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Another Brick in the Wall? Neo-*Refoulement* and the Externalization of Asylum by Australia and Europe[1]

How can the refugee be made deportable again? – Hannah Arendt

WRITING IN THE CONTEXT OF WIDESPREAD STATELESSNESS AFTER THE Second World War, Hannah Arendt lamented the unenforceability of 'human rights' in comparison to the rights of citizens protected by their governments: 'The very phrase human rights became for all concerned – victims, persecutors, and onlookers alike – the evidence of hopeless idealism or fumbling feeble-minded hypocrisy'.[2] She elaborates further, 'Not the loss of specific rights, then, but the loss of a community willing and able to guarantee any rights whatsoever, has been the calamity that has befallen ever-increasing numbers of people. . . .'[3] In the post-9/11 context of fear and threat, Arendt's work remains relevant, as foreigners of all kinds are scrutinized in new ways through biopolitical regimes that aim to mark, trace, and exclude where deemed necessary. We argue here that the loss of access to sovereign territory that allows asylum seekers to mobilize rights is the most pressing problem and outcome of the externalization of asylum. The problem of externalization at once elides and divides foreign migrants and domestic systems of legal protection, a process that pivots on strategic geographical tactics.

[2] Hannah Arendt, *The Origins of Totalitarianism*, Cleveland and New York, Meridian Books, 1958, p. 269.

[3] Arendt, cited in Matthew Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees*, Cambridge, Cambridge University Press, 2004, p. 1. Cf. Jennifer Hyndman, *Managing Displacement: Refugees and the Politics of Humanitarianism*, Minneapolis, Minnesota University Press, 2000.

'Neo-*refoulement*', we contend, refers to a geographically based strategy of preventing the possibility of asylum through a new form of forced return different from non-*refoulement*, the strictly legal term that prohibits a signatory state from forcibly repatriating a refugee against its commitment codified in Article 33 of the 1951 Refugee Convention. 'The principle is now recognized as a component of customary international law and is therefore considered binding on all states, including those that are not signatories to the 1951 Refugee Convention.'[4] Yet, it is not the actions of non-signatories that concern us here. Specifically, we address strategies employed by the Australian government and European Union whereby legal and extra-legal geographies of exclusion lead to neo-*refoulement*, that is, the return of asylum seekers and other migrants to transit countries or regions of origin *before* they reach the sovereign territory in which they could make a claim. While externalization is not particularly new, this deliberate respatialization of asylum deserves more attention, given its increasingly commonplace use.

Asylum is increasingly characterized as a security issue, rather than one of protection for refugees ensconced in international law. This continuous act of defining asylum in security terms has a performative element, in the Foucauldian sense: '*it produces the effect that it names. Its categories, codes, and conventions shape the practices of those who draw upon it, actively constituting its object . . . in such a way that this structure is as much a *repertoire* as it is an archive.'[5] A parallel development in international politics is the shift from liberal norms of legal frameworks to more politicized practices of sovereign exceptionalism.[6] As Judith Butler writes of Guantánamo Bay, ' "Indefinite detention" is an illegitimate exercise of power, but it is, significantly, part of a broader tactic to neutralize the rule of law in the name of security. . . . The fact of extra-legal power is not new, but the mechanism by which it achieves its goals under present circumstances is singular.'[7] She argues that the suspension of the rule of law allows for the convergence of governmentality and sovereignty where

[4] UNHCR, *State of the World's Refugees, 2006*, Oxford, Oxford University Press, 2006.

[5] Derek Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq*, Malden, Blackwell, 2004.

[6] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, Stanford, Stanford University Press, 1998.

[7] Judith Butler, *Precarious Life*, New York, Verso, 2004, pp. 67 and 92.

sovereignty is exercised in the act of suspension, and also in the self-allocation of the legal prerogative.

In outlining Agamben's and Foucault's distinct conceptions of power, Derek Gregory points out that:

One crucial difference between the two projects is that Foucault focused on strategies through which the normal order contains and confines 'the outside' (the sick, the mad, the criminal) whereas Agamben focuses on strategies through which 'the outside' is included 'by the suspension of the juridical order's validity – by letting the juridical order withdraw from the exception and abandon it'.[8]

If asylum seekers represent 'the outside' from a state's perspective, we contend that the normal order on the one hand geographically contains and confines the asylum seeker, and on the other hand keeps them in a space outside juridical law, despite the law's existence, by excluding them from sovereign territory where they could make a legal refugee claim.

The shift from legal discourses of rights to more geopolitical projects based on security is widespread. In one example, Hyndman traces a shift in emphasis from human rights to human security. She shows how the concept of human security, as ensconced in UN doctrine through 'Responsibility to Protect', represents the politicization of human rights, shifting the protection of civilians in a conflict zone from the domain of international law to that of politics as decided by the United Nations Security Council.[9] Theoretically, human security guarantees the protection of civilian life, not just states. In practice, human security renders human rights conditional, even while they are often unenforceable as per Arendt's observations.

In this article, we make a different, but related, argument: that the externalization of asylum represents a shift from the legal domain where international instruments to protect refugees are still very much intact to the political domain where migrant flows are managed, preferably in regions of origin. Like human security, the externalization of asylum becomes a bundle of political, securitized

[8] Derek Gregory, 'Vanishing Points: Law, Violence, and Exception in the Global War Prison', in D. Gregory and A. Pred (eds), *Violent Geographies*, New York, Routledge, 2007, p. 207.

