

Restricting boat refugees at sea – rescuing the sovereign? The response to boat refugees across time and space, 1979–2001

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Abstract

This article considers how notions of sovereignty and solidarity influenced the response to boat refugees at sea between 1979 and 2001. It argues that states responded with prolonged solidarity when helping boat refugees served to support their foreign policy goals and fitted with the moral zeitgeist. When such conditions did not exist, states successfully used the legal ambiguity of the sea to intercept, repatriate and in some cases strategically confine boat refugees to offshore detention centres located beyond the reach of national courts. Restricting boat refugees on the high seas served to bolster governments' claims that they could control unwanted immigration and, in doing so, rescue their territorial sovereignty. Yet this created a notable paradox: by allegedly preserving territorial sovereignty in their dramatic and very visible border spectacles with boat refugees, governments felt it necessary to cheat national and international law.

Keywords

refugees, sovereignty, solidarity, gap hypothesis, law of the sea, offshore detention

Introduction

Historical scholarship on refugees usually focuses on why people fled their country of origin or concentrates on their reception and integration in the destination country. This article, by contrast, focuses on the response to boat refugees at sea. The emphasis of most research on boat refugees remains the Mediterranean, especially since over

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one million sailed across the sea in search of asylum in 2015. Despite not being the first time that large numbers of refugees took to the seas, contemporary commentators have largely overlooked previous journeys and experiences when discussing more recent events. This article studies what occurred in three different regions in a period before the Mediterranean became the focus of attention for boat refugees to identify how state and non-state actors acted to the appearance of boat refugees across time and space.

To take to a sea or an ocean in search of protection means crossing a threshold of sorts. Water represents a liminal but formative and transformative space. In Vinh Nguyen's words, for refugees 'the sea is not merely a physical setting, but rather a crucible, a place and an experience that destroys and produces, that moulds and transforms'.¹ The boat refugees referred to in this article were generally escaping persecution or fleeing from some kind of political or humanitarian crisis. They attempted to sail to states that were usually politically and economically more stable than the ones from which they were escaping. They used boats because it was often the only transport medium available to them, or it represented the only way to access states that were otherwise closed off to them because of immigration restrictions. The label 'boat migrants' may be technically more accurate to account for these people, but it does not adequately capture the fact that so many of those taking to the seas were fleeing conflicts and significant political instability and persecution in their home countries, unlike 'migrants' more generally – hence my use of the term 'boat refugees'.²

Boat refugees often appear unexpectedly and without prior permission to land. Their presence frequently provokes public and political debates that touch on illegality, security and sovereignty, on the one hand, and humanitarianism, morality and solidarity, on the other. As a result of this and the fact that the journey boat refugees make is fraught with real danger – as evidenced by the deaths of so many on the South China Sea in the 1970s and 1980s and on the Mediterranean in recent years – the issue of boat refugees garners substantial political and public attention.

Research question and structure of article

The theme of the forum of which this article forms a part highlights how maritime spaces are shaped by complex constellations of divergent legal, moral, political and economic norms. This is clearly apparent in the reception of boat refugees at sea. Typically, states initially welcome the first boat refugees who unexpectedly arrive by

1. Vinh Nguyen, 'Nước/Water: Oceanic Spatiality and the Vietnamese Diaspora', in Lynda Mannik, ed., *Migration by Boat: Discourses of Trauma, Exclusion and Survival* (London, 2016), 70.
2. I am not the first to use this term. The legal scholars Thomas Gammeltoft-Hansen, Violeta Moreno-Lax and Efthymios Papastavridis also use this same definition. See Thomas Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge, 2011); Violeta Moreno-Lax and Efthymios Papastavridis, eds., *'Boat Refugees' and Migrants at Sea: A Comprehensive Approach* (Leiden, 2016). I refrain from using the term 'boat people' for the article as a whole because of its association with those fleeing Vietnam in the 1970s and 1980s, who will also be discussed throughout.

acknowledging the problems they have sought to escape, recognizing the danger of their journeys and providing them with some kind of sanctuary. Passing merchant or fishing boats also are more likely at first to help and, in some instances, rescue boat refugees in distress. Hospitality generally starts to give way to rising apathy from seafarers and hostility from states as boats continue to appear, with political, economic, security and logistical issues arising. When states attempt to introduce harsher measures to control entry into their territory, they sometimes encounter challenges in trying to restrict or dissuade boat refugees from coming due to their inability to affect conditions in the country of departure, difficulty in controlling lengthy coastlines, and the various national, international and moral obligations they have to those in difficulty at sea. These responsibilities are often highlighted by the international media, the UNHCR (the United Nations (UN) refugee agency, the international organization responsible for refugees), the activism of non-governmental organizations (NGOs) at sea, in the courts and in the public domain, as well as in the difficulty commercial vessels sometimes encounter when trying to disembark the boat refugees they have rescued at sea.

The research question this article considers is: How did notions of sovereignty and solidarity influence the response to boat refugees at sea between 1979 and 2001? State and non-state actors had the potential to show their solidarity with boat refugees by providing a metaphorical bridge across the water. However, they also had the potential to use the sea, in the words of David Scott FitzGerald, as 'a moat to keep out the unwanted'.³ The article argues that states responded with prolonged solidarity only when helping boat refugees served to support their foreign policy goals and adhered to the moral and political climate at the time. This was particularly apparent at certain junctures during the Cold War, when assisting boat refugees fleeing hostile regimes could be used to discredit communism and celebrate the proclaimed humanitarian values of the receiving states. When such conditions did not exist and political and public unease around immigration was more prominent, states successfully used the legal ambiguity of the high seas to purportedly enhance their national territorial sovereignty by intercepting and pushing back boat refugees at sea, as well as in some cases strategically placing refugees in offshore detention centres located beyond the reach of national courts. In doing so, states used the sea as a policy venue to sidestep the constraints they faced in dealing with unwanted immigration within their territory. This was despite the best efforts of non-state pro-refugee actors pursuing solidarity to challenge state policies at sea. In some ways, this finding flips the title of the forum, 'The Rescuing Sovereign at Sea', on its head. In the case studies covered, governments claimed that restricting boat refugees at sea served to rescue the sovereign by circumventing the national restraints and international responsibilities that they encountered on land when dealing with unwanted immigrants.

The article is structured as follows. First, I briefly define what I mean by sovereignty and solidarity. I then consider three case studies chronologically: (1) Vietnamese boat refugees on the South China Sea in the late 1970s and early 1980s; (2) Cuban and Haitians in the Caribbean in the 1980s and 1990s; and (3) Iranian, Iraqi and Afghan boat refugees' encounters with Australia in the Indian Ocean in the late 1990s and

3. David Scott FitzGerald, *Refuge beyond Reach: How Rich Democracies Repel Asylum Seekers* (Oxford, 2019), 8.

early 2000s. I provide some concise background details about each case before recounting the reception of boat refugees at sea. I then compare across time and space and identify an important shift that occurred after the end of the Cold War, when governments started to restrict boat refugees at sea, which coincided with immigration becoming a more prominent and divisive topic of debate. Finally, I offer some comparative insights that have resonance for more recent incidents involving boat refugees at sea in the Mediterranean.

Boat refugees, as defined above, existed before 1979. For instance, during the 1930s and 1940s, tens of thousands of Jewish boat refugees tried to flee Europe by sailing across the Mediterranean to the British Mandate of Palestine – the vast majority after 1945.⁴ Yet, it was only from the late 1970s onwards that boat refugees began to appear more regularly around the world. Today, boat refugees have unfortunately become a regular global phenomenon. Examples include those trying to cross the Gulf of Aden to reach Yemen, the Atlantic to reach the Canary Islands, the Bay of Bengal to reach Malaysia and the English Channel to reach Britain, as well as the Mediterranean – to name but a few well-known examples. The main emphasis in this article is on the period between 1979, when the crisis involving Vietnamese ‘boat people’ reached its peak, and 2001, when Australia introduced its Pacific Solution, which led to the detention of boat refugees trying to reach Australia in third countries – namely, Nauru and Papua New Guinea.

Sovereignty and solidarity at sea

According to Stephen Krasner, there are three core elements of sovereignty: international legal sovereignty, or the right to enter into treaties with other states; Westphalian sovereignty, or the absence of submission to external authority structures in matters relating to national jurisdiction; and domestic sovereignty, or control over the territory of the state, including the ability to regulate its borders.⁵ The last category – territorial sovereignty – will be foremost in this article. Hannah Arendt famously contended that ‘sovereignty is nowhere more absolute’ than when it relates to immigration and nationality.⁶ Similarly, Catherine Dauvergne has argued that ‘control over the movement of people has become the last bastion of sovereignty’.⁷ States often struggle with the problem of providing a duty of care to refugees in urgent need, on the one hand, and controlling entry to their territory, on the other. The political theorist Michael Walzer explains that when the numbers of refugees are ‘so small that they cannot have any significant impact upon the character of the political community’, there is a moral responsibility to help them. However, Walzer maintains that when the numbers are not so small, ‘the right to restrain

4. Zeev Hadari, *Second Exodus: The Full Story of Jewish Illegal Immigration to Palestine, 1945–1948* (London, 1991).

5. Stephen K. Krasner, ‘The Durability of Organized Hypocrisy’, in Hent Kalmo and Quentin Skinner, eds., *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge, 2011), 96–113.

6. Hannah Arendt, *The Origins of Totalitarianism* (New York, 2004), 354.

7. Catherine Dauvergne, ‘Sovereignty, Migration and the Rule of Law in Global Times’, *Modern Law Review*, 67, No. 4 (2004), 588.

the flow remains a feature of communal self-determination'.⁸ Defining what 'not so small' means remains highly subjective and problematic.

