

Refugee Interdiction and the Outer Limits of Sovereignty

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The anti-liberal prides himself on the clarity of his intellect. ... Believing that he has seen through the veils of sentimental illusion, he talks incessantly about “reality” and what things cost, about the way in which deluded technocrats persist in confusing the Kingdom of Heaven with the Department of Health, Education and Welfare. Sooner or later he gets around to saying there isn’t enough money in the world ...

The anti-conservative prides himself on the quality of his emotions. ... he believes that he has looked into the bottomless wells of human sorrow. He talks incessantly about “the moral parameters” and what things mean Sooner or later he gets around to saying there isn’t enough love in the world ...

- Lewis Lapham, *Harper's* (November, 2003)

I. The practice of interdiction and its effect on asylum seekers

Within the last two decades, Western governments have begun to implement a wide variety of measures under the rubric of “interdiction” that are designed to control and curtail “irregular migration”.¹ This is being done in furtherance of the ostensibly legitimate interest that states are said to have in setting the terms pursuant to which non-nationals may enter their territories. “Irregular migrants”, “illegal immigrants”, “undocumented” or “improperly documented” travellers, “unauthorized arrivals”, and other similar designations essentially refer to people who seek entry to a given country without its prior, official permission. The capacity of a state to control admission to its borders is said to be underwritten by its right, derived from the international law concept of “sovereignty”, to exclude aliens from its territory. The following passage, from an Australian case, is illustrative of this principle:

The power to exclude or expel even a friendly alien is recognized by international law as an incident of sovereignty over territory. As Lord Atkinson, speaking for a strong Judicial Committee of the Privy Council, said in *Attorney-General (Canada) v. Cain and Gilhula*: “One of the rights possessed by the supreme power in every State is the right to refuse to permit

¹ See generally International Symposium on Migration, The Bangkok Declaration on Irregular Migration (Bangkok: April, 1999), online: International Organization for Migration (IOM) <http://www.iom.int/documents/officialtxt/en/Bangkok_decl.htm>.

an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: Vattel, *Law of Nations*, book 1, s.231; book 2, s.125.”²

From this standpoint, a state’s right to practise “migration control” in general appears unassailable.

However, a less dispassionate take on the practice of interdiction as a particular form of migration control that affects asylum seekers en route is offered by Gibney and Hansen:

Since the early 1990s, all Western states have embraced as a chief policy goal (arguably *the* chief goal) the prevention of the

² *Victorian Council for Civil Liberties Inc. v. Minister for Immigration & Multicultural Affairs* (2001), 182 A.L.R. 617, [2001] F.C.A. 1297 at para. 119; see also *Nishimura Ekiu v. United States*, 142 U.S. 651 at 659 (1892):

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases or upon such conditions as it may see fit to prescribe. Vattel, *Lib. 2, §§ 94, 100*; Phillimore (3d ed.) c.10, § 220.

The position of aliens at common law is stated by Lord Denning M.R. in *R. v. Governor of Pentonville Prison*, [1973] 2 All E.R. 741 at 747:

At common law no alien has any right to enter this country except by leave of the Crown; and the Crown can refuse leave without giving any reason: see *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149 at 168. If he comes by leave, the Crown can impose such conditions as it thinks fit, as to his length of stay, or otherwise. He has no right whatever to remain here. He is liable to be sent home to his own country at any time if, in the opinion of the Crown, his presence here is not conducive to the public good; and for this purpose, the executive may arrest him and put him on board a ship or aircraft bound for his own country: see *R. v. Brixton Prison (Governor), ex parte Soblen* [1963] 2 Q.B. 243 at 300, 301. The position of aliens at common law has since been covered by various regulations; but the principles remain the same.

For a critical assessment of the use, or rather misuse, of Vattel in Anglo-American jurisprudence, and of the very notion that states enjoy an absolute or peremptory right to exclude aliens, see James A.R. Nafziger, “The General Admission of Aliens Under International Law” (1983) 77 A.J.I.L. 804.

arrival of asylum seekers at their frontiers or territory. They have done so largely to avoid incurring responsibilities under the 1951 Convention [Relating to the Status of Refugees] (and other domestic and international legal instruments), and by so doing to escape the expenses of asylum processing and the possibility of political backlashes caused by the arrival of large numbers of entrants.³

Whether or not the underlying purpose of the measures being taken is to stem the flow of refugees *per se*, an inevitable by-product of the Western countries' attempts to control "irregular migration" has been the denial of asylum to *some* portion of the world's population genuinely and urgently in need of such protection. Of course, rather than dwelling on "expenses" or other burdens involved in granting persecuted persons asylum, politicians tend to suggest that migration control measures such as interdiction are taken in response to safety and security concerns. Politicians will often emphasize examples of large numbers of foreigners who travel to the West by dangerous means, such as un-seaworthy ships or in cargo containers,⁴ or through exploitation by human smugglers or traffickers, and cite instances of those who wish to enter the country undetected in order to engage in criminal or terrorist activities. If this purported concern for security and safety is indeed the overriding motivation behind migration control measures, then we would have to concede that the sovereign power to exclude is invoked incidentally as the legal *mechanism* through which migration can be regularized. For, "regular" migration is, essentially, authorized migration—entry with official permission. Authorized migration, in turn, is safe and secure migration.

³ Mathew J. Gibney & R. Randall Hansen, *Asylum Policy in the West: Past Trends, Future Possibilities*, United Nations University, World Institution for Development Economics Research, Discussion Paper No. 2003/68 (September 2003) at 5, online: United Nations University <<http://www.wider.unu.edu/publications/dps/dps2003/dp2003-068.pdf>>.

