The Spaces In Between: American and Australian Interdiction Policies and Their Implications for the Refugee Protection Regime

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Abstract

Interdiction policies by countries such as the U.S. and Australia are embedded in these states' perception of their obligations to asylum seekers as strictly territorially bound. With the aim of limiting asylum seekers access to protection mechanisms, these policies are carried out in an arena firmly within the reach of executive-driven actions yet beyond the purview of constitutional or judicial safeguards. In the case of the U.S., the long-standing Haitian interdiction policy illustrates the manipulation of this protection gap, and, in Australia, the administration's reaction to the Tampa incident in 2001 and the subsequent policy developments provide further illustration. The autonomy with which states carry out such policies poses a significant threat to the refugee protection regime, especially the international norm of non-refoulement.

Résumé

Les politiques d'interdiction poursuivies par certains pays, tel les États-Unis et l'Australie, reposent sur leur conviction profonde que leurs devoirs envers les demandeurs d'asile sont strictement limités à leur territoire. Dans le but de limiter l'accès des demandeurs d'asile aux mécanismes de protection déjà en place, ces politiques sont appliquées dans des lieux fermement sous le contrôle des forces de l'ordre, tout en ne bénéficiant d'aucune garantie constitutionnelle ou judiciaire. Aux États-Unis, la politique d'interdiction déjà ancienne envers les Haïtiens illustre bien la manipulation de ces interstices dans la protection, tout comme les politiques australiennes qui ont suivi l'incident du Tampa en 2001. La grande liberté dont disposent les États pour appliquer de telles politiques constitue une menace pour le système de protection des réfugiés, en particulier pour le respect du principe cardinal de non-refoulement.

I. Introduction

Interdiction policies highlight tensions in the current relationship between the liberal democratic asylee-receiving state, the international human rights regime, and the realities facing the asylum seeker. Embodying the discourse of the human rights regime in the context of globalization, Soysal holds that "individual rights, expansively redefined as human rights on a universalistic basis and legitimized at the transnational level, undercut the import of national citizenship by disrupting the territorial close of nations."[1] In a similar vein, Jacobson notes a process of "deterritorialization" whereby the "nation" is becoming delinked from the territorial state.[2] The realities of interdiction, however, present a stark contrast to this vision. The draconian measure of forcing a ship from a country's territorial waters in order to avoid legal obligations exhibits, not deference to a transnational rights bearing regime, but a reassertion of the primacy of territoriality and boundedness of the duty of protection. Even a ruling in an international tribunal stating that such protection duties are attached to states operating outside their physical boundaries does not have the leverage of directly impacting state policy or jurisprudence.[3] Through their interdiction campaigns, the U.S. and Australia have demonstrated the lacuna between the physical spaces in which states exercise jurisdictional control and the spaces in which they will assume juridical responsibility. The

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existence of such policies and the relative impunity with which states enact them expose deficiencies in both the institutional and legal mechanisms of the refugee protection regime. The right to seek asylum, although provided for by international human rights doctrines, remains a territorially bounded claim.

While U.S. President Ronald Reagan's codification of interdiction policy in 1981 represented a formalization of the use of interdiction as a form of immigration control, the United States had been guilty before of turning vessels from its shores at the cost of human life. Denying the U.S. *St. Louis*, a passenger ship from Hamburg, Germany, permission to dock after being turned back from its original port of call, Havana, had drastic humanitarian repercussions. The year was 1939 – over nine hundred of the passengers on board were Jews escaping Nazism. In the next few years, perhaps after viewing Miami from the deck, hundreds of the ship's passengers perished in concentration camps.[4]

In the past decade, however, the encounter at sea between the asylum seekers and repelling state has become a hallmark of the desperation on both sides in the prevailing restrictionist climate. Apart from the long-standing American policy, until recently there has been no equal in terms of a codified policy of interdiction. In August 2001, Australia resorted to interdiction in the midst of a highly publicized standoff with the captain of the *Tampa*, a Norwegian container ship seeking to off-load over four hundred rescued asylum seekers onto Australian territory. In the wake of this incident, Australia has formalized the use of interdiction through new legislation relating to "off-shore arrivals." Australia is not alone in the use of such strategies: in the Mediterranean, Italy, France, and Spain have begun to interdict vessels carrying North Africans and Albanians struggling to reach their shores. The harmonization of borders, and thus immigration policy, in the EU has made it increasingly difficult for asylum seekers to reach their shores, making sea arrivals, often organized by smugglers, increasingly prevalent.

Interdiction policies are the most extreme example of a trend of restrictionist, non-entrée policies implemented by liberal democratic receiving countries to reduce illegal immigration. This set of policies includes carrier sanctions, visa controls, and safe third country determinations. To the detriment of refugee protection, the sweeping exclusiveness of these policies does not discriminate between economic immigrants and asylum seekers with legitimate protection claims. Implicit to this "teleology of restriction" is the assumption that many asylum seekers' claims are not well-founded and that refugee status is being used as a "revolving door" for otherwise inadmissible entrants.[5] This skepticism is reflected by a set of "deterrence" policies enacted to complement the non-entrée regime. Governments seek to dissuade potential asylum seekers, referred to as "queue jumpers," from making the journey through harsh detention policies upon arrival, expedited removal processes, and a rollback in access to judicial review.

