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A Historical Odyssey of Boat Refugees

JAMM04 Master Thesis

International Human Rights Law
30 higher education credits

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Term: Spring 2013

*“Migration and asylum policy mirrors not only the attitudes of politicians but also the spirit of societies.” **

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Summary

Attitudes towards refugees develop over time. The motives behind the attitude changes can be found if the world order is assessed from a bigger perspective. There have been major changes in the global community since the adoption of the Refugee Convention relating to the Status of Refugees in 1951 and the attitudes towards refugees has followed suit. This development gives reasons to believe that it will continue in the same way, meaning that objectives, which affects global politics and the international community at large, will continue to affect the attitudes towards refugees in the future, as it has in the past. This would mean that objectives such as *inter alia* national security and protection against terrorism will probably be argued towards stricter future refugee policies.

It is argued in this thesis that the treatment of irregular migrants has developed over the past 65 years in certain aspects, but has always been the same in other contexts. It is stated that the aspiration presented in the Refugee Convention and its commentary from 1951 has never been fully implemented, and that the attitudes has changed in accordance with convenience; and that this is not only true regarding national treatment but also the attitudes shown by the UNHCR.

In order to assess how the attitudes has changed, the thesis describes the rationale provided by states as to why boat migrants are hindered to seek asylum, and how the international community has met this reasoning. From this base, the thesis draws certain conclusions regarding the past that can give indications regarding the future attitudes towards refugees. This presupposes that the past can tell us something about the future and that a descriptive, rather than practical, perspective brings clarity to questions of the future.

When looking at the acts implemented by states in order to hinder irregular migrants from seeking asylum, two general attitudes can be identified. The first one is defined as “nonchalant” and includes actions implemented without any regard for the irregular migrants desperate situation, the best example is perhaps migration control where the fate of the migrants depends on luck, as only a set number of migrants are offered protection. If a migrant is unfortunate enough to seek asylum after the threshold is reached, his case will not even be considered. The other attitude that has been identified is “hostile”, which is present when states uses force to keep the migrants out of their territorial waters in order to escape responsibility. No chronological order can however been established regarding the two different categories of acts, and no guidance for future acts can thus be established.

It is concluded in this thesis that the rationale provided by states has become more and more intentional and well-argued, in conjunction with the development of more restrictive refugee policies. During the exodus

resulting from the Vietnam War in the 70s, the countries of first asylum accepted migrants up until they had reached their maximum capacity before asking the international community for help. In the subsequent cases, instead of states offering procedures after their capacity, prevention mechanisms has been introduced and developed to become more and more controlling and restrictive towards the right to seek asylum, with the latest example being the creation of a common border agency for the EU – Frontex.

The reactions by the international community have at the same time developed to provide clearer and more thorough interpretations of the situation and the legal frameworks. The interpretation of the content of the right to seek asylum by the UNHCR, for example, has developed since 1993, when no notion was given to the right when interpreting *non-refoulement*, to today's interpretation where the right to asylum is seen as an inherited right following from *non-refoulement*.

The result of the attitude analysis conducted within the thesis is that attitudes have changed in a negative manner since the adoption of the Refugee Convention in 1951. The protection of irregular migrants has in practice become less effective and *non-refoulement* has repeatedly been violated without any regard to previous reactions towards breaches. For this negative evolution to change pace and turn into a positive one, there is a need for changes within the very core of refugee protection through the introduction of a monitoring mechanism.

Sammanfattning

Staters attityder mot båtmigranter har utvecklats sedan tillkomsten av flyktingkonventionen 1951. Motiven bakom attitydförändringarna kan identifieras om världsordningen analyseras från ett brett perspektiv. Det globala samfundet har förändrats markant sedan tillkomsten av flyktingkonventionen och attityder mot irreguljära migranter har följt denna utveckling. Detta ger anledning att misstänka att framtida förändringar kommer att följa samma mönster samt att mål som påverkar och driver den globala politiken och det internationella samfundet i stort kommer att påverka attityder mot framtida båtmigranter. Konsekvensen blir då att moderna motiv så som bland annat nationell säkerhet och terrorismbekämpning förmodligen kommer att argumenteras som grund för en strängare flyktingpolitik.

Det argumenteras i förevarande uppsats att hanteringen av irreguljära migranter har utvecklats i vissa aspekter under de senaste 65 åren, men har varit statisk i andra kontext. Den aspiration som flyktingkonventionen presenterade har aldrig blivit uppfylld, och attitydförändringarna har skett grundat i bekvämlighet, då det varit lämpligt. Detta gäller inte bara flyktingmottagande på nationell nivå utan även på internationell nivå, så som genom tolkningar av UNHCR.

Attitydförändringarna studeras genom att staters givna förklaringar till varför irreguljära migranter hindrats från att söka asyl analyseras kritiskt. Det internationella samfundets reaktion till dessa förklaringar presenteras vidare. Utifrån denna grund dras vissa slutsatser om historien som förser oss med indikationer om framtida flyktingattityder. Dessas riktighet förutsätter att det förflutna kan säga oss någonting om framtiden, och att ett rent beskrivande, snarare än praktiserande, perspektiv kan ge klarhet i frågor om framtiden.

Två generella attityder kan läsas ur de handlingar stater implementerat för att hindra irreguljära migranternas möjligheter att söka asyl. Dels nonchalans, vilket inkluderar handlingar som genomförs utan hänsyn till irreguljära migranternas desperata situation. Ett gott exempel på nonchalanta handlingar är implementering av bilaterala migrationsavtal, då dessa lämnar varje migrants öde till slumpen. Om en migrant har oturen att söka asyl efter att det bestämda antalet migranter blivit mottagna undersöks hans situation inte, oavsett hur desperat den än må vara. Den alternativa attityden som båtmigranterna mötts av är fiendlighet, vilket förekommer då stater brukar våld för att stoppa migranternas insegling i territorialhavet och således undgår ansvar. Några kronologiska mönster rörande när den ena eller andra attityden nyttjats finns ej att identifiera och fastställandet i sig bidrar således inte med något klagörande om framtida tillämpning.

Staters rättfärdigande av brott mot *non-refoulement* har utvecklats genom att bli mer och mer avsiktligt och välargumenterat, i samband med att flyktingpolitiken har blivit striktare. Under utvandringen som följde Vietnamkriget mottog de omgivande staterna migranter i så stor utsträckning de kunde, och bad sedan det internationella samfundet om hjälp. I senare fall har stater, istället för att erbjuda skydd baserat på kapacitet, utvecklat förebyggande åtgärder för att undgå ansvar för migranterna. Dessa åtgärder har blivit mer och mer kontrollerande och restriktiva mot rätten att söka asyl, det mest talande exemplet på det är förmodligen tillkomsten av EU:s gemensamma gränsövervakningsorgan Frontex.

Det internationella samfundets reaktioner på staters metoder och rättfärdiganden har utvecklats parallellt, och givit tydligare och mer ingående tolkningar av situationer och den internationella regleringen. UNHCR:s uppfattning om innehållet i rätten att söka asyl har ändrats sedan 1993, då rätten att söka asyl inte nämndes i samband med tillämpandet av *non-refoulement*, till dagens tolkning då rätten att söka asyl anses följa av *non-refoulement*.

Resultatet av uppsatsens attitydanalys är att attityder har utvecklats negativt sedan tillkomsten av flyktingkonventionen 1951. Det skydd som irreguljära migranter erbjuds har blivit mindre effektivt och förbudet mot *refoulement* har vid upprepade tillfällen brutits mot. För att vända denna negativa utveckling krävs förändringar i flyktingrättens kärna genom tillkomsten av någon form av övervakningsmekanism.

Preface

My initial aspiration was to thank people along the way as they helped me, thus eliminating the need for a thank you list. However, it turns out that thesis writing turned me into an ungrateful narcissist who forgets to thank the ones that have helped out the most. The remedy for this erratic behavior thus follows. Thank you to my supervisor Karol Nowak, for your guidance and supervision through the jungle that is thesis writing. Thank you to my dear Sofias (yes, plural) for discussing the topic and content with me over and over, and without whom this final product would not have reached the current quality. Thank you mamma for sharing your academic excellence with me, and pappa for your constant support. Thank you Petter and Jitna for letting me into your home and correcting my English, and lastly thank you Malin and Ellen for forcing me to take breaks and making me laugh while doing so.

Abbreviations

ECOSOC	Economic and Social Council
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRW	Human Rights Watch
IACoMHR	Inter-American Commission on Human Rights
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

1 Introduction

1.1 Background

Pictures of overcrowded, unseaworthy vessels being stopped whilst crossing the Mediterranean Sea only to be returned to their countries of embarkation have been occupying the TV screens and the front pages of western news from time to time over the past years. The borders of the European Union are carefully guarded to such a degree that Europe has been deemed “Fortress Europe”¹. The pictures of boat refugees that we see in the news today mirrors pictures from the Indochinese Exodus in the 1970’s, the exoduses in the Caribbean Sea in the 1990’s and around Australia from 2001 and up until today. By only looking at the pictures, the situation for refugees travelling by boats and the implementation of interception of migrant boats appears to have been constant since the Second World War.

Since the adoption of the Convention relating to the Status of Refugees (the Refugee Convention) in 1951, the world of migration has changed profoundly through economic development, globalization and political alterations. The substantial content of the Refugee Convention has however not been altered in accordance with those changes, nor has any other universal instrument been adopted to the effect of changing neither the principles of *non-refoulement*, nor the protection offered to refugees. However, the treatment and attitudes shown towards migrants and refugees have not been as static.

By looking at a number of occurrences where migrants have been hindered from seeking asylum through interception at sea, this thesis aims at establishing how the attitudes towards migrants have changed over time. The attitudes are scrutinized by looking into how the right to seek asylum has been addressed at different times, both by the intercepting state, and by the international community at large. A global perspective is taken, as situations from Europe, Asia, Australia and America is evaluated, ending the odyssey with the current situation in the Mediterranean Sea.

1.2 Purpose and Research Question

The aim with this thesis is to assess what lies in the future for refugee protection and what can be done to ensure the future universal fulfillment of the Refugee Convention, by analyzing the previous attitudes shown by states towards irregular migrants’ rights to seek asylum in order to perform refugee determination. This is done by the establishment of trends regarding

* The quote on the cover sheet is taken from Gebrewold, *Africa and Fortress Europe – Threats and Opportunities*, (2007), Ashgate Publishing Limited: Hampshire p. 155

¹ Gebrewold, *supra* note 1, p. 45

how the attitudes shown towards boat refugees has developed since the Second World War, in order to establish why and how refugee policies change over time.

This thesis is nothing if not a product of its time, a time of terrorist attacks and economic downfall; a time of non-international armed conflicts and revolutions against previous dictatorship-esque Middle Eastern leaders. It aims at providing a broad perspective over how attitudes have changed over time by looking at how the law has been interpreted. Instead of choosing the regular legal method by looking at the legal norms and scrutinizing alleged violations, the opposite perspective is taken. What is state practice, and is it adjusted to the legal norms? A certain loophole in refugee protection can be identified regarding the prohibition of *non-refoulement* and the access to asylum procedure during interception at sea. A look at the interpretation and usage of this loophole provides an interesting ground for analyzing how attitudes towards irregular migrants have changed over time. This thesis thus aims at scrutinizing historical events to find trends in the attitude towards migrants, in order to explain why different times render different conducts and what this indicates for future attitudes towards irregular migrants. Certain suggestions regarding how the international community can meet those future trends in order to maximize the effectiveness of refugee protection is lastly presented.

1.3 Method and Material

It has been stated by Foucault that to establish how the state and society took its current form, the analysis should begin from governmental practice and the ways it reflects on itself and is rationalized, rather than by already given objects, such as the state and its sovereignty.² With those words in mind, this thesis rather focuses on the states' rationale behind not granting irregular migrants a right to seek asylum than on how states have breached international law in doing so.

In order to understand how the attitudes by states, which ultimately create the international community that writes international law, towards irregular migrants has developed in the past 60 years, this essay do not explain how the legal protection has developed but rather how this legal protection has been implemented by states in times of distress. The aim is to start from the exodus that followed the Second World War, and then to continue by analyzing the most significant examples of interception at sea through the action by states, the reaction of the international community, including the actions by the United Nations High Commissioner for Refugees (UNHCR). Instead of looking at the given objects, which are the sovereign and the state, a state's practices and the way it reflects on itself and is rationalized is

² Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979* (2008) Picador Books: London, p 2.

analyzed, to show how the present situations were actually formed over a scope of time.

Starting out, the intention was to look into international legislation and to see whether the application over the past 60 years had been correct. From the point of view of a legal scholar, this is the natural way of analyzing juridical problems and situations. However, the main purpose with this thesis is not to evaluate the application but rather the attitudes shown through the application, which has not been adjusted to the legal regulations. The thesis thus starts out by establishing the right to seek asylum in Chapter Two, and then looks critically into how this right has been breached over time, together with the rationale provided by states regarding the violations. This enables a discussion regarding how the attitudes have changed over time, and further how this change can be explained by looking at the world at large. Chapter Two do not represent a full presentation of the legal context, but rather serves as a background to clarify the content of Chapter Three and permit a deeper analysis in Chapter Four. The analysis is not delimited to a certain article of the Refugee Convention, nor a specific problem other than the possibility for migrants to seek refuge, as reality has proven not to depend on adopted regulations.

The ultimate goal of this thesis is to analyze the attitudes shown by states towards irregular migrants' rights to seek asylum in order to perform refugee determination. A problem derived from the research question in itself is how to define "attitudes" in a way which is, on the one hand, general enough to be relevant and to provide a foundation for an analysis, but on the other hand, specific enough not to make the analysis irrelevant and too superficial. This is hopefully avoided as the problem is recognized and considered as the attitudes are identified. A pattern emerges from the thesis' structure which provides a ground for the analysis, and no further definition of attitudes is made, as this would limit the analysis in an undesirable manner.

The occasions of interception at sea which are explained and analyzed in Chapter Three are chosen in order to provide a broad foundation for analysis and to cover a large geographical and temporal area. An exception in this selection, however, is the Haitian and Cuban-cases, which occurred in the same region within the scope of one year and the interception was in both cases implemented by the U.S. The events do however enable an interesting insight regarding how two similar situations are met by different treatment, and are thus both represented within the scope of the Chapter. For reasons of time and space, each presentation is brief and selective in order to enable a comparative analysis.

The descriptions of the course of events are based on literature studies. The attitudes by the international community have been researched by looking into reports from non-governmental organizations (NGOs), transcripts of meetings in the UNHCR Executive Committee and reports by the UNHCR; but also by analyzing court cases from both national and regional courts.

The NGOs chosen are limited to Human Rights Watch (HRW), Amnesty International, U.S. Committee for Refugees and organizations used by regional courts as third party interveners, because they are generally seen as credible and they have produced reports in the chosen cases.

The thesis describes events from 65 years ago and up until today. The published material regarding the Jews situation in 1947 is sparse, especially compared to the amplitude of material published on the Hirsi-case. This can be explained by the fact that boat refugees were not considered a problem at that time, but clearly also because of the time passed. Consequently, the subchapter on Palestine is shorter and analyzed in a shallower manner. As the sources are thinned out over time, the historical debate is sometimes hard to review in the same manner as events that are more current. A fair comparison of the different events can thus not be conducted, as certain subchapters are inevitably analyzed in a deeper manner. However, the aim is not to compare the events as such but rather to scrutinize the development. Keeping this in mind, the thesis is still relevant, as it provides an overview of the situation this far. Every case of exodus has been handled as if it was a new concept, to which different solutions has been implemented. A historic approach to the refugee problematic, such as the one taken within this thesis, can provide guidance in how new exoduses should be handled which eliminates the need to invent new solutions.

1.4 Delimitations and Definitions

Article 14 of the Universal Declaration of Human Rights (UDHR) provides a right to seek asylum. As UDHR is an instrument of soft law, which is not legally binding, this right is not be regarded within the scope of this paper. The regulation in the Charter of Fundamental Rights of the European Union as well as the American Declaration of the Rights and Duties of Man also provide a right to asylum, but as those instruments have a highly regional applicability, they are not scrutinized within this paper.

The term “illegal migration” and “illegal migrants” is purposely avoided within this thesis. To migrate in order to escape persecution is not a crime; it is a right established in UDHR, and the author actively resent any references to migrants as criminals purely because of them exercising their human rights. “Irregular migrant” is used regarding all persons arriving by sea in an irregular manner, which includes all boat refugees. It is possible that an irregular migrant is also a refugee, but states have to determine this before they will have access to protection under the Convention. Thus, the term irregular migrant is used even for those who are refugees.

The notion of good office refugees are not considered in this paper. No regard is further given to individual irregular migrant’s claims but only the right to get their claims assessed. The relevant regulations in international

law regarding interception at sea are extensive, and all relevant provisions are not included within the scope of this thesis.³

The author's utopia is a world where all relevant instruments of refugee protection are respected and implemented. Developments in a "negative manner" thus mean that the treatment/attitudes towards irregular migrants have become more restrictive, more degrading or even harsher. Please note that any references to the 1951 Convention and the 1967 Protocol on the Status of Refugees are shorted to "The Refugee Convention", and further that the "International Community" includes NGOs, regional courts and UN organs.

The discussion is based on the right to seek asylum that is argued for in Chapter Two. Another interesting question is whether or not there is a right to be granted asylum and a right to enter the territory. This discussion is left for someone else to consider. Interception at sea does on many occasions result in detention of irregular migrants, which often breaches the right to liberty. Questions following from such breaches are not considered. Both limitations are made as the inclusion of the issues would render this thesis too broad and thus shallow.

1.5 Outline

The substantial part of the thesis starts out in Chapter Two, which provides the legal background to the right to seek asylum. Chapter Three includes the description of six different occurrences of interception at sea, which have hindered migrants from seeking asylum. Each of the six subchapters provides a short background, a description of the event of interception and a presentation on the reaction by the international community. Lastly, the attitudes that can be crystallized from the national rationale behind the interceptions as well as the international reactions are scrutinized.

Chapter 3.1 presents the interception at sea which Jewish migrants was subjected to following the Second World War to provide the reader with the situation current prior to the adoption of the 1951 Convention. Chapter 3.2 reflects on the Vietnamese situation and how international cooperation was implemented during one of the greatest people movements of our time. Chapter 3.3 is disposed in a different manner, as the background in the Caribbean Sea is common for Haiti and Cuba. It further includes a concluding part regarding the differential treatment of irregular migrants from Haiti and Cuba. The two occasions are chosen as it provides the base for an interesting comparison. In order to geographically broaden the content, the Australian policies regarding the Tampa-incident are analyzed

³ For more information on how interception at sea is regarded in international law, the author would like to refer to UNHCR's "*Rescue at Sea, Stowaways and Maritime Interception – Selected Reference Materials*" 2nd ed., (2011)

in Chapter 3.4, and the more current situation in the Mediterranean Sea is lastly chosen to provide a modern example of interception at sea.

