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Adèle Garnier

Are states in control of their borders?

Testing the venue-shopping approach in the Australian context

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Content

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Abstract

Focusing on Australian policies as a "critical case", this paper discusses the relevance of the venue-shopping approach for the study of the internationalisation of asylum policies. The venue-shopping approach takes its stance in the "sovereignty debate" which argues for and against the enduring autonomy of state policies vis-à-vis cross-border flows. To this approach, governments confronted with an increase of unwanted migration, and to domestic constraints which affect the range of entry controls measures available to them, are able to maintain state sovereignty. Governments "shop" for international and private venues of border control beyond the domestic sphere. These venues are presented to domestic constituencies as legitimate through the development of convincing policy-images. The study of the Australian case shows that if the venue-shopping approach aptly conceptualises the internationalisation of control policies as a consequences of domestic constraints, it overestimates both the ability of governments to dominate domestic debates as well as the efficiency of new venues of border controls. Thus, it cannot be said in the Australian case that venue-shopping measures lead to a reaffirmation of state sovereignty. These findings call for a better conceptualisation of agency in the venue-shopping approach in particular and in the "sovereignty debate" in general.

I Introduction

Since the rise of the nation-state, controlling the entry of people into state territory has been considered a sovereign prerogative of the state.[1] Following this view, border controls are mechanisms essential to the regulation of state sovereignty. Over the last decades, and accompanying the stunning increase of international mobility and transnational activities, the location and actors of entry control have been transformed. *Entry control* is increasingly disconnected from *border control* in its narrow sense, that is, controlling border-crossing activities at the territorial border of states. However, many authors consider that the crossing of an international border also encompasses the entry into a political, social and cultural system with its rights and duties.[2] The contemporary social and geographical transformation of border controls, among other objectives, aims to ensure the regulation of access to a particular regime of political and social rights. Following Brenner (1999), this process can be described as an attempted reterritorialisation of border controls in order to ensure state sovereignty. Brenner defines

1 See for instance Torpey 2000.
2 See Simmel 2006 (1908), Strassoldo 1982, Shamir 2005.

reterritorialisation as "the continual production of relatively fixed (…) configurations of territorial organization on multiple scales", responding to deterritorialisation processes the British geographer describes as "the endemic drive towards space-time compression under capitalism" comprising the increase of cross-border flows (Brenner 1999: 43).[3]

The success of this enterprise has been hotly debated over the last decades, giving way to an interdisciplinary "sovereignty debate". Scholars discussing immigration and border controls either argue that the state is able to maintain, or even to enhance, its sovereignty through the reconfiguration of border controls, or that state sovereignty is undermined by the current increase of cross-border flows of various kinds.[4]

My paper focuses of one particular school of thought in this debate and deals with one particular policy field in one particular empirical case. Yet its findings might shed a new light on some problematic aspects of both the studied school of thought and the general nature of the "sovereignty debate". I will study the "venue-shopping" approach, labelled as such by Guiraudon (2000) while its core assumptions are shared by a number of scholars.[5] The venue-shopping approach argues that state actors confronted to an increase of unwanted migration, and to domestic constraints which affect the range of entry controls measures available to them, are able to maintain what they consider state sovereignty through the cooptation of private and non-domestic actors put in charge of border control. The approach has been almost exclusively applied to Western European countries; hence it seems fruitful to test its explanatory value as well as its fundamental assumptions in a non-European case. I will consider Australia, precisely Australian asylum policies of the last decades as a *critical case* (Yin 2003: 39ff).

II Reterritorialisation of border controls and sovereignty debate

State sovereignty has been at the core of many debates in international relations and political sociology in the last decades. Studies linking sovereignty, immigration and border controls often elude the issue of the nature of sovereignty, focus partly on the normative implications of the concept[6], and, mostly, take stance regarding its disappearance/persistence. Scholars generally note that the increase of human mobility in the last decades has transformed sovereignty (Sassen 2004, Cohen 2001). Yet the overall persistence of sovereignty is a matter of debates. To authors focusing on transnational networks (Sassen 1996, Pries 2001), borders do not seem to constrain the development of strong and informal cross-border connections. States do not appear to be in control of what happens at their borders. Besides, it is argued that the development of an international human rights regime undermines the

3 Reterritorialisation processes occur inside the state (inward) as well as through internationalisation of what was previously limited to the territory of the state (outward). The "relative fixity" of inward and outward reterritorialisation is ensured by regulatory frameworks such as laws and institutions. In Brenner' view, reterritorialisation and deterritorialisation constitute the dialectical interplay of globalisation (Brenner 1999).

4 See discussion below.

5 The venue-shopping is understood in the paper as an "analytic paradigm", which is, following Merton (1968) more than a loose conceptual model, while its explanatory value is lesser precise than a theoretical model forecasting measurable results. See especially Allison's (1969) comparative study of the Cuban missile crisis in which several authors are clustered together as representative of three "analytic paradigms" of foreign policy studies.

