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Chapter 2

THE SHIFTING FRONTIERS OF MIGRATION CONTROL

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> Halfway up the stairs isn't up and isn't down.
> It isn't in the nursery. It isn't in the town.
> And all sorts of funny thoughts run round my head.
> It isn't really anywhere—it's somewhere else instead.
>
> A.A. Milne, *Halfway Down the Stairs*

> Every nationalist is haunted by the belief that the past can be altered.
>
> George Orwell, cited by Stanley Cohen in *States of Denial*

1. FOOTPRINTS IN THE SAND

Just after midday on November 4th 2003, a 12-metre fishing boat, the *Minasa Bone*, carrying 14 Kurdish men, landed on Melville Island, 80 kilometres off the northern coastline of Australia. According to eye witnesses, two of the men waded ashore, scooped handfuls of sand from the beach and asked locals whether they had reached Australia (Morris 2004). When they were told that they had, the men are said to have danced for joy. Their elation was to be short-lived.
Local police and fishermen initially attended the scene. In the hours that followed, a navy warship was despatched to escort the Minasa Bone out to sea. An air navigation exclusion zone was declared over the island, preventing the arrival of the press or legal advisors. Customs, immigration and Australian Federal Police officers were flown to the scene. And the Governor-General was summoned from his official duties at Australia's most celebrated horserace, the Melbourne Cup, to give royal assent to statutory regulations that had been prepared for just such an occasion as this.[1] With the stroke of a pen, the official memory of the landing of those men on Australian soil had been erased. The 'finishing line', as some newspaper reports put it, had been shifted. The men had never really been in Australia, at least not in any way that could be of benefit to them.

These extraordinary events are the culmination of a spiralling cycle of border control measures directed almost exclusively at 'onshore' asylum seekers who arrive in Australia by sea. This reaction is rooted in Australia in an historical fear of invasion from the Asian north, but is also part of a larger story about the failure of governments around the developed world to deal constructively with the reality of contemporary migration. In their efforts to control unwanted arrivals, these governments have taken increasingly extreme measures to barricade their borders. But despite these efforts, people continue to do what they have always done, that is, to 'burst

across borders, seeking new or better opportunities' (Horsman and Marshall 1994: 60). Faced with this prospect, some governments have moved their attention beyond the various control measures they have in place on and around their increasingly ungovernable borders, and have begun to manipulate the location and meaning of the borders themselves. The central thesis of my argument in this chapter is that, just as the contemporary citizen is increasingly 'on the move' (Valier 2003: 2), national borders are also becoming mobile in both time and space. Through rather mysterious official processes which will be outlined later, Melville Island can be 'Australia' one minute but 'not-really-Australia' the next.

Borders have traditionally marked the limits of sovereign territory and acted as the primary site of expression of the exclusionary powers of the state. In a globalising world, the ability for individuals to move and, more particularly, to cross borders, has emerged as a key social signifier, stratifying populations according to a 'global hierarchy of mobility' (Bauman 1998: 69). Bauman argues that, while global elites have always enjoyed transnational status, the prospect of the democratisation of mobility to allow the free movement of people in line with the lack of territorial constraints on commodities and capital, has been strongly resisted in developed states. Sassen (1996: xvi) interprets these trends as a 'denationalizing of economic space' alongside the 'renationalizing of politics', with border crossing emerging as a 'strategic site of inquiry about the limits of the new order'. She refers to a 'new geography of power', in which border control has become a ready vehicle through which the nationalist state retains its claim as an absolute sovereign in the realm of immigration control, while abdicating to denationalising forces in other areas of responsibility. The development of a transnational human rights regime which has forced a partial decentring of state sovereignty and begun to erode the distinction between 'citizen' and 'alien', is another factor on the denationalising side of the equation. Spontaneous and unauthorised border crossers clearly present a special challenge to sovereignty, while refugees, in particular, force a direct confrontation between nationalist politics and an ascendant—although still far from firmly established—international human rights regime.

The conflicting demands of globalisation have differential impacts on different borders and different categories of people who seek to cross them. Firstly, as Gready (2004: 350) has noted, 'globalisation erases certain borders while entrenching, establishing and redrawing others'. For example, the fortification of the external borders of the European Union alongside the relaxation of internal borders has been interpreted as part of the project to define a new European identity by delineating who is to be included and excluded (Green and Grewcock 2002). As Horsman and Marshall (1994: 59) observe, 'the erosion of the territorial state has not just made it easier to disregard frontiers within, for instance, Europe, it has also made it more difficult to ignore the frontier with the rest of the world.' And the heavily militarised United States border with Mexico (Cornelius 2005) is another clear example of the concentration of state resources to fortify the front line of a frontier struggle between the global north and global south. Gready (2004: 352) concludes: 'While it is true … that globalisation erases borders, it is also true that those which remain are sharp edges, more closely policed, more violent'.

Borders also assert themselves differently in relation to different groups of border crossers. Against a backdrop of unprecedented mobility, the coming of the 21st century has been experienced by the majority of the world's population as an 'age of involuntary immobility' (Carling 2004: 37; see also Brown 2004). The internal borders of the European Union turn out to be not so relaxed after all in relation to the many thousands of 'third country nationals' who are legally resident in a European Union country, but unable to exercise the mobility rights associated with full European citizenship (McMaster 2001: 185). Bauman (1993: 241) argues that two 'postmodern types' have emerged with respect to global mobility, the welcome tourist and the unwelcome vagabond: 'Like the vagabond, the tourist is extraterritorial, but unlike the vagabond he (sic) lives his extraterritoriality as a privilege, as independence, as the right to be free, free to

choose; as a licence to restructure the world'. Elsewhere, Bauman (1998: 89) has observed that, while borders are 'levelled down' for global business and cultural elites, the remainder face 'walls built of immigration controls'. Although government rhetoric is often aimed at reinforcing the idea of the border as solid and impenetrable, in line with these 'sharp' and 'solid' images, there is much to suggest that borders are becoming malleable and fluid. In order to meet the contradictory demands made on borders under globalisation, state borders could be said to operate as 'porous dams' (Joly 1994), expected to allow a steady and lucrative flow of welcome visitors, while holding back the floods of unwanted Others.