The attitudes towards irregular migrants shown by both states and the international community are further critically scrutinized in Chapter Four, which aims at establishing how the issue has developed over time. This differential treatment is compared to try and find trends in the implemented methods and the rationale behind the actions. The chapter also includes an analysis regarding how the attitudes and actions can be explained. By scrutinizing the conclusions drawn in the chapter, the future for boat irregular migrants' right to seek asylum is considered and speculated around.

Chapter Five presents concluding remarks on the development of attitudes, but also an idea on how such attitudes will develop in the future.

2 International Law

The international regulations in the context of boat refugees and the alleged right to seek asylum are briefly presented in this following chapter. It proves the existence of a right to seek asylum which enables the attitude analysis that is done in Chapter Three. The general regulations are firstly presented, including the definition of the term refugees and the principle of state of first asylum. Secondly, the more specific regulations regarding the right to seek asylum are provided, meaning the notion of *non-refoulement* under the Refugee Convention. The prohibition of *refoulement* exists in a number of other international and regional instruments, under the prohibition of torture. However, as the effect of the different regulations are identical to the one provided in the Refugee Convention, no attention is given to alternative instruments. The chapter concludes with establishing the right to seek asylum under refugee law.

2.1 Definition of the Term ‘Refugee’

The first paragraph of the Refugee Convention provides a definition of the term refugee by stating:

“For the purposes of the present Convention, the term “refugee” shall apply to any person who [...], owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

Certain elements of the refugee definition are relevant within the scope of this paper. Firstly, the person must be “outside of his country of origin”, but the article does not require that the person has entered another state. This indicates that refugee status may also be acquired on the High Seas.⁴ A person does not become a refugee because of recognition, but is recognized because he or she is a refugee.⁵ It is however necessary for the border control to try if an alleged refugee fulfills those requirements. The rights of an asylum seeker are identical to those of a refugee according the Refugee Convention, and a person is thus to be considered a refugee until it is proven that he is not.⁶

⁴ Zimmermann, *The 1951 Convention Relating to the Status of Refugees and its Protocol, a Commentary* (2011) Oxford University Press: New York p. 442 §582

⁵ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, UN Doc. HCR/1P/4/ENG/REV. 3 §28

⁶ UNCHR, *Conclusions Adopted by the Executive Committee on the International Protection of Refugees 1975-2009 (Conclusion No. 1 – 109)* (2009) Conclusion No. 79, No. 81 and No. 82

2.2 The Principle of “Country of First Asylum”

Article 31 of the Refugee Convention provides that no one should be penalized for illegally entering a state of refuge, given that the refugee has arrived directly from a state where he or she fears persecution. Certain states have interpreted this regulation to imply an obligation for the country of first asylum to try and grant refugee status. If a refugee has obtained refugee status in one state, this state will be responsible for protecting that person. If the refugee seeks asylum in a third country, he can be returned to the first country of asylum without any threat of persecution, which invokes the application of article 31. He can further not be granted refugee status again, based on article 33, which also includes a right for the states of destination to return an asylum seeker to the country of first asylum. However, the Refugee Convention is silent with respect to states’ positive obligations to assess refugee applications, and the principle has not formally been recognized elsewhere within international conventions or customary law.⁷

UNHCR has, on the one hand, recognized that asylum seekers should be admitted to the state in which they first seek asylum at least on a temporary basis.⁸ However, the Commissioner has further emphasized that this does not indicate a means for states to shirk their responsibilities towards individual refugees because the person has found or might be expected to find protection in another state, and that the Refugee Convention as a whole was designed to “provide certain standards of protection rather than to ensure that protection was available in a particular country.”⁹ For a country to provide effective protection, respect for *non-refoulement* is necessary but not conclusive, there is further a need of individual assessments, and no state should be categorized as generally safe. The risk of persecution for the individual shall always be decisive, and should be considered in all instances of returning asylum seekers to the country of first asylum, but also regarding other measures, such as visa regulations, carrier sanctions and pre-departure checks.¹⁰ It was further established at the 1977 Diplomatic Conference on Territorial Asylum that asylum should not be refused solely on the grounds that it could have been sought elsewhere.¹¹

The country of first asylum principle has been legislated by the European Union within the Dublin Regulation¹², which aims at identifying a single

⁷ Goodwin-Gill and McAdam, *The Refugee in International Law*, 3 ed. (2007) Oxford University Press: New York, p. 159

⁸ UNCHR (2009), *supra* note 6, Conclusion No. 22 (XXXII)

⁹ Ms. Feller (UNHCR): UN doc. A/AC.96/SR.585 (2004) §28

¹⁰ UNHCR, *Note on International Protection*, UN doc. A/AC.96/914 (7 July 1999) §19; UNHCR, *Note on International Protection*, UN doc. A/AC.96/830 (7 September 1994) §43

¹¹ UNHCR, *Background Note on the Safe Country Concept and Refugee Status*, 26 July 1991, UN doc. EC/SCP/68

¹² Council Regulation (EC) No 343/2003 of 18 February 2003, Establishing the Criteria and Mechanism for Determining the Member State Responsible for Examining an Asylum Application Lodged in one of the Member States by a Third-country National.

responsible state to prevent multiple applications from the same asylum seeker. This regulation is however not relevant within the scope of this paper and will thus not be scrutinized any further.

2.3 Non-Refoulement

The principle of *non-refoulement* has been referred to as the “cornerstone” in refugee law. As there is no universal, legally binding obligation for states to grant asylum, the right not to be returned to the borders of a country where the refugee will be persecuted constitutes the strongest commitment which states have been willing to make to those which are no longer under protection of their own government.¹³ The principle was first included in the Refugee Convention from 1933, which was only ratified by 9 states and served as a model for the 1951 Convention.¹⁴

Article 33 of the Refugee Convention states that:

“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.”

About three quarters of the world’s nations have ratified the Refugee Convention and/or the 1967 Protocol, and the Convention is thus not universally applicable on this ground. However, it has emerged to a part of customary international law¹⁵, as it fulfills the two elements required: state practice and *opinio juris*.

State practice is proven when “a very widespread and representative participation in the Convention” is shown, “especially of states whose interests were specifically affected”.¹⁶ Alongside the high number of ratifications, the practice of specifically affected states, which have hosted large number of refugees for many years, indicates that their behavior is in line with the requirements of *non-refoulement*.¹⁷ As regards *opinio juris*, the UNHCR Exclusive Committee established in 1977 that the principle was “generally established by states”¹⁸ and 125 states have implemented the principle of *non-refoulement* in their domestic laws, which also indicates *opinio juris*.¹⁹ It has further been accepted that parts of the *non-refoulement*- principle can be classified as *jus cogens*.²⁰

¹³ Gammeltoft-Hansen, *Access to Asylum –International Refugee Law and the Globalisation of Migration Control* (2011) Cambridge University Press: New York p. 44

¹⁴ Goodwin-Gill and McAdam, *supra* note 7, p. 203

¹⁵ UNCHR (2009), *supra* note 6, Conclusion No. 25 (XXXIII) – 1982 (b).

¹⁶ ICJ, *North Sea Continental Shelf*, Judgment, ICJ Reports (1969), No. 3 §§43 and 73

¹⁷ Zimmermann, *supra* note 4, p. 1343-44

¹⁸ UNCHR (2009), *supra* note 6, Conclusion No.6 (1977)

¹⁹ Zimmermann, *supra* note 4, p. 1344 §29

²⁰ *ibid* p. 1346 §32

The relevant regulation within the context of this paper is the issue of “returning a refugee in any manner to the frontiers of territories”. The notion of how this regulation is formulated and applied will thus be discussed in detail below.

2.3.1 Rejection of irregular migrants at the Border

Some of the cases of interception presented in Chapter 3 take place on in the territorial waters of the intercepting states. In order for that interception to amount to a breach of *non-refoulement*, it must be shown that rejections on the territories’ borders correspond to rejections on the territory of the state. This will be done below.

During the drafting process, the US delegate to the *Ad Hoc Committee on Statelessness and Related Problems* stated that

“[When] it was a question of closing the frontier to a refugee who asked admittance, [...] he must not be turned back to a country where his life or freedom could be threatened. No consideration to public order should be allowed to overrule that guarantee, for if the State concerned wished to get rid of the refugee at all costs, it could send him to another country or place him in an international camp.”²¹

The British delegate Brass concluded from the discussion that the notion of “*refoulement*” could apply to *inter alia* refugees seeking admission.²² Accordingly, the 1951 Convention has to apply to the question of admittance as well. Those views were challenged during the Conference of Plenipotentiaries in 1950. The Dutch representatives wanted to limit the personal scope of the rule to only include refugees already present in the state territory, an opinion that was seconded by the Swiss delegate, albeit only regarding times of mass influx.²³ The Dutch interpretation was that mass migration across the border was not covered by article 33, unless “international collaboration was sufficiently organized to deal with such a situation”.²⁴ The comments were put in the records but are neither an official interpretation of the convention nor a binding limitation on the plain language.²⁵ It can thus be established that even though the issue of admission was discussed during the drafting process of the Convention, the final text does not include a limitation to migrants present in the country of refuge.

Whether rejection at a border can amount to a breach of *non-refoulement* has been actively discussed in the literature. According to Zimmermann, the

²¹ Ad Hoc Committee on Refugees and Stateless Persons, *Summary Record of the Twentieth Meeting Held at Lake Success*, UN doc. E/AC.32/SR.20 §§54-55

²² Ad Hoc Committee on Refugees and Stateless Persons, *Summary Record of the Twentieth Meeting Held at Lake Success*, UN doc. E/AC.32/SR.21 §16

²³ UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Summary Record of the Sixteenth Meeting*, UN doc. A/CONF.2/SR.16 p. 6

²⁴ *Ibid*, p. 11

²⁵ Goodwin-Gill and McAdam, *supra* note 7, p. 206, note 22

refugee is under the effective control of the country of refuge as soon as he has approached a border guard, and the country of persecution is thus hindered from arresting the refugee without breaching the sovereignty of the country of refuge. As the refugee is under the control of the country of refuge, that state should be held responsible for the conduct of its border authorities. If the refugee is refused, he will inevitably be “returned to the frontiers of the territories where his life or freedom would be threatened”, and the country of refuge is thus violating article 33.²⁶

The Refugee Convention does not regulate the right to asylum, but this does not indicate that the principle of *non-refoulement* should not apply to rejections at the border. The principle does however not provide an obligation for states to grant refugees asylum. According to Kälin, to fulfill the obligations posed by article 33, states that do not grant the refugee asylum must adopt a course that does not amount to *refoulement*, which might involve removal to a safe third country or providing temporary protection for the refugee.²⁷ An interpretation in accordance with Vienna Convention on the Law of Treaties (VCLT), articles 32-33 provides that the rejection of a refugee at the border is prohibited under article 33, an unambiguous and reasonable conclusion, which is supported both by the wording of the article and the humanitarian purpose of the Convention. The statements made by the Swiss and Dutch delegates during the drafting process which contravene this conclusion is considered a supplementary means of interpretation, which is not determinative as long as other interpretative methods lead to an unambiguous and reasonable result.²⁸ To sum up, many arguments support the conclusion that rejection of refugees at the territorial border of the state amounts to a violation of article 33. This conclusion has been confirmed by UNHCR.²⁹

2.3.2 Rejection of irregular migrants on the High Seas

A number of the occasions of interception under chapter 3 are implemented on the high seas, where the intercepting state stops a ship with irregular migrants on the high seas and uses different means to return it to its country of embarkation or a third state. For this to amount to *non-refoulement* within the intercepting state’s jurisdiction, the extraterritorial application of the Refugee Convention must be proved.

Unlike other articles in the 1951 Convention, article 33 lacks a territorial limitation for application. An *e contrario* interpretation supports the argument that the article thus has extraterritorial application, wherever a state exercises jurisdiction over a refugee. Jurisdiction is exercised wherever a person is under the effective control of; or is directly affected by, those

²⁶ Zimmermann, supra note 4, p. 1369 §105-107

²⁷ Kälin, *Non-Refoulement* (1982) Peter Lang Publishing Inc., p. 107

²⁸ Zimmermann, supra note 4, p. 1368, §109

²⁹ UNHCR (2009), supra note 6, Conclusion No 81, No 82, No. 85, No. 99, and No. 108

acting on behalf of the state in question.³⁰ State actors exercising effective control over a refugee outside of the state's territory are thus bound to act in accordance with article 33. This has further been confirmed by the UNHCR, by stating that the prohibition of *refoulement* applies wherever a state exercises jurisdiction, including at the frontier, on the high seas or in the territory of another state.³¹ It would be inconsistent with the object and purpose of the Convention to avoid responsibility under article 33 simply because the state is acting outside of its own territory. The scope of *non-refoulement* regulates the prohibition to return someone *to* a certain state, rather than *from* a state, which indicates that the place where the refugees are moved from is unimportant.³² Gammeltoft-Hansen has confirmed this by referring to the purpose of article 33 which is to prevent a certain consequence, namely the return of refugees to persecution. He thus claims that there is no *a priori* reason to limit its obligations to state territory.³³

2.4 The Right to Seek Asylum

The right for refugees to seek asylum generally stems from the effectiveness of article 33. Lauterpacht described the notion of effectiveness within international law in 1958 by stating “the maximum of effectiveness should be given to it [an instrument] consistently with the intention – the common intention – of the parties”.³⁴ To use the common intention of the authors to a treaty as a means of interpretation is further established in article 31 of the Vienna Convention on the Law of Treaties.

The Refugee Convention does not express a binding right for migrants to seek asylum, it only obliges states not to return anyone who would risk persecution. A migrant can thus not claim any right to be screened, but the state must make sure not to return a refugee to a country of persecution regardless. It follows from the notion of effectiveness that for a country to effectively fulfill its obligations under article 33, a certain screening must be conducted, and such a screening amounts to an asylum procedure. An interpretation of the Refugee Convention that disregards the right for migrants to seek asylum would be contrary to the common aim of the authors of said Conventions intention.

³⁰ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports (2004) §179ff.

³¹ 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, §24

³² Gammeltoft-Hansen, *supra* note 13, p. 45-47

³³ *ibid*, p. 97

³⁴ Lauterpacht, *Development of International Law* (1958) Oxford University Press: New York, p. 229

Plender has further explained this:

“The right to seek asylum, otherwise expressed, is (at least) a right to advance a claim. The right to advance a claim has little practical content if States are entirely at liberty to determine, in their absolute discretion, how that claim must be advanced and how it may be considered. [...] it appears possible to identify some minimal restrictions on the latitude enjoyed by States in this matter...”³⁵

Plender identifies an obligation to establish a determination procedure, which should "ensure the impartial and equitable application of the principles [regarding determination of refugee status], some special system of semi-judicial machinery should be created, with appropriate constitution, procedure and terms of reference."³⁶

The right to seek asylum has further been confirmed by the UNHCR on many occasions through the organization's Executive Committee's conclusions. The role of the UNHCR is according to the Refugee Convention to supervise the signatory states in the fulfillment of their mandate, and article 35 states that the parties must “undertake to cooperate.... and shall in particular facilitate its duty of supervising the application of the provisions of this Convention”.³⁷ It lies within the UNHCR Executive Committee's mandate to adopt conclusions on International Protection. Those are not legally binding but still relevant to the interpretation of the international protection regime as they expresses opinions which are “broadly representative of the views of the international community”³⁸

In Conclusion number 15 from 1979, the Executive Committee stated that it is the humanitarian obligation of all coastal states to allow vessels in distress to seek haven in their waters and to grant asylum or temporary refuge to persons on board wishing to seek asylum. Regarding situations of large-scale influx of asylum seekers, the Executive Committee stressed that all persons seeking asylum shall receive at least temporary refuge and that states which, because of its geographical location, receives a large-scale influx should receive assistance from other states in accordance with the principle of “equitable burden-sharing”.³⁹ It is less clear if the obligation provided by Conclusion 15 stem from article 33 or from a more general “humanitarian obligation” and the law of the sea.⁴⁰

In conclusion, the effectiveness of the prohibition of *refoulement* would be deficient if its application were limited to those who get “the right to claim a

³⁵ Plender, *The Right of Asylum*, Centre for Studies and Research in International Law and International Relations (1989) Martin Nijhoff Publishers: Dordrecht, p. 82

³⁶ *ibid*, p. 82

³⁷ Morris, “The Spaces in Between: American and Australian Interdiction Policies and Their Implications for the Refugee Protection Regime” in *Refuge* (2003) Vol. 21, No. 4: *Interdiction at the Expense of Human Rights*, p. 59

³⁸ UNHCR, <http://www.unhcr.org/pages/49e6e6dd6.html>

³⁹ UNCHR (2009), *supra* note 6, Conclusion 15

⁴⁰ Gammeltoft-Hansen, *supra* note 13, p. 71

right". It can thus be established that a right to seek asylum exists following from the prohibition of *non-refoulement*. This provision is universal and a part of customary international law, and applicable both on the high seas and at the border. Regardless of this theoretical conclusion, interception at sea has been implemented over the past 65 years resulting in non-fulfillments of the right to seek asylum. A presentation of how this unlawful implementation has been applied and what attitudes can be identified in the application will be provided in the next chapter.

3 The Post World War II History of Boat Refugees

The legal regulation protecting the right for migrants to seek asylum was presented in Chapter Two. This chapter will present the history of boat refugees through a number of historical occurrences where refugee boats have been intercepted by the state, either on high seas or in the territorial waters of the receiving state, where migrants' rights to apply for asylum have been impeded. Each event will be presented by providing the background to the situation and the reasoning behind the interception, given by the intercepting state. This will be followed by comments regarding the event provided by the UNHCR, regional courts or NGOs, in order to establish the international community's opinion on the event. Lastly, the provided statements by the international community will be analyzed to try and establish the attitudes shown against the irregular migrants travelling by boats.

The chosen occurrences of interception have been selected to demonstrate the broadest possible perspective, both geographically and temporally. Events from 4 different continents over 65 years of time will be assessed. This will hopefully provide a "bigger picture" which enables a deeper analysis regarding the development on attitudes towards irregular migrants. The temporal frame is chosen as a new legal paradigm was introduced following the Second World War, with the creation of the United Nations and the adoption of the UDHR. This new paradigm introduces a convenient time to start off an analysis.

3.1 Irregular Jewish Migrants in Palestine 1947

The chapter begins by describing the interception that took place in the Mediterranean Sea following the Second World War, where Jews were intercepted on their way to Palestine. This occurred before the adoption of the Refugee Convention, and was thus not commented on by the UNHCR. The analysis will therefore be rather short, because of lack of material on the subject. The subchapter serves to establish the situation for irregular migrants travelling by boats before the adoption of the Refugee Convention.

