

Legal and Constitutional Committee

Regarding the non-existent people smuggling of refugees to Australia, again

"As has been observed in relation to other cases of this kind, the prisoners were not involved in a 'people-smuggling' exercise. There was nothing covert about either operation. They were transporting the non-citizens to Australia for presentation to Australian authorities. There was no attempt to hide from the authorities or to disguise what they had done."

The idiocy of the government position can be seen in the list of boats supplied by DIAC to the senate estimates committee and proves the lie that we are punishing any people smugglers, just trying to stop any refugees ever getting here.

It is claimed that the Indonesian fishermen are smuggling people to Australia, yet all of the Afghans, Iranians, Kurds, Sri Lankans and others have been "smuggled" out of their own countries simply because they cannot get documents from their tormentors.

I would advise the committee strongly to listen to the For a Radio address by Richard Towle from last April regarding so-called SIEV 36.

On these dates: 27/1/08, 2/4/09, 22/4/09, 29/4/09, 9/6/09, 28/0/09/ 11/7/09, 13/8/09, 29/9/09, 27/9/09 x 2 groups of Afghans 22/10/09, 1/11/09, 26/11/09, 27/11/09, 3/12/09, 9/12/09, 13/1/10, 6/2/10 refugees arrived with benefit of "smugglers" aka Indonesian or any other fishermen. That is 902 refugee claimants sailed themselves, so who is the government going to punish?

The family for paying for the boat? Who is going to be punished because mostly Afghans and Sri Lankans managed to get themselves to Australia to seek asylum?

It makes a complete and utter nonsense that 902 out of 3494 so called smuggled migrants came on their own but we still don't understand that it is not people smuggling.

**This protocol is nothing to do with the movement of refugees across borders and the lie is that it does.**

**Refugees do not require documents to move across borders, they are not coerced or bought and sold across borders except often times by governments as in Malaysia.**

**See Article 31 of the refugee convention for reference and confirmation, or the Australian migration Act Article 36.**

**Article 19 is very clear and should we keep implementing this as a means to punish those who would save the lives of refugees we would be contributing to the exact same genocide as we did in 1938 when we denied entry to Jewish refugees.**

**The senate has been sent documents hundreds of times, the records of people sent to jail for not people smuggling have been sent to the senate dozens of times and are all available here again.**

**By continuing this doltish behaviour Australia allows so called people smugglers lawyers, trials, appeals, sentences and then the right to go home for not smuggling anyone to Australia, as the court cases all clearly show.**

**Under Australian law, as the letter from Senator Evans department attached, clearly shows, anyone has the right to seek asylum here, they do not need papers and they don't need prior permission. To have it so would negate the refugee convention.**

**It is time the senate recognised that we are illegally locking up innocent men, women and children in other countries in the bogus name of "preventing people smuggling" when no-one is being smuggled.**

**Thursday, 10 February 2000 SENATE—*Legislation L&C 205***

**Senator McKIERNAN—I am talking particularly about the boat people. They are the people who arrive on our shores – mainly on Ashmore Islands – and who put their hands up and say, ‘Find me, find me! Take me in.’ They do not use these exact words, but they want to be found. These are not people who are escaping the scrutiny of our Coast Watch people.**

**Senator Vanstone—Senator, I cannot resist! Perhaps you could tell Mr Beazley that so he does not keep raving on about this silly idea that we need a Coast Guard to locate the people. You at least realise that they want to be found; it would be helpful if your party realised that as well.**

# **PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME UNITED NATIONS 2000**

Advance copy of the authentic text. The copy certified by the Secretary-General will be issued at a later time.

