POLICY BRIEF 4

The Interdiction of Asylum Seekers at Sea: Law and (mal)practice in Europe and Australia

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Executive summary

The phenomenon of irregular migration by sea or ‘boat migration’ is not new, but it has drawn significant attention since the Tampa affair in Australia in 2001 and during the so-called ‘migration/refugee crisis’ in the Mediterranean in 2015–2016. Both regions have replaced proactive search and rescue (SAR) efforts with militarised border security missions, which has had detrimental effects on those seeking asylum.

This policy brief explores this evolution and critically evaluates policies and practices of deterrence at sea against the standards set by international law. It considers:

- State powers of interception, as regulated by the law of the sea for the different maritime zones, in particular as they relate to flagless (migrant) vessels;

- The duties of SAR for flag and coastal States, clarifying notions of ‘distress’, ‘rescue’, ‘disembarkation’ and ‘place of safety’ as applied to asylum seekers;

- The interaction of State obligations under the law of the sea with their obligations under human rights and refugee law, especially with respect to the principle of non-refoulement, non-arbitrary detention and due process guarantees, as well as issues of extraterritoriality and ‘effective control’.

The policy brief concludes that current strategies in Europe and Australia are not viable in the long term. It recommends that both regions abandon practices of containment without protection, engage in genuine SAR actions, and embrace a comprehensive approach to ‘boat migration’ that conforms with States’ international legal obligations and the rights of refugees and migrants.

It specifically argues that States should:

- Conduct genuine SAR missions, instead of interdiction/deterrence operations, to comply with their obligations relating to the right to life and related responsibilities underpinning the SAR regime;

- Take account of the individual circumstances of each asylum seeker encountered at sea, avoiding direct/automatic returns before considering the conditions required for their safety and respect for their rights;

- Allow disembarkation of those rescued and permit access to their territory for the purposes of refugee status determination, as this is the only solution capable of guaranteeing that any subsequent removal to a third country is safe;

- Embrace a comprehensive approach, in which law of the sea obligations are interpreted in accordance with international refugee law and human rights law, in particular the right to life, the prohibition on arbitrary detention and the principle of non-refoulement;

- Open up alternative pathways to ensure safe and legal access to Europe and Australia in humane conditions, thus avoiding asylum seekers having to resort to smuggling/trafficking rings, reducing fatalities at sea, and allowing for more orderly arrivals.
1 Introduction

The phenomenon of ‘boat migration’ has a long history. Movements of refugees across the ocean include the Vietnamese ‘boat people’ in the 1970s and 1990s; Haitians and Cubans in the Caribbean since the early 1980s; Albanians escaping the Hoxhaist regime via the Adriatic Sea in the 1990s; and a range of movements in the 2000s, including Ethiopians and Somalis crossing the Gulf of Aden, Afghans and Sri Lankans crossing the Bay of Bengal, Sub-Saharan Africans crossing the Strait of Sicily, Iraqis crossing the Aegean Sea, and most recently Syrians traversing the Mediterranean. What is new today is the scale and the danger of these movements, and the nature of responses by destination countries. The increasingly securitised and militarised measures to counter maritime flows adopted by European Union (EU) Member States and Australia, among others, appear misplaced when considering the type of movements that occur. Overreliance on interdiction powers, which go beyond what is permitted under the law of the sea (section 3), coupled with a selective approach towards rescue obligations and human rights and refugee law standards operating at sea (sections 4 and 5), compound rather than resolve the situation. These approaches arguably overstep the limits of State sovereignty to the detriment of international protection for refugees and other vulnerable migrants (section 6).

2 Background: State practice in Europe and Australia

Since 2000, 46,000 asylum seekers and migrants have drowned, mostly in the Mediterranean. This is despite the fact that this stretch of water is the most heavily surveyed and among the most tranquil in the world. The Australian Border Deaths Database has documented 1,992 deaths between 2000–2017 connected to Australia’s migration control policies. In both scenarios, the countries of origin of boat arrivals are typically war-ravaged, refugee-producing regimes. Consequently, although the flows are mixed (i.e. composed of different categories of migrants), 80–90% are asylum seekers and belong to the top-10 nationalities of the world’s refugees. In other words, the majority are likely to have international protection needs which remain unaddressed when turnback and interdiction policies are used.

2.1 Europe

Even though sea crossings are clearly linked to refugee movements, especially from Syria, Eritrea, Afghanistan and Iraq, since the beginning of the so-called ‘refugee/migration crisis’ in 2015, EU Member States have deployed a securitarian, rather than humanitarian, response.

Operations coordinated by the external frontiers agency (Frontex), renamed the European Border and Coast Guard in 2016 (EBCG), have taken over national SAR initiatives, such as the Italian Mare Nostrum mission in the Strait of Sicily, which rescued more than 140,000 migrants in distress at sea between October 2013 and October 2014. Frontex’s subsequent substitute mission, Operation Triton, has only partially replaced Mare Nostrum, as its focus is on border security and migration control and does not include a proactive SAR component.

Operation Triton has been supported by a military operation, the European Union Naval Force Mediterranean (EUNAVFOR Med) Operation Sophia, whose objective is to combat smuggling and trafficking through the Central Mediterranean. Its role is not only to identify smuggling vessels, but also to capture and dispose of them pursuant to a United Nations (UN) Security Council Resolution covering use-of-force activities on the high seas. The idea is to ‘deter’ irregular border crossings, without giving much attention to the ‘push factors’ underpinning such movements.
On the Aegean Sea, Frontex-led Operation Poseidon has been buttressed by two additional measures. First, the EU–Turkey Statement guarantees the readmission of all ‘irregular migrants’ who have left Turkey, including refugees, and ensures Turkey’s cooperation with EU anti-smuggling efforts, including through ‘pullbacks’ of migrant vessels headed to Greece. So far, Turkey has readmitted 1,487 people and blocked the exit of most migrants since March 2016. This has resulted in a huge drop of daily crossings from 2,500 to just 43, notwithstanding human rights concerns. Secondly, controls at sea have been reinforced by a NATO mission ‘tasked to conduct reconnaissance, monitoring and surveillance of illegal crossings in the Aegean’. As the mission lacks a specific SAR or border control mandate, when encountered with distress situations, it apparently rescues and (directly) returns to Turkey all survivors, irrespective of non-refoulement and related guarantees.