[9] Jennifer Hyndman, 'Conflict, Citizenship, and Human Security: Geographies of Protection', in D. Cowen and E. Gilbert (eds), *War, Citizenship, Territory*, New York and London, Routledge, 2007, pp. 241–59.

practices that reconstitute asylum as part of state-centric interna-
tional relations discourse, not legal discourse. The protection of
refugees is invoked not by law but through ad hoc decisions of
governments made through offshore processing centres, bilateral
readmission agreements, and other tools of the transnational state
that aim to prevent asylum seekers from ever landing on the territory
of a signatory to the 1951 Refugee Convention or the 1967
Protocol.[10]

This article illustrates how Derek Gregory's 'architecture of
enmity', masquerading as protection-on-paper, has been con-
structed, policy by policy, in Australia and Europe.[11] Our analysis is by
no means exhaustive in its genealogy and geography, but demon-
strates that the respatialization of asylum is a sustained and well-
funded project in the name of 'security'. The securitization of asylum
continues as fiercely between the lines of policy as among them.

TRACING EXTERNALIZATION

In 1993, the United Nations High Commissioner for Refugees,
Madame Sadako Ogata, introduced the concept of 'preventive pro-
tection', thus marking a distinctive shift in the orientation of refugee
policy that occurred in the early 1990s.[12] Preventive protection
belongs to a language that emphasizes the 'right to remain' in one's
home country over the former dominant discourse of the 'right to
leave'. The 'right to remain' was endorsed by Ogata:

Today displacement is as much a problem within borders as across
them. . . . the political and strategic value of granting asylum diminishes.
. . . The cost of processing asylum applications has skyrocketed, while public
acceptance of refugees has plummeted. . . . At the heart of . . . a preventive
and solution-oriented strategy must be the clear recognition of the right of
people to remain in safety in their homes. . . . 'the right to remain' . . . the
basic right of the individual not to be forced into exile. . . . I am convinced
that preventive activities can help to contain the dimensions of human
catastrophe by creating time and space for the political process.

[10] Alison Mountz, 'Human Smuggling and the Canadian State', *Canadian Foreign Policy*, 13: 1 (2006), pp. 59–80.
[11] Gregory, *The Colonial Present*.
[12] Hyndman, *Managing Displacement*.

In the 1990s, preventive protection and the containment of human displacement proved to be a very dangerous policy, especially in Srebrenica in July 1995, when Dutch peacekeepers were unable to keep Serb militias at bay. Between 7,000 and 8,000 Muslim boys and men were murdered in this so-called 'safe city'.[13] Preventive protection also shifted protection from legal ground, namely the Refugee Convention, to political ground, whereby the UN Security Council named six safe cities inside Bosnia-Herzegovina, authorized peacekeepers to protect them, and in so doing ethnically cleansed the Bosnian countryside of endangered Muslim civilians. If these civilians had been allowed to 'leak' into nearby signatory states as refugees, the slaughter could have been averted. This anecdote illustrates that 'protection in the region' and the exclusion of asylum seekers from the territory of signatory states in the global North is not new. Furthermore, 'preventive protection' has returned under another guise: preventive protection of home through the neo-*refoulement* of asylum seekers to transit countries or regions of origin, from where they can 'properly' apply for asylum consideration.

This architecture of enmity, framed as protection, has been constructed policy by policy. The respatialization of asylum is a deliberate political project stoked by fear and buttressed by incredible funds and 'aid' in the name of 'security'. The securitization of asylum continues, for which we reference a shift from a paradigm of refugee protection to prioritizing the protection of national security interests. The remainder of this article contextualizes links between asylum and security, highlighting the political uses of fear in relation to migration. We then trace the 'architecture of enmity' that both Australia and the EU have erected through policies that include readmission agreements (in return for aid), safe third-country agreements, aggressive visa regimes, detention and interdiction practices, among other strategies. By mapping systematic geographical projects that make access to asylum all but impossible for those travelling overland and across seas, we argue that this bundle of policies and spatial practices constitutes neo-*refoulement*.

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[13] Jennifer Hyndman, 'Preventive, Palliative, or Punitive? Safe Spaces in Bosnia-Herzegovina, Somalia, and Sri Lanka', *Journal of Refugee Studies*, 16: 2 (2003), pp. 167–85.

