

Factsheet

Maritime interception and screening of asylum seekers at sea

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This factsheet focuses on the practice of screening asylum seekers at sea in the context of maritime interception operations. For more information about Australia's policy of intercepting asylum seeker boats generally, see the Kaldor Centre's factsheet on '[Turning back boats](#)'.¹

Executive Summary

In the course of intercepting asylum seekers at sea, some states conduct 'on-water screening'. This is an attempt to rapidly – and very cursorily – identify whether anyone on board has an obvious protection need, before the boat is turned around.

As a general rule, screening asylum seekers at sea is inappropriate and must not replace a full refugee status determination (RSD) process (with all its procedural and substantive safeguards). In particular, on-water screening creates a risk that asylum seekers' protection needs will not be identified, and they will be sent back to places where they fear persecution or other forms of significant harm. If this occurred, it would be a violation of Australia's *non-refoulement* obligations under international law.

Inherent in Australia's *non-refoulement* obligation is the requirement that all asylum seekers – including those intercepted at sea – are given an effective opportunity to express their need for international protection and are given access to a fair, transparent and effective RSD process.

Minimum standards for RSD include ensuring that:²

- asylum seekers are provided with information about the process, in a language they understand;
- asylum seekers have access to an interpreter;
- asylum seekers have access to legal advice and representation;
- assessments are undertaken by officials trained in identifying protection needs, who understand the principle of *non-refoulement*;
- decision-makers have access to up-to-date, authoritative and impartial country of origin information;
- written reasons are given for the decision;

- asylum seekers have an opportunity to appeal the decision on matters of fact and law, and are informed of their right to appeal;
- special procedures are put in place to enable the appropriate handling of claims involving asylum seekers with special needs or particular vulnerabilities, such as unaccompanied and separated children;
- processing take place within physical facilities that enable confidentiality and due process to be respected, and in dignified conditions where asylum seekers have access to basic services.

In *exceptional circumstances*, initial screening at sea may be undertaken to proactively identify people with protection needs and expedite their access to a full RSD process. However, it should not be used as a routine policy measure. Experience in other parts of the world shows that there are considerable logistical difficulties in ensuring that on-water reception arrangements and asylum procedures accord with the minimum international standards outlined above.

If a state implements pre-screening procedures prior to full RSD, it must ensure that:

- such an assessment does not replace full RSD, or become a *de facto* RSD procedure with limited procedural guarantees;
- if there is any doubt whether an individual may be in need of protection, they are referred to a full RSD process;
- there is a monitoring process in place to ensure that screening is conducted transparently and effectively to correctly identify those with possible protection needs;³
- pre-screening does not take place if an asylum seeker's physical and/or mental state suggests that they are not able to effectively express a need for protection.⁴

Turnbacks and international law

The practice of intercepting and turning back boats raises a number of concerns regarding Australia's compliance with its international legal obligations.⁵

With respect to Australia's obligations under international refugee and human rights law, the key concern is the risk that the principle of *non-refoulement* will be breached. This principle requires States not to send people to any country where they face a risk of persecution or other significant harm, such as arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment.⁶ This means that states must not send people to a country where they are directly at risk of such harm, or to any country that may, in turn, send them to a place where they are at risk of such harm.

Australia remains responsible for ensuring that Australian officials do not breach the principle of *non-refoulement* wherever they act, including outside Australia's territory and on the high seas.⁷

In order to give effect to its *non-refoulement* obligations, Australia must ensure that every person whom it intercepts at sea is given 'an effective opportunity to express his or her wish to seek international protection'⁸ and access to a fair, transparent and effective RSD process.⁹ Turning back boats in the absence of these safeguards creates a risk that the principle of *non-refoulement* will be violated.

Applicable standards

Although the Refugee Convention does not stipulate how RSD should take place, minimum standards have been established by UNHCR and states. These standards require that:¹⁰

- asylum seekers are provided with information about the process, in a language they understand;
- asylum seekers have access to an interpreter;
- asylum seekers have access to legal advice and representation;
- assessments are undertaken by officials trained in identifying protection needs, who understand the principle of *non-refoulement*;
- decision-makers have access to up-to-date, authoritative and impartial country of origin information;
- written reasons are given for the decision;
- asylum seekers have an opportunity to appeal the decision on matters of fact and law, and are informed of their right to appeal;
- special procedures are put in place to enable the appropriate handling of claims involving asylum seekers with special needs or particular vulnerabilities, such as unaccompanied and separated children;
- processing take place within physical facilities that enable confidentiality and due process to be respected, and in dignified conditions where asylum seekers have access to basic services.