2.2 Australia

In Australia, there have been far fewer boat arrivals than in Europe, with just over 60,000 landings since 2000, including a peak in 2013 of 20,719. Progressively, the number has been reduced to virtually zero.

Boat deterrent initiatives started in late 2001 after the Tampa incident, through a policy known as the ‘Pacific Solution’. The Tampa was a Norwegian-registered container ship that rescued 438 asylum seekers within the SAR region of Indonesia, but closer to Christmas Island (part of Australia). When permission to disembark was requested, Australia considered it to be Indonesia’s responsibility, entering into a diplomatic standoff, during which time the Tampa remained at sea. It was eventually boarded by Australian military officials, and following hasty agreements with Nauru and Papua New Guinea (PNG), the asylum seekers were taken there to ‘offshore’ detention centres.

The incident led to the adoption of domestic legislation through which Australia has ‘excised’ its territory for immigration law purposes, such that no valid asylum claim can be made by irregular entrants (the fiction created is they have not entered Australia in a legal sense). Instead, they are directly taken to third countries declared safe, such as Nauru and PNG, where Australia has funded detention centres. Those found to be refugees are denied settlement in Australia, and must remain in Nauru or PNG or be resettled elsewhere (with very few viable options forthcoming).

Maritime interdictions were initially carried out under Operation Relex (2001–2007), with Operation Sovereign Borders commencing in September 2013 when the policy of turning back boats was reintroduced after a hiatus between 2008–2012. As a military-led border security operation, Operation Sovereign Borders focuses on deterrence, interception and forcible turnbacks of boats. According to government figures, as at early April 2017, 30 boats carrying approximately 765 people had been turned back at sea or otherwise returned to their country of departure since Operation Sovereign Borders commenced. The operations have been shrouded in secrecy, as the government’s policy is not to provide information routinely about ‘on-water’ matters. Reports from media and civil society organisations suggest that turnbacks by Australia have involved a range of risks to the safety of passengers and crew, both in the course of operations and upon return.

3 Interdiction powers under the law of the sea

Both Australia and the EU have regulated interdiction at sea in domestic/regional law, vesting extensive powers on warships to counter infringements of immigration law. In the EU, the Maritime Surveillance Regulation (MSR) establishes the rules applicable to Frontex-coordinated operations.
authorising Member States to stop, board, search and seize a vessel, to order it to alter its course or even to conduct it to a third country. In Australia, the Maritime Powers Act 2013 (Cth) (MPA) allows similar action.

Yet, under international law, the UN Convention on the Law of the Sea (UNCLOS) — to which Australia, the EU, and all its Member States are bound — imposes important limits on interdiction powers, as detailed below.

### 3.1 Territorial sea: Rights of innocent passage and refuge in port

Coastal States have sovereignty over the 12 nautical miles from their baselines, described as the ‘territorial sea’. They are permitted to exercise control there, but do not have unlimited powers. According to article 17 of the UNCLOS, vessels of all countries enjoy a right of innocent passage through the territorial sea, which includes stopping or anchoring when rendered necessary by distress or to render assistance, among other things.

According to article 19 of the UNCLOS, passage is not innocent when it is prejudicial to the peace, good order or security of the coastal State. In particular, it may be rendered non-innocent if a vessel loads or unloads persons ‘contrary to the ... immigration ... laws and regulations of the coastal State’, which is what Australia and EU Member States tend to rely on to curtail traffic. Determining exactly when passage becomes non-innocent is, therefore, crucial to establishing whether Australian and EU practice conforms with international law, as it is only in such cases that they are allowed to take ‘the necessary steps ... to prevent passage’. What these ‘necessary steps’ entail is then limited by article 27 of the UNCLOS, which excludes the exercise of criminal jurisdiction during passage, except in the cases explicitly listed (which do not contemplate ‘boat migration’ as such).

Some authors suggest that ‘[t]he fact that a vessel may be carrying ... asylum seekers who intend to request the protection of the coastal State arguably removes that vessel from the category of innocent passage’. Others note that seeking asylum actually ‘accords with international law’, although recognise that, in some cases, ‘passage with asylum seekers aboard may be non-innocent’. Still others submit that unless there is actual ‘loading’ or ‘unloading’ of persons in breach of immigration regulations, article 19(1) of the UNCLOS should not apply. The fact that article 31 of the Refugee Convention explicitly states that refugees must not be penalised for unauthorised entry, and that States are bound to interpret anti-smuggling/anti-trafficking provisions as subject to refugee law (see section 3.2), reinforces this interpretation. Thus, the mere fact that a person may request asylum does not render their passage non-innocent by default.

More generally, ‘distress’ provides an exception to coastal State control over territorial waters, independent of immigration/asylum considerations. Faced with a situation of danger, vessels transiting (or on the verge of) the territorial sea have a right to seek refuge in adjacent ports as a matter of customary law, particularly when there is ‘a well-grounded apprehension of the loss of the vessel ... or of the lives of the crew’. Refusing access to port in these circumstances would ignore ‘elementary considerations of humanity’. Therefore, practices of retention at, or ejection from, territorial waters in this situation infringe international law.

