Andrew & Renata Kaldor Centre
for International Refugee Law

Research Brief **TURNING BACK BOATS**

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What policies has Australia had on turning back boats?

1976-2001: Before Operation Relex

The first recorded arrivals of asylum seeker boats in Australia occurred in 1976.[1] As the number of people fleeing the Indochinese conflict rose, the Fraser Government rejected the options of turning back boats and indefinite immigration detention, on the basis that they would be inhumane, damaging to Australia's international reputation and would not provide a lasting solution for people forced to flee.[2] The Government instead opted to encourage a sceptical Australian public to welcome boat arrivals.

A 'second wave' of boat arrivals from the late 1980s saw Australia's policy toward asylum seekers begin to harden. From 1989 asylum seekers could be detained on a discretionary basis[3] and the Keating Government introduced a policy of mandatory detention for those arriving by boat in 1992.[4] However, it was not until 2001 that Australia introduced a policy of intercepting asylum boats at sea.

Operation Relex

Operation Relex was introduced by the Howard Government on 3 September 2001 with the aim to deter people from arriving in Australia by boat by denying them access to Australia.[5] Under this policy, the Royal Australian Navy was to intercept and board 'Suspected Illegal Entry Vessels' (SIEVs) – that is, boats suspected of carrying people seeking to come to Australia without a visa – when they entered Australia's contiguous zone.[6] The Navy was directed to return these boats to the edge of Indonesian territorial waters, either by operating the boat under its own engine power or towing it.[7]

Operation Relex ended on 13 March 2002, to enable information relating to the operation to be made available to a Senate Select Committee for an Inquiry into a Certain Maritime Incident, also known as the 'Children Overboard Affair'.[8] It was succeeded by Operation Relex II, which commenced on 14 March 2002 and ended on 16 July 2006 when 'domestic maritime security activities' were consolidated into a single operation called Operation Resolute.[9]

In total, 17 SIEVs were intercepted under the Howard Government, although only five were turned around.[10]

Rudd and Gillard government policy

After the election of the Rudd Government in December 2007, Australian Navy and Customs officials continued the practice of intercepting vessels en route to Australia, issuing warnings and advising them to return to Indonesia, but did not in fact turn any vessels back to Indonesia.[11] The practice of issuing warnings to vessels ceased after an explosion aboard SIEV 36, which killed five asylum seekers and injured many others.[12] The Northern Territory Coroner's report into the incident concluded that a group of passengers mistakenly believed they were being returned to Indonesia and thus set fire to the vessel to avoid return.[13]

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In 2012, the Gillard Government commissioned an expert advisory panel to make recommendations about Australia's asylum seeker policy.[14] The panel recommended that a policy of turning back boats to Indonesia should only be reintroduced where certain conditions were present, including consent from the country to which boats were being returned, compliance with domestic and international law, and respect for obligations under the *Safety of Life at Sea Convention*.[15] The panel concluded that the conditions for 'effective, lawful and safe' turnbacks were not met at the time the report was released.[16]

Operation Sovereign Borders

In September 2013, the Abbott Government introduced 'Operation Sovereign Borders' (OSB), a military-led inter-agency border security initiative which incorporates offshore processing, activities to disrupt and deter people smuggling, and interception of boats.[17] Under OSB, the Government's policy is to turn back boats 'where it is safe to do so'.[18] Any determination of when it is 'safe to do so' is made by the commanding officer of an intercepting vessel.[19]

On 9 September 2018, the Minister for Home Affairs stated that OSB had intercepted 33 vessels since the start of its operations, with 827 people on-board returned to their country of departure or country of origin.

How much information is available about Operation Sovereign Borders?