6 A significant amount of literature discusses the normative value of border controls (see for instance Barry and Goodin 1992, Schuster 2003), yet is not always related to the normative value of sovereignty itself.

state prerogative to determine the status of migrants both at territorial borders and on state territory (Soysal 1994, Sassen 2004). Soysal and Sassen consider that instruments of supranational law such as the European Convention on Human Rights or the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (hereafter the Refugee Convention) as well as supranational courts such as the European Court of Human Rights undermine state borders and state sovereignty. Migrants are entitled to claim and be granted rights affirmed in supranational conventions, since states have ratified these conventions. Other scholars argue that welcoming migrant can be part of state strategies (Cohen 2001). To Cohen, the claim that sovereignty is undermined by the increase of international mobility overestimates the strength of borders in the past. The US-Mexican border for instance has always been porous. Moreover, the increase of controls which aim to reinforce the cohesion of the US nation-state contribute to enhance the visibility of informal cross-border flows (Joppke 1998a: 12). Similarly, commentators of the transnational networks thesis ask for further evidence regarding a qualitative change in the last decades (Bommes 2003). Sceptics of the international human right regime's strength argue that state executives, if constrained in their prerogative to determine who has a right to come to and stay, are constrained by their own, domestic judiciary. Besides, states ratify, and implement, supranational conventions. With the exception of the European Convention on Human Rights, supranational conventions remain soft law instruments with no supranational enforcement mechanism similar to the European Court of Human Rights (Joppke 1998a, 1998b). Critical security studies point at the discursive and institutional construction of migrants as a threat to the security of the community. The framing of migrants as a danger legitimises the increase of exclusionary measures (Bigo 2002, Huysmans 2006). Critical security studies postulate that such measures are efficient. Therefore state sovereignty can be maintained. Contrary to the approaches mentioned above, sovereignty is conceived in political rather than in legal terms, hence following Carl Schmitt's sovereignty concept.[7] The existence of a legal order and the role of domestic or international rights are mostly not dealt with in critical security studies. Border camps for migrants aiming to determine their status are conceived as an expression of the state of exception and hence of the unfettered power of the sovereign executive over the population of a state (see especially Agamben 1998)[8].

III Venue-shopping approach

The venue-shopping approach belongs to the stream of studies arguing that states are able to adapt to sovereignty challenges triggered by the increase of international migration. "Venue-shopping" is a term coined by Virginie Guiraudon (2000). It refers to internationalisation, devolution and privatisation of immigration control by Western liberal democracies facing changing circumstances, i.e. a sharp increase from the 1980s of what is considered unwanted migration, particularly the arrival of asylum-seekers from the global South.[9] Governments "shop" for new control "venues" on the local and on

7 To Schmitt, the sovereign possessed the authority to proclaim the state of exception and to define who is friend and who is enemy of a political community. Fear of the enemy constitutes the organising principle of the political (Schmitt 1963, Huysmans 2008).

8 This stance is at times combined with a Foucaldian study of states' day-to-day practices of domination (Rajaram and Grundy-Warr 2004, Bigo 2007). For a critical appraisal of the Agambenian stance see Huysmans 2008. Foucault himself considered that state sovereignty relates to *territorial* control and consequently belongs to the past. To him, the power regime developed by state actors since the Industrial Revolution, which he characterises as governmentality, aims to control *people* (see Foucault 2007)..

9 On the increase of asylum claims since the 1980s see Martin 1988, Joppke 1998, Gibney 2005.

the international level, and co-opt private actors on different levels, so as to maintain or restore state sovereignty over entry control. In the domestic sphere, the executive uses specific policy images to legitimate its "shopping" behaviour. Policy change is framed in terms of beneficent European integration and international cooperation to tackle entry control as a cross-border problem that cannot be solved by isolated governments. [10]

Venue-shopping is a means to overcome the gap between policy objective (effective entry control) and outcome (immigrants managing to arrive to the territory of liberal nation-states are seldom rejected), a gap reflecting the contradiction between opened markets and closed political communities.[11] The gap between objectives and outcomes de-legitimates governments in the eyes of their constituencies (Cornelius et. al. 1994).[12] The venue-shopping approach owes to public policy analysis which emphasises the role of institutions (March and Olsen 1989), the evolution of agenda-setting and framing (Baumgartner and Jones 1993) as well as principal-agents approaches in which delegation of competencies are assessed (Williamson 1967).

The sovereignty of the executive and the legislative in the field of entry control is challenged by the judiciary. Non-state actors (i.e. not belonging to the bureaucratic apparatus of the state) such as political parties, the media, immigration and security experts, and migrants and refugee advocates influence the debates.[13] Thus, no congruence of interests between these actors is assumed. Following Williamson's principal-agents model, Guiraudon (2001b; with Lahav 2006) argues that the principal, here the executive, is in informational disadvantage in relation to agents implementing policies. The executive may not be able to monitor the implementation process. The interests of policy-making agents are not necessarily congruent with the interests of implementing agents (Lahav and Guiraudon 2006: 215). On the international level, the executive, especially home affairs representatives, recruit "sheriff's deputies" (Guiraudon 2000: 252) such as states of origin and of transit of migrants and private companies such as carriers. "Passing the buck" to third parties allows the executive to avoid domestic constraints set up by the judiciary as well as concurring state administrations also concerned with migrant issues, such as social welfare and labour ministries.

