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Introduction

I am a Cuban mother who finds herself in the U.S. Naval Base in Guantánamo Bay, Cuba. My name is Arelys Valladares Prado. I am here with my husband and my two daughters, one who is 5 years old, the other who is 15. Today, as sadness and isolation grip my heart, having spent more than a year and a half in this labyrinth, I take the liberty to write to you, to tell you how desperately lost we are. . . . To those of us who abandoned our homes and risked our lives at sea, it's hard to conceive that all this time that has been lost will never be recovered. . . . Please, I am desperate. Don't forget me.¹

This is not a polite, bloodless process which is going on. . . . Mr Bertrand and Mr Remy . . . were interdicted on the high seas. Their boats were destroyed by the Coast Guard. They were taken to Guantánamo, where they were held behind barbed wire in U.S. captivity for months. And then, when they asked for lawyers, before they had an asylum hearing, they were forced back onto the boats and returned to Haiti . . . at Port-au-Prince, Mr Bertrand was driven off the boat with fire hoses. He was fingerprinted, identified by the Haitian military. That night he was taken from his bed, beaten, his left arm was fractured, and he fled into hiding. And he would now flee again, but for this [Migrant Interdiction Program].²

U.S. President Barack Obama has stated that Guantánamo Bay is 'a symbol around the world for an America that flouts the rule of law'.³ President

¹ 'A refugee mother opens her heart', *Miami Herald*, 19 February 2001 <www.latinamericanstudies.org/immigration/arelys.htm>.
² Harold Koh, Oral testimony before the U.S. Supreme Court, *Chris Sale, Acting Commissioner, Immigration and Naturalization Service, et al., Petitioners v Haitian Centers Council et. al.*, No 92–344, 2 March 1993.
³ President Barack Obama, *Remarks by the President at the National Defense University* (23 May 2013) <www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

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Obama was referring to the imprisonment of non-citizens in the ‘war on terror’ in the U.S. naval base that has garnered unprecedented international attention and has been the subject of much scholarship. Yet the same quotation is also applicable to the detention of refugees and individuals fleeing torture in the U.S. immigration detention facility in Guantánamo Bay. However, the continuing operation of an immigration detention facility, across the bay from the facilities used in the ‘war on terror’, is virtually unknown both in the United States and internationally. The immigration detention facility in Guantánamo Bay has received almost no media or scholarly attention since the mid-1990s.⁴ Indeed, the majority of scholars believe the facility has not been used since 1996, and the few scholars who acknowledge its continuing operation harbour significant misconceptions about its current role.⁵ Despite an expressed intention to close down the detention facilities used in the ‘war on terror’ at Guantánamo Bay,⁶ at no point has the U.S. executive indicated any intention to close down the immigration detention facility there. On the contrary, there is some evidence of plans to expand the facility.⁷

The immigration detention facility in Guantánamo Bay has been in operation since 1991 as part of the U.S. ‘Migrant Interdiction Program’

⁴ The lack of reporting is in part because media representatives are prohibited from speaking to individuals transferred to Guantánamo Bay under the Migrant Interdiction Program (MIP) without specific approval: Department of Defense, ‘Media Ground Rules for Guantánamo Bay, Cuba’ (10 September 2010), H.2. Three pieces of scholarship which constitute a notable exception to the silence on the rights of Haitian and Cuban nationals detained in Guantánamo Bay under the MIP in recent years are Sonia Farber, ‘Forgotten at Guantánamo: The *Boumediene* Decision and Its Implications for Refugees at the Base under the Obama Administration’ (2010) 98 *California Law Review* 989; Christina Frohock, ‘“Brisas Del Mar”: Judicial and Political Outcomes of the Cuban Rafter Crisis in Guantánamo Bay’ (2012) 15 *Harvard Latin Law Review* 302; and Niels Frenzen, ‘US Migrant Interdiction Practices in International and Territorial Waters’ in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers, 2010).

