Maritime Interdiction

Now the Australian government is prepared to turn boats around, we’ve been able to do it safely and effectively and I am not surprised that other countries are now doing likewise.

Former Australian Prime Minister Tony Abbott, May 2015

Maritime interdiction is one of the most controversial measures used by states in their bids to control their borders. In the context of boat migration, it refers to any ‘action taken by states to prevent sea-borne migrants from reaching their intended destination’. This generally involves two distinct phases of action. First, a vessel is physically intercepted and boarded or inspected. The second stage involves the deflection or ‘taking’ of the vessel and/or the passengers to some location. This location could be within or outside the territory of the interdicting state. It could be the point of embarkation, international waters, territorial waters of another nation, a third country or an external territory.

Interdiction at sea and the return of boat migrants without screening asylum claims has been called the ‘ultimate’ barrier or deterrent. The US Coast Guard explains that ‘[i]nterdicting migrants at sea means they can quickly be returned to their countries of origin without the costly process required if they successfully enter the United States’. By relying on a view that the Refugee Convention has no extraterritorial effect, its non-refoulement obligations are said not to apply. A similar argument is employed in an attempt to avoid judicial enforcement of constitutional and statutory rights that migrants may enjoy if they enter the nation’s territory. Interdiction coupled with some form of screening for asylum claims strikes a more balanced (but still problematic) approach between border control concerns and protection outcomes. Screening may take place on board Navy or Coast Guard vessels at sea or in a third country or external territory. This practice, known as extraterritorial or offshore processing, is examined in Chapter 5.

3 US Coast Guard, Alien Migrant Interdiction (31 October 2014) www.uscg.mil/hq/cg5/cg531/AMIO/amio.asp (site down at the time of writing, copy on file with author).
4 Convention Relating to the Status of Refugees, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) (‘Refugee Convention’); the validity of this claim is questioned below at nn 37–57, 164–71 and accompanying text, and in Chapter 6.
5 In this context, the term ‘external territory’ is used to describe a territory outside the traditional geographic boundaries of country, over which the country’s government exercises control, but which is designated as an area in which regular domestic laws are said not to apply.
4.1 US Coast Guard Alien Migrant Interdiction Program

For the most part, US interdiction policies have targeted sea-borne asylum seekers from Haiti and Cuba. The Haitian interdiction program began in 1981. The Coast Guard was authorised to intercept and search vessels suspected of transporting undocumented Haitians. These early measures included summary asylum screening carried out aboard US Coast Guard cutters. Those found to have a ‘credible fear’ of persecution were transferred to the United States to pursue their claim, while the others were returned to Haiti. The interdiction program and screening procedures were carried out pursuant to a bilateral treaty between the United States and Haiti, INS Interdiction Guidelines, and Executive Order 12324.

The interdiction program has operated continuously to this day. While the interception component has remained largely the same, the actions taken against migrants after they come under the control of the US Coast Guard has varied over the years. The first major policy change occurred in November 1991, when screening procedures for Haitian asylum seekers were suspended. A violent military coup in Haiti replaced the democratically elected President Jean-Bertrand Aristide with a military junta. Reports of widespread politically motivated violence and the US administration’s public condemnation of the coup made it difficult for the United States to summarily dismiss asylum claims by interdicted Haitians. But the administration of George HW Bush was reluctant to admit the large number of asylum seekers attempting to reach the United States by boat (more than 38,000 Haitians were interdicted in the eight-month period following the coup). For a brief period, all interdicted Haitians were held on Coast Guard cutters outside US territorial waters. The Bush Administration attempted to frame the issue as a regional problem and negotiated with other Caribbean nations to take some of the Haitians held on US ships. On the whole, these efforts were unsuccessful. Although Belize, Honduras, Venezuela, and Trinidad and Tobago agreed to offer temporary shelter to small numbers in UN-administered camps, the combined intake of 550 places was not enough to defuse the crisis. By late November 1991, 2,200 Haitians were being held in custody and all available Coast Guard cutters were at capacity.

The Bush Administration responded by resuming summary screening at sea and repatriating those who were deemed not to have a credible fear of persecution. A series of injunctions issued by the US District Court for the Southern District of Florida at the end of 1991, temporarily prevented the United States from returning Haitians to their

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6 For a detailed analysis of political and historic background of Haitian and Cuban sea-borne migration to the United States, see Azadeh Dastyari, United States Migrant Interdiction and the Detention of Refugees in Guantánamo Bay (Cambridge University Press, 2015) 13–52.
9 Exec Order No 12324, 46 Fed Reg 48109 (1 October 1981).
10 For a detailed account of the development of the policy, see Dastyari, above n 6, 13–57.
13 Ibid 3.
home country. Unwilling to let the Haitians enter the United States, and with no space left on the Coast Guard cutters, the US government decided to transfer the asylum seekers to a hastily built camp on the US-controlled territory of Guantánamo Bay in Cuba. Although better known in recent times as an exceptional space created to exclude enemy combatants from the protections of the US justice system, Guantánamo was used first as a holding and processing centre to bar interdicted asylum seekers from accessing these same legal protections. Between November 1991 and May 1992, all interdicted Haitians were taken to Guantánamo for processing. Those found to have a credible fear of persecution were transferred to the United States to pursue an asylum claim. Those found not to exhibit such a fear were forcibly returned to Haiti. Even these streamlined procedures, however, could not keep up with the steady flow of arrivals, and the makeshift camp at Guantánamo quickly reached its 12,500-person capacity.

With the facilities at Guantánamo full, President Bush issued the ‘Kennebunkport Order’ on 24 May 1992. The new policy provided for the interdiction and summary return of all Haitians leaving Haiti by boat. The order expressly declared that US non-refoulement obligations under the Refugee Convention and Protocol did not extend outside US territory. Despite criticising the policy during the 1992 presidential election and promising to repeal it, President Bill Clinton maintained the policy of interdiction and return without screening when he came to office. In 1993, in Sale v Haitian Centers Council, the Supreme Court tacitly upheld the no-screening policy. It affirmed the government’s stance that neither the non-refoulement obligations in the Refugee Convention and Protocol nor the United States implementing legislation prohibited the return of refugees intercepted on the high seas. This decision is examined in detail later in this section.

President Clinton suspended the no-screening policy in May 1994, apparently deciding that Haiti was, in fact, too dangerous a place to return the asylum seekers to. Initially, all Haitians were subject to full status determination procedures. These took place aboard US Coast Guard vessels on the high seas, in the territorial waters of third countries or in Guantánamo Bay. Those who satisfied the more stringent ‘well-founded fear of persecution’ test (rather than the ‘credible fear’ test) were resettled in the United States. The number of Haitians arriving quickly outstripped the processing capabilities, and the refugee

14 Haitian Refugee Center, Inc v Baker, 789 F Supp 1552, 1576–1577 (SD Fla, 1991) (‘Baker’); Haitian Refugee Center, Inc. v Baker, 789 F Supp 1579 (SD Fla, 1991). These were overturned in Haitian Refugee Center v Baker (‘Baker II’) 949 F 2d 1109 (11th Cir, 1991) and Haitian Refugee Center v Baker (‘Baker III’) 953 F 2d 1498 (11th Cir, 1992). These cases are examined in detail in Chapter 5.
15 See Chapter 5, nn 19–50 and accompanying text. For a historical overview of US interests in Guantánamo Bay, see Dastyari, above n 6, 6–8.
17 Note that persons who were found to have a credible fear but were HIV positive were not transferred to the US, but were detained in a special section of the Guantánamo Bay facility: see Chapter 5.
18 Exec Order No 12807, 57 Fed Reg 23 133 (1 June 1992).
22 For an examination of the processing of asylum claims in third countries, see Chapter 5, nn 78–79 and accompanying text.
adjudication procedures were suspended. From July 1994 onwards, Haitians were instead extended ‘safe haven’ in either Guantánamo or one of a number of participating Caribbean nations.23 In August 1994, the interdiction and safe haven policy was extended to Cuban arrivals. Up until then, US policy had presumed all persons fleeing Cuba to be refugees, and those that made it to sea had been rescued and brought to the United States.24 A large spike in the number of Cubans making the journey prompted a rethink of this approach.25 The safe haven policy came to an end in 1995. Reinstating a policy of presumptive ineligibility, the United States repatriated nearly all the remaining Haitian asylum seekers held at Guantánamo in January 1995.26 The Cubans on Guantánamo were more lucky. Those remaining in the camp were transferred to the United States in May 1995. But future arrivals were subject to the same presumptive ineligibility as Haitians. They were to be interdicted and returned to Cuba, except where they could show shipboard adjudicators a ‘genuine need for protection; that could not be satisfied by applying for refugee status with the US Interests Section in Havana’.27