The combination of non-entrée policies with deterrence measures by Australia and the U.S. undermines the ability of genuine asylum seekers to avail themselves of protection. The Australian government has gone so far as to sponsor public information campaigns warning prospective immigrants about the crocodile-infested waters lining their borders.[6] Dangerous generalizations regarding the nature of asylum flows are driving this policy framework. While refugee status is conceived as a highly individualized condition, the labeling of thousands of people as "economic migrants," as has been the tradition with Haitians in the U.S., prejudices the entire determination system against fair, individual-based determinations. In Australia there have been instances in which important officials within the executive and Parliament have publicly undermined the foundedness of claims by particular groups of asylum seekers.[7] Interdiction policies represent the most tangible manifestation of this exclusionary trend.

The present paper seeks to illustrate how non-entrée policies, specifically interdiction, signify an assertion of state sovereignty and confirm the predominance of territorially based claims to protection by asylum seekers. While the protection claims of asylum seekers have firm footing once they are physically within a state's territory, when they find themselves in the spaces in between territorial boundaries, prospects for protection are as tenuous as the unseaworthy vessels that are so often a hallmark of their grave circumstances. The first section introduces the cases, U.S. and Australian interdiction policies, and establishes a rationale for the comparison. The following section will explore the remaking of the condition of being "outside" in the language of immigration, considering the plenary power doctrine and the implications of extraterritoriality. The final section contains commentary on the state of refugee protection with respect to interdiction.

II. Interdiction in the U.S. and Australia: A Framework for Comparison

While Australian and U.S. interdiction policies are essentially homegrown, products of the countries' respective domestic political environments and regional conditions, compelling parallels exist between the two. Essentially, they are both concerned with the diversion of asylum seekers from their shores. The overriding concern manifest in these projects is the states' discomfort with a self-diagnosed territorial vulnerability. This perceived weakness has been com-

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batted with drastic measures to regain control over entry. In both cases, the policies were introduced only after a series of other deterrence measures had appeared to fail. The lead role of the executive in initiating the interdiction measures in Australia and the U.S. demonstrates the extent to which immigration control measures were equated with questions of national security. The importance of keeping potential entrants physically outside a demarcated zone in both instances reflects the power of protection mechanisms once the line has been crossed. The role of an activist judiciary in developing these protection mechanisms and in challenging the development of restrictionist norms has been significant in both cases. While governmental discourse surrounding the policies has acknowledged international law and obligations regarding asylum seekers, the goal of reasserting sovereignty clearly supersedes international responsibilities in this regard.

Acknowledging the parallels between the interdiction policies of these two countries leads to an inquiry regarding the possibility of some kind of causal link. Given the American reputation for unsavoury exports and the fact that Haitian interdiction preceded Australia's formal policy by twenty years, the possibility that the U.S. policy served as a precedent looms large. One of the many criticisms levied by human rights advocates over the course of Haitian intervention was that America was setting a negative example for other countries and that refugee protection could suffer exponentially as a consequence. Of special importance to the legal community was the legitimizing of the treatment of Haitians through the resounding victory of the state in Supreme Court case *Sale v. Haitian Centers Council (1993)*. The late Arthur C. Helton, a lawyer at the helm of the movement to challenge interdiction, called the *Sale* case "a dangerous precedent at the international level," with the likelihood of being interpreted by some states "as an invitation to use brutal forms of refugee control."[8]

While America's long-standing interdiction policy certainly aids the Australians in their ability to deny extraterritorial responsibility, interdiction arose as a policy option primarily as a result of domestic and regional developments. For this reason, the initial inquiry must lie, not in the realm of precedent setting, which emphasizes the agency of the state in responding to conditions, but in the conditions themselves. There have been several attempts to explain similarities across immigration policies in liberal democratic countries along these lines. In a comparative study of nine countries, Cornelius et al. defend a "convergence hypothesis" which finds a "growing similarity" in the policy instruments used in immigration control along with the results of these policies and their reception by the public.[9] Acknowledging the importance of changes in the international system, the authors hold that it is *endogenous* factors that are the key determinants in immigration control.[10] In a smaller-scale study focusing specifically on the state of asylum, Joppke also emphasizes the importance of a state-based framework in which "there is a convergence on the erection of doubly restrictive asylum regimes."[11] Brief overviews of the interdiction policies of the two countries illuminate key points and will set the stage for further inquiry.

U.S. Interdiction Policy: From Reagan to Clinton

When President Reagan proclaimed on September 29, 1981, that illegal immigration had reached the level of a "serious national problem detrimental to the interest of the United States," an interdiction policy explicitly directed at Haitians was set in place that would survive ideological shifts in the White House and the end of the Cold War.[12] This Presidential Proclamation along with Executive Order 12324 of the same day outlined the nature of the threat posed by an influx of illegal immigrants, thereby activating the constitutionality of presidential authority in such matters and granting the Coast Guard the responsibility of protecting America's shores from the onslaught. The Coast Guard was given authorization to stop and board ships on the high seas that appeared to have the intentions of entering territorial waters with human cargo in violation of immigration law. The presidential directive ordered the Secretary of State to enter into bilateral agreements with "appropriate foreign countries" to facilitate co-operation in deterring illegal immigration to the U.S. Haiti was the only state with which any such agreement was ever negotiated, stipulating the return of interdictees to their country of origin. In recognition of its responsibilities not to *refoule* refugees, there was a provision that "no person who is a refugee would be returned without his consent." Immigration and Naturalization Service (INS) officials were stationed on board the Coast Guard cutters to make the necessary determination as to the likelihood of *refoulement*. The adequacy of this screening process was soon to be challenged by the courts.