### 3.2 Contiguous zone: Rights of police as ‘necessary’

In the contiguous zone, which extends an extra 12 nautical miles beyond the territorial sea, the coastal State enjoys ‘a limited right of police’. This area does not fall within its exclusive power and, for most purposes, counts as part of the high seas. In fact, article 33(1) of the UNCLOS allows the coastal State to exercise only such control as is ‘necessary to prevent [the] infringement
of its … immigration … regulations within its territory or territorial sea’, which requires proportionality in each individual case.49

Contrary to what Australia and EU Member States appear to assume, it is not obvious that powers of detention, escort to port or forcible return are encompassed within the meaning of this provision.50 Rather, the ‘necessary’ power to control does not seem to include any of these, ‘because at this stage (i.e. that of a ship coming into the contiguous zone) the ship cannot have committed an offence’.51 In addition, it should be borne in mind that every exercise of jurisdiction in this zone remains subject to ‘other rules of international law’,52 including refugee law and human rights law.

3.3 High seas: Flag State jurisdiction, the ‘right of visit’ and stateless ships

In the high seas, freedom of navigation reigns and, as a rule, vessels are only subject to the authority of their flag State.53 Other States may exercise power in very limited cases only, as exhaustively listed in UNCLOS.54

In the case of stateless/flagless ships encountered on the high seas, which are those routinely used by asylum seekers, all States enjoy a ‘right of visit’.55 This entails a right to approach and board the vessel to verify its nationality. But whether or not additional powers of ‘arrest’ or ‘interdiction’ are included remains controversial. Most authors consider this is not the case, ‘[e]xcept where … [expressly] conferred by treaty’.56 Also, the fact that visit and enforcement powers have been regulated in separate clauses in UNCLOS (e.g. with respect to piracy or unauthorised broadcasting57) suggests that the right of visit concerning flagless ships does not imply wider enforcement prerogatives.58

‘Seizure’, for instance, assumes that a crime has been committed on the high seas. Mere navigation by asylum seekers is not considered as such a crime under international law. However, where a vessel is engaged in the ‘transport of slaves’, in human trafficking, or in migrant smuggling, the approach adopted under the various international treaties is inconsistent.59 Slave trade, under articles 99 and 110 of the UNCLOS, attracts only a right of visit. The slavery conventions do not provide for interdiction powers either.60 The UN Trafficking Protocol provides for cooperation to prevent and combat trafficking and to protect the victims thereof.61 It is only the UN Smuggling Protocol that allows for ‘appropriate measures’ to be taken where ‘evidence confirming suspicion’ of migrant smuggling is found,62 but these must take account of ‘the other rights, obligations and responsibilities of States and individuals under international law, including … international human rights law … the 1951 Convention … and the principle of non-refoulement’.63

Therefore, contrary to what European and Australian legislators appear to assume, actions such as seizing a vessel and apprehending those on board; ordering a vessel to modify its course; or conducting a vessel or those on board to a third country or handing them over to the authorities of a third State,64 do not follow from the terms of the applicable treaties. The fact that asylum seeker boats may be flagless does not allow for unlimited enforcement powers.

4 Duties of search and rescue at sea

Rescue-at-sea has sometimes been used by destination countries as an excuse for boarding flagless vessels, enabling them to intervene beyond the limits of their interdiction powers under UNCLOS, with motives other than, or additional to, the preservation of human life.65 However, the
duty to render assistance, as a core principle of the law of the sea, has a distinct purpose which is different from interception.

4.1 State obligations: Article 98 of the UNCLOS, SAR and SOLAS Conventions

A number of treaties specify several elements of the duty to rescue, including the UNCLOS, the 1974 Safety of Life at Sea Convention (SOLAS Convention), and the 1979 Search and Rescue Convention (SAR Convention). These impose obligations both on flag States and coastal States.

4.1.1 Flag State obligations: The duty to render assistance

Article 98(1) of the UNCLOS provides that ‘[e]very State shall require the master of a ship flying its flag … to render assistance to any person found at sea in danger of being lost’ and ‘to proceed with all possible speed to the rescue of persons in distress’. The obligation is not absolute and depends on whether the master ‘can do so without serious danger to the ship, the crew, or the passengers’. The SOLAS Convention contains a similar duty, but it again depends on the master’s ‘position to be able to provide assistance’.

Australian and European approaches do not foster compliance with this obligation. Rather than prosecuting shipmasters for failing to provide help, they instead tend to threaten them with (or press) charges for facilitating irregular entry of rescued asylum seekers.

4.1.2 Coastal State obligations: The duty to rescue and set up SAR services

The obligations imposed on coastal States are more stringent and include a positive duty to ensure coast-watching and rescue around their shores. ‘These arrangements shall include the establishment, operation and maintenance of such [SAR] facilities as are deemed practicable and necessary’ to proactively guarantee preparedness in cases of distress. The SAR Convention additionally provides for inter-State coordination of SAR services and for the delimitation of SAR regions, so as to cover all areas of the world.

This clarity in law is in contrast to the recurrent conflicts in practice where there are overlapping SAR regions (such as the Greek and Turkish regions in the Aegean) or where safe ports are closer to a non-SAR region coastal State (as in the Tampa case). The elimination of proactive SAR endeavours and their replacement with border security missions, as in the Mediterranean or through Operation Sovereign Borders, is also at odds with these positive obligations of coast-watching and proactive rescue.

4.2 Personal scope of application: ‘Any person’

The personal scope of application of the SAR obligation is universal. It benefits ‘any person’ found in distress at sea, including ‘everybody, even though an enemy’, regardless of nationality or legal (including immigration) status. Discrimination on account of other circumstances is also prohibited.

4.3 Territorial scope of application: ‘(Everywhere) at sea’

In regard to its territorial ambit, the SAR obligation applies ‘throughout the ocean’, unlike powers of interdiction whose exercise is subordinated to limitations (depending on maritime jurisdictional areas). The use of the generic term ‘at sea’ in article 98 of the UNCLOS supports this interpretation.
4.4 Content: Notions of ‘distress’ and ‘rescue’

The content of the SAR obligation is the most controversial on account of the potential flexibility of the core notions of ‘distress’ and ‘rescue’, discussed below. This creates inconsistencies in practice and has led to episodes of non-compliance, with boats ‘left to die’ on more than one occasion.78

The notion of ‘rescue’ relates to the ‘operation to retrieve persons in distress, provide for their initial medical or other needs and to deliver them to a place of safety’,79 which, in turn, requires further specification (see section 4.5 below).