## **PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, SEA AND AIR, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME**

### **Preamble**

*The States Parties to this Protocol,*

*Declaring* that effective action to prevent and combat the smuggling of migrants by land, sea and air requires a comprehensive international approach, including cooperation, the exchange of information and other appropriate measures, including socio-economic measures, at the national, regional and international levels,

*Recalling* General Assembly resolution 54/212 of 22 December 1999, in which the Assembly urged Member States and the United Nations system to strengthen international cooperation in the area of international migration and development in order to address the root causes of migration, especially those related to poverty, and to maximize the benefits of international migration to those concerned, and encouraged, where relevant, interregional, regional and subregional mechanisms to continue to address the question of migration and development,

*Convinced* of the need to provide migrants with humane treatment and full protection of their rights,

*Taking into account* the fact that, despite work undertaken in other international forums, there is no universal instrument that addresses all aspects of smuggling of migrants and other related issues,

*Concerned* at the significant increase in the activities of organized criminal groups in smuggling of migrants and other related criminal activities set forth in this Protocol, which bring great harm to the States concerned,

*Also concerned* that the smuggling of migrants can endanger the lives or security of the migrants involved,

*Recalling* General Assembly resolution 53/111 of 9 December 1998, in which the Assembly decided to establish an open-ended intergovernmental ad hoc committee for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration of, inter alia, an international instrument addressing illegal trafficking in and transporting of migrants, including by sea,

*Convinced* that supplementing the United Nations Convention against Transnational Organized Crime with an international instrument

against the smuggling of migrants by land, sea and air will be useful in preventing and combating that crime,

*Have agreed as follows:*

### **I. General provisions**

#### *Article 1*

*Relation with the United Nations Convention against Transnational Organized Crime*

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.
2. The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein.
3. The offences established in accordance with article 6 of this Protocol shall be regarded as offences established in accordance with the Convention.

#### *Article 2*

*Statement of purpose*

The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

### *Article 3*

#### *Use of terms*

For the purposes of this Protocol:

- (a) "Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;
- (b) "Illegal entry" shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State;
- (c) "Fraudulent travel or identity document" shall mean any travel or identity document:
  - (i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or
  - (ii) That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or
  - (iii) That is being used by a person other than the rightful holder;
- (d) "Vessel" shall mean any type of water craft, including nondisplacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service.

### *Article 4*

#### *Scope of application*

This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 6 of this Protocol, where the offences are transnational in nature and involve an organized criminal group, as well as to the protection of the rights of persons who have been the object of such offences.

### *Article 5*

#### *Criminal liability of migrants*

Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.

### *Article 6*

#### *Criminalization*

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

- (a) The smuggling of migrants;
- (b) When committed for the purpose of enabling the smuggling of migrants:
  - (i) Producing a fraudulent travel or identity document;
  - (ii) Procuring, providing or possessing such a document;
- (c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:

- (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;
- (b) Participating as an accomplice in an offence established in accordance with paragraph 1 (a), (b) (i) or (c) of this article and, subject to the basic concepts of its legal system, participating as an accomplice in an offence established in accordance with paragraph 1 (b) (ii) of this article;
- (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

3. Each State Party shall adopt such legislative and other measures as may be necessary to establish as aggravating circumstances to the offences established in accordance with paragraph 1 (a), (b) (i) and (c) of this article and, subject to the basic concepts of its legal system, to the offences established in accordance with paragraph 2 (b) and (c) of this article, circumstances:

- (a) That endanger, or are likely to endanger, the lives or safety of the migrants concerned; or
- (b) That entail inhuman or degrading treatment, including for exploitation, of such migrants.

4. Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.

## **II. Smuggling of migrants by sea**

### *Article 7*

#### *Cooperation*

States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.

#### *Article 8*

##### *Measures against the smuggling of migrants by sea*

1. A State Party that has reasonable grounds to suspect that a vessel that is flying its flag or claiming its registry, that is without nationality or that, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party concerned is engaged in the smuggling of migrants by sea may request the assistance of other States

Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance to the extent possible within their means.

2. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying the marks of registry of another State Party is engaged in the smuggling of migrants by sea may so notify the flag State, request confirmation of registry and, if confirmed, request

authorization from the flag State to take appropriate measures with regard to that vessel. The flag State may authorize the requesting State, inter alia:

(a) To board the vessel;

(b) To search the vessel; and

(c) If evidence is found that the vessel is engaged in the smuggling of migrants by sea, to take appropriate measures with respect to the vessel and persons and cargo on board, as authorized by the flag State.