⁴ Among the arguments advanced by the American government for the necessity of its interdiction programme against Haitians in the early 1990s—many of whom were seeking asylum but, pursuant to an executive order of the President, were repatriated by the U.S. Coast Guard without a minimal, preliminary screening of their claims—was that many, possibly thousands, were dying as the unseaworthy vessels they were travelling in sank, *i.e.*, that they were being interdicted for their own safety, or to deter others from undertaking such a hazardous journey. In the well known case where this practice was challenged, *Sale v. Haitian Centers Council, Inc.*, 113 S.Ct. 2549, 509 U.S. 155 (1993) [*Sale*], Justice Stevens accepted the government's position. Of course, the argument in itself does not explain why, in order to secure their well being, it was necessary to turn the Haitians away instead of take them in.

The process of authorizing entry enables states to manage the risks involved in receiving foreign nationals.⁵

Unfortunately, however, persons who are genuinely in need of asylum happen to be among those who travel by irregular means. As such, at least some subset of “irregular” migrants being interdicted will consist of persecuted persons seeking asylum. The result of this is that attempts to regularize migration through interdiction will inevitably result in denial of protection to refugees. As indicated in a June 2000 report by the UNHCR:

In order to combat human smuggling and trafficking, States have adopted, *inter alia*, the practice of “intercepting” persons travelling without the required documentation—whether in the country of departure, in the transit country, within territorial waters or on the high seas, or just prior to the arrival in the country of destination. *In some instances, interception has affected the ability of asylum-seekers and refugees to benefit from international protection.*

* * *

Unfortunately, existing control tools, such as visa requirements and the imposition of carrier sanctions, as well as interception measures, *often do not differentiate between genuine asylum-seekers and economic migrants.* National authorities, including immigration and airline officials posted abroad, are frequently not aware of the paramount distinction between refugees, who are entitled to international protection, and other migrants, who are able to rely on national protection.⁶

⁵ One might say, for example: if those people looking to be smuggled in by boat or as stowaways (“boat people”) would only apply and wait for a visa, then they would not have to face the dangers of the high seas; or, if more visaless people were turned away, then fewer terrorists would be allowed entry.

⁶ UNHCR (Executive Committee of the High Commissioner’s Programme), *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, UN Doc. EC/50/SC/CRP.17 (9 June 2000) at paras. 3–17 [emphasis added]. See also Gibney & Hansen, *supra* note 3 at 7 (“All interdiction increases the risk of *refoulement*.”); and, John Morrison & Beth Crosland, *The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?* UNHCR Working Paper No. 39 (Geneva: UNHCR, April 2001) at 32:

It is impossible to quantify what percentage of these would-be irregular immigrants would have claimed asylum upon arrival in the European Union nor what percentage would have gained Convention status.

The underlying problem, then, is that the pursuit of migration control or border protection as an overriding objective tends to undermine the very purpose of the 1951 *Convention Relating to the Status of Refugees*,⁷ the protection of the human rights of asylum seekers.⁸

Interdiction is sometimes designated, more narrowly, as “interception”. While there is no general consensus as to the proper definition of these terms, a provisional definition is offered by the UNHCR as follows:

[I]nterception is defined as encompassing all measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination.⁹

For our purposes, the practices that fall under the rubric of interdiction and which, cumulatively or individually, increase the risk of *refoulement*¹⁰ of refugees include the following:¹¹

- ◆ The imposition of visa requirements on migrants from refugee producing countries;
- ◆ The posting of immigration officials (sometimes called “airport liaison officers”) at foreign airports charged with detecting and

However, an inspection of the operational manuals used by ALOs [Airport Liaison Officers], as well as Government reports of their activities, shows no reference to possible refugee protection issues or other human rights concerns. Rather, the focus is on blanket border control against irregular migration and information-gathering to support strategic anti-trafficking measures. Such activities do prevent refugees from leaving their country of origin or at times a neighbouring state in which they are still unsafe. This might loosely be called *presumptive refoulement*.

⁷ 28 July 1951, 189 U.N.T.S. 150, Can. T.S. 1969 No. 6 (entered into force 22 April 1954) [*Refugee Convention*]

⁸ See further Andrew Brouwer & Judith Kumin, “Interception and Asylum: When Migration Control and Human Rights Collide” (2003) 21(4) *Refugee* 6.

⁹ UNHCR, *supra* note 6 at para 10.

¹⁰ Article 33 of the *Refugee Convention*, *supra* note 7 (reproduced *infra* at note 23), states: “No Contracting State shall expel or return (“refouler”) a refugee...”

¹¹ This list is partly adapted from Canadian Council for Refugees, *Interdicting Refugees* (May 1998) at 5, online: Canadian Council for Refugees <<http://www.web.net/~ccr/Interd.pdf>>.

turning away potential irregular migrants in advance, that is, while they are *en route* to their final destination;¹²

- ◆ The imposition of sanctions on carrier companies that, knowingly or not, transport improperly documented or undocumented travellers;
- ◆ The training, by the interdicting country, of carrier staff or officials at departure countries in the inspection and detection of improperly documented travellers or the identification of “suspicious” persons;
- ◆ The interception and diversion of ships carrying irregular migrants, either on the high seas or within territorial waters, and with or without procedures for screening for asylum claimants (examples include the infamous MV Tampa incident off the coast of Australia,¹³ and the regular practice of maritime interception by the U.S. Coast Guard in the Caribbean¹⁴);
- ◆ The creation of so-called international zones or excised territories whereby portions of the national territory are redefined for immigration purposes and wherein lesser or no protections are made available to asylum seekers (such as the airports at France, Switzerland, Germany and Spain; the processing of asylum claims by the U.S. at Guantanamo Bay; the “excision” of Christmas Island, Ashmore Reef and the Cocos Island by Australia, areas that are otherwise part of its national territory);¹⁵ and,
- ◆ The return of refugee claimants to countries of transit deemed, either via international cooperation or not, “safe third countries” or “countries of first asylum” whereby refugee claimants are

¹² In a “Performance Report” for the period ending in March 1999 issued by Citizenship and Immigration Canada, it is claimed that: “over the past three years, there has been a steady increase in interceptions of improperly documented passengers by Canada’s overseas Immigration Control Officer (ICO) network. During 1998, over 6,000 improperly documented passengers were intercepted.” CIC, online: CIC Homepage <<http://www.cic.gc.ca/english/pub/dpr1999/dpr-03de.html>>.