However, since rescue is contingent on ‘distress’, the definition of that term is central to the SAR response. ‘Distress’ is defined as ‘a situation wherein there is a reasonable certainty that a person, a vessel or other craft is threatened by grave and imminent danger and requires immediate assistance’.80 Further nuance has been provided in case law, which characterises ‘distress’ as not requiring instant or overwhelming physical peril, like a vessel taking on water or being ‘dashed against the rocks’.81 The focus is on the prospect of danger, not on harm that has already occurred or is about to occur. As such, unseaworthiness could per se entail distress and trigger SAR obligations.82

The definition in the EU MSR warrants this conclusion. The text distinguishes between the ‘phase of uncertainty’, where a person/vessel is reported missing or overdue; the ‘phase of alert’, where attempts to establish contact have failed or the operating efficiency of the vessel is impaired; and the ‘phase of distress’, where the need for assistance is determined by a number of elements, including the seaworthiness of the vessel, so that ‘the existence of a request for assistance … shall not be the sole factor’.83

By comparison, the Australian SAR Manual is less detailed.84 A ‘maritime SAR incident’ is said to exist when any of the following conditions exist: a vessel has requested assistance, a vessel has sent a distress signal, or it is obvious that a vessel is in distress because it has gone missing, has been reported to be sinking/have sunk, has been/is about to be abandoned, has its operating efficiency seriously impaired, or the crew/passengers are in the water.85 Like the EU MSR, the Manual also distinguishes the phases of ‘uncertainty’ and ‘alert’ in similar terms.86 Yet, by contrast, ‘distress’ is considered to occur when a vessel requires ‘immediate assistance’ resulting from ‘grave or imminent danger’.87 So, unlike a ‘reasonable certainty’ of a threat, as per the SAR Convention, the Manual requires that a person be (already) ‘threatened’ for ‘distress’ to materialise, which has at times delayed, if not pre-empted, the SAR response.88

4.5 ‘Place of safety’, disembarkation and termination of SAR operations

As a result of repeated episodes of non-compliance with SAR obligations and frequent disagreement over disembarkation, the SAR and SOLAS Conventions have been amended89 and the content of the duty to rescue further clarified.90

Since July 2006, the State responsible for the SAR region in which assistance is rendered must exercise ‘primary responsibility’ to ensure the necessary cooperation for survivors to be ‘delivered to a place of safety’.91 Although the duty is limited to ensuring collaboration, the amendments nonetheless require a specific outcome to be achieved, namely that the survivors are ‘effectively disembarked’. This means that, contrary to growing (mal)practice, SAR operations can only be considered to terminate upon disembarkation on dry land at a place that can be considered safe. As a result, Australia’s practice of returning vessels to the edge of the territorial waters of the location from which they departed—be it on the original vessel, an orange lifeboat, or another vessel—does
not conform to this standard, whether or not the passengers have been provided with lifejackets, fuel or other supplies.\textsuperscript{92}

Although neither the ‘place of safety’ nor the concept of ‘safety’ itself has been defined in SAR or SOLAS, the amendments clearly indicate that both ‘the particular circumstances of the case and [the] guidelines developed by the [International Maritime] Organization’ have to be taken into account.\textsuperscript{93} According to the International Maritime Organization (IMO) Guidelines, a ‘place of safety’ is:

\begin{quote}

a location where rescue operations are considered to terminate ... [A] place where the survivors’ safety of life is no longer threatened and where their basic human needs ... can be met.\textsuperscript{94}

\end{quote}

This, however, does not amount to designating a default port of disembarkation – whether the next port of call,\textsuperscript{95} the port geographically closest\textsuperscript{96} or one within the SAR region country.\textsuperscript{97} Instead, it is left to the States involved to come up with an appropriate solution in the circumstances.

This is a significant gap.\textsuperscript{98} To (partially) fill it – and then only in the context of to Frontex-coordinated operations – the EU MSR stipulate that the operational plan of each Frontex-led mission must contain the ‘modalities for the disembarkation of the persons intercepted or rescued’, foreseeing three alternatives: disembarkation in the coastal Member State hosting the operation, when interdiction occurs in its territorial waters or contiguous zone; disembarkation at the place designated by the Rescue Coordination Centre (in cooperation with the host and participating Member States), in the case of SAR events; or disembarkation in ‘the third country from which the vessel is assumed to have departed’, if interdiction happens on the high seas.\textsuperscript{99} This last option is the one preferred by the EU legislator – it is only ‘if that is not possible’ that disembarkation should be arranged ‘in the host Member State’\textsuperscript{100} – but poses compatibility problems with States’ non-refoulement obligations. Its succinct formulation appears to imply that disembarkation can be arranged in a third country by default, contrary to the need to consider the individual circumstances of each asylum seeker concerned (and the general situation prevailing in the disembarkation country) (see section 5.1 below).

In terms of Australia, the SAR Manual only includes guidance on the conclusion of ‘search’ action, but not on ‘rescue’ itself\textsuperscript{101} (which is defined reproducing the SAR Annex terms).\textsuperscript{102} Otherwise, there is no further indication of what ‘safety’, ‘place of safety’ or ‘disembarkation’ mean.\textsuperscript{103} Instead, practice reveals that asylum seekers are either turned back at sea, or taken to Nauru or PNG for processing.\textsuperscript{104}

\section{Intersection with human rights and refugee law obligations}

The notion of ‘safety’ has no single meaning and the arrangements made for some asylum seekers may not be appropriate for others, given their individual circumstances and the general situation in the country of disembarkation. One advantage of the absence of a precise definition of ‘place of safety’ is that it allows for tailored responses, ‘taking into account the particular circumstances of the case’, alongside ‘other rules of international law’ (in conformity with which the law of the sea is to be construed).\textsuperscript{105}

Those ‘particular circumstances’, as spelt out in the IMO Guidelines, ‘may include factors such as the situation on board the assisting ship, on scene conditions, medical needs, and availability of transportation or other rescue units’.\textsuperscript{106} The reality is that ‘[e]ach case is unique, and selection of a
place of safety may need to account for a variety of important factors, including, above all, individual rights. As underlined in the IMO Guidelines, ‘[t]he need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea.