It would amount to a vast oversimplification to interpret the Haitian interdiction policy initiated by Reagan in 1981 simply as a symptom of anti-immigrant feelings leading to a newly aggressive restrictionism. If this were the case then Haitians, estimated to represent only 2 per cent of illegal immigrants at the time of the interdiction policy, would not have been a logical target.[13] Haitian policy must be viewed in light of attitudes and policies towards Cuban asylum seekers, beneficiaries since 1966 of the Cuban Adjustment Act, which voided individual status determination requirements and granted Cubans automatic entry into the United States. While the 1980 Refugee Act established a normative

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break in American law from the Cold War tradition of conceiving of refugees as ideological symbols, long-standing approaches towards Cubans would continue to hold sway over the legal conception of refugee status in American law. Haitians had the bad luck of arriving *en masse* on the shores of southern Florida alongside Cubans in the late seventies and early eighties. Indicative of the building pressure in southern Florida, the INS was busy developing plans in 1978 to expedite the removal of Haitians by way of mass expulsion hearings motivated by the perception that current backlogs and inefficiencies were attracting further flows.[14] The arrival of 125,000 Cubans and 25,000 Haitians on the shores of Florida over a five-month period in 1980 threw the asylum system into crisis. Although President Jimmy Carter granted "special entrant status" to both groups, such a humanitarian gesture was unsustainable in the face of such large flows. Due to the special legislation in place welcoming Cubans and Fidel Castro's outright refusal to take back any new arrivals, the only opportunity to assert control rested with the Haitians.[15]

The original interdiction policy introduced by Reagan remained in place for eleven years, suffering from continuous legal challenges regarding the nature of refugee determination procedures. A significant development in the interdiction program, with important legal ramifications for the question of asylum, was the use of the U.S. base in Cuba, Guantánamo Bay, as a holding pen for Haitians awaiting screening. Although these challenges resulted in small victories, including temporary bans on repatriation of Haitians, President George H.W. Bush's issuance of the Kennebunkport Order on May 23, 1992, rendered this progress irrelevant.[16] By including the following provision, "nor shall this order be construed to require any procedures to determine whether a person is a refugee," Bush assured that intercepted migrants would be summarily returned to their country of origin, overriding the previous commitment to avoid *refoulement*.

Flows had once again increased dramatically in the wake of September the 30, 1991, military coup overthrowing Haiti's first democratically elected president, Jean-Bertrand Aristide. In lieu of screening procedures before repatriation, the Bush administration sought to divert potential asylum seekers through the channels of in-country processing, a mechanism "historically conceived as an additional avenue of protection for refugees."[17]

Despite President Bill Clinton's defense of the principle of first asylum and his criticism of the current policy during the campaign, once in the White House, he continued the interdiction program in the same fashion. Clinton's attention to Haiti as a foreign policy priority acknowledged the reality that even the most draconian immigration control policies would not stop Haitians from making the journey. Economic sanctions were imposed and ultimately a military intervention carried out in attempt to stabilize the political situation. The most significant court case regarding interdiction was decided in the beginning of Clinton's first term. In *Sale v. Haitian Centers Council* (1993) the Supreme Court ruled 8 to 1 that Article 33 of the 1951 Convention relating to the Status of Refugees (the Refugee Convention), protecting asylum seekers from *refoulement,* did not have an extraterritorial effect. This ruling legitimized the direct return of Haitians interdicted on the high seas without any inquiry into their refugee status.

Clinton was ultimately forced to recognize the urgent protection needs despite this ruling, however. This resulted in the provision of safe havens at the Guantánamo base and in other countries around the Caribbean. The persuasion by the U.S. of countries in the Caribbean and Central America to provide safe havens for Haitians demonstrated a blatant shifting of the problem. As one critic said, with the creation of safe havens in Honduras and Venezuela, "the United States stood the principle of burden sharing on its head."[18]

Australia's Interdiction Policies: The War on Smuggling

Compared to the long historical trajectory of Haitian interdiction, Australia's policy is in its infancy. The legislation outlining the new policy of interdiction, the Border Protection (Validation and Enforcement) Act 2001, was introduced in September of that year to retroactively legitimize action taken in late August by the Australian government. Unlike the case of U.S. interdiction policy that developed behind closed doors over time and was not a reactive measure taken in response to one single event, Australia's policy was formed in the midst of a standoff at the edges of its territorial waters. In late August 2001 a Norwegian cargo ship, the *Tampa*, responded to a call of a ship in distress by the Australian Coast Watch, thereby starting a chain of events that would capture the attention of the world for days and lead to a complete overhaul in Australia's immigration policies. After taking aboard the 433 passengers, hailing from Afghanistan, Iraq, Sri Lanka, and Pakistan, the captain headed for Indonesia, the point of origin of his new passengers. Complicating the situation, some of the hopeful asylum seekers threatened to jump overboard if returned to Indonesia. Considering this development and the deteriorating health of many of the passengers, the captain decided to make way for Australia's Christmas Island, the nearest port. Australia denied permission to enter territorial waters and proceeded to establish a naval blockade to prevent entry into the port. The standoff ended with the interdiction of the ship by the Australian Special Services and the removal of

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the asylum seekers onto an Australian naval vessel and eventually to refugee processing points around the Pacific.[19] While refugee advocates in Australia attempted to force the government to bring the asylum seekers to the mainland in order to file their claims, the decision was ultimately in favour of the state. The court's message was clear: interdictees had no rights under Australian law.