In this chapter, I try to capture some of the elusiveness and plurality of borders. It is a discussion about the extreme, often squalid, and sometimes bizarre attempts being made to selectively control global mobility through various techniques described by Perera (2002) as 'defensive geography'. I will build the discussion in four steps, using examples primarily from Australia and Britain. In the first section, I highlight the mobile nature of border controls which transcend the constraints of physical borders and operate both outside and within them. In the case of these *functionally mobile* borders, the border function is expressed at various sites of enforcement, but the location of the border and its symbolic value as a marker of territory remain unchallenged. Next I consider an Australian example of the *spatially mobile* border, where the physical location of the border is directly manipulated in the interests of border protection. This border manipulation is taken a step further in the case of *temporally mobile* borders which, remarkably, can be made to appear or disappear retrospectively as required. And finally I consider the possibility of fully *personalised borders* where the border is defined, not by a fixed geographical location, nor with reference to the location of border control activities, but is equated with the location of officially sanctioned border crossers, who legally *embody* the border.

2. FUNCTIONALLY MOBILE BORDERS

For island nations such as Britain or Australia, checks at the border have long been the preferred method of immigration control, and Continental-style population surveillance measures involving identity cards and police checks have been strongly resisted. However, under pressure to control spontaneous migration, preventative and enforcement activity has shifted both inwards and outwards from the border. More recently, this expansion of internal checks and pre-emptive measures has also been justified in the name of combating both international and domestic terrorist threats. In relation to these initiatives, the border as a physical construct remains geographically fixed but it no longer retains a special significance as the exclusive, or even primary, site for migration control. Exclusionary processes operate at multiple sites and involve increasingly sophisticated and extensive networks of public and private agencies (Weber and Bowling 2004). The notion of the border retains enormous symbolic and political importance, but the reality is that in Britain, for example, resources have been moved away from border checks over the last decade, and the emphasis at ports of arrival has been on facilitating the efficient passage of desirable visitors, while streamlining efforts to screen out and deter the others (Crawley 1999).

Although front line immigration officers may perceive these changes to be an abandonment of political commitment to immigration control (Weber 2003), I will argue that they actually represent a strategic shift to a reconceived idea of borders and border protection. The state's arsenal of exclusionary devices increasingly involves pre-emptive measures to prevent and deter unauthorised arrival; efforts to increase the efficient sorting of desirable and undesirable passengers at the border, particularly through the application of new border technologies (such as biometric passports and advanced passenger processing systems); and punitive responses, such as

administrative detention and forcible deportation, directed at those who enter or remain without authorisation. These shifts in the sites of migration control could be thought of as creating 'quasi-borders' where exclusionary powers are expressed far away from the designated border. The physical borders are not so much diminishing, but are changing towards 'smart borders',[2] while the border function is both trans-nationalised and internally dispersed. Motomura (1993) has pointed out that the legal precedent for the idea of 'functional borders' has been long established in American jurisprudence, although its application has been somewhat lopsided (I will discuss this below). For the purposes of this section, the border will be conceptualised according to Motomura's (1993: 712) analysis as: 'not a fixed location but rather wherever the government performs border functions'.

Many commentators have observed a gradual process of internalisation of immigration controls since the 1970s (reviewed in Weber and Bowling 2004). In Britain, this process accelerated in the 1990s with a raft of immigration legislation which led Anne Owers (now Her Majesty's Inspector of Prisons) to ask whether the country was entering a 'new age of internal controls' (Owers 1994). Developments during and since that time include *inter alia*: the formation of a specialist enforcement section in the United Kingdom Immigration Service and increased powers of search and arrest for immigration officers; the introduction of criminal sanctions against employers who fail to check the immigration status of employees; the establishment of highly publicised targets for the removal of 'failed asylum seekers' and 'immigration offenders'; the formation of specialist 'snatch squads' of police and immigration officers to effect forcible expulsions, and cooperation with other European Union countries to expel 'aliens' through jointly-administered charter flights; the increased use of administrative detention and expansion of the privately-run detention estate; the systematic withdrawal of welfare and legal support from asylum seekers; and dispersal into designated places of residence which has been linked to increased violence against asylum seekers and can be interpreted, at least in part, as a form of welfare-based surveillance. Further fuelled by post September 11 insecurity and the threat of home-grown terrorism following the London Underground bombings in July 2005, electronic tagging of asylum applicants has been trialled; a proposal for a national identity card, long resisted by the British public, has gone before Parliament; and members of the public are being encouraged to report suspected immigration offenders. Although there are many signs of resistance against being drawn into this web of immigration enforcement, for example, from health authorities, librarians and teachers, the official message seems to be that the functional border is everywhere, and internal controls can be operated by anyone at any time.

One powerful mechanism for the internal expression of sovereignty is administrative detention. The discretionary detention of asylum seekers in Britain has been highly controversial. But, amongst liberal democracies, it is the Australian Government which has made the most uncompromising claim of absolute sovereignty over its territorial borders, through its mandatory detention policies and its deliberate placement of detention centres in remote and hostile environments. The exclusionary power of these policies—both real and symbolic—has been graphically captured by Australian novelist Bernard Cohn: 'In those places, you see, they are not really in Australia. They are in the empty ungoverned space of their bodies, I guess, confined within not-Australia.' (cited in Perera 2002: 10). Internalised border controls shift the focus away from defending a physically-bounded territory towards a more dynamic delineation of those who do and do not belong. Dauvergne (2004: 601) argues that labelling certain people as 'illegal' shifts the boundaries of exclusion, allowing those whose presence is not wanted to be 'erased from within':

> Sovereignty in this picture is again seen to be about people not territory, as the label 'illegal' allows us to shift the US–THEM line from the border of the nation to within the nation, wherever it is required. In this way, cracking down on illegal migration functions as an

assertion of both the internal and the external dimensions of sovereignty.

