of Australia's asylum policies. It was marked with the implementation of the Migration Legislation Amendment Act 1989 which allows authorized officers to arrest and detain anyone suspected of being an 'illegal entrant'. Since then, detention of boat people has been the center of Australia's asylum policies.

According to Janet Phillips and Harriet Spinks (2013a), Australia has been receiving boat people since 1976. In their work, *Boat Arrivals in Australia Since 1976* (ibid), they explain how the controversy began with five Indochinese men who arrived in

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[1] The Migration Amendment (Unauthorized Maritime Arrivals and Other Measures) Bill 2012 was introduced to the House of Representatives on 12 October 2012 and assent by the House of Representatives and Senate on 20 May 2013, amends the Migration Act 1958 (Cth) by replacing the term, 'offshore entry person' with a new term, 'unauthorized maritime arrival' in certain provisions of the Migration Act. (http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r4920)

Darwin shore, followed by 2059 Vietnamese boat arrivals for the next five year until August 1981 (2013a, p. 1). This was called the first wave of boat people. "The term 'boat people' entered the Australian vernacular in the 1970s with the arrival of the first wave of boats carrying people seeking asylum from the aftermath of the Vietnam War. (Phillips & Spinks, 2013a, p. 1)" The term 'boat people' is used here to describe groups of people who travel by sea without valid visa to seek protection in Australia based on historical background of the arrival of Vietnamese boat people in Australia, and as the basis for understanding the discourse around it. Moreover, the term boat people is also used to avoid the prompt judgment to call them illegal as mentioned in legal documents solely because they cross the border without authorization.[2]

The second wave began in November 1989 and continued for nine additional years until 1998 with the arrival of about 300 people per year—mostly from Cambodia, Vietnam and southern China (Phillips & Spinks, 2013a, p. 1). The third wave which is noted as beginning in 1999 until 2001, consists mostly of asylum seekers from the Middle East (Phillips & Spinks, 2013a, p. 1). The fourth, and the most recent wave of migrants is marked by the arrival of 2726 people on 60 boats in 2009, and continued until the present with records of 134 boats carrying 6555 people came in 2010 and 69 boats of 4565 asylum seekers in 2011 (Mckenzie & Hasmath, 2013, p. 418), mainly from Afghanistan, Iraq, Iran, and Sri Lanka (Report of the Expert Panel on Asylum Seekers, 2012, p. 23). Given the rapid rise in number of asylum seekers coming by boat to

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[2] See http://www.refugeecouncil.org.au/r/s&l/131105_TAbbott_Illegal.pdf

Australia over the last few decades, the Australian government and its population have shown much concern and increased its negative discourse of asylum seekers and boat people (Phillips & Spinks, 2013a, p. 6).

When the second wave of boat people began, Australia no longer welcomed them but rather started to implement the *Migration Legislation Amendment Act 1989* as a new system of processing boat arrivals which authorized officers to arrest and detain anyone suspected of being an 'illegal entrant' in the 'administrative detention' (Phillips & Spinks, 2013b, p. 3). In response to both the second wave influx of boat people mostly from Cambodia and the implementation of *Migration Legislation Amendment Act 1989,* the Port Hedland Immigration Reception and Processing Center opened in 1991 aimed at accommodating some of the (mainly Cambodian) asylum seekers (Phillips & Spinks, 2013b, p. 4).

In his book titled *Borderline: Australia's treatment of refugees and asylum seekers* Peter Mares (2001) describes the inspiration behind the establishment of Port Hedland Immigration Reception and Processing Center was the arrivals of a boat carrying twenty-six people named 'Pender Bay' in Broome, Western Australia, in November 1989, followed by two boats in 1990 and eight more in 1991 (p. 68). When these boats arrived in Australia, sailing down from camps in Indonesia or from refugee resettlement in southern China carrying mostly Vietnamese and some Cambodians and Chinese nationals, they were held in low security facilities in the Westbridge migrant hostel in Melbourne (Mares, 2001, p. 68). The government took a different approach after asylum seekers began to escape from the facilities and created public anxiety (Mares, 2001, p. 68).

Furthermore, detention measures were established not only to address the public's concern but also to send signal to boat people that their arrivals in Australia were not welcomed (Mares, 2001, p. 78-79).

David Marr and Marian Wilkinson (2003) in their book entitled *Dark Victory* describe the intense relationship between Australia and boat people who arrived in Australia's shore without valid visa and try their luck at living permanently in Australia. Many Australians hold a negative connotation of the word 'boat people' because they associate the unexpected arrival of boat people as evidence of insecure borders against an Asian invasion (Mckenzie & Hasmath, 2013, p. 402). The arrival has, for many, fomented concern over failures in protecting their territory and fear of future problems caused by these 'uninvited people'. It did not mean that they fear Asian refugees. Australia has been receiving refugees of the Vietnam War who were staying at holding camps in Thailand, Malaysia, and Indonesia. The Australian government chose refugees from those camps who were allowed to be brought to Australia (Marr & Wilkinson, 2003, p. 35).

Although the number of boat people are relatively small, only 0.01 per cent of all arrivals in Australia (McMaster, 2001, p. 67), they do not have valid documentation and authorization to come legally to Australia, hence they are labelled as "unauthorized irregular migrants" and forced to wait in the detention centers until their refugee status is determined or otherwise be deported from Australia (Nancy Hudson-Rodd, 2009, p. 189).

When Australia signed the 1951 Convention relating to the Status of Refugees (the 1951 Refugee Convention) on 22 January 1954, Australia adopted a more generous

position in sharing a global burden of those who lost their houses or flew their countries due to death threat or political persecution. But the good cause is problematic. Even though the 1951 Refugee Convention has been recognized as the Magna Carta of international refugee law as the guidance to assist countries in following up the issue,[3] arrival of asylum seekers has caused various public opinions in countries of the parties of the 1951 Refugee Convention. Australia is emblematic of a country which understands the responsibility of being the signatory party of the 1951 Refugee Convention, however it remains reluctant to accept the influx of asylum seekers to arrive and resettle in their land.

This paper describes the reasons why Australians and Australian governments seem to be great proponent of harsh treatments and policies towards boat people, especially in recent years. I examine three major policies and a proposal for cooperation on the period of 1989 to 2011, when Australia began to implement various asylum policies focused on deterring boat people from coming to Australia, namely Mandatory Detention Program, Pacific Solution program, Temporary Protection Visa, and Australia-Malaysia People Swap. These three policies and a proposal are chosen as focus of the study due to the controversial element of Australia's asylum policies. Mandatory detention program and Pacific Solution are criticized for violation of Article 9 of the International Covenant on Civil and Political Rights (ICCPR) and the 1951 Refugee Convention obligations. Temporary Protection Visa is granting up to three years for those 'unauthorized' asylum

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[3] UNHCR, the Refugee Convention at 50, Analysis/Editorials, 2 July 2001, viewed 20 February 2016, http://www.unhcr.org/3b4c06f0d.html

seekers who are proven to be genuine refugees but restricted from access to government's services. They are expected to leave at the end of their visa unless they continue to require protection. A proposal for an Australia-Malaysia People Swap is controversial because Australia's High Court has decided the proposal is unlawful and Malaysia is not a signatory party of the 1951 Refugee Convention. These policies are interesting because although each has its own form and purpose, they have shared elements that resonate from one to another which will be discussed further as theoretical analysis of these policies: namely as forms of government control and policies of deterrence.