The US interdiction program has also targeted migrants from a range of other countries, including the Dominican Republic, Ecuador and China. Current operations are carried out pursuant to Executive Order 13276, which was issued by President George W Bush in 2002.28 This authorises the Attorney General to detain, at any location she or he deems appropriate, any undocumented aliens she or he has reason to believe are seeking to enter the United States and who are intercepted in the Caribbean region. In the 2016 financial year, there were a total of 6,346 migrants interdicted.29 Interdicted migrants undergo basic screening at sea. The vast majority are ‘screened out’ and returned to their point of departure, but a small number continue to be transferred to Guantánamo Bay for processing.30

The leading Supreme Court case on the legality of the US migrant interdiction program is Sale v Haitian Centers Council (‘Sale’).31 This involved a challenge to President George HW Bush’s ‘Kennebunkport Order’ of 24 May 1992, which authorised the interdiction and repatriation of all Haitians attempting to reach the United States by boat without any screening for asylum claims.32 The main issue in Sale was whether these actions violated the non-refoulement obligation in art 33 of the Refugee Convention,33 or section 243(h) of the Immigration and Nationality Act (‘INA’), which implemented a similar obligation into US law.34 Prior to the Supreme Court’s decision, several circuit courts had considered this issue in the context of the Haitian interdiction program. The District of Columbia and Eleventh Circuit found that the US government’s non-refoulement obligations under the

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23 See Chapter 5, nn 47–50, 82–4 and accompanying text. 24 Frielick, above n 21, 68.
25 This was precipitated by an announcement by the Cuban government on 6 August 1994 that they would no longer interfere with efforts of those who desired to emigrate to the United States: Thomas David Jones, ‘A Human Rights Tragedy: The Cuban and Haitian Refugee Crises Revisited’ (1995) 9 Georgetown Immigration Law Journal 479, 492; The similarities to the Mariel boat lift in 1981 led some to label the incident as Mariel II: Carlos Verdecia, ‘Wily Castro Again Sends His Problems North’, Christian Science Monitor (12 September 1994) 19; See also Appendix, Table A.1.
26 Frielick, above n 21, 67. 27 Ibid 72.
33 Note that the United States is not party to the Convention but in effect assumed the obligations under it when it acceded to the Protocol.
34 In 1996, Congress repealed § 243(h) and inserted similar provisions in § 241(b)(3) of the INA: see Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub L No 104–208, 100 Stat 3009–546.
Refugee Convention and the INA only extended to aliens who were physically present in the United States. The Second Circuit took the contrary view, interpreting art 33 and the relevant legislative provisions as having extraterritorial effect.

In Sale, the US Supreme Court adopted the restrictive interpretation of the non-refoulement obligations as only applying within the territorial boundaries of the United States. Stevens J, writing for the majority, began by examining the meaning of the relevant provisions of the INA. Section 243(h) provided, subject to a number of exceptions, that ‘the Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership of a particular social group, or political opinion’.

Through an examination of the language and legislative history of this provision, the Court interpreted two main restrictions to its operation. First, as the language only referred to the Attorney General, it could not be interpreted as placing any limitations on the President’s authority to repatriate aliens interdicted in international waters. Second, the provision was interpreted as not having any extraterritorial applicability. This was grounded in a view that the protection only extended to regulating actions of the Attorney General authorised under the Act. The Act only authorised the operation of deportation and exclusion proceedings within the United States. Stevens J reasoned, therefore, that ‘[s]ince there is no provision in the statute for the conduct of such proceedings outside the United States . . . we cannot reasonably construe § 243(h) to limit the Attorney General’s actions in geographic areas where she has not been authorised to conduct such proceedings’. His Honour also relied on the presumption that acts of Congress do not ordinarily apply outside US borders to support the interpretation of § 243(h) as only applying within US territory.

Having rejected the proposition that the INA created any extraterritorial non-refoulement obligations, Stevens J turned his attention to the possibility that the Refugee Convention may create such an obligation. If that were the case, under the Supremacy Clause of the US Constitution, the broader treaty obligation might provide the controlling rule of law. The Court decided, however, that neither a textual analysis nor the negotiating history of the treaty supported the position that art 33 is applicable on the high seas or extraterritorially.

Article 33 of the Refugee Convention states:

1. No Contracting State shall expel or return (‘refoulé’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country.

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35 Haitian Refugee Center v Gracey, 809 F 2d 794 (DC Cir, 1987); Haitian Refugee Center v Baker, 949 F 2d 1109 (11th Cir, 1991); Haitian Refugee Center v Baker, 953 F 2d 1498 (11th Cir, 1992).
36 Haitian Centers Council v McNary, 969 F 2d 1350 (2nd Cir, 1992).
Steven J’s first textual argument stemmed from the geographic limitation included in art 33(2). The effect of that provision is that a refugee cannot claim the benefit of the non-refoulement obligation if he poses a threat to the country in which he is located. His Honour reasoned that

[i]f the first paragraph did not apply to the high seas, no nation could invoke the second paragraph’s exception with respect to an alien there: An alien intercepted on the high seas is in no country at all. If Article 33.1 applied extraterritorially, therefore, Article 33.2 would create an absurd anomaly: Dangerous aliens on the high seas would be entitled to the benefits of 33.1 while those residing in the country that sought to expel them would not.42

Steven J’s second textual argument related to the meanings of the terms ‘expel’ and ‘return’ in art 33(1). The Court ruled that these terms paralleled the phrase ‘deport or return’ found in § 243(h)(1) of the INA. ‘Expel’ was interpreted as having the same meaning as ‘deport’, referring to the deportation or expulsion of an alien who is already present in the host country. The term ‘return’ (refouler) was interpreted as being limited to the exclusion of aliens who are ‘on the threshold of initial entry’.43 The Court reasoned that the inclusion of the term ‘refouler’ following ‘return’ narrows the meaning of the term, as ‘refouler’ is not a synonym for ‘return’.44 Stevens J referred to two English–French dictionaries translating ‘refouler’ as ‘repulse’, ‘drive back’ or ‘expel’. His Honour concluded that these translations imply that in the context of art 33(1), “return” means a defensive act of resistance or exclusion at the border rather than an act of transporting someone to a particular destination.45 The Court also found that this interpretation of the terms ‘expel’ and ‘return’ (as applying only to refugees who have entered the host country) was also supported by the travaux préparatoires of the Refugee Convention. The Court cited statements by the Swiss and Dutch delegates supporting such an interpretation.46 Thus, the Supreme Court held that art 33 does not have extraterritorial effect.

Blackmun J delivered a powerful dissent, finding that the duty of non-refoulement in both the Refugee Convention and the INA applied extraterritorially. In relation to art 33 of the Refugee Convention, His Honour’s starting point was the principle that a treaty must be construed according to its ‘ordinary meaning’.47 The majority’s attempt to give the term ‘return’ a more narrow legal meaning was inconsistent with this accepted canon of statutory interpretation. Blackmun J found that the ordinary meaning of ‘return’ is ‘to bring, send, or put (a person or thing) back to or in a former position’, and that was exactly what the US government was doing to the Haitians.48 His Honour was critical of the majority’s attempt to construe the term refouler in the text of art 33(2) as somehow limiting the meaning of ‘return’ in that provision. Blackmun J noted that even if the majority’s translation of refouler as ‘repulse’, ‘repel’ and ‘drive back’ was accepted, none of these terms necessitated the

48 Ibid.
conclusion that the term should be read down to only mean exclusion at the border. A person can be repulsed, repelled or driven back on the high seas.

Next, Blackmun J dismissed the majority’s argument relating to the inclusion of the geographical limitation in art 33(2). For His Honour, the fact that the drafters of the Convention decided to allow nations to deport criminal aliens who have entered their territory hardly suggested an intent to permit the apprehension and return of non-criminal aliens who have not entered their territory.49 Blackmun J was also very critical of the majority’s reliance on the travaux préparatoires, and in particular the oral statements of Swiss and Dutch delegates. Such reference, he argued, should only be made as a last resort when there is ambiguity in the language.50 They could not be used to change the plain meaning of the text. Moreover, there is no evidence that the statements relied upon reflected the views of other delegates, as they were not ‘agreed to’ or ‘adopted’ as official amendments to the Convention.51

In relation to § 243(h) of the INA, Blackmun J reasoned that the provisions are both syntactically and grammatically unambiguous in their extraterritorial effect. His Honour argued that such an interpretation was supported by a correct reading of the legislative history. He criticised the majority’s reliance on the presumption against the extraterritorial applicability of US law. The presumption, he argued, only operates where congressional intent is ‘unexpressed’. The language of the provisions in this case clearly expressed an extraterritorial effect. Even if the congressional intent was unexpressed, the international subject matter of the legislation (immigration, nationalities and refugees) created a presumption of extraterritorial applicability. Blackmun J also dismissed the argument that as § 243(h) only purports to constrain the actions of the Attorney General, the provision did not apply to the Haitian interdiction program as it was carried out pursuant to a Presidential Order. His Honour concluded that ‘[t]here can be no doubt that the Coast Guard is acting as the Attorney General’s agent when it seizes and returns undocumented aliens’.52