⁵ Some scholars wrongly believe, for example, that all Cubans interdicted by the United States are sent to Guantánamo Bay for status determinations during interdiction operation: see Stephen Legomsky, ‘The USA and the Caribbean Interdiction Program’ (2006) 18 *International Journal of Refugee Law* 677, 684; Lori Nessel, ‘Externalized Borders and the Invisible Refugee’ (2009) 40 *Columbia Human Rights Law Review* 625, 695; Maryellen Fullerton, ‘Cuban Exceptionalism: Migration and Asylum in Spain and the United States’ (2004) 35 *University of Miami Inter-American Law Review* 527, 531. In fact, between 1996 and 2013, less than 1.7 per cent of all Cuban nationals interdicted were identified as having any form of protection needs under the MIP and were transferred to Guantánamo Bay. The vast majority were simply repatriated. See Section 5.6.

⁶ Executive Order 13492, 74 *Federal Register* 4897 (2009).

⁷ See Section 2.4.

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(MIP), also referred to by the United States as Alien Migration Interdiction Operations,⁸ in the Caribbean region.⁹ Interdiction has been aptly defined by Ryan as action taken by states to prevent non-citizens ‘from reaching their intended destination’.¹⁰ Under the MIP, the United States intercepts sea vessels outside U.S. waters to prevent non-citizens from entering the municipally defined territory of the United States (U.S. mainland) without authorisation.¹¹ The vast majority of interdictions under the MIP take place in and around the Straits of Florida, the Windward Passage and the Mona Passage, where the United States maintains a persistent presence of U.S. Coast Guard vessels.¹² This area is represented in the map in Figure 1.

The vast majority of people interdicted at sea, referred to in this book as ‘interdictees’, are returned to their point of origin. However, the U.S. Coast Guard identifies a very small percentage of interdictees as having a credible fear of persecution or torture and transfers them to Guantánamo Bay. Once in Guantánamo Bay, interdictees are detained for further processing to determine whether or not they have a well-founded fear of persecution (are refugees) or are more likely than not to be tortured if returned home. Anyone found not to have protection needs in Guantánamo Bay

⁸ See, for example, U.S. Coast Guard, *Statistics: Alien Migrant Interdiction* <www.uscg.mil/hq/cg5/cg531/AMIO/amio.asp>.

⁹ As discussed in Section 4.2, the use of the term ‘migrant’ by the United States to refer to its interdiction program is misleading because not all individuals interdicted by the United States are, in fact, ‘migrants’. Some individuals interdicted by the United States are refugees, which is a legally defined status that carries certain obligations under international refugee law. On this issue, see James Hathaway, ‘Forced Migration Studies: Could We Agree Just to “Date”?’ (2007) 20 *Journal of Refugee Studies* 349. See also Erica Feller, ‘Refugees Are Not Migrants’ (2005) 24 *Refugee Survey Quarterly* 27, 28. The use of the term ‘Migrant Interdiction Program’ and references in this book to ‘migrant interdictions’ should not be seen as an endorsement of the terminology adopted by the United States. The terms are utilised in this book to avoid confusion by retaining consistency with literature produced by the U.S. executive.

¹⁰ Bernard Ryan, ‘Extraterritorial Immigration Control: What Role for Legal Guarantees?’ in Bernard Ryan and Valsamis Mitsilegas (eds.), *Extraterritorial Immigration Control: Legal Challenges* (Martinus Nijhoff Publishers, 2010), 22.

¹¹ The ‘United States’ is defined under U.S. municipal law as ‘Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands’: INA § 101(a)(38); 8 USC § 1101(a)(38). See Section 1.2. It is U.S. policy to interdict vessels ‘as far as possible from the US border’: Presidential Decision Directive 9, ‘Alien Smuggling’, White House, 18 June 1993.

¹² See Testimony of Rear Admiral Vincent Atkins, U.S. Coast Guard, before the House Subcommittee on Homeland Security, on Department of Homeland Security Air and Marine Operations and Investments, 19 April 2010 <www.dhs.gov/ynews/testimony/testimony_1271690315007.shtm>.