SECURITY, FEAR AND THE UNINVITED MIGRANT

Ian McEwan's novel, *Saturday*, subtly represents the production of fear generated by attacks on the nation in a post-9/11 world. Pre-emptive security measures to minimize risk are proffered as the way forward in an unstable world: 'Sleepless in the early hours, you make a nest out of your own fears – there must have been survival advantage in dreaming up bad outcomes and scheming to avoid them. This trick of dark imagining is one legacy of natural selection in a dangerous world.'[14]

The threat of migrant invasion is underwritten by securitization, a governmentality based on mistrust and fear of the uninvited other.[15] The mobilization of fear to securitize asylum serves a politically powerful resource for states that need legitimate grounds for extraordinary measures, such as exclusion from their territories by potentially legitimate legal subjects, namely asylum seekers.[16] Yet 'Government practices of border control do not simply defend the "inside" from the threats "outside", but continually produce our sense of the insiders and outsiders in the global political economy'.[17] Societal fear is actively fuelled by the reiteration of threats and creation of discursive distance between 'us' and 'them', producing a crisis in search of a response. Such crises create an opening for states to advance enforcement agendas.[18]

In their responses to human smuggling by sea, for example, Alison Mountz shows how states operate transnationally, working far beyond traditional territorial borders through airline carrier sanctions, offshore screening of passengers by airline liaison officers and visa restrictions to exclude asylum seekers and other migrants.[19] Comple-

[14] Ian McEwan, *Saturday*, London, Cape, 2005, p. 39.

[15] Didier Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease', *Alternatives*, 27 (2002), pp. 63–92.

[16] Jennifer Hyndman, 'The Securitisation of Fear in Post-Tsunami Sri Lanka', *Annals of the Association of American Geographers*, 97: 2 (2007), pp. 361–72.

[17] Louise Amoore and Marieke de Goede, 'Governance, Risk and Dataveillance in the War on Terror', *Crime, Law and Social Change*, 43 (2005), pp. 149–73, p. 168.

[18] Alison Mountz, *Transnational States of Migration: Human Smuggling and the Borders of Sovereignty*, forthcoming.

[19] Alison Mountz, 'Embodied Geographies of the Nation-State: An Ethnography of Canada's Response to Human Smuggling', Department of Geography, University of British Columbia, 2003; and Mountz, 'Human Smuggling and the Canadian State'.

menting this analysis, William Walters also argues that security measures transcend the political borders of any single nation-state, and he introduces the concept of 'domopolitics' to suggest the central place of the home (*domus*) in geopolitical discourse: 'Domopolitics implies a reconfiguring of the relations between citizenship, state, and territory. At its heart is a fateful conjunction of home, land and security. It rationalizes a series of security measures in the name of a particular conception of home. . . . The home as hearth . . . as *our* place, where we belong naturally . . . home as a place we must protect.'[20]

While any *natural* conception of home is at risk of being essentialist and becoming a reactionary Heideggerian politics of belonging, metaphors of family and homeland conjure powerful nationalistic images during times of conflict or perceived danger.[21] And yet the nationalistic production of home requires a constitutive outside, something against which home is defined. Migrants occupy these spheres 'outside' national belonging.

Matthew Sparke argues that the securitization of nationalism, evident in the discursive distance actively created between 'us' and 'them', is consistent with a state's economic goals related to migration: 'By securitised nationalism I am referring to the cultural-political forces that lead to the imagining, surveilling and policing of the nation-state in especially exclusionary but economically discerning ways.'[22] Didier Bigo observes that the 'expansion of what security is taken to include effectively results in a convergence between the meaning of international and internal security.'[23]

Fear and insecurity are produced at multiple locations and across space, from the bodies of asylum seekers who represent insecurity in the imagination of states in the global North to transnational networks of biopolitical surveillance at borders but also within. Fear does deeply political work: it generates feelings of insecurity based on what are seen to be credible threats, and then, as Ian McEwan hints in the excerpt from *Saturday*, creates a crisis in search of a response. Left

[20] William Walters, 'Secure Borders, Safe Haven, Domopolitics', *Citizenship Studies*, 8: 3 (2004), pp. 237–60, p. 241.

[21] Deborah Cowen and Emily Gilbert, 'Citizenship in the "Homeland": Families at War', in Cowan and Gilbert, *War, Citizenship, Territory*, pp. 261–8.

[22] Matthew Sparke, 'The Neoliberal Nexus', *Political Geography*, 25: 2 (2006), pp. 151–80, p. 153.

[23] Bigo, 'Security and Immigration', p. 63.

unchallenged, fear and the threats of invasion upon which it is predicated represent a deeply geopolitical problem that eschews legal approaches to asylum and migration in general, preferring a politicized, comprehensive and transnational approach of invisible policy walls. We turn now to detail the construction of these walls, connecting the dots from brick to brick across shores and international borders.

SHEDDING SHORELINE AND BUILDING WALLS:
AUSTRALIA AND THE EU

Australia

Since the 1990s, Australia has crafted aggressive detention, interdiction and deportation regimes to deter asylum seekers from landing on mainland sovereign territory. It is important, therefore, to go to the source; to understand what exclusion looks like within (and beyond) Australia, since it has been a leader among a small 'community' of nation-states with managed refugee resettlement programmes. This is a dark story, many parts of which have been documented by others but bear repeating.[24] Australia prides itself on some of the most controlled cross-border flows and has used isolation and racialized dehumanization to exclude asylum seekers in particular from accessing asylum, sovereign territory and Australian society.

In 1993 the Liberal Party ratified and in 1994 implemented a policy of mandatory detention of anyone who arrives on Australian shores without a visa. 'Non-citizens in Australia without a valid visa are unlawful and must, by law, be detained.'[25] A person who arrives in Australia without a visa will immediately be imprisoned or expelled.