The overwhelming weight of academic opinion backs Blackmun J’s dissent. The majority’s reasoning in Sale is subject to almost universal criticism by US,53 as well as international, legal scholars.54 The Executive Committee of UNHCR was also quick to condemn the outcome of the case: ‘UNHCR considers the Court’s decision a setback to modern international refugee law which has been developing for more than forty years, since the end of World War II. It renders the work of the Office of the High Commissioner in its global refugee protection role more difficult and sets a very unfortunate example.’55

55 ‘UN High Commissioner for Refugees Responds to US Supreme Court Decision in Sale v Haitian Centers Council’ (1993) 32 International Legal Materials 1215. For an elaboration of the UNHCR position, see Executive Committee of the High Commissioner’s Programme, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, 18th standing mtg, UN Doc EC/50/SC/CRP.17 (9 June 2000) [10].
A similar view was affirmed by the Inter-American Commission on Human Rights when it was called upon to determine the legality of the US Haitian interdiction program. The Commission rejected the Supreme Court’s approach in Sale, interpreting art 33 of the Refugee Convention as operating extraterritorially in the context of migrant interdiction on the high seas. The decision in Sale also directly contradicts advice provided to the government by its own Office of Legal Counsel back in 1981 when the Haitian interdiction program was established. This advice concluded that even on the high seas, art 33 created an obligation for the United States to ensure that interdicted Haitians ‘who claim they will be persecuted . . . are given an opportunity to substantiate their claims’.

The widespread criticism of the legal reasoning adopted in the case, the fact that the outcome contradicted the government’s earlier legal advice and the plausibility of the construction put forward in Blackmun J’s dissent all indicate that the alternative interpretation recognising the extraterritorial effect of the non-refoulement obligations under the Refugee Convention and INA was at the very least open to the judges in Sale.

In the immediate aftermath of the Supreme Court’s decision in Sale, concerns were raised that it would provide a green light for other nations to engage in push-back operations. The New York Times queried whether ‘this ruling by one of the most influential courts in the world [could] set a tempting precedent, particularly for developing nations? If the United States, with the imprimatur of its highest court, appears to put the protection of its borders above its responsibilities under international law, will others be enticed to follow suit?’

This concern turned out to be well founded. But it is interesting to note that the New York Times was wrong to single out ‘developing nations’, with the influence of the US interdiction practices having the most direct influence on wealthy liberal democracies such as Australia.

4.2 Australia’s Interdiction and ‘Push-Back’ Operations

Australia’s reaction to its first large-scale experience of asylum-seeker boat arrivals was relatively restrained. The asylum seekers from Vietnam, who arrived in Australia from 1976 to 1981, were provided with hostel accommodation and generous settlement services. The second group of boat arrivals to reach Australia mostly consisted of Cambodian, Sino-Vietnamese and Chinese nationals, who travelled to Australia between 1989 and 1995. As discussed in Chapter 3, the Australian government’s response to these arrivals was to introduce a system of mandatory immigration detention. The introduction of maritime

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interdiction and extraterritorial processing measures can be broadly viewed as a response to a new flow of boats carrying asylum seekers from Iraq and Afghanistan. The immediate trigger for the policy change was the rescue at sea of 433 asylum seekers by a Norwegian-registered container ship, MV Tampa, in August of 2001.59 A diplomatic row erupted over where the rescues should be delivered. Reflecting the climate of public unease with the increasing number of unauthorised arrivals, Prime Minister John Howard decided to prevent the delivery of the rescues to Australia. When initial negotiations failed to convince the ship’s captain to change course, Australian Special Air Service troops were deployed to board the vessel and prevent it from entering Australian territorial waters. After a five-day stand-off, the crisis was resolved when agreements were reached with New Zealand and Nauru for rescues to be transferred to those countries to have their protection claims assessed.

At the time, the Australian government did not have statutory powers that authorised the actions that were taken against the passengers of the MV Tampa. Two years earlier, the Border Protection Legislation Amendment Act 1999 (Cth) had inserted provisions into the Migration Act 1958 (Cth) (‘Migration Act’) authorising maritime interdiction activities.60 However, these provisions only allowed interdicted persons to be detained at sea and brought to Australia. The provisions did not authorise transfer to locations outside Australia.61 Given the absence of statutory authority, the government purported to be acting pursuant to the executive’s ‘prerogative power’. This claim was challenged in Ruddock v Vadarlis, which is examined later in this section.62

In the immediate aftermath of the Tampa incident, the Australian Parliament enacted a series of legislative reforms that retrospectively validated the executive’s response,63 and introduced new provisions to deprive future unauthorised boat arrivals of access to regular Australian asylum procedures. The scheme, which became known as the ‘Pacific Solution’ and later the ‘Pacific Strategy’, involved two main initiatives. The first was the offshore processing regime established in Nauru and Manus Island. This is explored in detail in Chapter 5. The second strategy was a maritime interdiction program dubbed ‘Operation Relex’. The Royal Australian Navy was deployed to intercept unauthorised boats attempting to enter Australia. Interceptions took place when boats entered Australia’s contiguous zone, which extends twenty-four nautical miles from the Australian coast. The Navy would then attempt to tow or escort intercepted vessels back to the edge of Indonesian territorial waters. If these attempts failed, the asylum seekers aboard the vessels were transferred to Manus Island or Nauru for processing of their claims. The so-called ‘push-back’ operations

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60 Migration Act pt 2 div 12A.

61 See former s 245F(9) of the Migration Act, inserted by the Border Protection Legislation Amendment Act 1999 (Ch).


63 Border Protection (Validation and Enforcement Powers) Act 2001 (Cth) ss 5 and 6 (providing that any action taken between 27 August 2001 and 27 September 2001 by the Commonwealth in relation to the MV Tampa and other vessels carrying passengers attempting ‘to enter Australia unlawfully’ and any person who was on board such a vessel ‘is taken for all purposes to have been lawful when it occurred’).
were carried out pursuant to amendments to the *Migration Act* that authorised the transfer of interdicted vessels and their passengers ‘to a place outside Australia’.\(^{64}\)

There is ample evidence demonstrating that both the interdiction and extraterritorial processing elements of the Pacific Solution were modelled on US policy. The similarities in the extraterritorial processing regimes are examined in Chapter 5. In relation to interdiction, Operation Relex operated in a very similar way to the US interdiction program that was in force from March 1992 to March 1994, during which boats carrying Haitian asylum seekers were intercepted and returned to their point of departure with no screening of asylum claims. The clear similarities between Operation Relex and the US interdiction program raise a strong presumption that legal and policy transfer has occurred. Such a view is supported by evidence that policymakers in Australia had direct knowledge of the US precedent. The bilateral and multilateral forums discussed in Chapter 3 provided ample *opportunity* for US and Australian policymakers to meet and share information on interdiction activities. The key forums discussed there were networks operating within international organisations (as well as the informal bilateral discussions that occur on the sidelines of these meetings); Regional Consultative Processes such as the Five Country Conferences and the Intergovernmental Consultations on Asylum; and bilateral avenues of communication such as ad hoc meetings, staff exchanges, fact-finding missions and migration policy attachés based in the Australian Embassy in Washington and the US Embassy in Canberra. In terms of direct evidence of legal and policy transfer, the Bills Digest accompanying the *Border Protection (Validation and Enforcement Powers) Act 2001* refers to the US precedent.\(^{65}\) This Act was the first of a series passed in the immediate aftermath of the *Tampa* incident to retrospectively authorise the actions taken against that vessel and establish the legislative framework underpinning interdiction and offshore processing. The Bills Digest includes a section titled ‘United States Analogy’, which sets out a detailed history of US interdiction and extraterritorial processing.\(^{66}\)

A senior US policymaker interviewed by the author confirmed that they had provided Australian policymakers extensive advice relating to the US experience with interdiction and extraterritorial processing in the immediate lead-up to the introduction of the Pacific Solution.\(^{67}\) This interview subject was a former senior bureaucrat who had been one of the key architects of the US extraterritorial processing policies in the Caribbean in the 1990s. The policymaker reported sharing detailed advice relating to the US experience with Haitian arrivals with officials from Australia’s Department of Foreign Affairs and Trade and the Department of Immigration, as well as with the Australian Ambassador in Geneva. The policymaker was based in Geneva at the time the *Tampa* crisis unfolded, and was consulted on a daily basis by Australian officials in the immediate aftermath of the incident.

Operation Relex operated from 28 August 2001 to 12 March 2002. During this time, a total of twelve asylum-seeker boats were intercepted by the Australian Navy.\(^{68}\) Of these, 4 boats, with some 600 asylum seekers on board, were successfully forced back to Indonesia.