Chapter 2

National Identity and the Construction of the 'Other'

Australia is an immigrant nation (Castles & Vasta, 2004, p. 142), built by settlers who came from somewhere else outside the continent (Ng & Metz, 2014, p. 255). The indigenous people came to the island dated back over forty thousand years ago, while European settlers started to arrive in 1788 (McMaster, 2001, p. 38). According to 2011 census, Australian population reached the number of 21.73 million people with seventy per cent of the total population born in Australia.[4] It can be said that roughly more than one out of four Australians was born overseas with the four largest countries of origin being the United Kingdom, New Zealand, China and India.[5] Despite its historical background and the fact of being a country of immigrants, Australia is experiencing an old dilemma of viewing immigrants not as an accustomed marker of its population but rather as a threat to its national identity (Castles & Vasta, 2004, p. 142).

Australia's national identity is founded on the boundary drawn to distinguish between who is Australian and who is not Australian, known as the White Australia policy. This idea emerged in close relation to the geographical location of the continent. Australia as a nation state enjoys their geographical position as a "western civilization" in

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[4] http://theconversation.com/portrait-of-a-population-what-the-australian-census-found-7843

[5] http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/quickstat/0?opendocument&navpos=220

a sea of Asian countries which shapes Australia's sense of identity inward and outward looking and directs the way it sees and treats foreigners and itself (Wazana, 2004, p. 84).

Although the idea of White Australia has been well-established in the society since 1850s, its official basis was founded in the enactment of *the Commonwealth of Australia Constitution Act 1900,* as the foundation of the federal state of Australia, passed by the Parliament of the United Kingdom in July 1900 and came into force on 1 January 1901 (McMaster 2001:41). The Act states:

> "The power of the Commonwealth parliament included the power to make laws for the peace, order, and good government of the Commonwealth with respect to naturalisation and aliens; the people of any race, other than the aboriginal race in any state, for whom it was deemed necessary to make special laws; emigration; and the relations of the Commonwealth with the islands of the Pacific. (McMaster 2001:41)"

Following up this Act, the new Commonwealth government produced *The Commonwealth Immigration Restriction Act 1901* which guided Australian immigration policy to provide legal document to forbid, with few exemption, non-whites to settle, work, or live in Australia, temporarily or permanently (McMaster, 2001, p. 41). Don McMaster (2001) in his book entitled *Asylum Seekers: Australia's Response to Refugees* emphasizes that this policy has become the legal justification of institutional racism in Australia (p. 41). Among few first laws launched by the new Government, this law was the one to become the guiding principle of Australia's identity as a nation that underlines the imperative idea of Australia as predominantly white (McMaster, 2001, p. 133), and at the same time construct the notion of the 'significant other' (McMaster, 2001, p. 38). McMaster explains that according to historian Keith Hancock, the White Australia policy

was treated as the 'indispensable condition of every other Australian policy' aiming for the preservation of a white society and in parallel with its treatment against the 'other' (McMaster, 2001, p. 41).

The origin of White Australia as a political strategy was Anti-Chinese feeling during the gold rush in the period of 1850s to 1870s (Elder, 2005). In this period of time the presence of Asians, especially Chinese 'coolies' who worked at goldfields in Victoria, was started to be negatively recognized due to their 'otherness' from the white British. The policy of exclusion was imposed on Chinese community to keep them apart from the white community by involving the checking of Asian immigrants during the gold rush (Pietsch, 2013). It was believed that exclusion of the Chinese immigrants will keep them as the 'other' from the white settler. Racist propaganda was used to create tension by accusing the Chinese of undermining wages, bringing crime and disease, and coveting with white women (Castles & Vasta, 2004, p. 142).

McMaster (2001) points out that Australian's treatment towards the Chinese was because, "The Chinese were regarded as 'polluted' and 'impure'... The 'Chinese' presented the starkest example of what 'Australians' were not" (p. 132-133). The imaginary picture of a white Australia was planted upon the myth of the cultural and biological superiority of the white European race (McMaster, 2001, p. 133). The policy was also an embodiment of their fear towards their surrounding north 'colored race' neighboring countries (McMaster, 2001, p. 133), which were more populous (Mares, 2011, p. 411), who were eager to invade their land.

The fear of being invaded and swamped by the flood of outsider –in here is the Chinese, no matter how small and humble their number were, has been buried deep in the mind of Australia society (Mares, 2011, p. 411). This fear likely continues to appear on how Australians see boat people today with the landing of waves of boat people influx in their shores that brings risk to overrun the land (Mares, 2011, p 411-412). It creates national anxiety which the term is used to oppose the coming of asylum seekers arriving by boat as carrying a threat to their national identity and their way of life (McKenzie & Hasmath, 2013, p. 420).

Castles & Vasta (2004) explain that as an immigrant nation, Australia sees its immigration policies and opinions to always have concern on race content and fear that they would be colonized by other more populous countries surround it (p. 142). Their construction of national identity is in parallel with interwoven of their values, national identity and fear of the 'other' in considering who is Australian and who is un-Australian which creates boundaries of acceptability (Babacan & Babacan, 2013, p. 152).

Chapter 3

Australia Asylum Refugee Policies

In the 1920s emerged a discourse that Australia needed to raise the number of its population. One opinion from pro-immigration groups was conveying the need to occupy Australia's wide open spaces with people and use them as a reasonable defense against the Asians (McMaster, 2001, p. 42). The anti-immigration groups, such as the trade unions, debated the argument by saying that a large immigration intake would create a threat to full employment and the standard of living (McMaster, 2001, p. 42). This discourse underlined the next stage of Australia's decision as a new nation to receive refugees as part of their immigration intakes (McMaster, 2001, p. 43). However, certain conditions were applied in the admission process towards immigrants: they had to be of European descent, and physically and mentally healthy, as poof of their ability to sustain their living in Australia (McMaster, 2001, p. 43).

Refugee is not a foreign term for Australians due to its great contribution in postwar refugee resettlement, even though their noble acts are found on mix of reasons between humanitarian responsibility, international image and relations, and the needs for population and economic growth (Moran, 2005, p. 176). Since Britain is no longer able to supply enough numbers of immigrants to Australia after the Second World War, the options were to open its door for eastern and central European refugees as the dominant

source of both population and labor in Australian postwar reconstruction as well as economic and industrial development (Moran, 2005, p. 176).

Australia's experiences in dealing with refugees started in 1930s when several thousand Jewish refugees escaping Nazi domination arrived in their land. Based on the 1938 Evian Conference, Australia agreed to receive 15,000 Jewish refugees, but only 7500 of the refugees arrived due the outbreak of war (McMaster, 2001, p. 42). Jewish refugees suffered from prejudice and labelled as 'reffos' not specifically because of anti-Semitism but simply because they were 'not British' (McMaster, 2001, p. 42). To add the 7500 Jewish transported to Australia, more than 2000 other Europeans tortured by Germany were sent to Australia in 1940, further increasing the diversity of European settlers in Australia (McMaster, 2001, p. 42).