Geographically, venue-shopping literature mostly analyses European processes, that is, the Europeanisation of immigration control.[14] Guiraudon and Lahav (2000) and Guiraudon (2001a) focus especially on France, Germany and the Netherlands. Venue-shopping motives as well as the influence of supranational court decisions on the entry control policies of these states are analysed. Geddes (2001) and Lavenex (2006) highlight the outcome of "venue-shopping" practices, that is, patterns of Europeanisation. Lavenex especially focuses on processes induced in countries beyond the European Union. Beyond the European context, Joppke (1998b) addresses the gap between policy objectives and outcome in the case of the US asylum policy, compared to German and British policies. However, an analysis of the "shopping" for non-domestic seems reserved to European countries.

The venue-shopping approach reveals a number of conceptual strengths regarding the analysis of

10 „Actors seek new venues when they need to adapt to institutional constraints in a changing environment. To do so, they must resort to framing processes or policy images– the 'constructivist' moment." (Guiraudon 2000: 258).

11 Hollifield (1992) has denominated this contradiction "liberal paradox".

12 Guiraudon and Joppke (2001) argue that it would be a simplification to assume that the constituencies motivating the decisions of the executive are merely the general electorate. See also the discussion in Guiraudon 2006.

13 Guiraudon and Lahav (2000: 190) label this perspective a "disaggregated view of the state".

14 See Geddes 2001, Guiraudon 2000, Guiraudon and Lahav 2000, Lahav and Guiraudon 2006, Lavenex 2006, Gammeltoft-Hansen 2008. "Europeanisation" as it is understood in the approach goes beyond the EU level, as a number of authors deal with the impact of European Court of Human Rights decisions linked to membership of the Council of Europe, and not necessarily of the European Union.

the reterritorialisation of border controls. A consistent explanatory model of the relationship between domestic and international spheres is provided: the approach argues that non-congruence between domestic actors leads specific domestic actors to seek the involvement of private and international actors in policy implementation. However, the approach appears to fall short of detailed accounts of the will and ability of the "sheriff's deputies" involved in border control to fulfil their delegated control tasks. If non-congruence of interests as well as implementation difficulties beyond the domestic sphere are not excluded per se in the approach, empirical evidence focuses mostly on the domestic level. Besides, research beyond Western European processes is scarce. Finally, even if the approach is explicitly taking stance in the aforementioned "sovereignty debate" (see especially Guiraudon and Lahav 2000), rather cursory references are made to a definition of sovereignty. Sovereignty is generally referred to as the authority of the state over its own affairs. The approach neither distinguishes between legal and political components of sovereignty nor discusses the identity of the sovereign, as critical security studies do.[15] The following section thus tests the explanatory value of the venue-shopping approach in an extra-European context.

IV Critical case: Australian asylum policies since the 1970s

1 – Critical case: definition and application

The development of Australian asylum policies will be studied in order to test the venue-shopping approach. Australian asylum policies will be used as a critical case. Yin (2003: 39ff) defines a critical case as a case to which a well-formulated theory is applied, so as to confirm, challenge or infirm the tested theory. Not only should the assumptions of this theory be clearly specified, but the chosen case should also present the conditions within which the theoretical propositions are believed to be valid. The explanatory value of the theory must be considered a realistic possibility. If the venue-shopping approach might appear too loose to be qualified a theory, its consistency pleads in favour of a test it by means of a critical case.

Why is it possible to consider the Australian a potentially appropriate case to test the venue-shopping approach? The venue-shopping approach deals with Western liberal democracies confronted to changing circumstances, that is, to the increase of unwanted migration since the 1980s. The plurality of domestic actors constrains the executive which attempts to restore control over who enters the country and its regime of social and political rights. Executive officials search for new control mechanisms to be implemented, meaning that alternative control mechanisms have to be potentially available, and the transformation of control policies is legitimated in the domestic sphere by specific policy-images.

Australia is a Western parliamentarian democracy[16] characterised by a multi-party political system and

15 Guiraudon and Lahav (2000) do not give any explicit definition of sovereignty. However, the authors make it clear clears that sovereignty is assumed to be the authority of the nation-state over its affairs, especially over migration control. Joppke (1998:10) is somehow more explicit, as he defines sovereignty as "ultimate control over a territory and populace" and distinguishes the shape of sovereignty on domestic level (plurality of actors) and on international level (unitary state). Gammeltoft-Hansen (2008) offers a reflection on sovereignty on state level and on its role in the contemporary international regime, defined as a "late sovereign order".

16 Australia has been historically bound to the „West" since its English colonisation in the 18th century. The Australian political system is a federal version of the Westminster system. Besides, Australia is firmly integrated within post-WW II