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\(^{64}\) See *Migration Act* ss 245F(9) and (9A), amended by the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth).


\(^{66}\) Ibid.

\(^{67}\) USB19.

\(^{68}\) For a detailed account of what happened to each of these vessels, see Adreas Schloenhardt and Colin Craig, ‘Turning Back the Boats: Australia’s Interdiction of Irregular Migrants at Sea’ (2015) 27 *International Journal of Refugee Law* 536.
The other eight were intercepted but could not safely make the journey back, either because they had broken down or because they had been sabotaged by asylum seekers in an attempt to stop their return. The passengers aboard these vessels were transferred to Nauru or Manus Island. Operation Relex was replaced by Operation Relex II, which continued until 16 July 2006. This operation only involved the successful return of one vessel to Indonesia.

Maritime interdiction continued under the Rudd Labor government, which came to power in late 2007. But the policy of returning vessels to Indonesia was abandoned. Instead, vessels were issued with warnings about the penalties attached to migrant-smuggling offences in Australia and told to return to Indonesia. Where these warnings failed to dissuade the migrant vessel from continuing its journey (as they often did), the boat would be boarded and escorted to Christmas Island, an Australian territory in the Indian Ocean.

Over the next few years the number of asylum seekers attempting to reach Australia began to increase. Consisting of mostly Iranian, Sri Lankan, Afghani and Syrian asylum seekers, the size of this new group of arrivals soon outstripped anything Australia had experienced before. More than 50,000 asylum seekers travelled by boat to Australia between 2009 and 2013. The Coalition government was elected in September 2013 on a policy platform which promised to ‘stop the boats’. Immediately upon coming to office, Prime Minister Tony Abbott launched Operation Sovereign Borders, a military-led initiative to deter and prevent asylum seekers reaching Australia by sea. Turn-backs were to be used alongside a suite of other policies aimed at containing and deterring unauthorised boat arrivals. As of April 2017, the government had intercepted and returned thirty boats carrying approximately 765 people as part of Operation Sovereign Borders.

The majority of these turn-back operations involved the return of asylum-seeker boats to the edge of Indonesia’s waters, often without the cooperation of the Indonesian government. There have also been at least four reports of asylum-seeker vessels being intercepted en route to Australia from Sri Lanka and their passengers being handed over to Sri Lankan authorities on the high seas. Where the asylum seekers returned to Indonesia have not been subject to any screening processes, the Sri Lankan asylum seekers were subject to

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69 See Appendix, Table A.2.
summary screenings at sea via teleconference.72 In this regard, there are clear parallels with the current iteration of the US interdiction program (operating since 1995) where asylum seekers are subject to summary screening procedures at sea.

The Australian government has also invested in purchasing vessels to be used in the return of migrants in situations where interdicted vessels are unseaworthy and cannot make the journey back to Indonesia. These are presumably to prevent the sabotage of vessels and associated loss of life that marred Operation Relex.73 Initially, custom-built orange life boats were used, but recent reports indicated that these have been replaced by a fleet of Vietnamese-built wooden vessels, resembling Asian fishing boats.74 The need for such vessels underscores one of the differences between the Australian and US interdiction operations. The United States has entered into various bilateral agreements which authorise the US Coast Guard to enter the territorial waters of certain Caribbean nations for the purpose of carrying out interdiction activities and returning interdicted vessels.75 Australia does not have any equivalent agreement with Indonesia. As such, vessels are left at the edge of Indonesia’s territorial sea and must be sea-worthy to undertake the twelve-nautical-mile trip to the coastline.76 Sri Lanka and Vietnam have been more willing to cooperate with Australia in relation to accepting the return of interdicted migrants.

Another important distinction between US and Australian interdiction activities relates to the location of interception. The United States generally intercepts and returns boats before they reach US waters (either in international waters, or the territorial sea of other nations).77 In contrast, there are numerous reports of Australian authorities returning boats intercepted in Australian territorial waters, and in some cases, boats that had reached Australia’s northern outlying islands.78 This distinction has important ramifications under international law, which are explored in Chapter 6.

The statutory basis for the current interdiction regime is the Maritime Powers Act 2013 (Cth) (‘MPA’). This Act consolidates the Commonwealth’s existing maritime enforcement powers, including those previously included in the Migration Act,79 into a single framework.80 The key relevant provision, s 72(4), states that where a maritime officer suspects a vessel has been involved in a contravention of Australian law, including the Migration Act,
a maritime officer may detain the person and take them to a place inside or outside Australia’s migration zone.81

In response to the CPCF v MIBP litigation examined later in this section,82 the government passed the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) (‘Legacy Caseload Act’), which included a raft of changes to the MPA that greatly expanded the executive’s powers to interdict, detain and transfer asylum seekers at sea.83 Most significantly, the amendments stipulate that when carrying out maritime powers, an authorising officer is not required to consider Australia’s international obligations, or the international obligations or domestic law of another country.84 Additionally, the amendments stipulate that authorisation of maritime powers under the Act is not invalid if inconsistent with Australia’s international obligations.85 As such, there are no legal safeguards in place to ensure that Australia does not breach its non-refoulement obligations by returning a person to a place where they face persecution contrary to the Refugee Convention, or to a situation where they are in danger of death, torture or other mistreatment. Other amendments authorise potentially long-term detention at sea;86 restrict the application of the rules of natural justice from applying to most maritime powers under the Act;87 and restrict the capacity of the courts to review government actions at sea in a number of other ways.88 The government continues to claim that its interdiction activities are also authorised under its non-statutory prerogative power.

Ruddock v Vadarlis dealt with the actions of the Australian government against the passengers of the MV Tampa in 2001.89 The case was heard while the vessel was under the control of Australian Special Armed Service troops off Christmas Island. Eric Vadarlis and the Victorian Council for Civil Liberties commenced proceedings in the Federal Court against the Minister for Immigration and a number of other Commonwealth officers in an attempt to force the government to bring the asylum seekers to shore.90 The first hurdle to overcome was the issue of standing. While the lawyers had received a letter from the rescuees, they were unable to obtain direct instructions for the purpose of mounting a legal challenge under the Migration Act.91 Given the lack of direct instructions, the public

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81 These provisions reflect the former s 245F(9)–(9A) of the Migration Act. 82 (2015) 255 CLR 514. 83 Legacy Caseload Act sch 1. 84 MPA s 22A(1)(a). 85 MPA s 22A(1)(c). 86 The Minister is authorised to detain passengers of an interdicted vessel for as long as a decision is made on where the indertictees should be transferred: MPA s 75A(1)(c). 87 MPA s 22B, which relates to the authorisation powers under pt 2 div 2, and s 75B, which relates to the exercise of powers under ss 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G or 75H. 88 These include exclusion of review by the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 (Cth) of certain decisions (see, eg, new ss 75D and 75H) and the provisions discussed above which state that the exercise of certain maritime powers are not invalid due to a failure to consider, or inconsistency with, Australia’s international obligations. 89 (2001) 110 FCR 491. 90 Victorian Council for Civil Liberties v MIMA (‘VCCL’) (2001) 110 FCR 452. 91 Vadarlis argued that s 245F(9), which confers on officers the power to board ships, applies to the rescuees and requires the government to bring the rescuees to mainland Australia. He contended further that the mandatory detention provisions contained in s 189 of the Act applied to the rescuees and required the respondents to take the rescuees into detention. The application for mandamus to compel the respondents to perform these statutory duties was dismissed on the grounds that Vadarlis did not have standing: VCCL (2001) 110 FCR 452, 467–68 [45]–[48] (North J); Ruddock v Vadarlis (2001) 110 FCR 491, 529–30 [151]–[152] (French J). Vadarlis also claimed that the government’s refusal to give him access to the rescuees constituted a breach of his implied constitutional right to freedom of communication. He
advocates only had standing to seek an order in the nature of habeas corpus, requiring the respondents to bring the rescuees to Australia.\(^92\) Two requirements had to be met for the writ to issue. First, the rescuees had to be ‘detained’ by the government. This required a determination that the government was imposing total restraint on their movement. Second, it needed to be shown that this detention was not authorised by law. The government purported to be acting outside of the statutory regime set up by the Migration Act. This was because if this Act was to apply, the rescuees would have to be transferred into immigration detention in Australia and afforded an opportunity to claim asylum.\(^93\) Instead, the government argued that the executive had a non-statutory ‘prerogative power’ which authorised its actions. The determinative question in this regard was whether such a power existed.

The trial judge, North J, held that the circumstances amounted to a total restraint on the freedom of the rescuees attributable to the government. On the second question, North J concluded that there was no non-statutory prerogative power to detain non-citizens for the purpose of expulsion. If there ever had been such a power, North J reasoned that it was extinguished by the comprehensive provisions contained in the Migration Act dealing with the subject. Detention could only be authorised if it was pursuant to the Migration Act, and to the extent that the government purported to be acting outside the Act, detention was unlawful. Accordingly, orders were made directing the Commonwealth to bring ashore and release the asylum seekers.