However, these mechanisms for maintaining the internal us–them border are fragile and are vulnerable to challenge through legal and political activism. States have therefore been reluctant to rely on them as the sole back-up for checks at the border. Morris (2003: 8) argues that: 'As the importance of being *legally* 'outside' (but physically within a state) has eroded in the context of domestic rights allocation, states have sought ways to reassert their sovereignty and, thus, their control over who remains *physically* 'outside' the demarcated territorial boundaries' (emphasis added). Similarly, Bauman (2002: 111) points to the political difficulties faced by governments when they are forced into violent and highly visible tactics against those who manage to breach border defences: 'Since deportations and expulsions make dramatic television and are likely to trigger a public outcry and tarnish the international credentials of the perpetrators, governments prefer to steer clear of trouble by locking the doors against all who knock asking for shelter'. The desire to lock the doors more effectively has resulted in a proliferation of externalised migration control measures intended to prevent unwanted arrivals. Former director of the European Council on Refugees and Exiles, Philip Rudge (1997: 72), has noted that there is a 'clear political will to move border controls back from the literal border' through mechanisms such as targeted visa regimes and carrier sanctions which 'appear to change the location of the world's borders'. Offshore, pre-emptive controls which stretch out from territorial borders to prevent unwanted arrivals are an obvious product of the actuarial calculus employed by governments of late-modernity, anxious to reduce their exposure to destabilising risks and to limit their own liability. The logic of these policies is simple: they transform 'an asylum seeker who would otherwise be "here" into an asylum seeker who is merely "there"' (Motomura 1993: 700).

Pre-emptive measures adopted in Britain include: the posting of overseas liaison officers to prevent the embarkation of targeted ethnic or national groups; explicit, publicly-announced targets for blanket reductions in asylum applications; and 'juxtaposed' border controls operated on behalf of the British Government in France, Belgium and the Netherlands, described by one British official as 'exporting our frontier controls to where they are most needed'.[3] With their universal visa system, well-developed overseas liaison network and computerised Advanced Passenger Processing (APP) system, Australia has, arguably, an even more comprehensive arsenal of offshore controls. Departmental reports describe their border strategy as follows: 'Australia manages the movement of non-citizens across its border by, in effect, pushing the border offshore. This means that checking and screening starts well before a person reaches our physical border.' (Department of Immigration, Multicultural and Indigenous Affairs 2004: 3)

Interdiction policies are perhaps the most coercive and controversial of these pre-emptive measures, as they provide the most direct challenge to the international legal order and human rights regimes: 'Located above and beyond the reach of the law, interdiction policies exist in a unique realm exploited by states to exert an unprecedented level of immigration control. … These policies reflect a powerful reassertion of sovereignty on behalf of the state' (Morris 2003: 18). The best known example of this strategy in recent times was the interception by the United States coastguard of tens of thousands of Haitians who fled the Papa Doc regime by boat in the 1980s. The interdicted Haitians were either returned or redirected to detention centres at Guantanamo Bay (Magner 2004).

The parallels between this 'Caribbean solution' and Australia's more recent 'Pacific solution' are numerous and unmistakeable. On the 28 August 2001, following a spate of unauthorised arrivals of barely seaworthy fishing boats, the Norwegian merchant vessel *MV Tampa*, acting at the request of Australian authorities, rescued 430 asylum seekers whose boat had broken down 80 nautical miles from the remote Australian territory of Christmas Island. The events which followed gained widespread media coverage and have been well described elsewhere (see Magner 2004; Morris 2003; Mares 2001). As the humanitarian situation on board the

overcrowded ship began to deteriorate, the response of the Australian Government was 'swift and decisive' (Howard 2003). Forty-five armed Special Air Services (SAS) troops boarded the *Tampa*. Most of the rescuees were taken aboard the warship *Manoora* to the impoverished Pacific nation of Nauru to be detained (under whose authority is a matter of debate) while their claims for refugee status were considered under international (not Australian) procedures. Academic lawyer Ernst Willheim claimed that asylum seekers diverted to the offshore detention centre at Nauru were being dealt with in a 'legal vacuum', paid for with Australian taxpayers' money, but recognised neither under Australian law nor the law of the host nation.[4] High Court judge Mary Gaudron likened the tactics employed by the Australian Government to the creation of a 'legal no man's land' by the United States Government at Guantanamo Bay (Banham 2004).

Legislation was rushed through both houses of parliament which retrospectively authorised the seizure of the *Tampa* and set in place additional authority for future action of a similar kind (Magner 2004). A naval blockade, *Operation Relex*, was established to 'deter and deny' suspected illegal entry vessels (SIEVs) and defence personnel were granted special authority to board vessels outside Australian territorial waters in the area of more diluted sovereignty known as the *contiguous zone* (Howard 2003). The British Government has responded with approval to these grossly disproportionate, yet seemingly effective, measures by making a series of proposals to the European Union for the establishment of 'regional protected zones' to operate in conjunction with naval interception programs (Sianni 2003). Zones near to countries of origin are reportedly now being favoured over the original idea of processing centres or transit zones on the periphery of the European Union, but other means have been used to enlist the support of a 'circle of friends' in North Africa, the Middle East and the former Soviet Union, in order to create so-called 'frontiers of return' within which individuals can be intercepted and repelled, both within and beyond borders (Statewatch 2003).