3.1.1 Background

The situation for the Jewish population in Europe remained difficult after the division of Nazi Germany between the Allied Forces. Regardless of the atrocities that the religious group faced during the war and through the

Holocaust, military commanders in the Western zones refused to accept that the Jews introduced special problems or had particularly urgent needs requiring attention. Jews were classified according to their former nationality, no notion was given to Jewish particularity, and many were put in camps for displaced people together with known anti-Semites. The British resistance shown against the recognition of a Jewish nationality has been argued to depend on the fear that such recognition would lend weight to the Jewish demand over the British colony Palestine.⁴¹ Immigration to Palestine was restricted by British migration control, through the White Paper of 1939, according to which there would be an annual quota of 10 000 Jews for the next five years, plus another 25 000 refugees.⁴²

3.1.2 Interception on the high seas: the Exodus-ship

To escape the poor living standards for Jews in Europe, many fled over the Mediterranean Sea to Palestine. As a measure to stop such irregular immigration, the British authorities intercepted ships with irregular migrants on their journey over the Mediterranean Sea and escorted them back to their ports of embarkation in Europe. This new method in the British fight against irregular immigration became known as *refoulement*.⁴³ The U.K. did not accept article 3 of the 1938 Refugee Convention, which legislated the principle of *non-refoulement*, and did thus not acknowledge the interception as a violation of the regulation. The *refoulement* of the ship SS Exodus in 1947 was the first amongst a number of vessels with irregular Jewish migrants, which were intercepted by the British authorities to hinder its arrival to Palestine. The vessel sailed from the port of Site in southern France in July 1947 with 4,500 immigrants. British destroyers accompanied the vessel as soon as it reached high seas, rammed it, and then boarded the following day, near the coast of Palestine but outside the territorial waters. The ship was sent to Haifa in Palestine, where the immigrants were forced onto deportation ships bound back to France. The immigrants rejected disembarkation in France, and the France authorities refused to force them. The British authorities decided to return the ship and the immigrants to the British parts of Germany, where the immigrants were put in camps.⁴⁴

3.1.3 International response

The international community criticized the British approach to the Exodus affair and the British were “treated to three months of unfortunate press”. As a reaction, the United Kingdom referred the Palestine question to the

⁴¹ Marrus *Unwanted - European Refugees in the Twentieth Century* (1985) Oxford University Press: New York, p. 332

⁴² *ibid*, p. 152f

⁴³ Halamish, *Exodus Affair: Holocaust Survivors and the Struggle for Palestine 1947* (1998) Syracuse University Press: Syracuse, p. 42

⁴⁴ Marrus, *supra* note 41, p. 338

General Assembly.⁴⁵ To assess the displaced persons in Europe following the war, the International Refugee Organization (IRO) was created. There was a conflict between East and West regarding which groups were genuine refugees entitled to international protection. Whereas West sought to include dissident and anti-Communist element, East tried to exclude those whom they thought were deadly political enemies. The IRO however ignored the discussions and the draft document's final definition of refugees inspired the definition provided in the Refugee Convention.⁴⁶

Alongside the assessment of the Palestine question in the General Assembly, the discussions of a new Convention on the Status of Refugees was brought up in the same forum. The ECOSOC appointed an Ad Hoc Committee in 1949 to "consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees".⁴⁷ The discussions led to the adoption of the 1951 Convention relating to the Status of Refugees.

3.1.4 Analysis: Attitudes towards irregular migrants in Palestine 1947

At the time of the Exodus-ship, the U.K. had yet to acknowledge the prohibition of *refoulement*, and the migrants were only subjected to *ad hoc*-migration control. The U.K. had no legal obligation towards where the migrants ended up, except from a bilateral agreement between states, according to which the U.K. had to allow 75,000 refugees access to Palestine during 5 years.⁴⁸ Such quota does not adjust the number of refugees to the current situation: the moment 75,000 had gained entry, no one else was allowed in. The attitude towards refugees under such agreement indicates that no attention is given to humanitarian principles and the needs of people in a desperate situation. Migration control was discriminative and would have been violating human rights after the adoption of UDHR in 1948. Luckily, the migration control that the irregular migrants onboard the Exodus were subjected to in 1947 was eliminated through the adoption of the Refugee Convention in 1951, at least in theory. The discussions in the IRO regarding the refugee definition also provide certain clarity regarding the attitudes towards irregular migrants at that time. While Western powers were afraid of welcoming communists as refugees in need of protection, Eastern powers refused to acknowledge the needs of political enemies. The refugee definition provided by the IRO, which was legislated in the Refugee Convention, prevents discrimination by the receiving state. The fears of both Western and Eastern states were thus not given any attention.

⁴⁵ *ibid*, p. 339f

⁴⁶ *ibid*, p. 341

⁴⁷ ECOSOC res 248(IX)B, 8 Aug 1949

⁴⁸ Marrus, *supra* note 41, p. 335

3.2 Irregular Vietnamese Migrants in Indo-China 1975-1985

There is a lot to be said about how the irregular migrants from Indochina were handled and received by the Western states. As the topic of this paper is the right to seek asylum, the notion of international cooperation handling the refugee crisis in Indochina will not be scrutinized in detail, but only briefly in subchapter 4.2. Focus will rather lie on how the irregular migrants were received in the first country of asylum, and not on how the resettlement processes in the Western states were implemented.

3.2.1 Background

For half a century, Indochina was ravaged by war, resulting in a mass exodus from Vietnam, Laos and Cambodia. Many fled the war by boat.⁴⁹ Some of the irregular migrants were ethnic Chinese, which the Vietnam communist government considered undesirable in their “new society”.⁵⁰ The irregular migrants fleeing by boat ended up in the surrounding, non-communist countries, mainly Thailand, Indonesia and Malaysia.

In 1975, the Thai Cabinet stated that it was undesirable to allow displaced persons to seek asylum in Thailand, and that they should be pushed out as soon as possible. The boats that had reached the shores should be provided minimum help and then be towed out of the Thai waters without delay, and boats that were stopped within the territorial waters were to be towed out immediately.⁵¹ However, as the exodus developed and became more extensive, the principles changed; the push-backs by the Thai authorities became more brutal and effective, and less humanitarian support was provided to the boats before they were pushed back. In 1978, Thailand was the country that received the largest influx of displaced persons from the Indo-Chinese peninsula.⁵²

After the Vietnamese invasion of Cambodia during the summer of 1979, large amounts of irregular migrants reached Thailand by boat. The screening process for refugees was ineffective and the army commander chief stated:

“The UNHCR feels we have to assist all the incoming refugees, but we think we have had enough trouble and need not increase the size of the burden. [...] If the refugees are sick, we give them medicine, if they are hungry, we will feed them. And when they have recovered, they will be pushed back across the border.”⁵³

⁴⁹ Robinson, *Terms of Refuge – the Indochinese exodus and the International Response* (1998) Zed Books: London

⁵⁰ Wain, “Indochina Refugee Crisis” in *Foreign Affairs*, Vol. 58 (1979-1980) p. 163

⁵¹ Robinson, supra note 49, pp. 20 and 43

⁵² UNHCR, *Report of the UNHCR* (1978) UN doc. A/33/12 §200

⁵² Robinson, supra note 49, p. 45

⁵³ *ibid*, p. 45

Further, the head of the International Committee of Red Cross delegation in Bangkok was forced to leave the country after acknowledging the regular practice of *refoulement* implemented by the Thai authorities through push-backs, as the Thai Prime minister deemed the refugee situation “a national interest”. UNHCR expressed its deep concern over this decision and asked to prevent further push-backs, a reaction which has been deemed “one of the low points in its [UNHCR’s] protection history.”⁵⁴

The situation in Indochina became more acute, and the foreign ministers of the five-member Association of Southeast Asian Nations (ASEAN) issued a joint communiqué, stating that they had reached the limits of their endurance and had decided not to accept any new arrivals, and that those who arrived illegally would have to be found and sent out of the country. The Malaysian prime minister was quoted in the local daily on June 16th, 1979, stating that he had given order to “shoot on sight” any Vietnamese found trying to enter Malaysian territory.⁵⁵

3.2.2 Interception at the border: The Hai Hong

The freighter Hai Hong departed from Singapore in October 1978 with the objective to pick up Vietnamese migrants. 2,500 irregular migrants, which had paid smugglers to get out of Vietnam, were rescued from the smugglers’ smaller boats by the freighter. Hai Hong anchored in Indonesia temporarily but was forced back out to the high seas and ended up in Malaysia. The Malaysian authorities wanted the ship to return to sea whereas UNHCR and Western Embassies urged that the boat should be allowed ashore for resettlement of the irregular migrants. The standoff lasted for two weeks.⁵⁶

The representative of UNHCR reported from Malaysia and expressed his concern for the 2,500 Vietnamese on board the Hai Hong, and the UNHCR reacted in November 1978 by declaring that all irregular migrants from Vietnam that travelled by boat was of *prima facie* concern for the UNHCR. This decision gave the Vietnamese asylum seekers *de facto* refugee status, regardless of their individual situations. This status remained for a decade.⁵⁷ The recognition of *prima facie* refugee status on the basis of the objective circumstances in the country of origin giving rise to exodus aims at ensuring admission to safety, protection from *refoulement* and basic humanitarian treatment for those in need of it. Following this statement, the passengers of Hai Hong were disembarked off the freighter and put in UNHCR’s refugee

⁵⁴ McNamara *The politics of humanitarianism: a study of some aspects of the international response to the Indochinese refugee influx (1975-1985)* Unpublished manuscript, Section II, p. 47; Section V, p. 21

⁵⁵ Robinson, *supra* note 49, p. 51

⁵⁶ *ibid*, p. 28

⁵⁶ *ibid*, p. 28

⁵⁷ *ibid*, p. 29

camps.⁵⁸ However, the Malaysian government did not follow suit to the new directives from UNHCR. As a reaction to the arrival of the ship *Hai Hong*, the Malaysian National Security Council created the Federal Task Force on Vietnamese Illegal Immigrants (called Task Force VII) and provided it with, *inter alia* the task to “stop landings of boat people”.⁵⁹ This was implemented as the Malaysian authorities “assisted” the boats, carrying Vietnamese passengers, out of territorial waters and left them in the high seas. In May 1979, 13,500 people were refused asylum in Malaysia and pushed back out to sea. According to UNHCR, most of those pushed back boats ended up in Indonesia, where the massive flow of irregular migrants increased rapidly.⁶⁰ There was, however, a tacit “gentlemen’s agreement”, between the Task Force VII and UNHCR, giving the UNHCR the opportunity to help irregular migrants they reached before Task Force VII by putting them in refugee camps.⁶¹

3.2.3 International response

In his yearly report 1978, the High Commissioner, Poul Hartling, requested for all coastal states to provide disembarkation permission to those coming to their shores in order not to demean humanity.⁶² The Commissioner further arranged a consultative meeting with interested governments on refugees and displaced persons in South-East Asia, which was held in December 1978. The meeting emphasized that humane and durable solutions to the refugee situation in Indochina depended on the granting of temporary asylum in accordance with internationally accepted humanitarian principles by governments. Lastly, concerns regarding the high magnitude of refugees were raised, and it was established that existing facilities in countries of first asylum were already overloaded, resulting in a dependency on third countries to facilitate resettlement and avoid residual problems.⁶³ In 1979, The General Assembly addressed the problem at the Meeting on Refugees and Displaced Persons in South-East Asia in 1979. The Secretary General issued a communication regarding the need for a strict adherence to the internationally accepted humanitarian principle of asylum, as a generous policy of at least temporary asylum was the foundation for humanitarian action. He further emphasized the importance of realization of the

⁵⁸ UNHCR, Protection of Refugees in Mass Influx Situations: Overall Protection Framework, Background Paper prepared for the Global Consultation on International Protection, UN doc. EC/GC/01/4, 19 Feb. 2001, § 6

⁵⁹ Hedman, “Refuge, Governmentality and Citizenship: Capturing ‘Illegal Migrants’ in Malaysia and Thailand” in *Government and Opposition* (2008) Vol. 43, No. 2, pp. 358–383

⁶⁰ Robinson, *supra* note 49, p. 43

⁶¹ Interview with Francois Fouinat, Geneva, 12 February 1996, as cited in: Robinson, *supra* note 49, p. 42

⁶² Statement by Mr. Poul Hartling, UNHCR, to the Third Committee of the United Nations General Assembly, 13 November 1978

⁶³ Consultative Meetings with Interested Governments on Refugees and Displaced Persons in South-East Asia (Geneva, 11-12 December 1978) (Protocol annexed to the Report of the Secretary-General, UNGA Meeting on Refugees and Displaced Persons in South-East Asia, convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979) § 1 and § 5 (a)

interrelationship of obligations and responsibilities on part of countries of origin, of first asylum and of final settlement. The Secretary General further stated that the economic and social constraints of the countries of first asylum made it essential for the countries outside the area to assume the principal responsibility for resettlement. Regardless of this, the countries of first asylum were nevertheless expected to respect fully the principle of first asylum for refugees coming by land or sea.⁶⁴

The meeting was successful in many ways, and the Secretary General stated in his report that “The proceedings were marked by an extraordinary spirit of co-operation [...] Generous offers of places of resettlement, of processing centers and of funds were made.” Following the Meeting, the Thai authorities were persuaded to give temporary asylum to all who seek refuge in the present circumstances.⁶⁵ The UNHCR director further explained “the Vietnamese crisis is perhaps the experience that best exemplifies what can be achieved when international organizations, governments and the shipping industry pull together to find workable solutions to a humanitarian crisis.”⁶⁶

3.2.4 Analysis: Attitudes towards irregular migrants in the Indochina 1975-1985

As regards the attitudes shown against irregular migrants during the exoduses in Indochina, certain aspects provide some interesting insights. To start off, it is important to emphasize the extreme migration situation, where three million persons fled Vietnam during five years, which makes it one of the great population shifts in history.⁶⁷ However, the irregular migrants were not fleeing from a poor country to a rich but rather between developing countries to escape persecution from the authorities. Because of the economic situation in the countries of first asylum together with the amount of refugees, the situation became unsustainable and the receiving governments became desperate. The initial reaction against the irregular migrants by the receiving countries was to provide them certain first aid but returning them to the high seas, actions which can be compared to Band-Aids for bullet holes, as the government only made sure that the irregular migrants survived as long as they stayed within the territorial waters, but did not allow any screening for refugees and did not offer a solution but rather pushed the boats out to make them someone else’s problem. As the situation

⁶⁴ UN General Assembly, *Meeting on Refugees and Displaced Persons in South-East Asia*, convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979, and subsequent developments: Report of the Secretary-General, 7 November 1979, UN doc. A/34/627, § 12

⁶⁵ Statement by Mr. Poul Hartling, UNHCR, to the Third Committee of the United Nations General Assembly, 12 November 1979

⁶⁶ UNHCR, Presentation by Ms. Erika Feller, Director, Department of International Protection, UNHCR, at the International Shipping Federation Manning and Training Conference, The British Library, London: *“Asylum-seekers, refugees and Rescue-at-Sea”*, 11 September 2002

⁶⁷ Wain, *The Refused: The Agony of the Indochina refugees* (1981) Simon and Schuster: New York, p. 80

became more extreme, the treatment evolved into using actual force to keep the refugees out.

The “Gentlemen’s agreement” between the Malay authorities and UNHCR establishes that there was no principal resistance against irregular migrants; the Malay authorities did nothing to hinder the work by UNHCR, as long as it was not within the responsibilities of Malaysia. It is arguable that the attitudes and actions taken by the first countries of asylum were not based on principles but rather economic distress.

When it comes to matters of resettlement, the Western states provided a general attitude of co-operation towards the crisis and initially worked on a voluntary basis. All states had the opportunity to ignore the exodus and refer the problem to the countries of first asylum, as the irregular migrants were half-way around the world to most Western countries. Instead, some states chose to intervene to solve the humanitarian situation and showed through this support for the right to seek asylum. The reasons for this generosity will be further scrutinized below. (See chapter 4.2)

When it comes to the attitudes shown by the UNHCR, the organization worked actively in Malaysia to receive the irregular migrants before the authorities pushed them back and thus confirmed the importance of granting temporary asylum while waiting for replacements. The right to seek asylum was thus indirectly confirmed by UNHCR in this case, and further by Harting, stating that denying the asylum seekers to embark would demean humanity. The access to asylum for the irregular migrants was thus grounded in humanitarian assistance rather than refugee law, which can possibly be explained by the fact that the countries of first asylum (Indonesia, Malaysia and Thailand) were not parties to the Refugee Convention. This further explains why the UNHCR initially was reluctant to refer to the irregular migrants as refugees, and the official documents rather uses the terms “displaced persons from Indo-China outside their country of origin”, or “persons leaving Indo-China on small boats”.⁶⁸

3.3 Irregular Haitian and Cuban Migrants in the U.S. 1993 – 1994

3.3.1 Background

The United States is the Western country that has accepted the highest numbers of refugees since the end of World War II. The rationale behind this inclusiveness could be its history as a country of immigration, but as will be shown, the refugee admissions has also become entangled with foreign policy.⁶⁹ In this chapter, the exoduses from Haiti and Cuba will be

⁶⁸ Goodwin-Gill and McAdam, *supra* note 7, p. 28

⁶⁹ Gibney, *The Ethics and Politics of Asylum – Liberal Democracy and the Response to Refugees* (2004) Cambridge University Press: Cambridge, p. 132f

presented, and the differential treatment of the irregular migrants will be assessed. Lastly a number of concluding remarks regarding the U.S. attitudes towards Cubans and Haitian will be provided.

3.3.2 Haiti

The United States and the Republic of Haiti entered into an agreement in 1981, according to which the United States Coast Guard was authorized to intercept vessels engaged in illegal transportation of undocumented aliens to the US shores.⁷⁰ It was further established that the U.S. would not return passengers which qualify for refugee status. The Attorney General's mandate was expanded to include the establishment of procedures for aliens physically present in the U.S. or at a land border, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determined that such alien is a refugee.⁷¹ In the ten years following the agreement, only 28 out of 24,500 intercepted irregular migrants were permitted to enter the United States to apply for asylum, the rest were returned to Haiti.⁷²

The exodus of Haitian citizens escalated rapidly as a consequence of the military coup in Haiti in 1991, which resulted in the displacement of Aristide, the first democratically elected president in Haitian history, and caused many to flee the state. To release the pressure put on the Coast Guards, all Haitian irregular migrants which were picked up at sea were sent to Guantanamo Bay on Cuba for an initial screening. When Guantanamo became overcrowded in May 1992 to a point where it could not handle any more asylum seekers⁷³, nearly a third of those screened up until then had been found to have a credible fear of persecution and were allowed to proceed to the United States.⁷⁴ President Bush adopted an exclusive order which established that the interdiction and repatriation of irregular migrants should continue, but without the screening-in for those who might qualify as refugees. Such screening should be replaced by in-country processing instead of at the American Embassy, which was considered a "viable substitute" for the right to seek protection abroad. A humanitarian aspect was provided for the decision made by President Bush as a solution to the situation: many of the migrants were not refugees and would have to embark on a long journey back to Haiti on un-seaworthy ships after their asylum claims had been denied. The decision was implemented by the

⁷⁰ Agreement on Migrant(s) -- Interdiction, Sept. 23, 1981, United States-Haiti, 33 U.S. T. 3559, 3560, T. I. A. S. No. 10241

⁷¹ Ibid, Section 1158(a)

⁷² Newland, "The impact of US Refugee Policies in US Foreign Policy: A Case of the Tail Wagging the Dog?" in Tertelbaum and Weiner (eds.), *Threaten Peoples, Threatened Borders* (1995) Norton: New York, p. 190

⁷³ U.S. Supreme Court, *Sale, Acting Commissioner, Immigration and Naturalization Service, et al. v. Haitian Centers Council, Inc.*, (*Sale v. Haitian Centers Council Inc.*) 509 U.S. 155 (1993) §8

⁷⁴ Newland, *supra* note 72, p. 190

Coast Guards, which was instructed to stop and board all vessels and to return vessels and its passengers to the country from which it came.⁷⁵

3.3.2.1 Interception at the high seas: Sale v Haitian Centers Council, Inc.

Bush's executive order and its implementation were challenged in the case of *Sale v. Haitian Centers Council, Inc.*, where the Haitian Centers Council Inc. held that the order breached the prohibition of *non-refoulement* as expressed in the Refugee Convention and in domestic law. However, the Supreme Court established that neither domestic law nor international regulations such as article 33 of the Refugee Convention limited the power of the President to order the Coast Guard to repatriate undocumented aliens, including refugees, on the high seas.⁷⁶ The Court further stated that the drafters of the Refugee Convention and the Protocol may not have contemplated that any nation would gather fleeing refugees and return them to the country they had desperately sought to escape, such actions may even violate the spirit of article 33; but that a treaty cannot impose non-contemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. Because the text of article 33 cannot reasonably be read to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions.⁷⁷ The conclusion was thus that even if the action by the U.S. was in fact contravening the object and purpose of the Refugee Convention, the "general humanitarian intent" is not enough to apply for the extraterritorial application of the Convention, as this would be unreasonable.⁷⁸ The Haitian boat migrants were thus not considered to be under the protection of refugee law when intercepted on the high seas, regardless of their legal status.

