DENIAL AND DETERRENCE IN REFUGEE POLICY AND PRACTICE IN AUSTRALIA, HUNGARY AND THE UNITED STATES

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Executive Summary

This Thesis examines the practices and policies pursued by Australia, Hungary and the United States with respect to persons seeking international protection. Under the Refugee Convention, these countries are internationally bound to respect the prohibition on *refoulement*, to provide persons seeking international protection access to asylum procedures, and to provide broader Convention rights to such persons who are subject to their jurisdiction and physically within their territories; the refugee protection frameworks in these countries have evolved in such a way as to be incompatible with these key obligations. As such, this Thesis then turns to the nature of the rhetoric employed in Australia, Hungary and the United States when discussing, promoting and justifying their policies and practices which are inconsistent with the Convention obligations, and then analyses this rhetoric by reference to the conceptual framework provided by the juncture of securitisation, majority identitarian populism and crimmigration.

Australia, Hungary and the United States incontrovertibly violate their Convention obligations. While this thesis may provide an explanation for why these violations occur, it does not provide an answer for what happens as a consequence of these violations. While Hungary may face some consequences through the supranational legal framework of the European Union, it is unlikely that Australia and the United States will be held accountable in any meaningful way for their violations of the Convention. This demonstrates the limited force the Convention has as an instrument of international law, as it only has the power that signatory states ultimately decide to accord it through their laws and practices. Broadly, this has concerning ramifications for the future interpretation of the aforementioned key Convention obligations. While *non-refoulement* exists to prevent the return of persons seeking international protection *in any manner whatsoever* to countries where they may face harm that amounts to persecution,

practices whereby access to territory is prevented and entry into territory is criminalised mean that these states can very easily *refoul*e persons they are bound to protect. Where states are able to force refugees back to countries where they risk persecution, whether through directly deporting them to their countries of origin or indirectly forcing them to return through the cumulative effect of policies of denial and deterrence, the foundational protection of the Convention is fundamentally weakened.

Introduction

As states parties to the 1951 Refugee Convention,[1] and its 1967 Protocol,[2] Australia, Hungary and the United States are responsible under international law to respect their obligations towards persons seeking international protection. Australia acceded to the Convention on 22 January 1954, and the Protocol on 13 December 1973; Hungary acceded to both the Convention and the Protocol on 14 March 1989; the USA acceded to the Protocol on 1 November 1968.[3] The three countries of Australia, Hungary and the United States are of particular interest, due to the ways in which they have developed their interpretations of their obligations under the Convention and Protocol. Each of these states asserts their generosity towards persons seeking international protection, yet have created frameworks whereby physical entry into their territories in order to seek international protection is severely limited.

In order to examine the relationship between these restrictive frameworks and respect for and compliance with the norms of the Convention, this Thesis is divided into four sections. Chapter 1 will examine the three key obligations upon these countries: the obligation to respect the prohibition of *refoulement*, the obligation to provide access to asylum procedures, and the obligation to afford other Convention rights to persons seeking international protection who are within the physical territory of these countries, or subject to their jurisdiction. Chapter 2 will provide an overview of the refugee protection frameworks in Australia, Hungary and the United States, and examine the extent to which these frameworks respect these obligations,

[1] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: http://www.refworld.org/docid/3be01b964.html [accessed 23 October 2017], hereinafter the Convention.

[22] UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: http://www.refworld.org/docid/3ae6b3ae4.html [accessed 23 October 2017]

[3] UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: http://www.refworld.org/docid/4f33c8d92.html [accessed 23 October 2017], Annex IV, page 66.

with particular attention paid to the Convention's prohibition on discrimination. Chapter 3 will then turn to the policy discourse in each of these countries that has accompanied the evolution of these frameworks, and examine the language and rhetoric that is employed by those responsible for devising and enforcing these frameworks. Lastly, in Chapter 4, this Thesis will analyse this rhetoric, and the way it is used to justify policies and practices which are at odds with the requirements and spirit of the Convention.

For the purposes of this Thesis, the term "persons seeking international protection" will be used to encapsulate asylum seekers, refugees, and all aliens in need of protection.

Chapter 1 – The rights of persons seeking international protection

For the purposes of this chapter, it is necessary to highlight two functions of the Convention and Protocol. Firstly, they contain provisions that provide a definition of who is a refugee, and who has ceased to be a refugee; as per Article 1A(2) of the Convention, the term "refugee" refers to anyone who:

> "As a result of events occurring before 1 January 1951 and 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".[4]

Secondly, the Convention and Protocol contain provisions defining the legal status of refugees, and their rights and duties in host countries. By acceding to these instruments, Australia, Hungary and the USA have acknowledged that they owe certain obligations to persons seeking international protection in their respective territories, and that these obligations must be respected in order to accord these persons the capacity to enjoy fully their Convention rights and duties. Moreover, these obligations do not exist within the vacuum of the Convention and Protocol, but within an ever-evolving and multi-layered framework of international legal requirements.

It is thus useful at this point to demarcate the boundaries of some of the obligations arising out of the Convention: firstly, the *grundnorm* duty to respect the prohibition of expulsion or return (*refoulement*); secondly, the duty to respect the right to *seek* asylum, and; thirdly, the duty to

[4] Refugee Convention, above n 1, Article 1A(2).

enable the enjoyment of broader Convention rights by persons seeking international protection. This Chapter will now address these three obligations, and explore the class of beneficiaries of these obligations.

1.1 Non-refoulement

According to Article 33(1) of the Convention:

> "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".[5]

Since this provision was drafted, there have been significant developments in international law which have expanded this Article's scope and meaning, particularly with respect to the subsequent development of major human rights treaties. According to James Hathaway, while the guarantee provided by Article 33(1) is insufficient, as it protects only refugees whose lives and freedoms are threatened, "[it] is effectively remedied by the ability to invoke other standards of international law".[6] Hathaway states that through the explicit duty of non-return contained in Article 3 of the United Nations Torture Convention,[7] coupled with the implicit duties of non-return located in Articles 6 and 7 of the ICCPR,[8] there is "a principled limit on the right of most states to remove a broadly defined group of at-risk non-citizens from their

[5] Ibid, Article 33(1).
[6] James C. Hathaway, *The Rights of Refugees Under International Law* (2005: Cambridge University Press), pages 369-370.
[7] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: http://www.refworld.org/docid/3ae6b3a94.html [accessed 23 October 2017], hereinafter Torture Convention.
[8] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html [accessed 23 October 2017].

territory".[9] While this limit on *refoulement* applies to states with respect to recognised refugees (those who have been determined to meet the aforementioned criteria outlined in Article 1A(2) of the Convention), the extent to which it applies to a broader class of persons seeking international protection is unclear. In particular, there is no international consensus on its application to persons who may be awaiting official determination of their asylum claim, or to persons who may have yet to register their intent to apply for asylum.

In an expert paper presented to the UNHCR's 2000-2002 Global Consultations on International Protection, Sir Elihu Lauterpacht and Daniel Bethlehem argue that respect for *non-refoulement* has become an obligation upon all states under customary international law.[10] Particularly, they argue, while *non-refoulement* applies to persons facing the threats to "life or freedom" contained in Article 33(1), it also applies to all persons who can demonstrate substantial grounds for believing that they would be subject to torture or cruel, inhuman or degrading treatment or punishment, irrespective of status or conduct.[11] In support of this argument Lauterpacht and Bethlehem point to the extent of state participation in not only the Refugee Convention and Protocol, but also the Torture Convention, the ICCPR, and UN General Assembly resolutions, and claim that this demonstrates a "near universal acceptance of the principle" of *non-refoulement*.[12] Lauterpacht and Bethlehem further state that, in light of this high degree of acceptance, "and in view also of the evident lack of expressed objection by any State to the normative character of the principle of non-refoulement, [they] consider that *non-refoulement* must be regarded as a principle of customary international law".[13]

[9] James C. Hathaway, "Leveraging Asylum" (2008) 45 *Texas International Law Journal* 503, page 504.
[10] Cambridge University Press, *The Scope and Content of the Principle of* Non-Refoulement*: Opinion*, June 2003, available at: http://www.refworld.org/docid/470a33af0.html [accessed 23 October 2017].
[11] Ibid, paras 251-252.
[12] Ibid, para 209.
[13] Ibid, para 216.

However, Hathaway finds the core premise of Lauterpacht and Bethlehem's argument to be flawed, stating that they "weave together disparate bits of *opinio juris* arising from distinct treaties dealing with distinct issues to locate *opinio juris* for a principle that is more comprehensive than any of the underlying commitments".[14] This is because the instruments upon which Lauterpacht and Bethlehem rely relate to persons at risk of a wide range of human rights abuses, and as such there is "no common acceptance of the duty of *non-refoulement* related to any particular class of persons or type of risk, much less to their beneficiary class".[15] Hathaway further points to evidence of state practice that "denies in one way or another the right to be protected against *refoulement*".[16] He lists examples of such practice: Egypt sending Eritrean refugees back to Eritrea without any explanation or justification; Greece sending back or damaging boats containing persons coming to apply for asylum; Jordan declaring its right to refuse entry to Iraqi Palestinians on the grounds of the enormity of its other responsibilities to Palestinians.[17]

The arguments presented by Hathaway and Lauterpacht and Bethlehem in this chapter thus provide a brief illustration of the way in which the exact scope of the duty of *non-refoulement* remains undefined. This lack of definition creates a grey area in which states are able to declare themselves willing participants in the international protection system, yet simultaneously able to define the duty of *non-refoulement* in a way that prioritises domestic policy interests above respecting duties owed to persons seeking international protection. This room for manoeuvring enables conditions which compromise the coherency of the international protection system. It is in these conditions that states parties to the Convention are able to implement refugee policies which violate international obligations, whilst still being able to assert compliance with the

[14] Hathaway, above n 9, page 509.
[15] Ibid, page 510.
[16] Ibid, page 516.
[17] Ibid, pages 518-519.

same obligations. This will be addressed with respect to Australia, Hungary and the United States in Chapter Two of this thesis.

1.2 The right to seek asylum and the right of access to procedures

By acceding to the Convention, states parties make an undertaking to provide international protection to refugees and asylum-seekers. It is thus arguable that, given the absence of an express "right to seek asylum", or any explicit statement to the contrary, the Convention's sheer existence necessitates an implicit right to seek asylum. Indeed, as Guy Goodwin-Gill refers, "the right to asylum was implicit in the Convention, even if it was not explicitly proclaimed therein, for the very existence of refugees depended on it".[18] According to Goldman and Martin, the origins of such a right are found in the "right of sanctuary" in ancient Greece, Rome, and early Christian civilisation.[19] Alice Edwards states that its "modern equivalent was recognised by States in the form of Article 14 of the UDHR";[20] this Article states that "everyone has the right to seek and to enjoy in other countries asylum from persecution".[21]

Edwards further states that:

> "Access to asylum procedures is also debatably an implied right under the 1951 Convention (although such procedures are not necessary to accord refugee protection), and is an accepted part of State practice… [W]ithout appropriate asylum

[18] Guy Goodwin-Gill, *The Refugee in International Law* (1998: Oxford University Press), page 175.
[19] R.K. Goldman and S.M. Martin, 'International Legal Standards Relating to the Rights of Aliens and Refugees and United States Immigration Law' (1983) 5(3) *HRQ* 302, page 309.
[20] Alice Edwards, 'Human Rights, Refugees, and The Right 'To Enjoy' Asylum' (2005) 17 *International Journal of Refugee Law* 293, page 299.
[21] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: http://www.refworld.org/docid/3ae6b3712c.html [accessed 24 October 2017], Article 14(1).

procedures, obligations of non-refoulement, including rejection at the frontier, could be infringed".[22]

According to Reinhard Marx, the implicit right of access to asylum procedures necessarily creates an obligation upon states to establish asylum procedures:

> "The rationale of the obligation to establish procedures is two-fold. States must identify their international obligations, but this can only be done by means of effective case-by-case consideration of claims. Proper processing of State obligations is thus inherently intertwined with a fair and just examination of an individual claim for protection".[23]

To understand better the possible contents of the right to seek asylum and the obligation to create asylum procedures, it is useful to look to the work of the Office of the UNHCR. As the neutral body responsible for asylum procedures in many contracting and non-contracting states, the UNHCR conducts these procedures in accordance with its own Procedural Standards.[24] Under these Procedural Standards, designed to afford the greatest possible procedural fairness to all persons of concern to the UNHCR, asylum seekers are entitled to certain protections as they exercise their right to seek asylum. These include: the right of access to information; the right to a non-discriminatory, timely, transparent and fair process; the right to legal representation; the right to have their claims determined by qualified staff, including the right to be assisted by qualified interpreters, and; the right of appeal with respect to negative decisions.

[22] Edwards, above n 20, page 301.
[23] Reinhard Marx, 'Non-Refoulement, Access to Procedures, and Responsibility for Determining Refugee Claims' (1995) 7 *International Journal of Refugee Law* 383, page 401.
[24] UN High Commissioner for Refugees (UNHCR), *Procedural Standards for Refugee Status Determination Under UNHCR's Mandate*, 20 November 2003, available at: http://www.refworld.org/docid/42d66dd84.html [accessed 24 October 2017].