Interdiction policies have demonstrated the 'lacuna between the physical spaces in which states exercise jurisdictional control and the spaces in which they will assume juridical responsibility' (Morris 2003: 2). They have done so by exploiting the grey areas at the boundaries of refugee law, international human rights law, and the law of the sea (Howard 2003: 21). While expanding the reach of the sovereign power to exclude, interdiction policies simultaneously challenge the wider jurisdiction of international law, for example, in relation to the law of the sea (with respect to the boarding of vessels), and *non-refoulement* of refugees. Australian interdiction policies have been described as efforts to 'draw a line in the sea', not merely against asylum seekers themselves, but also against the incursions of international law (Perera 2002: 3). In fact, a common feature of interdiction policies is the building in of immunity from judicial review, allowing unfettered expression of sovereign power over entry to territory (Motomura 1993). Douzinas (2002: 32) describes intercepted asylum seekers as being caught in a rights-free, unprotected zone from where 'they are chased away, kept from our borders lest they engage the law in responsibility'.

These developments have reportedly taken international human rights advocates by surprise, since the prospect that a contracting state would 'reach beyond its territory to seize and return refugees' would have been 'unimaginable' at the time the international legal regime for refugee protection was drafted (Magner 2004: 68). But even more unimaginable are the steps that have been taken by the Australian Government to strengthen its geographical defences still further by manipulating the physical location of the border itself. Even in the face of the relentless border protection measures described in this section, asylum seekers and other unauthorised border crossers have stubbornly refused to disappear. Instead, the Australian Government has resorted to making the borders themselves disappear.

3. SPATIALLY MOBILE BORDERS

A brief foray into maritime law reveals that Australia already operates many different borders. About 20 kilometres offshore is the boundary of Australia's 'territorial seas' which are subject to full Australian sovereignty. A 'contiguous zone' extends a further 20 kilometres within which Australia is entitled to take action to prevent and punish infringements of its domestic law, for example customs and immigration laws. And Australia has the right to exploit and manage natural resources for up to 200 nautical miles in the area known as the 'economic exclusion zone' (Coombs 2004). So the idea of a plurality of borders, each associated with different rights, responsibilities and functions, is already well established, although the meaning of each entity is by no means settled in practice.

In contrast to these entities which, however contested, are recognised under the United Nations *Convention on the Law of the Sea*, the idea of a *migration zone* is a construct defined solely within Australian law. In fact, High Court judge Mary Gaudron has described the very idea of a migration zone as a 'cute legal fiction' (Banham 2004). The *Migration Act 1958* defines the migration zone as 'the area of Australia where a non citizen must hold a visa in order to legally enter and remain in Australia' (DIMIA). For people travelling without visas, arrival in that zone subjects them to mandatory detention as 'unlawful non-citizens', but at least opens the possibility of applying for temporary protection as a refugee, and gives some limited access to Australian courts. It is the way in which this notional boundary has been manipulated to keep asylum seekers legally outside of Australia that has created so much controversy.

Australia has 37,000 kilometres of coastline and administers more than 8000 islands. The vast and sparsely populated northern shores of the continent, fringed by the crowded islands of Indonesia, have long been cast in the national imagination as a place of vulnerability to incursion from Asia. In the years leading up to the *Tampa* crisis, several outposts of Australian sovereignty, such as Christmas, Cocos and Ashmore Islands—which lie in the Indian Ocean much closer to Java than to the Australian mainland—were targeted by organised groups transporting asylum seekers and other irregular migrants via Indonesia. Melville Island, which was the setting for the events described at the beginning of this chapter, is comparatively close to the mainland and is inhabited by the Indigenous Tiwi people. In September 2001, in the continued flurry of law-making after the *Tampa* crisis, legislation was rushed through both houses of parliament which excised Christmas, Cocos and Ashmore Islands from the migration zone.[5] In future, any asylum seekers who slipped through the interdiction net and managed to land at any of these locations would be labelled 'offshore entry persons', and could be diverted into offshore processing centres along with passengers on boats intercepted on the open sea. In addition, the classification of Christmas Island as outside the migration zone cleared the way for a putative 'offshore' detention facility to be retained there, which, unlike Nauru, would be directly and openly under the control of the Australian Government.[6] The creation of a new legal category of 'offshore entry person' therefore provided a back-up strategy intended to deny asylum seekers any legal recourse should they penetrate the physical defences already associated with Australia's extended boundary (Morris 2003).

The excision of territory was seen by one leading commentator as a uniquely Australian innovation which added a new twist to the interdiction and offshore processing regimes pioneered by the United States: 'America's never gone so far as saying part of America's not America'.[7] Opposition politicians in Australia criticised the government's actions as either inhumane or foolish, the latter view based on indignation at the apparent ceding of Australian territory. In practice, any apparent loss of territorial sovereignty resulting from excisions was far outweighed by gains in functional sovereignty. The effect of excising territory from the migration zone is to

deny people who land there (in not-really-Australia) access to Australian courts and refugee protection procedures, while still classifying their entry (into Australia) as unlawful.[8] This places 'offshore entry persons' in a perpetual state of non-arrival, true to Bauman's (2002: 112) description of refugees as people who 'do not *change* places; they lose a place on earth, they are catapulted into a nowhere'. In an insightful analysis of decisions to accept or reject asylum applicants at Australian airports, Parsley (2003: 75) has pointed out that even these routine performances of the border have the effect of denying arrival: 'The refugee, even as their body is acted upon and removed from Australian territory, awaits the recognition of themselves as ever having arrived'. In the remote, less-governable reaches of Australia's northern frontier, excision has been used to achieve the same effect. Australian sovereignty in these excised locations is deemed to exist for the purposes of exercising sovereign powers, but seems to vanish in relation to any associated domestic and international responsibilities:

> Thus the Australian state is simultaneously expanding, in terms of its extraterritorial immigration control operations, and shrinking in terms of the territory for which it is legally responsible. While interdiction exploits the gap between jurisdiction and juridical responsibility on the high seas, Australia's excision policy has created such a gap *on its own territory*. (Morris 2003: 14, emphasis added)