The democratic members of the U.S. congress pressured president Clinton in 1994 to either admit Haitian boat people to the U.S. or to militarily intervene in Haiti to restore former president Aristide to power. In fear of electoral backlash, Clinton went with the latter course of action, stating that the intervention in September 1994 aimed at "protecting the integrity of the US borders." After Aristide returned to power in October 1994, the new Haitian government offered the Haitians on Guantanamo to repatriate to Haiti.⁷⁹

⁷⁵ Executive Order No. 12,807:57 *Fed. Reg.* 23133

⁷⁶ *Sale v. Haitian Centers Council Inc.*, supra note 73 §16f; Goodwin-Gill and McAdam, supra note 7, p. 247

⁷⁷ *Sale v. Haitian Centers Council Inc.*, supra note 73, §16f

⁷⁸ *ibid.*, §§23-27

⁷⁹ Gibney, supra note 69, p.162

3.3.2.2 International response

In recommendations to the Executive Committee of the UN High Commissioner for Refugees, Amnesty International expressed concern about the US policy of forcibly returning all Haitian irregular migrants directly to their country, without the possibility of having their cases tried.⁸⁰

UNHCR submitted an *amicus curiae* brief regarding the Sale-case in the U.S. Supreme Court, which was motivated by the fact that the Supreme Court's decision of the fundamental safeguard that is *non-refoulement* may "well influence, for years to come, the behavior of other countries and thus the fates of untold numbers of refugees throughout the world"⁸¹. The Commissioner stated:

"No State other than the United States has, to UNHCR's knowledge, resorted to the implementation of a formal policy of intercepting refugees on the high seas and repatriating them against their will. This fact confirms the international understanding that Article 33 prohibits such conduct".⁸²

The *amicus curiae* in the Sale-case urged the Supreme Court to acknowledge the absolute prohibition of *refoulement* of refugees, regardless of whether the refugee has been formally recognized as such by a state. It further established that no exceptions are made in article 33 for state conduct that occurs outside the territory or territorial waters of the contracting state.⁸³ The *amicus curiae* do not mention if a right to seek asylum follows from *non-refoulement* but focuses on the non-existent geographical limitations.

The Haitian Center for Human Rights challenged the U.S. Court judgment in the Sale-case, along with other cases regarding the interception and repatriation of Haitian migrants, in the Inter-American Commission of Human Rights. The case focused on the statement by the U.S. Court regarding the geographical limits of the principle of *non-refoulement*, which according to the court was not applicable outside of U.S. territory. The U.S. government stated that the U.S. law on the question of the 'right to asylum' of Haitians is perfectly clear: Haitians interdicted by the United States at sea are not entitled to enter the United States or to avoid repatriation to Haiti, even if they are refugees under the standards of the 1951 Refugee Convention or the standards of U.S. law.⁸⁴ The Inter-American Commission established that by interdicting Haitian boats and returning the irregular migrants to Haiti, the U.S. authorities hindered the migrants from seeking

⁸⁰ Amnesty International, *Amnesty International Report 1994 - United States*, 1 January 1994

⁸¹ UNCHR, "Brief *amicus curiae*" in *International Journal of Refugee Law* (1994) No. 6 p. 86

⁸² *ibid*, p. 92

⁸³ *ibid*, p. 85

⁸⁴ IAComHR, *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, Inter-Am.C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997). §160

asylum, not only in the U.S. but also in surrounding states, an action which breached the irregular migrants' rights to seek asylum in accordance with the American Declaration and *non-refoulement* under the Refugee Convention.⁸⁵ It further confirmed, by referring to the *amicus curiae* by the UNHCR in the domestic case, that article 33 does not have any geographical limitations.⁸⁶

3.3.2.3 Analysis: Attitudes shown towards irregular migrants from Haiti 1991

The U.S. attitude towards the right for the Haitian boat people to seek asylum shifts over the course of the exodus. From an initial screening on the high seas, to an asylum procedure at the local US embassy in Port au Prince rather than within the US, and lastly the irregular migrants are simply moved to refugee camps in Guantanamo without any screening. Bush explains this change in attitude by referring to humanitarian considerations. According to his statements, the more humanitarian alternative is to hinder the boats rather than to let them enter U.S. territorial waters and be rejected and sent back. The interception serves as an indication for other people not to flee by boats, as they could get seriously injured from the journey.

In the Sale-case, the Supreme Court interprets the intent of the drafters of the Refugee Convention, admitting that they could possibly not have foreseen a situation and a solution such as the one currently implemented at that time in the Caribbean Sea. However, this does not make any difference regarding the fact that a treaty cannot impose non-contemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent. As the text of article 33 cannot reasonably be interpreted to say anything at all about a nation's actions toward aliens outside its own territory, it does not prohibit such actions. In other words, the Supreme Court states that the action is possibly not in accordance with the original intent of the Convention, but it does however not amount to a violation of article 33. What is especially interesting regarding the Supreme Court's interpretation is that the implementation of article 33 has changed over time, as irregular migrants in the Caribbean Sea have been subjected to screening for refugees in the previous years, regardless of them being geographically outside of U.S. territorial waters and thus, jurisdiction. This was explained by the U.S. representative at the 442 Meeting of the Exclusive Committee, stating that the previous practice which included an element of *non-refoulement* was not based on legal obligations under the Refugee Convention, but rather as "a matter of humanitarian principles", and that *non-refoulement* was only applicable to those present in the US territory.⁸⁷ The U.S. did thus only regard itself bound by the Refugee Convention in a limited geographical area, and irregular migrants that had previously been offered protection outside of that area did only receive this

⁸⁵ *ibid*, §§162 - 163

⁸⁶ UNCHR (1994) *supra* note 81, p.86

⁸⁷ Executive Committee of The High Commissioner's Programme, *Summary Record of the 442nd Meeting*, Fortieth Session, 9 October 1989, A/AC.96/SR.442 §§ 78-9, 80, 82

treatment based on humanitarian principles, not on international law. This interpretation leaves the U.S. with a broad margin of scrutiny and demonstrates that obedience to humanitarian principles can change over time. In a response to a 2007 advisory opinion by the UNHCR, the United States confirmed yet again that any practice of the United States to respect the *non-refoulement* principle when carrying out interception on the high seas is a matter of national policy rather than an international obligation.⁸⁸ It can thus be established that U.S. refugee policies are easily adjustable to the current politic climate. The Supreme Court further states that international law as such cannot regulate the President's mandate, and thus claims that domestic law has supremacy over international law.⁸⁹

To sum up the attitudes shown towards irregular migrants in the Sale-case, it is clear that the Supreme Court acknowledges the principle of *non-refoulement* but uses all means present to avoid making the Haitian boat migrants the state's responsibility. The repeated usage of "humanitarian principles" rather than references to the Refugee Convention seems to be a way to pick and choose responsibilities depending on what is convenient at the time. It is evident that irregular migrants are used as a means in gathering points within a bigger political picture. This is further confirmed by the fact that the American Congress pressured Clinton to either admit the Haitian migrants on Guantanamo to the U.S., or to intervene Haiti to prevent a resumed exodus at its core, and Clinton decided to intervene and thus escaped having to admit the Haitian migrants. In other words – the U.S. intervention in Haiti in 1994 was partially a consequence of the reluctance to change the strict refugee policies.

UNHCR recognizes the importance of a clear statement following the U.S. policy change, which is deemed unique. The *amicus curiae* does not mention a right for the irregular migrants to seek asylum in the U.S. However, the commissioner states that the applicability of the Refugee Convention is not geographically limited.

The Inter-American Commission puts focus on the right under the American Declaration of Rights and Duties of Man to seek asylum, and that the U.S. has hindered the boat refugees to seek asylum in states other than the U.S., which violates the mentioned regulation. This indicates that the Commission considers the irregular migrants to have a right to seek asylum, even though they may not have a right to seek asylum in the U.S. However, the Commission does not comment more precisely on the issue of *non-refoulement*, other than agreeing with the UNHCR's *amicus curiae* on the lack of geographical limitation of the application of *non-refoulement*.

⁸⁸ US mission to the United Nations and other International Organizations in Geneva, Observations of the United States on the Advisory Opinion of the UN Commissioner for Refugees on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, 28 December 2007, p. 9

⁸⁹ Sale v. Haitian Centers Council Inc. supra note 73, §§14-32

3.3.3 Cuba

After Castro came to power in Cuba 1959, the U.S. tolerated the movement of Cubans into the U.S., as it was reluctant to repatriate people to a Communist country, while the Cuban government refused to accept the return of Cuban migrants who had previously left the country in an illegal matter.⁹⁰

The granting of asylum for Cuban migrants was seen as a way of hastening the regime's rapid demise, and the admission of such large numbers of Cubans had little to do with persecution or escaping violence, there was rather a lot of economic migrants or persons migrating on grounds of family reunification, which was admitted. This ideological use of refugee policy diminished as the Cold War ended in 1989, as the ideological benefits of the US image as a country that was the sanctuary for the oppressed were outmatched by the costs of appearing to tolerate uncontrolled migration.⁹¹

3.3.3.1 Interception at the high seas: the “Wet Feet, Dry Feet” - policy

In July 1994, Cuban asylum seekers attempted to hijack a Cuban ferry in order to reach the United States. The Cuban authorities stopped the hijacking with heavy loss of life among the asylum seekers as a consequence. The incident was the start of riots in Havana, directed against Castro, which resulted in the opening of the Cuban borders by Castro for the first time since 1980, for those who wanted to leave Cuba by boat.⁹² The action resulted in a mass exodus, through which 35,000 Cubans took to the sea and headed for the U.S. During previous exoduses, the U.S. had welcomed irregular migrants from Cuba, but in 1994, Clinton ordered the Coast Guard to intercept all Cuban boats and deny them asylum.⁹³ This marked the end of a 28 years old tradition to automatically grant political asylum to Cuban asylum seekers, and to the implication that all Cubans were subjected to persecution. All Cubans which were intercepted by the Coast Guard were sent to the refugee camps in Guantanamo Bay on Cuba, where Haitian boat refugees were being sent at the same time.⁹⁴ The reason provided for the interception was both to “quell the influx of migrants” and to save the boat people’s lives“,⁹⁵ or, “to deter further dangerous migration from Cuba, and to provide Cubans seeking entry into the state a safe alternative to boat departures.”⁹⁶ However, administration officials were also

⁹⁰ Wasem, *Cuban Migration to the United States: Policy and Trends* Congressional Research Service (2009) p. 2

⁹¹ Gibney, *supra* note 69, p. 158f

⁹² Newland, *supra* note 72, p. 190

⁹³ Human Rights Watch, *Cuba – Repression, the Exodus of August 1994, and the US response* (1994) Volume 6, No.12, p. 10f

⁹⁴ Olson and Olson, *Cuban Americans: from Trauma to Triumph* (1995) Twayne Publishers: London, p. 111

⁹⁵ *Cuban-American Bar Association, Haitian Refugee Center, Inc., v. Warren Christopher, Secretary of State*, Nos. 94-5138, 94-5231 and 94-5234 (11th Cir. 1995) §1.A(1)

⁹⁶ *ibid*, at footnote 2

keenly aware of the electoral disadvantages of presiding over a refugee influx seen to be out of control as this had been an issue in the past.⁹⁷ It has further been argued that the policy changes introduced by Clinton in August 1994 were set in motion to punish Castro for permitting the exodus to occur.⁹⁸

Less than a month after the opening of the Cuban borders, 27,500 irregular migrants had been picked up by the Coast Guards and transported to Guantanamo. In September 1994, the U.S. and Cuba reached an agreement, through which Castro assured that he would prevent unsafe departures from Cuba, by restoring “illegal exist” provisions in the penal code, and using “mainly persuasive methods” (a statement which HRW has interpreted as allowing force to end the exodus), in exchange for a promise by the US to admit a minimum of 20 000 Cubans each year.⁹⁹ The agreement thus encouraged Cuban migrants to apply for asylum at the Swiss Embassy in Cuba rather than trying to reach the U.S. without permission.¹⁰⁰ However, those who managed to reach the U.S. shores were allowed to stay and be subjected to determination of refugee status, which resulted in the name “the Wet Feet, Dry Feet” – policy. The U.S. and Cuba did not reach an agreement on how to handle Cubans which had left Cuba in an illegal manner.¹⁰¹

The September-agreement effectively ended the exodus from Cuba, leaving the U.S. with 25,000 irregular Cuban migrants detained at Guantanamo Bay. The Cuban migrants were left with three alternatives: to stay at Guantanamo; try to return to the Cuban territory, despite the threat of punishment because of their illegal exits; or to seek asylum in a third, safe country. Discussions followed regarding whether the policy amounted to *non-refoulement*, but the Court of Appeals held that, in accordance with the judgment in *Sale v. Haitian Council for Refugees*, article 33 was not applicable extraterritorially and the refugees held at Guantanamo Bay were thus not protected against *non-refoulement*, nor any other substantial rights provided by the Refugee Convention.¹⁰² This argument was challenged and its content denied by the UNHCR and the Inter-American Commission of Human Rights, see Chapter 3.4.2.2 below.

3.3.3.2 International response

The HRW report from 1994 acknowledges the September- agreement between the American and Cuban governments regarding the interception of Cuban refugees and establishes that the Border Patrol agents of the Immigration and Naturalization Service violates the refugees’ right to be free from torture or cruel, inhuman or degrading treatment as well as the

⁹⁷ Newland, *supra* note 72, p. 190

⁹⁸ Human Rights Watch, (1994) *supra* note 93, p. 11

⁹⁹ *ibid*

¹⁰⁰ As the United States and Cuba do not have formal diplomatic relations, U.S interests in Cuba are conducted through the Embassy of Switzerland in Havana.

¹⁰¹ Wasem, *supra* note 90, p. 3

¹⁰² U.S. Supreme Court, *supra* note 95

right to liberty and security.¹⁰³ The report does not, however, discuss the compliance with *non-refoulement*.

Amnesty International's report from 1995 does not express any opinion regarding Clinton's sudden policy change in 1994, through which all boat migrants were denied asylum without any screening. The report establishes a concern regarding a substantial number of Cubans held at Guantánamo Bay, who were not permitted to seek asylum in the U.S., and that they could risk human rights violations upon return to Cuba. Amnesty emphasized the irregular Cuban migrants' right to present their asylum applications in accordance with internationally accepted procedures. It is however notable that Amnesty does not as such mention the U.S. acts of inception, but rather focuses on the treatment the irregular migrants receive following the inception.¹⁰⁴

3.3.3.3 Analysis: Attitudes shown towards irregular migrants from Cuba in 1994

Before 1994, all Cubans that reached the U.S. shores were categorized as refugees as they were all considered to be risking persecution upon return to Cuba. This dramatically changed after the end of the Cold War when the ideological benefits from such policy were no longer more persuasive than the economic costs. A drastic change in the prior attitude was implemented as a result of the 1994 Agreement. This agreement further introduced migration control in the same manner as was done in Palestine following the Second World War, with the same discriminative result.

It can be argued that both the US – Cuba Agreement and the decision to detain the Cuban irregular migrants in Guantanamo were completely politically motivated. Clinton motivated the new agreement and the new stricter policy towards boat refugees as a way to “discourage further exits” without any regard to *non-refoulement*, neither within the agreement nor in its implementation. This is perhaps not surprising, as the U.S. had established just months earlier that they did not consider *non-refoulement* to be applicable outside the American territorial waters and the interception took place on the high seas. In the Cuban case, the attitudes towards irregular migrants can be established both by looking at the U.S. and Cuban policies. It has been argued that Castro used the new refugee policy and opened the borders in order to “get rid of” political opponents, a reasoning Clinton met by stating that the best solution for Cuba was for the migrants to stay in Cuba to change the system rather than to escape from it.¹⁰⁵ The irregular migrants were thus used as a checker in a political game from both parties at this point, rather than respected and protected in accordance with international obligations. On top of this, it can further be argued that the

¹⁰³ Human Rights Watch, *Human Rights Watch World Report 1995 - United States*, 1 January 1995

¹⁰⁴ Amnesty International, *Amnesty International Report 1995 - United States*, 1 January 1995

¹⁰⁵ Newland, *supra* note 72, p. 190

irregular migrants were used as a means of punishment vis-à-vis both of the governments. The statement by Clinton regarding the Cubans obligations to fight the system rather than flee from it shows nonchalance and lack of insight in the refugees' situation.

The “wet feet, dry feet”-policy is very discriminative, but not surprising considering the general U.S. interpretation of the geographical scope of the Refugee Convention. The policy did not change the attitudes towards alleged persecution taking place in Cuba; it rather limited the geographical scope for Cuban irregular migrants to be as narrow as it was for Haitian irregular migrants.

3.3.4 Conclusions Regarding U.S. Attitudes Towards Irregular Migrants

The U.S. opened the door to migrants from communist regimes during the Cold War to “contribute to the overarching objective of damaging and defeating communist countries”¹⁰⁶. The U.S. refugee policies were adjusted in accordance with the current foreign policy, and the U.S. definition of a refugee after the Cold War was closely knit with escape from communist countries, which meant that refugees from non-communist states had no legal status in the U.S.¹⁰⁷

The differential treatment Haitian and Cuban refugees received by the U.S. up until 1990 confirm this. Haitian boat migrants were unlikely to be granted refugee status, whereas the borders were left open to irregular migrants from Cuba.¹⁰⁸ This double standard meant that until the change of policies towards Cuban irregular migrants in 1994, they had clear advantages upon approaching the U.S. compared to the situation for Haitian irregular migrants, who were stopped and directed to Guantanamo bay without any opportunity neither to be subjected to screening nor to seek asylum in other countries. The exclusive order adopted by President Bush in 1992 was nationality-neutral and should thus have been applied on both Cubans and Haitians. This was however not practice, as no regard was taken to the order when subjecting Cuban migrants to special treatment. When analyzing the potential reasons for the difference in treatment, the political rationale might be the most accurate guess. The U.S. fight against communism, which had been running since the end of the Second World War, included providing refuge for those escaping communist countries in order to offer them a non-communistic alternative.