In the 1947 agreement between Australia and the International Refugee Organization, it stated that Australia agreed to receive a minimum of 12,000 per year Europe's displaced persons which amounted to total 170,000 refugees in the end of the agreement in 1954 under the Displaced Persons Scheme (Moran, 2005, p. 176). This is a small percentage compared to the number of Europe's displaced person post Second World War that reached 40 million people (Moran, 2005, p. 176). They were skilled Eastern Europeans from the Baltics, Czechoslovakia, and Poland who were provided with passage assistance and quickly absorbed by Australian economy (McMaster, 2011, p. 44). To add to that number, between 1952 and 1961, Australia continued to accept 70,000 refugees consisting of Yugoslavs, Italians, Germans, Dutch, Hungarians and Russians among others (McMaster, 2001, p. 44).

Australia's current asylum policies are rooted in its participation as a signatory party of the 1951 Refugee Convention. The 1951 Refugee Convention inspires some part of the Migration Act 1958 as Australia's domestic migration law, including regulation to deal with refugee and asylum seekers. The Migration Act accommodates art 1A(2) of the 1951 Refugee Convention to define a refugee as a person who,

> "owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Australia's treatment to refugees is stated in Section 36 (2) of the Immigration Act that is to provide a protection visa to those who are considered as a 'non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the 1967 Refugees Protocol'. [6]

Australia's contributions for humanitarian assistance are not only in the form of accepting and resettling refugees in their land but also through 'offshore' program. Graeme Hugo (2006) in his article entitled *Globalization and Changes in Australian International Migration* describes Australia's long established offshore humanitarian migration program which consists of three elements, namely Refugee Programs, Special Humanitarian Programs, and Global Special Humanitarian Program;

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[6] http://www.alrc.gov.au/publications/22-refugee-law/refugee-law-australia-0

"The *Refugee Program* provides protection for people outside their country fleeing persecution. *Special Humanitarian Programs (SHP)* comprise the In-country Special Humanitarian Program for people suffering persecution within their own country, and the Global Special Humanitarian Program for people who have left their country because of significant discrimination amounting to a gross violation of human rights. The *Special Assistance Category (SAC)* embraces groups determined by the Minister for Immigration and Multicultural Affairs to be of special concern to Australia and in real need, but which do not fit within traditional humanitarian categories. This program also assists those internally and externally displaced people who have close family links in Australia. (2006:115)"

The humanitarian Program for refugees in Australia is under the umbrella of Australia's Immigration Program[7], alongside with Migration Program for skilled and family migrants. Its Humanitarian Program consists of two components namely the onshore protection/asylum for those who already in Australia that their claim for refugee status are proven according to the 1951 Refugees Convention, and the other is the offshore resettlement for those who are outside of Australia's territory. Offshore resettlement program consists of refugee category visas and Special Humanitarian Programme (SHP) visa, are for those who apply for it from outside Australia. The type of visas are vary and granted upon approval for Refugee Visa (Subclass 200), In-country Special Humanitarian (Subclass 201), Emergency Rescue Visa (Subclass 203), Woman at Risk (Subclass 204), and Global Special Humanitarian Programme Visa (Subclass 202).

According to Commonwealth of Australia in 2008, Australia sets a yearly intake of 13,000 refugees who are thoroughly selected as part of an offshore SHP (Nancy Hudson-Rodd, 2009, p. 189). The onshore program is intended to grant protection visas to people

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[7] https://www.border.gov.au/about/corporate/information/fact-sheets/60refugee

who arrived in Australia with valid visa (student, tourist, or other short term visas) who then apply for refugee status (Nancy Hudson-Rodd, 2009, p. 189).

When Australia opened its door for European displaced persons after the war, Australian officials were sent to Europe in full control to choose suitable white refugees, to be brought home (Marr & Wilkinson, 2003, p. 35). This process and procedure has created an image in the eyes of Australians of 'genuine refugees' as those who are patiently waiting for officials to come and choose them from camps far away from Australia (Marr & Wilkinson, 2003, p. 35). This idea of genuine refugees was tempered when the boat people started to arrive unexpected and uninvited in Australia in 1976.

The ever-growing number of boat people since 1976 has created anxiety among Australians and their government particularly in the sense that they feel they are losing control over who are allowed to come and settle in Australia. They established several policies addressing the problem in order to ensure they regain the full control over their territory and their people. There have been a variety of policies toward unauthorized maritime arrival over the years which are criticized as being discriminatory regardless of their claims for protection. In the following, i present some of these policies not in terms of chronological order, but in terms of their significance. I will first analyze Mandatory Detention Program followed by the Pacific Solution since detention of boat people has been the center of Australia's asylum policies. Subsequently, Temporary Protection Visa is discussed as this policies has direct link to the detention programs. The last is Australia-Malaysia People Swap as an example of the government's continued attempt to deal with boat people through cooperation with neighboring countries.

Chapter 4

Policies Addressing Irregular Maritime Arrivals

4.1 Mandatory Detention Program

The first five Indochinese arrived in Australia by a small boat in 1976 was followed by six boats in 1977 carrying a total of 204 people, placed in government hostels and, very quickly, granted refugee status as well as given permanent residence (McMaster, 2001, p. 70). For this first wave of boat people, until 1981, detention was not an issue (McMaster,2001, p. 73) although they were held in detention on a discretionary principles under the *Migration Act 1958* (Phillips & Spinks, 2013a, p. 12). They were housed in a loose detention in Sydney's Westbridge Migrant Center for their claims to be processed (Phillips & Spinks, 2013b, p. 3). The general assumption towards them was that they were 'genuine refugee' fleeing from a country of which its regime was an enemy that Australia had fought against (Phillips & Spinks, 2013b, p. 3).

Responding to these arrivals of boat people, the Fraser Liberal-National Party Coalition Government (1975-1983) released a policy paper the 'Green Paper' on Immigration Policies and Australia's Population on 17 March 1977, followed by policy statement on 24 May 1977 by the then Immigration Minister MacKellar saying that Australia understood its humanitarian commitment and was willing to help with refugee resettlement in other countries (McMaster, 2001, 50). This policy contained the idea of controlled refugee intake as a deterrence policy, rather than to open its door for the arrival of boat people (McMaster, 2001, p. 50,70).

The continuing arrivals of boat people in 1977 caused the wide spread public accusation that their claims for refugee status were not genuine (McMaster, 2001, p. 52), but rather were pirates, rich businessmen, drug runners, and communist infiltrators (Phillips & Spinks, 2013a, p. 7). Public discourse on boat people evolved around issues of increasing unemployment, boat people 'jumping the immigration queue', and concern that Australia was losing control over their migrant selection policy (Phillips & Spinks, 2013a, p. 6). Moreover, the Government's treatment towards boat people by letting them to stay in Australia was disappointing the trade union and resulted in the Darwin branch of the Waterside Workers' Federation calling for strikes to protest at the 'preferential treatment' towards boat people (Phillips & Spinks, 2013a, p. 6). Responding to these concerns, the Government established the Determination of Refugee Status (DORS) Committee in March 1978 to serve as an administrative order to assess and verify the claims of asylum seekers and provide recommendations to the Minister (McMaster, 2001, p. 52,71). Although the Committee did not have legal basis and could not give final decision on the requests for refugee claims, but its establishment had made a way for a more open and accountable refugee processing (McMaster, 2001, p. 71).

Other measures taken by the Fraser Coalition Government were cooperation with regional governments to allow asylum seekers boats to be processed in camps in countries of first asylum, increased the number of Indochinese refugees accepted for resettlement from camps in Southeast Asia in order to decrease the number of people who were willing to travel by boat to Australia, and introducing procedure to determine of status per individual case to ensure their genuine cause (Phillips & Spinks, 2013a, p. 9).