Unwanted immigration, often in the form of people entering a country and then seeking asylum, has posed a significant challenge to the domestic sovereignty of liberal democratic states in recent decades, when understood primarily through the lens of territoriality. Boat refugees represent a very visible manifestation of this, since the media covers their appearance extensively. Political scientists have highlighted the problem that governments face when trying to manage unwanted immigration by arguing that 'significant and persistent gaps exist between official immigration policies and actual policy outcomes'.⁹ In other words, despite politicians regularly claiming that they will stop or greatly reduce the amount of people entering and applying for asylum, they find this difficult to achieve. Scholars have identified several reasons why such a gap exists between what states want to do and what they can do. The most prominent explanations put forward by scholars in relation to the so-called 'gap hypothesis' include domestic court decisions that undermine government policies; states being signatories to various international human rights treaties; perceived moral duties; and an inability to predict refugee crises.¹⁰ Christian Joppke gives an excellent example of what he terms the implementation failure gap by relating the story of how despite Western Europe restricting guest workers from 1973, people continued to arrive in the form of family migrants and asylum-seekers. As he notes: 'The state was powerless to halt this, because this was as-of-right migration protected by courts, constitutions, and international conventions'.¹¹

Thomas Gammeltoft-Hansen identifies another source of tension for states' efforts to control unwanted immigration: their commitments to international sovereignty. Whereas national sovereignty theoretically allows states to exclude or deport foreigners from their territory, states have binding commitments to international law. Of particular importance for boat refugees are the law of the sea and human rights treaties that 'explicitly constrain this freedom to act and impose a corollary responsibility to respect the rights of

8. Michael Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (Oxford, 1982), 48, 51.

9. Wayne Cornelius, Philip Martin and James Hollifield, 'Controlling Immigration: The Limits of Government Intervention', in Wayne Cornelius, Philip Martin and James Hollifield, eds., *Controlling Immigration: A Global Perspective* (Stanford, CA, 1994), 3. For an updated view on this, which holds that this gap is growing wider, see James F. Hollifield et al., 'The Dilemmas of Immigration Control in Liberal Democracies', in James F. Hollifield et al., eds., *Controlling Immigration: A Comparative Perspective* (Stanford, CA: 2022), 3.

10. See Yasemin Nuhoglu Soysal, *Limits of Citizenship* (Chicago, 1994), 151–2; Christian Joppke, 'Asylum and State Sovereignty: A Comparison of the United States, Germany, and Britain', *Comparative Political Studies*, 30, No. 3 (1997), 293; Saskia Bonjour, 'The Power and Morals of Policy Makers: Reassessing the Control Gap Debate', *International Migration Review*, 45, No. 1 (2011), 89–122; Aristide Zolberg, 'The Formation of New States as a Refugee-Generating Process', *Annals of the American Academy of Political and Social Science*, 467, No. 1 (1983), 25.

11. Christian Joppke, 'Multiple Gaps', in Hollifield et al., *Controlling Immigration*, 61.

individuals within their jurisdiction'.¹² The horrors of the Second World War led to the establishment of the UN in 1945 and the adoption of the Universal Declaration of Human Rights in 1948. In 1951, the UN Convention on the Status of Refugees came into being. The Refugee Convention initially dealt solely with events that had occurred in Europe before 1951. In 1967, however, many states agreed to sign a protocol that expanded the scope of the Convention by doing away with geographical and time limits to make it a global legal instrument.¹³ During the 1970s, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights entered into force. Crucially, this meant that the aspirations of the Universal Declaration of Human Rights finally became binding international law.¹⁴ This led Samuel Moyn to claim that '[o]ver the course of the 1970s, the moral world of Westerners shifted, opening a space for the sort of utopianism that coalesced in an international human rights movement that had never existed before'.¹⁵

The international legal developments discussed above occurred just as globalization began to intensify. This was reflected in immigration to North America, Australasia and Western Europe, facilitated not only by technological developments, particularly in air travel, but also by political developments. The decolonization of former European colonies in the decades after the Second World War, the United States' Immigration and Nationality Act of 1965, the adoption of multicultural immigration policies in Australia and Canada in the early 1970s, and the globalization of asylum-seeking in the 1980s ensured that the composition of immigrants became more heterogeneous than before. Despite occasional efforts by states to reduce immigration, people continued to come through various channels. This gave rise to certain political actors speculating in the 1980s that immigration threatened national sovereignty – a view that became more widespread throughout subsequent decades.¹⁶

12. Thomas Gammeltoft-Hansen, 'The Perfect Storm: Sovereignty Games and the Law and Politics of Boat Migration', in Moreno-Lax and Papastavridis, *Boat Refugees*, 63.

13. This was partly because of moves by the Organisation of the African Unity to produce its own, more generous, refugee convention. See Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (New York, 1993), 80. Latin American countries did likewise for their region in 1984 with the Cartagena Declaration on Refugees.

14. David Jacobson, *Rights across Borders: Immigration and the Decline of Citizenship* (Baltimore, 1996), 77; Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights into Domestic Practices: Introduction', in Thomas Risse, Stephen C. Ropp and Kathryn Sikkink, eds., *The Power of Human Rights: International Norms and Domestic Changes* (Cambridge, 1999), 21.

15. Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA, 2010), 1.

16. For instance, in the 1980s, extensive debates took place in the United States around immigration legislation; in Australia, there was a backlash against Asian immigration; and in western Europe, nativist anti-immigration parties started to feature more prominently. See Kristina Shull, 'Reagan's Cold War on Immigrants: Resistance and the Rise of a Detention Regime, 1981–1985', *Journal of American Ethnic History*, 40, No. 2 (2021), 5–51; Irial Glynn, *Asylum Policy, Boat People and Political Discourse: Boats, Votes and Asylum in Australia and Italy* (London, 2016), 58; Cas Mudde, *The Far Right Today* (Cambridge, 2019), 17.

States also started to adopt several international legal instruments related to the law of the sea throughout the 1970s and 1980s. The duty to rescue seafarers in distress predates the genesis of legal codification, as other articles in this forum highlight. Such a duty quickly became a cornerstone of modern international law as it developed.¹⁷ In 1974, states started to adopt the International Convention for the Safety of Life at Sea (SOLAS).¹⁸ The 1979 International Convention on Maritime Search and Rescue and the 1982 United Nations Convention on the Law of the Sea (UNCLOS) quickly followed and built upon several other related legal instruments.¹⁹ UNCLOS obliged all seafarers to render assistance to those in distress at sea:

Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:

(a) to render assistance to any person found at sea in danger of being lost;

(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him.²⁰

It also noted: ‘No State may validly purport to subject any part of the high seas to its sovereignty’.²¹ The high seas signify international waters that lie beyond national boundaries. UNCLOS stipulated that every state has the right to establish sovereign territory over ‘the breadth of its territorial sea up to a limit not exceeding 12 nautical miles’ from the baseline along the coast, and that the contiguous zone stretches further – up to 24 nautical miles from the baseline – within which a state can exert limited control.²² This control extends to the prevention of any infringement of its immigration laws and the ability to punish breaches of any laws and regulations committed within its territory or territorial sea. Beyond this are the high seas. In theory, following the logic of UNCLOS, Eugenio Cusumano hypothesizes that international waters should provide a humanitarian space ‘where all seafarers enjoy a right of innocent passage and no state jurisdiction applies’.²³ Yet, instead of representing a humanitarian space, the sea largely represents a problematic and complex legal space for boat refugees in search of asylum, as will become evident in the empirical case studies.

17. Irini Papanicolopulu, ‘The Historical Origins of the Duty to Save Life at Sea in International Law’, *Journal of the History of International Law*, 24, No. 2 (2022), 149–50.

18. The first version originated after the sinking of RMS *Titanic* in 1912. The 1974 version came into force in 1980.

19. See Sophie Cacciaguidi-Fahy, ‘The Law of the Sea and Human Rights’, *Sri Lanka Journal of International Law*, 19, No. 1 (2007), 85–107.

20. United Nations Convention on the Law of the Sea (UNCLOS) (1982), Article 98. https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.

21. UNCLOS, Article 89.

22. UNCLOS, Article 3.

23. Eugenio Cusumano, ‘The Sea as Humanitarian Space: Non-Governmental Search and Rescue Dilemmas on the Central Mediterranean Migratory Route’, *Mediterranean Politics*, 23, No. 3 (2018), 388.