3. A State Party that has taken any measure in accordance with paragraph 2 of this article shall promptly inform the flag State concerned of the results of that measure.

4. A State Party shall respond expeditiously to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorization made in accordance with paragraph 2 of this article.

5. A flag State may, consistent with article 7 of this Protocol, subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken. A State Party shall take no additional measures without the express authorization of the flag State, except those

necessary to relieve imminent danger to the lives of persons or those which derive from relevant bilateral or multilateral agreements.

6. Each State Party shall designate an authority or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of registry or of the right of a vessel to fly its flag and for authorization to take appropriate measures. Such designation shall be notified through the Secretary-General to all other States Parties within one month of the designation.

7. A State Party that has reasonable grounds to suspect that a vessel is engaged in the smuggling of migrants by sea and is without nationality or may be assimilated to a vessel without nationality may board and search the vessel. If evidence confirming the suspicion is found, that State Party shall take appropriate measures in accordance with relevant domestic and international law.

#### *Article 9*

##### *Safeguard clauses*

1. Where a State Party takes measures against a vessel in accordance with article 8 of this Protocol, it shall:

(a) Ensure the safety and humane treatment of the persons on board;

(b) Take due account of the need not to endanger the security of the vessel or its cargo;

(c) Take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State;

(d) Ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.

2. Where the grounds for measures taken pursuant to article 8 of this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.

3. Any measure taken, adopted or implemented in accordance with this chapter shall take due account of the need not to interfere with or to affect:

(a) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or

(b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.

4. Any measure taken at sea pursuant to this chapter shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

### **III. Prevention, cooperation and other measures**

#### *Article 10*

##### *Information*

1. Without prejudice to articles 27 and 28 of the Convention, States Parties, in particular those with common borders or located on routes along which migrants are smuggled, shall, for the purpose of achieving the objectives of this Protocol, exchange among themselves, consistent with their respective domestic legal and administrative systems, relevant information on matters such as:
  - (a) Embarkation and destination points, as well as routes, carriers and means of transportation, known to be or suspected of being used by an organized criminal group engaged in conduct set forth in article 6 of this Protocol;
  - (b) The identity and methods of organizations or organized criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol;
  - (c) The authenticity and proper form of travel documents issued by a State Party and the theft or related misuse of blank travel or identity documents;
  - (d) Means and methods of concealment and transportation of persons, the unlawful alteration, reproduction or acquisition or other misuse of travel or identity documents used in conduct set forth in article 6 of this Protocol and ways of detecting them;
  - (e) Legislative experiences and practices and measures to prevent and combat the conduct set forth in article 6 of this Protocol; and
  - (f) Scientific and technological information useful to law enforcement, so as to enhance each other's ability to prevent, detect and investigate the conduct set forth in article 6 of this Protocol and to prosecute those involved.
2. A State Party that receives information shall comply with any request by the State Party that transmitted the information that places restrictions on its use.

#### *Article 11*

##### *Border measures*

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.
2. Each State Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of the offence established in accordance with article 6, paragraph 1 (a), of this Protocol.
3. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.
4. Each State Party shall take the necessary measures, in accordance with its domestic law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.
5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.
6. Without prejudice to article 27 of the Convention, States Parties shall consider strengthening cooperation among border control agencies by, inter alia, establishing and maintaining direct channels of communication.

#### *Article 12*

##### *Security and control of documents*

Each State Party shall take such measures as may be necessary, within available means:

- (a) To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and
- (b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the State Party and to prevent their unlawful creation, issuance and use.

#### *Article 13*

##### *Legitimacy and validity of documents*

At the request of another State Party, a State Party shall, in accordance with its domestic law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for purposes of conduct set forth in article 6 of this Protocol.

#### *Article 14*

##### *Training and technical cooperation*

1. States Parties shall provide or strengthen specialized training for immigration and other relevant officials in preventing the conduct set forth in article 6 of this Protocol and in the humane treatment of migrants who have been the object of such conduct, while respecting their rights as set forth in this Protocol.