While Australia has a harsh detention policy towards asylum seekers and makes use of other non-entrée policies, interdiction represented a break from past dealings with boat arrivals. Restrictionist policies have been the trend since the Australian asylum system was challenged by the arrival of Cambodian boat people in the late eighties.[20] Despite the smaller numbers, in relevant terms this influx compared with the arrival of thousands of Cubans and Haitian in south Florida in the early eighties and was portrayed in a sensationalist manner by the media and manipulated by politicians. Australia's restrictionist policies should be seen in light of their preoccupation with the asylum-smuggling nexus. In order to combat this phenomenon, Philip Ruddock, Immigration Minister during the John Howard administrations, has taken an active stance in initiating regional co-operation on this issue. The focus has been a program involving the processing of refugee claims in Indonesia with the co-operation of the Indonesian government, International Organization for Migration (IOM) and the United Nations High Commissioner for Refugees (UNHCR).[21] In the year leading up to the *Tampa* crisis, Australia did experience a significant increase in unauthorized arrivals by sea. Despite the increase, Australia still hosts extremely few refugees in comparison to a country such as Canada, which is similarly isolated.[22] The elevation of the *Tampa* standoff to the level of a national crisis was a result of campaign showmanship by the incumbent Prime Minister, John Howard, eager to prove he could take a tough stand on illegal immigration. Now that the elections have come and gone, Howard and his controversial Immigration Minister, Ruddock, have shown a continued commitment to keeping asylum seekers at bay.

III. The Remaking of the "Outside"

In the language of immigration, the condition of being "outside" contains multiple layers of meaning. The policy of interdiction is both a reaction to and an agent in the implementation of these various meanings on three levels. At the most physical level, "outside" refers to a potential entrant's physical location beyond the territorial domain of the state. On a more abstract plain, domestic immigration laws recognize that an individual can be physically present in a state and remain "outside" in legal terms. Finally, it is possible for an individual to be within the jurisdictional control of the state and remain "outside" the zone of juridical responsibility. The shifting emphasis of the condition of being "outside" is underscored by tensions between the various branches of the government exerting their authority over these meanings. These tensions are played out in increasing judicial activism regarding immigration matters and the subsequent challenge to the plenary power doctrine in the U.S. and the corresponding legal basis for executive control in Australia. As the importance of being legally "outside" (but physically within a state) has eroded in the context of domestic rights allocation, states have sought ways to reassert their sovereignty and, thus, their control over who remains physically "outside" the demarcated territorial boundaries.[23] Along with interdiction, Australia's excision of territory from their migration zone for the purpose of limiting the claims of "offshore entrants" emphasizes the capacity of the state to interpret the condition of being "outside" in accordance with domestic concerns.

Immigration Law: The Changing Significance of Positionality

A pillar of immigration law in liberal democratic countries has historically been the de-linking of territoriality with most rights-based claims. Citizenship, "an exclusive status that confers on individuals rights and privileges within national boundaries," exists to demarcate the insiders from the outsiders.[24] An embodiment of this distinction lies in the development of parallel sets of entitlements regarding procedural guarantees in immigration proceedings depending on an immigrant's legal standing: deportation proceedings apply to those legally *within* the country while exclusion procedures apply to those legally *outside*. In the U.S., the case history establishing the treatment of deportable and excludable aliens stretches back to the 1903 Supreme Court case, *Yamataya v. Fisher*.[25] Subsequent judicial rulings established that the right to due process, established by the Fifth and Fourteenth Amendments, is granted to every person in America: "even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."[26] These universalist interpretations of the Constitution hinge on the use of the word "person" in a portion of the Fourteenth Amendment, implying that the following rights are not related to immigrant status: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[27]

Lacking a bill of rights and without provisions for national citizenship until 1949, Australia is much less developed in its system of rights allocation according to citizenship and migration status. In Australia, "it is difficult to differentiate clearly between the rights of citizens and

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non-citizens because the rights of citizens themselves are not always clearly and consistently defined."[28] Common law with regard to equal legal protection and due process has developed to the extent that certain basic rights are clearly established for all persons in Australia.[29] The Migration Act 1958 established the normative basis for the most controversial feature of Australia's immigration policies that seek to differentiate between legal and illegal non-citizens: mandatory detention policies.[30] While rights are granted at a diminishing rate as one considers the three categories of citizen, legal non-citizen, and illegal non-citizen, the important point remains that a certain level of rights, albeit unequal, is bestowed upon all persons who find themselves physically within Australian or American territory.