In Ruddock v Vadarlis, the Full Federal Court overturned the primary judge’s ruling in a 2:1 majority decision.\(^94\) Black CJ, in dissent, would have dismissed the appeal on similar grounds relied upon in the primary decision. French J, joined by Beaumont J, disagreed with North J’s and Black CJ’s analysis of the two key questions. On the question of whether the rescuees were being detained by the government, French J invoked the ‘three walled prison’ concept constructed by the High Court in Chu Kheng Lim v MILGEA (‘Lim’).\(^95\) His Honour reasoned that the rescuees were not being detained as they were free to travel anywhere they wished, except to Australia.\(^96\) French J went on to conclude that even if the rescuees were being detained, such detention would be authorised pursuant to the government’s executive power conferred by s 61 of the Australian Constitution.\(^97\) His Honour distinguished between the old royal prerogative powers and the constitutional executive power, finding that the former had been subsumed by the latter upon the creation of the

\(^{92}\) VCCL (2001) 110 FCR 452, 469 [56] (North J); Ruddock v Vadarlis (2001) 110 FCR 491, 509 [66] (Black CJ), 518 [108] (Beaumont J). The Federal Court of Australia Act 1976 (Cth), which sets out the powers of the Federal Court, does not explicitly mention the writ of habeas corpus. This has led to divided opinions as to whether the Court has the power to issue such a writ: see David Clark, ‘Jurisdiction and Power: Habeas Corpus and the Federal Court’ (2006) 32 Monash University Law Review 275 (arguing that the Federal Court judges have been incorrect in their conclusion that they do not have the power to issue habeas corpus writs). It is accepted, however, that the Court has the power to issue a writ in the nature of habeas corpus, which is essentially a mandatory injunction: Ruddock v Vadarlis (2001) 110 FCR 491, 518 [107] (Beaumont J).

\(^{93}\) See above nn 60–1 and accompanying text.

\(^{94}\) (2001) 110 FCR 491.

\(^{95}\) (1992) 176 CLR 1, 34 (Brennan, Deane and Dawson JJ); see Chapter 3, n 207 and accompanying text.

\(^{96}\) Ruddock v Vadarlis (2001) 110 FCR 491, 548 [214].

\(^{97}\) Section 61 of the Australian Constitution provides that ‘the executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General’. 
Australian Constitution. The executive power authorises the executive to prevent the entry of non-citizens and to do all things necessary to effect such exclusion (including detention). Whereas the old prerogative power could be superseded by legislation which operates in the same area, the executive power could only be displaced by clear and unambiguous legislative intention. This is particularly so in cases where the executive power is of great significance to national sovereignty. While detailed and comprehensive, the provisions of the Migration Act dealing with the entry and removal of non-citizens were construed as not demonstrating an intention to override the executive of its non-statutory power to prevent the entry of non-citizens into Australian waters. Vadarlis sought leave to appeal to the High Court. However, the Court declined to entertain the appeal, as by that stage, the rescues had been transferred to Nauru and New Zealand.

Much like the Sale decision in the United States, the majority’s decision in Ruddock v Vadarlis has been the subject of intense academic criticism. In reaching the conclusion that the rescues were not detained as they were free to go anywhere other than Australia, French J relied on the High Court’s decision in Lim. As Mary Crock points out, however, that characterisation of immigration detention in Lim had been repeatedly and roundly rejected by the UN Human Rights Committee and by the European Court of Human Rights. This point is also made by Black CJ in his dissenting opinion.

The majority’s broad construction of the executive power is also questionable. French J’s assertion that the boundaries of the Commonwealth executive power should not be determined with reference to the content of the prerogative power deviates from precedent. The approach is also at odds with the context of imperial and colonial history in which the constitutional provision was drafted. George Winterton argues that French J’s approach...
involves abandoning the long-standing principle that the common law should be used to interpret both statutes and constitutions.\textsuperscript{107} For Winterton, the prerogative, despite its uncertainty, ‘constitutes a substantial body of principles, rules and precedents, established over hundreds of years’.\textsuperscript{108} Such principles provide clearer guidance than vague notions of sovereignty and what is ‘appropriate’ for national governments.\textsuperscript{109}

The second line of criticism targets French J’s conclusion that the executive power to prevent the entry of non-citizens had not been abrogated by the passage of the \textit{Migration Act}.\textsuperscript{110} Again, this conclusion is not derived from any precedent\textsuperscript{111} and ‘ignores the history of the executive power since the 17th century [which] demonstrates progressive constitutionalisation, moderation, and republicanism’\textsuperscript{112}. This history supports the conclusion that even if the executive power encompassed a power to detain non-citizens for the purpose of exclusion at federation, this power was abrogated by the legislative action of passing the relevant provisions on interdiction and exclusion contained in the \textit{Migration Act}. Simon Evans argues that this position is correct when one considers the legislative intention behind the passage of those provisions, querying whether it is ‘realistic to imagine that the Parliament intended to enact in clear and general terms that a person attempting to enter Australia unlawfully must be taken into immigration detention by an officer, but to leave open to the officer an alternative non-statutory option with none of the safeguards of immigration detention?’\textsuperscript{113}

This criticism, combined with the fact that two out of the four judges who heard the case at trial and appeal upheld the habeas challenge (including the most senior judge of the group, Black CJ), illustrates that, at the very least, a reasonable alternative construction was available to that which was adopted by the majority of the Full Federal Court.

The High Court had an opportunity to examine some of the issues raised in \textit{Ruddock v Vadarlis} in its 2015 decision in \textit{CPCF v MIBP} (\textit{CPCF}).\textsuperscript{114} The case concerned a challenge to the detention at sea of one of a group of 157 Sri Lankan asylum seekers interdicted en route to Australia. The Indian-flagged vessel on which the group was travelling was intercepted on 29 June 2014 by an Australian Customs vessel in Australia’s contiguous zone. The asylum seekers were transferred to the Australian vessel, where they were detained while diplomatic negotiations were undertaken to return them to India. They remained aboard the Customs vessel until 27 July 2014, when a decision was made to disembark the passengers to Cocos (Keeling) Island, an Australian territory in the Indian Ocean. Subsequently, the asylum seekers were moved to the offshore processing facility on Nauru.

\begin{footnotes}
\item[107] Winterton, above n 102.
\item[108] Ibid 35.
\item[109] Note that French J went on to become the Chief Justice of the High Court. Under his leadership, the Court further developed and implemented His Honour’s expansive view of the executive power. See \textit{Pape v Commissioner of Taxation} (2009) 238 CLR 1, and follow-up discussion in \textit{Williams v the Commonwealth} (2012) 248 CLR 156 and \textit{Williams v the Commonwealth} (2014) 252 CLR 416 (finding the executive power includes a power to engage in actions peculiarly adapted to a national government and that these powers exist separately from those derived from the prerogative, statute and its capacities as a person.)
\item[110] See \textit{Ruddock v Vadarlis} (2001) 110 FCR 491, 540 [183].
\item[111] Winterton, above n 102, 47 (arguing that ‘it may be doubted whether the cases upon which French J relied upon [to reach this conclusion] represent current Australian authority’).
\item[112] Evans, above n 102, 98.
\item[113] Ibid.
\item[114] (2015) 255 CLR 514.
\end{footnotes}
The key legal issue was that of wrongful imprisonment, namely whether the detention of the plaintiff for almost one month on the Australian vessel was lawful. As already discussed, following Ruddock v Vadarlis, the government had introduced a comprehensive legislative framework for maritime interdiction activities.115 This was later consolidated into the Maritime Powers Act 2013 (Cth) (‘MPA’). The Commonwealth’s argument was that its actions were authorised under s 72(4) of the MPA, which provided that where a maritime officer suspects a vessel has been involved in a contravention of an Australian law (including the Migration Act):116

A maritime officer may detain the person and take the person, or cause the person to be taken:

(a) To a place in the migration zone; or

(b) To a place outside the migration zone, including a place outside Australia.117

In the alternative, the Commonwealth argued that detention was authorised by the non-statutory executive power of the Commonwealth derived from s 61 of the Australian Constitution. This drew on the majority’s reasoning in Ruddock v Vadarlis, where French J noted that the Commonwealth executive power included the power ‘to prevent the entry of non-citizens and to do such things as necessary to effect such exclusion’.118