¹³ See Craig H. Allen, “Symposium – Australia’s *Tampa* Incident: The Convergence of International and Domestic Refugee and Maritime Law in the Pacific Rim” (2003) 12 *Pacific Rim L. & Pol’y J.* 97.

¹⁴ According to its own statistics, kept weekly since 1982, the U.S. Coast Guard has interdicted close to 200,000 people at sea. See U.S. Coast Guard (USCG), “Coast Guard Migrant Interdictions at Sea, Calendar Year 1982-2004,” online: USCG Homepage <<http://www.uscg.mil/hq/g-o/g-opl/mle/amiostats1.htm#cy>>.

¹⁵ See Gibney & Hansen, *supra* note 3 at 6.

“denied access to substantive asylum procedure on the grounds that they could have or should have sought protection elsewhere,”¹⁶ a practice also called deflection.¹⁷

From the standpoint of the interdicting state, the obvious central concern is whether the migrant has prior authorization to enter its territory, authorization commonly in the form of a visa. The measures are designed, in essence, to deny territorial access to those lacking such authorization. In the case of refugees who happen to lack such authorization and are detected *en route*, these measures also preclude access to a substantive refugee determination process and, ultimately, protection. Compounding these risks is the “safe third country” measure, which precludes access to the interdicting state’s asylum process even where the refugee has effectively entered its territory and made a claim.

This article is primarily concerned with interdiction measures intended to preclude access to territory as such and their effect on refugees, rather than with states’ attempts to diminish or deny access to determination processes (through “deflection” to safe third countries and like measures) to refugees who are otherwise clearly *within* states’ territories. To be sure, the effect in each instance is ultimately the same, namely denial of protection. However, in the latter instance the risk of potential *refoulement* of refugees is, in principle at least, more readily addressed; for, having effectively entered the state’s territory and made a claim, the capacity of a claimant to impugn any given provision that would deflect her to a third country (and, potentially, lead to her *refoulement*)¹⁸ will be stronger. In this

¹⁶ Judith Kumin, “Asylum in Europe: Sharing or Shifting the Burden?” *World Refugee Survey* (1995), online: U.S. Committee for Refugees & Immigrants <http://www.refugees.org/world/articles/europe_wrs95.htm>; (continuing: “In other words, the route one takes into exile determines whether or not protection will be granted, rather than the reasons behind one’s flight.”).

¹⁷ See James C. Hathaway & R. Alexander Neve, “Fundamental Justice and the Deflection of Refugees from Canada” (1996) 34(2) *Osgoode Hall L.J.* 213.

¹⁸ See Kumin, *supra* note 16, who cites a number of particularly egregious cases and notes that

[b]ecause the “safe third country” principle is frequently applied without sufficient procedural safeguards, it carries with it the risk of direct *refoulement* or of chain deportations, in which each state without looking into the merits of the claim passes the asylum seeker back to the last country through which he or she traveled until the journey ends, either in a country that manifestly does not afford adequate protection to refugees or, worse, in the country of origin.

situation, her status and capacity to avail herself of certain substantive and procedural rights will tend to be more secure. While it is clear that Article 33 of the *Refugee Convention*¹⁹ applies to refugees present, legally or illegally, *within* the receiving state's territory, it is less certain that it applies (extraterritorially) to those who are not.²⁰ As such, a claimant inside the territory of the state that is attempting to deflect her (back) to another country has a stronger claim against *refoulement*, should the potential for indirect *refoulement* exist. Further, a claimant within a state's territory may have recourse to Article 3 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,²¹ which prohibits party states from sending anyone to another state "where there are substantial grounds for believing that he would be in danger of being subjected to torture;" and, in Europe, to Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,²² which the European High Court of Human Rights has interpreted as barring state parties from sending

¹⁹ *Supra* note 7. Article 33 provides as follows:

(1) No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(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 in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

²⁰ See Kay Hailbronner, "Non-Refoulement and Humanitarian Refugees: Customary International Law or Wishful Legal Thinking?" (1986) Va. J. Int'l L. 857; and Sale, *supra* note 4 at 2563 ("If Article 33.1 applied extraterritorially, ... 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. It is more reasonable to assume that the coverage of 33.2 was limited to those already in the country because it was understood that 33.1 obligated the signatory state only with respect to aliens within its territory.") For the contrary view, see Elihu Lauterpacht & Daniel Bethlehem, "The Scope and Content of the Principle of Non-Refoulement" in Erika Feller, Volker Türk & Frances Nicholson, eds. *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) at 89-181.

²¹ GA res. 39/46 [annex, 39 UN GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987.

²² 4 November 1950, 213 U.N.T.S. 221.

individuals to other states in which there is a “real risk” of such conduct.²³ Each of these protections may, in principle, be invoked if the mechanisms through which the asylum seeker is to be deflected to a “safe” third country could potentially lead to *refoulement* to the claimant’s country of origin (e.g., through chain deportation, or other indirect means).²⁴

On the other hand, the position of refugees who are interdicted outside the interdicting state’s territory is far more precarious. Despite the self-assured pronouncements of American and Australian jurisprudence that aliens outside national territories, refugees or not, have minimal or no rights as against states refusing them entry,²⁵ such persons are usually thought to be in a rather nebulous legal zone. I argue, however, that quite the opposite is true: refugees who are intercepted outside national boundaries for lack of documentation do have a viable entitlement to have their asylum claims heard, and states that are party to the *Refugee Convention* do incur obligations with respect to asylum seekers who appear before them, even outside national territories. That is, what needs to be made clear is that the American and Australian position of refusing to hear the claims of asylum seekers simply because they happen to be in transit is ultimately unjustifiable.