a pluralist society with both a strong media and a lively civil society. In terms of legal regime, Australia is a rare example of a Western democracy which has not adopted a constitutional declaration of rights. The Australian executive has historically been attributed broad discretionary powers. However administrative discretion has been reduced by several parliamentary Acts since the 1970s which have guaranteed judicial oversight over administrative decisions, including administrative discretion in migration matters, as will be shown below.[17] Besides, a number of international law instruments have had a significant influence on domestic law, even if domestic transposition of international law appears a difficult process (Charlesworth et. al. 2003). The Australian economic system is liberal, the country having experienced profound "economic rationalism" reforms from the 1980s (Pusey 1991). Australia has been considered as an incarnation of Hollifield's "liberal paradox" characterised by an open market and a strict regime of entry control.[18] (Birrell 1992, McNevin 2007). Australia's quasi-universal visa requirement is related to a tradition of "remote controls": entry control and border controls have been distinct for a long time (Cronin 1993). Another aspect rather uncommon in Europe is the existence of policy of managed immigration since the beginning of the twentieth century, including resettlement policies towards refugees.[19] Immigration policy has been administered by a specific governmental department since 1945. Finally, even if Australia's macro-regional environment is not as integrated as Europe is with its periphery, the Australian authorities actively cooperate with neighbouring countries of the Asia-Pacific area. The country can be considered an economical, political and military hegemon in the Pacific (if not in South-East Asia). This geopolitical and economical situation provides leverage in terms of international policy in Australia's immediate regional environment (Dinnen 2004).

Hence, Australia appears a plausible case to apply the venue-shopping approach. Historically, spontaneous migrant arrivals have occurred since the 1970s. Even if the geographical isolation of Australia has limited the scale of undocumented arrivals compared to that in Europe, controversies over spontaneous border arrivals, particularly the arrival of people claiming asylum, have given way to "shopping" strategies so as to ensure its control over entry.

The following section provides a chronological account of the development of Australian asylum policies in the last decades. Asylum policy affects people – at the border or on the territory of a state that is not their own, claiming to be granted refugee status as it is defined in the Refugee Convention, as they fear persecution in their country of origin.[20] According to the Refugee Convention's *non-refoulement* principle, a person cannot be sent back to his or her country of origin during the processing of an asylum claim as potential refugees would be of at risk of persecution. Moreover, refugees coming unlawfully to a country of refuge shall not be penalised.[21] Yet a right to be granted refugee status,

"Western" alliances such as the Australia, New Zealand, United States Security Treaty (ANZUS), which is the equivalent of the North Atlantic Treaty Organization (NATO) in the Pacific region.

17 Judicial review is crucial in common law countries such as the United Kingdom, Canada or Australia, in which law is traditionally developed by court decisions.

18 While the Australian economy has been deeply liberalised, a universal visa regime remains in place. With the exception of New Zealanders, every foreign arrival has to apply for a visa to enter Australia.

19 Refugee resettlement policies target people already assessed as refugees in first countries of asylum and selected for resettlement if they are not in a situation to integrate locally or to repatriate safely to their country of origin. Australia resettles annually several thousands of Convention refugees from first country of asylum in the framework of its humanitarian program.

20 Art.1 of the Refugee Convention defines a refugee as a person "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."

21 See art. 31 of the Refugee Convention.

that is, a right of asylum, is not part of international refugee law (see Grahl-Madsen 2001). Despite the absence of a supranational mechanism allowing to enforce the Refugee Convention, the United Nations High Commissioner for Refugees (UNHCR) plays a significant monitoring role regarding the implementation of the Refugee Convention in contracting states.[22]

2 – Australian asylum policies: domestic, private and international actors[23]

Historically, Australian asylum policies constitute a marginal policy field. Compared to Europe or the US, the numbers of asylum claims made at the border or on Australian territory remained, until 1989, at a very low level with, at most, a few hundred of cases annually. In terms of public awareness, Australian governments have been wary to keep immigration policy in general out of public controversy, and to insist on the need for immigration to correspond to Australia's economic, social and cultural needs. This communitarian concern has been reflected in the existence of the White Australia policy until the early 1970s.[24] Deciding upon the entry of migrant, asylum seekers or refugees has been considered a prerogative of the Australian government and defined as such in the 1958 Migration Act. Even though the 1958 Migration Act has been heavily modified through parliamentary amendments, the Act provides until today the legislative framework of Australia's immigration and asylum policies. In spite of Australia's ratification of the Refugee Convention in 1954[25], the convention has not been transposed into domestic law. The decision to grant refugee status remained a purely administrative decision until the end of the 1970s. It started to change in 1977 as the Australian Parliament passed the Administrative Decision (Judicial Review) Act. The Act granted judicial review of administrative decisions, not only to Australian citizens but also to non-residents. Following the 1977 Act, the role of the judiciary in migration matters expanded. When reviewing asylum cases, courts increasingly referred to principles of international law, especially the Refugee Convention, hence transforming domestic common law.[26]

Nevertheless, the first official refugee policy formulated in 1977 reaffirmed the pre-eminence of the government regarding refugee status determination.[27] The introduction of an official refugee policy was a reaction to the increasing arrival of refugees fleeing the Vietnam War and resettled in Australia from refugee camps in countries neighbouring the Indo-Chinese peninsula[28], but also of the first boat people landing directly on Australian shores in 1976 and claiming asylum in Australia. The arrival of several hundred Indo-Chinese boat people over the following years attracted an increasing public

22 The UNHCR's monitoring role is statutory, see art. 35 of the Refugee Convention.

23 This section is based on secondary sources, document analysis such as the Australian Senate and House of Parliament Hansards, in which parliamentary debates are published, as well as expert interviews on asylum policy which were conducted in Australia in 2007.

24 Australia officially restricted the entry of non-White immigrants until 1973. International pressure played a significant role regarding the decline of entry restrictions from the end of the 1960s (see Jupp 2002, Dutton 2002).