The U.S. reasons, regardless of their moral consideration, can thus be explained. What is surprising is how the international community reacted, or rather the seemingly lack of reaction following the policy change against Cuban irregular migrants in comparison with the reaction towards the policy

¹⁰⁶ *ibid*

¹⁰⁷ Gibney, *supra* note 69, p. 148

¹⁰⁸ Newland, *supra* note 72, p. 190

changes regarding Haitian irregular migrants. The reactions by the Inter-American Commission, the UNHCR and Amnesty International clearly state the deprecation towards the U.S. actions towards the Haitian migrants' posterior to the governmental change in 1991. The international community expressed concern regarding the lack of screening and the repatriation of Haitians to Guantanamo, and that the U.S. policies violated the Refugee Convention. However, when the same policy was implemented towards Cubans three years later, the reaction did not reach the same magnitude.

In the UNHCR's Annual Report of 1994, the Commissioner, requesting the implementation of a "comprehensive regional approach", acknowledged the lack of screening procedures offered by US to Haitian irregular migrants. The situation which Cubans faced by was however not approached.¹⁰⁹ The Amnesty International report from 1994 acknowledges the interception that Haitians were being subjected to by the US but failed to address the policy change towards Cubans in 1994. The situation that both Haitian and Cuban refugees were faced by at Guantanamo was considered by Amnesty, but the interception towards Cubans was neglected. One explanation could be that the U.S. had already used the same policies towards Haitians for a number of years before the same treatment was implemented towards Cubans. It is possible that UNHCR thus did not consider the policy change as important, as they had already reacted towards the identical behavior a few years prior. The Sale-case had yet to be settled in the Inter-American Commission (the judgment was delivered in 1997), and it is possible that the UNHCR was of the view that they had already addressed the violation through their *amicus curiae* briefs and were waiting for the judgment by the Commission. It is further possible that the lack of reaction depended on the quick change of pace implemented by Clinton. It only took until May 1995, less than a year after the introduction of new policies, for the policy to be changed again. Perhaps it took the international community a while to react towards the changes, and that the new policies were already implemented as it did.

3.4 Irregular Migrants in Australia 2001

This chapter considers the Tampa-incident in 2001. It differs slightly from the previous chapters as it includes a longer discussion regarding an alleged breach of *non-refoulement* based on the thoughts of legal scholars. This is included to provide a deeper insight into the reaction and to show that no consensus existed at the time regarding how the prohibition of *non-refoulement* should be interpreted.

3.4.1 Background

Australia has been described as a country of immigrants and a generous provider of temporary refuge; a good example is the welcoming of 4 000

¹⁰⁹ UNHCR, *Report of the UNHCR*, (1994) UN doc. A/49/12 §114

persons following the Balkan conflict in 1999. However, the country has a reputation of being everything but welcoming towards irregular migration.¹¹⁰ For example, the 1999 “Border Protection Act” deems Australia “not to have protection obligations” to anyone who has failed to take “all possible steps” to find safe haven in any country in which the asylum seeker has spent seven or more days en route to Australia. The Minister of Immigration can further unilaterally deem certain countries as safe third states to which migrants may be deported without prior refugee determination process.¹¹¹

3.4.2 Interception on the High Seas: MV Tampa

On August 26, 2001, the Norwegian ship MV Tampa was directed by Australian authorities to rescue a ship in distress. The captain found a leaky boat carrying about 450 irregular migrants, mostly from Afghanistan, on the high seas 75 miles outside of Australia. The Tampa captain let the migrants’ board and the poor health conditions of the passengers led him to navigate the ship towards Australia. Four miles outside of Christmas Island he was ordered by Australian authorities to stop and turn around, but the captain contravened the denial and entered the Australian waters looking for sanitary assistance.¹¹² An Australian special army intervened to avoid the disembarkation of the migrants. The Migration Cabinet decided to prevent the irregular migrants from reaching Australian soil, to “send a clear message to people smugglers [...] that Australia is not a soft touch”¹¹³, or, as the Australian Prime Minister Howard put it: “We simply cannot allow a situation where Australia is seen around the world as a country of easy destination”.¹¹⁴ The government argued that the irregular migrants could and should have found protection closer to home and should thus not have entered Australian waters.¹¹⁵ The port of Christmas Island was closed with barriers to prevent the ship from docking, and the Australian Defense Force took control of the Tampa-ship. The irregular migrants were isolated from the rest of the world, they were denied contact with lawyers and they did not have any opportunity to tell their story to the press.¹¹⁶ Burnside explains the situation for the irregular migrants by stating: “Although the misery of the refugees’ situation was obvious enough none of them was seen as human beings.”¹¹⁷

¹¹⁰ Crock, Saul and Dastyari, *Future Seekers II: Refugees and irregular migration in Australia* (2008) The Federation Press: Annandale, p. 4

¹¹¹ *ibid.*, p. 111

¹¹² Trevisanut, “The principle of Non-Refoulement at Sea and the Effectiveness of Asylum Protection” in *Max Planck Yearbook of United Nations Law*, (2008) Vol. 12, p. 224 f

¹¹³ Burnside, “Refugees: The Tampa Case” in *Postcolonial Studies* (2001) Vol. 5, No. 1, p. 3

¹¹⁴ BBC News, 2001, “High Stakes for Howard”, 30 August. Accessed at <http://news.bbc.co.uk/1/hi/world/asia-pacific/1517183.stm>

¹¹⁵ Human Rights Watch, *By invitation only: Australian Asylum Policy* (2002) p.3

¹¹⁶ *Minister for Immigration and Multicultural Affairs & Others v. Vadarlis* (“Tampa Appeal”), (2001) FCA 1329, 17 September 2001 §80

¹¹⁷ Burnside, *supra* note 113, p. 3

The migrants' situation became a case for the Federal Court of Australia (*Tampa Decision*) as the Victorian Council for Civil Liberties Inc. claimed that the Australian authorities were unlawfully holding 433 irregular migrants detained aboard the Tampa. The applicants asked the court to allow them to enter the Australian mainland to apply for protection visas, which they had a right to apply for under the domestic law. Alternatively, the applicants argued that they were detained on the boat without any lawful authority. The respondents argued to the first statement that domestic law did not apply to the situation of the migrants, as they had reached Australia in an illegal manner. Secondly, they argued that the migrants were not detained as they were free to go wherever they wished, other than Australia. Upon the commence of the proceedings, an announcement by the Australian Prime Minister was read, stating that the Australian government had reached an agreement with the governments of New Zealand and Nauru, according to which the migrants should be conveyed to Nauru and New Zealand for initial asylum processing.

As a result of meditations which were carried through during the procedures, an agreement was reached by the parties, according to which the removal would be implemented on the basis that the government would return the asylum seekers if the applicants' case was successful. Following this agreement, the migrants were transferred to the HMAS Manooka which then commenced the voyage towards Nauru.¹¹⁸ The trial continued in parallel with the transport of the migrants, and in its judgment, the Court ordered for the migrants to be released by the Australian authorities and brought to the Australian mainland, as the previous detention was settled to be violating domestic law.¹¹⁹ This decision was however successfully appealed by the Australian government in the Full Federal Court through the case of *Ruddock v Vadarlis (Tampa Appeal)*, during which it was settled that the migrants had no legal right to enter Australia after a refugee process.¹²⁰ Judge French decided that the government could expel non-citizens as a part of the unwritten executive power of government that is an implied part of national sovereignty. Judge Beaumont emphasized that article 33 of the Refugee Convention imposes no obligation upon a coastal state to resettle a refugee in its own territory.¹²¹

As a consequence of the judgment, the Australian Migration Act was thoroughly amended. The Parliament of Australia further passed the amended version of the "Border Protection Act", a retrospective statutory authorization to the actions of the government in denying the irregular migrants on the MV Tampa access to an asylum procedure. According to the new regulation, the outer parts of the Australian territory were excised

¹¹⁸ *Minister for Immigration and Multicultural Affairs & Others v. Vadarlis* ("Tampa Decision"), (2001) FCA 1297 11 September 2001 §43

¹¹⁹ *ibid* §169

¹²⁰ *Tampa Appeal*, *supra* note 116

¹²¹ *ibid* §126

from the domestic migration zone, which opened the opportunity to deny entry of irregular migrants arriving by boat.¹²²

The Tampa-migrants were transported to New Zealand and Nauru, states that offered temporary asylum as a result of financial deals between them and Australia. As the migrants were no longer present in the Australian territory, their possibilities to apply for asylum were successfully hindered by the new legislation. The government's efforts to resolve the crisis by drawing upon resettlement options in other states became known as the "Pacific Solution".¹²³ The Australian Prime Minister justified the policy's accordance with the Refugee Convention by holding that "no person intercepted by Australian authorities will be denied access to refugee determination procedures, but there is nothing in the Convention that directs where those procedures take place."¹²⁴

3.4.3 International Response

The Australian action during and following the Tampa-incident has been widely criticized, both based on the refusal to process refugee claims and for the detention which the irregular migrants were subjected to. This chapter only references the response to the refusal to process refugee claims within the national asylum system, any comments regarding the detention has been disregarded as it is not relevant within the scope of this thesis.

On December 6, 2001, Amnesty International issued a report describing Australia's "Pacific Solution" as "unsustainable and inhumane", and observing that while the world has focused on the humanitarian crisis in and around Afghanistan, "the Australian government has been sending boatloads of Afghans and other asylum seekers around the Pacific".¹²⁵ In its report from August 2002, Amnesty further criticized the interpretation of the Refugee Convention provided by the Australian Prime Minister, regarding the place where refugee determination takes place, by stating that such interpretation would allow wealthy countries like Australia to shift responsibility for refugee determination, an option that is not available to developing countries.¹²⁶ To resettle the balance, Amnesty further established that migrants transported by Australian authorities to "safe third states" remain under the responsibility of Australia.¹²⁷ To sum up, Amnesty International stated that Australia's new refugee policy ignored the state's obligations under international human rights law and that the motivation and

¹²² Gibney, *supra* note 69, p. 189

¹²³ *ibid.*, p. 189

¹²⁴ Ruddock, "Australian Government position on the MV Tampa refugees" in *Online Opinion*, 15 October 2001

¹²⁵ U.S. Committee For Refugees, *Sea change: Australia's New Approach to Asylum Seekers* (2002) p. 38

¹²⁶ Amnesty International, *Australia-Pacific, Offending human dignity – the Pacific "Solution"* (2002) p. 19

¹²⁷ *ibid.*, p. 20

rationale for the “Pacific Solution” was inherently flawed, as it punishes asylum seekers rather than people smugglers, with arbitrary detention.¹²⁸

In its report from 2002, HRW emphasized that to prevent entry of irregular migrants at sea without granting them access to fair procedures identifying and protecting those facing threats to their life as a direct or indirect result of being denied entry may amount to *refoulement*. It was further concluded that interceptions of irregular migrants that commence as rescues at sea should always lead to prompt access to a state’s territory for the purpose of considering their claims, and treatment of intercepted persons should at all times accord with applicable human rights standards.¹²⁹ The organization established that other than implementing a policy that contravenes both of those statements, the Australian policy also penalized the migrants, which violated article 31 of the Convention.¹³⁰

UNHCR observed that the Tampa incident highlights the “problem of access to territory and procedures for those arriving by sea”, and the refusal by Australia to disembark rescued persons was described as a serious problem.¹³¹ During the standoff outside of Christmas Island, UNHCR urged Australia, Indonesia and Norway to “work this out as soon as possible”, and that Australia should act “according to humanitarian principles.”¹³² A spokesperson from UNHCR stated, regarding the movement of the migrants from the Tampa and to Nauru and New Zealand: “UNHCR would have preferred another solution to this. Our opinion would have been first to put them ashore on Christmas Island, at least temporarily.” He further emphasized the inappropriateness of the “Pacific Solution”, as it could send a negative message to impoverished nations closer to conflict zones, which often take in hundreds of thousands of refugees.¹³³ Regarding the implementation of the “Pacific Solution”, UNHCR official Ellen Hansen said:

“We consider that the sort of arrangements of basically intercepting asylum seekers on their way to a country and taking them elsewhere for processing is inappropriate and inconsistent with the edifice of asylum that’s been built up over years [...] We think it’s more appropriate for them to come to Australia and be processed under Australian law.”¹³⁴

The commissioner further told HRW that it declined to play the real role in caring for asylum seekers stranded in Indonesia, out of principled objections to Australia’s interception policy.¹³⁵

¹²⁸ *ibid* p. 22

¹²⁹ Human Rights Watch (2002), *supra* note 115, p. 46

¹³⁰ *ibid*, p. 39ff

¹³¹ UNHCR: *Note on International Protection*, UN doc. A/AC.96/965 (11 September 2002) §20

¹³² U.S. Committee for Refugees, *supra* note 125 p. 28

¹³³ *ibid*

¹³⁴ *ibid*, p. 31

¹³⁵ Human Rights Watch (2002) *supra* note 115, p. 52

Many legal scholars have commented on the inappropriateness of the retrospective amendment of the Migration Act. It has been argued that a country cannot simply define and delimit its territory on which international obligations are owed, because sovereignty is defined not by individual announcement but by effective possession and exercise of power.¹³⁶

Whether or not the right to seek asylum is violated in the Tampa-case depends on how the principle of *non-refoulement* is interpreted. On the one hand, the resettlement of migrants to Nauru, which is not a party to the Refugee Convention, may breach the principle and this is not changed by the declaration from the Prime Minister, stating that Nauru provides effective protection.¹³⁷ Australia did however take steps to resettle the migrants in states where they would possibly not be subjected to persecution. According to Gammeltoft-Hansen's theory, there is a right for migrants to seek asylum, but not an obligation for countries to conduct refugee determination for asylum seekers themselves, as long as the state to which the procedure is moved will not subject the migrants to persecution, which would mean that Australia did not breach *non-refoulement*. It is however questionable how the authorities would establish that each individual migrant would not be subjected to persecution in the country of destination, as no screening whatsoever was carried through by the Australian authorities.

This is the opinion briefed by Trevisanut who argues that Australia, by taking steps with the purpose and effect of preventing the migrants from entering Australia, and arranging their departure from Australian territorial waters, breached article 33 of the Refugee Convention. To refuse the asylum seekers a screening and then redirect them to a third country does amount to a *refoulement de facto*. Trevisanut argues that even though Australia exercised their sovereign right to expel the vessel, which had violated immigration regulations by entering the territorial sea without permission, such expulsion must be implemented in accordance with international law. From being the first country of arrival follows a duty for Australia to provide the migrants with temporary refuge and a first screening of asylum requests. This duty was not fulfilled in the present case and the action, regardless of the guarantees of fair treatment and respect of international standards in human rights and asylum law provided by New Zealand and Nauru, violated the prohibition of *refoulement*.¹³⁸ Goodwin claims that the Migration laws from 2001, which delimit Australia's migration zone to dent legal presence, and thus the ability to make an asylum claim for those who are in fact present in Australian territory, are constructed to fall within the letter, and not the spirit of international law.¹³⁹ Both scholars thus argues that there is a right for the migrants to seek asylum in their country of

¹³⁶ Magner, "Less than Pacific Solution for Asylum Seekers in Australia" in *International Journal of Refugee Law* (2004) Vol. 16, No. 1, p. 74ff

¹³⁷ Gammeltoft-Hansen, *supra* note 13, p. 77

¹³⁸ Trevisanut, *supra* note 112, p. 225

¹³⁹ Goodwin-Gill and McAdam, *supra* note 7, p. 255

choice, in this case Australia, and from this follows an obligation for Australia to try the claims by migrants which has reached its territory.

3.4.4. Attitude analysis

This subchapter will provide examples on the attitude towards refugees, shown by Australia through both the authorities, the Court and the public, but also by the international community.

The rationale for Australian policy, including setting up a blockade to prevent irregular migrants on boats from making landfall¹⁴⁰, was set to prevent people smuggling, but it is questionable if the big measures taken by the Australian government are proportionate to this rationale alone. The Australian government justified their actions by arguing that “queue jumpers” should not be rewarded when legal ways of entering the country existed.¹⁴¹ No regard is thus given to the desperation or the vulnerability that the migrants are subjected to - they are supposed to follow the bureaucratic way to asylum or else they will be punished with deportation for queue jumping. Irregular migrants searching for immediate help and protection after crossing the high seas were seen as cheaters, not as humans in desperate need for protection against persecution.

The same day that the Australian authorities had taken control over the Tampa, the new “Border Protection Bill” was introduced and passed in the Australian House of Representatives, but it was defeated in the Senate. Regardless of this, the content indicates the attitudes shown by the House of Representatives. The bill included a right for any officer to direct a ship out of the territorial sea, using reasonable force, and no proceedings should be available to prevent the removal of such ship. Lastly, the new bill established that any application for protection visa under the domestic law on migration by a person who is onboard such ship is not a valid application, and that the new act “has effect in spite of any other law”.¹⁴² This, taken together with the governments statements during the Ruddock v Vadarlis-case (according to which domestic law does not apply for migrants who have reached Australia in an irregular manner) show a reluctance to abide to obligations under the Refugee Convention. It is interesting how the court focused their discussion on the detention that the migrants were being subjected to, while it ignored the lack of screening of the migrants before their removal to Nauru. It is further interesting that the court settled that the migrants onboard Tampa should be referred to as “rescues”, rather than migrants, asylum seekers or refugees. This provides an indication about the courts attitude towards the migrants – they were not acknowledged for seeking refuge or asylum, they were simply people who happened to be on a leaking boat that was rescued. The Court stated that it chose to use this term, as it was considered value neutral.