II. The nature of the relationship between interdicting states and asylum seekers who are intercepted outside their territorial boundaries

Rather than analyzing the legal or moral viability of each of the specific interdiction measures adopted by various states, or the various provisions that give them effect, I will examine the practice of interdiction in more general terms, in the hope of highlighting the underlying theoretical problems involved. I also avoid the broader social and political question as to whether or not interdiction practices are motivated by a concern with the “costs” of asylum and the supposedly negative impact on host

²³ See *Soering v. United Kingdom*, 1989 ECHR 14038/88, 1989 (11) EHRR 439.

²⁴ In Canada, laws that created such a risk could be challenged through a fairly arguable expansion of the reasoning in *Suresh v. Canada (M.C.I.)*, [2002] 1 S.C.R. 3.

²⁵ For a survey of the American jurisprudence, see Donald Galloway, “The Extraterritorial Application of the Charter of Rights to Visa Applicants” (1991) 23 Ottawa L. Rev. 335; for the Australian position, see Penelope Mathew, “Australian Refugee Protection in the Wake of the Tampa” (2002) 96(3) A.J.I.L. 661; and Jessica Howard, “To Deter and Deny: Australia and the Interdiction of Asylum Seekers” (2003) 21(4) *Refuge* 35.

countries of bearing an influx of refugees, as Gibney and Hansen suggest. Such matters have been more or less extensively canvassed in the literature and the media.²⁶ A number of critics of immigration policy have noted the importance of striking the right balance between the interest of states in controlling migration and the interest of asylum seekers in having their claims heard,²⁷ and it has been clearly shown that excessive emphasis by Western states on their otherwise legitimate power to secure their borders against *mala fide* entrants can undermine the broader aim of refugee protection (by increasing the risk of *refoulement*). While some are convinced that the point of interdiction is precisely to cut back on refugee protection—a means by which Western states can avoid their *Refugee Convention* obligations—it is possible to remain largely neutral as to the political motivations underlying the practice of interdiction. Irrespective of the underlying reasons for the current imbalance as between the goals of border protection and refugee protection, the need to correct it becomes apparent once we pay closer attention to the broader legal aspects of the relationship between interdicting states and asylum seekers in (unauthorized) transit.²⁸

²⁶ See the extensive list of sources compiled by the Canadian Council for Refugees (CCR), *Interdiction References: Secondary Sources*, online: CCR Homepage <<http://www.web.ca/~ccr/interbibsec.htm>>.

²⁷ See Luise Druke, “Striking the Balance Between Migration Control and Refugee Protection” (2001) 3 *The Refugees: Today and Tomorrow* 2; online: Luise Druke Homepage <http://www.luisedruke.com/luise/refugee_3_2001_en.htm>.

²⁸ My suggestion, briefly, will be that the moment an asylum seeker declares before a state official (or state agent) that she fears return to her country of origin, a state that is party to the *Refugee Convention* must, even if she is as yet outside its territory and travelling by “unauthorized” means, take reasonable steps to ensure that her claim is heard, lest her fear should happen to be well-founded. Such a position may be deemed impracticable, especially in the current atmosphere of the “war on terrorism” prevailing in the West where border protection is of deep concern. While I concede that the practical aspects of fully upholding their *Refugee Convention* obligations may well require Western states to incur significant costs, a comprehensive discussion of the practical challenges involved in a proper balancing of border security and refugee protection is, unfortunately, well beyond the scope of this article. As for the terrorist threat, I would only point out that while the current security crisis faced by the West provides impetus towards greater border protection, interdiction was practised well before the events of September 11, 2001, took place, so it is not clear that this threat was the original motivating factor for interdiction. If overwhelming security concerns are now deemed to justify more robust interdiction measures—and if proper treatment of intercepted asylum claimants, as would be requisite to full compliance with the *Refugee Convention*, is indeed practically incompatible with security arrangements—then it seems to me that, rather than pretend that we continue to uphold the values of the *Convention*, Western nations ought to simply

My basic observation is this: at some point upon exiting her country of origin, the refugee will encounter the outer boundary of her destination state's sovereign authority. If she lacks prior, official permission to enter, the state will endeavour to interdict her. At this point we must consider what norms should govern the interaction between the refugee and interdicting state. In the event that she explicitly claims asylum at the point of contact, does the state have the rightful capacity to turn her away, to refuse entry or to refuse even a preliminary, though fair, reasonable and effective,²⁹ assessment of the claim? Further, can the claimant in these circumstances be denied standing and the attendant procedural rights to challenge the validity of her interdiction?

These questions should be answered in the negative. However, before I set out the argument for this, I should indicate that I make two important assumptions throughout: first, that the asylum seeker in transit does at some point come into contact with a figure who, for all intents and purposes, represents the state attempting to interdict her; second, that upon such contact, she makes an explicit claim of fear of return to her country of origin. Regarding the first assumption, it is important to note that interdicting states do not always effect interdiction directly. Rather, they may delegate interception functions to private parties (for example, airline staff) or to other states (for example, through readmission agreements such as those between Germany and Poland, and Spain and Morocco, whereby the state that is geographically closer to refugee producing countries takes on the work of preventing migrants travelling through its territory), so that the undocumented traveller may not in fact come into direct contact with the primary interdicting state. Although beyond the scope of this discussion, it is arguable that basic principles of the law of agency would allow us to say that even where they effect their

concede that refugee protection has been at least temporarily trumped by the need for secure borders.