2. States Parties shall cooperate with each other and with competent international organizations, non-governmental organizations, other relevant organizations and other elements of civil society as appropriate to ensure that there is adequate personnel training in their territories to prevent, combat and eradicate the conduct set forth in article 6

of this Protocol and to protect the rights of migrants who have been the object of such conduct. Such training shall include:

(a) Improving the security and quality of travel documents;

(b) Recognizing and detecting fraudulent travel or identity documents;

(c) Gathering criminal intelligence, relating in particular to the identification of organized criminal groups known to be or suspected of being engaged in conduct set forth in article 6 of this Protocol, the methods used to transport smuggled migrants, the misuse of travel or identity documents for purposes of conduct set forth in article 6 and the means of concealment used in the smuggling of migrants;

(d) Improving procedures for detecting smuggled persons at conventional and non-conventional points of entry and exit; and

(e) The humane treatment of migrants and the protection of their rights as set forth in this Protocol.

3. States Parties with relevant expertise shall consider providing technical assistance to States that are frequently countries of origin or transit for persons who have been the object of conduct set forth in article 6 of this Protocol. States Parties shall make every effort to provide the necessary resources, such as vehicles, computer systems and document readers, to combat the conduct set forth in article 6.

#### *Article 15*

##### *Other prevention measures*

1. Each State Party shall take measures to ensure that it provides or strengthens information programmes to increase public awareness of the fact that the conduct set forth in article 6 of this Protocol is a criminal activity frequently perpetrated by organized criminal groups for profit and that it poses serious risks to the migrants concerned.

2. In accordance with article 31 of the Convention, States Parties shall cooperate in the field of public information for the purpose of preventing potential migrants from falling victim to organized criminal groups.

3. Each State Party shall promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.

#### *Article 16*

##### *Protection and assistance measures*

1. In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

2. Each State Party shall take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol.

3. Each State Party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol.

4. In applying the provisions of this article, States Parties shall take into account the special needs of women and children.

5. In the case of the detention of a person who has been the object of conduct set forth in article 6 of this Protocol, each State Party shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers.

#### *Article 17*

##### *Agreements and arrangements*

States Parties shall consider the conclusion of bilateral or regional agreements or operational arrangements or understandings aimed at:

- (a) Establishing the most appropriate and effective measures to prevent and combat the conduct set forth in article 6 of this Protocol; or
- (b) Enhancing the provisions of this Protocol among themselves.

#### *Article 18*

##### *Return of smuggled migrants*

1. Each State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who is its national or who has the right of permanent residence in its territory at the time of return.
2. Each State Party shall consider the possibility of facilitating and accepting the return of a person who has been the object of conduct set forth in article 6 of this Protocol and who had the right of permanent residence in its territory at the time of entry into the receiving State in accordance with its domestic law.
3. At the request of the receiving State Party, a requested State Party shall, without undue or unreasonable delay, verify whether a person who has been the object of conduct set forth in article 6 of this Protocol is its national or has the right of permanent residence in its territory.
4. In order to facilitate the return of a person who has been the object of conduct set forth in article 6 of this Protocol and is without proper documentation, the State Party of which that person is a national or in which he or she has the right of permanent residence shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person to travel to and reenter its territory.
5. Each State Party involved with the return of a person who has been the object of conduct set forth in article 6 of this Protocol shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person.
6. States Parties may cooperate with relevant international organizations in the implementation of this article.
7. This article shall be without prejudice to any right afforded to persons who have been the object of conduct set forth in article 6 of this Protocol by any domestic law of the receiving State Party.
8. This article shall not affect the obligations entered into under any other applicable treaty, bilateral or multilateral, or any other applicable operational agreement or arrangement that governs, in whole or in part, the return of persons who have been the object of conduct set forth in article 6 of this Protocol.