This win-win situation may have been a political coup for the conservative Coalition government, but was described by one legal commentator as making 'a mockery of basic principles of territoriality and legal certainty' (Crock, cited in Coombs 2004). United Nations High Commissioner for Refugees (UNHCR), Ruud Lubbers, referred to Australia's selective approach to the meaning of its borders as the 'law of the jungle' (cited by Magner 2004: 82) and another UNHCR spokesperson was quoted as saying: 'For us a country is a country, with all its territories, and any excising will have absolutely no bearing on the obligation of the country to abide by international obligations' (McCall 2003). Furthermore, the Australian Government's willingness to manipulate its borders to keep asylum seekers out stands in marked contrast to the stance they have adopted in their bid to draw a boundary around the Timor Gap oil and gas reserves which is favourable to Australian business interests. Faced with sustained criticism from international development and human rights non-government organisations (NGOs)[9] for its insistence that the boundary of the economic exclusion zone with Timor Leste be drawn at a location which would deny the emerging nation most of the proceeds, the Australian Foreign Minister is on the record as having stated: 'If there is an issue of economic disparity between Australia and East Timor, that should be addressed through aid programs … [it] should not be addressed through shifting boundaries and changing international law.'[10]

Debates over whether the Australian Government reneged on its international responsibilities in its interdiction and excision policies, particularly the duty of *non-refoulement* of refugees, have hinged on the crucial relationship between borders, border crossing and the rights and responsibilities associated with sovereign control of territorial space (see Magner 2004; Pallis 2002). Magner argues that the location of a 'frontier' for asylum seekers at sea is less obvious than a land border but, as a rule of thumb, is generally taken to be the edge of the territorial seas for most aspects of international law. The crossing of that frontier therefore evokes some obligations in international law, if not under domestic jurisdiction. Even so, the law of the sea confers rights on states which conflict with protection requirements, and states are prone to acting extra-legally in this disputed zone, as is evident in Australia's handling of the *Tampa* affair (Pallis 2002). Such exploitation of the watery borderlands which demarcate the various zones of power and responsibility around the country's coastline has particularly significant consequences for refugees. As noted by Perera (2002: 10): 'Lines in the water are such weighty and such ephemeral things: a mile this way or that is the line between life and death, safety and terror'.

Since the events surrounding the *MV Tampa*, Australia's excision legislation has had a mixed history. Regulations passed following the *Tampa* events allowed for excisions to be declared without reference to parliament, although they are subject to later review by the Senate. Attempts to excise a further 4000 islands in June 2002 were ultimately defeated in the upper house. A subsequent attempt was also rejected in December 2002, and a third in March 2003. The Coalition government finally succeeded in authorising further excisions in July 2005, after a federal election gave it control of the Senate. The historical record of the government's use of excision orders demonstrates the reactive and precipitate nature of these border-redefining procedures. According to an Australian Parliamentary Library report, Regulations that were gazetted in March 2003 to excise Bernier, Dorre, Dirk Hartog and Faure Islands when a boatload of suspected asylum seekers was seen approaching Australia's north-western coast, were later rescinded when the vessel was found to be a Sri Lankan fishing boat (Coombs 2004). A few months later, the arrival of a group of Kurdish asylum seekers on Melville Island took the excision strategy to a new level. Having been unable either to predict or pre-empt the arrival of the tiny *Mimosa Bone*, the Australian Government was forced to use its last trump card: the manipulation of borders not only in space, but also in time.

4. TEMPORALLY MOBILE BORDERS

A fact sheet promulgated by the Australian immigration authorities includes in a list of changes associated with the *Border Protection Act 2001* 'measures to put beyond doubt the legality of the actions of the Government in relation to the *MV Tampa* and the *Aceng*, and additional statutory authority *for future action*' (emphasis added) (DIMIA). The Interpretation Notes for section 5 of the *Migration Act 1958*, as well as defining 'excised offshore places', include detailed definitions of 'excision time'.[11] These notes state specific times for already excised locations, and associate future excisions with the more open ended 'time when regulations commence'. When the Kurdish occupants of the tiny *Mimosa Bone* arrived at Melville Island around midday on 4 November 2003, they landed within Australia's migration zone and unwittingly set in train a series of pre-planned official actions. The ready-to-go regulation to excise the island received royal assent from the Governor-General that evening. (One can imagine the Queen's representative, still in the morning suit he had worn that day to the Melbourne Cup races, rushing to the urgent defence of his nation.) In contravention of long established principles of the non-retrospectivity of the law, the excision was deemed to have taken effect from the previous midnight. According to Australian immigration law, as it stood on the evening of 4 November, the Kurdish men who had waded ashore that day, had never set foot in Australia, and would have no access to Australian courts.

The Melville Island regulations were eventually overturned in the Senate in November 2003, and Attorney-General, Philip Ruddock, reported that the government was taking advice on other measures that could be used to achieve a similar effect.[12] But the brief window of opportunity afforded by the excision had given the government a legal veneer for its decision to return the *Mimosa Bone* to Indonesia, a country which has not signed the UN *Convention on the Status of Refugees*. In a bizarre twist in the border protection saga, the 14 Kurdish men had not been driven out of Australian waters by naval warships, but had instead been 'tricked out' (Perera 2002: 11).
A spokesperson from the NGO, *A Just Australia*, described the government's strategy of 'pretending that a boat hasn't really made it to Australia' as an 'Alice in Wonderland approach' (McCall 2003). Prominent refugee advocate and Jesuit priest, Frank Brennan, noted the irony of this official re-writing of history in a country colonised by British settlers who had themselves arrived, uninvited, by sea: 'If only indigenous communities had been able to avail themselves of

such legal artifices two centuries ago most of us could be deemed never to have arrived.'[13]