If a state implements pre-screening procedures prior to full RSD, it must ensure that:¹¹

- such an assessment does not replace full RSD, or become a *de facto* RSD procedure with limited procedural guarantees;
- if there is any doubt whether an individual may be in need of protection, they are referred to a full RSD process;
- there is a monitoring process in place to ensure that screening is conducted transparently and effectively to correctly identify those with possible protection needs;¹²
- pre-screening does not take place if an asylum seeker's physical and/or mental state suggests that they are not able to effectively express a need for protection.¹³

Processing on board maritime vessels

Some states, including Australia, have sought to process asylum claims on board maritime vessels in the course of turnback operations, as part of their efforts to deter boat arrivals.

UNHCR states that, as a general rule, the processing of asylum claims on board maritime vessels is not appropriate because of the difficulties of ensuring compliance with the relevant standards.¹⁴ Asylum claims should instead be processed within the territory of the intercepting State.¹⁵

RSD should not be carried out at sea because it is very difficult to ensure that reception arrangements or asylum procedures accord with the minimum international standards outlined above.

UNHCR states that in *exceptional circumstances*, initial screening may be undertaken on board a maritime vessel by the intercepting State in order to identify people with protection needs.¹⁶ Fundamentally, any screening that takes place in the course of an interception operation must not result in asylum seekers being returned, directly or indirectly, to any place where they have a well-founded fear of persecution or a real risk of other significant harm. UNHCR observes that '[a]n environment of trust, confidence and transparency where individuals know what they can expect and where service providers have adequate capacity to assist arrivals is a necessary pre-condition'¹⁷ to any effective screening exercise. As noted below, there are considerable logistical difficulties in ensuring that the above requirements are met when screening takes place at sea. As a result, screening should not generally occur on board maritime vessels.

The intercepting State is responsible for ensuring that intercepted asylum seekers have access to a fair, transparent and effective RSD process.¹⁸ Following screening, those identified as having a potential protection need should be disembarked and given access to the regular RSD process, generally in the territory of the intercepting State.¹⁹ Transfer of responsibility for processing to a third State is only acceptable if asylum seekers will be able to access a fair, transparent and effective RSD process, and, if recognized as a refugee or person in need of complementary protection, will be able to enjoy effective protection there.²⁰

On-board screening in practice

In practice, attempts by states to undertake screening on board maritime vessels have generally posed considerable problems in terms of compliance with applicable international standards.²¹

Australia: Screening at sea

Australia currently has a practice of conducting on board screening of asylum seekers. In June 2014, Australian authorities intercepted two boats of Sri Lankan asylum seekers. The first group was returned directly to Sri Lankan authorities after a cursory 'enhanced

screening' process at sea to determine whether or not they raised any 'credible' protection claims. The second group, comprised of 157 Tamil asylum seekers, had set sail from a refugee camp in India. They were also subjected to enhanced screening at sea, and then were detained on an Australian Customs vessel for four weeks while the Australian government negotiated with Indian authorities about their possible return. When India refused, they were taken briefly to the Australian mainland and then transferred to offshore detention on Nauru.¹¹

In a case brought before the High Court of Australia by one of the asylum seekers, challenging the detention at sea, it was accepted that Australia had made no inquiries or assessment as to the circumstances of his departure from Sri Lanka or India, nor any assessment of whether he would be protected from *refoulement* if returned to India.²² Ultimately, the court's decision did not turn on whether or not Australia had complied with its *non-refoulement* obligations.²³ However, during the course of argument, UNHCR had expressed serious concerns that the screening procedures conducted on board the Australian vessel were not sufficient to protect the asylum seekers against *refoulement*.²⁴

Australia has continued to intercept and screen asylum seekers at sea, including boats carrying Sri Lankan asylum seekers (in November 2014²⁵ and February 2015),²⁶ and a boatload of 46 Vietnamese in March 2015, who were transferred to an Australian vessel for 'enhanced screening' interviews. These interviews were undertaken by Department of Immigration and Border Protection officials, reportedly taking between 40 minutes and two hours each.²⁷

Various concerns have been expressed about Australia's use of enhanced screening procedures – whether undertaken on land or at sea (sometimes described as 'on-water screening').²⁸ These concerns include the fact that screening interviews may be too brief to identify relevant claims,²⁹ and that people are not informed of their right to seek asylum³⁰ or their right to legal advice.³¹ Written reasons are not given for the decision, and there is no access to independent merits review.³² UNHCR has expressed concern that the enhanced screening process is 'unfair and unreliable'.³³ On-water screening amplifies these concerns because of the logistical difficulty of meeting international standards on board maritime vessels, and the lack of information that is released publicly about on-water matters.