The plaintiff argued that his detention was not authorised by the MPA as the decision to take him to India was invalid. He contended that detention was unlawful because there was no assurance he would be allowed to disembark in India. The plaintiff sought to rely on the High Court’s ruling in Lim that a Commonwealth statute authorising executive detention must limit the duration of incarceration to what is reasonably capable of being seen as necessary to effect an identified statutory purpose which is reasonably capable of being achieved.119 The lack of agreement with India for disembarkation created uncertainty regarding the possible duration of detention. It was argued that this took the duration of the plaintiff’s detention beyond something reasonably capable of being seen as necessary to effect removal. The plaintiff’s second argument relied on the fact that there was no legal guarantee of non-refoulement by India. Finally, the plaintiff contended that the majority’s ruling on the executive power in Ruddock v Vadarlis was incorrect, arguing that even if an executive power to detain on the high seas had ever existed, it was extinguished by the MPA.120

By a narrow 4:3 majority, the High Court found that the detention of the plaintiff was authorised under s 72(4) of the MPA. Almost all the judges cited with approval the constitutional principle in Lim. That is, statutory detention provisions must be limited to what is reasonably capable of being seen to be necessary to effect an identified statutory purpose which is reasonably capable of being achieved.121 However, they split on how

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115 See former div 12A of the Migration Act. 116 See MPA ss 9, 17 and 18.
117 These provisions reflect the former s 245F(9)–(9A) of the Migration Act.
118 Ruddock v Vadarlis (2001) 110 FCR 491, 543 [193].
120 A third argument alleged that the maritime officer responsible for detaining him and taking him towards India made the decision to do so at the dictation of the National Security Committee without exercising independent discretion as to where he should be taken. This argument was dismissed by all members of the Court and is beyond the scope of the present analysis.
this principle should be applied to the facts before them. The majority consisted of four separate judgments delivered by French CJ and Crennan, Keane and Gageler JJ. All rejected the plaintiff’s argument that Lim created an implicit requirement in s 72(4) that detention be authorised only when the detainee has an existing right to disembark in the destination country.

French CJ noted that the statute could not be construed as authorising ‘futile or entirely speculative taking’. However, it did authorise detention when there is knowledge or reasonable belief that the destination country would allow the person to enter its territory.122 The ongoing diplomatic negotiations between Australian and Indian officials were sufficient to support this requisite reasonable belief. Crennan J found that while removal must be to a reasonable place and within a reasonable time, s 72(4) did not require certainty of disembarkation at a specific destination.123 Gageler J adopted a similar approach, finding that the only limitation on the power was that it be exercised reasonably, in good faith and in accordance with the objects of the Act.124

The fourth member of the majority, Keane J, took a slightly different approach, but reached a similar conclusion. For Keane J, the decision to take the plaintiff and the other passengers to India was not made under the Act. Keane J interpreted s 72(4) as authorising only actions taken by a maritime officer. The decision to take the plaintiff to India was made by the Minister in consultation with the National Security Committee (‘NSC’), not the maritime officer aboard the Australian Customs vessel. As s 72(4) was not a source of the decision-making power exercised by the executive, it was not a source of constraint on the power of the executive.125 Instead, Keane J found the decision of the Minister and the NCP to take the plaintiff to India was authorised under the executive powers conferred by ss 61 and 64 of the Australian Constitution.126 His Honour did stipulate, however, that the implementation of that decision was ‘subject to such constraints as are expressed by, or necessarily implicit in, s 72(4)’.127 This included requirements that the power be exercised with reference to the scope and purpose of the Act, and that ‘taking’ under s 72(4) be carried out in a reasonable time.128 His Honour concluded that these constraints had not been breached in this case.

The dissenting judges held that s 72(4) of the MPA only authorised the removal of a person to a destination when, at the time the destination is chosen, the person taken has a right or permission to enter.129 In addition to the Lim test, Hayne and Bell JJ (in a joint judgment) and Kiefel J referred to the High Court’s ruling in Plaintiff S4/2014 v MIBP (‘Plaintiff S4’).130 There, the Court said ‘[t]he duration of any form of detention, and thus its lawfulness, must be capable of being determined at any time and from time to time. Otherwise, the lawfulness of the detention could not be determined and enforced by the courts, and, ultimately by this Court’.131

Hayne and Bell JJ reasoned that the duration of detention was not capable of determination where uncertainty surrounds a person’s right to enter a place chosen for the purposes of s 72(4). In such circumstances, ‘the length of detention would depend upon the particular (unconstrained) decision to choose as the destination to which a person subject to s 72 of

122 Ibid 540–1 [46]–[50].
123 Ibid 582 [205]–[207].
124 Ibid 620 [360]–[361].
125 Ibid 641 [450].
126 Ibid 636 [423].
127 Ibid 641 [450].
128 Ibid 641–2 [450]–[453].
129 Ibid 547 [71], 552 [92], 554 [99], 560–1 [123], 564 [135] (Hayne and Bell JJ); 609 [318] (Kiefel J).
130 Ibid 553 [97] (Hayne and Bell JJ); 610 [321] (Kiefel J).
the [MPA] should be taken a place (or succession of places) which that person has no right or permission to enter.132

They went on to reason that a construction of the statute that would authorise detention where there is a hope that a person may be allowed to land would raise serious concerns:

How is a court (and ultimately this Court) to judge whether that hope has been explored with sufficient diligence to make the consequential detention not unduly, and thus not unlawfully prolonged? If neither a right to land nor an existing permission to do so is required, and hope of landing will do, what level of hope must exist?133

The difficulties in answering these questions make it impossible for a court to determine whether the person has been detained for longer than was reasonably necessary to be taken to his or her destination.

Kiefel J agreed that the valid exercise of the detention power under s 72(4) required certainty about the choice of place to which the plaintiff would be removed. A decision under s 72(4) must be ‘limited to one place, which is identified at the time the decision is made as one where it is known that the detained person may be disembarked’.134 To hold otherwise would result in a situation where the length of a person’s detention is unknown. Such detention would fall foul of the principles from Lim and Plaintiff S4 discussed previously in this chapter.

On the facts before them, most of the Justices found it unnecessary to address the question of whether the power to detain and transfer a person under s 72(4) was constrained by the non-refoulement provisions of the Refugee Convention and other human rights treaties. This was because there was no evidence before the Court that the plaintiff faced any risk of refoulement if returned to India. Nevertheless, the Justices provided some hints about how they would approach this question if the fact scenario was different.

French CJ and Keane and Gageler JJ all indicated that there was no basis for adopting a construction that limited the power conferred by s 72(4) by reference to Australia’s non-refoulement obligations.135 Given the dualist nature of Australia’s legal system, international law does not form part of Australian law until it has been enacted in legislation. However, it is an accepted principle of statutory construction that ‘a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law’.136 French CJ and Keane and Gageler JJ all indicated that this principle does not assist the plaintiff in this case, as both the text of the relevant provisions and the scope and purpose of the Act are clear and unambiguous.137

The judgments of Kiefel and Crennan JJ and the joint judgment delivered by Hayne and Bell JJ all leave open the possibility that the power under s 72(4) may be limited by Australia’s non-refoulement obligations. Interestingly, it was Crennan J, who formed part of the majority in upholding the legality of the detention of the plaintiff, who gave the strongest indication that Australia’s non-refoulement obligations may limit the power to transfer detainees under s 72(4). Her Honour stated that

[t]he Refugees Convention is part of the context of the Act, considered widely. If the s 72(4)(b) power had been invoked to return the plaintiff to Sri Lanka or to take the

plaintiff to a place outside the migration zone which was not safe, questions might have arisen about an interpretation of s 72(4)(b) consistent with Australia’s obligation under the Refugees Convention.138

A number of the Justices also noted that statutory protections included in the MPA impose similar protections to the non-refoulement obligations of the Refugee Convention and other human rights instruments. The power to detain and transfer a person under s 72(4) is limited by s 74 of the MPA, which provides that ‘[a] maritime officer must not place . . . a person in a place, unless the officer is satisfied, on reasonable grounds that it is safe for the person to be in that place’. For Hayne and Bell JJ, this safeguard provides a similar scope of protection as found in the Refugee Convention:

The reference in s 74 to a person being ‘safe’ in a place must be read as meaning safe from risk of physical harm. A decision-maker who considers whether he or she is satisfied, on reasonable grounds, that it is safe for a person to be in a place must ask and answer a different question from that inferentially imposed by the Refugees Convention. But there is a very considerable factual overlap between the two inquiries. Many who fear persecution for a Convention reason fear for their personal safety in their country of nationality.139

French CJ makes a similar observation, stating:

[t]he content of the term ‘safe for the person to be in that place’ in s 74 may be evaluative and involve a risk assessment on the part of those directing or advising the relevant maritime officers. A place which presents a substantial risk that the person, if taken there, will be exposed to persecution or torture would be unlikely to meet the criterion ‘that it is safe for the person to be in that place’. The constraint imposed by s 74 embraces risks of the kind to which the non-refoulement obligations under the Refugees Convention and Convention against Torture are directed. The existence of such risks may therefore amount to a mandatory relevant consideration in the exercise of the power under s 72(4) because they enliven the limit on that power which is imposed by s 74 at the point of discharge in the country to which the person is taken.140

Kiefel J took a slightly different approach, finding that s 74 only requires that a point of disembarkation for a person is, ‘in its immediate physical aspects . . . safe’.141 It does not require that a maritime officer be satisfied that that place is one in which the person will not face a real risk of harm more generally. Meeting such an obligation would involve wider considerations than what is necessary to a decision under s 72(4).142

Only four out of the seven Justices in the case addressed the question of whether the executive power in s 61 of the Constitution extended to detention and removal of non-citizens seeking to enter Australia without authorisation. Having found that the detention of the plaintiff was authorised under the MPA, French CJ and Crennan and Gageler JJ indicated that it was not necessary to address this question.143 The fourth member of the majority, Keane J, agreed that it was not strictly necessary to answer this question.144 However, His Honour went on to do so at length in obiter dictum. Keane J endorsed the

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approach of the majority in *Ruddock v Vadarlis*. He found that the Commonwealth had a non-statutory executive power to prevent non-citizens from entering Australia and to detain them for that purpose. This power had not been abrogated by the *MPA* or the *Migration Act*. Finally, this power to detain and remove was not constrained by Australia’s *non-refoulement* obligations or the requirement of certainty of destination.