¹⁴⁰ Crock et al., supra note 110, p. 4

¹⁴¹ Gibney, supra note 69, p. 191

¹⁴² Border Protection Bill 2001, 2 – 10

Justice North confirmed in the Tampa-decision that the Tampa-question was a matter of great current debate.¹⁴³ It is worth mentioning that the government's response to the Tampa-issue and the changes in Migration policy following the incident were celebrated by the public, 77 % of the responding Australians supported the policy of refusing refugees entry, and Prime Minister Howard was reelected following the incident¹⁴⁴, possibly because of his campaign promise that "not a single asylum seeker would reach Australia's shores if he were to be reelected"¹⁴⁵. It is arguable that the Howard administration used the Tampa issue as a tool to garner support and ultimately achieve electoral victory.¹⁴⁶ Unlike the political reactions following *inter alia* the Haitian boat crisis in the U.S., where the question of immigration was taken off the political agenda as quick as possible, the Howard government saw the public anxiety over the boat people and the alleged serious threat they posted against the nation as something that could be used to their electoral advantage.¹⁴⁷ The negative attitude towards refugees and the narrow interpretation of the Refugee Convention was thus widely accepted by the Australian public. For example, "Sink all the boats" was a phrase used by the Australian public but also by some Australian politicians when discussing Australia's response to unauthorized arrivals, which can be considered primary an emotional reaction that demonstrates the level of rhetoric surrounding the asylum debate.¹⁴⁸

Officials hinted following the terror attacks in New York on September 11, that there was a need to prevent boat arrivals as they might bring a risk of infiltrated terrorists.¹⁴⁹ The Defense Minister Peter Reith said on September 13 that the attacks showed the importance of strong border protection, "otherwise it can be a pipeline for terrorists".¹⁵⁰ Those statements provide certain incitements that the national security is prioritized higher than fulfillment of international human rights obligations. It might be rich to suggest that the attacks happened at a convenient time for the Australian government, as they could use them as a rationale towards the international community to motivate the new immigration policies. It is however possible to argue that this might just be the case. The Tampa-decision in the Federal Court was delivered just hours before the attacks in New York. The public sympathy given to the Tampa-migrants, which mostly consisted of people from Afghanistan, before 11 September was replaced by a harder attitude, they were transformed overnight from victims into potential terrorists.¹⁵¹

The Australian attitudes toward irregular migrants can be analyzed by looking into the reasoning behind the "Pacific Solution". It has been

¹⁴³ "Tampa Decision", supra note 118, §7

¹⁴⁴ Gibney, supra note 69, p. 190

¹⁴⁵ Morris, supra note 37, p 60

¹⁴⁶ Gibney, supra note 69, p. 190

¹⁴⁷ *ibid*

¹⁴⁸ U.S. Committee for Refugees, supra note 125, p. 27

¹⁴⁹ Gibney, supra note 69, p. 191

¹⁵⁰ Transcript of the Hon Peter Reith MP, Radio Interview with Derryn Hinch (13 Sept 2001) accessed at <http://www.defence.gov.au/minister/8tpl.cfm?CurrentId=999>

¹⁵¹ Crock et al., supra note 110, p. 116

confirmed by the Australian Prime Minister that the principle of *non-refoulement* presupposes a refugee determination process, but that the location of such process is not established in the Refugee Convention. In other words: the obligation is acknowledged, but responsibility is denied. The situation in Australia turns out to be yet another occurrence where the interpretation of the Refugee Convention is tailored and cut to fit the political and ideological agenda.

The international community's reaction to the Australian actions was very critical. Amnesty deemed the Pacific Solution inhumane and condemned the treatment of refugees. The organization further raised the question of justice between countries of refuge, which is disturbed by Australia's policy to pay countries to carry through refugee determination. HRW statements go as far as to establish that rescued migrants have a right to access territory to have their claims tried by the competent authorities. This statement goes further than previous statements by international organizations, since the notion of a right to access territory under the prohibition of non-refoulement had previously not been regarded. HRW also establishes that Australia is responsible for the refugee determination process abroad if the migrants are moved to another country, regardless of economical unilateral agreements. In practice, this means that Australia has obligations towards migrants that originated in the fact that they reached Australia first.

Statements by the UNHCR provide certain remarkable incitement for the attitude shown towards refugees' right to seek asylum. It is clear from the statement by Ellen Hansen that UNHCR hold that the migrants should have access to an Australian refugee determination for the states obligations to be fulfilled. During an interview with HRW, it was expressed that UNHCR refused to conduct screening processes in Indonesia in accordance with the "Pacific Solution", as a means to show the Australian authorities that UNHCR condemned the Australian interception policy. This reaction can be read as a childish attempt to punish Australia with negative consequences for the migrants. However, a certain amount of frustration from UNHCR is understandable, as the Australian actions clearly do not follow the adopted conclusions and gives no regard to UNHCR's earlier statements regarding interception at sea. The UNHCR Director at the Department of International Protection explained the restricted attitudes shown worldwide at the beginning of 2000, and listed the increasingly intermingling between migrants protection needs and concerns regarding immigration policies as a reason.

"Most of these measures [to limit access to territories and safeguard national interests] are primarily intended to combat human trafficking and migrant smuggling but they impact equally on asylum seekers and refugees. [...] In short the environment in which we work is not always a receptive and flexible one."¹⁵²

She further stated that the attitude towards refugees in 2000 differ considerably compared to the attitudes shown following the Vietnamese

¹⁵² UNHCR, *Presentation by Ms. Feller*, supra note 66

crisis in 70's. It is interesting to note that during the Indochinese exodus, Australia was an active advocate for offering protection to refugees on humanitarian grounds, whereas the suggestion to do so during 2001 was met by a blank no.¹⁵³ In sum, the response from the international community was critical and immediate to the support of the right to seek asylum.

The analysis based on statements by legal scholars regarding the right to seek asylum shows that there is a lack of consensus whether this right includes a freedom of choice regarding the state of refuge. According to Gammeltoft-Hansen, the effort put in by Australia to transfer the irregular migrants to Nauru for their asylum procedure is not a violation of *non-refoulement*, an opinion that is challenged by both Goodwin and Trevisanut. The complexity of the issue is thus confirmed by the different views provided by the government, the legal scholars and NGOs.

3.5 Current Irregular African Migrants in the Mediterranean Sea

The “Attitudes” section in this chapter includes a brief comparison of the attitudes shown in the “Sale”-case and the “Hirsi”-case. The similarities of the merits in the two cases provide a good foundation for an analysis, which simply could not be ignored.

3.5.1 Background

The internal borders within the European Union (EU) were gradually opened through the implementation of the Treaty of Rome. The notion of free movement within the EU has been interpreted in different directions since the adoption of the Treaty in 1957 along with developments within the Union. Lately, a need to strengthen the control of the external border has emerged. To complement national border control, the EU thus created a specialized body, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex). Frontex' rationale is to protect the member states against all kinds of threats that could arise on the external border of the union.¹⁵⁴ In 2006, the European Parliament adopted Resolution 2006/2250, which encourages the EU member states to set up joint monitoring patrols, coordinated by Frontex, at the sea borders, and further to cooperate with third states in order to control clandestine immigration.¹⁵⁵

This resolution was implemented by Italy in 2008, when the state signed a “Treaty of Friendship, Partnership and Cooperation” with Libya. The treaty called for “intensifying” the cooperation in “fighting terrorism, organized crime, drug trafficking and illegal immigration”. The parties agreed to strengthen the border control system for the Libyan land borders, through

¹⁵³ Goodwin-Gill and McAdam, supra note 7, p. 281

¹⁵⁴ Gebrewold, supra note 1, p. 128

¹⁵⁵ European Parliament Resolution 2250/2006, §23-24 and §37

Italian and EU funding, and to use Italian companies in this endeavor.¹⁵⁶ The implementation of the treaty started during May 2009, when a total of nine push-back operations were carried out by Italy, returning a total of 834 persons to Libya.¹⁵⁷ According to Italian authorities, neither identification processes nor interviews with the persons in question regarding their potential need for international protection were carried out aboard the Italian vessels during the push-back operations.¹⁵⁸ The interception included the transfer of the migrants from the unseaworthy boats onto the Italian vessels and then the return to Libya, either directly or via Libyan patrol boats. According to witnesses, the migrants were led to believe that they would be taken to Italy in order to make them board the Italian vessels. Upon arrival to the shore, the migrants expressed fear of being returned to Libya, but they were nevertheless handed over.¹⁵⁹

3.5.2 Interception on the High Seas: *Hirsi Jamaa v Italy*

In May 2009, the Italian Revenue Police and Coastguard intercepted three Libyan vessels carrying 200 irregular migrants, sailing on the high seas with the aim to reach the Italian coast. The migrants were transferred to Italian military ships and returned to Tripoli in Libya, but the Italian authorities never boarded the boats. According to the migrants, the military took no steps to identify them, nor were they informed of their destination. Upon arrival in Libya, they were handed over to the Libyan authorities.¹⁶⁰

The action was, according to the Italian Minister of the Interior, the consequence of the entry into force of the “Treaty of Friendship, Partnership and Cooperation”. The Minister of the Interior stated that the push-back strategy which was implemented had proven to be very effective in combating illegal immigration, and the policy discouraged criminal gangs involved in people smuggling and trafficking, helped save lives at sea and substantially reduced landings of irregular migrants along the Italian coast. The number of irregular migrants along the Italian coast decreased five folds in May 2009 compared to May 2008.¹⁶¹

The applicants in the *Hirsi*-case in the European Court on Human Rights consisted of eleven Somali nationals and thirteen Eritrean nationals, who complained directly to the court and claimed that the interception which they had been subjected to had breached the prohibition of *refoulement* (and thus of torture), the prohibition of collective expulsions and their right to an

¹⁵⁶ Friendship Partnership and Cooperation Treaty Between Libya and Italy, Article 19

¹⁵⁷ UNHCR, *Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Hirsi and Others v. Italy*, Application no. 27765/09 (2010) §2.2.2

¹⁵⁸ *ibid.*, §2.2.2

¹⁵⁹ UNHCR, *UNHCR interviews asylum seekers pushed back to Libya*, Press Release, 14 July 2009

¹⁶⁰ ECtHR, *Hirsi Jamaa and others v. Italy* [GC], No. 27765/09, (2012), § 9-12

¹⁶¹ *ibid.*, §13

effective remedy.¹⁶² All three alleged violations are relevant for the right to seek asylum.

The Italian government claimed that the application was inadmissible because domestic remedies had not been exhausted; the applicants had not lodged proceedings within the Italian criminal court. However, the applicants on the other hand had complained that they were not afforded a remedy satisfying the requirements of the right to an effective remedy. The government furthermore denied responsibility, as they had not exercised “absolute and exclusive control” over the applicants. It was held that the migrants had been intercepted in the context of the rescue on the high seas of persons in distress, which is an obligation imposed by international law, which they simply abided to. This did, according to the government, not create a jurisdictional link between Italy and the migrants.¹⁶³

As regards the question of *non-refoulement*, the applicants claimed that they had not been afforded the opportunity to request international protection from the Italian authorities, as they had not been informed of the destination of the boat. The government argued that the return of the migrants was implemented in accordance with the bilateral agreement between Italy and Libya, which was signed in a spirit of cooperation with the aim to combat clandestine immigration after the encouragement of cooperation between the Mediterranean countries to control migration and combat crimes associated with clandestine immigration, through European Parliament Resolution 2006/2250.¹⁶⁴

The government further argued that they had merely provided necessary humanitarian assistance to the migrants. Identity checks could not be carried out onboard the ships, as there was no maritime police present on the ships. The applicants had not expressed their intention to apply for political asylum or international protection, and their plea not to be handed over to the Libyan authorities could not be interpreted as a request for asylum. However, had the applicants asked for asylum and described the risks they were facing in Libya, then they would have been taken to the Italian territory.¹⁶⁵

3.5.3 International Response

The European Court of Human Rights established that a state cannot circumvent its jurisdiction under the Convention by describing the issue as rescue operations on the high seas. As the events in the Hirsi-case took place entirely onboard ships of the Italian armed forces, crewed by Italian military personnel, the applicants were under the continuous and exclusive control of the Italian authorities regardless of the nature and purpose of the intervention. The Court further established that measures “managing

¹⁶² *ibid*, §2

¹⁶³ *ibid*, §65-66

¹⁶⁴ *ibid*, §94

¹⁶⁵ *ibid*, §96

migration flows does not justify having recourse to practices which are not compatible with the state's obligations under the Convention. [...] The Convention shall be interpreted [...] in accordance with the principle of effectiveness.”¹⁶⁶ The court thus emphasizes that the Convention and refugee protection is higher in hierarchy than the treaty between Italy and Libya regarding migration control, implementing resolutions from the EU, and that no excuses will change the fact that the Italian authorities stopped the migrant's boats, took them aboard and returned them to Libya.¹⁶⁷

As regards the lack of request for asylum by the migrants, the Court stated that the national authorities were obliged to find out about the treatment the applicants would be exposed to after their return. The fact that the migrants had failed to expressly request asylum did not exempt Italy from fulfilling its obligation, with regard to the severe situation in Libya at that time.¹⁶⁸ This interpretation puts a high level of responsibility on the authorities of the intercepting ship. They should have insight in current situation in the country to which they return the intercepted migrants and decide for the migrants whether or not their situation itself indicated a presumed application for asylum. The Court further set certain standards in cases of interception for the right to an effective remedy to be fulfilled, including an identification procedure, an assessment of each migrants' personal circumstances and the presence of legal advisers and interpreters. After assessing the circumstances of the case, the Court ruled that Italy had breached the prohibition of torture, the prohibition of collective expulsions and the right to an effective remedy.¹⁶⁹

In UNHCR's submission for the Hirsi-case, the fact that principles of cooperation between states to combat trafficking and provisions of international law of the sea would exempt a state from their obligations under international law was contended.¹⁷⁰ The commissioner further stated that when people are intercepted on the high seas, rescued and put on board a vessel of the intercepting state, the intercepting state is exercising jurisdiction. This requires respect for the principle of *non-refoulement*. The commissioner moreover stated that the principle of *non-refoulement* included procedural obligations for states, and that the access to an effective asylum procedure was more vital regarding mixed flows as potential asylum seekers must be singled out and distinguished from other irregular migrants.¹⁷¹ The disembarkation of the intercepted migrants should, according to the commissioner, take place on the territory of the intercepting state.¹⁷²

¹⁶⁶ *ibid.*, §179

¹⁶⁷ *ibid.*, §79-81

¹⁶⁸ *ibid.*, §133

¹⁶⁹ *ibid.*, §185 f

¹⁷⁰ UNHCR (2010) *supra* note 157, §2.1.2 f

¹⁷¹ *ibid.*, §4.3.4

¹⁷² *ibid.*, §4.3.6

Amnesty International, The Advice on Individual rights in Europe Centre and the International Federation of Human Rights intervened in the Hirsi-case with a statement which established that the individuals, who were pushed back as a result of interception at sea, did not have access to any remedy. They further argued that during the implementation of the interception resulting in a push-back, it was the intercepting state's responsibility to ensure that each of the migrants concerned had an effective opportunity to challenge his/her return and to obtain an examination of his or her application before the return was effected.¹⁷³ Amnesty International's Head of Refugee and Migrants' Rights, Sherif Elsayed-Ali, deemed the judgment "historic" and that it "strengthens respect for human rights across Europe and upholds international legal safeguards for migrants and asylum seekers."¹⁷⁴ The Columbia Law School Human Rights Clinic et al.¹⁷⁵ asserted that a state should advise irregular migrants of their right to access protection, as they are particularly unlikely to be familiar with local law and often lacked an interpreter.¹⁷⁶

HRW published a report on the situation for refugees affected by the Treatment of Friendship between Italy and Libya, before the judgment in the Hirsi-case was delivered. In the report, HRW encouraged Italy to immediately cease the interdiction and return of boat migrants to Libya, stop the cooperation with the Libyan government and to ensure access to full and fair asylum procedures in order not to breach the prohibition of torture and its inherited prohibition of *refoulement*.¹⁷⁷

3.5.4 Attitude analysis

The Case of Hirsi v Italy is a goldmine in trying to establish the current European attitudes towards boat refugees and the right to seek asylum. It is a case by the European Court of Human Rights, which does not *per se* interpret the Refugee Convention but rather the European Convention of Human Rights. The case does not only establish if the migrants have been subjected to *refoulement* but also whether the action taken by the Italian authorities breaches the prohibition against collective expulsions and the right to remedy. The right to remedy under the European Convention is closely knit to the right to seek asylum, which is discussed in this thesis. For this reason, the assessment of the court will be analyzed below, despite the

¹⁷³ *Hirsi Jamaa and others v. Italy*, supra note 160, §103ff

¹⁷⁴ Amnesty International, *Italy: 'Historic' European Court judgment upholds migrants' rights*, 12 February 2012, accessed at <http://www.amnesty.org/en/news/italy-historic-european-court-judgment-upholds-migrants-rights-2012-02-23> 2013-05-14

¹⁷⁵ African Refugee Development Center, Allard K. Lowenstein International Human Rights Clinic at Yale Law School, Center for Social Justice at Seton Hall University School of Law, Florida Coastal School of Law Immigrant Rights Clinic, Institute for Justice and Democracy in Haiti, Migrant and Refugee Rights Project of the Australian Human Rights Centre at The University of New South Wales School of Law, Physicians for Human Rights, Professors James Gathi, Tally Kritzman-Amir, Stephen H. Legomsky and Margaret L- Satterthwaite.

¹⁷⁶ Columbia Law School Human Rights Clinic et. al., *Written Comments on Hirsi Jamaa v. Italy*, 17 April 2012

¹⁷⁷ Human Rights Watch, *Pushed Back, Pushed Around* (2009) p. 18

fact that it does not fall under the regular scope of *non-refoulement*, which has previously been discussed.

A number of conclusions can be drawn regarding the Italian authorities' attitudes towards irregular migrants' right to seek asylum by analyzing their rationale as presented to the Court. First off, Italy argues that the migrants should have claimed their rights in the national court, even though they had no possibility to enter the country. They further state that the interception was part of the search and rescue operation put in place to save the migrants in distress. Moreover, they argue a lack of expressed request for asylum from the migrants. It is clear from the explanations provided by Italy that the irregular migrants are not highly valued, and that other issues, such as the fulfillment of the bilateral agreement with Libya and international law on search and rescue, are more important than the fulfillment of the *jus cogens* norm that is *non-refoulement*.

The fact that the European Court had to establish the geographical scope of the principle of *non-refoulement* and the right to seek asylum, regardless of those facts being set prior to the interception in the Mediterranean Sea, indicates a gap between the regulation and the European implementation. It is arguable that the Italian attitudes towards irregular migrants' rights to seek asylum are negative, as regulation confirmed by both UNHCR and the Inter-American Commission is completely ignored in the implementation of refugee policies in the Mediterranean Sea. The Hirsi case provides clarification on the scope of the right to an effective remedy for intercepted migrants in a way that confirms high obligations on states regarding the initial treatment of migrants. This indicates that migrants have previously been disregarded as humans protected under the Convention. Moreno-Lax argues that the Hirsi judgment "signifies the alignment of Strasbourg jurisprudence with the approach adopted by other human rights bodies on the extraterritorial applicability of human rights guarantees."¹⁷⁸ The threshold for fulfilling the obligations posted in the Convention is set high by the intervening parties, which expresses in consensus that the migrants had a right to seek asylum and that this right was breached as they were pushed back to Libya.

A reoccurring issue is the classification of all boat migrants as "illegal migrants". The Executive Director of Frontex, Ilkka Laitinen, has stated that illegal migration is a crime and that the European borders need to be closely managed to ensure the security of the European citizens.¹⁷⁹ He does not, however, offer any regard to the security of refugees, which have a legal right not to be returned to a country of persecution. The issue of mixed flows is ignored, as it would complicate the new implementation by Frontex and the member states. The lack of a separation between economic migrants and asylum seekers, which is present in the Hirsi-case, inevitably causes

¹⁷⁸ Moreno-Lax, "Hirsi Jamaa and Others v Italy or the Strasbourg Court versus Extraterritorial Migration Control?" in *Human Rights Law Review* (2012) Vol. 12, Issue 3, p. 596

¹⁷⁹ Gebrewold, *supra* note 1, p. 137

problems regarding the fulfillment of *non-refoulement*, and it shows an ignorant attitude towards refugees' rights to seek asylum.