25 The 1951 Refugee Convention was only applicable to European post-WWII refugees. Its geographical limitations were removed through its 1967 protocol. Australia signed into the 1967 protocol in 1973, after the end of the White Australia policy which also applied to refugees.

26 In the Chan Yee Kim v Minister for Immigration and Ethnic Affairs case (1989), the High Court extended the definition of a "particular social group". Following art. 1 of the Refugee Convention, belonging to a "particular social group" of people fearing persecution qualifies for the obtention of refugee status.

27 Immigration Minister Michael McKellar, ministerial statement, House of Representatives Hansard, 24 May 1977: 1714.

28 The acceptance of a relatively large intake of refugees was then driven by external actors. Countries of first asylum in the region as well as the US and the UNHCR pressured a greater Australian engagement in resettling Indo-Chinese refugees (Viviani 1984: 55).

awareness (see Viviani 1984). The government was particularly concerned about, what it considered, "organised rackets" of commercial ships making profit out of transporting Indo-Chinese fleeing the Vietnam War, and thus introduced high penalties for the transport of undocumented migrants in 1980.[29] In terms of border controls in the broad sense, another concern for the government was the increasing number of "visa overstayers" who remained in Australia after the expiration of their visa. An important group of overstayers were Chinese students whose numbers had increased strongly over the 1980s as Australia was liberalising its educational system and welcoming more and more foreign students.[30]

The issue of asylum and of visa overstay somehow merged in 1989. Following the repression of pro-democracy demonstrators at Tien An Men square in June 1989, the Australian Prime Minister announced that no Chinese national living in Australia would be sent back to China against his or her will. Consequently, large numbers of Chinese nationals applied for asylum in Australia. Until 1989/90, there had been no more than 500 asylum claims a year. The numbers then peaked to more than 13,000 in 1990/91 and came to balance between 3800 and 4100 in the following years. This fuelled a systemic crisis of the refugee determination system.

This systemic crisis was reinforced by the 1989 reform of the 1958 Migration Act. The reform largely removed the Immigration minister from the decision-making process. Immigration decisions became statutory decisions, i.e. a matter of compliance with the law. Limiting discretionary powers and codifying rules have remained crucial principles of migration and asylum legislation until today. These institutional changes were generally welcomed in the policy field. Yet implementing the Migration Act reform proved difficult. Administrative regulations to implement legislative changes were drafted hastily and amended numerous times. A pattern of legislative reform followed by amendments and further legislative reforms would remain constant over the following years.

Not only was the asylum system confronted with a record number of claims from "inside the territory", but the number of boat people claiming asylum at the border started to increase as well in 1989.[31] Refugee determination procedures were reformed several times in the early 1990s so as to reduce procedural length.[32] Procedural delays were of particular concern for people claiming asylum at the border. The usual immigration procedure towards undocumented non-citizens arriving at the border, including people claiming asylum, was to place them in custody until entrance status had been cleared. The granting of an entry permit led to release while a refusal of entry permit led to deportation.[33]

Most boat people between 1989 and 1995 spent years in immigration detention. Detention of undocumented border arrivals was a matter of discretion until 1989 and became mandatory for boat people in 1992 and for all "unlawful non-citizens" in 1994. The length of detention was related partly to the assessment procedures at the border[34] and partly to the state of the refugee determination system

29 Bringing more than five undocumented non-citizen to Australia became an offence punishable up to 100 000 dollars or 10 years of imprisonment, Immigration (Unauthorised arrivals) Amendment Act 1980, see Hawkins 1991: 202.

30 The Department of Immigration estimated that 40 per cent of Chinese students were overstaying their visas in 1989 ((DIEA 1990: 30f).

31 After there had been no boat arrivals on Australian shores since 1981, a boat carrying 26 Cambodians reached Broome in Northern Australia in November 1989 (DIEA 1990: 15) followed by other boats over the next years. Between 1989 and 1993, 735 boat people arrived on Australian shores.

32 The backlog of asylum cases peaked in December 1991 with 23 000 pending refugee applications.

33 Australia has a policy of mandatory deportation of persons in breach of immigration law (see Joint Standing Committee 1990).

34 At the border, officers responsible for immigration clearance were not legally required to refer refugee claims to the Department of Immigration, contrary to the practice of other countries. In 1989 there was also no time limit to the submission of a refugee application after having entered the Australian territory. Many boat people spent years in deten-

at that period, as most arrivals made application for refugee status. Numerous asylum decisions were appealed at higher courts. The executive and the parliament increasingly perceived court actions, dubbed "judicial activism" as a challenge to popular sovereignty. The answer was an increasing legislative creativity so as to curtail the capacity of action of the judiciary. In 1992, an amendment of the 1958 Migration Act imposing mandatory detention of undocumented boat people was passed a day before a court decision was scheduled to rule out as unconstitutional the detention of undocumented arrivals.[35]

The increasing restrictiveness towards onshore arrivals was reflected in the argumentation developed to defend the policy. The focus of parliamentary debates on border and migration control issues between 1989 and the mid-1990s shifted from the issue of "visa overstayers" to "illegal entrants" at the border. To not detain undocumented persons would undermine Australia's immigration policy and potentially put the community at risk. Detention had to be considered in the framework of Australia's generous response towards humanitarian crises in general, as Australia was one of the rare countries which resettled thousands of refugees from camps each year in the framework of its humanitarian program (see Joint Standing Committee 1994). Courts were not the only actor considered by the executive and parliamentarians as undermining Australian sovereignty. So were refugee advocates and lawyers which pleaded in favour of the release of asylum seekers. By the mid-1990s, parliamentary debates increasingly refer to the attitude of "middle Australia". Boat people had become an issue of heightened and controversial public interest.