Therefore, ‘States cannot circumvent refugee law and human rights requirements by declaring border control measures … to be rescue measures’. Removal elsewhere without prior assessment of each individual’s situation is not ‘rescue’. Launching maritime operations with the objective of ‘stopping the boats’ and/or ‘[preventing] migrants from leaving the shores [of a third country]’ constitutes a misconception of SAR duties. Equating interdiction to SAR and disconnecting it from attendant human rights implications does not have support in international law. In the same way, disembarkation in a pre-determined place—such as Turkey/Libya or Nauru/PNG—disregarding the particular conditions of the case at hand, may not only amount to a direct breach of a State’s protection obligations, but may also entail a bad faith implementation of the law of the sea itself.

5.1 Interdiction/rescue and the principle of non-refoulement

Interdiction measures, such as those allowed under Frontex regulations and Australian law, need to comply with the principle of non-refoulement (among others) and protect survivors from any action that exposes them to a well-founded fear of persecution or a real risk of serious harm. This covers instances of ‘chain’ or ‘indirect refoulement’ via intermediary countries (such as returns via Turkey or Indonesia).

The prohibition of refoulement is key to the international protection system and is considered part of customary international law (thus binding all States independently of explicit treaty commitments). Consequently, provisions like section 22 of the MPA, according to which maritime enforcement powers can be exercised under Australian law without consideration of Australia’s international protection obligations, are in direct defiance of this prohibition. Basic tenets of international law require States to honour their international commitments in good faith. They are specifically banned from invoking the provisions of their internal law as a justification for failure to do so.

International human rights and refugee law protections apply within the territory of the State concerned, but they may also have extraterritorial application. So long as affected individuals come within a State’s ‘jurisdiction’, that State will have an obligation to ‘ensure’ that the relevant rights are guaranteed. As such, and notwithstanding the Refugee Convention’s silence about its extraterritorial reach, there is general consensus that ‘the ordinary meaning of refouler is to drive back, repel, or re-conduct, which does not presuppose a presence in-country’, thereby supporting the view that article 33(1) of the Refugee Convention includes rejection at the border, in transit (or ‘excised’) zones, as well as (anywhere) at sea. The same applies with respect to the non-refoulement obligation in article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), article 7 of the International Covenant on Civil and Political Rights (ICCPR), and article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), all of which prohibit exposure to a real risk of ill-treatment in whatever circumstances.

As a result, whether interdiction takes the form of contact actions (such as seizing, towing, boarding and returning a vessel, or handing people over to third countries) or contactless measures (including warning, blockading, re-routing or ordering a change of course) is immaterial. In so far as ‘the effect’ of the measure concerned—whatever its name or form—is to prevent migrants from reaching the borders of the [would-be host] State, exposing them to serious harm, the prohibition will be engaged. The establishment of ‘effective control’, whether through ‘active’ or ‘passive’
steps, is what counts as an exercise of ‘jurisdiction’, giving rise to international responsibility under human rights law.\textsuperscript{122} Thus, \textit{direct returns} to Turkey by NATO units, or to Sri Lanka, Vietnam, or the edges of Indonesian waters under \textit{Operation Sovereign Borders}, for instance, as well as \textit{indirect enforcement} of migration/border controls through maritime blockades, as in \textit{Operation Sophia}, are incompatible with the prohibition on \textit{refoulement}.

The EU MSR provides specific coverage in this respect, with article 4 explicitly stating that:

\begin{quote}
No person shall … be disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a country where … there is a serious risk [of] … inhuman or degrading treatment or punishment, or where … life or freedom would be threatened on account of … race, religion, nationality, sexual orientation, membership of a particular social group or political opinion … or from which there is a serious risk of an expulsion…to another country in contravention of the principle of non-refoulement.
\end{quote}

No particular territorial limitation is contemplated. Rather, the principle seems to apply to \textit{any} Frontex-led mission, whether undertaken in territorial waters, the contiguous zone of the host Member State or on the high seas.

\subsection{5.2 Interdiction/rescue and the prohibition of arbitrary detention}

In addition to the requirement that interdiction (or rescue) actions must not amount to \textit{refoulement}, intermediary stages of interception/SAR operations may also raise other human rights/refugee law issues. If those rescued are arbitrarily held at sea or in offshore facilities under the ‘effective control’ of Australia or the EU Member States, a count of unlawful detention may ensue,\textsuperscript{123} in violation of the right to liberty.\textsuperscript{124}

As noted earlier, both EU and Australian rules allow for stateless vessels presumed to be engaged in migrant smuggling to be stopped and boarded, and for the persons on board to be apprehended.\textsuperscript{125} This is intended to be, at least in the European case, ‘in accordance with the Protocol against the Smuggling of Migrants’.\textsuperscript{126} However, the Smuggling Protocol does not regulate the conditions under which smuggled migrants can be detained. It provides merely for the State concerned to take ‘appropriate measures’ if evidence is found confirming suspicions.\textsuperscript{127}

In \textit{Medvedev}, the European Court of Human Rights held that a similar ‘appropriate measures’ clause in the Convention against Illicit Traffic in Narcotic Drugs was inadequate to serve as basis for detaining people on the high seas who were suspected of drug trafficking.\textsuperscript{128} The provision did ‘not afford sufficient protection against arbitrary violations of the right to liberty’.\textsuperscript{129} Like article 8(7) of the UN Smuggling Protocol, article 17 of the Convention against Illicit Traffic in Narcotic Drugs merely allows the intervening State to ‘take appropriate measures’, without explicitly authorising detention and establishing the conditions under which it may occur. The provision also fails to indicate related guarantees of due process and judicial protection.\textsuperscript{130} Following the principle of legal certainty,\textsuperscript{131} the court therefore concluded that the clause was insufficient to justify deprivation of liberty.