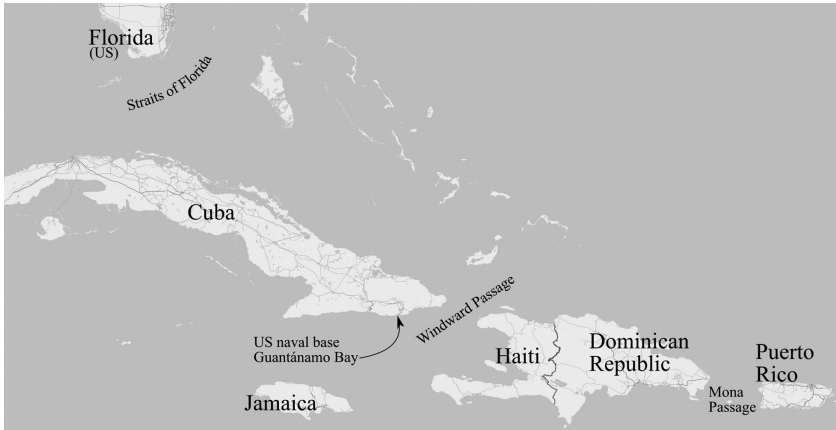


Figure 1. Map showing the Straits of Florida, the Windward Passage and the Mona Passage. Open Street Maps <www.openstreetmap.org/>. Markings made by author.

is repatriated. However, refugees and individuals at risk of torture remain in Guantánamo Bay until they can be resettled. It is U.S. policy that individuals interdicted under the MIP will not be paroled or admitted onto the U.S. mainland.¹³ As a result, the majority of refugees and individuals at risk of torture remain in Guantánamo Bay until they can be resettled in a third country.¹⁴

As Brouwer and Kumin argue, ‘in terms of numbers, the U.S. would appear to be the leader in maritime interception’.¹⁵ The numbers are indeed striking. Between the fiscal years 1982 and 2014,¹⁶ the United States interdicted

¹³ However, individuals in need of emergency medical attention during interdiction operations, for whom adequate care cannot be provided on board a Coast Guard vessel, are taken to the hospital of nearest convenience, which may be on the U.S. mainland: Friedman et al., *Maritime Interception: History, Practice and Emerging Issues*, Yale Law School, Allard K. Lowenstein International Human Rights Clinic (Unpublished, 2002), 26. Copy on file with the author.

¹⁴ A very small number of individuals have in fact been paroled or admitted to the U.S. mainland despite this general policy. Between the fiscal years 2009 and 2014, five Cuban nationals were the only individuals to be admitted to the U.S. mainland from Guantánamo Bay. They constituted 5 per cent of all individuals found to have protection needs in Guantánamo Bay during the period: U.S. Immigration and Customs Enforcement, ICE FOIA Case Number 2014-ICFO-03555 (30 September 2014), copy on file with the author.

¹⁵ Andrew Brouwer and Judith Kumin, ‘Interception and Asylum: When Migration Control and Human Rights Collide’ (2003) 21 *Refuge: Canada’s Journal on Refugees* 6.

¹⁶ The U.S. fiscal year is from 1 October to 30 September.

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244,488 people under the MIP.¹⁷ Yet the number of individuals transferred to Guantánamo Bay for further status determination and potential resettlement is extraordinarily small compared to the total number interdicted. For example, between the fiscal years 1996 and 2014, only 425 individuals were transferred to Guantánamo Bay for further processing.¹⁸ The small number of individuals found to have protection needs during interdiction operations at sea is consistent with the substantial evidence that the screening procedures adopted by the U.S. Coast Guard on board Coast Guard vessels are inadequate and fail to identify many refugees and individuals at risk of torture. As a result, there is a high probability that the United States is not complying with its international obligation to protect refugees and individuals at risk of torture from being returned to harm.¹⁹

The largest groups of individuals interdicted by the United States under the MIP are nationals of Haiti, Dominican Republic, China, Cuba, Mexico and Ecuador.²⁰ Only Haitians, Cubans and Chinese nationals are known to have been transferred to Guantánamo Bay following an interdiction. However, only Haitian and Cuban nationals have been, and continue to be, systematically transferred to Guantánamo Bay, in very small numbers, as part of the MIP and are the only groups confirmed to have been resettled in third countries after having been taken to Guantánamo Bay for full status determinations.²¹ In contrast, two groups of Chinese nationals were transferred to Guantánamo Bay in 1996 and 1997. These were ad hoc events that ended with the repatriation of the interdictees.²² No Chinese national is known to have been transferred to Guantánamo Bay after 1997. This book therefore focuses on the implications of the U.S. interdiction program in the Caribbean region for Haitian and Cuban nationals.