Few details are publicly available regarding the conduct of turnback operations due to the Government's policy of not generally releasing information about 'on-water operations.' Initially, the Minister for Immigration and Border Protection and the Commander of OSB held weekly press conferences; these have since been replaced by monthly updates, in which limited information is provided.[20]

In response to Senate requests for the release of details about OSB, the Government has raised a claim of public interest immunity. At a Senate Inquiry into the claim, then-Minister for Immigration and Border Protection, Scott Morrison, stated that to provide the requested information 'would prejudice current and future operations, put people at risk who are involved in our operations and unnecessarily cause damage to Australia's national security, defence and international relations'.[21] The majority report expressed concern about the Government's refusal to provide relevant information to the Committee, which was unable to form a conclusion about the merits of the Government's claim as a result.[22]

The Government has since continued to refer to its public interest immunity claim in declining to answer certain questions put to it about OSB in Senate Estimates hearings.[23]

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What happens when boats are turned back under Operation Sovereign Borders?

The Government makes a distinction between 'turnbacks' and 'takebacks'.[24] In most cases, 'turnbacks' are where a vessel is removed from Australian waters and returned to just outside the territorial seas of the country from which it departed. Boats are known to have been turned back to the edge of Indonesian waters under OSB; in some instances, Australian vessels inadvertently breached Indonesian territorial sovereignty during the course of turnback operations.[25]

A 'takeback' is where Australia works with a country of departure to effect the return of passengers and crew, either by plane or via an at-sea transfer from one sovereign authority to another. Takebacks are known to have occurred in collaboration with the governments of Sri Lanka[26] and Vietnam.[27]

In some instances, passengers have reportedly been turned back on their original vessel, which was in some cases repaired and/or refuelled by Australian personnel.[28] In other cases, people were transferred to orange lifeboats purchased by the Australian Government for $2.5 million.[29] In later instances, passengers and crew were transferred onto wooden boats resembling fishing boats, which had been purchased by Australia for turnback operations.[30] In several cases, passengers and crew were transferred onto Australian Customs or Navy vessels, where they have been detained for differing periods of time before being returned.[31]

In June 2015, Australian officials were alleged to have paid approximately $40,000 cash to the crew of an asylum seeker vessel to return to Indonesia.[32] At a Senate Inquiry into the allegations, the Australian Government refused to confirm or deny whether the payments had been made.[33] For an analysis of the legal implications of the alleged payment, see the Kaldor Centre's submission to the Senate Inquiry into the incident.[34]

What operational challenges are posed by turning back boats?

Experience suggests that turning back boats is fraught with significant risks. The challenges involved in intercepting and turning back boats under Operation Relex were documented in the report of the Senate Inquiry into a Certain Maritime Incident.[35] Under Operation Relex, three SIEVs sank during Navy operations, resulting in the loss of two lives.[36] Even in the four 'successful' cases where SIEVs were turned back to Indonesia, the Navy had to deal with incidents such as threats and acts of self-harm, aggression towards members of the boarding party, and acts of sabotage to the boat.[37]

As noted by Vice Admiral Ray Griggs at a Senate Estimates Hearing in 2011:[38]

> There are risks involved in this whole endeavour. As I said, there were incidents during these activities, as there have been incidents subsequently, which have been risky. There have been fires lit, there have been attempts to storm the engine compartment of these boats, there have been people jumping in the water and that sort of thing.

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Similar concerns were expressed by retired Admiral Chris Barrie,[39] who was Chief of the Australian Defence Force during Operation Relex, and in a Border Protection Command report obtained by *The Australian* in 2012 under Freedom of Information laws.[40]

Under OSB, various risks to the life and safety of passengers, crew and Australian personnel have been reported, including passengers going overboard and acts of sabotage.[41] Asylum seekers have reported receiving heavy-handed treatment by Australian authorities in the course of turnback operations. Allegations have included limited food and access to sunlight, limited freedom of movement, separation of families and verbal abuse.[42] The Government has denied claims that asylum seekers have been mistreated in the course of OSB operations.[43]

What happens to people after they have been turned back?