Additionally, according to the UNHCR's 2007 Advisory Opinion on the Extra-Territorial Application of Non-Refoulement Obligations Under the Convention, the dual right to seek asylum and the obligation to provide access to asylum procedures means that persons seeking international protection enjoy a right of access to territory.[25] In particular, the Advisory Opinion makes clear that, in order to give effect to their Convention and Protocol obligations, "States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures".[26]

1.3 Other Convention rights

Under Article 7(1) of the Refugee Convention:

> "Except where this Convention contains more favorable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally".[27]

Consequently, states parties to the Convention are obliged to provide refugees with at least the same civil, political, social and economic rights as they provide to any aliens lawfully residing within their territory. Hathaway provides a useful interpretation of the Convention rights enjoyed by refugees by grouping them into five categories: rights enjoyed by persons *subject to a state's jurisdiction*; rights enjoyed by those who are *physically present* in a contracting state's territory; rights enjoyed by those *lawfully present* in a contracting state's territory; rights enjoyed by those *lawfully staying* in a contracting state's territory, and; rights enjoyed by those *habitually resident* in contracting state.[28] For the purposes of this chapter and thesis, the first and second categories (rights enjoyed by those subject to a state's jurisdiction, and rights

[25] UN High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, available at: http://www.refworld.org/docid/45f17a1a4.html [accessed 24 October 2017].
[26] Ibid, para 8.
[27] Refugee Convention, above n 1, Article 7(1).
[28] Hathaway, above n 6, pages 160-191.

enjoyed by those physically present in a contracting state's territory) are of most relevance, in light of the Australian, Hungarian and United States policies and legal frameworks that will be addressed in Chapters Two and Three.

1.3.1 Rights enjoyed by those subject to a state's jurisdiction

Hathaway states that although most Convention rights inhere only once a person seeking international protection "is either in, lawfully in, lawfully staying in, or durably residing in an asylum country, a small number of core rights are defined to apply with no qualification based upon level of attachment".[29] He further states that "there are some circumstances in which a refugee will be under the control and authority of a state party even though he or she is not physically present in, or at the border of, its territory".[30] Hathaway provides an protection-based explanation for this:

> "From the perspective of the refugee, moreover, the state's control and authority over him or her – whether legally justified or not – is just as capable of either inflicting harm or providing assistance as would be the case if the state's formal jurisdiction were fully established there".[31]

In such circumstances, persons seeking international protection enjoy the Convention right of non-discrimination (Article 3), the right to property (Article 13), the right of access to courts (Article 16(1)), the right to education (Article 22), rights relating to fiscal charges (Article 29), and the right of naturalisation (Article 34). Additionally, and most fundamentally, those subject to a state's jurisdiction benefit from the protection of Article 33 from *refoulement*.

[29] Ibid, page 160.
[30] Ibid.
[31] Ibid, page 161.

1.3.2 Rights enjoyed by those physically present in a contracting state's territory

In addition to the directly aforementioned rights, there are further rights accrued by persons seeking international protection by virtue of being physically present in a contracting state's territory. Hathaway summarises these rights concisely, citing "six categories of vital concern":

> "First, persons who claim to be refugees are generally entitled to enter and remain in the territory of a state party until and unless they are found not to be Convention refugees. Second, they should not be arbitrarily detained or otherwise penalized for seeking protection. Third, it should be possible to meet essential security and economic subsistence needs while the host state takes whatever measures it deems necessary to verify the claim to Convention refugee status. Fourth, basic human dignity ought to be respected, including by respect for property and related rights, preservation of family unity, honoring freedom of thought, conscience, and religion, and by the provision of primary education to refugee children. Fifth, authoritative documentation of identity and status in the host state should be made available. Sixth, asylum-seekers must have access to a meaningful remedy to enforce their rights, including to seek a remedy for breach of any of these primary protection rights".[32]

1.3.3 Class of beneficiaries

While Hathaway's aforementioned writings use the word "refugee", it is arguable that states owe Convention rights to individuals beyond this strictly narrow class of persons. Just as Lauterpacht and Bethlehem argued with respect to the class of beneficiaries of *non-refoulement* protections, Jane McAdam makes a comparable argument with respect to other Convention rights: that any person who enjoys protection from *refoulement* also enjoys the rights conferred

[32] Ibid, page 279.

to strict "refugees" under the Convention.[33] McAdam argues that, because the standard of protection afforded by general human rights instruments to "non-removable non-refugees" is insufficient, it is necessary to provide beneficiaries of *non-refoulement* with all Convention protections, as the "strong theoretical claims of human rights law unfortunately do not always sit comfortably with the realities of State practice".[34] To support her claims, McAdam argues that the expansion of the scope of *non-refoulement* through human rights instruments "necessarily widens the Convention's application".[35] This is because the Convention is an instrument that protects "all those in need of international protection, and provides an appropriate legal status irrespective of the State's protection obligation".[36]

Just as he disputed Lauterpacht and Bethlehem's assertions of the scope of *non-refoulement*, so too does Hathaway dispute McAdam's argument. He claims that:

> "It is legally impossible to insist that the beneficiary class for refugee rights has been de jure expanded to include all those protected against *refoulement*, whether refugees or not, in the absence of any argument based on treaty amendment or on the rise of either a customary or general principles norm".[37]

Further, Hathaway states that "there is no extant legal basis to assert that all legally non-returnable persons are entitle de jure to claim all Refugee Convention rights".[38] Again, as with the above contrasting of Lauterpacht and Bethlehem with Hathaway with respect to *non-refoulement*, the disparity here between the views of McAdam and Hathaway are

[33] Jane McAdam, *Complementary Protection in International Refugee Law* (2007: Oxford University Press), pages 173-196.
[34] Ibid, page 253.
[35] Ibid, page 209.
[36] Ibid, page 1.
[37] Hathaway, above n 9, page 532.
[38] Ibid, page 534.

demonstrative of the absence of consensus on the make-up of the class of the Convention's beneficiaries.

1.4 Concluding comments on Chapter 1

From the above, it is apparent that there are key and inviolable obligations upon Australia, Hungary and the United States as participants in the international refugee protection system. First and foremost, there is an obligation to respect the prohibition on *refoulement*. Secondly, there is an obligation upon these states to afford persons seeking international protection access to asylum procedures. Thirdly, there is an obligation upon these states to afford certain Convention rights to persons subject to their jurisdiction, and to persons physically within their territory.

Chapter 2 – The current refugee law frameworks in Australia, Hungary and the United States

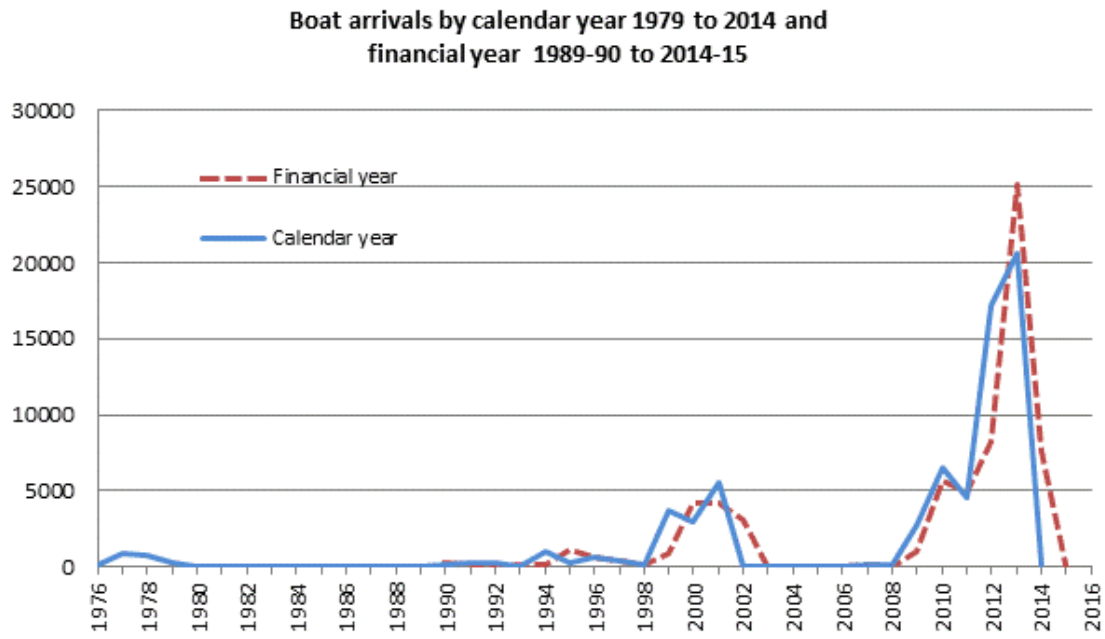
The purpose of this Chapter is to provide a brief overview of the legal developments that have taken place in Australia, Hungary and the United States with respect to their present-day refugee protection frameworks, so as to address the rights afforded to persons seeking international protection in each of these countries. In particular, this Chapter will look to the respect of each of these countries for the prohibition on *refoulement,* the right of access to asylum procedures, and the prohibition on discrimination.

2.1 Legal frameworks for seeking international protection

In Chapter 1, this Thesis established that persons seeking international protection accrue certain rights by virtue of being subject to a state's jurisdiction, or being physically present within a state's territory. This Chapter will now look to the interpretation and implementation of those rights within the legal frameworks of Australia, Hungary and the United States.

2.1.1 Australia

Waves of successive legislative amendments in Australia have resulted in a distinct stratification of beneficiaries of international protection obligations. As the below chart illustrates, Australia witnessed an increase in so-called "boat arrivals", or persons seeking international protection who reached Australian territory by boat:



[39]

These "boat arrivals" did not travel to mainland Australia to seek asylum, but rather a series of Australia territories in the Indian Ocean physically closer to their points of departure in Indonesia: Ashmore Island, the Cartier Islands, Christmas Island and Cocos Island. In response to the increase in "boat arrivals" in the late 1990s, Australia introduced legislation effective from September 2001 which "excised" these territories from the Australian "migration zone".[40] The legislation created the category of "offshore entry person", later renamed as "unauthorised maritime arrivals", who are defined as "unlawful non-citizens" of Australia.[41] Somewhat confusingly, the Australian parliament subsequently passed a bill in May 2013 which further

[39] Janet Phillips, 'Boat arrivals and boat 'turnbacks' in Australia since 1976: a quick guide to the statistics', *Parliament of Australia Library*, 17 January 2017, available at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/BoatTurnbacks [accessed 24 October 2017].

[40] *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth), available at: https://www.legislation.gov.au/Details/C2004A00887 [accessed 27 October 2017]; *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth), available at: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd0102/02bd070 [accessed 27 October 2017].

[41] *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth), available at: https://www.legislation.gov.au/Details/C2004A00887 [accessed 27 October 2017], Schedule 1, Article 3.

excised mainland Australia from the "migration zone".[42] This new framework has brought about the counter-intuitive situation where physical entry into Australia is deemed not to have happened, when the entry is unlawful (without a valid visa) and for the purposes of seeking asylum. As such, persons seeking international protection in Australia are deemed *not to have entered Australia*; for the purposes of the aforementioned rights to which they are entitled, they nonetheless remain subject to Australia's jurisdiction, and are physically on Australian territory.

The excision of Australian territory from its "migration zone" was coupled with the introduction of a policy of mandatory "offshore processing", whereby persons reaching excised Australian territory were taken to "offshore processing centres" (OPCs) in the legislatively-designated "regional processing countries" of Papua New Guinea and Nauru.[43] Under the first iteration of this policy, from 2001 until its end in 2007, persons seeking international protection had their asylum claims adjudicated in these third states, after which they were either resettled in Australia or another third country. After the policy was abolished in 2007, "boat arrivals" were subject to mandatory detention in immigration detention centres in mainland Australia. As the above graph illustrates, the policy's end in 2007 coincided with a significant increase in "boat arrivals", causing the government to re-introduce mandatory offshore detention and processing on 13 August 2012.[44] Those "boat arrivals" who reached Australian territory after this date became ineligible for any pathways to permanent residency; they are eligible to apply only for "temporary protection visas" valid for a duration of three years.[45] Upon expiration of

[42] ABC, 'Parliament excises mainland from migration zone', 16 May 2013, available at: http://www.abc.net.au/news/2013-05-16/parliament-excises-mainland-from-migration-zone/4693940 [accessed 27 October 2017].
[43] *Migration Act 1958* (Cth), available at: http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ma1958118/s198ab.html [accessed 27 October 2017], Section 198AB.
[44] Parliament of Australia, *Developments in Australian refugee law and policy (2012 to August 2013)*, 25 September 2014, available at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/RefugeeLawPolicy [accessed 27 October 2017].
[45] Australian Department of Immigration and Border Protection, *Temporary Protection visa (subclass 785)*, available at: https://www.border.gov.au/Trav/Visa-1/785- [accessed 27 October 2017].

this visa, persons seeking international protection are again required to demonstrate their ongoing need for protection.[46]

As the immigration detention centres in Australia and OPCs in Papua New Guinea and Nauru were too small to accommodate the influx of persons seeking international protection, those persons seeking international protection identified as most vulnerable were moved to "community detention" on the Australian mainland. According to the Refugee Council of Australia:

> "In October 2011, the Government began to release large numbers of asylum seekers from closed immigration detention facilities in to the community on Bridging Visas (subclass E). These visas allow people to live in the community pending resolution of their protection claims. Most asylum seekers living in the community on Bridging Visas have access to Australia's universal health care system, Medicare, and receive a basic living allowance... People who are in community detention can move freely in the community but cannot choose where they live. They must live at an address specified by the Minister for Immigration. They are also subject to curfews and other supervision arrangements".[47]

The demand for adjudication of asylum claims exceeded Australia's institutional capacity to respond in a timely manner, and from 13 August 2012 until 2015 all new "boat arrivals" were barred from lodging asylum applications.[48] Between 2015 and 2016, this cohort of "boat arrivals" gradually had the "bar" lifted, and became eligible to apply for temporary protection

[46] Ibid.
[47] Refugee Council of Australia, *Recent changes in Australian refugee policy*, 8 June 2017, available at: https://www.refugeecouncil.org.au/publications/recent-changes-australian-refugee-policy/ [accessed 27 October 2017].
[48] Ibid.

visas. This freezing of adjudication of asylum applications coincided with the abolition of government-funded legal advice.[49] Further, according to the Refugee Council of Australia,

> "On 21 May 2017, the Minister for Immigration announced that if people fail to apply for protection visas by 1 October 2017, they will be barred from applying for any temporary or permanent visa in Australia and should return to their home countries. It is expected that the processing of claims take at least until the end of 2018 before the backlog of refugee claims is cleared".[50]

Additionally, since 18 September 2013, "Operation Sovereign Borders" has been in place: according to its website, it is "a military-led border security operation aimed at combating maritime people smuggling and protecting Australia's borders".[51] The website further states:

> "Anyone who attempts to reach Australia illegally by boat will be turned back or returned to their home country. Australia's borders are closed to anyone who attempts to reach Australia illegally, and they will stay closed".[52]

The website additionally states that "settlement in Australia will never be an option for anyone who travels illegally by boat".[53] Consequently, the legislative framework of excision of Australian territory is now reinforced with a military policy of mandatory push-backs of prospective "boat arrivals". These combined legal and military deterrents have prevented any additional "boat arrivals" from reaching Australia to seek international protection, leaving Australia with a finite group of relevant persons under its control and jurisdiction. Concurrently, the Minister responsible for Operation Sovereign Borders enjoys broad, discretionary and unreviewable powers "to approve, refuse, or cancel visas, to detain or re-

[49] Ibid.
[50] Ibid.
[51] Australian Department of Immigration and Border Protection, *Operation Sovereign Borders*, available at: http://www.osb.border.gov.au/ [accessed 27 October 2017].
[52] Ibid, available at: http://www.osb.border.gov.au/Outside-Australia [accessed 27 October 2017].
[53] Ibid.

detain an asylum seeker without warning, to send asylum seekers to offshore detention centres and, in some cases, prevent reviews of decisions not to grant protection visas".[54]

From the above, it is convenient at this point to summarise the different "cohorts" of "boat arrivals" seeking international protection in the following way:

- Those who arrived *before 13 August 2012*, who are eligible for permanent protection;
- Those who arrived *after 13 August 2012*, who are living in "community detention" in mainland Australia, who enjoy certain rights under "bridging visas" and are only eligible for temporary protection visas;
- Those who arrived *after 13 August 2012*, who are in OPCs in Papua New Guinea and Nauru, and are permanently ineligible from being resettled in Australia.

Finally, there are two additional developments that must be noted here. Firstly, the Supreme Court of Papua New Guinea ruled in April 2016 that the detention of Australian-sent asylum seekers and refugees violated the right to personal liberty enshrined in Papua New Guinea's constitution, and that the OPC on Manus Island must close immediately.[55] Subsequently, the Supreme Court of the Australian state of Victoria approved a 70m AUD (approximately 46m EUR) compensation payout to those found to be illegally detained on Manus Island, meaning that each eligible person would receive a payout between 30,000 and 40,000 AUD

[54] The Guardian, *Dutton's powers unchecked and unjust, former Liberal immigration minister says*, 4 May 2017, available at: https://www.theguardian.com/australia-news/2017/may/04/duttons-powers-unchecked-and-unjust-former-liberal-immigration-minister-says [accessed 27 October 2017].
[55] The Guardian, *Papua New Guinea court rules detention of asylum seekers on Manus Island illegal*, 26 April 2016, available at: https://www.theguardian.com/australia-news/2016/apr/26/papua-new-guinea-court-rules-detention-asylum-seekers-manus-unconstitutional [accessed 27 October 2017].

(approximately 20,000 to 26,000 EUR).[56] After progressively shuttering water, electricity and food supplies, the OPC on Manus Island is projected to be fully closed on 31 October 2017.[57]

Secondly, in accordance with the Operation Sovereign Borders mandate that "boat arrivals" seeking international protection may never be resettled in Australia, the Australian government reached a "refugee swap" agreement with the United States, under the terms of which up to 1,250 recognised refugees will be resettled from Manus Island and Nauru in the United States, and Australia will resettle a group of Central American refugees presently living at a camp in Costa Rica.[58] At present, 52 refugees from Manus Island have been resettled in the United States, and no Central American refugees have been resettled in Australia.[59]

2.1.2 Hungary

Just as much of Australia's present refugee protection policy has evolved in response to influxes of persons seeking international protection, so too has Hungary's. In the Hungarian case, recent developments have taken place against the backdrop of the "European migration crisis", whereby European member states received more than double the asylum applications in 2015 than it did in 2014.[60]

[56] ABC, *Manus Island refugees and asylum seekers say $70m payout 'not enough'*, 6 September 2017, available at: http://www.abc.net.au/news/2017-09-06/manus-island-detainees-say-$70-million-payout-not-enough/8878976 [accessed 27 October 2017].
[57] The Guardian, *Manus Island closure: PNG's notorious police mobile squad to be deployed*, 27 October 2017, available at: https://www.theguardian.com/australia-news/2017/oct/27/manus-island-closure-faces-local-opposition-and-legal-challenge [accessed 27 October 2017].
[58] The Guardian, *Australian refugee deal with US costs Turnbull government additional $22m*, 3 May 2017, available at: https://www.theguardian.com/australia-news/2017/may/03/australian-refugee-deal-with-us-costs-turnbull-government-additional-22m [accessed 27 October 2017].
[59] The Guardian, *First Manus Island-held refugees flown to US under resettlement deal*, 26 September 2017, available at; https://www.theguardian.com/world/2017/sep/26/first-manus-island-held-refugees-flown-to-us-under-resettlement-deal [accessed 27 October 2017].
[60] Eurostat, *Record number of over 1.2 million first time asylum seekers registered in 2015*, 4 March 2016, available at: http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6 [accessed 27 October 2017].

According to the Hungarian Helsinki Committee, there have been four successive waves of legal changes in Hungary since late 2015. Under the first wave, from 1 August 2015, Serbia was unilaterally designated as a Safe Third Country for persons seeking international protection ("resulting in the quasi-automatic rejection of over 99 percent of asylum claims"), asylum proceedings were "extremely accelerated", judicial review of asylum cases became ineffective through "unreasonably short deadlines for submitting an appeal", and official "transit zones" were introduced for the processing of asylum applications.[61] Under the second wave, from 15 September 2015, an "asylum procedure" was introduced (whereby persons seeking international protection must submit their applications in the aforementioned transit zones, and under which a decision upon the application must be delivered in no less than 8 calendar days), all rejected asylum seekers became banned from entering Hungary for between 12 and 24 months, and criminal sanctions were introduced for illegal crossing of the fences demarcating Hungary's borders.[62]

Under the third wave, from 5 July 2016, Hungarian police became obliged to push back any asylum seeker found within eight kilometres of either the Serbian-Hungarian or Croatian-Hungarian borders.[63] Lastly, under the fourth wave from 28 March 2017, a "state of crisis due to mass migration" was extended until 7 September 2017 (which has since been extended until 7 March 2018), under which police became authorised to push back asylum seekers found in any part of the country, "without any legal procedure or opportunity to challenge this measure"; furthermore, all asylum applicants (including vulnerable persons and asylum-seeking children

[61] Hungarian Helsinki Committee, *Two Years After: What's Left of Refugee Protection in Hungary?*, September 2017, available at: http://www.helsinki.hu/wp-content/uploads/Two-years-after_2017.pdf [accessed 27 October 2017], page 5.
[62] Ibid.
[63] Ibid.

above the age of 14) became subject to mandatory detention in transit zones for the duration of the adjudication of their protection applications, without any recourse to judicial remedies, and the deadlines for seeking judicial review of inadmissibility decisions and negative asylum decisions became shortened to 3 calendar days.[64] Moreover, since 23 January 2017, only 5 persons are admitted entry into Hungary's two transit zones each working day, limiting the number of persons who can apply for international protection to 50 persons per week.[65]

According to the Hungarian Helsinki Committee, the Hungarian government has stated that the transit zones do not constitute Hungarian territory, and are in fact a "no man's land":

> "The official government position, as communicated in the press, is that asylum-seekers admitted to the transit zone are on "no man's land", and persons who were admitted and later "pushed back" in the direction of Serbia have never really entered the territory of Hungary. Consequently, such "push-backs" do not qualify as acts of forced return… The transit zone and the fence are on Hungarian territory and even those queuing in front of the transit zone's door are standing on Hungarian soil – as also evidenced by border stones clearly indicating the exact border between the two states".[66]

This results in comparable situation to that in Australia, as the Hungarian government has declared that Hungarian territory is not, in fact, part of Hungary for the purposes of seeking asylum. The similarities between Australia and Hungary continue with respect to the coupling of policies of territorial excision with military force: just as the Australian "Border Force" is mandated to push back all boats containing persons seeking international protection, preventing such persons from applying for protection and denying such persons recourse to any judicial

[64] Ibid, page 5-6.
[65] Ibid, page 3.
[66] Hungarian Helsinki Committee, *No Country for Refugees*, 18 September 2015, available at: http://helsinki.hu/wp-content/uploads/HHC_Hungary_Info_Note_Sept_2015_No_country_for_refugees.pdf [accessed 27 October 2017], page 3.

remedies, so too is Hungary's border police mandated to expel all asylum seekers from Hungarian territory.

2.1.3 United States

For the purposes of the comparative analysis required for this Thesis, this section will address both the historical practice of the United States with respect to Haitians and Cubans seeking to enter the territory of the United States by boat, and the Executive Orders of 2017 constituting the "travel ban".

2.1.3.1 Haitians and Cubans

An interesting point of comparison for the purposes of this thesis is found in the historical disparity between the way in which the United States treated Haitians and Cubans seeking international protection. In the wake of widespread political violence in Haiti in 1991, tens of thousands of Haitians boarded boats to seek safety in Florida; the United States responded by mandating its Coast Guard to apprehend and destroy the vessels. The Coast Guard conducted cursory interviews with the Haitian asylum seekers, "screening out" those who lacked a credible fear of political persecution; of those who were "screened in", some were permitted to apply for political asylum in the United States, while many were taken to Guantanamo.[67] Subsequently, the first Bush Administration "began simply interdicting all Haitians and summarily returning them to Haiti, without any individualized inquiry into each person's potential refugee status".[68] Those who were "screened in" but sent to Guantanamo were found

[67] Harold Hongju Koh and Michael Wishnie, 'The Story of *Sale v. Haitian Centers Council*: Guantanamo and *Refoulement*', in Deena Hurwitz and Douglas Ford, *Human Rights Advocacy Stories* (2009: Foundation Press), page 386.
[68] Ibid.

to have had their due process rights violated by being denied "the procedures available to asylum applicants in the United States, by showing deliberate indifference to their medical needs, and by subjecting them to informal disciplinary procedures and indefinite detention";[69] for those who had been summarily returned, who argued at the Supreme Court that their right to *non-refoulement* had been violated, it was held that *non-refoulement* protections did not apply as they had been apprehended on the high seas.[70]

In the aftermath of the above cases, from 1993, where the Supreme Court took issue with the *refoulement* of Haitians seeking protection in the United States, Cubans seeking the same protection became subject to a significantly different policy. Through a series of bilateral migration accords signed between the United States and Cuba in 1994 and 1995, the "wet-foot, dry-foot" policy came into effect, according to which:

> "unless they cite fears of persecution, Cubans intercepted at sea are returned to Cuba, where the Cuban government, per signed accords, cannot retaliate against them, while those who reach the United States are generally permitted to stay and may adjust to permanent resident status after one year".[71]

While the Haitians before the Supreme Court were summarily returned to Haiti, irrespective of whether they claimed they were coming to the United States as a consequence of political persecution, Cubans citing fear of the same persecution intercepted on the high seas were permitted entry to the United States. Moreover, Cubans in the United States enjoyed a fast-tracked pathway to citizenship, and were able to gain permanent residency after only one year.[72] Significantly, given that the extra-territorial application of *non-refoulement* was

[69] Ibid, citing *Haitian Centers Council, Inc. v. Sale*, 823 F.Supp. 1028 (E.D.N.Y. 1993), paras 1041-45.
[70] Ibid, citing *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 177 (1993), para 187.
[71] Migration Policy Institute, *Cuban Immigrants in the United States*, 7 April 2015, available at: https://www.migrationpolicy.org/article/cuban-immigrants-united-states [accessed 27 October 2017].
[72] Ibid.

rejected by the Supreme Court with respect to the Haitians, it is notable that the provisions in the bilateral accords assured that the Cuban government would not retaliate in any way against those who returned to Cuba. The disparity between the treatment of persons seeking international protection originating from Cuba and Haiti thus became jarringly evident, rendering the asylum policy of the United States arbitrarily discriminatory and internally incoherent.