²⁹ A fair and effective claim assessment would have to involve a variety of factors, including claimants' access to legal assistance, a qualified interpreter, an individualized hearing, appeal procedures, and so on. Above all, the decision maker, i.e., the claims assessor, would have to be qualified to interpret and apply principles of refugee law. For a more comprehensive list of factors that go into an adequate asylum procedure, see Amnesty International, *Refugees: Human Rights Have No Borders* (1997), online: Amnesty International <www.amnesty.org/ailib/intcam/refugee/report/chapter4.htm>. In Canada, the requisite standards, from a legal standpoint, were discussed in the landmark case of *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177.

purposes through delegation (or, as it were, by “contracting out” interception operations) states are nevertheless ultimately responsible for the effects of the interdiction measures they instigate, such that any obligations that may come to be owed to interdicted refugees are ultimately theirs to bear.³⁰ As for the second assumption, it is a sad reality that many refugees who are intercepted for being undocumented are unaware of their rights and, feeling vulnerable, will not state their case explicitly or demand that their claim be heard. This of course gives rise to the question of whether an interdicting state, in order to minimize the risk of *refoulement*, should be obliged to inquire, before turning away an undocumented traveller, if she has reason to fear return to her country of origin. It appears that in many situations no such inquiries are explicitly made.³¹

Having regard to these assumptions, I would maintain that the refugee claimant does have standing to challenge the validity of her interdiction, in essence because interdiction is an exercise of coercive power, purportedly authorized by some item of domestic legislation, that has a substantial personal effect on her. While the state is in a position to coerce the refugee, the refugee, in turn, has no standing to take action, and no recourse to procedure, in any jurisdiction apart from that of the

³⁰ See also James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002). The International Law Commission's Articles on State Responsibility constitute an authoritative attempt to codify the basic norms of international law pertaining to state responsibility. Articles 5 and 8 of this document, respectively, provide as follows:

Art. 5 The conduct of a person or entity which is not an organ of the State ... but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

Art. 8 The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

While interdicting states have attempted to deny this, it seems clear that the actions of, say, an airline employee acting on the instructions of an Airport Liaison Officer (who is an official of the state) will be attributed to the interdicting state itself. For further discussion, see Brouwer & Kumin, *supra* note 8 at 13-14.

³¹ For further background on both assumptions, see Canadian Council for Refugees (CCR), *Interdiction and Refugee Protection: Bridging the Gap*, (International Workshop, Ottawa, Canada, 29 May 2003), online: CCR Homepage <www.web.net/~ccr/interdictionproceedings.pdf>.

interdicting state itself. She certainly lacks a viable connection to her home state and likewise to the transit country within which the interdiction may take place (assuming it does not take place on the high seas). Being a *refugee*, a condition arguably analogous to statelessness,³² her closest connection, perhaps ironically, is to the interdicting state before which she endeavours to make a claim. And this holds, irrespective of the fact that she does not find herself within the interdicting state's territory; it is the sheer fact of contact at the state's outer frontier that counts. Moreover, it is the nexus generated between the refugee and the state with which she comes into contact, and to whose coercive powers she is thereby exposed, that simultaneously grounds both her standing to impugn the validity of her being interdicted³³ and her right to have her claim heard. If, at the point of contact, her exposure to coercion by the state brings her

³² This may be a controversial suggestion. But see Andrew E. Shacknove, "Who is a Refugee?" (1985) 95(2) *Ethics* 274 at 275. Shacknove suggests that the conception of refugeehood underlying its particular definition in the Refugee Convention, entails the following:

- a) a bond of trust, loyalty, protection, and assistance between the citizen and the state constitutes the normal basis of society;
- b) in the case of the refugee, this bond has been severed;
- c) persecution and alienage are always the physical manifestations of this severed bond; and
- d) these manifestations are the necessary and sufficient conditions for determining refugeehood.

³³ In Canadian law, the basic issue to be addressed in determining whether a non-resident non-citizen has standing to invoke the protection of the Charter with respect to an exercise of authority by the state is whether the party seeking the intervention has been directly affected or injured by the state's action, or whether she has a sufficient personal interest in the legality of the action or has suffered special damage. See *Crease v. Canada (T.D.)*, [1994] 3 F.C. 480 and *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607. The refugee's being subject to the state's coercive authority to exclude—where the actions of the state, at a minimum, affect her ability to have her claim heard, but also expose her to the risk of continued persecution should she end up being returned to her country of origin—would surely be sufficient to establish her standing. As a matter of procedural rights, pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, for instance, a non-resident non-citizen who makes a visa application at a Canadian mission abroad, and is rejected, can apply for judicial review of the officer's decision. (For an outline of the procedure, see Citizenship and Immigration Canada (CIC), *Overseas Processing Manual*, "Chapter OP 22: Judicial Review," online: CIC Homepage <<http://www.cic.gc.ca/manuals-guides/english/op/op22e.pdf>>.) It would, to say the least, be surprising if a visa applicant, whose only interest at stake may be that in visiting Canada as a tourist, could have recourse to procedural safeguards with respect to a discretionary decision making power of the state, but that an undocumented refugee claimant intercepted by an Immigration Control Officer in transit, whose life may be at stake, would not.

within the ambit of its jurisdiction for the purposes of recourse to procedure (to determine whether her free-standing interest, as a refugee in transit, in having her claim heard at *some* point has been adversely affected by the state's extraterritorial actions and, if so, whether such actions are legitimate), then it also brings her within the ambit of the state's jurisdiction for the purposes of access to a hearing of her claim on its merits (which refugee claimants *within* the state's territory would in any event have as a matter of substantive right, that is, in virtue of the state being a party to the *Refugee Convention*).³⁴ If the state's putting itself in a position to coerce the refugee who appears before it should trigger a procedural entitlement to impugn the legitimacy of any actual coercion by the state (or to test the conformity of its actions to the domestic or international norms by which such actions are bound), then it should also trigger her more substantive entitlement to be provided a reasonable and effective hearing of her claim.