Several boats are reported to have run out of fuel or run aground after being left at the edge of Indonesian waters by Australian authorities.[44] According to defence sources, the only 'safe' way of returning a boat would be for Australian officials to transfer control of intercepted boats to the Indonesian Navy at the edge of Indonesian territorial waters, or alternatively to transport intercepted boats directly to Indonesian shores.[45] Both of these tactics would require the cooperation of the Indonesian Government. However, Indonesia has consistently expressed its opposition to Australia's turnback policy.[46]

When boats are returned to Sri Lanka, passengers have reportedly been taken into the custody of the Sri Lankan Criminal Investigation Department.[47] In at least one case, a returnee has alleged that he was tortured by authorities upon return.[48] A number of asylum seekers returned by Australia to Sri Lanka subsequently fled to Nepal, where they were recognised as refugees by UNHCR.[49]

In the case of boats returned to Vietnam, passengers are reported to have been detained and interrogated by Vietnamese authorities after being returned by Australia.[50] Several returnees have been charged, convicted and jailed, despite Vietnam giving written assurances to Australia that they would not face adverse consequences for their irregular departure.[51] A number of people returned by Australia have subsequently fled Vietnam a second time and sought asylum in Indonesia.[52]

The Australian Government has confirmed that it does not monitor what happens to people who it has returned under OSB.[53]

Does Australia check if people need protection before turning them back?

It is unclear whether people turned back to Indonesia are given any opportunity to raise a claim for asylum in the course of turnback operations. However, in relation to passengers in 'takeback' operations to Sri Lanka and Vietnam, Australia has used an 'enhanced screening'

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process at sea.[54] In one case, enhanced screening interviews were reported to take place by teleconference, over a poor line and in noisy conditions.[55] In other cases, the Australian Government indicates that interviews were undertaken in person by Australian officials on board the vessel, with the support of interpreters.[56] However, reports from returned asylum seekers and their lawyers suggest that the enhanced screening process did not afford a sufficient opportunity to articulate a need for protection.[57]

UNHCR has expressed concern about Australia's use of enhanced screening procedures at sea, and its possible non-compliance with international law.[58] Legal experts have noted that these procedures raise a real risk of *refoulement*, and do not comply with the relevant international minimum standards.[59]

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.[60] Where it replaces a full RSD process, on-water screening creates a risk that asylum seekers' protection needs will not be identified and that they will consequently be sent back to places where they fear persecution or other forms of significant harm. If this occurred, it would be a violation of *non-refoulement* obligations under international law.

UNHCR indicates that 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.[61] However, UNHCR also states that this should not be used as a routine policy measure and is not appropriate for processing the claims of vulnerable people or those with specific needs, such as children.[62]

According to UNHCR, if a country implements pre-screening procedures prior to a full RSD, it must ensure that:[63]

- 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 need 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;
- 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.

UNHCR states 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' to any effective screening exercise.[64] Experience suggests that there may be considerable logistical difficulties in ensuring that on-water procedures meet the above conditions and afford a fair process.[65]

UNHCR also highlights that an intercepting country should take all appropriate steps to preserve the right to life and the right not to be subjected to torture or cruel, inhuman or

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degrading treatment or punishment for those it intercepts. This may require the intercepting country to ensure asylum seekers have access to a fair, transparent and effective RSD process.[66] UNHCR also recommends that, 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 country.[67]

Is turning back boats consistent with international law?

Obligations under the law of the sea

Under the *UN Convention on the Law of the Sea*[68] ('UNCLOS'), vessels on the high seas[69] are subject to the exclusive jurisdiction of the country in which the vessel is registered (the 'flag state').[70] Without the consent of the flag state, Australia has no right to intercept and turn back boats on the high seas, with very limited exceptions that are clearly set out under UNCLOS. While states may have a 'right of visit' with respect to stateless vessels, most experts do not consider that this includes a right of 'arrest' or 'interdiction'.[71] Thus, the legality of Australia's actions in turning back boats on the high seas is questionable.