From 1994, the involvement of international and private actors in Australian asylum policies increased. In 1994, the Migration Act was amended so as to recognise the validity of refugee determination procedures made in other countries, and to deny asylum claims from people coming from countries recognised as "safe third countries" (Kinslor 2000). This trend which began under a Labour government was reinforced under the Liberal-National Coalition government elected in 1996. The 1958 Migration Act was amended in 1999 so as to eliminate the possibility to grant refugee status to claimants that had spent at least seven days in another country on their way to Australia in which "effective protection" could have been sought (Kinslor 2000: 58). A further measure has attracted most of the literature on the evolution of Australia's asylum policies: the so-called Pacific Solution. In 1999-2000, increasing numbers of people from Afghanistan and Iraq arrived undocumented by boat on Australian shores and claimed asylum.[36] In previous years, the refugee recognition rate of Afghans and Iraqis in Australia had been among the highest compared to other nationalities. Boats came mostly from Indonesia with which Australia increasingly cooperated in immigration and border control matters.[37] The arrival of the freighter MV Tampa carrying 433 asylum seekers mostly from Afghanistan and Iraq in Australian waters in August 2001, a few months preceding federal elections, triggered the Pacific Solution. Legislation passed in September 2001 excised small peripheral Australian islands from its migration zone. It was thus no longer possible to claim asylum in Australia from these excised islands. People claiming

tion before lodging an asylum claim. Being able to lodge a refugee application as a border entrant in custody was not easy. Legal assistance was on a voluntary basis, and volunteering lawyers were not necessarily trained in immigration law. Interpreters were often missing. Gaining the confidence of detained asylum seekers took time, and attempt to lodge group, rather than individual, asylum claims slowed claim processing (Joint Standing Committee 1992: 165-167). Public resources were not immediately available to provide interpreters and lawyers and this contributed to the length of the procedure.

35 The amendment was voted on 5 June 1992 and entered in force the 6 June 1992, the day of the High Court decision in the so-called Lim case which dealt with the legality of the administrative detention of undocumented migrants.

36 Between 1998 and 2001, the arrivals of undocumented "boat people" increased sharply. 4174 people arrived undocumented by boat in from June 1999 to June 2000 and 4134 from 2000 to June 2001 (DIMIA 2001: 7).

37 In 1999, the Regional Cooperation Model was agreed with Indonesian authorities, the UNHCR and the IOM to fund the processing of asylum seekers located in Indonesia but identified as attempting to depart to Australia (Howard 2003: 41ff).

asylum in the "excised zone" were to be sent to Offshore Processing Centres (OPCs) hosted by the small island of Nauru and Papua New Guinea.[38] The UNHCR and the Australian government assessed asylum claims[39]. The International Organisation for Migration (IOM) administrated the OPCs and was responsible for accommodation, management and security and the providing of diverse services that could be subcontracted. Asylum seekers assessed in OPCs and granted refugee status had no right to be resettled in Australia. This political stance was reasserted numerous times by the Australian government.

The Australian government also increased international cooperation so as to reinforce "remote border controls". Such controls target irregular migrants, not asylum seekers in particular. Yet the indiscriminate character of remote controls might hinder the flight from persecution of undocumented persons. Besides the above mentioned cooperation measures with Indonesia, Australia triggered a number of regional and international conferences on the issue of irregular migration and people-smuggling[40], developed bilateral agreements with countries of origin and of transit of undocumented migrants regarding border and migration control[41] and forcefully advocated its own restrictive approach on asylum policies at UNHCR global fora.[42]

The internationalisation of asylum policies from 1994 does not mean that domestic repressive policies and controversies had disappeared. The government presented its attempt to involve other countries in its migration control policies as a solution to entry control problems that had become global. As the number of border arrivals claiming asylum continued to increase between 1994 and 2001, new domestic detention centres were built, mostly in remote locations. The management of detention centres was privatised in 1997. Detention centres remained full as first instance decisions of the Department of Immigration were still often challenged by way of administrative and judicial appeals. Appeal decisions regularly overturned departmental decisions, leading in turn to the introduction of new repressive measures.[43] Asylum became increasingly politicised. New domestic actors argued both in favour of and against repressive policies. At the 1998 federal election, the anti-immigration party, One Nation, won about one million votes. One Nation became the most successful third party at an Australian federal election. The party was considered by the ruling Coalition government to express the opinions of struggling "Aussie battlers", i.e. the lower middle class preoccupied by immigration. Parliamentary immigration debates of that period are marked by the will of Coalition parliamentarians to point at

38 Nauru is not party to the Refugee Convention. Papua New Guinea is party to the Convention, yet numerous reservations regarding its application are in force.

39 The UNHCR refused to assess the claims of asylum seekers who were taken to the Nauruan OPCs after the Tampa boat-load, so that officials of the Australian Department of Immigration assessed the claims of the following arrivals.