With regard to asylum seekers apprehended at sea, an additional factor must be noted. Not only does the Smuggling Protocol fail to regulate detention, but it specifically requires that a general distinction be made between victims of smuggling and its perpetrators. Whereas the Protocol provides for ‘the prevention, investigation and prosecution’ of smuggling crimes,\textsuperscript{132} the victims thereof must be the object of ‘protection and assistance’,\textsuperscript{133} in line with States’ ‘obligations under international law’.\textsuperscript{134} Thus, simply declaring that ‘restraint is not arrest’, as in the Australian case, will not suffice to exclude responsibility.\textsuperscript{135}
5.3 Interdiction/rescue and procedural guarantees

Where individual rights are at stake, a series of related procedural guarantees are also applicable. Besides the need for judicial oversight of any deprivation of liberty, as indicated above, detention is only justifiable if, in the individual case, it is ‘necessary in all the circumstances’—not merely ‘reasonable’ or ‘convenient’ to public policy or national security—and is open to challenge by the individual concerned.\(^{136}\) This is so ‘even if [attempted] entry [is] illegal’. The Australian approach to mandatory detention is therefore untenable as a matter of international law.\(^{137}\)

The conditions of detention must also be adequate, otherwise they may amount to inhuman or degrading treatment.\(^{138}\) This is implicit in article 3 of the ECHR and explicit in article 10 of the ICCPR, which requires that all detained persons ‘be treated with humanity and with respect for the inherent dignity of the human person’. This entails a ‘positive obligation’ of care, with which compliance is obligatory irrespective of ‘the material resources available’.\(^{139}\) Detention that does not provide for a person’s essential needs, the opportunity to contact family or counsel, and adequate medical attention is incompatible with this obligation.\(^{140}\)

Regarding the principle of non-refoulement (including instances of indirect/chain refoulement), the only adequate manner in which to determine whether an individual can be safely sent elsewhere is to establish first that his or her life or freedom will not be threatened in the destination country, either due to lack of adequate protection there or because of insufficient procedural safeguards against onwards removal somewhere else.\(^{141}\) The Refugee Convention thus requires States to assess whether people have protection needs through an individual examination of each case.\(^{142}\) The same applies under international human rights law.\(^{143}\) To preserve the effectiveness of the principle,\(^{144}\) access to dedicated status determination procedures must be legally and practically feasible. Compliance with tight time limits and other such requirements must not frustrate this guarantee.\(^{145}\)

Indirect refoulement (via agreements with third countries, such as in the Hirsi case, which provided for automatic removals to Libya\(^ {146}\)) is also forbidden. States are prohibited from sending individuals to any country from which removal to a real risk of persecution or other serious harm is reasonably foreseeable. The presumption that a particular country is safe must be subject to rebuttal and will not be justified when reliable information indicates that the country concerned fails to meet suitable standards of protection (including procedurally). In such circumstances, it will be presumed that ‘those facts were known or ought to have been known to the [expelling] State at the time of removal’.\(^ {147}\) Hence, neither EU countries nor Australia can rely solely on international arrangements (such as those underpinning Frontex/EUNAVFOR/NATO operations or the ‘Pacific Solution’) to ensure that their non-refoulement obligations are met.\(^ {148}\)

Article 4 of the MSR recognises this to a certain extent, but fails to specify how exactly the principle is to be complied with in each individual case. The provision simply states that ‘before’ intercepted/rescued persons are disembarked, participating units ‘shall’ identify those concerned and ‘assess their personal circumstances’, giving them ‘the opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of refoulement’. However, it omits to concretise any follow-up action or to indicate which procedural guarantees apply. It also appears to assume that border officials are competent to carry out such (instant) evaluations on board ships—without providing legal counsel, translation or any facilities to prepare claims, which are basic elements for procedures to be fair.\(^ {149}\)

By contrast, Australian law contains no specific provisions to this effect. In fact, it explicitly authorises removal irrespective of whether this complies with Australia’s non-refoulement obligations,\(^ {150}\) which is in direct opposition to the most basic understanding of good faith compliance with international (procedural) commitments, as mentioned above. Instances of ‘enhanced
screening’, as are apparently taking place during turnback operations, are also insufficient to meet due process guarantees.

Even if an ‘independent and rigorous’ evaluation leads to a finding that a person is not at risk of persecution or other serious harm, the individual concerned must still be given an opportunity to have that decision reviewed. Indeed, the principle of non-refoulement ‘guarantees the availability at national level of a remedy to enforce … the [principle]’. To be effective, remedies must be legally and practically accessible, and must allow ‘the competent national authority both to deal with the substance of the … complaint and to grant appropriate relief’ (including the opportunity for review on the merits). The adjudicating authority must either be a court or be vested with similar powers and guarantees of impartiality and independence (which disqualifies ‘participating units’ in interdiction/SAR operations). In addition, appeals must have ‘automatic suspensive effect’ so as to ‘prevent the execution of measures … whose effects are potentially irreversible’. As a result, measures such as immediate returns to places like Indonesia or Turkey are incompatible with these requirements.