Moreover, although Australia is permitted to 'exercise the control necessary' to prevent infringement of its immigration laws within its contiguous zone,[72] the response must be proportional in each case. Some scholars state that the power to prevent infringement of laws in the contiguous zone would 'merely entail a right to approach, inspect and warn a vessel, rather than to take enforcement measures such as arrest, diversion or the forcible escort to a port'.[73] In any case, Australia's exercise of jurisdiction in the contiguous zone is limited by its obligations under international refugee law and human rights law.

Australia also has obligations to render assistance to those in distress at sea, in accordance with UNCLOS,[74] the *International Convention for the Safety of Life at Sea*,[75] and the *International Convention on Maritime Search and Rescue*.[76] Australia could be in breach of these treaties if it turned back unseaworthy boats and thereby placed lives at risk. Under these treaties, Australia would remain responsible if asylum seekers who were placed onto lifeboats and towed back into international waters by Australian authorities ended up in a situation of distress.

Obligations under human rights and refugee law

Australia would be at risk of breaching international refugee law and human rights law if it turned back boats without assessing protection claims made by people on board. Specifically, it would be at risk of breaching its obligation of *non-refoulement* under the *Convention relating to the Status of Refugees*[77] ('Refugee Convention'), the *International Covenant on Civil and Political Rights*,[78] and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*,[79] which require Australia not to return people to countries where they face a risk of persecution and other forms of serious harm.

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Indonesia, Sri Lanka and Vietnam are not parties to the *Refugee Convention*. Refugees in Indonesia have limited legal protections and are liable to detention.[80] In Sri Lanka there are reports of torture by Sri Lankan security forces,[81] and in Vietnam a range of serious human rights concerns have been raised, including state violence against detainees.[82] Due to these countries' practices, by turning boats back to Indonesia, Sri Lanka and Vietnam, Australia is at risk of breaching its *non-refoulement* obligations. Given the inadequacies of the enhanced screening process noted above, the likelihood of *refoulement* is significant.

Are turnbacks permissible under Australian law?

In June 2014, Australia intercepted a boat of 157 Sri Lankan Tamil asylum seekers, who had set sail from a refugee camp in India.[83] They were subjected to a cursory 'enhanced screening' process 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. A case was brought before the High Court of Australia on behalf of one of the asylum seekers. Among other things, it was argued that the Australian Government had unlawfully detained the asylum seekers at sea.

The case was heard in October 2014, and judgment was handed down in January 2015.[84] By a narrow 4:3 majority, the High Court held that the detention of these asylum seekers was not contrary to Australian law. Importantly, the decision turned on an interpretation of the scope of powers conferred on Australian officials under a domestic statute, the *Maritime Powers Act 2013* (Cth). The judges did not engage in any detailed analysis of whether such detention was lawful under international law.

Do other countries turn back boats?

Although some countries turn back asylum seeker boats, the permissibility of these actions under international law is in doubt, as explained above.

United States

Since 1991, the United States has had a policy of intercepting and turning back boats carrying people seeking to enter the US.[85] Until recently, the approach of the US towards potential refugee claims depended on the country of origin of the individuals concerned. Intercepted Haitians were subjected to a 'shout test': they were not advised of their right to seek asylum, and only those expressing a fear of returning received a shipboard screening. Those found to have a 'credible fear' were then transferred to Guantanamo Bay in Cuba for refugee status determination.[86] Previously, Cubans who were intercepted at sea were taken to Guantanamo Bay, where they were screened and returned to Cuba only if they were found not to have a protection claim. In January 2017, then-US President Barack Obama ended the 'wet foot-dry foot' policy under which Cubans who reached US soil were granted

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residency.[87] The number of Cuban asylum seekers travelling to the US by sea has since dropped considerably.[88]