[24] See for example Graeme Hugo, 'From Compassion to Compliance? Trends in Refugee and Humanitarian Migration in Australia', *Geoforum*, 55 (2001), pp. 27–37; and Suvendrini Perera, 'What is a Camp . . . ?', *Borderlands e-journal*, 1: 1 (2002), pp. 1–10, available at http://www.borderlandsejournal.adelaide.edu.au/vol1no1_2002/perera_camp.html.

[25] Australian Government Department of Immigration and Citizenship (DIAC), *Managing the Border: Immigration Compliance, 2004–2005 Edition*, 2006, p. 5, available at http://www.immi.gov.au/media/publications/compliance/managing-the-border/index.htm.

This includes those who claim asylum, until their cases are resolved. One immigration official interviewed in 2006 characterized this as Australia's 'right to sovereign assertion'.[26]

In the late 1990s, arrivals by sea increased, with smugglers operating through South-East Asia, and played on racialized images of invasion. The highest number of boat arrivals came in 2000 with some 4,000 persons. The largest countries of origin were Afghanistan, Iraq, Iran, with smaller numbers from Sri Lanka, Palestine, Syria, China and Vietnam. The largest number of refusals that year were to claims from Tonga, Russia, Indonesia and China.

Boats of migrants evoke xenophobic, racialized, well-rehearsed fears and moral panics about the 'other', linked to a desire to control borders and protect one's territory.[27] They are often treated distinctly from other modes of arrival. Along with the arrival of boats, Australia saw the rise of Pauline Hansen's One Nation Party and the corresponding development of a comprehensive detention regime.

Asylum seekers who arrived without visas were placed in remote detention centres along the west coast and in the outback in sites such as Woomera and Baxter. There, detainees were provided precious little information about Australia, their cases, possibilities for asylum or legal representation. Furthermore, information about them was kept hidden from the public, as were they, quite literally. Curtin Detention Centre, for example, is a nine-hour trip from Sydney. One flies to Perth, then Broom, and then travels more than 200 km by road to the air base in Derby.[28] As in other countries, therefore, detainees were strategically removed from access to advocates and information, translators and legal counsel. This removal continues today, wherein as punishment, detainees are flown to more remote detention centres away from contact with friends and advocates.

By not releasing the identities of detainees for several years, the Australian government conflated persons, histories, countries of origin and legal status. Through such homogenization emerged the figure of the bogus, criminalized, racialized asylum seeker. Australia has a long history of concealment by distinct kinds of imprisonment,

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[26] Interview, Canberra, April 2006.

[27] Mountz, *Transnational States of Migration*, forthcoming.

[28] Peter Mares, *Borderline*, Sydney, University of New South Wales Press, 2002.

and particular contemporary discourses offer narratives of migrants as security threat.[29]

Though human smugglers often facilitate the migration of populations characterized as 'mixed flows' (i.e. out of place for both political and economic reasons), these applicants tend to be scripted as economic migrants and therefore 'bogus refugees'. In the conflation of public discourse about terrorists, refugees, economic migrants, human smuggling and others on the move, people are stripped of their identities as individuals and re-subjectified as groups.[30] Articulated in the terms of human migration, this is the discursive space between nationalist 'us' and foreign 'them' identified by Sparke.[31] These images racialize and criminalize migrants in relation to the nation-state and saturate the media. The explanatory narratives that these are not 'genuine' convention refugees enable their remote detention and removal from the support of translators, refugee advocates, refugee lawyers and legal processes usually housed in urban centres. Multiple processes mark and differentiate, simultaneously grouping, homogenizing, racializing, medicalizing, criminalizing and isolating.

The dispersal of detention takes different forms in different countries.[32] In the United States, for example, secrecy about detainees extends to the places where they are detained. They are detained quietly, in county and state jails.[33] The most obvious example is Guantánamo Bay, where national and international laws and human rights agreements are undermined and the Patriot Act enacted, whereby citizens and non-citizens are stripped of civil rights, on limited evidence, in the name of protection from ambiguous others elsewhere. In Australia, a very strategic geography of isolation likewise coordinates extraterritorial and internal detention practices.[34]

[29] Alyson Bashford and Caroline Strange, 'Asylum-Seekers and National Histories of Detention', *Australian Journal of Politics and History*, 48: 4 (2002), pp. 509–27.

[30] Alison Mountz, 'Embodying the Nation-State: Canada's Response to Human Smuggling', *Political Geography*, 23: 3 (2004), pp. 323–45.

[31] Sparke, 'The Neoliberal Nexus'.

[32] Alice Bloch and Lise Schuster, 'At the Extremes of Exclusion: Deportation, Detention and Dispersal', *Ethnic and Racial Studies*, 28: 3 (2005), pp. 491–512.

[33] Michael Welch, *Detained: Immigration Laws and the Expanding I.N.S. Jail Complex*, Philadelphia, Temple University Press, 2002.

[34] Butler, *Precarious Life*.

Dispersed detentions correspond with human smuggling crises by sea. Geopolitical relations, meanwhile, structure the geography of interception and detention as well as asylum outcomes, wherein nationalist discourses and material inequalities between states engender exclusion. Those detained in remote locales between states do not count, are banned from becoming refugees. They do not have individual identities but pose, rather, a collective threat, which explains why they are there, safely at a distance from here.[35] These are among the acts committed against people in these locations where violence passes over into law.[36] By being inhibited from reaching sovereign territory, people on the move are forbidden from ever joining the juridical order. In Agambenian terms, they are included through exclusion.