United States: Interdiction in the Caribbean

Since 1981, it has been the policy of the United States to intercept and turn back boats carrying people from (principally) Haiti, Cuba, the Dominican Republic and the Bahamas. The US approach towards asylum seekers on those boats depends on the country of origin of the individuals concerned.

Under current US policy, Cubans who are intercepted are given screening interviews at sea, conducted by asylum officers from the US Citizenship and Immigration Service. Those found to have a 'credible fear' of harm are taken to Guantanamo Bay, where their claim is assessed in full. They are returned to Cuba only if they are found not to have a protection need.³⁴

By contrast, intercepted Haitians are subjected to a ‘manifestation of fear’ test: they are not advised of their right to seek asylum, and only those who express a fear of being returned undergo on-board screening. The manifestation of fear may be verbal or physical, and may include evidence of injury or non-verbal actions.³⁵ Those who undergo screening and are found to have a ‘credible fear’ are then transferred to Guantanamo Bay in Cuba for full RSD.

People who are intercepted in the territorial waters of a state with which the US has a bilateral agreement relating to maritime enforcement are summarily returned without screening. While protection screening may be required by the bilateral agreements, these agreements do not appear to be monitored or enforced, and it is not clear that penalties exist for lack of compliance.³⁶ UNHCR has expressed its serious concern about this.³⁷

Although UNHCR has periodically monitored US on-board screening, it has never formally endorsed the practice. Similarly, refugee law experts consider it to be inappropriate.³⁸ Recently, UNHCR has expressed its concern about the inadequacy of on-board screening, noting that ‘on-board screening and returns in the Caribbean ... appear not to fully protect against *non-refoulement*’.³⁹ In particular, the ‘manifestation of fear’ test, which places the burden on the asylum seeker to engage in behaviour that would trigger the screening process, has been deemed to be ineffective in identifying people with protection needs,⁴⁰ and thus inadequate. It has been noted that conditions on board vessels intercepted in the Caribbean (which are arguably applicable similar in other parts of the world as well) pose significant challenges to conducting screening in line with international standards. These challenges include overcrowding, sickness and fatigue, lack of medical care and lack of access to adequate information, legal advice and counselling.⁴¹

Further information

For more information on turning back boats and Australia’s international legal obligations, see the Kaldor Centre’s factsheet on [‘Turning back boats’](#).

Endnotes

¹ Andrew & Renata Kaldor Centre for International Refugee Law, *Factsheet: 'Turning back boats'*, August 2014, <http://www.kaldorcentre.unsw.edu.au/publication/%E2%80%98turning-back-boats%E2%80%99>.

² UNHCR Executive Committee, 'Determination of Refugee Status', Conclusion No. 8 (XXVIII), 12 October 1977, <http://www.unhcr.org/3ae68c6e4.html>; UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', December 2011, <http://www.unhcr.org/3d58e13b4.html> [189–191]; United Nations High Commissioner for Refugees, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate', September 2005, <http://www.refworld.org/pdfid/42d66dd84.pdf>; 'Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)', 31 May 2001, <http://www.refworld.org/docid/3b36f2fca.html>; UNHCR, 'Building In Quality: A Manual on Building a High Quality Asylum System', September 2011, <http://www.refworld.org/docid/4e85b36d2.html>.

³ UNHCR Executive Committee, 'Protection Safeguards in Interception Measures', Conclusion No. 97 (LIV), 10 October 2001, <http://www.unhcr.org/3f93b2894.html>, a)v.

⁴ UNHCR, *Background note on the protection of asylum-seekers and refugees rescued at sea*, 2002, <http://www.refworld.org/docid/3cd14bc24.html>, [24].

⁵ For more information on the turning back boats and Australia's international legal obligations, see Andrew & Renata Kaldor Centre for International Refugee Law, *Factsheet: 'Turning back boats'*, August 2014, <http://www.kaldorcentre.unsw.edu.au/publication/%E2%80%98turning-back-boats%E2%80%99>.

⁶ Convention relating to the Status of Refugees, art 33(1); Convention Against Torture, art 3; International Covenant on Civil and Political Rights, arts 6 and 7.