2.1.3.2 The travel ban

Moving from historical to contemporary United States practice, another example of laws and policies expressly designed to discriminate between persons seeking international protection on the basis of their country of origin can be found in the instruments collectively and alternatively known as the "travel ban" or "Muslim ban". These instruments include Executive Order 13769 of 27 January 2017,[73] its revised iteration Executive Order 13780 of 6 March 2017,[74] and its post-expiration replacement Proclamation 9645 of 24 September 2017.[75] Under the first Executive Order, the total number of refugees to be admitted into the United States in 2017 became capped at 50,000 people,[76] the United States Refugee Admissions Program was suspended for 120 days (ultimately until 24 October 2017),[77] the admission of Syrian refugees became indefinitely suspended,[78] and the entry into the United States of all nationals from

[73] Executive Order 13769, *Protecting the Nation From Foreign Terrorist Entry Into the United States*, 27 January 2017, available at: https://www.federalregister.gov/documents/2017/02/01/2017-02281/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states [accessed 28 October 2017].
[74] Executive Order 13780, *Protecting the Nation From Foreign Terrorist Entry into the United States*, 6 March 2017, available at: https://www.federalregister.gov/documents/2017/03/09/2017-04837/protecting-the-nation-from-foreign-terrorist-entry-into-the-united-states [accessed 28 October 2017].
[75] Proclamation 9645, *Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists or Other Public-Safety Threats*, 24 September 2017, available at: https://www.whitehouse.gov/the-press-office/2017/09/24/enhancing-vetting-capabilities-and-processes-detecting-attempted-entry [accessed 28 October 2017].
[76] Executive Order 13769, above n 73, Section 5(d).
[77] Ibid, Section 5(a).
[78] Ibid, Section 5(c).

seven countries (Iran, Iraq, Libya, Somalia, Sudan, Syria and Yemen) became suspended.[79] Additionally, upon the resumption of the Refugee Admissions Program, the Executive Order directed the United States Secretary of State "to prioritize refugee claims made by individuals on the basis of religious-based persecution, provided that the religion of the individual is a minority religion in the individual's country of nationality".[80]

The second of the Executive Orders removed Iraq from the list of affected countries of origin, and created classes of exceptions for individuals from the remaining affected countries to be permitted entry into the United States.[81] Under Proclamation 9645, the list of affected countries changed once again, this time affecting nationals of Chad, Iran, Libya, North Korea, Somalia, Syria, Venezuela and Yemen.[82] Federal Judge Derrick Watson from the District Court of Hawaii issued a temporary restraining order which prevented the application of the Proclamation to nationals of the countries other than North Korea and Venezuela, stating that "it lacks sufficient findings that the entry of more than 150 million nationals from six specified countries would be "detrimental to the interests of the United States".[83]

For the purposes of comparing this broader ban of entry into the United States with Australia's policy of denying "boat arrivals" access to Australian territory and Hungary's policy of constructively preventing persons seeking international protection from lodging asylum applications, it is interesting to compare the countries affected by the travel ban with the

[79] Ibid, Section 3.
[80] Ibid, Section 5(b).
[81] Executive Order 13780, above n 74, Sections 1(e) and 1(f).
[82] Proclamation 9645, above n 75,
[83] United States District Court for the District of Hawaii, *State of Hawaii, Ismail Elshikh, John Does 1 & 2, and Muslim Association of Hawaii Inc. v. Donald J. Trump, et al*., 17 October 2017, available at: http://i2.cdn.turner.com/cnn/2017/images/10/17/watson.pdf [accessed 28 October 2017].

countries of origin of persons resettled in the United States through its Refugee Admissions Program:

Top Ten Countries of Origin for Refugee Arrivals in the United States, FY 2016-2017[84]	**Targeted by Executive Order 13769?**	**Targeted by Executive Order 13780?**
1. Democratic Republic of Congo (17.2%)	-	-
2. Iraq (14.5%)	Yes	-
3. Syria (14.3%)	Yes	Yes
4. Somalia (12.2%)	Yes	Yes
5. Myanmar (8.9%)	-	-
6. Ukraine (6.8%)	-	-
7. Bhutan (5.5%)	-	-
8. Iran (5.0%)	Yes	Yes
9. Eritrea (2.7%)	-	-
10. Afghanistan (2.6%)	-	-

From the above table it is clear that, were the second Executive Order to have applied to the refugee intake from the 2016-2017 financial year, it would have precluded 31.5% of the otherwise admitted refugees from being granted protection in the United States. Furthermore,

[84] Migration Policy Institute, *Refugees and Asylees in the United States*, 7 June 2017, available at: https://www.migrationpolicy.org/article/refugees-and-asylees-united-states [accessed 28 October 2017].

if it had been the first Executive Order rather than the second, a total of 46% of the admitted refugees would have been denied protection in the United States.

2.2 Violations of the rights owed to this class of beneficiaries

In light of the refugee law frameworks and practices in Australia, Hungary and the United States outlined above, this Chapter will now look to the extent to which these frameworks and practices amount to a violation of each country's Convention obligations towards persons seeking international protection. This will be done by reference to the three key obligations outlined in Chapter 1 of this Thesis: the obligation under both the Convention and customary international law to respect the principle of *non-refoulement*, the obligation to afford persons seeking international protection access to asylum application procedures, and the obligation to afford Convention rights to persons subject to a state's jurisdiction and to persons physically within a state's territory.

2.2.1 Non-refoulement

Australia's policy of intercepting boats carrying persons seeking international protection and removing intercepted individuals to third countries is arguably incompatible with Australia's obligation to respect the principle of *non-refoulement*. In its December 2014 Concluding Observations on the Fourth and Fifth Periodic Reports of Australia, the United Nations Committee against Torture articulated distinct concern about how this policy violates the Torture Convention's prohibition on *refoulement* (Article 3):

> "The Committee is concerned at policies and practices currently applied in relation to persons who attempt to arrive or arrive irregularly in the State party, in particular the

policy of intercepting and turning back boats, without due consideration of the State party's obligations under article 3 of the Convention".[85]

Further, the Committee voiced concern that the amendment of Australia's legal framework in the wake of the introduction of "Operation Sovereign Borders" "would reduce some of the existing statutory standards against refoulement".[86] Additionally, the International Committee of Jurists labelled this approach towards the principle of *non-refoulement* as "contrary to obligations that Australia has undertaken by becoming a party to several international human rights treaties" including the ICCPR, the Torture Convention and the Refugee Convention.[87] The UNHCR has also criticised the refusal to provide an interpretation of *non-refoulement* by Australia's highest judicial body, the High Court. In the case of *CPCF v. Minister for Immigration and Border Protection*, the High Court cited judicial authority in Australia, the United Kingdom and the United States to support the view that *non-refoulement* is only engaged within a receiving state's territory, with the possibility of extra-territorial effect;[88] in the wake of this decision, the UNHCR reaffirmed its view that Australia's obligation to respect *non-refoulement* applies irrespective of whether its authorities intercept "boat arrivals" inside or outside of Australian territorial waters.[89]

[85] Committee against Torture, *Concluding observations on the fourth and fifth periodic reports of Australia*, December 2014, available at: http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/AUS/CAT_C_AUS_CO_4-5_18888_E.pdf [accessed 28 October 2017], page 5, para 15.
[86] Ibid.
[87] International Commission of Jurists (ICJ), *International Commission of Jurists' Submission to the Universal Periodic Review of Australia*, March 2015, available at: http://www.refworld.org/docid/5834531c4.html [accessed 28 October 2017], page 2, para 5.
[88] *CPCF v Minister for Immigration and Border Protection*, [2015] HCA 1, Australia: High Court, 28 January 2015, available at: http://www.refworld.org/cases,AUS_HC,54c8be3c4.html [accessed 28 October 2017].
[89] UNHCR, *UNHCR Legal Position: Despite court ruling on Sri Lankans detained at sea, Australia bound by international obligations*, 4 February 2015, available at: http://www.unhcr.org/news/press/2015/2/54d1e4ac9/unhcr-legal-position-despite-court-ruling-sri-lankans-detained-sea-australia.html [accessed 28 October 2017].

With respect to Hungary's observation of its *non-refoulement* obligations, the key concern arises in relation to Hungary's aforementioned unilateral declaration on 1 August 2015 of Serbia as a Safe Third Country. Under this framework, any person seeking international protection in Hungary who has passed through Serbia is to be returned there for the adjudication of their asylum claim, without any assessment of the merits of the individual claim. According to Hungarian legislation:

> "i) "safe third country" means a country in respect of which the asylum authority is satisfied that the applicant is treated according to the following principles…
>
> ib) in accordance with the Geneva Convention, the principle of *non-refoulement* is respected; … [and]
>
> id) the possibility exists to apply for recognition as a refugee; and persons recognised as refugees receive protection in accordance with the Geneva Convention".[90]

As early as September 2011, the Hungarian Helsinki Committee articulated why the application of the Safe Third Country concept to Serbia was unjustified.[91] A key reason identified in its report was the risk posed to persons returned to Serbia of "chain *refoulement*", where "the asylum seeker comes from a country of origin or a third country that Serbia considers as safe; and/or the asylum seeker asked for asylum in another country before entering Serbia".[92] The report focuses on the grave deficiencies in the human rights records of countries to where Serbia can expel persons seeking international protection, such as Turkey, highlighting the decision made by the European Court of Human Rights (ECtHR) in *M.S.S. v.*

[90] *Act no. LXXX of 2007 on Asylum*, Section 2(i), cited in *Ilias and Ahmed v. Hungary*, Application no. 47287/15, Council of Europe: European Court of Human Rights, 14 March 2017, available at: http://www.refworld.org/cases,ECHR,58c968ad4.html [accessed 28 October 2017], page 6, para 31.
[91] Hungarian Helsinki Committee, *Serbia As a Safe Third Country: A Wrong Presumption*, September 2011, available at: http://www.refworld.org/docid/4e815dec2.html [accessed 28 October 2017].
[92] Ibid, page 1.

Belgium and Greece.[93] In that decision, the ECtHR found that Belgium had violated an Afghan asylum seeker's right to freedom from torture and inhuman or degrading treatment or punishment by returning the individual to Greece, where he faced a deficient asylum procedure and "indirect *refoulement*".[94] While these concerns regarding Serbia were first voiced in 2011, the UNHCR reaffirmed in May 2016 that no asylum seekers should be returned to Serbia.[95]

As for the United States, the role of *non-refoulement* with respect to the Haitian cases is discussed above. Of key concern in that scenario is the fact that, even where the Haitians stated that they were fleeing persecution and seeking international protection, they were summarily returned to their country of origin. Justice Harry Blackmun, the sole dissenting judge in the aforementioned case of *Sale v. Haitian Centers Council*, criticised the United States Supreme Court's decision to deny the existence of the extra-territorial application of *non-refoulement*:

> "To allow nations to skirt their solemn treaty obligations and return vulnerable refugees to persecution simply by intercepting them in international waters is…to turn the Refugee Convention into a 'cruel hoax.'… We perhaps can take some comfort in the fact that although the Supreme Court is the highest court in the land, its ruling are not necessarily the final words on questions of international law".[96]

Additionally, after the first of the two Executive Orders was announced, a group of United Nations human rights experts declared that it could result in individuals being returned to their

[93] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: http://www.refworld.org/cases,ECHR,4d39bc7f2.html [accessed 28 October 2017].
[94] Ibid, page 88.
[95] UN High Commissioner for Refugees (UNHCR), *Hungary as a country of asylum. Observations on restrictive legal measures and subsequent practice implemented between July 2015 and March 2016*, May 2016, available at: http://www.refworld.org/docid/57319d514.html [accessed 28 October 2017], page 25, para 71.
[96] Koh and Wishnie, above n 67, page 426.

countries of origin "in direct contravention of international humanitarian and human rights laws which uphold the principle of non-refoulement".[97]

2.2.2 Access to asylum procedures

With respect to the established international legal requirement to provide access to asylum procedures, the policies of prevention of entry practiced by Australia, Hungary and the United States prove problematic. In the Australian context, the policy of mandatory indefinite offshore detention for "boat arrivals" violates Australia's requirement to afford persons seeking international protection access to territory and access to fair and efficient asylum procedures. All "boat arrivals" who reached Australian territory between 13 August 2012 and 1 January 2014, and who were not taken to Nauru or Papua New Guinea for offshore processing became subject to a "fast-tracking process".[98] Under this process, fast-track applicants are denied access to Australia's Administrative Appeals Tribunal, and are also denied an automatic right of review of negative asylum decisions.[99] The UN Special Rapporteur on the human rights of migrants stated that this process denies persons seeking international protection "appropriate procedural safeguards, including the opportunity to be heard in person".[100] The Special Rapporteur further found that persons detained in Australian-controlled OPCs are inadequately informed of their right to seek asylum, unable to register their asylum claim, unable to communicate with the UNHCR, lawyers and civil society organisations, and denied access to

[97] UN OHCHR, *US travel ban: "New policy breaches Washington's human rights obligations" – UN experts*, 1 February 2017, available at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21136&LangID=E [accessed 28 October 2017].