40 The Australian government was instrumental in the creation in 1996of the Asia Pacific Consultations on Refugees, Displaced Persons and Migrations (APC) and of the Pacific Immigration Directorates Conference (PIDC) as well as, in 2002, of the Bali Process dealing with people-smuggling and trafficking issues on the regional level. On the international level, the Australian authorities played from the end of the 1990s an active role in the Intergovernmental Consultations on Migration, Asylum and Refugees (IGC).

41 The Australian authorities provided bilateral assistance to an increasing number of countries, helping them enhancing border surveillance systems and irregular migrant detection. Australian immigration officers (airline liaison officers) were dispatched to airports of countries from which irregular immigration occurred. Emphasis was also put on intelligence-sharing. The Australian government also funded international as well as regional organisations to enhance information exchange on immigration movements, patterns of immigration fraud, border surveillance devices and training.

42 Australia was an active participant to the UNHCR Global Consultations on International Protection and to the Convention Plus negotiations. The Department of Immigration released a volume in 2002 that was disseminated in such forums: Interpreting the Refugee Convention – an Australian perspective (DIMIA 2002).

43 The Labour party in opposition often slowed the introduction of such amendments by voting against it in the Senate (the second legislative Chamber besides the House of Representatives), in which the Coalition government did not have a majority between 1996 and 2005.

differences with One Nation's views. However, some of One Nation's proposals were implemented, such as the excision policy described above (Jupp 2002). In the media, "talkback radio" gave a public voice to hostility to asylum seekers perceived as non-genuine and "queue-jumpers" (see Mares 2002).

Opposition to asylum-seekers' detention at domestic level and abroad also increased. From the end of the 1990s, dozens of refugee advocacy groups were created locally.[44] Broadsheets became increasingly critical about asylum policies. At the political level, the Australian Labour Party, the main party of opposition, broke the bipartisan parliamentary consensus on immigration issues and started to question the legitimacy of measures such as the Pacific Solution.[45] Eventually, a series of scandals in domestic detention centres led to dissent inside the governing Coalition. Internal tensions forced the government to soften domestic detention policies in 2005.[46] Not only did the controversies at the domestic level around detention conditions let the government amend its policy. Difficulties regarding the implementation of the Pacific Solution in third countries are as well responsible for the ending of this measure.

From the outset, the political stance of the Coalition government to deny access to Australian territory to people granted refugee status in Offshore Processing Centres had been difficult to implement. The refugee recognition rate of asylum seekers sent to the OPCs on Nauru and Manus Island was higher than the recognition rate on Australian territory, as most asylum seekers held in OPCs came from war-torn Iraq and Afghanistan.[47] It showed that OPCs had failed to deter those considered "bogus asylum seekers" by the Department of Immigration, politicians, large parts of the Australian public and of the media.[48] Resettlement countries had to be found. Australia was very reluctant to accept them, yet most of the other countries of resettlement considered the refugees in OPCs to be Australia's responsibility. Eventually, Australia resettled more than 60 per cent of the OPC refugees (UNHCR 2008).

However, the Pacific Solution implied high financial costs. Nauru and Papua New Guinea, which hosted the OPCs, were amongst the poorest countries of the region and relied heavily on Australian official development assistance. When the first asylum seekers arrived in 2001, no appropriate facilities were available. The living conditions in the OPCs were appalling. Important investments in local infrastructure were made and presented as development assistance to local communities. Analysing a broad range of governmental data, Oxfam estimated in a report in 2007 that the Pacific Solution had cost up to a billion Australian dollars (600 millions Euros) since 2001 (Bem et al 2007).

The Pacific Solution was also costly on the diplomatic level. The Tampa affair in August-September 2001 provoked a diplomatic incident with Indonesia. The UNHCR rewarded the MV Tampa captain, its crew and owner with the Nansen medal to honour the rescue of the refugees. The UNHCR regional office for the Pacific criticised Australia's Pacific Solution in the submissions the office sent to parliament and court enquiries on asylum and immigration policies.[49] Pacific islands government - even the Nauruan government - and civil society groups criticised the policies (Gordon 2005). Implementation difficulties

44 To name a few: Brisbane Actionweb for Refugee Collaboration, Just and Fair Asylum NSW, Refugee Action Collective Victoria, Tasmania for Refugee, the ACT Refugee Action Committee. Some of these organisations are no more active through their webpage in 2009.

45 Smaller parties such as the Democrats and the Greens had opposed such measures more consistently.

46 On international level, the UN High Commissioner for Human Rights produced a report that harshly criticised domestic detention centres (Baghwati 2002). The findings of the Baghwati reports were rebuked by the Australian government.

47 Between 2001 and 2008, 1153 of the 1647 asylum seekers held in OPCs were recognised as Convention refugees or as being compelling humanitarian cases requiring resettlement.

48 Besides, those found not to be refugees were generally very reluctant to leave. As an incentive, the Australian authorities developed reintegration packages – financial assistance granted to people accepting to return voluntarily to their countries of origin. 483 people returned voluntarily, 429 of them accepting the package (UNHCR 2008, DIAC 2007).