⁷ For more information on a state's responsibility beyond its borders, see Andrew & Renata Kaldor Centre for International Refugee Law, *Factsheet: Offshore processing and Australia's responsibility for asylum seekers and refugees in Nauru and Papua New Guinea*, April 2015, <http://www.kaldorcentre.unsw.edu.au/publications/offshore-processing-state-responsibility>.

⁸ Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Hirsi and Others v. Italy, (Application no. 27765/09), <http://www.refworld.org/pdfid/4d92d2c22.pdf>, [4.3.4].

⁹ UNHCR Executive Committee, 'Safeguarding Asylum', Conclusion No 82 (XLVIII), 17 October 1997, <http://www.refworld.org/docid/3ae68c958.html>, (ii)-(iii).

¹⁰ UNHCR Executive Committee, 'Determination of Refugee Status', Conclusion No. 8 (XXVIII), 12 October 1977, <http://www.unhcr.org/3ae68c6e4.html>; UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', December 2011, <http://www.unhcr.org/3d58e13b4.html> [189–191]; United Nations High Commissioner for Refugees, 'Procedural Standards for Refugee Status Determination under UNHCR's Mandate', September 2005, <http://www.refworld.org/pdfid/42d66dd84.pdf>; 'Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)', 31 May 2001, <http://www.refworld.org/docid/3b36f2fca.html>; UNHCR, 'Building In Quality: A Manual on Building a High Quality Asylum System', September 2011, <http://www.refworld.org/docid/4e85b36d2.html>.

¹¹ UNHCR Protection Policy Paper, *Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing* (Maritime interception operations), November 2010, [15]-[17], [55]-[59].

¹² UNHCR Executive Committee, 'Protection Safeguards in Interception Measures', Conclusion No. 97 (LIV), 10 October 2001, (a)v.

¹³ UNHCR, *Background note on the protection of asylum-seekers and refugees rescued at sea*, 2002, <http://www.refworld.org/docid/3cd14bc24.html>, [24].

¹⁴ UNHCR *Maritime interception operations*, [55]; UNHCR, *Background Paper, High Commissioner's Dialogue on Protection Challenges: Protection at Sea*, 11 Nov 2014, <http://www.refworld.org/docid/54b8fa5d4.html>, [18].

¹⁵ UNHCR, *Maritime interception operations*, [2].

¹⁶ UNHCR, *Maritime interception operations*, [55].

¹⁷ UNHCR, *Refugee Protection and Mixed Migration: 10 Point Plan in Action*, <http://www.unhcr.org/4d52864b9.html>, p126.

¹⁸ UNHCR, *Maritime interception operations*, [42]-[43]; Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Hirsi and Others v. Italy, <http://www.refworld.org/pdfid/4d92d2c22.pdf>, [4.3.4].

¹⁹ UNHCR, *Maritime interception operations*, [55].

²⁰ UNHCR, *Maritime interception operations*, [42]-[43]; UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, [15]; OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, A/69/150, http://www.ohchr.org/Documents/Issues/Migration/A-69-CRP-1_en.pdf, p15-17.

²¹ UNHCR, *Background note on the protection of asylum-seekers and refugees rescued at sea*, [23].

²² Submissions of the Office of the United Nations High Commissioner for Refugees seeking leave to intervene as amicus curiae in the case of CPCF vs Minister for Immigration and Border Protection (15 September 2014), http://www.hcourt.gov.au/assets/cases/s169-2014/CPCF_UNHCR.pdf, 46],[52].

²³ By a narrow majority (4:3) the Court held that the detention was not contrary to Australian law. However, the judgment was made on the basis of an analysis of domestic law (the Maritime Powers Act) and the Court did not engage in any detailed analysis of Australia's obligations under international refugee law. For more information, see the Kaldor Centre's case note: *CPCF v Minister for Immigration and Border Protection* [2015] HCA 1 <http://www.kaldorcentre.unsw.edu.au/publication/cpcf-v-minister-immigration-and-border-protection-2015-hca-1>.

²⁴ UNHCR, *UNHCR Legal Position: Despite court ruling on Sri Lankans detained at sea, Australia bound by international obligations*, 4 February 2015, <http://www.unhcr.org/54d1e4ac9.html>.

²⁵ Abbott Government to Assess 1 of 38 Asylum Seekers after Boat Turnback' *SBS News Online*, 29 November 2014, <http://www.sbs.com.au/news/article/2014/11/29/abbott-government-assess-1-38-asylum-seekers-after-boat-turnback>.