The arrival of the first wave of boat people was a new phenomenon for Australia (McMaster, 2001, p. 72), it created a precedent of lesson learnt on how to deal with influxes of asylum seekers. Ian Mcphee replaced MacKellar as Minister of Immigration and Ethnic Affairs and produced a more restrictive approach towards refugees (McMaster, 2001, p. 72). On 16 March 1982, Mcphee delivered a statement to the House of Representative, stating that 'the criteria for refugee entry would be tightened significantly by applying the refugee criteria of the UN Convention on an individual basis rather than relying on the group mandate status accorded by the UNHCR', in order to deter Indochinese economic refugees from fleeing camps and heading to Australia (McMaster, 2001, p. 72). This policy was proven to be a success to reduce the number of boat people by one-third from the previous three years (McMaster, 2001, p. 72). Analyzing Australia's asylum policy in this period, McMaster (2001) states that, "Macphee emphasized defense of Australia's northern coastline against an invasion from the north, setting the scene for the 'defend, deter, and detain' mentality of the following decade. (p. 72)"

The second wave of boat people started to arrive in Australia on 28 November 1989 with 26 Cambodian nationals followed few months later by 119 people on board of the *Beagle.* They were all detained since they reached Australia until they were rejected as refugees in April 1992 by the Immigration Department (McMaster, 2001, p, 73). Fearing that another outflow of refugee from Indochina would be flooding Australia once again, just like the case of Vietnamese in the 1970s, it wanted to send a strong and clear signal that boat people were not welcomed (McMaster, 2001, p. 74). The Hawke Labor

Government (1983-1991) addressing the coming of boat people by introducing a system that discriminate specific group, the Cambodian boat people (McMaster, 2001, p. 75).

One factor played an important role in this discriminatory treatment towards Cambodian boat people was Australia's great involvement in Paris Peace Agreement in early 1990s. As part of the effort to resolve Cambodia's domestic dispute which resulted in spillover of asylum seekers, Australia saw that accepting Cambodian boat people would conflicting the agreement and disrupt the negotiation process (McMaster, 2001, p. 75). Part of the Agreement in resolving Cambodia's internal conflict as well as conflict with Vietnam was to deal with Human Rights protection including the voluntary return of refugees and displaced persons of Cambodian nationals.[8]

Another issue contributing in the discussion on the discrimination of Cambodian boat people was the Government's decision to grant refugee status to Chinese students who arrived in Australia before 21 June 1989 and feared to come back to China after the Tiananmen Square incident (McMaster, 2001, 78). A total of 27,359 Chinese students were granted permanent status as a special group (McMaster, 2001, p. 78). This deemed generous act of the Australian government has created confusion and inconsistency of treatment towards asylum seekers based on how they entered the country and where they were from (McMaster, 2001, p. 78). This discrimination and inconsistency resulted from administrative system that focused on ministerial discretion had drawn criticism for its

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[8] http://peacemaker.un.org/cambodiaparisagreement91

lack of legal justification and failing to follow Australia's commitments under the 1951

Refugee Convention (McMaster, 2001, p. 79).

McMaster (2001) describes the situation as 'conflicts and power plays between the

administration and the judicial system' (p. 79). He adds, "During the 1980s people could

appeal against adverse decisions in the Federal Court. The court ceased to consider the

broad discretion characterizing the Migration Act before 1989 as permitting total control

by the Minister over migration decision making. (2001:79)" Tension between these two

highest actors in determining refugee status and criticism over the Government's decision

resulted in the Government's response to send boat people to remote detention facilities

at Port Hedland, north-west of Western Australia (McMaster, 2001, p. 79,80). This

measure was taken to put boat people away from the public eye and at the same time

sending signal to future boat people that they were not welcomed in Australia (McMaster,

2001, p. 80).

Learning from the arrival of the 1989 second wave of boat people and to give

control as well as legal structure over the Government's migration decision making

(McMaster, 2001, p. 80), the then Prime Minister Paul Keating and his Labor government

officially established mandatory detention on May 5th, 1992, through the enactment of

the *Migration Amendment Act 1992*, addressing those who were considered entering

Australia's territory without a valid visa (Phillips & Spinks, 2013b, p 5). The enactment

of this regulation gives legal basis for migration decision making to stay in the control of

the government and at the same time strengthen the power of the Parliament as law

maker in Australia (McMaster, 2001, p. 80,82). Gerry Hand, the then immigration

minister, explained the rationale behind the implementation of mandatory detention center was to assist the processing of refugee claims, avoid de facto migration and save money because the government did not need to place people in local community (Phillips & Spinks, 2013a, p. 12). However, Gerry Hand explicitly mentioned that mandatory detention was initially intended as a temporary and 'exceptional' measure to deal with a particular 'designated persons'—Indochinese unauthorized boat arrivals (Phillips & Spinks, 2013b, p. 5-6).

Subsequently, mandatory detention for *all* unlawful non-citizens (that is, any non-citizen who does not hold a valid visa) was launched under the *Migration Reform Act 1992* with the intention to facilitate not only the determination of refugee status but also the deportation of unlawful non-citizens who are not entitled to be in Australia (Phillips & Spinks, 2013a, p. 12). Under this legislation, migration officers must apprehend persons who are reasonably suspected to be unlawful non-citizens (Phillips & Spinks, 2013a, p. 12). However, there were some exceptions in the implementation of the Act directed to those who fulfilled certain criteria, such as visa overstayers who were not considered to be a security risk would be able to obtain lawful status through the grant of a bridging visa so that they can avoid detention (Phillips & Spinks, 2013b, p 7). This decision was made with reasoning that visa overstayers had once received authorization because they 'submitted themselves to a proper application and entry process offshore' (Phillips & Spinks, 2013b, p. 7).

Different from treatment obtained by visa overstayers, asylum seekers who arrive by boat without prior government authorization face mandatory detention in a system of

prison-like camps (Nancy Hudson-Rodd, 2009, p. 189) to be processed, have their security and health evaluated, and to determine whether they deserve to stay in Australia legitimately or not (Phillips & Spinks, 2013b, p. 8).

Marr and Wilkinson (2003) point out that the mandatory detention policy quickly became popular among Australians and has remained unchanged. A year after the establishment of mandatory detention for all unlawful non-citizens, a national poll in 1993 showed almost a full support for the policy and 44 per cent endorsement of strong rejection for all boat people to settle in Australia. (2003, p. 37).

The mandatory detention policy experienced a great disruption when the number of boats landed in Australia's land increased significantly in 1999 with 3274 people and 2937 people in 2000 arrived at Ashmore and Christmas Island, mainly from Afghanistan and Iraq (Marr and Wilkinson, 2003, p. 43). These arrivals have created fear among Australians, although most of them were found to be eligible for refugee protection as they had escaped religious, racial, and political persecution in their home countries (Marr and Wilkinson, 2003, p. 44).

4.2 Offshore Detention Program
a. Pacific Solution

According to Marr and Wilkinson (2003), the Pacific Solution idea is not a new invention, but an old arrangement of the British when they sent Jewish refugees to Mauritius and Cyprus before the Second World War (p. 106). A similar arrangement was

conducted by the United States to relocate thousands of Haitian immigrants offshore to Guantanamo Bay in Cuba in the 1980s and 1990s (Marr & Wilkinson, 2003, p. 106).