[98] Australian Department of Immigration and Border Protection, *The Fast-Track Assessment Process*, March 2015, available at: https://www.refugeecouncil.org.au/wp-content/uploads/2015/08/Fast-track-Fact-sheet.pdf [accessed 28 October 2017].

[99] Ibid.

[100] UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru*, 24 April 2017, A/HRC/35/25/Add.3, available at: http://www.refworld.org/docid/593a8c924.html [accessed 28 October 2017], page 17, para 88.

competent and free legal advice to assist with challenging decisions relating to expulsion, detention and asylum procedures.[101]

Denial of access to territory and the excision of territory is also problematic in the Hungarian context. However, unlike in the Australian situation, Hungary's practices take place within the supra-national European legal framework. In particular, Hungary's policy of mandatory push-backs to its southern border of all asylum seekers within its territory is incompatible with the jurisprudence of the ECtHR. In the Court's recent decision in *N.D. and N.T. v. Spain*, the ECtHR found that Spain's policy of push-backs in its exclave territory of Melilla breached the prohibition on collective expulsion of aliens (Article 4 of Protocol 4) and right to an effective remedy (Article 13) enshrined in the European Convention on Human Rights (ECHR).[102] In particular, those who were expelled from Spanish territory did not have their identities verified, and were denied access to legal representation and interpreters. While the Spanish government argued that the individuals concerned were not subject to Spanish jurisdiction as they were outside Spanish territory, the ECtHR held that when a country, "through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation to secure the rights and freedoms that are relevant to the situation of that individual".[103] The ECtHR reaffirmed that a state cannot redefine its borders to prevent a person seeking international protection from applying for asylum, echoing its 1996 decision in *Amuur v. France*.[104] The ECtHR further found it unnecessary to determine whether the relevant border crossing constituted Spanish territory, due to the clear control exercised over the territory by Spanish authorities. Such a finding demonstrates that Hungary's present policy is diametrically

[101] Ibid, page 20, paras 125-126.
[102] *N.D. and N.T. v. Spain*, 8675/15 and 8697/15, Council of Europe: European Court of Human Rights, 3 October 2017, available at: http://www.refworld.org/cases,ECHR,59d3a7634.html [accessed 28 October 2017].
[103] Ibid, para 51.
[104] *Amuur v. France*, 17/1995/523/609, Council of Europe: European Court of Human Rights, 25 June 1996, available at: http://www.refworld.org/cases,ECHR,3ae6b76710.html [accessed 28 October 2017].

opposed to its international legal responsibilities, particularly with respect to the procedural fairness rights afforded by the ECHR.

As for the United States, it is apparent that the summary expulsion of Haitian asylum seekers amounted to a comprehensive denial of access to territory and access to asylum procedures. Similarly, the aforementioned "travel ban" denies individuals the same access to territory and procedures on the basis of their nationality. At present, the existing legislative framework has greatly increased the number of migrants who may be subject to detention. According to a report by the Harvard Immigration and Refugee Clinical Program, "asylum seekers in detention are five times less likely to have legal counsel than those who are not detained".[105] Moreover:

> "Asylum seekers without legal representation are almost five times less likely to win their cases than those with representation. Detained immigrants facing custody hearings were four times more likely to be released from detention when represented by counsel. They are eleven times more likely to seek relief such as asylum, and are twice as likely to obtain such protection as those without representation. Access to counsel is particularly important in the context of asylum because many individuals who arrive in the United States do not realize that they are required to adhere to a one-year filing deadline to apply for asylum".[106]

This demonstrates that, through the impact of the Executive Orders of 2017, even those individuals who are within the territory of the United States are facing a structural denial of access to procedure.

[105] Harvard Immigration and Refugee Clinical Program, *The Impact of President Trump's Executive Orders on Asylum Seekers*, February 2017, available at: https://today.law.harvard.edu/wp-content/uploads/2017/02/Report-Impact-of-Trump-Executive-Orders-on-Asylum-Seekers.pdf [accessed 28 October 2017], page 3.
[106] Ibid.

2.2.3 The prohibition on discrimination

As established above, persons seeking international protection accrue rights by virtue of being subject to a state's jurisdiction, as well as by being physically present within a state's territory. Amongst the Convention rights that accrue in such circumstances, a key point of commonality between Australia, Hungary and the United States is their uniform violation of the prohibition on discrimination under Article 3 of the Convention. While the text of Article 3 states that discrimination on the basis of race, religion and country of origin is prohibited, the UNHCR has cited Professor Atle Grahl-Madsen's commentary that "the enumeration of grounds on which discrimination must not take place must be considered as exhaustive".[107] Professor Grahl-Madsen cites other grounds of discrimination that were considered and rejected by the drafters of the Convention, in large part because "[i]t was found impracticable to mention all the reasons set forth in the Universal Declaration of Human Rights".[108]

It is perhaps not implausible to propose that discrimination on the basis of the method of transport used to enter a territory to seek asylum was not one of the grounds contemplated by the drafters. In the absence of evidence to the contrary, Australia's practice of discriminating between "boat arrivals" and "plane arrivals" appears incompatible with the spirit of Article 3, if not its explicit text. Hungary's practice is explicitly discriminatory on the basis of religion, and incontrovertibly violates Article 3. The nature of this religious discrimination will be properly addressed in the next Chapter of this Thesis. Similarly, it is readily apparent that the historical practice of the United States in affording differential treatment to Haitians and Cubans is discriminatory, as is the contemporary practice of broadly banning individuals from entering the United States by virtue of their country of origin.

[107] UNHCR, *Commentary on the Refugee Convention 1951 Articles 2-11, 13-37*, October 1997, available at: http://www.unhcr.org/3d4ab5fb9.pdf [accessed 28 October 2017], page 9, para 4.
[108] Ibid.

2.3 Concluding comments on Chapter 2

This Chapter has provided a brief overview of relevant aspects of the current refugee law frameworks in Australia, Hungary and the United States, with an additional overview of the historical example of United States policy towards Haitians and Cubans. This Chapter has also examined these frameworks, policies and practices with respect to the obligations upon Australia, Hungary and the United States to respect the principle of *non-refoulement*, to provide access to asylum procedures, and to respect the prohibition on discrimination. With respect to the right of access to asylum procedures, it is apparent that this can only be meaningfully effective where it is supported by corollary procedural fairness rights, including access to legal advice, access to interpreters and access to information. This is arguably supplemented by the Article 16(1) Convention right of access to courts. While there is no clear uniformity in the manners in which Australia, Hungary and the United States violate their obligations towards persons seeking international protection, there are clear points of commonality in the ways in which their practices are opposed to their duties under the Convention and other human rights instruments. Additionally, it is noteworthy that, through Australia's policies of territorial excision and pushing-back of boats, Hungary's criminalisation of entry and pushing-back of persons seeking international protection, and the United States blanket ban on the entry of refugees and people from Muslim-majority nations, each of these three countries have acted to severely curtail the capacity for people to actually seek asylum in their territories.

Chapter 3 – The policy discourse surrounding refugees in Australia, Hungary and the United States

As Chapter 2 demonstrated, Australia, Hungary and the United States have taken steps which have drastically limited the capacity for persons seeking international protection to gain physical entry to their territories. These shifts and evolutions in law and policy have been accompanied by rhetoric at the highest levels of government in each country, whereby those in power have sought to frame the laws and policies in the most favourable light possible. This Thesis has already established the obligations borne by Australia, Hungary and the United States with respect to persons seeking international protection, and the ways in which their policies and practices violate these obligations. This Chapter will now focus on the rhetoric and discourse employed by the politicians behind these policies, to illuminate the ways in which policies diametrically opposed to international legal principles and requirements are justified.

3.1 The discourse in Australia

What is arguably the defining moment in Australian government rhetoric regarding refugees was made by former Prime Minister John Howard in October 2001, prior to his re-election the general election in November 2001. After discussing Australia's "fundamental right" to protect its borders in the face of the threat of terrorism, Howard then moved to the "generous open hearted" nature of Australians, and the country's "proud record of welcoming people from 140 different nations".[109] He then made the now-famous statement that "we will decide who comes to this country and the circumstances in which they come".[110] This speech was

[109] Museum of Australian Democracy, *Election Speeches – 2001 – John Howard*, 28 October 2001, available at: https://electionspeeches.moadoph.gov.au/speeches/2001-john-howard [accessed 28 October 2017].
[110] Ibid.

made in the wake of the September 2001 excision of Australian territories in the Indian Ocean from Australia's migration zone; his subsequent re-election on the back of a campaign defined by anti-"boat arrival" rhetoric indicates the resonance of this message with elements of the Australian electorate.

Another defining feature of the Australian rhetoric surrounding refugees is that of the "queue-jumper". Along with the United States, Canada and Nordic Countries, Australia has historically been one of the most significant contributors to and supporters of the UNHCR's third-country resettlement program.[111] The UNHCR does not refer recognised refugees for resettlement in Australia on the basis of any queue – these referrals are made on the basis of serious need and protection issues. However, those referred to Australia by the UNHCR are framed as having waited in a non-existent "queue", and persons seeking international protection who arrive in Australia by boat are framed as "queue-jumpers". This dichotomy finds its genesis in another general election, from December 1977: at that time, former-Prime Minister and then-Leader of the Opposition Gough Whitlam stated that Vietnamese "boat people" should not be put "ahead in the queue" over persons privately sponsored by family members in Australia.[112] The thus-misfounded concept of the "queue-jumper" has endured, and been perpetuated by successive Australian governments. In May 2015, former-Prime Minister Tony Abbott (who rode to an electoral victory on the back of a "Stop the Boats" campaign) stated: "If you want to start a new life, you come through the front door, not through the back door".[113] The same former-Prime Minister reinforced this rhetoric of a permissible

[111] UNHCR, *Resettlement*, (no date), available at: http://www.unhcr.org/resettlement.html [accessed 28 October 2017].
[112] The Guardian, *'Queue jumpers' and 'boat people': the way we talk about refugees began in 1977*, 5 June 2015, available at: https://www.theguardian.com/commentisfree/2015/jun/05/queue-jumpers-and-boat-people-the-way-we-talk-about-refugees-began-in-1977 [accessed 28 October 2017].
[113] SBS, *'Nope, nope, nope' to resettlement: PM*, 21 May 2015, available at: http://www.sbs.com.au/news/article/2015/05/21/nope-nope-nope-resettlement-pm [accessed 28 October 2017].

"front door" and an impermissible "back door", emphasising the generosity of Australia's resettlement program: "We take more refugees than any other through the UNHCR on a per capita basis".[114]

The rejection of "boat arrivals" as being as deserving of international protection as those referred to Australia by the UNHCR is reflected in the language employed by Australia in its response to those who attempt to reach Australia by boat. For many years, "boat arrivals" were officially labelled by the Australian government as "irregular maritime arrivals".[115] However, in October 2013, shortly after the commencement of "Operation Sovereign Borders", the terminology officially changed from "irregular maritime arrival" to "illegal maritime arrival".[116] This change came in the wake of the re-naming of the Australian "Department of Immigration and Citizenship" to the "Department of Immigration and Border Protection".[117] These changes were accompanied by a strong focus in official government rhetoric on the humanitarian justifications of such a response: tough policies of boat turn-backs and offshore detention are the only way to disrupt people-smuggling networks and prevent deaths at sea.[118] The Australian government has actively sought to promote its interpretation of refugee protection to international audiences: as the European migration crisis emerged in 2015, the

[114] Sydney Morning Herald, *Fact and fiction with Prime Minister Tony Abbott's refugee intake numbers*, 7 September 2015, available at: http://www.smh.com.au/federal-politics/political-opinion/fact-and-fiction-with-prime-minister-tony-abbotts-refugee-intake-numbers-20150906-gjgc7q.html [accessed 21 May 2015].
[115] Parliament of Australia, *Asylum seekers and refugees: what are the facts?*, 2 March 2015, available at: https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1415/AsylumFacts [accessed 28 October 2017].
[116] Sydney Morning Herald, *Minister wants boat people called illegals*, 20 October 2013, available at: http://www.smh.com.au/federal-politics/political-news/minister-wants-boat-people-called-illegals-20131019-2vtl0.html [accessed 28 October 2017].
[117] Migration Expert, *DIAC Changes Name to Department of Immigration and Border Protection (DIBP)*, 24 September 2013, available at: https://www.migrationexpert.com.au/australian_immigration_news/2013/Sep/729/diac_changes_name_to_department_of_immigration_and_border_protection_dibp [accessed 28 October 2017].
[118] The Conversation, *FactCheck: did 1200 refugees die at sea under Labor?*, 3 March 2015, available at: https://theconversation.com/factcheck-did-1200-refugees-die-at-sea-under-labor-38094 [accessed 28 October 2017].