Under the Trump Administration, information on the number of asylum seekers arriving by sea and intercepted by the US Coast Guard has reportedly become difficult to obtain.[89] Coast Guard media releases have confirmed that interdictions and turnbacks are continuing under President Trump.[90]

Although UNHCR has periodically monitored US on-board screening, it has never formally endorsed the practice. Similarly, some refugee law experts consider the US on-board screening policy to be inappropriate, particularly due to the inability to provide accessible information, rest, medical care or even the ability to submit and pursue asylum claims effectively at sea.[91] Senior UNHCR officials have also expressed concern about the inadequacy of on-board screening by the US, noting that 'on-board screening and returns in the Caribbean … appear not to fully protect against *non-refoulement*'.[92] In particular, the 'manifestation of fear' test, which places the burden on Haitian asylum seekers to engage in behaviour that would trigger the screening process, has been deemed to be ineffective in identifying people with protection needs, and thus inadequate.[93] It has been noted that conditions on board vessels intercepted in the Caribbean pose significant challenges to conducting screening in line with international standards.[94] These challenges include overcrowding, sickness and fatigue, lack of medical care and lack of access to adequate information, legal advice and counselling.[95]

European Union

The European Union border management agency, Frontex, coordinates a number of joint missions to intercept and return boats, which have become a major focus of European national search and rescue initiatives.[96] Operation Triton focuses on border security and migration control.[97] This is supported by a military operation, the European Union Naval Force Mediterranean ('EUNAVFOR Med') Operation Sophia, which aims to combat smuggling and trafficking through the Central Mediterranean and includes action to identify, capture and dispose of smuggling vessels.[98] Joint Operation Poseidon addresses irregular movements in south-eastern Europe, particularly along Greece's sea and land borders.[99]

Under a March 2016 agreement between the EU and Turkey, all 'new irregular migrants' crossing from Turkey into the Greek islands are to be returned to Turkey, including through turning back vessels; relevant international and EU law protections are intended to be respected during this process.[100] Turkey is required to take 'any necessary measures' to prevent irregular migration through new sea or land routes to the EU. In return, the EU agreed to resettle one Syrian refugee in Turkey for every Syrian returned from Greece. Once irregular crossings between Turkey and the EU have been 'substantially and sustainably reduced', a Voluntary Humanitarian Admission Scheme is to be activated for Syrian refugees in Turkey. Boat turnbacks to Turkey are supported by a NATO mission 'tasked to conduct reconnaissance, monitoring and surveillance of illegal crossings in the Aegean'.[101]

Southeast Asia

In 2013, Thailand turned back boats of Rohingya people fleeing Myanmar following conflict between Buddhists and Muslims in Rakhine State in Myanmar.[102] UNHCR expressed grave concerns about these turnbacks and also about reports that shots were fired at Rohingya people during the interception of one of these boats.[103]

In May 2015, Thailand, Malaysia and Indonesia pushed back boatloads of Rohingya and Bangladeshi asylum seekers and migrants, leaving around 8,000 people stranded at sea.[104] Following negotiations, Malaysia and Indonesia agreed to allow the passengers to disembark on the condition that they be resettled or repatriated within one year.[105] Australia refused to assist with resettlement of refugees caught up in the incident.[106] UNHCR made a number of recommendations for how irregular maritime movements in Southeast Asia could be better addressed as a response to the crisis.[107] This crisis catalysed efforts within regional fora to more effectively address similar incidents in future.[108]

What are the alternatives to turning back boats?

Alternatives that prioritise compliance with Australia's international obligations and the safety those travelling by sea include good-faith search and rescue operations; access for all those intercepted to proper refugee status determination procedures on land; and the facilitation of alternative pathways, which would allow those seeking asylum to avoid dangerous sea journeys while reducing opportunities for smuggling and trafficking rings.

For more information, see the Kaldor Centre Policy Brief, *The interdiction of asylum seekers at sea: Law and (mal)practice in Europe and Australia.*

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