In both Australia and the U.S., the domestic legal boundaries delineating the inside from the outside have become blurred over time as the gap between citizen and non-citizen rights has diminished. This is consistent with a general trend across liberal democratic states.[31] The continuous evaluation and contestation of these boundaries by the judiciary has been key to their devolution. The 1982 U.S. Supreme Court decision, *Plyer v. Doe*, granting children of illegal aliens full access to public education, is the most commonly cited example of this trend. With regard to asylum-related concerns, courts have "brought to bear the communitarian impetus of immigration law on the new field of asylum," challenging the deprivation of rights on the basis of due process and equal protection provisions.[32]

In Australia, the courts have been consistently restricted with regard to their authority to contest immigration-related matters. While still limiting the judiciary in many respects, the passage of the Administrative Decisions (Judicial Review) Act 1977 greatly expanded the reach of the courts in immigration matters. As a result, the largest caseload in the Federal Court involving Migration Act decisions appeared in the mid-eighties. The caseload continued to swell by 161 per cent from 1995 to 2000.[33] The arrival of Cambodian boat people in the late nineties was also a focal point in the judiciary's role in both justifying and challenging the government's immigration policy.[34] Interdiction policies represent an explicit intention to control immigration beyond the scope of a judiciary that is weighted more towards principles of inclusion than exclusion.

The Re-emergence of Plenary Power: Operating "Outside" the Law

In wresting control from the judiciary and asserting the power of the executive and Congress (in the U.S.) and Parliament (in Australia) over entry, interdiction policies are grounded in the renewed application of the plenary power doctrine. Entailing "the power to regulate immigration without judicial constraint," this doctrine is grounded in notions of absolute state sovereignty.[35] Demonstrating the conventional use of the doctrine, legislation in the U.S. and Australia in recent years has asserted plenary power by denying judicial review of immigration-related decisions. In 1996 the U.S. passed legislation providing for expedited removal procedures that are not eligible for judicial review. Even more recently, the U.S.A. Patriot Act gives the Attorney General remarkable capabilities to detain non-citizens loosely suspected of terrorist connections. Since the events of September 11, 2001, national security discourse is the trump, giving a whole new life to the reaches of the plenary power doctrine on the domestic front.

Australia has also experienced perennial power struggles regarding authority on immigration matters. Legislation passed on September 21, 2001, redefines most immigration and asylum-related decisions as falling under a "privative clause," signifying that they shall not "be challenged, appealed against, reviewed, quashed, or called in question in any court."[36] Those that emphasize a new era of restricted sovereignty and consider the plenary power doctrine (and its Australian equivalent) to be a "constitutional fossil" underestimate the forces behind restrictionist immigration controls such as interdiction.[37]

Interdiction policies exercise the plenary power doctrine in two ways, exploiting the immunity inherent in the condition of being "outside" on different levels. The most traditional form of plenary power application refers to the ability of the executive and legislature to respond quickly and flexibly to situations that concern the safety and welfare of the nation. Since the process of judicial scrutiny often stands in the way of expediency, it is bypassed in favour of tools such as executive orders and emergency legislation. Thus, the state is operating *legally* "outside" the reach of its own courts. Interdiction also constitutes a twist on the old practice of "judge-proofing" by operating *physically* "outside" the territorial boundaries of the state. Measures taken to prevent entry into territorial waters have the effect of "skewing the inquiry into an immigrant's physical connection" to the state.[38]

In this regard, the controversial legal condition of extraterritoriality is of the utmost importance. In the American and Australian cases, interdiction policies evoke immunity on both levels: the domestic policy formation process and the extraterritorial application of the policy. Experiencing many twists and turns under the direction of three Presidents, the U.S. interdiction policy actually gained immunity over time thanks to the decision in the *Sale* case.

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Whether or not this will be the case in Australia is yet to be seen.

Reagan's interdiction policies "effectively restored much if not all of the immunity that the plenary power doctrine originally established."[39] Reagan's policy was enacted under Constitutional and statutory provisions that granted express authority "whenever the President finds that the entry of any aliens into the United Sates would be detrimental to the interests of the United States, he may, by proclamation, for such a period has he shall deem necessary suspend the entry of all aliens or any class of aliens."[40] Illustrating just how dramatic it was for the President to exercise this power, the Task Force on Immigration assumed that an amendment to current legislation would be necessary to legitimize such a policy in the form of an "Emergency Interdiction Act." Due to the political pressures emanating from the situation in Florida, the Reagan administration forged ahead with a drastic new form of immigration control making use of a statutory source of power that had not been exercised by any President since becoming law in 1952.[41] Unilaterally, Reagan declared, "The entry of undocumented aliens from the high seas is hereby suspended and shall be prevented by the interdiction of certain vessels carrying such aliens."[42]

Reactionary and politically motivated, the first act of interdiction in Australia occurred entirely at the behest of the executive before the official articulation of any policy related to the actions. When the *Tampa* with its cargo of 433 asylum seekers entered Australia's territorial waters after being denied permission, the government responded with the drastic measure of ordering the Special Armed Forces to intercept and take control of the *Tampa* in the appropriately named "Operation Reflex." By doing so, the Australian government proceeded to elevate the event into a national security crisis, thereby justifying the executive's overarching decision-making power. The government presented the Border Protection Bill 2001 to the Parliament the same day as troops boarded the *Tampa.* The main provisions included the retrospective granting of "absolute discretion" to officers in the use of "reasonable force" against any ship just inside the territorial sea to force it back out. Most importantly, the bill declared outright that interdictees had no rights under Australian law and would not be given an opportunity to seek refugee status.[43] Although this bill was voted down in the Senate (after passing in the House of Representative), a very similar piece of legislation, the Border Protection (Validation and Enforcement Powers) Bill 2001, was passed the following month.