An important moment in recent Australian history transpired in August 2001 when the *Tampa*, a Norwegian merchant vessel, rescued 433 asylum seekers from an Indonesian ship. After leaving for Christmas Island, the next closest port, the captain was warned by Australia that he would be charged with people-smuggling. Not allowed to land on mainland or territories, the captain sent distress signals for medical assistance that were ignored for days. He tried to defy orders and approach the shore, but was sent back out and told he would only be assisted if the ship remained beyond the 12-mile zone delineating territorial waters. The then Prime Minster John Howard had drawn his 'line in the sand', and the boat was secured by commandos. Howard's response was probably influenced by a re-election campaign that suddenly turned around on a platform based on a xenophobic 'hard line' on immigration and border enforcement.

This moment signalled new realms of cruelty in the detention regime in Australia with the introduction of what was called the Pacific Solution. Australia refused to land migrants arriving by sea. Instead, detention and processing was subcontracted out to small, poor islands north of Australia, including Manus, Papua New Guinea and Nauru.[37]

Parliament then met in 2001 to declare retroactively several hundred small islands no longer part of Australia for the purposes of

[35] Mountz 'Embodying the Nation-State'.

[36] Agamben, *Homo Sacer*.

[37] Tara Magner, 'A Less than "Pacific" Solution for Asylum Seekers in Australia', *International Journal of Refugee Law*, 16: 1 (2004), pp. 53–90.

migration law. This was called 'the power of excision' and signalled the implementation of a new two-tier strategy. Those intercepted by sea would be brought to Christmas Island, Papua New Guinea, Manus or Nauru, where they could not make a claim in Australia. These detainees were – for the most part – denied lawyers and any access to Australian process.[38] Even if they were later moved to detention on the mainland or, as was common, flown there for medical attention, they carried their excision with them, the border moving with them like a bubble around their bodies.[39]

The Australian state thus practises an extensive geography of exclusion through interdiction and detention. It uses the Pacific Solution to deter boats carrying migrants from reaching sovereign territory, moving them instead to other island territories that are either 'safe' independent states (bankrupt Nauru, Papua New Guinea) or territories, essentially outsourcing asylum responsibilities. Offshore processing accounts for most of the AUS$1.2 billion refugee budget increase in 2002–3: $403 million of the increase was allocated to processing in third countries in the Pacific (including Nauru and Manus Island) and $455 million was earmarked for processing in other offshore locations (such as Christmas Island and the Cocos Islands) from 2002 and 2006.[40]

Conditions for asylum seekers detained on sovereign territory were poor, but they were worse on Nauru, an impoverished island state facing severe environmental degradation due to the mining of phosphate. There, the International Organization for Migration (IOM) ran the centre, which – like detention centres in Australia – had no monitoring by human rights groups.[41] Water was supplied only once a day for one hour in which people clamoured to wash themselves and their clothes, and to use toilets. There were problems:

[38] Eventually, with intervention by the UNHCR, some were resettled in third countries like New Zealand and Canada. This became a popular strategy for Australian officials to 'save face', successfully refusing to resettle migrants arriving by sea while quietly brokering deals with other countries to resettle, thus continuing the public deferral and refusal of direct arrivals.

[39] Savitri Taylor, 'Sovereign Power at the Border', *Public Law Review*, 16: 1 (2005), pp. 55–77.

[40] Alexander Betts, 'The International Relations of the "New" Extraterritorial Approaches to Refugee Protection: Explaining the Policy Initiatives of the UK Government and UNHCR', *Refuge*, 22: 1 (2004), pp. 58–70, p. 63.

[41] Mares, *Borderline*.

sewage and flies that moved from toilets to food. The water supplied was salt water, so detainees were very sick, not to mention cut off from information or contact with families. Many were depressed and suicidal. As Monawir Al-Saber, one detainee on Nauru said: 'The detention camp is a small jail and the island is a big jail. All of the island, same jail. I want to get freedom.'[42]

This strategy occurred in concert with aggressive interdiction policies rivalled only by those of the United States. Australia patrols, intercepts and tows boats to Indonesia. Indonesia is not a signatory to the Convention, so those in search of asylum have limited means by which to make a claim there. Australia boasts the highest number of agreements, with some 20 bilateral arrangements with source countries like Indonesia and Malaysia to suppress smuggling or accept returnees, often in exchange for informal aid projects. One immigration official said, 'We'll work with everybody and anybody who can help.'[43] Does this outsourcing constitute the buying-out of responsibilities from signatories to the Convention? In fact, Australia has been found in violation of various aspects of the Convention on the Rights of the Child and criticized publicly by the United Nations High Commission on Human Rights (UNHCHR), Human Rights Watch, and Amnesty International, to name but a few.