The public controversy surrounding the arrival of the Kurdish men glossed over these deeper questions and hinged primarily on whether or not they had asked the authorities for asylum. Immigration officials had reportedly instructed Melville Islanders not to speak to the media and the imposition of the exclusion zone hindered the construction of reliable, independent accounts.[14] Some press reports referred to the men as 'suspected' or 'apparent' asylum seekers (see, for example, Banham 2003). The Northern Territory fishing operator who was quoted earlier as saying the Kurds had 'danced for joy', said his first thoughts were that they were refugees.[15] Defence force and Australian Federal Police officers were also reported as saying that the men had described Turkey as 'no good', had said they did not want to go back, and had pointed to the word 'refugee' in a Turkish-English dictionary.[16] After repeated official denials, Immigration Minister Amanda Vanstone was finally forced to admit that the issue of asylum may have been raised. The multi-agency People Smuggling Task Force accepted responsibility for the error, but played its trump card to get out of trouble, claiming it was irrelevant anyway because of the excision. The *Minasa Bone* was towed out to sea by a naval vessel on Tuesday night, and by Saturday was back in Indonesia. It is in doubt whether Indonesia ever formally agreed to the arrangement.

In an interview conducted after the Kurdish men had returned to Indonesia, Immigration Minister Vanstone is quoted as saying: 'We're not going to let our borders get eaten away bit by bit'.[17] According to the 'Alice in Wonderland view', it was the arrival of the asylum seekers, rather than the excision of sovereign territories from the migration zone, which threatened to diminish Australia's borders. The Leader of the Opposition, interviewed on ABC radio on 23 January 2004, criticised the government's actions, not for the violation of fundamental legal principles or the shirking of responsibilities under the *Convention on the Status of Refugees*, but because, he said, Labor would have taken a tougher approach and apprehended the crew as people smugglers.[18] He argued that borders should not be protected by wiping them out, and criticised the government for cutbacks to *Operation Relex* which had allowed the boat to slip through the nation's defences.

The cessation of unauthorised boat arrivals has obviated the need for any further twists in the Australian Government's spatial and temporal manipulation of its borders (although further excisions are being enacted, as discussed earlier). One is left to speculate about how much further this strategy could be taken. One clue might be found in the Migration Act Interpretation Notes which specify that the migration zone includes, *inter alia*, 'land that is part of a State or territory at mean low water'.[19] This raises the spectre of asylum seekers being peremptorily turned away after stepping ashore at an exceptionally low tide. This possibility may perhaps stretch the boundaries of the official imagination too far, but my final example, namely the creation of personalised borders in Britain, takes border manipulation in an equally surprising direction.

5. PERSONALISED BORDERS

Compared with these dramatic and highly publicised events off Australian shores, the quiet revolution in the location and meaning of borders that has taken place in Britain has gone virtually unnoticed. I owe my knowledge of this interesting development to an article by legal commentator, Elspeth Guild (2000: 228), where she makes the astonishing claim that: 'The UK border for persons has become entirely personal to the individual and unrelated to the physical territory over which the UK is sovereign'. New immigration Rules came into force in April 2000 which, according to Guild, shifted the moment at which entry to Britain is officially granted away

from the stamping of a passport at the border, and attached it instead to the time a visa is issued by a consular official overseas. The intention was to expedite passport checks at busy airports, where immigration officials are expected to rapidly sort 'undesirable' from 'desirable' visitors with minimal inconvenience to the latter. For the purposes of United Kingdom immigration law, the holder of a valid entry visa was henceforth to be considered, not just entry cleared, but actually legally present in the United Kingdom. On the other hand, Guild points out (and this was nothing new), persons could be physically present within the United Kingdom having entered clandestinely or fraudulently, without having ever been granted leave to enter. Not only can some individuals be legally nowhere (either in the weaker sense of being denied legal recognition of entry to sovereign territory, or in the stronger sense of existing in the legal 'no man's land' of Nauru or Guantanamo Bay), it seems that the holder of a British visa can now be simultaneously in two places on the globe. On this interpretation, British borders can be conceptualised as fragmented and fully portable, their location defined, not by sites of enforcement action by state officials (as discussed earlier), but in terms of the current whereabouts of certain intending visitors. In an ironic reversal of the patriotic poem by Rupert Brooke,[20] it seems that British sovereign territory is no longer manifest abroad through the bodies of fallen British soldiers whose burial sites remain 'forever England', but through the living bodies of non-British visa holders. The holders of valid British entry visas could be said to embody the externalised border. This seemingly modest development, inspired more by financial incentives to facilitate commercially valuable travel than by political imperatives to suppress unauthorised arrivals, takes the re-imagining of borders by the state a step further. The border is not fixed to a particular location for a particular purpose, or even explicitly redefined with reference to a particular group at a particular point of time, but effectively tracks the movements of each holder of a British visa as they go about their daily affairs. If this sounds rather reckless in relation to border control, it may simply reflect the chasm that has opened up between globally mobile elites and those who are marked for enforced immobility. Since Britain operates a selective rather than universal visa system, these living embodiments of the British border are likely to be 'desirable' individuals from countries which otherwise have been targeted for strict controls.

Ortiz (2001: 6), writing about the United States–Mexico border, has also described the social exclusion of Mexican Americans living legally on the United States side of the border in terms of embodiment, albeit an embodiment where ethnic categories surmount legal ones: 'Even when they constitute over 70% of the city's population, Mexican Americans embody the border in their skins or in their last names'. Perhaps the personalisation of borders was foreshadowed in these comments by Sassen (1996: 69) in a 1996 address: 'The framework for immigration singles out the border *and the individuals* as the sites for regulatory enforcement' (emphasis added). The guaranteed, personalised border for the favoured guest, and the physically elusive border—often violently policed and sometimes virtually unknowable—for the unwanted guest, can be seen as complementary aspects of the same process.