The wording of Reagan's original Executive Order did not explicitly deny the possibility of the extraterritorial responsibilities to asylum seekers under America's new refugee regime. In fact, the active participation of the INS in the interdiction of migrants and the provision that "no person who is a refugee will be returned without his consent" show a willingness to comply with these obligations.[44] A year after the induction of the program, the U.S. Attorney General wrote a letter to the UNHCR Chief of Mission in Washington, D.C., confirming "the Administration is firmly committed to the full observance of our international obligations and traditions regarding refugees."[45]

The reality of the U.S. interdiction program, however, represents a sharp break from this well-intentioned rhetoric. Guidelines developed by the INS explained to staff their responsibility in assuring that the U.S. is "in compliance with its obligations regarding actions toward refugees, including the necessity of being keenly attuned during any interdiction program to any evidence that may reflect an individual's well-founded fear of persecution."[46] Due to the inherent instability of the situation, however, INS officials were only permitted to have contact with the interdictees at the discretion of the Coast Guard officer in charge. The fact that interdiction was scheduled to occur *only* outside the territorial waters of the United States implies strongly that, were the boarding of vessels to occur within the territorial waters, a different set of procedural norms would apply. This judge's speculation regarding the extent of due process allowed to interdictees represents this ambiguity: "Because of the nature of the screening process and the fact that it was to take place on the high seas, it could not have been the intention of the President to allow the interdictees to initiate judicial review of their cases in the district courts of the United States."[47] The half-hearted provisions to provide adequate screening blurred the implications of extraterritoriality.

Convincing evidence of procedural inadequacies lies in the numbers of interdicted Haitians that successfully availed themselves of protection. Ten years after Reagan's executive order, out of the 25,000 Haitians interdicted, only twenty-eight were paroled into the U.S. to pursue asylum claims.[48] With mounting evidence against the government pointing to irregularities in the system, Haitian advocates seemed on the verge of a crucial decision acknowledging the rights of interdictees to due process at least on a par with exclusion proceedings. In November of 1991, a federal court hearing *Haitian Refugee Center, Inc. v. Baker* granted an injunction, preventing the forced repatriation of Haitians from Guatánamo Bay. By successfully bringing the issue of extraterritorialty to a head, judicial activism forced the executive to clarify its true intentions with regard to interdiction.

With the issuance of the Kennebunkport Order in response to a surge of interdictions following the coup in

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Haiti, Bush unequivocally rejected the extraterritorial application of U.S. law relating to refugees. While Reagan's order had at least implied a responsibility to avoid *refoulement*, the new policy explicitly states that U.S. law concerning *non-refoulement* does "not extend to persons located outside the territory of the United States." The court's reasoning in *Sale v. Haitian Centers Council* legitimized this position. At the end of the day, it was the Court's reliance on the presumption that "Acts of Congress do not ordinarily apply outside our borders" that resounded the most loudly.[49] Regardless of the extraterritorial protections that would normally apply, the majority opinion holds that the plenary power doctrine supersedes such protections anyway. Accordingly, the President possesses "ample power to establish a naval blockade that would simply deny illegal Haitian migrants the ability to disembark on our shores."

The dissenting opinion of Justice Blackmun dismissed the majority's decision in *Sale* as based on a "tortured reading" of the Refugee Convention. His argument emphasizes the minimalist nature of the plaintiff's claim: "The refugees attempting to escape from Haiti do not claim a right of admission to this country. They do not even argue that the Government has no right to intercept their boats. They demand only that the United States…cease forcibly driving them back to detention, abuse and death."[50] One cannot help but wonder if the court was somehow influenced by the practical implications of a *Haitian Centers Council* victory. An obligation to prevent *refoulement* would go hand in hand with a refugee status determination procedure. If conducted in a just and fair manner, this could have led to the incorporation of tens of thousands of Haitian refugees. The extraterritorial application of Article 33 was not a precedent they were prepared to set.

While Justice Blackmun was the lone dissenter on the Supreme Court bench, his interpretation of the extraterritorial application of *non-refoulement* was backed up by the Inter-American Commission of Human Rights in 1996.[51] Despite the court's decision that the norm of *non-refoulement* should be extraterritorially applied, the non-binding nature of the court's decision and the second-tier status of international law in American jurisprudence prevented the development from directly affecting interdiction policy. In fact, American's reply to the commission's findings stated their position on the extra-territorial application of all international human rights law: "The right to security of the person does not create an obligation on states to provide admission to persons fleeing their country by sea or preclude their repatriation, even in the case of a *bona fide* refugee."[52]

Exraterritoriality: "Outside" in Every Sense?