Meanwhile, the homogenization and demonization of asylum seekers as a political strategy continued to work for Prime Minister Howard. While there have been very few boat arrivals in recent years because of such successful interdiction, 42 West Papuan independence activists who arrived by boat in January 2006 were granted refugee status by April with very clear evidence of ties to the independence movement and signs of persecution. Indonesia was outraged on the announcement of their accepted claims and promptly withdrew its ambassador from Canberra and lamented the destabilization of its relationship. In response, John Howard announced a high-level review of the asylum-seeking process, in the interest of diplomatic relations. But diplomatic relations are not meant to dictate asylum policy. The risk for Australia was that Indonesia would stop doing the work of disruption that had so successfully suppressed boat arrivals over the last few years.

[42] Gordon, *Freeing Ali*.
[43] Interview, Canberra, April 2006.

In recent years, the number of people in detention has decreased significantly, from close to 4,000, to under 1,000.[44] At the same time, however, the federal government has constructed a substantial detention centre on the most isolated part of Christmas Island, where expedited access occurs. This construction project continues in spite of the facts: that fewer than 100 people have arrived by boat in the last three years, that following changes to detention policies in 2005 the numbers of asylum seekers in detention have gone down dramatically and that Australia still maintains thousands of beds in what it calls 'mothballed' detention centres that could be reopened with a month's notice.[45] Some have speculated that the Christmas Island detention centre will be Australia's Guantánamo Bay; others call this 'business as usual'.

This brief overview provides a sense of geographic and punitive excess, part of a broader landscape of externalization. Australia's geographic strategies in the form of interdiction and outsourcing correspond with aggressive exclusions occurring on the margins of other sovereign territories, and, in particular, efforts by member states of the European Union to enforce borders and harmonize returns collaboratively.

Europe

Once the United Nations High Commissioner for Refugees, Sadako Ogata, had introduced 'preventive protection' in 1993, the concept was quickly mobilized in Europe, creating the basis for an incremental and invisible policy wall around the EU. In 1994, the European Commission adopted a Communication on Immigration and Asylum Policies, which began by outlining three main elements: action on migration pressure, control of migration flows and integration.[46] Those fleeing conflict or widespread violence, the policy stated, would see efforts towards the restoration and preservation of peace

[44] DIAC, *Managing the Border*.

[45] Now the largest numbers of detainees are 'visa overstayers'. DIAC has shifted its resources to aggressive round-ups of people found in non-compliance with the conditions of visas.

[46] Commission of the European Communities, 'Communication to the Council and the European Parliament on Immigration and Asylum Policies', COM (94) 23 final, Brussels, 23 February 1994.

and respect for human rights, but this should be supplemented by humanitarian assistance to enable displaced persons to stay in the nearest safe area to their 'home'. Once the UNHCR signalled its endorsement of this initial step to regionalize asylum, European nations capitalized on the opportunity.

Michael Samers explores the broader EU policy developments related to the use of 'soft law' as one tool of geopolitical control in managing 'illegal' migration to Europe.[47] He argues that decision-making and control of migrant management has been re-scaled with strong evidence of 'securitarianism' in both cases. Building on Aristide Zolberg's concept of 'remote control', Samers contends that exclusion and control of potential entrants at a distance aims to prevent migrants from ever landing in Europe. These tactics, however, correspond to a rise in smuggling and trafficking, also originating beyond European borders.

A sustained, coordinated, and comprehensive set of policies to externalize asylum have likewise been introduced in the EU context.[48] In 1998, a strategy paper on immigration and asylum was issued by the Austrian government during its occupation of the EU presidency. The paper linked the reduction of migratory pressures to a 'coordinated policy which extends far beyond the narrow field of policy on aliens, asylum, immigration and border controls and also covers international relations and development aid', intervention in conflict regions and the raising of human rights standards.[49] As evidence of the shift from legal to more politicized ground, the paper stated that the Refugee Convention had become 'less applicable to the problem situations actually existing' and that solutions required not only asylum law but also cooperative transnational and comprehensive approaches.[50] New protection for refugees involved 'reform of the asylum application procedure and transition from protection concepts based only on the rule of law to include *politically oriented*

[47] Michael Samers, 'An Emerging Geopolitics of "Illegal" Immigration in the European Union', *European Journal of Migration and Law*, 6 (2004), pp. 27–45.

[48] Lise Schuster, 'The Realities of a New Asylum Paradigm', Centre on Migration, Policy and Society Working Paper 20, 2005, available at http://www.compas.ox.ac.uk/publications/Working%20papers/Liza%20Schuster%20wp0520.pdf.

[49] Council of the European Union, 'Note from Presidency to K4 Committee: Strategy Paper on Immigration and Asylum Policy', CK4 27, ASIM 170, 9809/98 (OR.d) Brussels, 1 July 1998, paragraph 41.

[50] Ibid., paragraphs 27 and 37.

concepts'.[51] While the most regressive elements of the paper were not incorporated in the action plan (on the implementation of the Treaty of Amsterdam, ratified by the Council later that year),[52] the intention of doing away with legal and normative constraints in asylum and immigration policies and ensuring state autonomy in this field has remained a key factor underlying developments on the external dimension of asylum policies since.