To sum up the reasoning provided on both sides, it is clear that the two parties (or in this case, Italy v. everyone else) operate on complete opposite sides on the spectrum, where Italy is keen on keeping its agreement with Libya in place and to present the intercepted migrants as criminals. The irregular migrants' rights are down prioritized, subsequent to other concerns, including the security of the EU citizens.

The similarities between the Sale-case, given by the Inter-American Commission on Human Rights in 1997, and the Hirsi-case from 2012 are remarkable. The UNHCR stated in the Sale-case that no other state had previously resorted to a formal policy on interception and repatriation.¹⁸⁰ It is notable that a similar formal policy is implemented through the EU cooperation provided by Frontex fifteen years later. It is disconcerting to consider that almost the exact same issue was current and dealt with by a regional court, but separated by 15 years, as if no progress have been made at all between those years. The merits of the cases are similar and the reasoning shares certain common objectives – to escape responsibility in order to control migration regardless of the legal framework. This conclusion raises other questions. Has nothing changed over the past 15 years? Are the writers of domestic policies unaware of the legal framework, of the history of boat refugees and the jurisprudence of regional courts? How can the area ever develop and implementation ever fulfill the obligations, if statements by the UNHCR, the official interpreters of the Refugee Convention and the regional courts are ignored by the policymakers? It is apparent that the notion of “learning from one’s mistakes” is not respected by the national policy makers. The European policy makers are not bound by the judgments of the IACommHR, but a common interpretation of *non-refoulement* (as it is put through in the American Declaration of Rights and Duties of Man and the European Convention) is nonetheless desirable.

Something that has changed, however, is the reaction by the international community. In the admissions by intervening parties in the Hirsi-case, emphasis is put on all relevant norms of refugee protection in a manner and an intensity, which has not been done earlier. The support shown by the international organizations towards the irregular migrants' rights are united and strong in a more convincing manner than it was when the Haitian case was tried by IAComHR. For example, UNHCR does not separate between the admission of asylum seekers and *non-refoulement* but states clearly that the lack of asylum procedure, including the geographical move of the migrants, breaches *non-refoulement*. Amnesty International confirms this by clearly establishing that the intercepting state's responsibility includes carrying through an asylum procedure. This difference can arguably be explained by the varying quantity of reports regarding the case because of

¹⁸⁰ UNCHR, (1994), supra note 81, p. 92

the temporal difference, as more reports are found regarding the Hirsi-case. However, the content of the reports provides clear indications on attitudes supporting strong protection for refugees.

Elsayes-Ali claims the Hirsi-case to be a “historic judgment”¹⁸¹, which is discussable. The situation in the Mediterranean Sea is neither new nor unique, as has been presented earlier in this chapter. It was established by the UNHCR in the Sale-case that the application of *non-refoulement* is not geographically limited, and the conclusion by the European Court that states which intercept individuals in international waters do not operate in a legal vacuum is thus no news. The historical element of the judgment is regionally limited, and it clarifies for the first time the application of the refugee protection offered under the European Convention.

¹⁸¹ Amnesty International (2012) supra note 174

4 The gap between legislation and practice regarding the right to seek asylum

Refugees have been called the anomaly in the nation-state system.¹⁸² States are obliged to protect their citizens from each other and other states under the notion of respect, protect and fulfill in the scope of human rights law. States should ensure that its citizens are secure from persecution and torture. However, when there is a deficit of safeguard, and a state cannot or will not offer their citizens' rights, they stand outside the scope of protection. This is the reality during times of distress, such as during wartime or in times of fundamental changes in governance. Such circumstances inevitably lead to humans leaving their countries of origin in order to escape persecution. While traveling to reach the state of refuge, the refugees stand outside of the scope of states' responsibility. This vacuum remains until the moment they approach the authorities of another country and claim to have rights under the Refugee Convention, which invokes the protection against *refoulement*. According to the Convention, and the conclusions made earlier in this thesis, the migrants have a right to seek asylum and to have their claims tried. However, this has not always been the case, the previous two chapters have established that there is a gap between the international legislation on the right to seek asylum and the measures implemented by states regarding boat refugees.

This chapter provides a more general discussion on the developments of the attitudes towards refugees, which aims at presenting the attitudes by both states and the international community, to analyze how they have developed over time and how the global situation has affected the attitudes. The answers to these questions enables an identification of trends, which possibly can be used in order to analyze how the attitudes towards refugees will develop in the future, which will be discussed in the second part. Those conclusions are thus speculative, but hopefully well-argued and substantiated.

4.1 How have the Attitudes towards Irregular Migrants Developed over Time?

This section will be separated into two parts, of which the first presents states' attitudes towards irregular migrants, whereas the other regards attitudes shown by the international community. The states' attitudes can be identified by either looking at the acts implemented by states to avoid granting the migrants the possibility to seek asylum, but also from the

¹⁸² Holborn, *Refugees: A Problem of Our Time The Work of the United Nations High Commissioner for Refugees, 1951-72* (1975) The Scarecrow Press: Metuchen, p. 5

explanation provided by the states to motivate the breach of the right. Both methods will be applied to analyze states' attitudes. The attitudes provided by the international community will be analyzed regarding the international community's reactions to the states' rationale.

4.1.1 Development in Attitudes Shown by States

4.1.1.1 Acts to hinder the fulfillment of the right to seek asylum

From the perspective of a human rights scholar, two general attitudes can be identified regarding the acts implemented by states. Either the act indicates a nonchalant attitude, or a hostile attitude; or in some cases a combination of both. The nonchalant attitudes include lack of respect shown for the migrants' needs: easy, short-term solutions to get the migrants "out of the way". The nonchalant attitude was shown towards the Jewish migrants in the Exodus-case, where the migrants were denied entry to Palestine based on migration control and bilateral agreements. In implementing migration control in accordance with bilateral agreements, the notion of protecting those in need is disregarded. The handling of the migrants is equal to the handling of goods that are imported and exported in accordance to an agreement, and no attention is given to humanity and the needs of people in need of protection are ignored. The nonchalant attitude is further shown by the U.S. regarding the Haitian and Cuban migrants, which were "shipped off" to Guantanamo to hinder them from seeking asylum in the U.S. The authorities must have been aware that the solution was unsustainable in a longer perspective, but still implemented the policy without any regards to the outlook for the migrants.

The actions by the U.S. regarding the Cubans were possibly politically motivated, and the irregular migrants were checkers in political games. This is further confirmed by looking into the act of discrimination implemented by the U.S., as the Cubans was favored because of the constant U.S. battle against communism, but the Haitians was not worth anything as the protection of them did not prove any political point. The opening of the Cuban border on Castro's side and the decision to stop the Cuban immigration by Clinton shows that the governments used the refugees as a way of punishment *vis-à-vis* both of the governments. This further confirms the nonchalance towards the irregular migrants' need of protection. The U.S.-Cuban agreement from 1994 indicates a right to use force in order to stop Cuban migrants to escape the country, which shows elements of hostility towards the migrants. A mix of both attitudes thus met the Cuban irregular migrants. Italy showed a nonchalant attitude towards the migrants in the Hirsi-case, as they simply guided them onto their military ships and escorted them back to Libya, ignoring the future they would meet.

A more hostile attitude was shown in certain acts implemented by Malaysia and Thailand towards the Vietnamese refugees in 1975, where the authorities resorted to actual force to hinder the refugees from entering the countries to seek protection. This hostile attitude is also confirmed by the

creation of the “Task Force VII” in Malaysia. The most hostile acts was implemented in the Tampa-case, where the irregular migrants was held detained on the ship, refused contact with the outside world and, according to Burnside “none of them was seen as human beings”¹⁸³. The public mirrored the treatment by the authorities, and the background presented above can establish a sense of hostility towards migrants at a national level. The usage of the phrase “shoot down all the boats” is a good example on the hostility shown by the public as well as the authorities.

Does the determination of the implementation of nonchalant versus hostile attitudes provide any answers regarding the development of attitudes towards irregular migrants over time? The answer is no, there are no chronological patterns regarding when one or the other attitude has been shown, and there might be many reasons to explain why one attitude is implemented instead of the other, other than the temporal current situation in the world - one might be the governing ideology in the country. The conclusion that can be drawn is that the attitudes has not shifted or developed over time, but are constantly either hostile or nonchalant, or in certain cases a combination of both attitudes.

The next interesting aspect that is considered is the rationale presented by states to motivate the hindering of the exercising of the refugees’ right to seek asylum.

4.1.1.2 Rationale behind hindering the fulfillment of the right to seek asylum in a the global perspective

Indiscriminative measures have rendered irregular migrants left completely to each country’s current refugee policy, which are shifting over time. The fate of refugees ultimately depends on the political and economic situation in the world and the country of refuge, and the following text confirms this by looking into the rationale provided by states regarding their violations together with the global situation at the times of interception presented in Chapter Three. Again, this is a critical and speculative discussion.

The interception of the Exodus-ship was motivated by a unilateral agreement of migration control. As the U.K did not acknowledge the prohibition of *refoulement* at the time, they had no reason to “justify” their violation, which unfortunately provides little ground for discussion on the rationale for the act *per se*. However, the British government was worried that the acknowledgment of a Jewish nationality would include a demand from the Jews over Palestine after the Second World War.¹⁸⁴ From this information, it can be argued that one of the reasons for the migration control which the Jews were subjected to when approaching Palestine was a British means to remain in control over Palestine. Europe was in pieces in the chaos following the war and territorial claims were elementary to rebuild

¹⁸³ Burnside, supra note 113, p. 3

¹⁸⁴ Marrus, supra note 41, p. 332

the nations. By remaining in control over Palestine, the U.K. strengthened its own state and identity.

The thirty years following the Jewish exodus saw major changes for the world of refugees, and for the notion of human rights protection. The adoption of international instruments such as the Bill of Rights and the UDHR provided the core for human rights in general, and more specifically, the Refugee Convention entered into force. It did however take a while before the prohibition of *non-refoulement* became part of customary law, which is part of the reason why it is hard to analyze the Vietnamese exodus from the perspective of a right to seek asylum, together with the fact that the affected states were not parties to the Convention itself. The receiving states initially helped the migrants to a certain degree, but this shifted over time as the numbers of irregular migrants rose to the extent of using actual force in order to keep the migrants out. The rationale behind hindering the entry of migrants, provided by the “Association of Southeast Asian Nations”, was that they had “reached the limit of their endurance”¹⁸⁵. Economic and social constraints thus hindered the states from offering the boat migrants asylum. The attitudes and actions taken by the first countries of asylum were thus possibly not based on principles or unwillingness but rather economic distress. This is further confirmed by the “gentlemen’s agreement” between the Malaysian authorities and UNHCR.

The general spirit of cooperation amongst the Western states regarding the resettlement of Vietnamese boat refugees was praised by the UNHCR. The U.S. was one of the states that offered most migrants resettlement, and the reason behind this generosity is debatable. It might on the one hand have been based on moral standards or willingness to help persecuted refugees, but can also be explained by the general global situation. This is confirmed by the fact that very few of the irregular migrants actually sought refugee status upon arrival to the U.S., as they were welcome to stay regardless of determination of persecution upon return.¹⁸⁶ The exodus took place during the Cold War, through which the U.S. and Soviet struggled for ideology and power. By moving the Vietnamese people that was fleeing from the communist regime to the U.S., the state was one step closer to defeating the communistic takeover in Indochina. This would contribute to the overarching objective to stop the primary enemy to the capitalistic society that was growing in the U.S., by hindering the “Domino-effect” in Southeast Asia.

The fall of the Berlin Wall in 1989 rendered the end of the ideological war between the U.S. and the Soviet Union. The change of governance in Haiti prompted many migrants to flee their country of origin, hoping to receive protection in the U.S. However, the lack of an U.S. ideological interest in the Haitian migrants rendered policy changes. This marks the moment where an analysis of attitudes starts getting interesting, as this was when the notion of “excuses” is introduced. In the case of Vietnam, the authorities

¹⁸⁵ Robinson, *supra* note 49, p. 51

¹⁸⁶ Gibney, *supra* note 69, p 152

acknowledged that their behavior was inhumane and asked the international community for help. In the subsequent cases, the violations was not acknowledged by the states, they rather interpreted and tailored the notion of the Refugee Convention to fit their actions. A possible reason for the shift is that the U.S., Australia and Italy are bound by the Refugee Convention.

In the Haitian-case, the U.S. decided from one day to the next that there should no longer be a possibility for Haitian boat-migrants to seek asylum in the U.S., and that they should instead all be deported to Guantanamo. Some of the arguments supporting the actions are easily contested from a human rights perspective. Within this category falls the claimed humanitarian reasons to support the lack of a right to seek asylum, which in itself is a bit contradictory, as humanitarian reasons are also commonly provided to support the right to seek asylum, and the U.S. later on stated that the possibility for irregular migrants on the high seas to seek asylum is solely based on principles of humanity. Regardless, the U.S. president claimed that it would be inhumane to let migrants travel the seas in unseaworthy ships and believe that they had a chance to get asylum. Therefore it was better to stop all boats by displaying that a future trip was hopeless. The Supreme Court further stated that international law as such could not regulate the President's mandate, and thus claimed that domestic law had supremacy over international law.¹⁸⁷

The illogical content behind those arguments shows that any arguments that could be made at the present time were good enough, and the Haitian refugees were treated with an attitude of ignorance. Looking into the reasoning of the court easily identifies the illogical elements. The Supreme Court held that the decision to deport all Haitian irregular migrants to Guantanamo was in accordance with the current legislation by contending the universality of the principle of *non-refoulement* and thus motivated a non-fulfillment of the right to seek asylum, as such a right would only exist within the territory of the state. The Supreme Court accepted the right in itself and established that the U.S. actions probably breached the objects and purpose of the Convention, but they still concluded that the U.S. was not obliged to apply it.¹⁸⁸ The same court further stated that protection of irregular migrants on the high seas was only provided based on humanitarian intent, and it can be established from state practice that that humanitarian intent changes over time. The rationale provided shows ignorance, discriminative elements and an overall approach that refugee protection and the possibility to seek asylum is shifting over time and can be tailored accordingly to the state's needs and the current political climate. The line of argumentation results in a situation where the right to seek asylum only is applied when the state benefits from it, regardless of the situation for migrants, even though it has been established that a third of the people that was screened the year before received refugee status. It is remarkable that the Court acknowledges that the authorities' actions probably contradict the object and purpose of the Convention, but still

¹⁸⁷ Sale v. Haitian Centers Council Inc., supra note 73, §§14-32

¹⁸⁸ *ibid*, §§23-27

consider the actions legal. This somehow further confirms the lack of respect shown towards both the refugees and the other parties to the Convention.

The U.S. persistent contention of the universality of *non-refoulement* is convincing to a certain degree. Their interpretation falls in line with the reasoning provided by the ICJ in the “Fisheries case”.¹⁸⁹ Many scholars has accepted that a state which objects persistently to the application of a rule of customary law during the process of accumulating into such a rule, they can ‘opt out’ of the application of the rule even after it has emerged into customary international law.¹⁹⁰ It can therefore be argued that the U.S., by repetitively opting out of the universality of *non-refoulement*, is not bound by it. This interpretation has however been quashed by the UNHCR in the *amicus curiae* to the Sale-case, as U.S. on prior occurrences has supported the universality of the rule and has thus not been persistent in their objections.¹⁹¹

By territorially delimiting the states’ obligations towards irregular migrants, the U.S.’s attitude shines through, as the protection by the state should only be afforded to those within the territory, whereas other migrants might be shipped away to avoid responsibility. Again, the protections are thus offered not on a humanitarian or moral ground but simply because they managed to pass the border. The U.S. only considers the irregular migrants to be in need of protection when they are within the territory, whereas they can be ignored while outside of it.

The U.S., president claimed that the migrants should apply for asylum at the U.S. embassy in Port-au-Prince instead of trying to reach U.S. territory by boat. This would however be unsuccessful as the refugee definition presupposes that the person is outside of its country of origin, which is not the case when applying at the embassy.¹⁹² Exceptions from these regulations are provided in the Organization of American States’ Convention on Political Asylum, article 2, according to which a migrant that is fleeing from persecution on political grounds can apply for asylum at the embassy. The U.S. is however not a party to the Convention and the regulation cannot be invoked.¹⁹³ The presence of a system of diplomatic asylum does further on not rule out the prohibition of *non-refoulement*.

A nonchalant attitude towards the Haitian refugees, including discriminative elements, is further confirmed by the differences in treatment received by Haitian and Cuban migrants prior to the American policy change in 1994. The policy change effectively ended the discrimination between Haitians

¹⁸⁹ ICJ, *Fisheries, Judgment*, ICJ Reports 1951, p 131

¹⁹⁰ Fitzmaurice, “The Law and Procedure of the International Court 1951-1954” in *British Yearbook of International Law*, (1953), Vol. 31, No.21, p. 111f

¹⁹¹ UNCHR (1994) supra note 81, p. 93f

¹⁹² Noll, “Seeking asylum at Embassies: A Right to Entry under International Law?” in *International Journal of Refugee Law*, (2005) Vol. 17, No. 3, p. 553

¹⁹³ Americas – Miscellaneous, *Treaty on Asylum and Political Refuge*, 4 August 1939

and Cubans, by making the situation just as bad for both parties. This shows how refugee policies are changed overnight when the current policy is no longer politically or economically beneficiary. Another possible reason for the sudden policy changes is public opinion. The bombing of World Trade Center in New York in February 1993 was partly planned by a kuwaitian citizen whose application for asylum was investigated during the time of the bombing. The legal procedure following the bombing attracted a lot of media attention and inspired a growing public skepticism towards asylum seekers.¹⁹⁴ It is possible that the policy changes towards Cuban and Haitian migrants in the subsequent years were influenced by the public skepticism and the growing fear of terrorists among asylum seekers.

The policy change towards Haitian migrants has other political explanations, namely the presidential election in 1993, in which Florida was a critical state in Bush's reelection bid. Florida was also one of the states that received the most Haitian migrants because of its geographical location. Bush hoped to win points in the election by controlling the immigration to Florida. An organized anti-immigrant lobby was quick to sound the alarm about the potential of a Haitian mass influx, which attempted to play on fears in Florida. Because of the reelection in combination with economic recession and a presidential campaign where economic and social downfall of the country was blamed on foreigners, no sympathy was expressed for the Haitian irregular migrants.¹⁹⁵ Migration lies at the very heart of sovereignty and the identity of a state, which is why migration policies often are adjusted in times for elections. The accuracy of this conclusion can be confirmed by looking at the mentioned American election 1993 and the Australian election 2001.