In the Australian case, extraterritoriality functions in a unique sense not with regard to interdiction, a policy that mirrors the post-*Sale* position in the U.S., but in the exceptional act of "excision." The most interesting and controversial immigration legislation passed in September 2001 was undoubtedly the Migration Amendment (Excision from Migration Zone) Bill 2001. This legislation had the effect of legally removing the outlying territories of Christmas Island, Ashmore Reef, Cartier Islands, and Cocos Islands from Australia's "migration zone." This can be seen as a backup or complementary policy to interdiction: if in the case that Coast Watch does not successfully interdict asylum seekers, they will still be unable to access legal recourse on the dry land they are most likely to reach. This policy creates the immigration category of "offshore entry person" to refer to non-citizens who enter Australia illegally via these territories. Thus the Australian state is simultaneously expanding, in terms of its extraterritorial immigration control operations, and shrinking in terms of the territory for which it is legally responsible. While interdiction exploits the gap between jurisdiction and juridical responsibility on the high seas, Australia's excision policy has created such a gap on its own territory. By rewriting its own territorial obligations, Australia has invented yet another meaning of "outside," asserting its sovereign power to define its own national community.

IV. Interdiction and Refugee Protection: Protection versus Rights to Protection

The long-standing policy of Haitian interdiction and Australia's new commitment to intercept asylum seekers beyond their territorial waters exposes a significant gap between purported rights to protection and actual protection. Champions of refugee protection and experts in international law assert rights that conflict with the current restrictionist climate: "Not only does the right to protection against *refoulement* inhere before status determination, but it applies as soon as a refugee comes under the *de jure* or *de facto* jurisdiction of a state or party."[53] While many agree that this right *should* apply, according to a resoundingly conclusive decision by the U.S. Supreme Court, in reality it is not enjoyed. Another theoretical application relevant to interdiction claims: "there is no principled reason to release states which act extraterritorially from legal obligation that would otherwise circumscribe the scope of their authority."[54] To the detriment of refugee protection, such a legal obligation is consistently recognized only in international law, however, and not by the states that are responsible for upholding it. Joppke's assertion that "human rights internationalists

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have inflated the effectiveness of international norms and regimes" speaks to this imbalance.[55]

This gap exists because, despite the existence of a multifaceted international refugee regime, the locus of power rests with states. There exists no legal doctrine or institutional body that can effectively check the state (especially a state such as the U.S. or Australia) with regard to its acts and omissions in refugee protection. The primary international instruments of refugee protection, the Refugee Convention and its Protocol, are not self-executing. The protection mechanisms and guidelines enshrined in these documents gain strength only to the extent that they are incorporated into the domestic law of the signatory states. Significantly, individuals in need of protection possess no right to asylum; "Governments grant asylum; individuals 'enjoy' it."[56] As shown by the case of interdiction, even the complete incorporation of the tenets of the Refugee Convention into the canon of domestic law provides no guarantees. Even the judiciary has the leverage to interpret protection obligations with a slanted perspective that puts national concerns ahead of what would seem to be justice (as in the *Sale* case).

While the political and financial commitments of proactive policies such as refugee resettlement speak encouragingly to an overall commitment to the spirit of protection, states maintain the convenience of interpreting their obligation to refugees as "*ex gratia*," implying whatever protection is provided results purely from humanitarian goodwill.[57] Evoking the uncertain grounding of the rights of asylum seekers, an American refugee advocate laments, "We have become minimalist in our demands…because the violations committed by our government deny even minimum standards of refugee protection that we thought were no longer open to question."[58]

The assertion of state sovereignty embodied by interdiction policy highlights the relative weakness of UNHCR, the international institution mandated with refugee protection, to provide any recourse for asylum seekers in this situation. According to the Refugee Convention, the role of UNHCR is to supervise the administering of international refugee protection. Emphasizing their reliance of the signatory states in the fulfillment of their mandate, Article 35 states that the contracting parties must "undertake to cooperate... and shall in particular facilitate its duty of supervising the application of the provisions of this Convention." In its supervisory role, however, UNHCR has not found an effective way to assert itself when it finds states to be falling short of their responsibilities under the Refugee Convention. Particularly crippling in its supervisory relationship with countries such as the U.S. has been UNHCR's heavy reliance on major donors. The funding situations creates a "Catch 22" in certain protection-related quandaries: strong advocacy regarding protection claims contrary to the national interests of a major donor could result in fewer resources and a *de facto* reduction in protection capacity.

A shocking example of this institutional weakness occurred in High Commissioner Poul Hartling's visit to the U.S. in late 1981 after the interdiction program began. Responding to criticisms after the trip regarding his failure to confront the administration on its new policy, Hartling said he was satisfied that the screening procedures were "absolutely fair and fine."[59] While the UNHCR spoke out against Australia's handling of the *Tampa* incident, it was unable to take any positive actions on behalf of the asylum seekers at risk. The only concrete gesture they made was to refuse to process a group of asylum seekers taken to Nauru by Australia, claiming it was Australia's responsibility to carry out the status determination process for the population in question.

This combination of nearly untouchable states, possessing the power to act arbitrarily in pursuit of their own interests, with a UNHCR incapable of posing a credible challenge, represents the bleak realities of refugee protection in the current climate. Hope remains, however, when one acknowledges that refugee protection exists, in its strengths, not only its weaknesses, thanks to states. While restrictionism is endogenous to the state, so are the liberal democratic ideals that foster protection. If change occurs, it will come from within: "Not external, but internal, constraints have prevented liberal states from shielding themselves completely from global refugee movements."[60]

The judiciary has a powerful role to play in establishing the norms of protection offered to asylum seekers. "Insulated from the popular politics and empowered by developments in administrative and human rights law…the courts have been able to expand the responsibilities of states to foreigners, including asylum seekers."[61] Safeguarding asylum seekers from the blow to protection dealt by interdiction policies presents a unique challenge. The Refugee Convention is generally thorough in providing for the various issues faced by asylum seekers, but interdiction is not explicitly referred to. Because of this, "it is really only when refugees are located on the high seas that they may fall outside the purview of the existing refugee law regime."[62] The existing tool kit of protection must be used creatively from within states in order to render these policies impracticable.