I acknowledge that this argument may run together the basic rights of due process acquired upon subjection to a state's coercive actions with the more substantive right of access to a hearing that refugee claimants have, as a matter of course, when they are within the territory of state that is party to the *Refugee Convention* insofar that it suggests that the latter should piggy-back on the former. However, if the general proposition that a state is legitimately compelled to grant certain procedural rights to non-resident aliens over whom it seeks to exercise a coercive power is sound, then it seems reasonable to suggest that, when the non-resident alien in question is a refugee claimant, that which grounds her entitlement to due process should be sufficient to also ground her entitlement to an asylum hearing. The point is that as soon as the state purports to subject a refugee claimant who appears before it to its coercive agency, it thereby brings her within the ambit of its jurisdiction. Moreover, as a purely practical matter, it would be rather odd if an interdicted refugee could challenge her interdiction in court and yet be unable to obtain a hearing because it was denied upon interdiction. If a burden is imposed on the state to defend its interdiction practice in a given case, then, rather than incur the expense of doing so, it might as well grant a hearing.

³⁴ See UNHCR, *Refugee Protection: A Guide to International Refugee Law* (Inter-Parliamentary Union, 2001) at 47ff, online: UN Relief Web Homepage <[http://www.reliefweb.int/w/lib.nsf/LibDocsByKey/LGEL-5E6KUQ/\\$FILE/unhcr-refugeelaw-dec01.pdf](http://www.reliefweb.int/w/lib.nsf/LibDocsByKey/LGEL-5E6KUQ/$FILE/unhcr-refugeelaw-dec01.pdf)>.

III. Two objections invoking states' right to exclude aliens

In sum, upon appearing before the outer frontier of the state and requesting entry, the effectively (or at least notionally) stateless (and hence vulnerable) refugee claimant becomes immediately subject to the state's sovereign capacity to coerce, and is therefore within the ambit of its jurisdiction. Therefore, she should be no less entitled to an effective hearing of her claim than she would have had she actually penetrated the outer boundary of the state and made her claim within its interior. However, there are two closely related objections to this line of reasoning that I will address.

The first objection is that the vertical relations between the state and an alien *within* its territorial domain are far more extensive in contrast to the more isolated and localized interaction that takes place between an alien who finds herself outside a state's territorial periphery and the state that purports to avert her entry. For example, refugee claimants within the state's territory are subject, *inter alia*, to its criminal laws, as indeed are all persons present on its territory.³⁵ Thus, it might be said that because the capacity of the state to control the alien still outside its territory is highly limited, it cannot be said to incur any correspondingly substantive obligations towards her—the premise being that the extent of a state's obligations towards a person is relative to the extent of its capacity to rule over them, such that those who are not truly subject to its authority cannot seek to impose terms or constraints (either procedural or substantive) upon its exercise of its authority. The countervailing consideration, however, is that, although their interaction at the frontier is isolated and localized, the alien refugee is subject to the state's authority in a very special way: the potential *effect* of the state's decision to exclude can be catastrophic to her. Thus, although it is true that, being at the periphery of its domain, the refugee claimant is not subject to the state's authority in an all-encompassing manner, she is nevertheless subject to its sovereign authority in the most crucial of respects: the refugee's most basic and widely recognized human rights (for example, to life and bodily integrity) are ultimately at stake. Should she be refused entry and denied

³⁵ Article 2 of the *Refugee Convention* sets out the general obligation of refugees who find themselves within the host country to conform to its laws and any measures for the maintenance of public order.

access to an asylum determination, she may end up back in the circumstances that she fled.

The second objection is that, if the state were deemed to incur certain obligations with respect to refugee claimants simply by virtue of having obstructed their in-bound passage while still well outside its territory—due, after all, to their lack of official authorization to enter—then the state’s (supposedly absolute) right to control its borders and refuse entry to aliens³⁶ will have been undermined. While it may be well established, as under Article 14(1) of the *Universal Declaration of Human Rights*,³⁷ that persons have a right to seek asylum outside their own countries³⁸ and that emigration in general is widely thought to be a basic human right,³⁹ it is also well established that states have no corresponding obligation to admit aliens and they are entitled to set the terms on which they will do so. As noted above, on this view, immigration control in general is a sovereign prerogative. If a state happens to interdict a refugee, it is not because it has sought to deny her right to seek asylum but rather because it has sought to control its borders. Further, it is the asylum seeker who puts herself in a position to be interdicted by her actions in seeking entry to the state’s territory without prior authorization. If the state were to incur an obligation to hear the asylum seeker’s claim just as soon as she appears before it, even during transit while still outside its territorial border, then the state’s obligation to hear her claim at that point would amount to a *de facto* obligation to authorize her entry. In essence, her claim itself would become the conceptual equivalent of a visa. This would undermine the state’s capacity to control its borders, because anyone making an asylum claim before the interdicting state’s officials (or agents thereof) will be thereby entitled to continue her in-bound journey and enter to have her claim processed. Thus, the rationale of the proposed line of argument is in principle inconsistent with the generally recognized prerogative of states to control the terms of entry of aliens.

There are, however, countervailing considerations here as well. First, there need not be an obligation to hear the claim within the state’s territory, should non-entry be deemed indispensable—the claimant could,

³⁶ See note 2 *supra*.

³⁷ GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948).

³⁸ See generally Fatimah Mateen & Brian Tittmore, “The Right to Seek Asylum: A Dwindling Right?” online: <www.wcl.american.edu/hrbrief/v2i2/asylum.htm>.