I now turn to solidarity. Barbara Prainsack defines solidarity as ‘a practice that expresses the willingness to support others with whom we recognise similarity in a relevant respect’. She explains that the ‘relevant respect’ is ‘determined by the specific situations within which solidarity takes place’.²⁴ Kurt Bayertz understands solidarity to be a political watchword rather than an ethical term because of its positive obligation to act.²⁵ Prainsack also asserts that solidarity is distinct from sympathy, empathy, charity or familial ties, because of its requirement for action:

Solidarity is different from empathy because it requires some outer expression ... Solidarity is different from charity in that it expresses itself as a fellowship of people who have something important in common: that they all share a joined human vulnerability in the face of crisis ... Finally, solidarity is different from support between lovers, friends, or within families, because what binds them together are much thicker bonds than the recognition of similarities in a relevant respect. Solidarity is subsidiary to these thicker bonds: it is particularly pertinent to situations where no other ties exist to bind people together.²⁶

Although states tend to prioritize social solidarity between their citizens, they occasionally help and voice their solidarity for boat refugees – often for political or moral purposes. For merchant vessels that encounter boat refugees in trouble at sea, solidarity could mean recognizing and acting on their duty to help fellow seafarers in trouble. For pro-refugee advocates such as NGOs, assisting boat refugees equates with Sally Scholz’s conception of political solidarity: it is ‘a moral relation that unites individuals acting on the basis of some form of commitment to challenge injustice, oppression, social vulnerability, or to otherwise struggle for liberation’.²⁷ As Jürgen Habermas contends, solidarity is a principle that is ‘rooted in the realization that each person must take responsibility for the other because as consociates all must have an interest in the integrity of their shared life context in the same way’.²⁸

The most high-profile action of solidarity from pro-refugee NGOs on the Mediterranean more recently was the search and rescue vessels that they launched in 2014. This followed the termination of Italy’s military and humanitarian Mare Nostrum operations, which had resulted in the Italian coastguard rescuing tens of thousands in the Mediterranean. Since 2017, the stand-off between NGOs’ search and rescue missions in the Mediterranean and European politicians – most notably in Italy

24. Barbara Prainsack, ‘Solidarity in Times of Pandemics’, *Democratic Theory*, 4, No. 2 (2020), 125, 126.

25. Kurt Bayertz, ‘Four Uses of “Solidarity”’, in Kurt Bayertz, ed., *Solidarity* (Dordrecht, 1999), 4.

26. Prainsack, ‘Solidarity’, 125–6.

27. Sally J. Scholz, ‘Political Solidarity and the More-Than-Human World’, *Ethics and the Environment*, 18, No. 2 (2013), 82. See also Sally J. Scholz, *Political Solidarity* (Pennsylvania, 2008), 10–13, 21.

28. Jürgen Habermas, ‘Justice and Solidarity: On the Discussion Concerning Stage 6’, in Thomas E. Wren, ed., *The Moral Domain: Essays in the Ongoing Discussion between Philosophy and the Social Sciences* (Boston, MA, 1990), 244.

– has resulted in the alleged ‘criminalisation of solidarity’.²⁹ Yet, the appearance of NGO search and rescue operations on the Mediterranean in 2014 did not represent the first time that NGOs had used rescue missions at sea to save boat refugees. Partly due to the increasing reluctance of merchant vessels and fishing boats to come to the aid of Vietnamese boats in the late 1970s, certain NGOs showed their solidarity for boat refugees when they began to carry out search and rescue operations in the South China Sea. Their appearance has since been sporadic and depended on the context. Cuban exiles based in the United States sailed directly to Cuba to transport their relatives back to Florida in a remarkable show of solidarity during the Mariel boatlift in 1980. Activists in the United States tried to show their solidarity with Haitian boat refugees by challenging states’ pushback, interdiction and offshore detention policies in court throughout the 1980s and early 1990s, as did pro-refugee groups in Australia in the late 1990s and early 2000s, as will be outlined in more detail below.

Boat refugees in the South China Sea, late 1970s to early 1980s

In the 15 years after the reunification of Vietnam in 1975, almost 800,000 escaped by boat, with 1979 representing the peak year of departure.³⁰ Approximately 130,000 fled initially from southern Vietnam in early 1975 due to its impending invasion by northern forces and the withdrawal of American troops.³¹ The United States fleet, positioned outside Vietnamese territorial waters, picked up half of those fleeing, and the remainder managed to sail mostly to Malaysia or the Philippines. The United States rapidly resettled these refugees in a show of solidarity with those understood to have ideological and actual links with American forces. Another wave of boat refugees began to leave Vietnam soon after, but numbers remained relatively low at first and the countries of first asylum in South East Asia continued to tolerate boat refugees by allowing them to remain on their territory until their resettlement elsewhere. The UNHCR and local civil society often accommodated and managed the presence of these refugees. In 1977, for example, the Malaysian Red Crescent Society won the UNHCR Nansen Refugee Award for its emergency relief and advocacy work with refugees.³² By the late 1970s, however, the amount of people arriving had risen substantially due to increasing persecution of Vietnamese of Chinese origin, amid growing tension between Vietnam and China.³³ Vietnamese people of Chinese origin made up a significant proportion of this later exodus of so-called ‘boat people’. In total, 277,000 arrived

29. Liz Fekete, ‘Migrants, Borders and the Criminalisation of Solidarity in the EU’, *Race and Class*, 59, No. 4 (2018), 65–83.

30. Mark Cutts, ‘Flight from Indochina’, in UNHCR, ed., *The State of the World’s Refugees 2000: Fifty Years of Humanitarian Action* (Oxford, 2000), 98.

31. Nghia M. Vo, *The Vietnamese Boat People, 1954 and 1975–1992* (Jefferson, NC, 2006), 2–3.

32. W. Courtland Robinson, *Terms of Refuge: The Indochinese Exodus and the International Response* (London, 1998), 23.

33. Judith Kumin, ‘Orderly Departure from Vietnam: Cold War Anomaly or Humanitarian Innovation?’, *Refugee Survey Quarterly*, 27, No. 1 (2008), 108.

by boat in other South East Asian countries in the first half of 1979.³⁴ Tens of thousands died at sea as many of the smaller boats were not designed for the open waters.³⁵ Starvation and disease accounted for large numbers of deaths on overcrowded boats. Additionally, Thai pirates murdered, robbed and raped large numbers on the high seas.³⁶ Malaysia received the most Vietnamese boat people, followed by Hong Kong. Boat refugees also arrived in Thailand, Indonesia, the Philippines, Singapore, Japan, Macau, South Korea and Australia.³⁷ South East Asian states housed boat refugees temporarily under the assumption that western states would resettle them; yet the rate of resettlement remained slow, despite the number of boat people arriving rising rapidly.

The swell of Indo-Chinese boat people in the late 1970s prompted various South East Asian countries to assert their territorial sovereignty by announcing plans to expel existing refugees and push back any further arrivals. This intensified following the appearance of several larger freighters on the South China Sea containing mostly Vietnamese of Chinese origin. The arrival of the *Hai Hong* in Malaysian waters carrying approximately 2,500 on board in late 1978 suggested to the authorities that smugglers and Vietnamese authorities had profited from the removal of an unwanted cohort of the population at the expense of the receiving states, which often had to also deal with their own diverse and sometimes complex ethnic make-ups.³⁸ In October 1978, Singapore vowed not to allow refugee boats to enter its waters unless in cases of dire hardship, where the authorities promised to provide emergency repairs and provisions before the ship had to move on.³⁹ One month later, Thailand made a similar proclamation by stating that it would not accept any more refugees, and unseaworthy boats would be repaired before being returned to the open seas.⁴⁰ Despite South East Asian countries' pledges to deter boat refugees, the numbers further intensified in the first half of 1979, prompting the Malaysian navy to start pushing back refugee boats at sea, with this practice intensifying

34. United Nations General Assembly, 'Meeting on Refugees and Displaced Persons in South-East Asia, Convened by the Secretary-General of the United Nations at Geneva, on 20 and 21 July 1979, and Subsequent Developments: Report of the Secretary-General', 7 November 1979, A/34/627.

35. Cutts, 'Flight from Indochina', 83, 86. See also Robinson, *Terms of Refuge*, 59.

36. For first-hand accounts of Vietnamese boat people's harrowing experiences, see Carina Hoang, ed., *Boat People: Personal Stories from the Vietnamese Exodus 1975–1992* (Cloverdale, WA, 2010).

37. Yuk Wah Chan, 'Revisiting the Vietnamese Refugee Era: An Asian Perspective from Hong Kong', in Yuk Wah Chan, ed., *The Chinese/Vietnamese Diaspora: Revisiting the Boat People* (London, 2011), 5.

38. See Sara E. Davies, *Legitimising Rejection: International Refugee Law in Southeast Asia* (Leiden, 2008), 98–102; Jana K. Lipman, *In Camps: Vietnamese Refugees, Asylum Seekers, and Repatriates* (Oakland, CA, 2020), 59.

39. Mary Yuen, 'Indochinese Refugees: 15 Years Later', *Southeast Asian Journal of Social Science*, 18, No. 1 (1990), 85.

40. Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (Oxford, 2001), 205.

throughout the first half of the year.⁴¹ In June 1979, Malaysia's deputy prime minister stated that the country would ship more than 70,000 Vietnamese boat people back into international waters from the country's refugee camps and shoot on sight any further attempts to enter its waters, claiming that 'being humane has not paid off for us at all'.⁴² Later that month, the Association of Southeast Asian Nations countries of Malaysia, Indonesia, Thailand, the Philippines and Singapore declared that they had 'reached the limit of their endurance and ha[d] decided that they would not accept any new arrivals'.⁴³

The Vietnam War and its aftermath was one of the first conflicts to be televised.⁴⁴ In addition to newspaper and radio coverage, television networks throughout North America and Europe broadcast graphic pictures of boat people at sea, with Becky Taylor et al. recounting that '[t]he drama of the sea rescues, the visibility of a crisis unfolding half a world away and the scale of events created a sense of urgency and often suggested that the crisis was unprecedented'.⁴⁵ This provided viewers with an intimacy and immediacy, which checked domestic negativity about immigration in Britain, France and West Germany, and instead elicited real sympathy and action.⁴⁶ Partly due to the increasing reluctance of coastguards and private vessels to come to the aid of boat refugees in the South China Sea, people demonstrated their solidarity for boat refugees by donating to efforts to carry out search and rescue operations at sea. In 1978, a committee of Parisian intellectuals and activists launched a fundraising campaign to charter a boat to rescue people at sea – something it succeeded in doing in early 1979 when a repurposed cargo vessel, the *Île de Lumière*, sailed to the South China Sea, where it rescued an estimated 30,000 people.⁴⁷ The West German Emergency Doctors Committee also launched a boat called the *Cap Anamur* in the late 1970s to help and rescue Vietnamese refugees

41. Loescher notes that 'Western refugee officials estimated that in February 1979 about 25 per cent of those who tried to land in Malaysia were pushed off, in April 50 per cent, and by mid-1979, 80 per cent'. Loescher, *The UNHCR*, 207. See also 'US Is Collecting Refugee Reports on Mistreatment by Malaysia's Navy', *New York Times*, 26 July 1979, where it was estimated that Malaysia had expelled approximately 35,000 boat refugees from the country's territorial waters by July 1979.