We contend that precisely this shift from legal to political objectives constitutes the mobilization of fear that feeds agendas to securitize asylum. In an attempt to deal with 'the problem of mass influxes of asylum seekers and illegal immigrants', the High-Level Working Group (HLWG) on Migration and Asylum was established with the task of preparing comprehensive action plans for the most important countries of origin and transit of asylum seekers and migrants.[53] The task of the HLWG until 2002 was to design EU action plans and develop practical and operational proposals to increase cooperation with countries of origin and transit. These enhanced the capacity of the EU to manage migration flows, involving a joint analysis of the causes of an influx, including the human rights situation in the subject country, an assessment of the effectiveness of aid and development strategies in dealing with economic migration, identification of needs and ways to assist in the reception of displaced persons in the region and establish and improve reception and protection in the region, and information on readmission agreements.

The HLWG also recommended the creation of a special budget heading for external actions in the field of migration and asylum in order to reinforce the role of the Commission in the implementation process. This was to take the shape of budget line B7-667, set up in 2001 for a period of three years to provide support for migration management and asylum systems, voluntary return to countries of origin, countries of origin's ability to cope with their readmission obligations to the European Union and its member states, and

[51] Ibid., paragraph 41, emphasis added.

[52] The 1997 Treaty of Amsterdam created the legal framework for a common European asylum system; for details, see UNHCR, *State of the World's Refugees, 2006*, p. 34. The Hague Programme of 2004 was a precursor to this; it set out a plan to develop 'freedom, security and justice' for the EU but one that underscores the right to seek asylum; see ibid., p. 35.

[53] General Affairs Council, press release, 6/12/1998 (Press:431 Nr: 13677/98), 5–6 December 1998.

prevention of trafficking and illegal immigration. The budget for this line was set for €10 million in 2001, €12.5 million for 2002 and €20 million for 2003. Responding to what they saw as constraints on government action imposed by international and regional human rights law (in particular Article 3 of the European Convention of Human Rights) – including judicial oversight of decisions on return and public scrutiny through parliaments or civil society – member states attempted to farm out their responsibilities to other states, using a narrow repertoire of control measures and instruments to tackle irregular migration flows.[54]

In 1999, the Tampere Conclusions outlined a vision of an open and secure European Union fully committed to the obligations of the Refugee Convention and able to respond to humanitarian needs.[55] When European Union heads of state met in Seville on 21–2 June 2002, however, their objective was to provide momentum for readmission agreements with transit countries. To achieve this purpose, all necessary technical and financial assistance was to be provided. Readmission and the fight against illegal migration were key priorities in Seville: every country should include a clause on the joint management of migration flows and on compulsory readmission in the event of illegal immigration. Readmission would include that of third countries' own nationals 'and, under the same conditions, that of other countries' nationals who can be shown to have passed through the country in question'.[56]

The final text of the Seville Conclusions could be considered an improvement to the agenda that Spain and the UK had reportedly intended to pursue in that meeting, namely the introduction of negative conditionality in EU relations with third countries. Under this agenda, countries that were not cooperating with the EU on readmission were to be penalized through cuts in development assistance.[57] The Cotonou Partnership Agreement overlaps with these conclusions; it commits all parties to accept the return and

[54] Christine Boswell, 'The External Dimension of EU Immigration and Asylum Policy', *International Affairs*, 79: 3 (2003), pp. 619–38.

[55] European Council, Presidency Conclusions, 15 and 16 October 1999.

[56] Council of the European Union, Presidency Conclusions, Seville, 21 and 22 June 2002.

[57] See for example press conference between Prime Minister Tony Blair and Prime Minister José Maria Aznar, 19 June 2002, available at http://www.number10.gov.uk/output/Page1718.asp.

readmission of any of their nationals who are illegally present on the territory of a state party, and refers to primarily the EU's relationship with African, Caribbean and Pacific (ACP) states. With €8.5 billion as a bargaining chip, the EU would not sign any association or cooperation agreements unless ACP countries agreed to these standard clauses.[58]

In 2003, intense debate emerged over Britain's proposal to adopt extraterritorial approaches to asylum-processing and refugee protection. Offshore 'transit processing centres' in places like Albania, Croatia and the Ukraine were vetted, with strong opposition from some quarters of the EU membership and from humanitarian organizations. Alexander Betts defines extraterritorial protection as 'the raft of refugee policies initiated by the OECD countries aimed at de-territorializing the provision of protection to refugees in such a way that temporary protection and the processing of asylum claims take place outside of the given nation-state'.[59] Such protection takes two geographical forms: first, in third-country processing centres, and second, in regional protection areas, normally close to countries of refugees' origin. In both cases, exclusion from the sovereign space of Britain was paramount. Betts traces how a political space for special agreements on the secondary movement of refugees and asylum seekers was created by the UN High Commissioner for Refugees, Ruud Lubbers, through the 'Convention Plus' initiative in 2002.

One example that capitalized on this political space is captured in the story of a German-registered ship, the *Cap Anamur*, which rescued 37 people in the Mediterranean in June 2004. The incident involved Malta, Italy and Germany – all EU member states – but Italy and Germany believed that it was Malta's duty to process any asylum claims made because it was the country of first arrival (the ship had crossed its territorial waters). Malta, however, refused, and a standoff ensued for several days. Finally, passengers were allowed ashore in Sicily on humanitarian grounds. While not as dramatic an example as the *Tampa* in Australia, the reluctance of countries even to accept asylum claims is clear in both cases. As the UNHCR notes, 'Interception measures that effectively deny refugees access to international

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[58] Ben Hayes and T. Bunyan, 'Migration, Development and the EU Security Agenda', *Statewatch*, 2003, available at http://www.statewatch.org/news/2003/sep/bhtb.pdf.