The MIP has an important role within U.S. immigration law and policy. For example, the MIP denies thousands of individuals from nations such as Haiti and Cuba access to the U.S. in-country processing regimes.

¹⁷ U.S. Coast Guard, *Statistics*, 'Alien Migrant Interdiction' <<http://www.uscg.mil/hq/cg5/cg531/AMIO/FlowStats/currentstats.asp>>.

¹⁸ Email to author from PRM Press, Bureau of Population, Refugees, and Migration, U.S. Department of State, 15 July 2014 (on file with author).

¹⁹ See discussion in Chapter 5.

²⁰ See the source in n 17 to this chapter.

²¹ In the fiscal years 2009 and 2014, 114 Cubans and 1 Haitian were the only individuals to be transferred to Guantánamo Bay under the MIP. See the source in n 14 to this chapter.

²² See Section 2.3.

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The MIP is also the cornerstone of the U.S. ‘wet-foot, dry-foot’ policy under which Cuban nationals interdicted at sea are prevented from entering the U.S. mainland. In contrast, any Cuban national who reaches the U.S. mainland is, as a matter of policy, paroled into the United States and is permitted to apply for an adjustment of status to a permanent resident after one year of being physically present in the country.²³ Furthermore, as the oldest extraterritorial interdiction, processing and detention regime in the world, the MIP is highly significant. It predates interdiction operations coordinated by the European Union’s border agency (FRONTEX), interdiction measures adopted by European States such as Italy and Spain, and Australia’s policy of extraterritorial processing and detention.

1.1 The United States’ Exercise of Jurisdiction and Control in Guantánamo Bay, Cuba

A unique feature of the U.S. MIP, which is not shared by the interdiction and extraterritorial detention regimes that preceded it, is that individuals found to have a credible fear of persecution or torture during interdiction operations at sea are transferred to Guantánamo Bay, territory under the ‘ultimate sovereignty of the Republic of Cuba’,²⁴ where the United States exercises ‘complete jurisdiction and control’.²⁵ To understand the position of Guantánamo Bay in international law and U.S. municipal law, it is important to understand the history of the area.

Cuba was Spanish territory when Spain declared war on the United States on 24 April 1898.²⁶ After sixteen weeks of fighting, the Spanish surrendered in July 1898 and relinquished control of Cuba by signing the *Treaty of Paris* on 10 December 1898.²⁷ Following the end of the war, Cuba came under U.S. military occupation.²⁸ The United States did not attempt

²³ This is pursuant to the *Cuban Adjustment Act* of 1966, Pub L No 89–414, 732, 80 Stat. 1161 (1966).

²⁴ *Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations; Lease to the United States of Lands in Cuba for Coaling and Naval Stations*, 16–23 February 1903, U.S.-Cuba, T.S. No 418, Art 3.

²⁵ *Ibid.* This issue will be explored further in subsection 6.3.1.

²⁶ *An Act Declaring that War Exists Between the United States of America and the Kingdom of Spain*, 30 Stat. 364.

²⁷ *Treaty of Paris*, 30 Stat. 1754.

²⁸ For commentary, see Marion Murphy, *History of Guantánamo Bay 1494–1964* (District Publications, 1962).