42. UK National Archives, Prem 19/129, Reuters Press Report, 14 June 1979. Several days later, the Malaysian prime minister stated that the country would not shoot on sight or remove those already in refugee camps in the country; nevertheless, he did assert that the navy would push back any boats containing migrants to international waters. See 'Malaysia Cancels Threats to Refugees', *New York Times*, 19 June 1979.

43. Quoted in Robinson, *Terms of Refuge*, 50.

44. Michael Mandelbaum, 'Vietnam: The Television War', *Daedalus*, 111, No. 4 (1982), 157.

45. Becky Taylor et al., 'Introduction', in Becky Taylor et al., eds., *When Boat People Were Resettled, 1975–1983: A Comparative History of European and Israeli Responses to the South-East Asian Refugee Crisis* (Cham, 2021), 1–2.

46. Taylor et al., 'Introduction', 36.

47. Imogen Dobie, "'Ambulances of the Sea": The Terracization of Maritime Aid', *Humanity*, 13, No. 2 (2022), 158.

stranded at sea.⁴⁸ These self-described ‘ambulances of the sea’ pursued what scholars have since termed ‘oceanic humanitarianism’ into the 1980s and ensured that the matter remained a prominent issue in the media and international affairs.⁴⁹

No state in South East Asia had signed international instruments such as the 1951 UN Refugee Convention or its subsequent 1967 protocol. Similarly, governments there did not face strong, independent domestic judiciaries. For South East Asian states, according to Jana Lipman, the problem stemmed from ‘an American war, and so the subsequent refugee crisis was seen as an American problem’.⁵⁰ There was, theoretically, no gap between what these states pledged to do – force boat refugees out of their territory – and what they could do. In contrast to its treatment of Jewish boat refugees in the 1940s, Britain did not push back boat refugees trying to reach its colony of Hong Kong, despite not having applied the Refugee Convention and its protocol to the territory.⁵¹ The Hong Kong Secretary for Security stated: ‘I do not believe it would be right, or to Hong Kong’s credit, to send out to sea a heavily loaded ship on the basis that they can take their chance somewhere else’.⁵² Instead, Britain reached out for international assistance by calling on the UN to organize a conference to explicitly address the issue of Vietnamese refugees.⁵³ In the meantime, the UNHCR had been working in the background with Vietnamese authorities. The two parties announced in late May 1979 that they had signed a memorandum of understanding to develop the Orderly Departure Programme so that people who wanted to leave Vietnam could theoretically do so in a safe and orderly way, instead of boarding often unseaworthy vessels.⁵⁴

To dissuade South East Asian states from pushing back boat people, western states, encouraged by the UN and concerned by the increasingly restrictive stance towards boat refugees taken by most South East Asian states, came together on 20–21 July 1979 in Geneva. They pledged that they would help resettle the boat people then stranded in various makeshift camps across the region and host Vietnamese leaving under the new

48. See Patrick Merziger, ‘The “Radical Humanism” of “Cap Anamur”/“German Emergency Doctors” in the 1980s: A Turning Point for the Idea, Practice and Policy of Humanitarian Aid’, *European Review of History: Revue Européenne d’Histoire*, 23, No. 1–2 (2016), 171–92; Laurent Suteau, ‘La coopération Marine-Médecins du Monde et l’assistance aux boat people du Golfe de Siam (1982–1988)’, *Matériaux pour l’Histoire de Notre Temps*, 95, No. 3 (2009), 46–52.

49. The term ‘oceanic humanitarianism’ was first coined by Peter Gatrell and then expanded on by Damousi et al. See Peter Gatrell, ‘Refugees – What’s Wrong with History?’, *Journal of Refugee Studies*, 30, No. 2 (2017), 175; Joy Damousi et al., ‘Forced Migration, Oceanic Humanitarianism, and the Paradox of Danger and Saviour of a Vietnamese Refugee Boat Journey’, *Historical Journal*, 65, No. 2 (2022), 505–26. See also Dobie, ‘“Ambulances of the Sea”’; Cutts, ‘Flight from Indochina’, 87.

50. Lipman, *In Camps*, 8.

51. Roda Mushkat, ‘Refugee in Hong Kong’, *International Journal of Refugee Law*, 1, No. 4 (1989), 451.

52. Quoted in Talbot Bashall, ‘Compassion Fatigue’, in Hoang, *Boat People*, 24.

53. UK National Archives, Prem 19/129, Telegram 611, UK Mission in New York to Foreign and Commonwealth Office, 14 June 1979.

54. Kumin, ‘Orderly Departure’, 105.

Orderly Departure Programme. Shortly thereafter, states began taking in an annual quota of refugees and migrants in need of humanitarian help. In return for major international assistance and a promise to resettle the vast majority of those stranded in camps throughout South East Asia, countries of first asylum in the area agreed to desist from pushing back future boat arrivals. Between July 1979 and July 1982, more than 20 countries, led by the United States, Australia, France and Canada, resettled 623,800 Indo-Chinese refugees, comprising Vietnamese boat people and refugees and humanitarian migrants from Cambodia and Laos.⁵⁵

The United States undertook such an effort because of its desire to provide refuge for those who supported its military efforts in South Vietnam; because it wanted to discredit the communist-led government following its embarrassing defeat in the Vietnam War; and because of the prominent voicing of humanitarian concerns for boat refugees in the US public sphere.⁵⁶ In Lipman's words, the US government 'accepted hundreds of thousands of Vietnamese in a departure from its immigration laws due to politics of obligation, generosity, guilt, and international expectations'.⁵⁷ Australia, which had fought in the Vietnam War alongside the United States, justified its acceptance of refugees by the need to maintain cordial relations with its Asian neighbours and used the country's refugee intake to demonstrate its humanitarian values to the rest of the world.⁵⁸ France also felt some responsibility for the refugees because of its previous colonization of Vietnam. Canada represented an outlier of sorts in that it had not participated in the Vietnam War and did not have any colonial ties with Vietnam. It pledged to resettle so many partly because of the introduction shortly before of new refugee procedures that allowed for private refugee sponsorship. Civil society actors, with religious groups to the fore, unexpectedly provided more sponsorship offers than expected in a resettlement that helped to develop Canada's image as a welcoming nation for refugees.⁵⁹ The resettlement agreement became what Gil Loescher refers to as 'the single largest permanent population transfer there has ever been between developing and industrialized countries' and a clear example of 'the benefits of international burden sharing'.⁶⁰ South East Asian countries' efforts to enact their domestic territorial sovereignty led to international solidarity from a number of western liberal democratic states on an enormous scale.

The number of boat refugees taking to the open seas started to decrease as the Orderly Departure Programme became more established throughout the 1980s. Boats continued to appear on the South China Sea, albeit less frequently. Tankers and merchant vessels from 31 different countries picked up boat refugees in the South China Sea in the late 1970s.⁶¹ Yet passing vessels increasingly started to ignore and avoid boat refugees at

55. China also resettled approximately a quarter of a million Vietnamese refugees. See Cutts, 'Flight from Indochina', 82, 86.

56. Loescher, *The UNHCR*, 205–6.

57. Lipman, *In Camps*, 7.

58. Glynn, *Asylum Policy*, 56.

59. See Michael J. Molloy et al., *Running on Empty: Canada and the Indochinese Refugees, 1975–1980* (Montreal, 2017).

60. Loescher, *The UNHCR*, 207.

61. Cutts, 'Flight from Indochina', 87.

sea because of the political, legal and economic implications that arose after rescuing those in difficulty, particularly when nearby states expressed their reluctance to provide refuge.⁶² James Pugash highlights this dilemma in what he terms the Catch-22 of the law of the sea:

It is well settled that the master of a ship is dutybound to rescue anyone in danger of being lost at sea. It is equally well settled that a sovereign state is under no duty to admit unwanted alien refugees.⁶³

The law of the sea obliged seafarers to render assistance to those in distress at sea but its lack of effectiveness was apparent throughout the 1980s as an increasing number of vessels in the South China Sea ignored boats carrying Vietnamese refugees.⁶⁴ The survivors of one boat that was eventually rescued on the South China Sea in 1981 highlighted such a trend. Two days after setting sail from Vietnam, the motor on the boat failed. After one week, the passengers had exhausted all their supplies. According to the captain of the boat, Binh Thai Van, 42 boats passed them without stopping to help, including two Japanese tankers that took photographs and videos of their vessel, which was built for sailing on rivers rather than the sea. Another boat offered food to the passengers but would not allow any of those on board to transfer to the vessel.⁶⁵ Forty-nine of the original 140 people who set sail had died by the time a Dutch gas tanker came to their aid and transferred the survivors to a hospital in Manila, and another 10 people died after being rescued. As international interest in the Vietnamese boat refugees declined, so too did solidarity at sea.

Boat refugees in the Caribbean, 1980 to 1994

Just as the Vietnamese refugee crisis began to alleviate, another episode involving people taking to the sea in search of sanctuary began to gain prominence. Boat refugees from Cuba and Haiti had crossed the Caribbean to reach the United States throughout the 1960s and 1970s, but the scale of arrival remained relatively low.⁶⁶ In response to a

62. In the British case, for instance, the shipping industry placed pressure on its government to accept these refugees in Britain because it slowed their boats' progress and consequently cost them money. See UK National Archives, PREM 19/129, Records of the Prime Minister's Office, Correspondence and Papers, 1979–1997, 'Vietnamese Refugees in Hong Kong, Possibility of Resettlement in the UK, Part 1', Letter from David Ropner, General Council of British Shipping, to Margaret Thatcher, 29 May 1979.