49 See UNHCR regional office submissions on these enquiries, http://www.unhcr.org.au/UNHCRsubmissionstoallinquiries-.shtml

and the unpopularity of the policy both on international and on Australian level stopped the Coalition government extending the policy in 2006. In 2007, the Labour government finally closed the OPCs in Nauru and Papua New Guinea, but did not repeal the legislative framework which excised remote islands from the Australian migration zones. The implementation of international border cooperation measures, which involved private actors such as carriers, and the introduction of safe third country agreement might to a certain extent be more successful from the point of view of the executive, even if evidence in terms of curbing unfounded asylum claims is difficult to assess. Numbers of arrivals indeed decreased sharply in 2002 and over the following years, but have increased again from 2008.[50] It is however difficult to establish if the temporary decrease was due to the deterrent effect of Offshore Processing Centres, to cooperation with countries of origin and of transit or to the evolution of conflicts in refugee-producing countries.[51]

V Evaluation of the case study: Australian asylum policies as a deviant case?

The critical case study delivers contrasted evidence regarding the explanatory value of the venue-shopping approach. It seems plausible that a lack of interest congruence between actors on domestic level, as Australia was confronted to an increase of asylum claims from 1989, fuelled the "shopping" of international and private entry control "venues" by the executive. However, the efficiency of new private and international control venues cannot be taken for granted. The political attempt of the Pacific Solution to recreate refugee camps at the periphery of Australia so as to select the "wanted ones" has failed. The privatisation of immigration detention centres at the domestic level was marked by a series of scandals leading to the revision of detention policy. The informational disadvantage of the executive postulated in the approach appears greater with respect to private and international actors than to the public, domestic sphere. The executive seems less able to monitor and influence private and international developments. Moreover, the transfer of entry control tasks to international and private actors has not led to a disappearance of dissent in the domestic sphere, even if the evidence on which dissent was based became more difficult to gather due to the difficulties to access to international and private venues.

Australian asylum policies can thus be considered, at least partly, as a deviant case (see Lijphart 1971: 691ff). The existence of a causal link between domestic and international spheres remains plausible. The executive appears able to frame forceful policy-images to justify policy changes as regards to border control. However, these policy-images compete with dissenting policy-images framed by both domestic and international opponents that contribute to induce changes such as the softening of domestic immigration detention as well as the ending of the Pacific Solution. Furthermore, the implementation of venue-shopping measures does not automatically lead to more efficient controls. In a nutshell, it cannot be said that venue-shopping measures lead to a reaffirmation of a postulated state sovereignty over border controls in the Australian case. These findings should be tested in further

50 Figures from DIMIA annual reports 2003 to 2006: there were no arrivals between December 2001 and June 2003, 83 in 2003/2004, no arrivals in 2004/2005, and 65 arrivals in 2005/2006. Numbers have started to increase again in 2008.

51 The introduction of a safe third country agreement with China in 1994 was followed by a decrease of undocumented arrivals from China.. Australia did not succeed in implementing further safe third country agreements, as countries of origin of most asylum seekers could not be legally been established as "safe". There is no reliable data on a correlation between the enhancing of border controls abroad through bilateral "capacity- building" and the decline of unsuccessful asylum claims.

cases to assess the extent to which the venue-shopping model needs reformulation.

Yet it cannot be deduced with certainty that state sovereignty is undermined, as the venue-shopping approach is not explicit about the *criteria* necessary to claim that a country is in control of its own borders. The approach often deals with the *claim* of the executive that state sovereignty is undermined by the increase of unwanted migration. The fuzziness regarding the boundaries between actors' agency and research design seems a general feature of the "sovereignty debate" on immigration and border controls.

VI Concluding remarks

The lack of clarity over the identity of sovereignty, and to what extent it is altered, is not reserved to the venue-shopping approach. Critical security studies are also awkward with the issue of establishing boundaries between the construction of reality by agents and the construction of a framework of analysis by researchers, or even to discuss the interplay between the two.[52] This may be related to the political saliency of immigration and border controls issues: distinguishing between policy-makers, implementing agents and researchers is not an easy task. This boundary-setting is at times explicitly rejected by immigration researchers who point at the links between social sciences and the policy-making and implementation spheres. Yet there is no reason why this claim should impede the clarification of a research design.

Yet even if one assumes a distinction between the definition of a research framework and the claims and actions as they are understood by agents in this framework, the nature of sovereignty remains often difficult to identify in studies relating sovereignty, immigration and border controls. Legal and political aspects are often implicitly dealt with, particularly in policy field analyses such as the venue-shopping approach. A more explicit reference to such aspects might help to foster a constructive dialogue between the venue-shopping approach and approaches rather rooted in political theory such as critical security studies. It might also help to relate immigration, border and sovereignty debates with other research fields in which the sovereignty issue is prominent.

These propositions might not simplify the task of the researcher as he or she is asked to address both the concept the sovereignty itself and to be consistent towards all the agents involved in it he enhancement (or the demise) of sovereignty. However, they might contribute to produce challenging research results about the effects of reterritorialisation of border controls on this enhancement (or demise), be it as it is claimed by agents on policy and implementation level, or in the framework of particular research designs.

52 Kurtulus (2005:33) provides a critical appraisal of the post-positivist sovereignty studies' quest for definitional boundaries.

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