Immigration Minister offered to help Europe implement "sensible measures" to stop asylum seeker boats crossing the Mediterranean Sea.[119]

Moreover, the Australian government fiercely condemns any criticism directed towards its treatment of persons seeking international protection. In November 2014, the Australian Human Rights Commission released a report entitled *The Forgotten Children: National Enquiry into Children in Immigration Detention*, which, aside from reaffirming the Commission's stance that mandatory immigration detention is contrary to Australia's international legal obligations, detailed the impact of prolonged immigration detention on the health, wellbeing and development of children, as well as the rates of physical and sexual abuse against children in Australia's care.[120] Then-Prime Minister Tony Abbott framed the report as a "transparent stitch-up" and a politicised exercise, stating:

> "I say to the Human Rights Commission if you are concerned about real human rights, real human decency, real compassion, real compassion for people, you should be writing congratulating letters to the former minister for Immigration and Border Protection".[121]

Shortly after this statement, the United Nations special rapporteur on torture issued a report which found that Australia's implementation of its border protection policies amounted to a breach of the Torture Convention; Abbott responded by stating that "Australians are sick of being lectured to by the United Nations, particularly given that we have stopped the boats, and

[119] The Weekend Australian, *We're willing to help Europe stop boats: Peter Dutton*, 22 April 2015, available at: http://www.theaustralian.com.au/national-affairs/immigration/were-willing-to-help-europe-stop-boats-peter-dutton/news-story/00e359c4a1a01cb392555d311d2bb1f8?from=public_rss [accessed 28 October 2017].
[120] Australian Human Rights Commission, *The Forgotten Children: National Enquiry into Children in Immigration Detention*, November 2014, available at: https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children [accessed 28 October 2017].
[121] Sydney Morning Herald, *Children in detention report not a political exercise: Human Rights Commission*, 13 February 2015, available at: http://www.smh.com.au/federal-politics/political-news/children-in-detention-report-not-a-political-exercise-human-rights-commission-20150212-13cnnd.html [accessed 28 October 2017]; in this case, the former minister in question oversaw the establishment of "Operation Sovereign Borders".

by stopping the boats we have ended the deaths at sea".[122] Moreover, the Australian Immigration Minister has described lawyers who act on behalf of asylum seekers as "un-Australian", stating that they are pursuing a "social justice agenda" influenced by "political correctness" designed to take advantage of the Australian taxpayer.[123]

Additionally, in September 2017, an Australian Supreme Court Justice approved a payout of $70 million (approximately 54m USD, 46m EUR) to current and former detainees in the OPC in Papua New Guinea in relation to "deaths inside the detention centre, allegations of systemic sexual and physical abuse, and allegations of inadequate medical treatment leading to injury and death".[124] Former-Prime Minister Tony Abbott described the decision as "a windfall for people who unfairly took advantage of our nation's generosity".[125] Furthermore, after the 52 refugees were resettled the United States as part of the aforementioned Australia-US refugee swap deal,[126] the Australian Immigration Minister stated that:

> "They're economic refugees, they got on a boat, paid a people smuggler a lot of money, and somebody once said to me that we've got the world's biggest collection of Armani jeans and handbags up on Nauru waiting for people to collect it when they depart".[127]

Notwithstanding the fact that the term "economic refugee" does not exist under any domestic or international legal framework, such a statement from the individual responsible for

[122] ABC, *Abbott says Australians 'sick of being lectured to by UN' after scathing report on asylum policies*, 9 March 2015, available at: http://www.abc.net.au/news/2015-03-09/tony-abbott-hits-out-united-nations-asylum-report/6289892 [accessed 28 October 2017].
[123] Sydney Morning Herald, *Lawyers representing asylum seekers are 'un-Australian': Peter Dutton*, 28 August 2017, available at: http://www.smh.com.au/federal-politics/political-news/lawyers-representing-asylum-seekers-are-unaustralian-peter-dutton-20170827-gy5ci7.html [accessed 28 October 2017].
[124] The Guardian, *Manus Island: judge approves $70m compensation for detainees*, 6 September 2017, available at: https://www.theguardian.com/australia-news/2017/sep/06/judge-approves-70m-compensation-for-manus-island-detainees [accessed 28 October 2017].
[125] Ibid.
[126] The Guardian, above n 59.
[127] The Guardian, *Peter Dutton launches extraordinary attack on 'economic refugees' sent to US*, 28 September 2017, available at: https://www.theguardian.com/australia-news/2017/sep/28/peter-dutton-lets-fly-at-armani-clad-economic-refugees-sent-to-us [accessed 28 October 2017].

Australia's refugee program is illustrative of the lens through which the government views persons seeking international protection. It is apparent that Australian immigration authorities view Australian practices as generous, humanitarian and necessarily strict, and that any disagreement with this assessment is reflective of a lack of gratitude on the part of refugees and asylum seekers.

The language of "economic refugees" was employed by Prime Minister Malcolm Turnbull in a phone call with United States President Donald Trump in January 2017. In a much-reported phone conversation, Turnbull sought Trump's assurances that the new United States administration would honour the Obama-era bilateral "refugee swap" deal and accept people who are "basically economic refugees".[128] Turnbull was at pains to stress that Trump would not be obliged to actually resettle any of the refugees, only that the United States would need to go through the vetting process:

- Trump: "Suppose I vet them closely and I do not take any?"
- Turnbull: "That is the point I have been trying to make"
- Trump: "How does that help you?"
- Turnbull: "Well, we assume that we will act in good faith".[129]

After Turnbull explained that Australia's hard-line policy was the only way to prevent boats from arriving, Trump responded: "That is a good idea. We should do that too. You are worse than I am".[130] Trump later asked, "What is the thing with boats? Why do you discriminate against boats? No, I know, they come from certain regions. I get it";[131] It is notable that Turnbull did not seek to correct Trump's reasoning or answer. Prior to the end of the phone

[128] ABC, *Donald Trump told Malcolm Turnbull 'you are worse than I am' on refugees during call, leaked transcript reveals*, 4 August 2017, available at: http://www.abc.net.au/news/2017-08-04/donald-trump-told-malcolm-turnbull-refugee-deal-was-stupid/8773368 [accessed 28 October 2017].
[129] Ibid.
[130] Ibid.
[131] Ibid.

conversation, Trump stated: "I will be seen as a weak and ineffective leader in my first week by these people. This is a killer".[132] The transcript of this phone conversation further illuminates an important aspect of refugee discourse in both Australia and the United States: the foremost consideration for both Turnbull and Trump was the extent to which their reputations and legitimacy would be strengthened or weakened by the success or failure of the refugee swap deal.

3.2 The discourse in Hungary

Contemporary discourse and rhetoric in Hungary towards persons seeking international protection can perhaps be best summarised by Prime Minister Viktor Orban's statement on 3 September 2015: "We have one message for refugees: don't come!".[133] This statement was made following the introduction of a government-funded nationwide anti-migrant billboard and advertising campaign, where Hungary was plastered with slogans stating, *inter alia*, "If you come to Hungary, don't take the jobs of Hungarians!", "If you come to Hungary, you have to keep our laws", and "If you come to Hungary, you must respect our culture".[134] Given that this billboard campaign was implemented at the time of the European migration crisis, it is clear that Hungarian authorities had the goal of framing persons seeking international protection as migrants with the goal of taking Hungarian jobs, violating Hungarian laws and disrespecting Hungarian culture.

[132] ibid.
[133] Hungarian Helsinki Committee, above n 66, page 1.
[134] BBC News, *Hungary's poster war on immigration*, 14 June 2015, available at: http://www.bbc.com/news/world-europe-33091597 [accessed 28 October 2017]; in Hungarian, these statements are "Ha Magyarországra jössz, nem veheted el a magyarok munkáját", "Ha Magyarországra jössz, tiszteletben kell tartanod a törvényeinket", and "Ha Magyarországra jössz, tiszteletben kell tartanod a kultúránkat".

Contemporaneously, the Hungarian government launched a "National Consultation on Immigration and Terrorism", a nationwide poll which asked Hungarian citizens some of the following questions:

- "There are some who think that mismanagement of the immigration question by Brussels may have something to do with increased terrorism. Do you agree with this view?"
- "There are some who believe that Brussels' policy on immigration and terrorism has failed, and that we therefore need a new approach to these questions. Do you agree?"
- "Would you support the Hungarian Government in the introduction of more stringent immigration regulations, in contrast to Brussels' lenient policy?"
- "Do you agree with the view that migrants illegally crossing the Hungarian border should be returned to their own countries within the shortest possible time?".[135]

The way in which these questions are framed adds an additional element to the framing of refugees in official Hungarian rhetoric: it expressly links immigration with terrorism, and disregards the fact that the illegal crossing of borders is permissible under Hungarian, European and international law where such a crossing is made for the purposes of seeking international protection.

Hungary proceeded to frame its refugee and migration discourse as a cultural "counter-revolution" within the European Union by holding a national referendum in October 2016, in which Hungarians were asked to vote on whether Hungary should be required to resettle 1,294 refugees as part of a European burden-sharing arrangement.[136] While the referendum was void,

[135] Prime Minister's Office, *National consultation on immigration to begin*, 24 April 2015, available at: http://www.kormany.hu/en/prime-minister-s-office/news/national-consultation-on-immigration-to-begin [accessed 28 October 2017].
[136] The Guardian, *Hungary's refugee referendum not valid after voters stay away*, 3 October 2016, available at: https://www.theguardian.com/world/2016/oct/02/hungarian-vote-on-refugees-will-not-take-place-suggest-first-poll-results [accessed 28 October 2017].

as less than 50% of the Hungarian electorate voted in the referendum, more than 98% of those who did participate voted in support of closing Hungary's doors to refugees.[137] Prime Minister Viktor Orban labelled the referendum as an "outstanding" victory, and stated that the result gave him a strong mandate to go to Brussels "to ensure that we should not be forced to accept in Hungary people we don't want to live with".[138] Additionally, the deputy of Orban's political party stated that the referendum result constituted "a sweeping victory for all those who believe that the foundations of a strong European Union can only be the strong nation states".[139] Hungary (along with Slovakia) filed a complaint against the mandatory resettlement quota with the European Court of Justice, which the Court dismissed; Orban responded by stating that the "real battle is just beginning", and that:

> "The whole issue raises a very serious question of principles: whether we are an alliance of European free nations with the Commission representing our joint interests, or a European empire which has its centre in Brussels and which can issue order".[140]

Additionally, the European Commission has since launched legal proceedings against Hungary for refusing to accept the refugee quota.[141]

Hungary continued to frame its rhetoric surrounding refugees and migration as a question of upholding national sovereignty and protecting Hungarians and Europeans from the threat of terrorism in its next "National Consultation", entitled "Let's Stop Brussels!".[142] Under this questionnaire, Hungarian citizens were asked, *inter alia*, the following questions:

[137] Ibid.
[138] Ibid.
[139] Ibid.
[140] Al Jazeera, *Hungary to fight EU migrant quotas despite setback*, 8 September 2017, available at: http://www.aljazeera.com/news/2017/09/hungary-fight-eu-migrant-quotas-setback-170908153009948.html [accessed 28 October 2017].
[141] Ibid.
[142] Politico, *Hungary's 'Let's stop Brussels!' survey*, 1 April 2017, available at: https://www.politico.eu/article/hungarys-lets-stop-brussels-survey/ [accessed 28 October 2017].

- "In recent times, terror attack after terror attack has taken place in Europe. Despite this fact, Brussels wants to force Hungary to allow illegal immigrants into the country. What do you think Hungary should do?"
- "By now it has become clear that, in addition to the smugglers, certain international organizations encourage the illegal immigrants to commit illegal acts. What do you think Hungary should do?"
- "More and more foreign-supported organizations operate in Hungary with the aim of interfering in the internal affairs of our country in an opaque manner. These organizations could jeopardize our independence. What do you think Hungary should do?"[143]

The questions of this second "National Consultation" demonstrate yet another element of the evolving anti-migrant discourse in Hungary: the role of foreign-supported international organisations in encouraging illegal immigrants to enter Hungary and commit illegal acts. These questions refer specifically to the role of George Soros, whose Open Society Foundation provides funding to civil society organisations acting to support persons seeking international protection, and who for many years has advocated for a comprehensive "rebuilding" of the European asylum system.[144] As Soros and organisations he funds advocate for persons seeking international protection to be able to enter Hungary, Orban has sought to frame this as being incompatible with Hungarian territorial sovereignty and national security.

Orban's anti-Soros rhetoric became even more explicit when he launched the most recent "National Consultation". In a gathering with religious leaders in the Hungarian parliament,

[143] Hungarian Spectrum, *National Consultation, 2017: Let's Stop Brussels!*, 2 April 2017, available at: http://hungarianspectrum.org/2017/04/02/national-consultation-2017-lets-stop-brussels/ [accessed 28 October 2017].
[144] George Soros, *Rebuilding the Asylum System*, 26 September 2015, available at: https://www.project-syndicate.org/commentary/rebuilding-refugee-asylum-system-by-george-soros-2015-09 [accessed 28 October 2017].