## **IV. Final provisions**

### *Article 19*

#### *Saving clause*

1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of nonrefoulement as contained therein.
2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

#### *Article 20*

##### *Settlement of disputes*

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.
2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.
3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.
4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

**Indonesia ratified this protocol but not the refugee protocol but it would be illegal for Indonesia to use this protocol to jail anyone who gives refugees a ride.**

#### **IV. Final provisions**

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2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

**UNHCR Summary Position on the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention Against Transnational Organized Crime**

1. UNHCR has followed with interest the recent adoption of the UN Convention against Transnational Organized Crime, including the Protocol against the Smuggling of Migrants by Land, Sea and Air ("Protocol against Smuggling") and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("Protocol against Trafficking"). The Office is pleased to be **present at the High-Level Political Signing Conference held in Palermo, Sicily, from 12 to 15 December 2000.**

2. **UNHCR shares the concerns raised by many States that criminal and organized smuggling of migrants, on a large scale, may lead to the misuse of national asylum or immigration procedures. However, given an increasing number of obstacles to access safety, asylum-seekers are often compelled to resort to smugglers. UNHCR is also aware of cases of trafficked persons, particularly women and children, who may, under exceptional circumstances, be in need of international protection. The Office therefore participated in the preparatory work of the Ad Hoc Committee in Vienna, supporting its efforts to elaborate international instruments which would enable governments to combat smuggling and trafficking of persons, whilst upholding their international protection responsibilities towards refugees.**

3. The Protocol against Smuggling, for instance, contains a number of provisions which may impact on smuggled asylum-seekers. The authorization to intercept vessels on the high seas, the obligation to strengthen border controls and to adopt sanctions for commercial carriers, or the commitment to accept the return of smuggled migrants may indeed affect those who seek international protection. A number of comparable provisions of the Protocol against Trafficking may have a similar effect.

4. **During the sessions of the Ad-Hoc Committee, UNHCR therefore emphasized the need to reconcile measures to combat the smuggling of migrants and the trafficking of persons with existing obligations under international refugee law. The Office welcomes the adoption of a saving clause in both Protocols, designed to safeguard the rights of asylum-seekers and refugees under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, in particular in relation to the principle of non-refoulement.**

5. In addition, UNHCR appreciates the adoption of provisions for the protection of smuggled migrants, such as the obligation of States Parties to take appropriate measures to afford smuggled migrants protection against violence and to take into account the special needs of women and children. The Protocol against Smuggling is also clear in that it does not aim at punishing persons for the mere fact of having been smuggled or at penalizing organizations which assist such persons for **purely humanitarian reasons**.

Indonesian fishermen do not deserve to be charged or jailed.

6. In conclusion, UNHCR hopes that States Parties will respect the international legal framework set out by both Protocols through the adoption of similar safeguards in all bilateral or regional agreements or operational arrangements implementing or enhancing the provisions of these Protocols.

Again, I implore the senate to stop this racist, cruel pandering to rednecks when all you really want to do is punish refugees for daring to access their legal rights to asylum or tell us how you think an unaccompanied Afghan Hazara can get legal documents when Afghans are not registered at birth and Hazara have never had legal rights in Afghanistan.

Or of the list below, who is it you think must be "stopped" in the name of the spurious "stopping people smuggling claim".

To 9 February 2010  
Irregular Maritime Arrivals (by sea) – 1 July 2008 to 9 February 2010  
Breakdown by Nationality

Nationalities	Number
Afghans	1966
Sri Lankans	801
Iraqis	284
Kurds	151
Iranians	121
Indonesians	62
Burmese (Rohingyas)	43
Stateless	21
Kuwaitis	11
Pakistani	9
Vietnamese	8
Bedouins	4
Bangladeshis	3
Palestinian	3
Somalis	2
Syrians	2
Others (2)	2
Yemenis	2
Total	3494

Tabled Document No 5

**QUESTION TAKEN ON NOTICE  
 ESTIMATES 2009-10 – SUPPLEMENTARY  
 2010: 9 FEBRUARY 2010**

By: DIAC  
 Date: 9/2/10

**IMMIGRATION AND CITIZENSHIP PORTFOLIO**

**(50) Output 1.3: Border Security**

Senator Barnett (L&CA 114) asked for an update of the answer to question No. 50 which sought updated information to the answer to question No. 39 of 28 May 2009, regarding figures for boat arrivals from 1 July 2008 to date, including total numbers for irregular maritime arrivals and crew.