³⁹ See Frederick Whelan, “Citizenship and the Right to Leave” (1981) 75(3) *American Political Science Review* 636.

for example, be referred to an appropriate international agency such as the UNHCR. So long as the claim is processed judiciously and effectively, it could be heard or “pre-screened” overseas.⁴⁰ Second, it is crucial to realize that, in light of her inability to return to her country of origin and her status as an unprotected person whose bonds to her home state have been severed, the refugee is not just like any other alien in transit. If she is unable to obtain a hearing of her claim at some point, *any* point, then, simply put, she has no viable place to go. The effect of this objection is that she may be reasonably denied a hearing simply by virtue of the fact that she happens to be outside of her country of origin without authorization to be wherever she happens to be or to go wherever she happens to be heading. But her lack of authorization in itself has absolutely no bearing on the fact that she is a refugee, and as such has a free-standing interest to have her claim heard so that she may avail herself of protection. In an ideal world, all refugees who have exited their country would have prior authorization to travel to some destination or to be present within whatever borders they happen to be. Alas, most states, especially Western states, make it especially difficult for persecuted persons to obtain such authorization, which in turn exposes them to interdiction should they have to flee without it.⁴¹ But, it is precisely these

⁴⁰ The crucial question, however, would be whether this is possible in practice. For example, although upon the interception unauthorized migrants on the high seas, the United States transfers some claimants for processing to Guantanamo Bay or sometimes conducts pre-screenings on board Coast Guard cutters, it is highly doubtful that any hearings conducted in such circumstances could equate to those conducted within the United States. Indeed, the very point of processing claims outside territorial boundaries often seems to be to abridge and dilute the procedure. (See Frelick’s contribution in *Interdiction and Refugee Protection: Bridging the Gap*, *supra* note 29 at 4.)

⁴¹ Practically all Western nations impose visa requirements on travelers from practically all refugee-producing nations and, in addition, impose scrupulous restrictions on who gets a visa. And, of course, those deemed likely to claim asylum upon arrival do not get one. See *e.g.*, *Interdicting Refugees*, *supra* note 11 at 23-24:

People who are seeking refuge in Canada will be refused a visitor’s visa. Only a tiny minority of refugees could qualify for a permanent resident visa and anyway the processing is too slow for anyone in a dangerous situation. There is a correlation between the imposition of a visa requirement by Canada and the kinds of human rights abuses that cause refugees to flee. The worse the human rights abuses, the more likely the country is to have a visa requirement imposed on it.

See also Morrison, *supra* note 6 at 27:

There is no such thing as a “refugee visa” to gain entry into the European Union explicitly for the purpose of claiming asylum. Although occasional “diplomatic protection” is offered by specific

states that have acceded to the *Refugee Convention* that are supposed to entertain her claim.

The upshot of the “migration control” rationale is that, despite acceding to the *Refugee Convention*, states are nevertheless entitled, pursuant to the prerogative of alien exclusion, to refuse claimants access to a hearing on the ground that they are outside their geographical territory and lacking prior authorization to enter. However, this involves drawing an ultimately artificial distinction between a state’s inner domain, within which obligations to entertain refugee claims are fully upheld, and all space beyond, wherein no substantial protections accrue to asylum seekers. The distinction is artificial for the simple reason that, while a state’s geographical territory may be clearly confined, the ambit of its power and authority is not. Put differently, authority and territory are not co-extensive and the exercise of power is not confined to the latter. The practice of interdiction itself accentuates this divergence: what the interdicting state purports to do is to expand its powers extraterritorially, acting in the space beyond its borders (either on the high seas or, with consent, in the territories of other states), ostensibly in order to secure the integrity of those borders in pre-emptive fashion. However, the overriding consideration is that interdiction is an exercise of state *power*, which is

national embassies abroad, the only regular channels for refugee migration are those requiring a “tourist”, “business”, “student” or some other category of visa. If any applicant is suspected of being a potential asylum-seeker then they will almost always be declined any type of entry clearance.” [footnotes omitted]

Thus, for some who experience persecution, there are roughly two options: either to flee by “irregular” means, in which case they risk interdiction, or seek authorization, in which case they must conceal the true reasons for their departure, *i.e.*, lie. Either way, the “regularity” of the departure is, strictly speaking, questionable. In any event, the logic of “regular migration”, whereby the concern with border control takes precedence over refugee protection, and the attendant failure to facilitate “regular” means of exit for persecuted persons, has created a disjunction between the means by which they exit and the reasons for which they do so. It is precisely such a disjunction that Article 31 of the *Refugee Convention* contemplates in precluding states from penalizing claimants who have arrived illegally or refusing to entertain their claims. The disjunction is also regularly noted by courts. See *e.g.*, *Takhar v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 240 at para. 14 (QL): “First, it is not uncommon for those who are fleeing from persecution not to have regular travel documents and, as a result of their fears and vulnerability, simply to act in accordance with the instructions of the agent who organized their escape. Second, whether a person has told the truth about her or his travel documents has little direct bearing on whether the person is indeed a refugee.”

what the undocumented refugee encounters at the outer limits of the state's sovereign domain.