²⁶ Amantha Perera et al, Asylum seeker transferred at sea by Australia to face court in Sri Lanka, *The Guardian*, 20 February 2015, <http://www.theguardian.com/australia-news/2015/feb/20/asylum-seekers-transferred-at-sea-by-australia-to-face-court-in-sri-lanka>.

²⁷ Senate Legal and Constitutional Affairs Legislation Committee, Estimates: Department of Immigration and Border Protection, 25 May 2015, http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/0c5973fa-5b41-457f-af39-57df2971a205/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2015_05_25_3493.pdf;fileType=application%2Fpdf#search=%22committees/estimate/0c5973fa-5b41-457f-af39-57df2971a205/0000%22_75-78; 'Boat of Vietnamese asylum seekers turned back after 40-minute interviews', *The Guardian*, 25 May 2015, <http://www.theguardian.com/australia-news/2015/may/25/vietnamese-asylum-seeker-boat-sent-back-australian-commander-confirms>.

²⁸ Senate Legal and Constitutional Affairs Legislation Committee, Estimates: Department of Immigration and Border Protection, 25 May 2015, http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/0c5973fa-5b41-457f-af39-57df2971a205/toc_pdf/Legal%20and%20Constitutional%20Affairs%20Legislation%20Committee_2015_05_25_3493.pdf;fileType=application%2Fpdf#search=%22committees/estimate/0c5973fa-5b41-457f-af39-57df2971a205/0000%22_75-78.

[493.pdf;fileType=application%2Fpdf#search=%22committees/estimate/0c5973fa-5b41-457f-af39-57df2971a205/0000%22,75-78.](#)

²⁹ See Australian Human Rights Commission (AHRC), *Tell Me About: The 'Enhanced Screening Process'*, <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/tell-me-about-enhanced-screening-process>, 2.

³⁰ Questions Taken on Notice, Immigration and Citizenship Portfolio, Budget Estimates Hearing, 28 May 2013 (BE13/0123).

³¹ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 28 May 2013, 62 (Ms Vicki Parker, Chief Lawyer, Legal and Assurance Division, Department of Immigration and Citizenship).

³² AHRC, *Tell Me About: The 'Enhanced Screening Process'*.

³³ UNHCR, *Humanitarian Response to Asylum-Seekers Needed*, 17 June 2013, http://unhcr.org.au/unhcr/index.php?option=com_content&view=article&id=322:humanitarian-response-to-asylum-seekers-needed-unhcr&catid=35:news-a-media&Itemid=63.

³⁴ Daniel Ghezelbash, 'Lessons in Exclusion: Interdiction and Extraterritorial Processing of Asylum Seekers in the United States and Australia' in J. Gauci et al, *Exploring the Boundaries of Refugee Law: Current Protection Challenges*, Hotei Publishing, 2015, https://books.google.com.au/books?id=cCdKCAAAQBAJ&pg=PA90&dq=ghezelbash+daniel+interdiction&hl=en&sa=X&ei=QA2CVeITOMW_mAWB_IKwCQ&ved=0CBwQ6AEwAA#v=onepage&q=ghezelbash%20daniel%20interdiction&f=false.

³⁵ US Coast Guard Immigration Law Enforcement Manual, Chapter 6, B.2.a.1, http://www.uscg.mil/hq/cg5/cg531/AMIO/FOIA_Docs.pdf.

³⁶ T Alexander Aleinikoff, UN Deputy High Commissioner for Refugees, 'International Protection Challenges Occasioned by Maritime Movement of Asylum Seekers', YLS Sale Symposium, *Opinio Juris*, 16 March 2014, <http://opiniojuris.org/2014/03/16/sale-symposium-international-protection-challenges-occasioned-maritime-movement-asylum-seekers/>.

³⁷ *Ibid.*

³⁸ Elspeth Guild et al, *New approaches, alternative avenues and means of access to asylum procedures*, CEPS Paper in Liberty and Security in Europe No 77, Jan 2015, <http://www.ceps.eu/system/files/New%20Approaches%20to%20Asylum.pdf>, p26.

³⁹ T Alexander Aleinikoff, UN Deputy High Commissioner for Refugees, 'International Protection Challenges Occasioned by Maritime Movement of Asylum Seekers', YLS Sale Symposium, *Opinio Juris*, 16 March 2014.

⁴⁰ *Ibid.*

⁴¹ Elspeth Guild et al, *New approaches, alternative avenues and means of access to asylum procedures*, p26.