The Pacific Solution scheme was launched in September 2001 under the Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bills 2001 by the then Prime Minister John Howard from the Liberal Party of Australia, as a response to an incident in August 2001 when a sinking boat carrying 433 asylum seekers on their way to Australia were rescued by a Norwegian freighter, the Tampa (Phillips & Spinks, 2013b, p. 9). After an intense communication between the Tampa, Australia, Indonesia, Timor Leste, the United Nations, Papua New Guinea, and Nauru, the Tampa, which was initially refused permission to enter Australia, stubbornly entered Australia's territorial waters where it was intercepted by the Special Air Service (SAS), and the asylum seekers were thereafter transferred to HMAS Manoora and sent to the Pacific island of Nauru (Phillips & Spinks, 2013b, p. 9).

Phillips and Spinks (2013b) explain that under this arrangement, several islands within Australia's territory (namely Christmas Island, Ashmore and Cartier Islands and the Cocos (Keeling) Islands) were excised from Australia's migration zone, with the consequence that non-citizens arriving without valid documentation at one of these islands were not able to apply for a visa to Australia, including Protection Visas (p. 9-10). Another feature of this arrangement is that Australian navy is allowed to intercept boats of asylum seekers heading to Australia (McKenzie & Hasmath, 2013, p. 418). As a result, unauthorized arrivals at any of the island were subject to transfer to Offshore Processing Centers which were set up in Nauru and Manus Island (Papua New Guinea) where they

stayed at during the process of their asylum claims (Phillips & Spinks, 2013b, p. 10). This arrangement was criticized because asylum seekers under the Pacific Solution were not provided with access to legal assistance or judicial review (Phillips & Spinks, 2013b, p. 10).

Since the implementation of the Pacific Solution in 2001, the most obvious result has been that the arrival of boat people seeking asylum dropped dramatically, with one person arriving in 2002, and an average of 57 people each year until Kevin Rudd's Labor government was elected in 2007 (McKenzie & Hasmath, 2013, p. 418).

When the Pacific Solution was formally ended in February 2008, acknowledging the ruthless treatment of asylum seekers in Australia (McKay, 2013, p. 25) as well as the high cost borne by Australian taxpayer (Phillips, 2014, p. 4), there were total of 1637 people had been detained in the Nauru and Manus facilities, with 1153 people or 70 per cent were granted the status of refugees (Phillips & Spinks, 2013b, p. 10). Sixty one per cent of them were resettled in Australia, while the rest resettled in other countries such as New Zealand, Sweden, Canada and the United States of America (USA) (Phillips & Spinks, 2013b, p. 10).

Although the Pacific Solution was ended with the announcement from The Rudd Government that Christmas Island would be the location to process future unauthorized boat arrivals, the Gillard Government then revoked the decision in 2012 due to an increase in boat arrivals, and reestablished the agreement with both Nauru and Papua New Guinea as offshore processing centers (Phillips & Spinks, 2013b, p. 12).

b. Pacific Solution Part II

The Gillard-led Labor government lasted from August 2010 to June 2013 after she ousted Kevin Rudd as the leader of the party. To inherit the previous legacy on keeping Australia safe from asylum seekers, she continued seeking the best mechanism to effectively transfer large numbers of asylum seekers to neighboring states (Grewcock, 2014, p. 73). The offshore processing arrangement remained to be the Government's commitment in handling the influx of boat people. During the Australian Labor Party (ALP) National Conference in December 2011 the Government expressed its intention to fulfill its commitment through the framework of 'strong regional and international arrangements' as an effort to prevent secondary movements of asylum seekers from coming to Australia (Phillips & Spinks, 2013b, p. 16). She attempted to set up cooperation with Timor Leste and Malaysia, but these all failed for different reasons. Meanwhile, on 19 August 2011 a cooperation with neighboring country seemed to work with the signing of a Memorandum of Understanding between the governments of Australia and Papua New Guinea on the proposed establishment of an 'assessment center' on Manus Island (Phillips & Spinks, 2013b, 15).

An incident happened in June 2012 which became a critical moment for future cooperation with neighboring countries. Two boats on the way to Christmas Island from Indonesia sank and resulted in at least ninety people drowned (Grewcock, 2014, p. 73). With the increase number of unauthorized boat arrivals in 2012 –largely from Sri Lanka- the Australian government was under pressure to seek alternative policy options as well as 'stop the boats' (Phillips & Spinks, 2013b, p. 17).

In order to obtain some recommendations for policy making process in deterring people risking their lives by traveling by boat to Australia (Grewcock, 2014, p. 73), the Gillard Government formed an Expert Panel on Asylum Seekers in June 2012 (Phillips & Spinks, 2013b, p. 18). As a result, the Panel released a report on 13 August 2012 which recognized the difficulty Australia was experiencing in coming up with effective policies to limit immigrants while addressing humanitarian challenges created by asylum seekers(Phillips & Spinks, 2013b, p. 18). The panel's recommendations included an increase Australia's annual humanitarian intake from 13,750 to 20,000, which included double the allocation of refugees to 12,000 (Grewcock, 2014, p. 73), and several long-term and short-term policies options to reduce pressure on the detention network, for instance, to produce legislations which underlie cooperation for transfer of people under regional offshore processing arrangements in Nauru and Papua New Guinea (Phillips & Spinks, 2013b, p. 18), to restrict family reunion for 'irregular maritime arrivals', as well as to excise the Australian mainland from Australia's migration zone (Grewcock, 2014, p. 73).

These recommendations adopted by the government through this revised version of the Pacific Solution reintroduced the offshore processing arrangement. According to the revised policy, all unauthorized refugees who landed in Australia after 13 August 2012 were required to endure forced transfer to Nauru or Manus Island (PNG) without an exact timeframe in processing their refugee claims; the timeframe was to be determined based on local law (Grewcock, 2014, p. 73). The policy shift did not deter continued arrivals of boat people. Rather, between 13 August 2012 and 24 May 2013, new immigrant numbers

reached 19,048 people, connected to family reunions had inspired people to arrange travel with their family altogether (Grewcock, 2014, p. 73).

Soon after Julia Gillard was ousted from her position as the Labor Party leader and at the same time as the first female Prime Minister of Australia, on 19 July 2013, Kevin Rudd, who took over the position, signed a Regional Settlement Arrangement (RSA) with Papua New Guinea's Prime Minister, Peter O'Neill. According to this arrangement, asylum seekers seeking unauthorized entry into Australia by boat since 19 July 2013 will be transferred to PNG and if their claim for refugee status is valid, they will be granted permanent settlement in PNG (Grewcock, 2014, p.71-72). Furthermore, on 3 August 2013 the Rudd government also signed an agreement with Nauru for a similar arrangement as with PNG (Grewcock, 2014, p. 72).

4.3 Temporary Protection Visa Regime

Temporary Protection Visas (TPVs) was introduced in October 1999 by the Coalition (Howard) Government which enabled the release of many detainees who obtained the refugee status into the community. The Government emphasized that the protection and residency in Australia would only be given on temporary basis (three years) in order to discourage potential asylum seekers to make their journey to Australia by boat (Phillips & Spinks, 2013b, p. 9).

Alice Edwards (2003) in her article entitled *Tampering with Refugee Protection: the Case of Australia* delineates the contradictory elements on the implementation of Australia's temporary Protection Visa regime (hereinafter 'TPV regime') which was

introduced in October 1999, and further restricted by amendments in September 2001, with regard to relevant international human rights and international refugee instruments, including, in particular, the 1951 Refugee Convention and it's 1967 Protocol (p. 193).