Indeed, states may effect interdiction either by extending the ambit of their outer boundaries (for example, through interception on the high seas or at foreign airports) or by contracting those boundaries relative to their actual geographical territory (for example, Australia's excised territories and "international zones") or both. Either way, we must analyze how the state exercises its powers and the consequences of that exercise. The broad consequences of interdiction are essentially twofold: the reinforcement of the state's capacity to exclude, and the dilution of the state's obligations with respect to asylum seekers (which, according to Gibney and Hansen, is deliberate).⁴² Note that the avoidance of obligations is achieved (intentionally or not) through a kind of division of labour within the state, corresponding to a differential application of the rule of law: immigration officials acting in what is purportedly the exterior of the state's territorial domain are endowed with expanded powers of exclusion while their capacity to facilitate inclusion of asylum seekers is curtailed; meanwhile, official functions under "internal" jurisdiction remain bound by *Convention* obligations.⁴³

Now let us presume that the state acting in an "extra-territorial" mode is clearly in breach of its obligations under the *Refugee Convention*. The crucial question then becomes: just what proportion of refugees encounter the state in its "extra-territorial" mode? If every asylum seeker in-bound to France ended up in its so-called "international zone" and received the treatment afforded claimants therein,⁴⁴ then it would be fairly safe to say that France might as well not be party to the *Convention*. Similarly, if it

⁴² Thus, regarding France's "international zone", a 1991 report of the Parliamentary Assembly of the Council of Europe stated: "Asylum seekers are detained in a so-called international zone at the airport, which means that they are not yet on French territory and the French authorities are therefore not under a legal obligation to examine the request as they would be if the request was made by someone already on French territory. The international zone has no legal background and must be considered as a device to avoid obligations." Cited in *Amuur v. France*, case 17/1995/523/609, European Court of Human Rights (June 25, 1996).

⁴³ Thus, in *Sale*, *supra* note 4, it was held that the President's executive orders with respect to extraterritorial matters (namely the interception of Haitians) were not constrained by the relevant provisions of the *Immigration and Nationality Act* (implementing the Art. 33 *non-refoulement* principle of the *Refugee Convention*) while the intra-territorial actions of the Attorney General were.

⁴⁴ See the facts in *Amuur v. France*, *supra* note 42.

turns out that a majority of refugees bound to states party to the *Refugee Convention*, taken in the aggregate, were interdicted or otherwise deflected, then the practical utility of the *Convention* would be open to question to say the least.

Moreover, what is crucial for our purposes is that interdiction is a form of state action that has a definite and potentially disastrous impact on individual interdictees. If, in light of this potential, the interdicting state were to deny that it incurs an obligation to entertain the refugee's claim, it would, on the one hand, be asserting a right to affect the course of peoples' lives while, on the other, disclaiming any responsibility to avert the potentially deleterious consequences of its actions, that is, to reduce the risk of *refoulement*. This incongruity is simply unsustainable. But for the essentially arbitrary differentiation between the extra-territorial and intra-territorial modes of exercising state authority, a state party to the *Refugee Convention* would be unable to disclaim its obligations to an asylum claimant. The attempt by interdicting states to disclaim their *Convention* obligations with respect to claimants by means of a distinction between the extra-territorial and intra-territorial exercise of power has been refuted by Lauterpacht and Bethlehem:

The responsibility of the Contracting State for its own conduct and that of those acting under its umbrella is not limited to conduct occurring within its territory. Such responsibility will ultimately hinge on whether the relevant conduct can be attributed to that State and not whether it occurs within the territory of the State or outside it.⁴⁵

This is to say that states practising interdiction are bound by the rule of law generally, and by *Convention* obligations in particular, simply by virtue of the fact that they seek to exercise coercive powers towards asylum

⁴⁵ Elihu Lauterpacht & Daniel Bethlehem, *supra* note 20 at 110. The authors also make this point in connection with the principle of *non-refoulement* in particular (at 111):

[P]ersons will come within the jurisdiction of a State in circumstances in which they can be said to be under the effective control of that State or are affected by those acting on behalf of the State more generally, *wherever this occurs*. It follows that the principle of *non-refoulement* will apply to the conduct of State officials or those acting on behalf of the State wherever this occurs, whether beyond the national territory of the State in question, at border posts or other points of entry, in international zones, at transit points, etc. [emphasis in original]

claimants who appear before them, *irrespective* of the location wherein contact between state and claimant occurs.

IV. Concluding observations

It is worthwhile to ask: in the name of what is the state's sovereign prerogative to exclude aliens being asserted? Put differently, what does the state seek to protect in asserting a right to control or prohibit movement across the borders of its territory? One plausible answer is that it ultimately seeks to maintain the integrity of its vertical relations with its citizens (for example, its legislative and executive capacities with respect to its subjects), and the ability to exclude aliens and control borders is deemed necessary to this end.⁴⁶ What is ultimately at stake from the standpoint of the state, then, is the nation's self-determination: its ability to govern and conduct itself in accordance with autonomously adopted norms and principles. But where a state party to the *Refugee Convention* is concerned, these principles will include the humanist aspiration to grant protection to those whose circumstances in their home lands are nothing short of tragic. Accordingly, it would be ironic to say the least if one of the means by which this aspiration is supposed to be secured were to be deployed against its very object.

In summary, the persecuted individual's exposure to interdiction begins with her decision to flee while being unable to do so through "regular" means (which is all too often the case). Her predicament is that, once she makes her exit, though she may be a *de facto* refugee, her condition must at some point be officially acknowledged so that asylum may be secured. Her ultimate destination is a state willing and able to offer an effective hearing. While in transit, political geography being the interlocking mesh that it is, she is liable to be detected as an unauthorized traveller and, if an interdiction programme is in place, may face forcible return. However, it is precisely at the point of contact with the interdicting state that her opportunity to make a claim arises. Should she do so of her own accord—or, better yet, should the state in question be sensible enough to have made inquiries—she cannot be legitimately denied access to a hearing. For the state's self-declared capacity to obstruct her passage by

⁴⁶ See A. J. Simmons, "On the Territorial Rights of States" (2001) 11 *Philosophical Issues* 300 at 306: "States claim the right not to be interfered with or usurped by alien persons, groups or states in the exercise of [their] ... legislative and executive powers" and this right of non-interference by aliens encompasses "rights to control or prohibit movement across the borders of the territory".

means of coercion is precisely what gives rise to its obligation to entertain her claim. The fact that she happens to be, as yet, outside the state's territorial boundary is, ultimately, irrelevant; what matters is that she has encountered the outer limits of its sovereign power.