The central quandary posed by interdiction, extraterritoriality, will be most effectively addressed, not through a groundbreaking ruling that will turn all of the courts previous decisions on their heads, but through a piecemeal process. Motomura presents two such ways of addressing

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interdiction as a "unique" case of extraterritoriality. The first relies on precedents wherein the state's "affirmative acts" with relation to an immigrant alter the legal obligations towards that immigrant. The other makes use of the legal concept of the "functional equivalent of the border" in order to provide interdictees protection from *refoulement*.[63] Establishing positive precedents in this regard is helpful, but the ability of the executive to evoke national security concerns as a trump could undermine such progress at any time. Despite this inherent weakness, the judiciary remains empowered. For example, in the U.S. it has been argued that the persistent attempts in the lower courts to establish exceptions to plenary power "will eventually lead the Supreme Court to 'wear way' the doctrine little by little without expressly overruling its precedent."[64]

V. Conclusion

Interdiction policies have the capacity to undermine refugee protection in indirect and diffuse ways. Through their implementation of interdiction, the U.S. and Australia have sacrificed a degree of moral authority that will potentially hinder regional co-operation arrangements and thwart their ability to act as advocates for refugees worldwide. The danger of hypocrisy was particularly real with reference to America's advocacy on behalf of Indochinese refugees in which the principle of first asylum was threatened by the pushing back of boats by Southeast Asian countries. In the wake of the Tampa standoff, Australia's reputation as an advocate for refugees has been similarly compromised. Reportedly, when demands were placed on President Musharraf of Pakistan by the international community to open Pakistan's borders to fleeing Afghans, he replied, "If a rich country like Australia could shut its doors to a few thousand asylum seekers, why should a poor country like Pakistan – which already hosts about 2 million refugees – take more?"[65] The disconnect between both of these countries' rhetoric concerning refugee protection and their own behaviour conveys a strong sense of the "not in my backyard" phenomenon.

The most troubling aspect of Australia's new policies is the "Pacific Solution," a self-proclaimed regional burden-sharing agreement conceived to help Australia avert the supposed impending national crisis. More realistically, the plan was conceived to help Howard achieve his campaign promise that not a single asylum seeker would reach Australia's shores if he were to be elected. Under this plan, interdictees have been taken to processing camps on islands in the Pacific. Governments of countries such as Nauru, Fiji, and New Zealand were baited into accepting the asylum seekers by millions of dollars in aid by the Australian government. Fitzpatrick describes the problematic nature of this arrangement: "Financial transfers may appear to be a questionable substitute for the core obligation to provide direct physical protection to refugees, especially where such transfers take place between highly developed and lesser-developed states and resemble 'burden shifting.'"[66] The accusation that Australia has created a "new international 'practice:' the export of a refugee problem from one area to another" is incorrect, however.[67] In taking interdicted Haitians to safe havens in developing countries around the Caribbean, the U.S. deserves credit for authoring this unsavoury "new international practice." This practice has opened up new frontiers in the debate on *non-refoulement*. Refugee advocates adopt a liberal interpretation, claiming that sending asylum seekers to countries such as Nauru that are not signatories to the Refugee Convention could constitute *refoulement*. While the risk of *refoulement* might exist, a more real threat is posed by the undermining of the principle of asylum.

In both cases, the need to implement such extensive regional co-operation programs emphasizes two important things about interdiction. The act of interdiction itself has the potential of creating a "refugee in orbit" type of situation, and although there is no recognition of specific protection obligations, the interdicting state must deal with the asylum seekers in one way or another. Even if states are not bound by statutory obligations, interdiction exacts high costs on states in the management of interdictees. That the states are willing to pay such a high price to avoid admitting asylum seekers onto their soil demonstrates the extreme measures politicians are willing to take in order to foster the appearance of control. Australian Treasurer Peter Costello has predicted yearly costs of the Pacific Solution to be in the vicinity of $450 million (in Australian dollars).[68] This exorbitant amount of money being spent to keep out asylum seekers far exceeds the resources it would take to receive them through the appropriate channels in Australia.

Located both above and beyond the reach of the law, interdiction policies exist in a unique realm exploited by states to exert an unprecedented level of immigration control. The unchecked power of the U.S. and Australia in this regard undermines notions that their sovereignty is being eroded by the human rights regime and is subject to a "de facto transnationalization of immigration policy."[69] These policies represent a powerful reassertion of sovereignty on behalf of the state. Contrary to the depiction of reality characterized by "the desacralization of territory and the fraying of national communal boundaries," interdiction policies emphasize the persistent centrality of territoriality with regard to refugee protection.[70] Australia's adoption of interdiction and the complete overhaul of its immigration laws twenty years after the inception of the Haitian Inter-

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diction Program suggests that the climate has, perhaps, become even more conducive to such muscle-flexing by states. As Brubaker writes, "Those who herald the emerging postnational age are too hasty in condemning the nation-state to the dustbin of history."[71]

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