63. James Z. Pugash, 'The Dilemma of the Sea Refugee: Rescue without Refuge', *Harvard International Law Journal*, 18, No. 3 (1977), 578.

64. Michael Aldrich, 'A Partial Remedy for the Plight of the Boat People: Protection and Indemnity Insurance', *Columbia Human Rights Law Review*, 18, No. 2 (1987), 299.

65. NPR/VPRO, 'Wanhoop op zee', *Anderere Tijden*, 8 September 2015, <https://anderetijden.nl/aflivering/4/Wanhoop-op-zee> (accessed 30 January 2025). Although the programme is mostly in Dutch, the interviews with the captain are in English.

66. Christopher Mitchell, 'US Policy toward Haitian Boat People, 1972–93', *Annals of the American Academy of Political and Social Science*, 534 (1994), 69–80.

series of domestic crises in Cuba, including the entry of over 10,000 Cubans into the Peruvian embassy in Havana in search of asylum and the hijacking of several boats by Cubans intent on sailing to Florida with the perceived encouragement of the United States, Fidel Castro announced in April 1980 that those who wanted to leave Cuba could do so. Shortly afterwards, Cuba opened the port of Mariel, located approximately 90 nautical miles from Key West in Florida, and announced that Cubans based in the United States could pick up their family members and friends by boat. This set off an extraordinary sequence of events, with Cuban exiles in the United States moving swiftly to facilitate the exit of their family and friends. They travelled to Key West in Florida in large numbers, where they sought to use their own boats or hired or bought the vessels of others with the intention of sailing to Mariel to bring Cubans back across the Caribbean.⁶⁷

Castro had instigated a similar policy in 1965 when he invited Cuban exiles in the United States to sail to Camarioca, another Cuban port, so they could bring their family members back with them to the United States. The boatlift lasted for only five weeks and led to the arrival of approximately 3,000 Cubans in Florida, with American officials secretly negotiating a deal with Cuba that saw the establishment of an orderly departure programme involving regular ‘freedom flights’ between Cuba and the United States, which ended in 1973, in exchange for Castro’s quick closure of the port.⁶⁸ The Carter administration acted more hesitantly in response to the 1980 Mariel boatlift – something that some scholars criticized extensively.⁶⁹ Mariel port stayed open for five months and approximately 125,000 Cubans arrived in Florida during this period.

In the absence of clear guidance from Washington, DC, the United States Coast Guard diverted military cutters to patrol the route from Mariel to Key West to help vessels in distress; surveillance flights were also launched.⁷⁰ On 27 April, a violent thunderstorm, which only lasted 15 to 20 minutes, gravely affected those sailing across the Straits of Florida, leaving scores of boats ‘capsized, disabled, or sinking’. In one five-minute period, the Coast Guard received 22 May Day calls from vessels in distress, and it was estimated that over a dozen people perished. Nevertheless, the Coast Guard managed to save hundreds in a clear show of solidarity with those in difficulty at sea.⁷¹

In early May 1980, President Carter publicly pledged that the United States would provide asylum to those Cubans in Florida, drawing on the country’s history of giving refuge to those in need and the Cold War to justify his stance: ‘Ours is a country of refugees. ... We’ll continue to provide an open heart and open arms to refugees seeking freedom from Communist domination and from the economic deprivation brought

67. Alex Larzelere, *The 1980 Cuban Boatlift: Castro’s Ploy – America’s Dilemma* (Stockton, CA, 2002), 187–93.

68. David W. Engstrom, *Presidential Decision Making Adrift: The Carter Administration and the Mariel Boatlift* (New York, 1997), 26–7.

69. Engstrom, in particular, lambasted the Carter regime for approaching ‘the forces and events behind the Mariel boatlift with its eyes closed’ and for not having applied the knowledge of Camarioca in its response. See Engstrom, *Presidential Decision Making Adrift*, 51.

70. Larzelere, *The 1980 Cuban Boatlift*, 207–10.

71. Larzelere, *The 1980 Cuban Boatlift*, 212–13.

about by Fidel Castro and his government'.⁷² Yet the American government and Florida state authorities worried about the scale and composition of the boat refugees. In return for allowing the departure of family members of Cuban exiles based in the United States, Cuban officials forced boats to also take on board those who the Castro regime considered troublesome or problematic, including people from jails and psychiatric institutes. One contemporary news report recorded that for every family member allowed to board a boat, four other passengers selected by Cuban officials joined them.⁷³ The scale of departure started to decline as the United States Coast Guard began to enforce measures to stem boats sailing from Key West to Mariel. In September 1980, Castro closed off Mariel harbour because the size of the exodus was damaging Cuba's reputation.⁷⁴ Despite approximately 125,000 'Marielitos' sailing to Florida during the boatlift, the Coast Guard believed that only 27 people lost their lives crossing the Straits of Florida – an incredibly low number – due to their efforts to rescue those in need of assistance.⁷⁵

Haitians in search of asylum also began to arrive by boat on Florida's shores in the spring of 1980 in increasing numbers. Their journey was much more perilous than that of their Cuban counterparts since they had to cover more than 600 nautical miles by boat. Although the United States maintained friendly relations with the Duvalier dictatorship in Haiti, the Carter regime was sensitive to accusations that it welcomed one group because they were fleeing a communist enemy regime and were predominantly white but rejected another group because they were fleeing a dictatorship allied to the United States and were mostly Black.⁷⁶ In June 1980, the Carter administration announced that the vast majority of the Cubans and Haitians would be allowed to remain for six months and potentially obtain permission to stay.⁷⁷ Roughly 25,000 Haitians made the dangerous journey to Florida.

Thereafter, the United States adopted a policy of deterrence. For Cubans, Castro facilitated such a stance by closing Mariel port. After Reagan's victory over Carter in the 1980 presidential election, the US administration instigated a policy to interdict and return Haitians on the high seas – with the assent of the Haitian Duvalier regime. This marked a crucial development in how the United States performed its territorial sovereignty in relation to those in search of asylum. Whereas those Haitians who had previously managed to sail to the United States coast could appeal to American courts if they received a deportation order, after the introduction of the interdiction policy, they

72. Jimmy Carter, 'League of Women Voters Remarks and a Question-and-Answer Session at the League's Biennial National Convention', 5 May 1980, *The American Presidency Project*, <https://www.presidency.ucsb.edu/documents/league-women-voters-remarks-and-question-and-answer-session-the-leagues-biennial-national> (accessed 17 February 2025).

73. 'Officials Insist They'll Start Enforcing the Law', *The Associated Press*, 24 April 1980. For a first-hand account of how this worked, see José Manuel García, *Voices from Mariel: Oral Histories of the 1980 Cuban Boatlift* (Gainesville, FL, 2018), 39–42.

74. FitzGerald, *Refuge beyond Reach*, 107.

75. Larzelere, *The 1980 Cuban Boatlift*, 240.

76. Carl Lindscoog, *Detain and Punish: Haitian Refugees and the Rise of the World's Largest Immigration Detention System* (Gainesville, FL, 2018), 37–40.

77. 'US to Let Refugees from Cuba and Haiti Remain for 6 Months', *New York Times*, 21 June 1980.

had no recourse to such actions because their repatriation took place on the high seas. According to Jeffrey S. Kahn:

This renewed search for sovereign control and liberated bureaucracy drove the asylum-screening apparatus outward into a space-time of relative oceanic freedom, a laboratory of sorts in which new forms of border governance would be tested, contested, and routinized over the years to come.⁷⁸

Under the 1981 United States–Haiti bilateral interdiction policy, United States Coast Guard vessels were instructed to ‘stop and board defined vessels, when there is reason to believe that such vessels are engaged in the irregular transportation of persons’, then ‘make inquiries of those on board’ and subsequently ‘return the vessel and its passengers to the country from which it came ... provided, however, that no person who is a refugee will be returned without his consent’.⁷⁹ The Coast Guard cutters that were employed to enforce the interdiction policy contained Immigration and Naturalization Service officers and translators to screen and theoretically interview the intercepted Haitians to determine if they potentially qualified for refugee status. In its first 10 years, the interdiction policy led to all but 28 of 25,000 intercepted at sea being returned to Haiti.⁸⁰

Various NGOs representing Haitians challenged this policy in US courts, but the United States District Court rejected the Haitian Refugee Center’s assertion in 1985 that the United States Coast Guard had ‘deprived Haitian refugees on interdicted vessels of their liberty and rights afforded them by the Refugee Act’ because ‘those acts only establish[ed] procedures guaranteed to aliens within the United States’.⁸¹ In other words, because the interception occurred outside US waters, US law did not apply. The Haitian Refugee Center also alleged that interdiction violated *non-refoulement*, the legal principle enshrined in the Refugee Convention that prohibits the return of individuals to places where their lives or freedom may be at risk due to persecution. The judge responded by acknowledging that the United States Congress had implemented the stipulation as part of the 1980 US Refugee Act but that this did ‘not provide any rights to aliens outside of the United States’.⁸²

In autumn 1991, following the overthrow of the democratically elected Jean Bertrand Aristide and the outbreak of considerable violence in Haiti, the United States remained unsure of how to handle the 2,800 Haitians the Coast Guard intercepted at sea in the weeks after the coup. Initially, the Coast Guard kept them on cutters at sea and took some of the Haitians to the Guantánamo military camp in Cuba while appealing to

78. Jeffrey S. Kahn, *Islands of Sovereignty: Haitian Migration and the Borders of Empire* (Chicago, 2019), 6.

79. Ronald Reagan, ‘Executive Order 12324 – Interdiction of Illegal Aliens’, 29 September 1981, *The American Presidency Project*, <https://www.presidency.ucsb.edu/documents/executive-order-12324-interdiction-illegal-aliens> (accessed 20 February 2025).