According to Edwards, until before October 1999, permanent protection visas were given to all recognized refugees considering mainly the purpose of international protection to those who need it regardless their mode of entry (2003, p. 196). When the policy changed in October 1999, the asylum system in Australia has produced two different refugee visa sub-classes, namely temporary and permanent which is granted to recognized refugees who arrive in Australia with prior authorization, such as resettled refugees coming from countries of secondary movement (Edwards, 2003, p. 196). This policy subsequently was changed in September 2001 when refugees resettled from places of first asylum no longer be given permanent residence, only temporary (Edwards, 2003, p. 196).

The launch of this change of policy received many critics because the updated system did not only consider the authorization aspect but also where and how asylum seekers arrive in Australia territory. Those who arrive in Australia's territory with valid proper visa and those who later apply for asylum, will have full access to procedures for permanent residence (Edwards, 2003, p. 196). On the contrary, for those who are proven to be in need of protection but arrive in Australia or on 'excised territories' without authorization, either by air or sea, they will only be given a TPV, which is subject to review after 30 months, with no access to permanent visa, this includes those who have spent 7 days or more in another country before reaching Australia (Edwards, 2003, p.

196-197). Hence, despite their mode of entry, although both could prove their claim for refugee to be genuine and deserve the refugee status as per the definition in Article 1A (2) of the 1951 Convention, they will be granted with different visas, so as what entitled to it (Edwards, 2003, p. 200).

The TPV system was formally abolished on 9 August 2008 through the issuance of amendments to the Migration Regulations during the Rudd Government. Under this regulation, the holders of TPVs from 2008-2009 and found their claims to be genuine refugees were granted permanent protection (Phillips & Spinks, 2013a, p. 19).

During the Gillard Government, after few unsuccessful initiatives in addressing the issue of asylum seekers such as the 'Timor Solution', the Migration Legislation Amendment (Offshore Processing and Other Measures) Bill 2011 and the 'Malaysia Solution', the Government released a policy in October 2011 to grant bridging visas for unauthorized arrivals by boat and (Phillips & Spinks, 2013b, p. 16). Aiming at reducing tension and pressure around the discourse on detention centers, detainees who acquired bridging visa would be released into the community while waiting for their claims to be processed (Phillips & Spinks, 2013b, p. 16). This type of visas is considered as a reversion to temporary protection visa but with different name, according to some observers (Phillips & Spinks, 2013b, p. 20).

The parallel processes of acquiring a bridging visa while waiting for claim assessment were implemented in a very short period of time and ended on 25 November 2011. In March 2012, the Gillard Government decides to return to a single statutory protection visa process regardless their mode of arrivals (Phillips & Spinks, 2013b, p. 17).

4.4 Cooperation with Malaysia (People Swap)

Despite the fact that this agreement failed to be implemented, it is still worth mentioning in order to show an instance of various governments' attempts in order to solve refugee problems. On 7 May 2011, with rationale to stop boat arrivals and people smuggling, the Australian government announced that an agreement for people swap was made with Malaysia (Phillips & Spinks, 2013b, p. 15). The agreement was signed through a bilateral scheme on 25 July 2011 by Australia and Malaysia. According to this agreement, Australia will transfer the first 800 asylum seekers to reach its territory by boat to Malaysia, and in return Malaysia will send 4000 refugees to Australia (McKenzie & Hasmath, 2013, p. 417). However, the agreement was declared unlawful by the High Court of Australia in August 2011, because Malaysia was not a party to Australian domestic law aimed at asylum seekers, not Malaysians (McKenzie & Hasmath, 2013, p. 417).

Although it was a very brief process, this proposal has interesting implications for labeling genuine and ungenuine asylum seekers. The Gillard Government used the agreement to emphasize that there was an orderly queue of asylum seekers in offshore camps whose claims were being processed to be granted refugee status (McKenzie & Hasmath, 2013, p. 421). Here, again the notion of genuine refugee for Australian is depicted as waiting in queue offshore to be chosen and brought to Australia. The Gillard Government underscored the importance of this queue by stating that for everyone who landed in Australia's territory was to be transferred to Malaysia and would instantly be taken to the back of the queue to wait for their turn, to express the Government's concept

of fairness towards asylum seekers who have been patiently waiting in the line (McKenzie & Hasmath, 2013, p. 421). However, the notion of fairness cherished by Australian government was problematic in its way that differentiate the mode of arrivals of asylum seekers regardless their valid claims for protection. Those who arrived by boat were labeled 'irregular' and considered less deserving of protection than other mode of arrival such as by air travel. On the other hand, those who were waiting for their case to be assessed in queue in camps outside Australia were termed 'genuine' and portrayed as deserving concern and protection (McKenzie & Hasmath, 2013, p. 421). The labeling between who is deserving and who is not based on their mode of arrivals as well as their action to wait or to use the unauthorized travel has created different public responses towards asylum seekers, to give sympathy or antipathy, regardless of their motive (McKenzie & Hasmath, 2013, p. 421).

Chapter 5

Policy Analysis

5.1 Boat People as a Symbol of Threat

Boat people labeled with various terms such as 'irregular migrants' (McKenzie &

Hasmath, 2013, p. 421), 'queue jumpers' (Marr & Wilkinson, 2007, p. 37), 'unauthorized

arrivals' (Phillips & Spinks, 2013a, p. 4), 'illegals' (Marr & Wilkinson, 2007, p. 37), and

'dangerous aliens' (James & McNevin, 2013, p. 88) with regard to their actions of

crossing the border unlawfully and the mode of transportation they use. Marr &

Wilkinson emphasize that,

> "The problem for boat people was always the boat: the symbol of Australia's old
> fears of invasion. People worried far less –indeed, hardly at all- about asylum
> seekers arriving by air, even though they were jumping the same queue, there were
> far more of them and they were about half as likely as those who came by sea to be
> genuine refugees. (2003:38)"

Although their causes for crossing border could be flying from religious, racial, and

political persecution in their homelands, as defined by the 1951 Refugee Convention are

valid to deserve protection, there are several explanations on why Australians fear boat

people from the symbol it represents pertaining aspects of state control and national

identity.

In his article entitled *Logics of Security: The Copenhagen School, Risk*

Management and the War on Terror, Rens van Munster (2015) emphasizes that whether

an issue becomes a security issue depends on how social actors frame it; he cites Buzan *et*

al. (1998) who state that, "In this approach, the meaning of a concept lies in its usage and is not something we can define analytically or philosophically according to what would be 'best'. (p. 24)" (p. 2). Concerning the definition of 'security', Buzan *et al.* (1998) suggest that, "'Security' is thus a self-referential practice, because it is in this practice that the issue becomes a security issue – not necessarily because a real existential threat exists but because the issue is presented as such a threat. (p. 24)"

Criticizing the narrowness of conceptual framework of the construction of security by the Copenhagen School, Matt McDonald (2008) suggests the need to put more attention on the some dynamics that play important role in the construction of specific issues as security threats, namely the role of 'facilitating conditions' and the 'audience' (p. 564). Furthermore, McDonald presents the definition of the term securitization as, "The positioning through speech acts (usually by a political leader) of a particular issue as a threat to survival, which in turn (with the consent of the relevant constituency) enables emergency measures and the suspension of 'normal politics' in dealing with that issues. (2008, p. 567)"

a. Threat to the Government's Control

The arrivals of boat people in Australia's shores have become a symbol represents several meanings security-wise. Australians think that when boat people appear in their yard, it means that they are losing control over their borders and control over who is allowed to come to their land. Despite the fear of invasion by the 'other', Australians understand that their geographical location, surrounded by sea on the southern corner of

the world, should be advantageous in terms of control over who comes in and out of the territory (Mckenzie & Hasmath, 2013, p. 425). When boat people landed uninvited and unexpected, they think they have lost that control. Hence, they must reclaim it back.