Having found that the detention of the plaintiff was not authorised under the *MPA*, the three dissenting Justices all rejected the government’s contention that the detention was authorised under the non-statutory executive power of the Commonwealth. Kiefel J adopted similar reasoning to Black CJ’s dissent in *Ruddock v Vadarlis*. Her Honour found it doubtful that such a power ever existed in Australia, but even if it did, it had since been displaced by the *MPA*. Hayne and Bell JJ rejected the need to analyse the broad historical questions of whether the government has the inherent power to regulate who enters the nation’s territory and to repel those who seek to do so without authority. Even if such a power is conceded, such considerations ‘do not answer the questions about the scope of the power and the organ or organs of government which must exercise it.’ Instead, Their Honours asked more narrowly whether the ‘executive power of the Commonwealth of itself provides legal authority for an officer of the Commonwealth to detain a person and thus commit a trespass?’ In answering this question in the negative, Hayne and Bell JJ relied on the following passage from the High Court’s decision in *Lim*:

> Neither public official nor private person can lawfully detain [an alien who is within this country, whether lawfully or unlawfully] or deal with his or her property except under and in accordance with some positive authority conferred by the law. Since the common law knows neither letter de cachet nor other executive warrant authorising arbitrary arrest or detention, any officer of the Commonwealth Executive who purports to authorise or enforce the detention in custody of such an alien without judicial mandate will be acting lawfully only to the extent that his or her conduct is justified by valid statutory provisions.

Like most of the cases examined in this book, the outcome in *CPCF* could easily have gone the other way. It was decided by a tight 4:3 majority and there was a lack of a uniform approach amongst the majority Justices. The majority consisted of four separate judgments. Keane J adopted a construction of the power conferred by the relevant statutory provisions that was significantly different from the other majority judges. French CJ and Gageler and Crennan JJ construed s 72(4) as the relevant source of power for both the maritime officers involved and the NSC that gave the order for removal. Keane J construed s 72(4) as only authorising actions of the maritime officers, finding that the decision of the NSC was made under the executive’s non-statutory powers. There was also no clear ratio on the relevance of the *non-refoulement* obligations under the *Refugee Convention* and other Human Rights instruments or on the scope of the executive’s non-statutory powers.

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145 Keane J quotes passages from French J’s judgment in *Ruddock v Vadarlis* (2001) 110 FCR 491 with approval at ibid 648 [482] and 650 [489].
147 Ibid 650–1 [488]–[492].
148 Ibid 651–2 [493]–[495].
149 Ibid 599 [271].
150 Ibid 600 [277], 601 [280].
151 Ibid 565–6 [143] (footnotes omitted) (Hayne and Bell JJ).
152 Ibid 567 [147].
153 *Lim* (1992) 176 CLR 1, 19 (Brennan, Deane and Dawson JJ) (footnotes omitted), cited at ibid 567 [148].
4.3 Comparing the US and Australian Jurisprudence

The decisions in *Sale*, *Ruddock v Vadarlis* and *CPCF* were and remain highly contentious. This is a reflection of the fact that the relevant legal principles were far from clear in each case. This gave substantial discretionary leeway to the presiding judges when deciding whether to uphold the validity of interdiction activities. But as they stand, the majority judgements in each case share a number of similarities. In all three instances, it was held that the executive had broad powers to intercept and deflect asylum seekers attempting to enter their respective jurisdictions without authorisation. In the US case of *Sale*, the interdiction program was explicitly authorised in an Executive Order issued by the President.\textsuperscript{154} The order was made pursuant to *INA* § 212(f), which confers authority on the President to suspend the entry of any class of aliens, or to impose on the entry of aliens any restrictions that the President may deem appropriate. In *Ruddock v Vadarlis*, the government’s authority to carry out the interdiction program was less explicit. The majority accepted the government’s claims that its activities were authorised under the executive power in s 61 of the *Australian Constitution*. Moreover, in both cases, the executive power was found not to be subject to the constraints of domestic statutory law. Both the *INA* and the *Migration Act* afforded certain protections for asylum seekers. In both cases, it was found that those protections did not apply to the interdicted asylum seekers.\textsuperscript{155} By the time of the High Court’s decision in *CPCF*, the government had introduced a new statutory regime with explicit interdiction powers. By a narrow majority, the Court found that the interdiction and detention at sea challenged in that case were authorised under this statutory framework. The *MPA* contained certain protections for interdicted persons, the most significant being that these people could be disembarked only at a ‘place of safety’.\textsuperscript{156} While the government responded to the *CPCF* litigation with legislation strengthening its interdiction powers under the *MPA*,\textsuperscript{157} the requirement that a person must not be taken to a place which is unsafe remains. No such limitations were read into the executive powers to interdict, detain and remove as construed by the US Supreme Court in *Sale* or by the Full Bench of the Australian Federal Court in *Ruddock v Vadarlis*.

There are also parallels in the way the US Supreme Court and the Australian Federal and High Court dealt with the issue of international law. In all three cases, a majority of the Justices indicated that nothing in international law constrained the actions of the executive. On this point, the approach taken in the Australian cases is more understandable. As discussed, Australia adheres to a dualist system of international law where international treaties ratified by the executive do not become binding at a domestic level unless translated through Parliament or legislation.\textsuperscript{158} As Parliament had not directly enacted the terms of the *Refugee Convention*,\textsuperscript{159} the Court was not called upon to determine the compatibility of

\textsuperscript{154} Exec Order No 12807, 57 Fed Reg 23133 (1 June 1992).
\textsuperscript{155} Note that in *Ruddock v Vadarlis*, this question was not dealt with directly as there was no standing to bring claims under the *Migration Act*.
\textsuperscript{156} *MPA* s 74.
\textsuperscript{157} See above nn 83–8 and accompanying text.
\textsuperscript{158} See above nn 135–6 and accompanying text; and Chapter 1, n 85 and accompanying text.
\textsuperscript{159} At the time *Ruddock v Vadarlis* and *CPCF* were decided, the *Migration Act* incorporated the *Refugee Convention* definition of a refugee into s 36 of the Act (stating ‘a person is qualified for a Protection visa if they are one to whom Australia owes obligations under the Convention’), but the Act did not incorporate the remainder of the Convention. The reference to the *Refugee Convention* in s 36 of the
the government’s actions with the Convention. The only scope for considering Australia’s obligations under the *Refugee Convention* was in the course of applying the accepted principle of statutory construction that requires statutes to be interpreted, as far as their language permits, in a manner which conforms to international law.160 However, neither the Federal Court in *Ruddock v Vadarlis* nor the High Court in *CPCF* addressed this point, as the facts before them did not give rise to any *non-refoulement* considerations. In *Ruddock v Vadarlis*, French J found that ‘nothing done by the Executive on the face of it amounts to a breach of Australia’s obligations in respect of *non-refoulement* under the Convention’.161 This was because the rescues were not being returned to their home countries; rather, the Australian government had concluded agreements with New Zealand and Papua New Guinea to transfer the asylum seekers to those countries for the processing of their claims. In *CPCF*, the challenge related to the legality of attempts by Australian officials to take the plaintiff to India, and there was no evidence before the Court indicating risk of harm or secondary *refoulement*.162 In this regard, the decision in *Sale* is of greater concern. There, the intercepted asylum seekers faced summary return to Haiti without any consideration of their protection needs. Further, the Court proceeded on the assumption that the Convention’s *non-refoulement* may have the force of law in the US domestic legal system.163 Nevertheless, the Court concluded that the actions of the executive did not breach the *Refugee Convention*. This was thanks to a somewhat questionable interpretation of the *non-refoulement* provision as having no extraterritorial effect.