1.1 The United States' Exercise of Jurisdiction

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to annex Cuba and its territory of Guantánamo Bay outright. However, in 1901, an amendment to an Army Appropriation Bill was proposed by Orville Platt, Chairman of the Senate Committee on Foreign Relations. The 'Platt amendment' stipulated conditions that had to be met before the United States would grant Cuba its independence, including Article VII which states

That to enable the United States to maintain the independence of Cuba, and to protect the people thereof, as well as for its own defense, the government of Cuba *will sell or lease to the United States lands necessary for coaling or naval stations* at certain specified points to be agreed upon with the President of the United States.²⁹

The Platt amendment, including Article VII, was approved by the U.S. Congress on 2 March 1901 and became an appendix to the Constitution of Cuba on 20 May 1902.³⁰

Pursuant to the Platt amendment, the first lease agreement for Guantánamo Bay as a coaling and naval station³¹ was signed by Cuban President Estrada Palma on 16 February 1903 and by U.S. President Theodore Roosevelt on 23 February 1903.³² Article III of the lease agreement states in part that

While on the one hand the United States recognizes the continuance of the *ultimate sovereignty* of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the *United States shall exercise complete jurisdiction and control over and within* said areas . . .³³

²⁹ *Treaty Between the United States of America and Cuba*, 29 May 1934, U.S.-Cuba, T.S. No 866. Emphasis added.
³⁰ See n 28 in this chapter.
³¹ Coaling stations were needed when Navy ships were fuelled by coal. They became obsolete with the First World War as the Navy began to use petroleum to fuel ships. See Gabrielle Hech, *Entangled Geographies: Empire and Technopolitics in the Global Cold War* (MIT Press, 2011), 30.
³² *Agreement between the United States and Cuba for the Lease of Lands for Coaling and Naval Stations; Lease to the United States of Lands in Cuba for Coaling and Naval Stations*, 16–23 February 1903, U.S.-Cuba, T.S. No 418.
³³ Emphasis added.

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A supplementary agreement dated 2 July 1903³⁴ stipulated under Article I that the United States agreed to pay Cuba two thousand dollars in gold annually for the occupation and use of Guantánamo Bay. The Lease Agreement and the Supplementary Agreement of 1903 formed the basis for the U.S. occupation of Guantánamo Bay until 1934.

In 1934, an additional agreement was signed in the *Treaty Between the United States of America and Cuba*,³⁵ which made the lease of Guantánamo Bay indefinite so that the lease agreement could only be broken by mutual agreement or by abandonment of the property by the United States.³⁶

The United States exercises jurisdiction over Guantánamo Bay to this day. The Cuban Supreme Court has stated that under Cuban law, ‘the territory of that naval station is for all legal effects regarded as foreign’ in Cuba.³⁷ As the U.S. Supreme Court declared in *Boumediene v Bush* (*Boumediene*),³⁸ ‘the United States, by virtue of its complete jurisdiction and control over the base, maintains *de facto* sovereignty over this territory’.³⁹

1.2 Structure of This Book

While the United States exercises *de facto* sovereignty over Guantánamo Bay, Guantánamo Bay does not constitute U.S. territory for the purposes of U.S. municipal law. The *Immigration and Nationality Act* (INA)⁴⁰ defines the ‘United States’, when used in a ‘geographical sense’, as ‘the continental United States, Alaska, Hawaii, Puerto Rico, Guam, the Virgin Islands of the United States and the Commonwealth of the Northern Mariana Islands’⁴¹ – what this book refers to as the ‘U.S. mainland’. This definition excludes the territory of Guantánamo Bay.⁴²

³⁴ *Lease to the United States by the Government of Cuba of Certain Areas of Land and Water for Naval or Coaling Stations in Guantánamo and Bahia Honda*, U.S.-Cuba, T.S. No 426, Art III. The United States discontinued the lease of Bahia Honda under the 1902 Supplementary Agreement.

³⁵ 29 May 1934, U.S.-Cuba, T.S. No 866.

³⁶ *Ibid* Art III.

³⁷ *In Re Guzman & Latamble*, Annual Digest, 1933–34, Case No 43 p 112. See subsection 6.3.1.

³⁸ 553 U.S. 723 (2008).

³⁹ *Ibid* 755. See subsection 6.3.1.

⁴⁰ Pub L No 82–414, 66 Stat. 163.

⁴¹ INA § 101(a)38; 8 USC § 1101(a)(38).

⁴² For simplicity, this book refers to the municipally defined territory of the United States as the ‘U.S. mainland’, even though it includes islands such as Hawaii and Guam.