Orban stated that Hungary was facing a "Soros plan" whereby Hungary would be forced to accept more migrants:

> "It is an action plan that describes exactly how disobedient, non-immigrant central European countries should be transformed into immigrant countries".[145]

The official government line against the "Soros plan" was coupled with a general anti-Soros campaign, whereby billboards across Hungary encouraged citizens to avoid Soros having the "last laugh";[146] the campaign was labelled by the European Commission as "highly misleading", and criticised by Jewish groups as risking "unleashing anti-Semitic passions".[147] Alongside the anti-Semitic, anti-migrant rhetoric extolled by Hungarian authorities, Orban added an additional element to the discourse, by framing Hungary's policies as being pursued in the interest of protecting Christians and Europe's Christian identity: Orban stated in October 2017 that:

> "Europe, however, is forcefully pursuing an immigration policy which results in letting extremists, dangerous extremists, into the territory of the European Union… A group of Europe's intellectual and political leaders wishes to create a mixed society in Europe which, within just a few generations, will utterly transform the cultural and ethnic composition of our continent – and consequently its Christian identity… The world should understand that what is at stake today is nothing less than the future of the European way of life, and of our identity".[148]

[145] Financial Times, *Hungary to consult public on alleged Soros migrant plan*, 20 September 2017, available at: https://www.ft.com/content/b7f5717a-9dd5-11e7-9a86-4d5a475ba4c5 [accessed 28 October 2017].
[146] 444, *Ne hagyjuk, hogy Soros nevessen az el nem készült bringaút végén*, 4 July 2017, available at: https://444.hu/2017/07/04/ne-hagyjuk-hogy-soros-nevessen-az-el-nem-keszult-bringaut-vegen [accessed 28 October 2017]; the statement was "Ne hagyjuk, hogy Soros nevessen a végén!".
[147] Financial Times, above n 145.
[148] The Irish Times, *Refugee-hostile Hungary urges Europe to protect Christians*, 13 October 2017, available at: https://www.irishtimes.com/news/world/europe/refugee-hostile-hungary-urges-europe-to-protect-christians-1.3255145 [accessed 28 October 2017].

This statement came after the announcement in September 2017 that two Syriac Orthodox Christian prelates from Iraq were granted Hungarian citizenship.[149] Because these two men are originally from Iraq, it provides the Orban administration with evidence that their anti-migrant policies are not racially-motivated, and bolsters their argument that all Christians require protection from the threat posed by Islam and, by consequence, Islamic terrorism.

3.3 The discourse in the United States

Turning first to the historical experience of the groups of Haitians seeking protection in the United States, it is significant that the Haitian refugee crisis emerged as a major issue in the 1992 United States Presidential election. While still a Presidential candidate, Bill Clinton praised a decision by a US court to "overturn the cruel policy of returning Haitian refugees to a brutal dictatorship without an asylum hearing".[150] While President-Elect, Clinton declared that the summary repatriation of Haitian refugees "back to Haiti under the circumstances which have prevailed for the last year was an error and so I will modify that process".[151] However, shortly prior to taking office, after "being accused of setting off an exodus of Haitians with his campaign promises", Clinton reversed course and endorsed his predecessor's policy, stating that "boat departures in the near future would result in further tragic losses of life".[152] In this way, Clinton sought to reframe the refugee discourse from being about respecting international legal requirements and fundamental due process obligations to being one grounded in humanitarian concern. Indeed, after Clinton had endorsed his predecessor's pro-*refoulement*

[149] Index, *Magyar állampolgár lett két szír egyházi vezető*, 21 September 2017, available at: http://index.hu/belfold/2017/09/21/magyar_allampolgar_lett_ket_szir_egyhazi_vezeto/ [accessed 28 October 2017].
[150] Koh and Wishnie, above n 67, page 397.
[151] Ibid.
[152] Los Angeles Times, *Clinton Warns Haitians Not to Flee to the U.S. : Immigration: He says in Voice of America broadcast refugees would be sent back, citing danger of boat trips*., 15 January 1993, available at: http://articles.latimes.com/1993-01-15/news/mn-1443_1_clinton-aides [accessed 28 October 2017].

policy, Supreme Court Justices Kennedy, O'Conner, Souter and Stevens went on to state: "If two presidents can live with *refoulement* (including one who had repeatedly condemned it), why can't we?".[153] When this quasi pro-*refoulement* discourse concerning Haitians is contrasted with the differential treatment afforded to Cubans seeking protection in the United States in the same period, the incoherency of the discourse of this period becomes starkly apparent.

As described earlier in this Thesis, the United States "travel bans" that have existed in various forms throughout 2017 have been drafted with the express goal of preventing the entry of refugees into the United States, and arguably specifically drafted to focus on the exclusion of Muslim refugees. Days after the introduction of the first Executive Order in January 2017, President Donald Trump spoke of the need to protect Christian refugees before providing protection to other persons: he stated that Syrian Christians were "horribly treated" under the Obama administration, and that "if you were a Muslim you could come in, but if you were a Christian it was almost impossible".[154] This was factually incorrect, as the previous year the United States had accepted almost equal numbers of Christian and Muslim refugees.[155] The language of the travel ban makes it explicitly clear that the United States under Trump had revived its Clinton-era spirit of discriminating between persons seeking international protection on arbitrary grounds, and providing different standards of treatment to individuals for politicised purposes. By entirely banning the entry into the United States of millions of individuals on the basis of their citizenship, the Executive Order revived arbitrary discrimination on the basis of an asylum seeker's country of origin; by expressly banning the

[153] Koh and Wishnie, above n 67, page 407.
[154] The Economist, *Donald Trump gets tough on refugees*, 28 January 2017, available at: https://www.economist.com/blogs/democracyinamerica/2017/01/keep-your-huddled-masses-0 [accessed 28 October 2017].
[155] Ibid.

entry into the United States of people from Muslim-majority countries, the Executive Order additionally discriminated on the basis of religion. Moreover, by labelling the Executive Order "Protecting the Nation From Foreign Terrorist Entry Into the United States", it functioned to conflate refugees with terrorists.

The Trump administration adopted a discourse throughout 2017 that sort to promote its interpretation of international protection obligations to other nations. While still President-elect, Trump commented in an interview with German tabloid Bild that Chancellor Angela Merkel had made a "catastrophic mistake" in adopting an open-door policy towards persons seeking international protection and "letting all these illegals into the country"; in support of this, he made reference to the December 2016 terrorist attack at a Christmas market in Berlin, whose perpetrator had entered Germany as an asylum seeker.[156] In response to this, Germany's Deputy Chancellor Sigmar Gabriel replied that:

> "There is a link between America's flawed interventionist policy, especially the Iraq war, and the refugee crisis, that's why my advice would be that we shouldn't tell each other what we have done right or wrong, but that we look into establishing peace in that region".[157]

It is noted at this point that Trump did not respond to this criticism of the United States, and did not address the idea that present international trends in migration could be the result of flawed United States policy.

[156] The Guardian, *Merkel made catastrophic mistake over open door to refugees, says Trump*, 16 January 2017, available at: https://www.theguardian.com/world/2017/jan/15/angela-merkel-refugees-policy-donald-trump [accessed 28 October 2017].
[157] The Guardian, *Germany hits back at Trump criticism of refugee policy and BMW tariff threat*, 16 January 2017, available at: https://www.theguardian.com/world/2017/jan/16/germany-hits-back-at-trump-criticism-of-refugee-policy-and-bmw-tariff-threat [accessed 28 October 2017].

In May 2017, Italy hosted a G-7 Summit in Sicily, the location of which was chosen to "symbolise the world's concern over the plight of refugees coming from the Middle East and Africa".[158] The Italian hosts had hoped that the Summit would result in a joint statement by G-7 nations that the world at large shared responsibility for the refugee crisis, rather than individual nations; in response, United States negotiators offered a text on a "take it or leave it" basis, which acknowledged the human rights of migrants but affirmed "the sovereign rights of states to control their own borders and set clear limits on net migration levels as key elements of their national security".[159] Additionally, the text supported the principle that refugees should remain within their regions of origin, and ultimately the statement produced at the Summit only made a reference to migration.[160] This approach, whereby persons seeking international protection would be actively discouraged from leaving their immediate regions of origin, was promoted by Trump again at the United Nations General Assembly in September 2017. He stated:

> "For the cost of resettling one refugee in the United States, we can assist more than 10 in their home region… Out of the goodness of our hearts, we offer financial assistance to hosting countries in the region, and we support recent agreements of the G-20 nations that will seek to host refugees as close to their home countries as possible. This is the safe, responsible and humanitarian approach".[161]

While it is true that the G-20 declaration to which he referred undertook to address "the distinct needs of refugees and migrants…close to their region of origin",[162] the language employed by

[158] The Guardian, *Hopes for refugee crisis plan fall into chasm between G7 and Trump*, 27 May 2017, available at: https://www.theguardian.com/world/2017/may/26/trump-set-to-clash-with-other-g7-leaders-over-refugees-and-climate [accessed 28 October 2017].
[159] Ibid.
[160] Ibid.
[161] Voice of America, *Trump Revives Rhetoric on Keeping Refugees in Host Countries*, 19 September 2017, available at: https://www.voanews.com/a/trump-revives-rhetoric-on-keeping-refugee-in-host-countries/4035754.html [accessed 28 October 2017].
[162] Ibid

Trump here further consolidates the emerging trends in his rhetoric, and portrays his policies as being representative of, or in harmony with, international consensus.

3.4 Concluding comments on Chapter 3

This Chapter has provided evidence of the policy discourses pursued in Australia, Hungary and the United States with respect to their interpretations of their international protection obligations, and their assessments of such practice. Australia regularly asserts the welcoming, generous and humanitarian nature of its policies and practices towards refugees, while paternalistically framing its denial of access to territory to "boat arrivals" as the only way to prevent the loss of life risked by dangerous boat journeys. However, when the treatment meted out by Australia to those within its care at OPCs results in loss of life, the human cost involved is minimised or dismissed, and attention is refocussed on Australia's success at "stopping the boats". In both Hungary and the United States, the question of refugee protection has been framed as a fundamental question of territorial sovereignty, Christian identity and national security. Whenever the those who wield power in these countries are questioned on the legitimacy of legality of their laws and policies, or whenever third parties seek to hold them accountable, each state clings ever more firmly to notions of historical and unquestionable generosity, humanitarian spirit, and incontrovertible national sovereignty and security.

Chapter 4 – Analysis

Up to this point, this Thesis has addressed three distinct questions with respect to the refugee protection frameworks in Australia, Hungary and the United States. Chapter 1 established that, as signatories to the Convention and Protocol, each of these states has accepted international responsibility to afford certain rights to persons seeking international protection. Chapter 2 looked to the legal frameworks in place in each of these countries, and established the ways in which these frameworks do not correspond to the international legal burden accepted by each country with respect to asylum seekers and refugees. Chapter 3 then looked to the policy discourse in each of these countries, and the nature of the rhetoric that has accompanied the introduction of laws and practices which are internationally unlawful. From this policy discourse, it can be inferred that the leadership in each of these states is well and truly aware of the unlawfulness of their laws and practices, but do not see unlawfulness as an impediment to pursuing broader political objectives. Contemporaneously, the leadership in each of these states seem invariably at pains to assert their utmost respect for these same international legal obligations. Each of these states seems to share a comparable message: you have the right to seek asylum, you just shouldn't do it here. This Chapter will attempt to make sense of this contradiction by applying a conceptual framework that exists at the intersection of securitisation, majority identitarian populism and crimmigration.

4.1 Conceptual framework

In an analysis of Hungary's asylum law and policy in 2015 and 2016, Boldizsar Nagy offers a theoretical explanation of Hungary's legal measures and practical actions through three compelling frameworks: securitisation, majority identitarian populism and crimmigration. Nagy posits that:

> "The assumption is that the seemingly irrational and grossly harmful measures adopted by the Hungarian government concerning refugee law and its neighbouring branches of law in 2015-2016 cannot be understood along the lines of an inherent logic of the legal development. Extra-legal factors have to be included to explain how and why the increasingly restrictive measures unfolded, leading to direct conflict with binding EU law".[163]

According to Nagy, the explanation for the developments in Hungary lies at the juncture of securitisation, majority identitarian populism and crimmigration. Securitisation is defined as a discourse which requires three elements: a securitising actor, a referent object to be protected, and an audience to consume acts of securitisation.[164] Securitisation looks to these "acts of securitisation" which treat "a phenomenon or process as threatening the well-being of the society and calls for extraordinary reaction on behalf of the securitising agent", which requires the setting aside of the regular functioning of the protections of the legal system.[165] This is necessary, under a securitisation framework, because the existing legal system is not equipped to respond to these extraordinary phenomena or processes, necessitating an exceptional response. Further, according to Nagy, the explanation provided by securitisation is ideally fitted to the Hungarian migration and refugee policy. Where migration is framed as a factor that weakens a society's traditions and homogeneity, migrants can be framed as being fundamentally dangerous to a nation's social fabric. By framing migration as a "threat", a discourse of securitisation "can become a self-legitimating and self-fulfilling mode of governing migration".[166]

[163] Boldizsar Nagy, "Hungarian Asylum Law and Policy in 2015-2016: Securitization Instead of Loyal Cooperation" (2016) 17 *German Law Journal* 1033, page 1034.
[164] Ibid, page 1041.
[165] Ibid.
[166] Ibid, page 1042.