As mentioned previously, Australia no longer received boat people with sympathy when the second wave of the influx began. When the first wave of boat people arrived, the governments realized that they did not have formal mechanisms to deal with onshore asylum seekers and the consequence of this situation was that refugee status determination was made based on discretion by the minister for immigration (Mares, 2001, p. 67-68). Hence, when the second wave of boat people landed on Australia shores, it started to implement the *Migration Legislation Amendment Act 1989* as a new system to processing boat arrivals which authorized officers to arrest and detain anyone suspected of being an 'illegal entrant' in the 'administrative detention' (Phillips & Spinks, 2013b, p. 3). The decision to establish legislative mechanisms to manage its immigration shows how Australia sees the influx as a threat to its border security. It is meant to reduce the number of refugee claims (Mckenzie & Hasmath, 2013, p. 425) and at the same time to display government's strengthened control over what was deemed a weakened border. Mckenzie & Hasmath (2013) cite a minister's argument on a culture of control:

> I can understand people say there is a culture of control, but […] you can only conduct good immigration policy and good refugee policy if you are able to manage your borders. (p. 425)

Anna Hayes and Robert Mason (2013) note how governments use the term 'national security' to signify their fight against irregular migrants, especially boat people

who are entering the state illegally (p. 7). Hayes and Mason (ibid) point out that this stance comes about in response to public concern about government's weakness in controlling and defending borders. Threats posed by asylum seekers arriving by boat are framed in their action to cross border by violating the local law which picture them as criminal. This idea hence connotes boat people as criminal, regardless the genuineness of their cause to flee from their country of origin. Moreover, boat people who mainly come from the Southeast and South Asia countries also pose a threat with their 'otherness' to the 'whiteness' of Australians, which play significance in their historical memory, suggest that the threat is more moral rather than physical one (Hayes & Mason, 2013, p. 9).

The framing of boat people as a security issue by Australian governments can be seen in their policies towards the arrivals of boat people. Mandatory detention is the first and remains popular policy which enables community to picture boat people as a threat to society. It sustains the idea that boat people must be detained upon their arrival in Australia's land because they are illegal, which make them criminals. As explained by Marr and Wilkinson (2003) a poll conducted a year after the establishment of mandatory detention for all unlawful non-citizens, showed a result on almost a full support of the community for the policy with 44 per cent of those questioned in 1993 displayed strong rejection for all boat people to settle in Australia (p. 37).

Australia has always have anxiety towards boat people, although their treatments to them were different from the first wave to the second wave forward. They acknowledged the coming of the first wave with sympathy due to the causes that encouraged them for

risking their lives sailing the high tide ocean to look for safety. But it changed when the second wave of boat people was happening. Boat people no longer received sympathy, but rather rejection. They were depicted as taking advantage of Australia's compassion and generosity, less deserving, queue jumpers, a 'problem', (McKenzie & Hasmath, 2013, p. 420-22), economic refugee (McMaster, 2001, p. 79) and somehow rich enough to pay people smugglers for their journeys to the south (Marr & Wilkinson, 2003, p. 30).

The shift of treatment towards boat people from the first wave and the second wave was also due to Australian government's struggle for control of its immigration policies under the pressures of its domestic and foreign policies. Australia's major involvement in Paris Peace Agreement to resolve peace and stability in Cambodia resulted in discriminatory detention of Cambodian boat people during the second wave was in parallel with the government's attempts to secure its supreme power over the judicial system, on immigration policy particularly in determination process of refugee status.

When the Pacific Solution scheme launched in September 2001 by the then Prime Minister John Howard from the Liberal Party of Australia, Australia wanted to make sure that a sinking boat carrying 433 asylum seekers rescued by a Norwegian freighter -the Tampa (Phillips & Spinks, 2013b, p. 9), would not make their way to Australia. They were sent to the Pacific island of Nauru (Phillips & Spinks, 2013b, p. 9), although it had not been a signatory party to the 1951 Refugee Convention when the case occurred.

The depiction of boat people as posing a threat also implicit in the decision to excise several islands within Australia's territory namely Christmas Island, Ashmore and Cartier Islands and the Cocos (Keeling) Islands from Australia's migration zone, causing

non-citizens arriving without valid documentation at one of these islands were not able to apply for a visa to Australia. By sending boat people to Offshore Processing Centers in Nauru and Manus Island, they were unable to access Australia's legal assistance or judicial review.

From the case of the People Swap versus the High Court, it can be seen how the government's speech shifted in order to show what topic they were focus on. Mckenzie and Hasmath (2013) describe the shift occurred during several five press conferences conducted by the then Prime Minister Gillard and Minister Bowen. Gillard mentioned about border protection only once on 25 July 2011 by saying that: 'this agreement will better secure our borders' (Mckenzie & Hasmath, 2013, p. 427). Later on, while the case was confronted by the High Court, Gillard used border control rhetoric more frequently on 1 and 12 September and 13 October 2011 (Mckenzie & Hasmath, 2013, p. 427). As an instance, during her speech on 1 September 2011, Gillard tried to assure the public that Australia 'got more assets patrolling our border than we've ever had before and we'll continue to do everything that we do to patrol and protect Australia's borders. (Mckenzie & Hasmath, 2013, p. 427)' She sharpened her tone during her speech on 12 September with a reminder of the introduction of mandatory detention by the Keating Government's in 1992, emphasizing the term of border protection as part of Labor's legacy:

> "We are a political party that has always been prepared to take the steps necessary to have border protection and to ensure that we had an orderly migration system. I refer you in that regard to the creation of mandatory detention by Minister Gerry Hand […] That is our heritage, that is who we are. (Mckenzie & Hasmath 2013:427)"

The rhetoric around border control in Gillard's press conferences as her defense for the People Swap arrangement has directed the public's attention to the issue as one of potential threat to Australia's borders, and hence it must be addressed in more assertive way. Australia's border is experiencing securitization. Matt McDonald (2011) refers to 'the process whereby through speech acts –and audience acceptance- particular issues come to be conceived and approached as existential threats to particular political communities (p. 282). In this case, securitization of the border occurs when Gillard emphasizes repeatedly the importance of securing the border from the threat in the form of boat people who cross the border illegally and public acceptance of her speeches confirming its existence.

b. Threat to National Identity

McMaster (2001) suggests that the principle of refugee detention policy carries the weight of fear of the 'other' and is interrelated with discourses on citizenship which are framed by the context of identity politics (p. 4), to determine who is Australian and who is not-Australian. Quoting Alastair Davidson, a leading scholar on citizenship studies of Australia, McMaster states that, "Citizenship and migration have always been confused in Australian history, where citizenship has been used by successive governments to exclude Australia's other" (McMaster, 2001, p. 4).