6. RECONSTITUTING SOVEREIGNTY AND DECRIMINALISING BORDER CROSSING

These changes in the way borders are interpreted by states reflect altered expressions of sovereignty that need to be considered by a globally aware criminology. The voluminous literatures on sovereignty, citizenship and globalisation are unfamiliar and perhaps forbidding territory for most criminologists. However, a rudimentary appreciation of these developments (and this is all I attempt here), is crucial in understanding present strategies of border control, and speculating about future prospects for the democratisation of mobility.

According to Dauvergne (2004: 593), some theorists detect the demise of sovereignty and the

nation-state in the face of globalisation; others assign a continuing relevance to transformed or partial manifestations of sovereignty; while others remain 'globalisation sceptics'. The border practices which have been analysed here support the second of these positions, and illustrate one aspect of what Sassen (1996) describes as the 'unbundling' of sovereignty. While seeking to divest itself of international responsibilities and abdicating many of the obligations associated with economic regulation, the late-modern state increasingly expresses its sovereign power through asserting, relocating and redefining its borders. Territorial borders remain as 'sites and symbols of power' which stand as a 'testament to the adaptability of the state' and can be reinforced or neglected depending on circumstances (Donnan and Wilson 1999).

This matters to critical criminologists because there are important parallels between the rise of border protection as an external expression of an unbundled sovereignty in the face of globalising processes, and domestic developments associated with the emergence of a late-modern state which is regulatory (in the economic sphere) yet selectively punitive (in the social sphere) (Braithwaite 2000; Garland 1996). Similar exclusionary and criminalising strategies have been employed by states against perceived sources of instability from without (i.e. illegal immigrants), and from within (i.e. criminals). Coutin (2005: 22) has argued that 'the convergence of policies that target illegal immigrants and those directed at criminals more generally makes it useful to bring illegal immigration into the purview of criminology'. She cites in evidence of this convergence the use of immigration law, which offers few constitutional protections, to hold detainees associated with the September 11 attacks, and observes that recent immigration reforms are following a crime control model based on increased penalties, detention and enforcement. As Garland (1996) acknowledges in his influential article about the limits of the sovereign state, the development of selectively punitive crime policies in many affluent states raises important questions about the contemporary expression of sovereign power. A critical criminology which looks beyond borders raises even more, and arguably more complex, questions about the responsibilities and powers of sovereign states with respect, not just to their existing populations, but to the citizens of other countries.

Looking beyond borders opens up a highly adversarial space where new challenges to territorial sovereignty are being played out. Bauman (2002: 90) has observed that 'global space has assumed the character of a frontier-land', a place of contested sovereignty in which adversaries are constantly on the move. The struggle between individual rights to global freedom of movement and sovereign rights to control access to territory and citizenship is the central dynamic of this unfolding process. The contest, as we have seen, is rather lopsided at present, and recognition of mobility rights is highly selective and contingent. Not surprisingly, international lawyers propose solutions that involve expanding the jurisdiction of international human rights law into these disputed frontier zones, to counter-balance the reach of externalised expressions of sovereign power: 'The violence of population mobility and immobility; conflicts, intervention and non-intervention; the global economy and contemporary politics, is nothing if not a call for genuinely *human* rights, accessible on the borders, carried across borders' (Gready 2004: 352).

Possible strategies to prevent 'untouchable states' exploiting what Morris (2003) calls the 'extraterritoriality gap' include applying the notion of the 'functional equivalent of the border' (evoked earlier in relation to sites of enforcement for migration controls), to force states to accept their international responsibilities (Motomura, cited in Morris 2003: 16). The rationale for such a

requirement, which Motomura borrows from the United States domestic criminal jurisdiction, is based on the proposition that 'the government's affirmative acts may expand the territorial scope of its obligations' (1993: 710). A more recent review of the jurisprudence of the European Court of Human Rights, the Inter-American Commission on Human Rights and the United Nations Human Rights Committee, has concluded that findings of extra-territorial responsibility have become the norm, rather than the exception, and that interpreters of human rights law have deemed 'the manner and the character of the state act more crucial than the territory where the act took place' (Mantouvalou 2005: 153).

The vision of these commentators is not of a world without borders, but one in which the meaning and significance of territorial borders is dramatically altered. McCorquodale (2001: 155) has argued that '[t]here are new ways to imagine the international legal role of territorial boundaries' which depend on new 'liberating' forms of governance not based on territory. Pangalangan (2001: 165) advocates a reconception of sovereignty based on the governance of people not place, the result of which is to 'recast territorial sovereignty from a source of power to a basis of responsibility' (see also Deng, cited in Juss 2004). And Horsman and Marshall (1994: 44) propose that borders can be re-imagined by the 'force of humanity on the move', that is, through a bottom-up globalisation process, leading ultimately, perhaps, to Urry's (2000) vision of a self-reinforcing 'global civil society' in which mobility is not a threat but an accepted and defining feature. A new global citizenship able to cope with mobility and transience might be based on notions of 'cultural citizenship' (McMaster 2001, citing Turner) or the 'citizen pilgrim' (McMaster 2001, citing Falk). This mobile citizen could be thought of as a merging of Bauman's (1993) two 'postmodern types'—a combination of an empowered and freely choosing global 'vagabond' and a culturally engaged and socially responsible 'tourist'.

Nevins (2001), for one, proposes freedom of movement to be a basic human right, derived from the universal right to work and live in dignity, and the necessity of migration, in many cases, in order to achieve these (see also Juss 2004). He imagines a universal community capable of guaranteeing these rights, constructed from a vision that puts humanity above national citizenry; a community where 'membership becomes a function of participation within a social, cultural and political-economic entity not limited to national boundaries' (Nevins 2001: 7). But a new type of fluid citizenship can also be imagined as arising, not from transnational structures or a truly global society, but from a reconceived nation-state 'founded upon a post-national sense of common purpose, which is a creative and productive life of boundary crossing, multiple identities, difficult dialogues, and the continuous hybrid reconstruction of our selves' (McMaster 2001: 188, citing an unpublished speech by Kalantzis). Importantly, from a criminological perspective, these images of a renegotiated citizenship offer the possibility to 'redefine the space occupied by unauthorized immigrants by contesting their state-defined status of criminality, and transforming the concepts of illegal presence, illicit labour and temporary legal status' (Coutin 2005: 22).