80. Lindskoog, *Detain and Punish*, 62.

81. *Haitian Refugee Center, Inc. v. Gracey*, 600 F. Supp. 1396 (D.D.C. 1985), US District Court for the District of Columbia, 10 January 1985.

82. *Haitian Refugee Center, Inc. v. Gracey*.

Caribbean and Latin American countries to offer asylum to the Haitians.⁸³ Their calls went largely unheeded and the appearance of increasing numbers of boat refugees at sea meant that the United States had to either start returning the boat refugees to Haiti or start transporting them to the United States. It initially chose to repatriate the refugees to Haiti just six weeks after the coup, despite ongoing chaos there. The Haitian Refugee Center immediately applied for a temporary restraining order preventing the further repatriation of boat refugees interdicted at sea to Haiti – a request that a district court judge in Florida granted.⁸⁴ To get around such a restraining order, the United States Coast Guard instead brought those it intended to repatriate temporarily to Guantánamo, where it established an extraterritorial detention facility for boat refugees.⁸⁵ The US Secretary of State successfully appealed against the restraining order.⁸⁶ The Haitian Refugee Center appealed to the US Supreme Court, but this failed. Consequently, the United States Coast Guard started to repatriate many of those held at Guantánamo back to Haiti. Between the coup in late September 1991 and early April 1992, the United States interdicted over 18,000 Haitians; it repatriated over 10,000 of these, brought approximately 4,300 to the United States to pursue asylum claims, and held the remainder in Guantánamo.⁸⁷

The number of Haitians appearing on the high seas increased dramatically in May 1992. President George H. W. Bush responded by issuing a new Executive Order that instructed the United States Coast Guard to return interdicted refugees to Haiti without screening them for asylum.⁸⁸ Pro-refugee actors proceeded to make several legal cases against the new policy, which resulted in the American Supreme Court confirming that Article 33 of the Refugee Convention relating to *non-refoulement* or domestic American law did not place any limit on the president's authority to repatriate aliens interdicted as long as the interdiction or repatriation occurred beyond the territorial seas of the United States.⁸⁹ This also had relevance for the treatment of Cubans on the Caribbean after the end of the Cold War.

Following the collapse of the Soviet Union in 1991, Cuba suffered several economic crises. As a result, the number of Cubans who attempted to sail to the United States rose substantially. Just as had occurred in 1965 and 1980, in 1994 Castro announced that Cubans who wanted to leave could do so to ease social tensions. Fearing a repeat of the Mariel boatlift, the United States under President Clinton announced a new policy to intercept Cuban *balseros* ('rafters') on the high seas and detain them alongside the

83. Lindskoog, *Detain and Punish*, 103.

84. Lindskoog, *Detain and Punish*, 110. See also Hearing Before the Subcommittee on International Law, Immigration, and Refugees of the Committee of the Judiciary (US House of Representatives), *Cuban and Haitian Immigration* (Washington, DC, 1992), 52–4.

85. Lindskoog, *Detain and Punish*, 105.

86. See Thomas David Jones, 'Haitian Refugee Center, Inc. v. James Baker, III: The Dred Scott Case of Immigration Law', *Penn State International Law Review*, 11, No. 1, (1992), 1–48.

87. Lindskoog, *Detain and Punish*, 113.

88. Lindskoog, *Detain and Punish*, 113.

89. *Sale v. Haitian Centers Council*, 509 US 155 (1993).

Haitians at Guantánamo.⁹⁰ The United States Coast Guard barred Cuban exiles from sailing to Cuban ports to transport their family members back. Instead, most of the boats that made the perilous journey across the Straits of Florida were small vessels and home-made rafts. In a limited show of solidarity, Hermanos al Rescate (Brothers to the Rescue), a Miami-based activist group, did try to assist with the rescue of rafters from Cuba by flying small airplanes over the Straits of Florida to identify those in distress. One *balsero*, who sailed with nine others on a home-made raft that had no motor and only oars, recounted that after three days at sea, 'We had gone like twenty, twenty-five, thirty miles ... the hills of Havana were still in sight'. This caused some to 'want to go back, they were afraid, they got scared' because the 'nights on the sea are terrible, terrible because you can't see anything, everything is dark'. They encountered sharks, high waves and whirlpools that threatened to take them to the Gulf of Mexico, which 'is a cemetery'.⁹¹ The United States Coast Guard eventually rescued those on board and took them to Guantánamo.⁹²

As part of an eventual deal struck between the two countries, Cuba agreed to stop boats departing and allow for the return of those interdicted on the high seas en route to the United States. In return, the United States agreed to receive at least 20,000 Cuban immigrants per year as part of an official programme. The US government transferred the vast majority of the 30,000 held at Guantánamo to the American mainland after the establishment of the deal, but repatriated those intercepted on the Caribbean Sea from then on.⁹³ In an appeasement of sorts, Cubans who managed to land on the US mainland were not returned under the so-called 'wet foot, dry foot' policy – a practice that did not apply to Haitians.⁹⁴

The United States showed much more solidarity with Cuban boat refugees than Haitians during the period concerned. This emanated from the fact that Cubans were fleeing a communist dictatorship that was at loggerheads with the United States. At times, this apparent solidarity was quite accidental. According to David Engstrom, the Carter administration reacted unwittingly and very slowly to the Mariel boatlift in 1980.⁹⁵ By the time the administration started to respond, it had lost the initiative to US-based Cuban exiles, who had already begun to sail across the Straits of Florida to transport their relatives back to the United States. Officials reacted by putting on a brave face and reluctantly welcoming the Cuban refugees, as well as the Haitians who arrived around the same time. The subsequent Reagan and Bush

90. Elizabeth Campisi, *Escape to Miami: An Oral History of the Cuban Rafter Crisis* (New York 2016), 13–15.

91. Quoted in Campisi, *Escape to Miami*, 43–6.

92. Campisi, *Escape to Miami*, 47.

93. Felix Masud-Piloto, *From Welcome Exiles to Illegal Immigrants: Cuban Migration to the US, 1959–1995* (Lanham, MD, 1996), 143.

94. Alberto J. Perez, 'Wet Foot, Dry Foot, No Foot: The Recurring Controversy between Cubans, Haitians, and the United States Immigration Policy', *Nova Law Review*, 28, No. 2 (2004), 445.

95. Engstrom, *Presidential Decision Making Adrift*, 51.

(Senior) administrations made no such concessions by taking a firm stand on boat refugees, particularly those sailing from Haiti. In 1981, the United States launched an interdiction policy that apparently strengthened its territorial sovereignty by stopping Haitians in international waters – away from the potential checks and balances of US law and, by extension, international law. In Kahn's words, the Immigration and Naturalization Service 'had been set free at the southeastern border, unleashed as a mobile oceangoing bureaucracy integrated into a new surveillance and policing regime, all beyond US sovereign territory'.⁹⁶ When the fallout from the overthrow of the democratic Aristide government in 1991 threatened this, the United States introduced offshore detention in Guantánamo to ensure that it could continue to act beyond the restraints and responsibilities of US law. When the public relations value of Cuban refugees started to diminish after the end of the Cold War, they too began to come under the remit of this particular type of American sovereignty that took place beyond US territory.

Boat refugees in the Indian Ocean, late 1990s to early 2000s

Australia received a small number of Vietnamese boat refugees – approximately 2,000 – in the late 1970s and early 1980s.⁹⁷ It later agreed to accept large numbers of Vietnamese stranded in neighbouring South East Asian refugee camps in an orderly and organized manner; in return, those same countries vowed to halt boats coming further south.⁹⁸ During the early 1990s, small numbers of boat refugees reappeared – mostly from China, Vietnam and Cambodia.⁹⁹ A notable change occurred in the late 1990s. Whereas just 200 boat refugees arrived in 1998, over 3,700 came in 1999.¹⁰⁰ They mostly originated from Afghanistan, Iran and Iraq. Despite the annual numbers of boat refugees remaining relatively low, the issue attracted considerable political and public attention. Unlike the boat refugees discussed in the South China Sea and the Caribbean, these people came indirectly to Australia – that is, they first made their way to Indonesia before employing smugglers to transport them by boat, mostly towards Christmas Island, an Australian island located approximately 350 kilometres south of Indonesia and over 1,500 kilometres north-west of the Australian mainland.¹⁰¹ Most Afghans and Iraqis flew to Malaysia, where they could obtain a tourist visa on arrival before entering Indonesia irregularly on one of the many maritime routes

96. Kahn, *Islands of Sovereignty*, 8.

97. Claire Higgins, *Asylum by Boat: Origins of Australia's Refugee Policy* (Sydney, 2017), 6.

98. Katharine Betts, 'Boatpeople and Public Opinion in Australia', *People and Place*, 9, No. 4 (2001), 35.

99. Glynn, *Asylum Policy*, 60.

100. Janet Phillips, 'Boat Arrivals in Australia: A Quick Guide to the Statistics', Australian Parliamentary Library (Canberra, ACT, 2014), 2.