Citizenship is a significant characteristic of modern society, as Rogers Brubaker points out its importance;

"citizenship confers not only political rights but the unconditional right to enter and reside in the country, complete access to the labour market, and eligibility for the full range of welfare benefits. In a world structured by enormous and increasing inequalities ... the rights conferred by citizenship decisively shape life chances. (cited by Alice Bloch, 2000, p. 78)"

Moreover, citizenship is not solely a matter of legal interaction between the state and the individual, but also concerns interactions among individuals within a community. Citizenship is a question of belonging which necessitates recognition by other members of the community to determine 'who is entailed to civil, political, and social rights by granting or withholding recognition. (Glenn, 2011, p. 3)'

In the case of Australia, its construction of national identity is in parallel with interwoven of their values, national identity and fear of the 'other' to consider who is Australian and who is un-Australian which creates boundaries of acceptability (Babacan & Babacan, 2013, p. 152). Boundaries of acceptability which draw the lines between who is Australian and who is not Australian make the sense of why Australia preferred to intercept *Tampa,* transferred the people on its board to Australian troopship *Manoora* and sent them the Nauru. Australian did not want them to land in Australia's land to submit their claims for protection to be assessed. It wanted them to be outside of Australia so that they could not reach Australia's immigration and legal system (Marr & Wilkinson, 2003, p. 106). That was why it directed them to detention centers in their neighboring countries under the Pacific Solution arrangement where their claims could be processed there.

Australians do not want boat people to enter Australia's territory because they are viewed as being at 'risk' to society that resulted in anxiety and insecurity among the community (Babacan & Babacan, 2012, p. 153). Here, the notion of exchanging the sense of security to civil liberties is used by the Australian Government to encourage them to implement harsh and tough measures that harming boat people (Babacan & Babacan, 2012, p. 153).

5.2 Policies of Deterrence

Sharon Pickering and Leanne Weber (2014) describe how Australia is experiencing a change in the realization of deterrence theories in its refugee policies implementation. As the basis of understanding, they explain the change in theories as follow:

> "Classical Deterrence Theory —based on increasing risks so that negative costs outweigh positive gains—is marked by a focus on the certainty, timeliness, and severity of *punishment*. Whereas classical deterrence typically relies on formal punishment mediated by court processes, more nuanced strategies that directly manipulate a range of incentive structures are being identified by criminologists as emerging neoliberal forms of governance. When applied to border control, classical deterrence employs forms of punitivism that bypass court proceedings but are nevertheless punitive in intent and effect, such as administrative detention and military interdiction. (p. 1006)"

In Australia refugee policies, deterrence is implemented to prevent asylum seekers to board on boat and sail to Australia (Pickering & Lambert, 2002, p. 66). In his speech to introduce policy of mandatory detention, Gerry Hand, Minister for Immigration during the Keating Labor government states, 'the Government is determined that a clear signal be sent that migration to Australia may not be achieved by simply arriving in this country

and expecting to be allowed into the community,' to emphasize the idea contained in the policy as to deter other asylum seekers from coming to Australia (Mares, 2001, p. 78-79).

The establishment of mandatory detention for those who arrive unauthorized and claim asylum contains two purposes of deterrence; to deter those in detention from pursuing their claims and to deter others from making the same travel arrangement (Pickering & Lambert, 2002, p. 78). Prior the implementation of mandatory detention policy, the Government sent boat people to remote detention facilities at Port Hedland, north-west of Western Australia to hide them away far from the public eye and simultaneously send a signal to future boat people that they were not welcomed in Australia (McMaster, 2001, p. 80).

Deterrence is also embodied in the implementation of the Temporary Protection Visa (TPV) introduced in October 1999 by the Coalition (Howard) Government which enabled the release of many detainees who obtained the refugee status into the community. The Howard Government emphasized that the protection and residency in Australia would only be given on temporary basis (three years) in order to discourage potential asylum seekers to make their journey to Australia by boat (Phillips & Spinks, 2013b, p. 9). The TPV policy was criticized because the system not only considered the authorization aspect but also where and how asylum seekers arrived in Australia territory, regardless the cause of asylum seekers to make the trip to Australia (Edwards, 2003, p. 196).

The implementation of the TPV is meant to differentiate TPV holders from 'genuine refugees' and Australian citizens when they live in the community (Pickering &

Lambert, 2002, p. 74). By alienating TPV holders from the community, the Government

aims at sending a message to onshore asylum seekers that they are not welcome in

Australia and to put label on them that they were deviant and criminal 'unauthorized

arrivals granted protection' (Pickering & Lambert, 2002, p. 74).

A similar message was carried by the People Swap arrangement proposed by the

Gillard government. The arrangement was supposed to send a clear signal: 'if you arrive

in Australian waters and are taken to Malaysia you will go to the back of the queue,'

where they would wait their turn together with the other 90,000 asylum seekers

(Mckenzie & Hasmath, 2013, p. 421). The People Swap proposal contained the notion

that asylum seekers were regarded as direct threat to Australia's migration policies

because they came uninvited and yet must be considered for protection (Mckenzie &

Hasmath, 2013, p. 426). The Gillard government attempted to use deportation to

Malaysia as a deterrent, in order to restore 'control' to the Australian government

(Mckenzie & Hasmath, 2013, p. 426).

The key idea for the Australian governments is that 'when we deter asylum seekers

we are in control' (Pickering & Lambert, 2002, p. 77). Since its establishment, mandatory

detention has been at the core of deterrence as control and control as deterrence discourse,

as states by Nick Bolkus, a cabinet member during Hawke and Keating Labor

Governments:

> ...[We] are not talking about protecting the rights of those who arrived here illegally
> -and we are not distinguishing between citizens and non citizens: we are
> distinguishing between those who come to Australia legally and those who come to
> Australia illegally. We are protecting those who, in many cases, probably are not

even in this country and who under our processes have been rejected as refugees (Pickering & Lambert, 2002, p. 78).

Chapter 6

Conclusion

Australia depicts boat people beyond their condition as individuals who travel through high tides with possibility to face death at sea. They are first regarded as threat to security and national identity before their causes for fleeing their home countries or refugee camps. Australia's treatment of boat people in the form of mandatory detention, has received criticism as a power play, breach of human rights, discrimination, and of simply being inconsistent. Based on their mods of entrance, boat people's claims for refugee status are pending, and in the meantime, they are treated as guilty until proven innocent in the detention centers. They are guilty because they crossed Australia's border unauthorized, hence they are unlawful. It is not only because they are the 'other' of Australian citizens, but also because they came uninvited.

Australia's contribution in humanitarian programs started back in postwar refugee resettlement with Australian officials were sent to Europe in full control to choose suitable white refugees, to be brought to Australia. For Australia, this controlled process and procedure accompany the idea of what is called as 'genuine refugees', as those who are patiently waiting for officials to come and choose them from camps far away from Australia. This image of genuine refugees is disrupted by boat people whose arrivals regarded as evidence that the government has lost control over its border and immigrant intake, who are allowed to come and stay as part of the community. In essence, their concern about boat people is an embodiment of their concern for losing control.

The threat of losing control inspires policies of deterrence. Harsh treatment toward boat people is intended to punish those who already violated the law by illegally crossing the border and to send message to stop those who intend to make the similar journey to Australia. A policy of deterrence is implemented not only as an element of Australia's immigration policies but also as an act of taking over and exercising control over what are deemed as important, namely border and national identity, among others.

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