Secondly, Nagy relies upon the explanatory power of majority identitarian populism. This is a framework of political discourse which comprises three key elements:

> "(1) Speaking on behalf of the national community as if it was a culturally, religiously and linguistically homogenous genuine community sharing the same values; (2) accusing the political elite and the intellectuals of being undemocratic, "incapable, unproductive and privileged, distant or alienated from the people, or lacking in the plebescitarian quality of common sense"; and (3) identifying a threatening Other – one or more groups whose members allegedly undermine the community's values or prosperity".[167]

While the speaking of a "political elite" is arguably more pertinent in a Hungarian setting than in an Australian or United States setting, the discursive framework has the capacity to illuminate the formation of the policies governing persons seeking international protection in all three countries. Specifically, Nagy cites that a dividing line between the majority and the Other "may be found in religion, ethnicity and values";[168] the broad potential for the idea of "values" to be wielded by a majority against an Other has significant explanatory power for the analysis in this Chapter.

Lastly, Nagy provides crimmigration, or the intersection of criminal law and immigration law, as the third pillar of his explanatory framework. This intersectionality explains how immigration law is being increasingly enforced through recourse to criminal law functions, and how the criminal law increasingly has consequences for immigration law purposes. This is supported by Catherine Dauvergne, who states that "migration law is the new last bastion of sovereignty".[169] She explains the link between criminal law and immigration law as being

[167] Ibid, page 1043.
[168] Ibid.
[169] Catherine Dauvergne, "Sovereignty, Migration and the Rule of Law in Global Times" (2004) 67 *Modern Law Review* 588.

founded in a climate of fear: fear of the "threat" of globalisation, and fear of the threat of terrorism.[170] This fear manifests itself in strict border control mechanisms and the employment of criminal legal functions to curb and regulate immigration, which is apparent through the emergence of the concept of "illegal migration":

> "Illegal migration is an affront to sovereignty because it is evidence that a nation is not in control of its borders. Contempt for illegal migration also affects refugee law, as well as public and political discussions of refugees. This threat to sovereignty and the influence on refugee discourses both engage…migration laws [and conceptions of] sovereignty".[171]

Dauvergne highlights that the term illegal migration, despite applying to a very broad range of people worldwide who are residing in (and lacking legal status in) a country outside their country of nationality, has evolved to conjure images of the "poor and brown and destitute".[172] Consequently, "the term 'illegal' has escaped its legal, and even grammatical, moorings and now stands alone as a noun".[173] This aligns neatly not only with the explanatory potential of crimmigration as articulated by Nagy, but also with the conceptual framework afforded by the juncture of crimmigration with securitisation and majority identitarian populism. The (poor, brown, Muslim, terrorist) "illegal" migrant is viewed by the majority as a threat to the majority's safety, and the survival of that majority's identity, and the safety provided by the criminal law is an effective way of constraining and negating that threat. When political parties seek to represent themselves as the only means of protecting the majority from that threat, they are able to employ language of "sovereignty", and back away from their Convention obligations to persons seeking international protection with scant consequence.

[170] Ibid, page 598.
[171] Ibid.
[172] Ibid, page 599.
[173] Ibid.

4.2 Australia

The juncture of securitisation, majority identitarian populism and crimmigration is exceptionally well-suited to the Australian migration context. Through the discourse around "Operation Sovereign Borders", along with the re-branding of the Australian Department of Immigration to the Department of Immigration and Border Protection, it is apparent that the stated requirements for securitisation are satisfied: the Australian state is the securitising actor, implementing policies of stopping boats and protecting borders; Australia's sovereignty and historical generosity towards persons seeking international protection is the referent object to be protected; the audience consuming these acts of securitisation is the Australian electorate, who has for decades successively elected governments on both sides of politics who pursue policies which "protect" Australia.

As referenced earlier in this Chapter, the idea of majority identitarian populism as used to describe the Hungarian context does not fully equate to its manifestation in an Australian context. The rhetoric of a distant, privileged and alienated elite is certainly employed in Australia, but this rhetoric lacks the force in Australia that it wields in nations like Hungary. This may be due to Australia's status as a relatively new country, where powerful notions of egalitarianism loom large in the national psyche. Nonetheless, the idea of political groups declaring that they speak on behalf of a homogenous community united by "Australian values", and that the Other that is persons seeking international protection must subscribe to these values. This is readily apparent through the aforementioned denunciation by the Australian Minister for Immigration that those who advocate for the rights of persons seeking international protection are "un-Australian". This is further witnessed in the fact that it is a requirement to sign an "Australian values statement" in order to complete an application for a refugee protection visa in Australia:

"I confirm that I have read, or had explained to me, information provided by the Australian Government on Australian society and values. I understand:

- Australian society values respect for the freedom and dignity of the individual, freedom of religion, commitment to the rule of law, Parliamentary democracy, equality of men and women and a spirit of egalitarianism that embraces mutual respect, tolerance, fair play and compassion for those in need and pursuit of the public good;
- Australian society values equality of opportunity for individuals, regardless of their race, religion or ethnic background;
- the English language, as the national language, is an important unifying element of Australian society.

I undertake to respect these values of Australian society during my stay in Australia and to obey the laws of Australia".[174]

The language employed by this "values statement" further perpetuates the idea of a refugee and asylum seeking Other that threatens to undermine the Australian community's values and prosperity. Consequently, any violation by holders of refugee protection visas in Australia would be criminally liable for any violation of this "values statement'. In this way, crimmigration is witnessed in action: those who are beneficiaries of Australian protection are there at the mercy of the criminal legal system. Where the harshness of that criminalisation is met with criticism by United Nations bodies that it amounts to a violation of the Torture Convention, the criticism is further rejected as an affront to Australian values and sovereignty.

[174] Australian Department of Immigration and Border Protection, *Application for a protection visa*, July 2017, available at: https://www.border.gov.au/Forms/Documents/866.pdf [accessed 29 October 2017], page 33, question 86.

Matthew Zagor provides an interesting perspective on Australia's paternalistic approach to taming the threatening Other.[175] He frames the act of seeking asylum as a true act of autonomy by an individual, inspired by Hathaway's view that refugee law is "fundamentally oriented to the promotion of autonomy".[176] At the same time, sovereignty is the ultimate manifestation of a state's own autonomy (or, recalling Dauvergne above, "the new last bastion of sovereignty"), and by entering a state to seek protection there is a clash between the sovereign state's autonomy and the asylum seeker's autonomy:

> "In brief, the nation state reacts to such exercises of autonomy not only be restricting and limiting its exercise, but by denying its very existence as an exercise of authentic moral agency. This in turn is achieved by subverting its rationality, converting it into, and representing it as, something more nefarious and dangerous – the irrational".[177]

As described earlier in this Thesis, Australia continuously asserts its historic and ongoing generosity towards refugees through its resettlement program with the UNHCR; those who are not resettled via this program are "queue jumpers", and this disrespect for the "queue" is the most offensive affront to Australian "values" conceivable. As such, while refugees who are resettled in Australia by passively waiting in a "queue" are welcomed, those who assert autonomy and jump the "queue" are "somehow lacking in the normative quality…that would otherwise define their victimhood, reflected in their failure to adhere to an authentic moral imperative of inaction and passivity".[178] With this in mind Australia is able to pursue a seemingly contradictory series of policies, whereby it is simultaneously the compassionate and generous redeemer of respectfully patient refugees, and the guardian of national values and sovereignty in the face of threats to these values and this sovereignty; a devoted observer and

[175] Matthew Zagor, "The struggle of autonomy and authenticity: framing the savage refugee" (2015) 21 *Journal for the Study of Race, Nation and Culture* 373.
[176] Ibid.
[177] Ibid, page 378.
[178] Ibid, page 380.

upholder of the norms of international refugee law, and a violator of these same norms that resolutely denies allegations of unlawfulness.

4.3 Hungary and the United States

As Nagy explores more fully in his article, the juncture of securitisation, majority identitarian populism and crimmigration has significant explanatory force regarding the evolution of the Hungarian migration and refugee law framework. In many ways, despite their differences, there are significant points of similarity between the Hungarian example and the contemporaneous developments in the United States. As described earlier in this Thesis, the exigencies of the migration crisis in Europe prompted a series of securitising acts by the Orban administration, whereby fences were erected along Hungary's southern borders and the act of entering Hungarian territory to seek protection became illegal, except in exceptionally limited and regulated circumstances. Similarly, through the two Executive Orders, the United States has pursued explicit acts of securitisation conceived to protect the nation from the threat of terrorism, which function not so much as to criminalise entry into the United States as much as to prevent entry entirely. In both Hungary and the United States, the threat of terrorism is so inseparable from migration that an "extraordinary reaction" is necessary, and the extraordinary action entails unprecedented restrictions upon entry into these countries.

Similarly, the role of majority identitarian populism is comparable in both Hungary and the United States. While Orban has pursued a rhetoric best summarised by his "one message" to refugees ("don't come here!"), and the Trump administration has sent the identical message through the Executive Orders. Both Orban and Trump have adopted rhetoric whereby they presume to speak on behalf of all Hungarians and Americans respectively, and essentialise the disparate views held in their countries into one singular voice: a voice that accuses a distant

"elite" of lacking in the common sense necessary to protect the nation (and Christians) from the threat posed by the Other. In the Hungarian example, the "elite" is Brussels, Europe, Soros; for the United States, the "elite" consists of all those who support the worldview propounded by the Obama administration.

Admittedly, there is much to be said for re-imagining the international protection system that is advocated for by Trump. The current international refugee protection framework was built in response to an ongoing emergency, and it has proved remarkably flexible and durable in its evolution. Nonetheless, the durable solutions needed for refugees worldwide are in short supply, and they become in even shorter supply when nations like Hungary devote significant financial resources to seeking justification for why refugees should not be resettled there. However, Trump's rhetoric concerning the goodwill of the United States in wanting to assist with protecting refugees in their regions of origin is arguably only cloaked in the humanitarian language of goodwill to legitimise the current United States policy, and to deflect attention and criticism from what it has as its fundamental goal: the denial of entry to the United States of Muslims seeking international protection.

4.4 Concluding comments on Chapter 4

Prior to applying the conceptual framework provided by the intersection of securitisation, majority identitarian populism and crimmigration to the laws, practices and rhetoric in Australia, Hungary and the United States, three outcomes appeared possible. Firstly, the framework could have made it apparent that there was something fundamentally exceptional to the responses to migration in these three countries, whereby there would be an acknowledgement that there was a divergence from lawful and expected practices, but that in the future practices would once again be in compliance with international legal requirements.

Secondly, it could have made it clear that the leadership in each state is oblivious to the exceptional nature of their practices, and in doing so demonstrated that these states were acting as though there was nothing exceptional taking place. Thirdly, it could have made it apparent that the leadership in each of these countries is well and truly aware that there is something exceptional in the harshness of their migration practices and measures, and that while this appears exceptional at present, it is in fact indicative of a "new normal". In light of the contents of this Chapter, it can only be the third of these options.

Conclusion

This Thesis has examined the practices and policies pursued by Australia, Hungary and the United States with respect to persons seeking international protection. Chapter 1 established that, under the Convention, these countries are internationally bound to respect the prohibition on *refoulement*, to provide persons seeking international protection access to asylum procedures, and to provide broader Convention rights to such persons who are subject to their jurisdiction and physically within their territories. Chapter 2 provided an overview of the evolution of the refugee protection frameworks in these three countries, and then demonstrated the ways in which these frameworks do not comply with these key obligations. Chapter 3 then turned to the nature of the rhetoric employed in Australia, Hungary and the United States when discussing, promoting and justifying their policies and practices which are inconsistent with the Convention obligations. Lastly, Chapter 4 analysed this rhetoric by reference to the conceptual framework provided by the juncture of securitisation, majority identitarian populism and crimmigration.

It can be concluded that Australia, Hungary and the United States incontrovertibly violate their Convention obligations. While the conceptual framework in Chapter 4 may provide an explanation for why these violations occur, it does not provide an answer for what happens as a consequence of these violations. It is true that Hungary may face some consequences, through the supranational legal framework of the European Union. However, Hungary could simply distort these consequences by framing them as further encroachment on Hungarian sovereignty, thereby having further ammunition for its majority identitarian populist rhetoric about the supremacy of European elites. As for Australia and the United States, it seems unlikely that either will be held accountable in any meaningful way for their violations of the Convention. This demonstrates the limited force the Convention has: as an instrument of

international law, it only has the power that signatory states ultimately decide to accord it through their laws and practices.

Broadly, this has concerning ramifications for the future interpretation of the Convention obligations addressed in this Thesis. While *non-refoulement* exists to prevent the return of persons seeking international protection *in any manner whatsoever* to countries where they may face harm that amounts to persecution, practices whereby access to territory is prevented and entry into territory is criminalised mean that these states can very easily *refoul*e persons they are bound to protect. Where states are able to force refugees back to countries where they risk persecution, whether through directly deporting them to their countries of origin or indirectly forcing them to return through the cumulative effect of policies of denial and deterrence, the foundational protection of the Convention is fundamentally weakened. To paraphrase Hathaway, given that the Convention is built upon the ability of refugees to invoke rights of protection in state parties like Australia, Hungary and the United States, this attack on *non-refoulement* could render the entire Convention nugatory.

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