101. Glynn, *Asylum Policy*, 152. They also made their way to Ashmore Reef, an uninhabited Australian territory located closer to Indonesia than Australia.

connecting the two states, whereas Iranians often travelled directly to Indonesia because of their entitlement to a 30-day tourist visa on arrival.¹⁰²

In response to the rise in boat refugees, the Australian government introduced several new punitive measures to deter more people from making the voyage across the Indian Ocean. Australia had already introduced mandatory detention in isolated locations for those arriving by boat in search of asylum – including children – in the early 1990s and, in 1999, proposed that boat refugees could only receive three-year temporary protection visas instead of permanent protection and would no longer have the right to later bring their families to Australia. By contrast, people who arrived by plane on a tourist or student visa and later applied for asylum in Australia received a bridging visa that allowed them to work and receive state medical assistance; if adjudged to be a refugee, they also gained permission to stay permanently in Australia and had the right to a family reunion.¹⁰³ The Australian government also placed a renewed emphasis on coastal surveillance, expanding powers for the Australian navy to chase and board ‘foreign vessels’ believed to be carrying boat refugees in or approaching Australia’s territorial and contiguous maritime zones.¹⁰⁴

The number of boats arriving remained constant, despite Australia’s efforts to dissuade people from making the trip.¹⁰⁵ Australia consequently looked beyond its borders for ways to restrict them. It encouraged Indonesia to stop people departing from its territory by providing significant funding and resources, including Australian-financed detention centres.¹⁰⁶ This had mixed results initially – partly because the vast Indonesian coastline made it so difficult to police; partly because of the adaptability and aptitude of the smugglers; and partly because of mutual suspicion between Australian and Indonesian officials.¹⁰⁷ Due to the mandatory detention of boat refugees and the sustained arrival of more boats, Australia’s detention centres became increasingly overcrowded. Riots and protests involving those detained became commonplace, causing public and political sympathy for the plight of boat refugees to deteriorate further.

The issue of boat refugees came to dominate Australian politics in late August and early September 2001 during the so-called ‘*Tampa* affair’ and continued to feature prominently in the run-up to the November 2001 elections. In late August 2001, the Australian Rescue Coordination Centre had first asked vessels in the proximity to assist an

102. Graeme Hugo, George Tan and Caven Jonathan Napitupulu, ‘Indonesia as a Transit Country in Irregular Migration to Australia’, in Marie McAuliffe and Khalid Koser, eds., *A Long Way to Go: Irregular Migration Patterns, Processes, Drivers and Decision-Making* (Canberra, 2017), 173.

103. Glynn, *Asylum Policy*, 100.

104. Andreas Schloenhardt, ‘Australia and the Boat-People: 25 Years of Unauthorized Arrivals’, *University of New South Wales Law Journal*, 23, No. 3 (2000), 53.

105. Approximately 85 per cent of boat refugees obtained refugee status after officials had assessed their applications. See ‘Hopes Blown Out of Water’, *Australian*, 18–19 August 2001.

106. Amy Nethery, Brynna Rafferty-Brown and Savitri Taylor, ‘Exporting Detention: Australia-Funded Immigration Detention in Indonesia’, *Journal of Refugee Studies*, 26, No. 1 (2013), 88–9.

107. David Marr and Marian Wilkinson, *Dark Victory* (Crows Nest, NSW, 2003), 4, 44–5.

Indonesian fishing boat overloaded with refugees in distress. A Norwegian freighter, the *MV Tampa*, was the most suitably located boat to answer the call, and the Australian authorities instructed it to proceed to the floundering vessel. The crew successfully transferred the 433 refugees from the fishing boat to the *Tampa*. This took place in international waters, but in Indonesia's search and rescue zone. The Indonesian authorities instructed the *Tampa* to sail to Merak, an Indonesian port. Shortly after setting out for Merak, five representatives of the boat refugees insisted that the captain of the *Tampa* sail for Australia and insinuated that there could be serious repercussions if he did not. Considering that Christmas Island was considerably closer than Merak, the Norwegian captain relented and changed course. After back-and-forth communication with officials, Australia informed the captain that he did not have permission to enter Australian waters and that he should consequently turn back. After realizing that the *Tampa* had changed course, the agitated refugees aggressively approached the captain once more and implored him to sail back towards Christmas Island, which he did. The *Tampa* remained outside Australian territorial waters awaiting permission to dock at Christmas Island. Australia refused to allow the *Tampa* to enter its waters and threatened to prosecute the captain for people-smuggling if he proceeded. After waiting for two days while conditions on board deteriorated further, the *Tampa's* captain declared a state of emergency and sailed into Australian waters, anchoring seven kilometres from the island. Australia responded by landing troops on board and ordering the captain to sail out of its territorial waters. The Australian prime minister, John Howard, explained the rationale behind ordering troops on board by bringing the defence of the country's national sovereignty to the fore:

Every nation has the right to effectively control its borders and to decide who comes here and under what circumstances, and Australia has no intention of surrendering or compromising that right. We have taken this action in furtherance of that view. It remains our very strong determination not to allow this vessel or its occupants, save and excepting humanitarian circumstances clearly demonstrated, to land in Australia, and we will take whatever action is needed – within the law, of course – to prevent that occurring.¹⁰⁸

The Norwegian foreign minister responded by publicly stating: 'Australia's attitude to the refugee incident is unacceptable and inhumane and contravening international law'.¹⁰⁹ The *Tampa's* captain refused to return the ship to international waters – a stance his Norwegian shipping company endorsed. An international stand-off ensued for several days, with Indonesia and Norway refusing to take the refugees. At Australia's request, the UNHCR became involved. After several days of negotiating, it proposed that the *Tampa* be allowed to temporarily disembark on Christmas Island, where the UNHCR could assess the asylum applications of those rescued, and then those deemed refugees could be transferred to third countries, in a process that would replicate what emerged from the refugee crisis in the South China Sea in 1979. This proposal

108. John Howard, Australian House of Representatives (Hansard), 29 August 2001. See also 'Howard and Beazley - their reasons', *Sydney Morning Herald*, 29 August 2001.

109. Quoted in 'The Loneliest Ship in the World', *Sydney Morning Herald*, 30 August 2001.

would have caused the Australian government to renege on its public objective of not allowing the vessel or its occupants to land on Australian territory. Consequently, Australia rejected the UNHCR's idea and developed its own response – the so-called 'Pacific Solution'.¹¹⁰

During the stand-off, Australia had unsuccessfully approached several Pacific states to accommodate the boat refugees who were trying to reach Australia, including Fiji, Tuvalu and East Timor.¹¹¹ Nauru, the smallest republic in the world, with a population at the time of approximately 10,000, became the first state to accept Australia's offer of substantial compensation in exchange for housing the intercepted boat refugees in hastily built detention centres financed with Australian money. Papua New Guinea's Manus Island, with a population of less than 45,000, later became the second. Both states were formerly under Australian control and relied heavily on Australia for aid. New Zealand also agreed to take approximately 150 of the *Tampa's* refugees. After announcing the Pacific Solution, the Australian navy transferred the refugees from the *Tampa* to an Australian navy vessel and transported them to Nauru.

Australia's actions met with widespread international condemnation – the captain and crew of the *Tampa* later received the Nansen Refugee Award – but considerable support at home. The tragic events of the 9/11 terrorist attacks in the United States later that same month bolstered public support for further securitizing the country's borders. In late September, the Australian Parliament approved several new measures to counter the arrival of boat refugees and legislate, retroactively, for its actions during the *Tampa* affair. These included excising certain Australian islands from the country's territorial waters for boat refugees; ensuring that boat refugees had minimal access to Australian courts; and allowing the Australian navy to intercept any vessel attempting to reach Australia and return it to international waters.¹¹² Solidarity towards boat refugees remained in short supply, and pro-refugee activists had few avenues in which to contest the new legal measures. In early October 2001, the Australian navy tried to turn around another boat containing 223 passengers towards Indonesia. After this failed, the navy vessel attached itself to the refugee boat and attempted to force it back to Indonesia. Two days later, the refugee boat began to sink. The navy transferred those on board the boat to the navy vessel in a complicated exercise that included rescuing people from the sea. Yet the government portrayed what occurred in a strikingly different manner, claiming that the boat refugees had deliberately thrown their children overboard to ensure that their boat could not be towed back to Indonesia, producing two images of children in the sea from the rescue operation to support its assertion. A later Senate report concluded that the government had deliberately misled the media.¹¹³

110. For an in-depth overview of the *Tampa* affair, see Marr and Wilkinson, *Dark Victory*.

111. 'Tampa Affair: How the UN Blocked East Timor Solution', *Sydney Morning Herald*, 22 October 2001.

112. Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001, Part 8, Division 1.1; Migration Legislation Amendment (Judicial Review) Act 2001; Border Protection (Validation and Enforcement Powers) Act 2001.

113. Jordana Silverstein, 'Refugee Children, Boats and Drownings: A History of an Australian "Humanitarian" Discourse', *History Australia*, 17, No. 4 (2020), 731–2.

The Pacific Solution ensured that, in the words of the then Australian Minister for Immigration, ‘unauthorised arrivals do not achieve their goal of reaching Australian soil; there is no automatic access to Australian residency; there is no access to the judicial system’.¹¹⁴ The Pacific Solution shared many similarities with the United States’ use of Guantánamo in the early 1990s; detaining boat refugees indefinitely on offshore centres ensured that the Australian government’s policies could not be challenged by pro-refugee actors in the national courts.¹¹⁵ Australia’s Pacific Solution proved incredibly effective. Whereas over 12,000 boat refugees sailed to Australia between 1999 and 2001, less than 500 succeeded in reaching the country in the three subsequent years.¹¹⁶ It also enabled the Australian prime minister to convincingly claim in the run-up to his party’s surprise re-election in late 2001 that ‘We will decide who comes to this country and the circumstances in which they come’.¹¹⁷

Comparing across time and space

Across the three case studies considered, numerous instances of solidarity took place in the response to the appearance of boat refugees at sea. Local and international organizations hosted refugees in camps throughout South East Asia from the mid 1970s onwards. NGOs carried out search and rescue missions that saved tens of thousands of refugees’ lives in the South China Sea. Private vessels also rescued many in distress – not only in the South China Sea, but also in the Indian Ocean with the *Tampa*. In the United States, Cuban exiles sailed across the Straits of Florida in freedom flotillas in 1980 to transport their relatives back to the United States, ably assisted by the United States Coast Guard, which ensured that deaths at sea remained at a minimum, despite approximately 125,000 people making the journey. Activist groups representing boat refugees seeking to enter the United States and Australia continuously challenged interdictions, pushbacks and detention policies through court appeals.

