

1 family torn apart by war  
is too many.



Geneva, 04.02.2015

## **UNHCR Legal Position: Despite court ruling on Sri Lankans detained at sea, Australia bound by international obligations**

UNHCR has followed with deep concern Australia's recent policies and practices of interception at sea, detention and removal of individuals who may be seeking Australia's protection.

UNHCR made a submission as *amicus curiae* (friend of the court) in the recent High Court case of *CPCF v Minister for Immigration and Border Protection*, decided on 28 January 2015.

UNHCR's submission focused on the application of ***non-refoulement* obligations** - that is, Australia's obligation **not to return an individual to persecution or other serious harm when intercepting a vessel outside its territorial waters**.

Key principles put forward by UNHCR included that the *non-refoulement* obligation in Article 33(1) of the 1951 Refugee Convention applies to officials of a Contracting State wherever they exercise jurisdiction; that Australia as a party to the Refugee Convention is obliged to fulfill its obligations in good faith; and that Australian laws, while binding on Australian officials and courts, do not change Australia's international obligations.

While the majority of the High Court found that Australia's detention of the 157 asylum-seekers at sea was permitted under the Maritime Powers Act, subject to some limits, including in relation to ensuring their safety, it did not find it necessary to decide on the scope of Australia's *non-refoulement* obligations on the facts before it.

The High Court judgment contains some references to judicial decisions in Australia, the UK, and the US as supporting the contention that the refugee *non-refoulement* obligation only applies within a receiving State's territory but, importantly, also acknowledges that *non-refoulement* obligations may have extraterritorial effect.

**From UNHCR's perspective, it is important to stress that, at international law, the principle of *non-refoulement*, including under Article 33(1) of the 1951 Refugee Convention, applies wherever and however a State exercises jurisdiction**, as set out in UNHCR's written submissions. UNHCR considers that there is only one superior court decision<sup>[1]</sup> that is at variance with this understanding, and that decision, like the one in *CPCF*, was based on

interpretation of national rather than international law.

Numerous conclusions of UNHCR's Executive Committee, of which Australia is a founding member, have attested to the overriding importance of the *non-refoulement* principle irrespective of the geographic location of the asylum-seeker or refugee. They have also emphasized the fundamental importance of fully respecting the principle of *non-refoulement* for people at sea, highlighting that:

“interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or

freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law.” (ExCom Conclusion No. 97 (LIV (2003 [(a)(iv)]

When vessels presumed to be carrying asylum-seekers are intercepted, or where there are indications that those on board intend to apply for asylum should they have the opportunity to do so, UNHCR's position is that they must be swiftly and individually screened, in a process which they understand and in which they are able to explain their needs. Such screening is best carried out on land, given safety concerns and other limitations of doing so at sea. If protection issues are raised, their cases should be properly determined through a substantive and fair refugee status determination procedure on the territory of the intercepting State to establish whether any one of them may be at risk of persecution or other serious human rights violations. This remains the case even when bilateral or multilateral transfer arrangements are involved. Anything short of such a screening, referral and assessment may risk putting already vulnerable individuals at grave risk of danger.

On a more general level, UNHCR appreciates actions taken by the Australian Government to save lives in rescue-at-sea operations and its willingness to work with UNHCR and other States to develop a regional approach to maritime movements. UNHCR urges renewed efforts towards the development of viable regional alternatives to potentially dangerous journeys by sea for asylum-seekers, refugees and stateless persons.

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[1] Sale (1993) 509 US 155.

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