[59] Cited in Betts, 'The International Relations of the "New" Extraterritorial Approaches to Refugee Protection', p. 59.

protection, or which result in them being returned to the countries where their security is at risk, do not conform to prevailing international guidelines and many even amount to a violation of the 1951 UN Refugee Convention.'[60]

There are many more pieces to the policy wall erected over the past decade or more around 'Fortress Europe', including the design and implementation of Frontex, the joint border-policing agency. The Thessaloniki Council conclusions concluded many readmission agreements, and even included a call for an evaluation mechanism to monitor third countries that might not be complying with the agreements: 'participation in the international instruments relevant to this matter; . . . cooperation . . . in the readmission/return of their nationals and of third country nationals; efforts in border control and interception of illegal immigrants; combating of trafficking in human beings; . . . cooperation on visa policy and possible adaptation of visa systems; [and finally] creation of asylum systems with specific reference to access to effective protection'.[61]

Money appears to be no object in designing this architecture of exclusion and neo-*refoulement*. UK Member of Parliament, Caroline Flint, compares the UNHCR's US$900 million annual budget to provide protection to 12 million refugees and 5 million internally displaced persons (IDPs) to the US$10 billion allocated by 15 Western states on providing asylum for 500,000 asylum seekers, mildly referring to it as an 'imbalance'.[62] The Refugee Council in the UK estimated the cost of the extraterritorial proposals for asylum-processing at £1.5 billion in additional financing.[63] Returning to Samers, 'This is not simply a case of placing police and customs officials in third country airports – as Zolberg so cogently points out, but rather *the gradual implementation of a system of migration management aligned with development assistance in third countries.*'[64] In 2005, the European Commission adopted a Communication on Regional Protection Programmes to enhance the protection capacity of countries

[60] UNHCR, *State of the World's Refugees, 2006*, p. 40.

[61] Council of the European Union, Presidency Conclusions, Thessaloniki, 19–20 June, 2003.

[62] Cited in Betts, 'The International Relations of the "New" Extraterritorial Approaches to Refugee Protection', p. 63.

[63] Ibid.

[64] Cited in Samers, 'An Emerging Geopolitics of "Illegal" Immigration', p. 43, emphasis added.

in refugees' regions of origin. North–South aid to fund these pro-
grammes continues to flow. Given that 70 per cent of the world's
refugees reside in developing countries, there is a risk that improving
protection in regions of origin will only require poorer states to
shoulder more responsibility for refugees than they already do.[65]

CONCLUSIONS: NEO-*REFOULEMENT* AND THE RE-SPATIALIZATION
OF ASYLUM

Neo-*refoulement* is not simply a new kind of return for asylum seekers,
but represents a new and literal terrain of geopolitical power on
which paths to seeking refugee status have been etched. Simulta-
neously, in Australia, political geographies of the state have been
altered by the state itself: for the purposes of asylum, the government
has excised its own shores. They have been rendered out of bounds
to asylum seekers who arrive by sea. Meanwhile, an invisible policy
wall has been erected over the past decade around the European
Union. Bilateral accords, especially readmission and safe third-
country agreements, create a geographical game of hopscotch for
asylum seekers, with fewer and fewer spaces through which to pass to
make a refugee claim. The terrain has shifted from a rights-based
legal grounding of asylum to a bundle of seemingly ad hoc geo-
political practices that aim to externalize asylum. Both Australia and
the countries of the EU may argue that they observe their commit-
ments to the 1951 Convention and the 1967 Protocol, but access to
the rights and safeguards enshrined therein is increasingly limited.
Keeping all uninvited migrants at bay – whether refugees or eco-
nomic workers – the geopolitical reality in both places is that 'getting
in' is a greater challenge than 'getting heard'.

    As fear foments the passage from legal imperatives to protect
to political climates to exclude, rights-based legal instruments are
trumped by geographic strategies that constitute neo-*refoulement*, the
strategy of preventing the possibility of asylum by denying access to
sovereign territory. We have shown here how the respatialization of
asylum is a deliberate political project buttressed by readmission
agreements and development funds that ensure cooperation among
donor states and transit countries.

    [65] Cited in UNHCR, *State of the World's Refugees, 2006* SOWR, pp. 60–1.

Both Australia and the European Union practised externalization by keeping asylum seekers offshore. They pursued similar strategies, including bilateral readmission agreements and material support in the form of small development projects in order to 'protect in the region of origin'. From 'preventive protection' to more subtle architectures of enmity, the threat of migrant invasion is underwritten by securitization, a governmentality based on mistrust and fear of the uninvited other. In Australia, the externalization of asylum is twinned with the isolation of punitive remote detention should a refugee claim be possible. In the European Union, proposals to process asylum seekers outside its borders have been displaced by efforts to exclude asylum seekers from making spontaneous claims while on sovereign territory. Shifting from legal frameworks of protection to more politicized and securitized practices of exclusion, neo-*refoulement* uses geography to suspend access to asylum.