6 Conclusion: The limitations of current approaches

The preceding sections have disclosed a picture of non-compliance by EU Member States and Australia with their SAR duties under the law of the sea, and with key obligations under refugee and human rights law:

- Deterrence and interdiction are pursued instead of operations focused on ensuring the safety and rights of refugees and asylum seekers at sea;
- Interdiction powers have been stretched beyond the limits allowed under the law of the sea to block asylum-seeker boats or to proactively deflect them to other destinations;
- Such interventions neglect human rights and jeopardise the principle of non-refoulement, which prohibits States from sending people to any country where they may face persecution, ill-treatment or other serious harm;
- Policies of immediate or automatic removal are fundamentally at odds with the principle of non-refoulement, which requires adequate, individualised procedures with a right of appeal and appropriate safeguards, including access to legal counsel, translation, and a rigorous merits review by a competent and impartial authority;
- Holding asylum seekers in purportedly extra-jurisdictional zones (such as excised territories, boats on the high seas or international areas of ports/airports) may unlawfully impede their access to such procedures and constitute arbitrary detention, and in some cases inhuman or degrading treatment.

To observe its legal obligations in good faith, an intervening State must instead:

- Conduct genuine SAR missions, instead of interdiction/deterrence operations, to comply with its obligations relating to the right to life and related responsibilities underpinning the SAR regime;
- Take account of the individual circumstances of each asylum seeker encountered at sea, avoiding direct/automatic returns before considering the conditions required for their safety and respect for their rights;
• To that effect, **allow disembarkation and access to its territory for the purposes of refugee status determination**, as this is the only solution capable of guaranteeing that any subsequent removal to a third country is, indeed, safe;¹⁶¹

• Instead of deflection and containment measures, which may channel asylum boats through ever more perilous routes and multiply fatalities,¹⁶² a good faith application of SAR would embrace a **comprehensive approach**, in which **law of the sea obligations** are interpreted in accordance with international refugee law and human rights law, in particular the right to life, the prohibition on arbitrary detention and the principle of non-refoulement;

• In parallel, open up **alternative pathways** to ensure **safe and legal access** to Europe and **Australia** in humane conditions, thus avoiding asylum seekers having to resort to smuggling/trafficking rings. This would reduce the number of fatalities at sea and allow for more orderly arrivals. Pressure on the SAR system would decrease and smuggling/trafficking routes would be rendered obsolete for asylum seekers at sea.¹⁶³

In conclusion, to ensure good faith compliance with international law, a comprehensive ‘**protection-centred vision**’ must replace the current securitised approach that dominates EU and Australian policy on refugees and asylum seekers at sea.¹⁶⁴
Endnotes

1 For an overview, see UNHCR, Danger on the Deep Blue Sea: 40 Years of Peril <http://www.unhcr.org/seadialogue/>.

2 Ibid.


5 On EUROSUR, see Frontex, EUROSUR <http://frontex.europa.eu/intelligence/eurosur/>.


8 The Australian government defines a ‘turnback’ as an operation whereby a vessel is removed from Australian waters and retuned to just outside the territorial seas of the location from which it departed. See Commonwealth of Australia, Senate, Legal and Constitutional Affairs Legislation Committee, Estimates, 23 February 2015, 137 (Lieutenant General Angus Campbell) <http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/726d2567-78be-48ef-a9df-f7302dbb884c/0000%22>.

9 There is no legal definition of ‘interdiction’. The term is commonly taken to encompass all ‘measures applied by a State, outside its national territory, in order to prevent, interrupt or stop the movement of persons without the required documentation crossing international borders by land, air or sea, and making their way to the country of prospective destination’. See UNHCR, Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, EC/50/SC/CRP.17 (9 June 2000) 10.


Andrew Rettman, ‘NATO to take migrants back to Turkey, if rescued’ on EUObserver (23 February 2016) <https://euobserver.com/foreign/132418>.


See, extensively, Madeline Gleeson, Offshore: Behind the wire on Manus and Nauru (NewSouth Publishing, 2016).

For an account of the facts, see Ruddock v Vadarlis [2001] FCA 1329; 110 FCR 491.


34 MSR arts 6–8.


37 UNCLOS arts 2–3. On the measurement of the baselines, see UNCLOS arts 5–16.

38 UNCLOS art 18(2).

39 Eg, Ruddock v Vadarlis [2001] FCA 1329; 110 FCR 491; and Hirsi v Italy (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012). See also MSR art 6.

40 UNCLOS art 25.


44 The Creole [1853] Moore, International Arbitration 824. See also Alexander P Higgins and Constantine J Colombos, Higgins and Colombos on the International Law of the Sea (Longmans/Green, 2nd rev ed, 1951) 329; Aldo Chirco, ‘The Customary Law of Refuge for Ships in Distress’, in Aldo Chirco and Olof Linden (eds), Places of Refuge for Ships: Emerging Environmental Concerns of a Maritime Custom (Nijhoff, 2006) 163. In this line, art 24(1)(a) of the UNCLOS provides that the coastal State ‘shall not impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage’.

45 Kate A Hoff v The United Mexican States [1929] 4 RIAA 444.

46 Corfu Channel Case (United Kingdom v Albania) [1949] ICJ Rep 4 [22]. The principle has been reiterated, eg, in Juno Trader (Saint Vincent and the Grenadines v Guinea-Bissau), Judgment [2004] ITLOS Rep 17, 128 ILR 267 [77].


48 UNCLOS art 87.

49 Guyan v Suriname, Award, ICGJ 370 (PCA 2007) [445].

50 Cf Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (Cth) and Australian Maritime Powers Act 2013 (Cth) (MPA); and MSR art 8.

51 O’Connell, above n 47.

52 UNCLOS art 87(1).

53 UNCLOS arts 92(1) and 87; Convention on the High Seas, adopted 29 April 1958, 450 UNTS 82 (entered into force 30 September 1962) art 6.
54 UNCLOS arts 99 (slave trade), 100 (piracy), 109 (unauthorised broadcasting), 110 (flaglessness) and 111 (hot pursuit). See further, Efthymios Papastavrdis, The Interception of Vessels on the High Seas (Hart, 2013).