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1.2 Structure of This Book

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The status of Guantánamo Bay, as an area under the jurisdiction of the United States but outside its municipally defined territory, has enabled the United States to deny interdictees protections that would be due to them under U.S. municipal law if they were located on the U.S. mainland. The English Court of Appeal in the case of *R (on the application of Abbasi et al.) v Secretary of State for Foreign and Commonwealth Affairs* referred to Guantánamo Bay as a space governed solely by the will of the U.S. government, ‘immune from review in any court or independent forum’.⁴³ This statement was a reference to the operation of the detention facilities in the ‘war on terror’, but it is equally relevant to the immigration detention facility on the U.S. naval base. However, it is misleading to categorise Guantánamo Bay as a ‘legal black hole’.⁴⁴ The United States is bound by legal obligations both under municipal law and international law when it exercises jurisdiction in Guantánamo Bay. In fact, this book will show that Guantánamo Bay constitutes U.S. territory for the purposes of international human rights and refugee law.⁴⁵ The lack of effective enforcement mechanisms under international law should not be confused with a lack of applicable law. The challenge for interdictees and their advocates is not overcoming a legal vacuum, but ensuring that the United States abides by its existing international human rights and refugee law obligations.

The lack of effective avenues for the enforcement of the U.S.’ international legal obligations has been an issue for individuals interdicted under the MIP from the program’s inception. Chapter 2 discusses the historical and political context of the MIP. The chapter begins by examining the evolution of the MIP from initially targeting the irregular movement of Haitians to its extension to include the interdiction of Cuban nationals. The chapter also briefly discusses the interdiction of individuals from the Dominican Republic, Ecuador and China under the program. Furthermore, the chapter provides a background and context to the largely unsuccessful attempts by interdictees to challenge the operation of the MIP in U.S. courts. The specific legal arguments raised in these litigations

⁴³ [2002] EWCA Civ 1598, [66].

⁴⁴ Ibid [64]. See also Ralph Wilde, ‘Legal Black Hole – Extraterritorial State Action and International Treaty Law on Civil and Political Rights’ (2006) 26 *Michigan Journal of International Law* 739; George Fletcher, ‘Black Hole in Guantánamo Bay’ (2004) 2 *Journal of International Criminal Justice* 121.

⁴⁵ See, for example, discussion of Articles 12(1) and 13 of the ICCPR in subsection 6.3.1.

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are further analysed in subsequent chapters to show the lack of avenues for challenging the MIP under municipal law. Finally, Chapter 2 considers the very few occasions where the MIP has been amended in favour of individuals interdicted under the program, showing that the changes occurred primarily as a result of effective public advocacy campaigns rather than litigation in the courts.

Chapters 3 and 4 examine the municipal and international legal frameworks governing the MIP. Chapter 3 analyses the municipal legal foundations of the MIP as well as the legal foundations of the MIP under the international law of the sea. The exercise of jurisdiction over individuals interdicted by the United States is largely compliant with both U.S. municipal law and the international law of the sea. The only exception is that the United States sometimes turns rescue operations into interdiction operations and destroys unseaworthy vessels flagged to another State with which it does not have an agreement. These practices are not authorised under the international law of the sea.

The international law of the sea is not, however, the only international law that governs the MIP. In Chapter 4, this book argues that U.S. obligations under international human rights and refugee law apply wherever the U.S. exercises jurisdiction, including outside its territorial waters and in Guantánamo Bay. It goes on to explore the extent to which the United States has implemented relevant international human rights and refugee law treaties in its municipal law. The chapter shows that individuals interdicted by the United States have no effective means of compelling the U.S. executive to abide by its obligations under international human rights and refugee law. U.S. courts will not recognise such rights unless they have been implemented in U.S. municipal law, and many of the obligations in question have not been implemented by the United States. Furthermore, when implementing legislation does exist, it has been found (or is likely to be found) by U.S. courts not to apply outside the U.S. mainland. In addition, the international legal arena does not provide any effective mechanisms for the enforcement of the U.S.' international obligations.

The specific rights under international human rights and refugee law that are violated by the United States during migrant interdiction operations are analysed in Chapters 5 and 6. This book is concerned with two particularly significant components of the MIP: status determinations and the plight of individuals whose protection needs are recognised by