It appears that the South China Sea case provided the most capacity for solidarity. South East Asian states announced their restrictive stances towards boat refugees from late 1978 but appeared comfortable with letting other state and non-state actors take responsibility for boat refugees in the area. In a remarkable show of solidarity, mostly western states pledged in July 1979 to resettle over 600,000 boat refugees and Indo-Chinese humanitarian migrants – a promise that led South East Asian states to agree to host boat refugees once more. This pledge derived from a combination of factors, including US guilt at the fallout from the Vietnam War, Cold War dynamics, and a desire among many liberal democratic societies to provide a humanitarian response to the visible drama taking place on the South China Sea. Very few refugees had sought

114. Philip Ruddock, ‘Host to Suffer as Australia Justifies Its Refugee Program; The Duel Refugees and Nauru Commentary’, *Australian Financial Review*, 6 October 2001.

115. See Azadeh Dastyari, ‘Refugees on Guantanamo Bay: A Blue Print for Australia’s “Pacific Solution”?’’, *Australian Quarterly*, 79, No. 1 (2007), 4–8.

116. Janet Phillips and Harriet Spinks, ‘Boat Arrivals in Australia since 1976’, Background Note prepared for the Australian Parliamentary Library (Canberra, ACT, 2009), 17.

117. See Glynn, *Asylum Policy*, 127.

asylum in liberal democratic states since the 1956 Hungarian Revolution, so societies and governments enthusiastically responded to pleas by the UN and the United States to help those fleeing communist Vietnam. The United States somewhat reluctantly provided solidarity with Cubans in 1980, again citing its fight against communism and the boat refugees' quest for freedom to support such a stance. Nevertheless, public and political disquiet with the arrival of so many Cubans ensured that such a position was finite, as did changing international circumstances. After the Cold War ended and Cubans tried to reach the United States again in 1994, they met with a much more hostile response because fleeing communism did not carry the same political kudos as before.

When the United States and Australia adopted restrictive stances in the 1990s and early 2000s, it did not lead to the same counterflow of solidarity. Unlike South East Asian countries, the United States and Australia did not happily derogate responsibility for boat refugees to other state and non-state actors; they maintained deliberate control over boat refugees. This provided less scope to practise solidarity with the boat refugees affected by such restrictive policies. Non-state actors, particularly NGOs trying to represent boat refugees, tried to step into this vacuum. Yet, states' interception of boat refugees on the high seas and their subsequent repatriation or transportation to offshore detention where national law did not apply meant that few avenues existed to challenge such practices. Using offshore detention meant that boat refugees could be detained indefinitely as there was limited recourse to national courts, and their remoteness ensured limited monitoring by state bodies or non-state actors.¹¹⁸ It also served to deter more people from coming. Perhaps most importantly for governments, intercepting boat refugees at sea served to reassure voters who were worried about immigration threatening territorial sovereignty that they could control their borders against such a perceived and visible threat.

Opposition towards immigration more generally grew throughout the 1990s as claims by certain political actors that governments had lost control of the issue began to gain more leverage.¹¹⁹ The appearance of boat refugees often intensified such beliefs because of claims of being invaded.¹²⁰ The media's extensive coverage of the appearance of boat refugees reinforced this 'border spectacle'.¹²¹ To counter the impression that the US and Australian governments had lost control of immigration, they initiated a number of harsh and punitive policies towards boat refugees, symbolized most prominently by placing them indefinitely in offshore detention. Ironically, by intercepting, pushing back and detaining boat refugees on the high seas, political leaders claimed to have

118. Caroline Fleay, 'The Limitations of Monitoring Immigration Detention in Australia', *Australian Journal of Human Rights*, 21, No. 1 (2015), 21.

119. See, for instance, Charles Jaret, 'Troubled by Newcomers: Anti-Immigrant Attitudes and Action during Two Eras of Mass Immigration to the United States', *Journal of American Ethnic History*, 18, No. 3 (1999), 13; Hans-Georg Betz, 'The New Politics of Resentment: Radical Right-Wing Populist Parties in Western Europe', *Comparative Politics*, 25, No. 4 (1993), 413–27.

120. Gammeltoft-Hansen, 'The Perfect Storm', 60.

121. Nicholas De Genova, 'Spectacles of Migrant "Illegality": The Scene of Exclusion, the Obscene of Inclusion', *Ethnic and Racial Studies*, 36, No. 7 (2013), 1180–98.

rescued their country's territorial sovereignty. Yet they had to bypass their national courts and international responsibilities to do so.

Phil Orchard argues that refugee crises are 'events that punctuate the status quo and cause states to question preexisting normative understandings', providing 'a window of opportunity for norm entrepreneurs at both the international and domestic levels to argue in favour of alternative normative understandings'.¹²² Such instances can lead to more humanitarian or more restrictive changes, depending on the context. In 1979, the empathetic media coverage of the plight facing Vietnamese boat refugees in many countries led to public calls for a more generous official response at a time when 'the reception of boat people built upon and fed the promotion of human rights and Western humanitarianism as a bulwark against the tyranny of communism'.¹²³ After having made human rights central to his foreign policy, President Carter ultimately provided Cuban boat refugees with sanctuary in 1980, albeit hesitantly. The end of the Cold War heralded an era of reduced state concern for refugees, which coincided with growing popular anxiety over immigration. The United States and Australia consequently used the 1994 *balseiro* crisis and the 2001 *Tampa* stand-off to implement more restrictive approaches to boat refugees approaching their shores. Civil society tried to mobilize solidarity to challenge perceived injustices, but states' extraterritorial methods made it difficult to contest such actions.

Conclusion

This article has concentrated principally on what occurred outside of Europe before 2001. Nevertheless, the above findings can also be of relevance for discussions about boat refugees in Europe more recently. European states have at times tried to externalize their response to boat refugees, but they have often met with more challenges than their American and Australian counterparts. This is partly because they have had to deal with a more varied composition of boat refugees, who have sometimes come directly and sometimes indirectly after transiting through North Africa or the Middle East. They have hailed from a variety of origins, including the Balkans, the Horn of Africa, North Africa, West Africa, the Middle East and Central Asia, since the 1990s. When one avenue has been sometimes closed off, another more dangerous route has often opened up. Furthermore, European states do not always appear to have the same flexibility to act with impunity on the high seas, with civil society repeatedly challenging such actions in national and supranational courts. The European Court of Human Rights, for instance, stipulated that Italian pushbacks of Somali and Eritrean boat refugees on the Mediterranean to Libya in May 2009 were illegal. Despite taking place on the high seas, the court ruled that Italy had certain obligations to the European Convention on Human Rights because the vessel responsible was flying an Italian flag.¹²⁴ That led

122. Phil Orchard, *A Right to Flee: Refugees, States, and the Construction of International Cooperation* (Cambridge, 2014), 18.

123. Taylor et al., 'Introduction', 38.

124. *Hirsi Jamaa and Others v. Italy*, Application No. 27765/09, European Court of Human Rights, 23 February 2012.


Italy and the European Union to invest further in the Libyan Coast Guard so as to rescind its responsibility – a scenario that has sometimes led to the creation of what Itamar Mann terms maritime legal black holes, where apparently no state has any responsibility for what occurs to boat refugees in distress.¹²⁵ Several European states – most notably Italy with Albania and the United Kingdom with Rwanda – have tried to transport refugees to a third country for processing, à la Australian Pacific Solution, but these efforts have so far failed.

Near the beginning of this article, I highlighted how unwanted immigration has apparently posed a huge challenge to the domestic sovereignty of liberal democratic states since 1945. Yet no major gaps appeared between states' desire to restrict boat refugees and their ability to do so in the three case studies covered. This may be understandable for South East Asian states in the late 1970s, whose governments did not encounter strong domestic judiciaries and had not signed up to such international instruments as the Refugee Convention. Yet this article has demonstrated that it also proved to be the case for the United States and Australia. By responding to boat refugees beyond their borders on the high seas, the United States and Australia did not face the same constraints and responsibilities that they faced within their borders. Indeed, their power to restrict boat refugees appeared to increase over time rather than decrease as they devised new ways to ensure boat refugees could not enter their territorial waters by further securitizing and externalizing their borders. Restricting boat refugees on the high seas served to bolster the governments' claims that they could control unwanted immigration and, in doing so, rescue their territorial sovereignty. Cheating national and international law to allegedly preserve territorial sovereignty seems illogical, yet these governments believed such actions served them well in these dramatic and very visible border spectacles.

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125. See Itamar Mann, 'Maritime Legal Black Holes: Migration and Rightlessness in International Law', *European Journal of International Law*, 29, No. 2 (2018), 357. This was most tragically demonstrated in the 'left-to-die boat' of 2011, when 63 of the 72 on board died after a vessel containing refugees fleeing Libya was left to drift in the Mediterranean Sea for 14 days, despite sending out distress signals in the area and several encounters with military aircrafts and a warship during the NATO-led military intervention in Libya. See Charles Heller, Lorenzo Pezzani and Situ Studio, *Forensic Oceanography: Report on the 'Left-To-Die Boat'* (London, 2012).