A regime of individual rights and protections which transcends physical location and applies equally to all in practice is a still-distant, arguably unattainable, cosmopolitan dream. Even Mantouvalou's promising account of directions in the juridical recognition of the extra-territorial responsibility of states recognises that this does not yet extend to an expectation of shared governmental responsibility for the protection of the full range of positive and negative human rights, regardless of the nationality of their holder (Mantouvalou 2005). Many other complex questions arise which go beyond the scope of this discussion. (See Brock 2005 for an accomplished discussion from a global contractarian position.) How can citizenship rights as we know them be guaranteed without a definable boundary? What circumstances could bring these transformations about, and to whom are these universal rights claims to be made? Ironically, the dismantling of state welfare systems and the promotion of radical individualism under neoliberal

policies, which have been the target of ongoing and justified criticism from critical criminologists and other commentators, might ultimately contribute to the conditions of possibility for the renegotiation of a new global contract, a reconnection of newly constituted communities, and the universalisation of mobility rights, as individual claims for security and wellbeing cease to be linked to citizenship of a territorially-defined state. The unbundling of sovereignty, which so far has empowered states to increase their freedom of action while reneging on their responsibilities, might conceivably create possibilities for some components of citizenship to be offered more freely within a transformed, but still state-based system (McMaster 2001). And changes in the economic calculus of individual mobility would need also to occur in order to bring about a real, if not necessarily just, 'globalisation of labour' (Sassen 1996).

Until such time as this new world arrives, there is much new territory to explore for a critical criminology which is aware of the changing significance of borders under globalisation. Its task will be to analyse the dynamics of frontier battles over access to territory; to challenge official discourses which seek to criminalise unauthorised, but otherwise benign, border crossers; to document and critique the often violent technologies of border policing; to promote due process approaches, or other liberating models, in place of purely control orientated policies; and to articulate the underlying social and structural changes which are fuelling the moral panic over population movements. Only when the establishment of a new and stable global order creates an acceptance of universal mobility (or perhaps the reverse, as Juss (2004) argues) and prompts a decriminalisation of border crossing, will the control of global mobility be once again beyond the boundaries of criminology.

1 There are two sources for this account: Mr Killesteyn, Chair of People Smuggling Task Force, questioned by the Senate Legal and Constitutional Legislation Committee (25 November 2003); http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=82201& table=ESTIMATE, and *Weekend Australian*, Vanstone approved boat plan day before (8 November 2003).

2 A term used, for example, by Greek Foreign Minister, George Papandreou, quoted in *Statewatch*; http://www.statewatch/org/news/2003/jun/07eubuffer.htm.

3 Immigration Service Director of Border Control, quoted in BBC news story, 'Immigration checks move to Belgium' (April 2004); http://news.bbc.co.uk/go/pr/fr//hi/uk_politics/ 3626355.stm.

4 'A lack of respect for rule of law', *Canberra Times* (18 November 2003), http://www.abc.net.au. 5 *Migration Amendment (Excision from Migration Zone) Act 2001*. 6 See Barry York, Social Policy Group, Department of Parliamentary Library, *Australia and Refugees, 1901-220: Annotated Chronology based on Official Sources, Summary* (16 June 2003); http://www.aph.gov.au/library/pubs/chron/2002-03/03chr02.pdf. 7 Mary Crock, quoted in 'Kurds and ways to a no zone', *Canberra Times* (8 November 2003).

8 Rather confusingly, another DIMIA briefing note states that excised offshore places remain not only part of Australia's territory, but also part of the migration zone so that all normal migration provisions apply. The only effect, it seems, is to prevent engagement of Australia's refugee determination system and bar any recourse to Australian courts; http://www.immi.gov.au/legislation/refugee/02.htm.

9 Oxfam Australia, 'Australia Pushing East Timor to Brink of Becoming Failed State', Press Release (20 May 2004); http://www.oxfam.org.uk/press/releases/etimor 2000504.htm.

10 Alexander Downer interviewed on ABC TV Four Corners program 'Rich Man, Poor Man' (10 May 2004); http://www.abc.net.au/4corners/content/2004/s1105310.htm.

11 Available at http://www.austlii.edu.au/legis/cth/consol_act/ma1958118/s5.html.

12 ABC Online, 'Govt considers options on migration zone', (25 November 2003); http://www.abc.net.au. The necessity for the government to pursue these other channels has since been diminished by the government's ability

to pass its legislation through both houses of parliament.

13 Father Frank Brennan's address to the National Press Club, 'Time to stop tampering with asylum', (5 November 2003) Canberra; http://www.uniya.org/talks/brennan_5nov03.html.

14 ' New bid to repel asylum seekers', *The Australian*, 5 November 2003.

15 'Kurds "danced for joy" on island', ABC News Online (12 November 2003); http://www.abc.net.au.

16 Reported by Mr Killesteyn, Chair of the People Smuggling Task Force to the Legal and Constitutional Legislation Committee (25 November 2003); http://www.parlinfoweb. aph.gov.au.

17 ABC Online 'Turkish asylum seekers now in Indonesia' (9 November 2003); http://www.abc.net.au.

18 ABC Online, 'PM—Labor gets tough on people smuggling'; http://www.abc.net.au.

19 http://www.austlii.edu.au/legis/cth/consol_act/ma1958118/s5.html.

20 The first lines of *The Soldier* by Rupert Brooke (1887-1915) read: 'If I should die, think only this of me: That there's some corner of a foreign field that is forever England.'

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