It has been argued earlier in this thesis that the Australian Prime Minister Howard remained in power in 2001 as a consequence of his reaction to the Tampa-incident, because the public had negative reactions towards asylum-seekers in general. The Australian authorities stated that the interception was necessary as it hindered international crimes, an argument which can be met by questioning the proportionality of the means and the goals. The threat posed by a refugee travelling by boat is questionable, and whether the issue of people smuggling is prevented *per se* by sending the irregular migrants elsewhere. A screening could effectively separate alleged terrorists, and economic migrants, from refugees. Controlling the borders does thus not necessarily exclude the identification of refugees and thus abundance with international regulations, as a system of refugee determination does not rule out the opportunity to return people.

The Australian authorities further consider the migrants using boats to migrate as "queue jumpers" who try to cheat their way into the country, without considering the desperate situation that possibly put them in the boat at the first place. By branding the migrants cheaters, they motivate a

¹⁹⁴ Gibney, *supra* note 69, p. 164

¹⁹⁵ Frelick "Haitian Boat Interdiction and Return: First Asylum and First Principles of Refugee Protection" in *Cornell International Law Journal* (1993) Vol. 26, p. 678

harsh legislation as it hinders the boat migrants from being rewarded for their cheating techniques.

When comparing the Australian policies towards refugees' right to seek asylum with policies implemented earlier, it can be established that they go much further than the policies implemented by the U.S. towards Haitians and Cubans in the beginning of the 90's. Whereas the American policy implemented inception and interdiction, the Australian policy legalizes excision, which allows expelling boat-loads of migrants when they have reached actual Australian territory and the migrants are thus cut off completely from the domestic asylum procedure, which is not the case in the "Wet feet, dry feet"-policy. Hereby, the Australian policy goes one step further in violating the Refugee Convention and the attitudes have thus developed to become even harsher over time. Regardless of this, the Australian authorities claim that the agreement with Nauru regarding the screening of migrants falls within the scope of the Convention.

To sum up, the attitudes shown towards irregular migrants' rights to seek asylum in Australia were not positive. The public, the politicians, the government and the court all managed to motivate a very tough and harsh legislation, which contravened such a right. This negative attitude could be explained by *inter alia* the terrorist attacks in New York, which initiated the "War on Terror".

It has been argued that the "War on Terror" inspired the creation of Frontex.¹⁹⁶ The Agency's repetitive encouragement towards cooperation between EU Member states and North African states in order to control immigration and prevent transnational crimes can be established to be a contributor to the interceptions in the Mediterranean Sea. This encouragement was used by Italy to reason its behavior in the Hirsi-case, as the fulfillment of the search and rescue operation and of the bilateral agreement with Libya was used as the rationale behind violating refugee law, even though the fulfillment of one of the legal spheres does not necessary disregard respect for the other ones. The Executive Director of Frontex argues that refugees are illegal, even though no screening is put in place to separate refugees from economic migrants, and further that the European borders have to be protected in order to secure the safety of the EU members.¹⁹⁷

Accordingly, migrants are considered to be both illegal and dangerous which gives a good reason for states to take distance from them. The attitudes towards the irregular migrants have thus developed to be even more negative than in the Australian case. This can however be contented

¹⁹⁶ Jorry, *Construction of a European Institutional Model for Managing Operational Cooperation at the EU's External Borders: Is The FRONTEX Agency a Decisive Step Forward?* (2007) CEPS Challenge Research Paper No. 6, p.1

¹⁹⁷ Carrera, *The EU Border Management Strategy – Frontex and the Challenges of Irregular Immigration in the Canary Islands* (2007) Center for European Policy Studies p.

by the argument that Frontex “at least” claims to be separating economic migrants from refugees, while the new Australian policy admits the all unauthorized entrants shall be kept out.¹⁹⁸ The action by Italy in the Hirsi-case does however not confirm that such separation is implemented in practice.

In conclusion, the rationale behind the interceptions has developed, as no rationale at all was provided in the case of Palestine, which later developed into wide interpretations of the Refugee Convention and international law by the U.S., and was followed by an even harsher attitude through the rationale by Australia and lastly to the creation of an organ to close the European borders for potential criminals. Migration policy has grown to become a big part of policies of national security. The irregular migrants have gone from being seen as an issue for the international community, to become checkers in the political games and lastly to be considered dangerous criminals that have to be controlled and put in place, as they are something that should be feared by the public. When looking at the cases chosen for this study in isolation, it can be argued that the development following the adoption of Refugee Convention has been negative for the irregular migrants, as the states justify their behavior by making narrow interpretations of the Convention. The U.S., Australia and Italy all claim to be implementing the Convention correctly, while intercepting refugees. Before the adoption and the universality of the Convention, the frames were blurry as protection was offered based on “humanitarian considerations” rather than on a legal instrument. Perhaps the blurry edged humanitarian considerations provided the individual irregular migrant with a more comprehensive protection than the legislated regulations has been able to do.

The policy shifts up until the creation of Frontex provides interesting aspects. In the earlier cases, the states started off by screening the migrants but shifted policy for different reasons, in Australia retrospective legislation was introduced to eliminate the need for screenings and in Europe legislation and the creation of Frontex was implemented in a preventive measure. The control over migrants’ possibilities to seek asylum goes from chaotic to organized, which proves that the handling of migrants are seen as a growing problem which requires more attention as time passes. This is very much confirmed by Frontex annual budget.¹⁹⁹ There has clearly been a development in the rationale; it has evolved from a fear of communism to a fear of terrorism and the irregular migrants have been categorized as belonging in the same social groups as the Western states’ “current enemy”. The political development globally is thus followed in refugee policies. The question that follows is – what does this say about the future? Will fear and protection of national security stop the humanity provided to those in need? The Security Council resolution 1373 “On threats to international peace and security caused by terrorist acts”, adopted in 2001, is a consequence to the terror attacks in New York on September 11 the same year. This binding

¹⁹⁸ Gibney, *supra* note 69, p 193

¹⁹⁹ 111 000 000 € in 2011, Frontex, *Frontex Programme of Work 2013* (2012) p. 4

document adopted under Chapter VII of the Charter of the United Nations does arguably encourage even stronger border controls under article 2 (g) and can be interpreted to hinder the fulfillment of refugee law. The resolution gives precedence to security measures against terrorism rather than human rights and thus ignores the rights of people to be protected from persecution.

It can be concluded that the development of policies regarding migrants' right to seek asylum can evidentially be explained by general global changes. In some cases, however, it is hard to distinguish whether the global change is a result of new migration policies or the other way around. There are no indications as to why this development would cease any time soon. The future developments on global politics will surely be mirrored in refugee policies. This underpins a continued insecurity in the application of refugee norms as policies have proven to depend on the current political state and on separate events. This clearly provides a lack of transparency in refugee protection, as interpretations occasionally are made, to use the words of Goodwin, in accordance with "the letter rather than the spirit of international law".²⁰⁰ What can be established is that countries have a habit to prioritize the well-being of their own citizens higher than the protection of refugees, which again leaves the refugees in a vulnerable situation. As long as the country can motivate refusal for the refugee to seek asylum based on the protection of the nation-state and its citizens, it seems that the country can somehow, at least according to its own interpretation, escape responsibility.

4.1.2 Development of Attitudes Shown by the International Community

The international community directed criticism towards the British authorities following the interception of the Exodus-ship, which indicates support and sympathy for the irregular migrants from the international community. The support is further confirmed by the development and adoption of the Refugee Convention in 1951, in which the principle of *non-refoulement* was legislated. The support for the migrants' right to seek asylum is further confirmed by the French authorities' refusal to disembark the migrants on French soil. The fears of Western and Eastern parts of Europe regarding the refugee definition and how it would force the Western states to handle asylum seekers from their "enemy" and communist countries however shows that the "pick and choose" attitude towards irregular migrants had already begun, but the fears were ignored in the definition, nonetheless.

As regards the reaction to the Vietnamese boat migrants by the international community, a general spirit of cooperation was shown and confirmed by statements by the UNHCR. It was emphasized by the organization that the international community had certain obligations following from the right to

²⁰⁰ Goodwin-Gill and McAdam, *supra* note 7, p. 255

seek asylum, as the refugees should be offered temporary asylum. The fulfillment of this provision by the first state of asylum however depended on the offers of resettlement by the international community. By providing such offers, it can be established that the international community supported the right to seek asylum.

The right to seek asylum is not expressly mentioned in UNCHR's *amicus curiae* regarding the Haitian interdiction cases. This could be interpreted as a lack of support, as the text focuses only on the geographical scope of article 33. This is however changed in 2001, when a representative from UNHCR expressed the right for irregular migrants' cases to be tried in Australia.²⁰¹ The international community at large reacted strongly and critically towards the Australian solution, and it was argued that there is in fact a right, not only to seek asylum, but also to territory.²⁰² The critique provided by UNHCR reaches new levels as the organization refuses to screen the migrants sent from Australia to Nauru as a means of punishment and to show that they refuse to support the "Pacific Solution". UNHCR further compares the situation in Australia with the one in Vietnam in the 70's and establishes that it is a completely different environment, and that the development has been very negative.²⁰³

In 2012, the right to seek asylum is approached in an even more generous manner. The European Court establishes in the *Hirsi*-case that there is a right to seek asylum and that many obligations follow from the rights for the intercepting states. The UNHCR further states that the right to seek asylum should not be separated from the principle of *non-refoulement*, as the one follows from the other.²⁰⁴ This is confirmed by the strong reaction towards the Italian interception shown by international organizations.

When looking upon the attitudes shown by the international community to the right to seek asylum, certain conclusions can be drawn. The international community has always been critical to interception at sea that hinders migrants from seeking asylum. As the means by states to avoid granting the right become more creative and harsh, the reaction by the international community in general and the UNHCR in particular become stronger and the interpretation of the right to seek asylum becomes more generous towards the irregular migrants, and is acknowledged in a broader manner.

4.2 Future Attitudes and Developments

This following discussion will start out by drawing conclusions regarding the future attitudes towards refugees from the previously identified trends. It

²⁰¹ U.S. Committee for Refugees, *supra* note 125, p. 28

²⁰² Human Rights Watch (2002) *supra* note 115, p. 46

²⁰³ UNHCR, *Presentation by Ms. Feller*, *supra* note 66

²⁰⁴ *Hirsi Jamaa and others v. Italy*, *supra* note 160, §103ff

will then discuss what can be done in order for future state practice to fulfill the right to seek asylum.

Presumptions upon addressing this topic was that to face a “slippery slope”, where the attitudes towards irregular migrants following the adoption of the Refugee Convention was positive and generous, only to become more and more hostile and restrictive as time passed by and globalization became apparent. In some aspects, those prejudices have been confirmed, especially by a state such as the U.S., which admitted considerable amounts of refugees after the Vietnam War as a part of the resettlement process, based on the notion of “international cooperation”, but adopted strict immigration policies in the 90’s. In 1993, Frelick reflected upon the development from the perspective of a legal scholar, by stating:

“We have become minimalist in our demands, not because we are any less committed to advocating for a range of rights and benefits for refugees and asylum seekers, but because the violations committed by our governments deny even minimum standards of refugee protection that we had thought were no longer open to question.”²⁰⁵

The negative development in the context of refugee protection which was experienced during the Haitian exodus and which has continued until today did not surprise legal scholars in 1993, and it does not surprise today.

By looking at the conclusions drawn within this chapter, the future of attitudes towards refugees will possibly see more extreme measures including less respect and less consideration to the individuals. There are no indications that the categorization of all irregular migrants as dangerous criminals will cease any time soon, and problems such as xenophobia, racism and exaggerated fear of terrorism will possibly continue to be used by governments to motivate more controlling and restricting policies towards migrants’ right to seek asylum. The polarization *vis-à-vis* the ECtHR and the European governments which can be established in the Hirsi-case raises concern regarding the future for the Court itself. National refugee policies are in certain cases at the other end of the spectrum from the Court’s decision. From where does the European Court and the Council of Europe get its authority, if the governments, selected by the people, adopt policies which contravene the European Convention? The continued development of this practice will inevitably diminish the Court’s credibility.

This dark conclusion can however be contended in the European context by looking at current development. To begin with, the Hirsi-case might influence positively on the right to seek asylum as it is identified as deriving from the European Convention. Refugee protection might furthermore benefit from the upcoming accession for EU to the European Convention. EU as an institution, including all its organs, will have to act in accordance with the Convention as it becomes legally binding for the Union and falls under the jurisdiction of the European Court of Human Rights. The

²⁰⁵ Frelick, *supra* note 195, p. 678.

accession does not only result in control of the compliance with the Convention regarding the Union's acts and omissions, but also the conduct of the union.²⁰⁶ The regional judiciaries in general will hopefully have the ability to put pressure on states in order to refrain from breaching the right to seek asylum.

Following the Tampa case, HRW claimed that the irregular migrants had not only a right to seek asylum but also a right to access the Australian territory in doing so. This claim was seconded in UNHCR's admission to the Hirsi-case. This shows that statements by NGOs do have impact on the UNHCR which indicates an even tougher reaction to future possible breaches of the right to seek asylum from the UNHCR, deriving from the intervening parties statements in the Hirsi-case.

The international community's reaction to more discriminative, harsher and more controlling state policies has been to issue more explicit reports, which demonstrates a growing concern towards refugees' situations and a broader interpretation of the regulations in order to expand on and clarify state obligations. It is however up to each government's discretion to implement regulations and conclusions, and no mechanism monitoring the compliance with the Refugee Convention exists. The system of refugee protection, including the right to seek asylum, has been binding for over 60 years, but there is an obvious gap between law and practice which has rendered the protection flawed over and over. This gap exists because the power still rests on the "untouchable" sovereign state and no monitoring body exists which can effectively check the state and sanction violations (acts or omissions to fulfill the regulation). The Refugee Convention is not self-executing, it gains strength only in accordance with the implementation and incorporation by states, and the ratification of the Convention does not automatically mean that states will abide to it, which the cases of Haiti, Cuba, Australia and Italy have shown. The more control states gain over their borders and the refugees, the more control is needed for the international community to ensure the fulfillment of refugees' rights. Looking into the comments provided by UNHCR following both the Sale-case and the Tampa-case, strong words are used to describe how the national actions violate the Refugee Convention, and UNHCR keeps adopting conclusions in order to secure the protection of boat refugees, but they are not considered by all states as guidance, since they have not been acknowledge as such in legislative measures, nor by the judiciary.

It is arguably time to finally start implementing the refugee protection in a real sense, without any excuses. In order to come to terms with the excuses, two alternative solutions can be introduced: information or control. The choice between the two depends on whether one considers that regulations should be adjusted to the current situation, or that laws form the society and should be used as a means to change attitudes.

²⁰⁶ Jacqué, "The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms" in *Common Market Law Review* (2011) No. 48 p. 1005

It has been established in this thesis that state practice shows a lack of the notion of “learning from history”, a pattern which could be changed by providing policy makers with information of the history of refugee protection. Considerations to previous state practice and the reactions of the international community when drafting new refugee policies could possibly prevent future breaches of the regulation. The alternative solution is to give the international community a means to control the implementation of the Refugee Convention. This could possibly be done by introducing a monitoring body within the Refugee Convention, through an optional protocol. The monitoring body would operate a report system in the same manner as the UN Treaty Bodies, and it would thus be able to name and shame states that breach the Convention. Situations like the one following the Tampa-accident, where the UNHCR stopped assessing refugee claims to “punish” the new Australian policies, could then be handled in a more effective way. Refugees’ access to remedies following interception at sea is today discriminative, as a consequence of the lack of a “World Court”. Both the Sale-case and the Hirsi-case has arguably strengthened the situations for boat refugees in the Caribbean and the Mediterranean Sea in a way that has not been done in for example Australia. The introduction of a monitoring body to the Convention would enable universal control over the Convention, which would eliminate this discriminative treatment. Certain problems are inherited in the alleged adoption of an optional protocol; the most important one being how to develop a protocol which will be ratified by states that has repeatedly breached the Convention. This is especially a problem for the U.S., which claims another geographical scope of the Convention than the UNHCR. The adoption of an optional protocol would however support and enable a full and universal fulfillment of the right to seek asylum and could possibly affect future attitudes towards boat refugees.

5 Concluding remarks

By applying the thoughts of Foucault, this thesis looks into state practice and policy in order to establish development and identify trends in states' attitudes towards boat migrants, as this shows the way that states reflect on and rationalizes themselves. The presentation of the acts implemented by states in order to hinder the fulfillment of the right to seek asylum demonstrates that either a nonchalant or a hostile attitude is shown. There are no chronological patterns to be identified regarding why one attitude is shown instead of the other, and the attitudes have not shifted or developed over time.

The same is not true regarding the rationale behind the non-fulfillment of the right to seek asylum. In this area, a negative development can be established by looking at both state practice and policy changes. It is clear that more restrictive policies, extended border controls and less consideration shown for humanitarian principles and *non-refoulement* have been introduced over the past 65 years. Policy changes have followed the global situation and refugees have been categorized in accordance with the current "enemy" of the Western community. Gebrewold concluded that migration policies mirror the spirit of societies²⁰⁷, and this has clearly been shown within this thesis. Such patterns will most possibly be followed as well in the future, and as the current threat changes over time, migration policies will follow suit. The situation risks deterioration if no global mechanisms to monitor governmental practice and policies are introduced.

This negative evolution is however balanced by the development within the international community and its attitudes and support for irregular migrants' right to seek asylum. This is confirmed by comparing the statements made by the UNHCR in 1993 and in 2001. In the former example, focus lies completely on the geographical scope of *non-refoulement* and the right to seek asylum is ignored. However, in 2001, the High Commissioner established that to avoid breaching *non-refoulement*, the irregular migrants have a right to seek asylum. Other than the statements by the UNHCR, it can be established that the support shown for a right to seek asylum by the international community grows stronger and the interpretations of the legal framework becomes more explicit as a reaction to the more restrictive national policies.

While the system of refugee protection has not changed dramatically since the adoption of the Refugee Convention in 1951, the world of refugees bear little resemblance with the situation following the Second World War. It has been established in this thesis that the protection for boat refugees provided by the Convention has not proven to be enough, as states interpret the provisions according to their own interests. It is very possible that a more active legal development, including amendments of the Convention, could

²⁰⁷ Gebrewold, (2007), supra note 1, p. 155

have saved the boat refugees from the negative attitudes and the harsh treatment that they have been subjected to. The way in which the strong reactions by the international community have been ignored in subsequent interpretations is highly disappointing and does not speak reassuringly about the future for boat refugees.

The conclusion opens up to a number of possible areas for future research, especially in areas that has only been touched briefly upon within the scope of this paper. One interesting question is how to develop an optional protocol to the Refugee Convention which introduces a monitoring committee that works to promote the universal fulfillment of the Convention, and how to provide an incitement for states that violate the convention repetitively to become parties to such a protocol. It would further be interesting to see how the Hirsi-judgment affects the future operative practice in the Mediterranean Sea, and whether the strong statements by the international community following the case will be met and treated on a national level, especially while the EU becomes a party to the European Convention on Human Rights.

In conclusion it can be established that in order to move on from the dire straits of the past and enable smooth sailing towards the future, there is a need for attitude changes which acknowledges the mistakes made in history and promotes the right to seek asylum.

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