56 Cf UNCLOS arts 110(1)(a) and 105 (piracy); arts 110(1)(c) and 109(4) (unauthorised broadcasting).

57 See further, Efthymios Papastavrdis, The Interception of Vessels on the High Seas (Hart, 2013).


79 SAR Annex [1.3.2].

80 SAR Annex [1.3.13].

81 Kate A Hoff v The United Mexican States [1929] 4 RIAA 444. See also English High Court of Admiralty, The Eleanor [1809] Edw, 135.


83 MSR art 9(c)–(f).


85 Ibid [3.3.3].

86 Ibid [3.4.1], [3.4.4], [3.4.5], [3.4.7].

87 Ibid [3.4.12].


89 Resolutions MSC.155(78) and MSC.153(78), 20 May 2004.

90 Beside the formal amendments, see Guidelines on the treatment of persons rescued at sea, Resolution MSC.167(78), 20 May 2014 (IMO Guidelines), and IMO/UNHCR ‘Rescue at Sea: A guide to principles and practices as applied to migrants and refugees’ (updated 2015) <http://www.refworld.org/docid/45b8d1e54.html>.

91 SAR Annex [3.1.9], and SOLAS Ch V Reg 33 (1–1) (in identical terms).


93 SAR Annex [3.1.9], and SOLAS Ch V Reg 33 (1–1) (in identical terms).

94 IMO Guidelines [6.12]. See also IMO/UNHCR, above n 90, 6.

95 See discussions at the 29th Session of IMO Facilitation Committee, 7–11 January 2002.


97 IMO, Principles relating to administrative procedures for disembarking persons rescued at sea, FAL.35/Circ.194, January 2009.


99 MSR art 10(1).

100 MSR art 10(1)(b).

101 Australian SAR Manual [7.1]–[7.2].

102 SAR Annex [1.3.2].

103 It is s 74 of the MPA that establishes the obligation of disembarkation at a ‘place of safety’, but again without defining any of the terms.

105 SAR Annex [3.1.9], and SOLAS Ch V Reg 33 (1–1) (emphasis added).

106 UNCLOS arts 2(3), 87(1).

107 IMO Guidelines [6.15].

108 Ibid.

109 W A O’Neil, IMO Secretary-General, Opening address to the 22nd regular session of the IMO Assembly, London, IMO Headquarters, 19 November 2001.


117 ECHR art 1. See also ICCPR art 2(1); CAT art 3.


121 Hirsi v Italy (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012) [180].

122 Moreno-Lax, above n 119.

123 On retention at sea, see CPCF [2015] HCA 1 and Medvedev v France (European Court of Human Rights, Grand Chamber, Application No 3394/03, 29 March 2010). On extraterritorial detention, see Al-Saadoon and Mufdhi v UK (European Court of Human Rights, Fourth Section, Application No 61498/08, 2 March 2010), and Namah v Pato [2016] PNG SC 13.
124 ECHR art 5; ICCPR art 9; Refugee Convention arts 26 and 31(2).

125 MSR arts 6(2)(a) (territorial sea) and 7(2)(a) (high seas); MPA Div 7 (detaining vessels); Div 8 (placing and moving persons); Div 9 (arrest).

126 MSR art 7(1).

127 MSP art 8(2).


129 Medvedyev v France (European Court of Human Rights, Grand Chamber, Application No 3394/03, 29 March 2010) [82]–[103].

130 Ibid [61].

131 Ibid [80], [102].

132 MSP art 4.

133 MSP art 16.

134 Ibid.

135 MPA s 75.


139 Human Rights Committee, General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty), 44th sess, HRI/GEN/Rev.9 (Vol I) (10 April 1992) [3]–[4].

140 Eg, Human Rights Committee, Views: Communication No 1011/2001, 81st sess, UN Doc CCPR/C/81/D/1011/2001 (26 August 2004) (‘Madafferi v Australia’) (detention against medical opinion); MSS v Belgium and Greece (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011) (overcrowding, poor hygiene, basic needs unmet, maltreatment by custodians).


143 ECHR arts 2–3; ICCPR arts 6–7; CAT art 3.

144 The Convention aspires to guarantee rights that are ‘practical and effective’, not ‘theoretical or illusory’. See, among many others, Artico v Italy (European Court of Human Rights, Application No 6694/74, 13 May 1980).

145 See, eg, Jabari v Turkey (European Court of Human Rights, Fourth Section, Application No 40035/98, 11 July 2000) [39]; Abdolkhani and Karimnia v Turkey (European Court of Human Rights, Second Section, Application No 30471/08, 22 September 2009) [107]–[17].

146 Hirsi v Italy (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012) [115], [129].

147 Ibid [121].
148 MSS v Belgium and Greece (European Court of Human Rights, Grand Chamber, Application No 30696/09, 21 January 2011).

149 Hirsi v Italy (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012) [113]–[138], [146]–[157], and [197]–[206].

150 Migration Act 1958 (Cth) s 197C. See also MPA s 22 and comment in section 5.1 above.


153 Jabari v Turkey (European Court of Human Rights, Fourth Section, Application No 40035/98, 11 July 2000) [48].

154 Salah Sheekh v The Netherlands (European Court of Human Rights, Third Section, Application No 1948/04, 11 January 2007) [121].

155 Jabari v Turkey (European Court of Human Rights, Fourth Section, Application No 40035/98, 11 July 2000) [48].

156 Čonka v Belgium (European Court of Human Rights, Third Section, Application No 51564/99, 5 February 2002) [75].

157 Gebremedhin v France (European Court of Human Rights, Second Section, Application No 25389/05, 26 April 2007) [66].

158 Čonka v Belgium (European Court of Human Rights, Third Section, Application No 51564/99, 5 February 2002) [79] (emphasis added).


160 Xhavara and 15 others v Italy and Albania (European Court of Human Rights, Fourth Section, Application No 39473/98, 11 January 2001) 1.

161 Hirsi v Italy (European Court of Human Rights, Grand Chamber, Application No 27765/09, 23 February 2012) and Separate Opinion of Judge Pinto de Alburquerque.