The Full Federal Court in *Ruddock v Vadarlis* and the High Court in *CPCF* did not have to directly deal with the question of whether the *Refugee Convention* constrained the power of the executive when carrying out interdiction activities. Accordingly, they avoided the question of whether the Convention’s *non-refoulement* obligations had extraterritorial effect. It would have been a moot point in *Ruddock v Vadarlis* given the fact that the asylum seekers were intercepted inside Australian territorial waters. French CJ and Keane J did address the issue briefly in *CPCF*. Their Honours noted that there is judicial authority in Australia, the United Kingdom and the United States supporting the proposition that the Convention’s *non-refoulement* obligation only extends to refugees within a state’s territory.164 *Sale* is the US authority cited by both Justices, and as discussed, that case clearly supports such an interpretation. The Australian and UK cases cited for the proposition by the two Justices are more problematic. Both French CJ and Keane J refer to comments by McHugh and Gummow JJ in *MIMIA v Khawar* (*Khawar*) as Australian authority

161 *Ruddock v Vadarlis* (2001) 110 FCR 491, 545 [203]; Beaumont J echoed a similar sentiment, referencing the *non-refoulement* obligation of the *Refugee Convention*, but noting that international law imposes no obligation to settle those who are rescued: 521 [126].
163 US courts have distinguished between ‘self-executing’ treaties and ‘non-self-executing treaties’. Whereas the former have automatic domestic effect, the latter must be enacted through implementing legislation to have effect domestically. While the lower courts found that art 33 of the *Refugee Convention* was not self-executing, the Supreme Court carefully avoided addressing the issue in *Sale*. Instead, the Court reasoned that regardless of its status under US municipal law, art 33 would not assist in this case as it did not apply extraterritorially: *Sale*, 509 US 155, 178 (1993).
164 *CPCF* (2015) 255 CLR 514, 527–8 [10] (French CJ) (note that French CJ does go on to note the contrary position put forward by UNHCR in their amicus curiae brief); 643 [461] (Keane J).
supporting the lack of extraterritorial applicability of the *Refugee Convention’s non-refoulement* obligations. However, this case did not deal with any issues of extraterritoriality. The comments relied upon were made in the context of a general introduction to the *Refugee Convention*. In that case, McHugh and Gummow JJ stated

The term ‘asylum’ does not appear in the main body of the text of the Convention; the Convention does not impose an obligation upon Contracting States to grant asylum or a right to settle in those States to refugees arriving at their borders. Nor does the Convention specify what constitutes entry into the territory of a Contracting State so as to then be in a position to have the benefits conferred by the Convention. Rather the protection obligations imposed by the Convention upon Contracting States concern the status and civil rights to be afforded to refugees who are within Contracting States.

Nothing here indicates that the *non-refoulement* obligations in the *Refugee Convention* do not apply extraterritorially. Rather, the claim relates to the absence of an obligation to provide asylum. The provision of asylum is qualitatively different to *non-refoulement* protection. The grant of asylum allows a person to stay in the receiving country’s territory. *Non-refoulement* does not necessarily require this. All that is required is that the person is not sent back to a place where they will be subject to certain prescribed harms. French CJ also refers to Gummow J’s comments in *MIMA v Haji Ibrahim* (‘Ibrahim’), where His Honour cites *Sale* with approval stating that ‘provisions of the Convention assume a situation in which refugees, possibly by irregular means, have somehow managed to arrive at or in the territory of the contracting State’. Again, these comments appear in a general background to the *Refugee Convention* in a case that does not deal with issues of extraterritorial applicability. It is a long bow to draw to conclude this statement supports a restrictive interpretation of *non-refoulement* obligations.

In *CPCF*, French CJ and Keane J also reference the House of Lords decision in *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* as UK authority for the non-extraterritorial applicability of the Convention’s *non-refoulement* obligations. That case challenged the practice of stationing UK immigration officials at Prague Airport to ‘pre-clear’ passengers before they boarded flights to the United Kingdom. Lord Bingham of Cornhill delivered the lead judgment on the issue of whether this practice was in contravention of the *Refugee Convention*. The key determining factor in finding that the policy in question did not violate the *Refugee Convention* was that the would-be asylum seekers had not left their country of origin or habitual residence. Hence, they could not meet the art 1A definition of a refugee. This was a very different situation to those which occurred in *Sale*, *Vadarlis* and *CPCF*, where the asylum seekers were intercepted on the high seas or in the contiguous zone of the intercepting state. Lord Bingham does, however, cite a number of authorities supporting the view that the *non-refoulement* obligations of the

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166 Rather, the main issue related to the meaning of the term ‘particular social group’ in the Convention definition of the term ‘refugee’ and whether it could encompass victims of domestic violence in certain cases.
170 *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1, 29–30, 33 (Lord Bingham).
Refugee Convention do not apply extraterritorially. Interestingly, Lord Bingham’s analysis on this point makes repeated references to the Australian High Court’s decisions in Khawar and Ibrahim.\(^{171}\) Again, as discussed, these cases are not sound authority for the non-extraterritorial applicability of art 33(2). It appears that in CPCF, French CJ and Keane J may have relied on Lord Bingham’s reference to Khawar and Ibrahim when citing these cases as authority for the lack of extraterritorial applicability of art 33. This represents an interesting example of the mischief that can be caused by the use of foreign case law, and, in particular, foreign interpretations of domestic case law.

Another interesting parallel between the US and Australian case law relates to the way in which each jurisdiction deals with the issue of whether the scope of rights afforded to non-citizens changes based on whether they are inside or outside the state’s territory. US law has long tied constitutional protections to the degree of connection a non-citizen has with the United States. As discussed in Chapter 3, the plenary power doctrine provides for differentiated treatment of non-citizens seeking entry into the United States and non-citizens who have effectuated entry and are subsequently being removed. While the former have no constitutional rights, the latter may have limited recourse to such protections. Given that even non-citizens physically present in the United States seeking entry cannot avail themselves of constitutional protections, it is no surprise that interdicted asylum seekers, who are outside US territory, are similarly excluded.

Australian law on this point is not as clear-cut. Three Justices directly addressed this issue in CPCF in the context of whether the constitutional limitations contained in Lim, in regard to the detention of non-citizens inside Australia, should also apply to non-citizens detained outside Australia’s territorial boundaries. Keane J appeared sympathetic to the US approach, explicitly limiting the applicability of the constitutional holding in Lim to non-citizens within Australia.\(^{172}\) Hayne and Bell JJ took a different approach:

> This case concerns actions taken beyond Australia’s borders. But why should some different rule apply there, to provide an answer to a claim made in an Australian court which must be determined according to Australian law? ... To hold that the Executive can act outside Australia’s borders in a way that it cannot lawfully act within Australia would stand legal principle on its head.\(^{173}\)

The High Court revisited the issue in 2016 in Plaintiff M68.\(^{174}\) The case, which is examined in depth in Chapter 5, challenged Australia’s involvement in the offshore detention arrangements in Nauru. A majority of the Court found that the Lim test did not apply because the plaintiff was being held by the Nauruan rather than the Australian government.\(^{175}\) In reaching this conclusion, they did not directly address the issue of extraterritorial applicability; rather, the focus was on who was exercising control over the detention of the plaintiff. However, Bell, Gageler and Gordon JJ all found that the Lim test did apply extraterritorially to detention on Nauru (although only Gordon J found the test’s requirements to be infringed).\(^{176}\) This is an issue that will no doubt be explored in future cases.

Attempts by the United States and Australia to circumvent obligations owed to asylum seekers through maritime interdiction activities have by and large been upheld in domestic

\(^{171}\) Ibid 30, 31, 38 (Lord Bingham).  
\(^{172}\) CPCF (2015) 255 CLR 514, 648 [483].  
\(^{173}\) Ibid 567–8 [149]–[150].  
\(^{174}\) (2016) 257 CLR 42.  
\(^{175}\) Ibid 70 [41] (French CJ, Kiefel and Nettle JJ), 124 [239] (Keane J).  
\(^{176}\) Ibid 84–7 [93]–[99] (Bell J), 111 [184] (Gageler J); 164–6 [395]–[401] (Gordon J).
courts. This outcome has not been without controversy, and the judicial reasoning in the leading cases in both Australia and the United States has been the subject of much criticism. In upholding government interdiction activities, the courts have relied on two layers of ambiguity relating to the rights of asylum seekers subject to such action. First is the general exceptional status afforded under statutory and constitutional law to unauthorised non-citizens seeking entry. This was explored at length in Chapter 3. Second is the ambiguity that arises when applying constitutional and statutory principles to non-citizens encountered outside a state’s territory. In the following chapter, I turn my attention to extraterritorial processing. As we will see, this practice can in some instances add a third layer of obfuscation by diffusing responsibility for the treatment of asylum seekers across multiple governments.