*Answer*

The previous updated information comprised irregular maritime arrivals (IMAs) from 1 July 2008 up to and including SIEV 74.

The information below comprises SIEV, IMA and crew numbers from SIEV 75 to SIEV 102 which arrived on 6 February 2010.

To 9 February 2010  
 Irregular Maritime Arrivals (by sea) – 1 July 2008 to 9 February 2010

Date of Arrival	SIEV	Number & Nationality (excludes crew)	Crew	Location
20-11-2009	75	49 Afghans, 1 Pakistani	2	Ashmore Islands
23-11-2009	76	55 Afghans, 1 Iranian	2	Cape Leveque
26-11-2009	77	2 Afghans, 2 Iranians, 45 Kurds	3	Christmas Island
26-11-2009	78	29 Afghans	0	Ashmore Islands
27-11-2009	79	22 Afghans	0	Ashmore Islands
03-12-2009	80	49 Afghans, 4 Iraqis	0	North West of Darwin
03-12-2009	81	15 Burmese	3	Ashmore Islands
06-12-2009	82	40 Afghans	2	Scott Reef
09-12-2009	83	44 Sri Lankans, 8 Pakistanis, 1 Afghan	0	Christmas Island
10-12-2009	84	48 Iraqis, 12 stateless(TBC)	3	Christmas Island
15-12-2009	85	51 Afghans	4	Ashmore Islands
18-12-2009	86	55 Afghans	4	Ashmore Islands
26-12-2009	87	3 Afghans, 3 Iranians	3	Ashmore Islands
28-12-2009	88	10 Burmese	1	Ashmore Islands
29-12-2009	89	30 Afghans	3	NE Gove
30-12-2009	90	48 Afghans	4	Ashmore Islands
31-12-2009	91	7 Afghans, 41 Iraqi, 4 Kurds, 5 Iranian, 1 Palestinian	4	Ashmore Islands

Or which part of "it is not an offence to enter Australia without documents or stay in Australia without documents" you don't understand or where in the refugee convention it says one particular form of transport is illegal.

This latest attempt to demonise refugees should be seen for what it is and treated with the contempt it deserves to a senate that refuses to recognise their rights under our own laws.

Our DIAC records show that as of 9 February this year 1966 of the arrivals were from Afghanistan and on that date only 879 were still in detention with not one person being deported. The notion that we could "stop" this number of genuine refugees by making their form of transport illegal is a delusion that Australia alone indulges in. The rest of the world with 99.999% of the world's refugees and asylum seekers does not use this protocol to lock up refugees without trial or charge, without lawyers or legal rights of any description.

Even if we sent all of the 176 fishermen who helped 3494 refugees to Australia from Indonesia to prison what would that prove? Would there be less refugees in the world? Would peace break out because Australia has made one form of transport criminal? The fishermen are paid a pittance and are outnumbered on average by 21:1 so the senate actually has to describe their crime.

Describe the crime involved in giving refugees a ride away from danger or have the ICC exhume those who helped the jews we rejected and have them tried as war criminals instead of internationally recognised heroes.

I know all the arguments that we never want to have another SIEVX and they are right, but SIEVX was engineered by the former government as a means of deterring refugees, not stopping people smuggling.

The women and children on SIEVX have never had an inquest held into their deaths, the men have never been claimed, we don't know yet who most of them are because the senate continues to hide the truth by refusing to order a royal commission into the deaths of 65 men, 146 children and 142 women whose only "crime" was to seek our help under the law.

The former government knew all about Abu Quesay in February 2000, yet they did nothing to stop him so I do not want one senator to bleat about the deaths on SIEVX when it is clear you simply do not care and do not understand that continuing to demonise refugees and the people who give them a ride you will be killing many more.

Or in the damning words of expert Professor James Hathaway, with particular note to the last sentence.

## **REFUGEE COUNCIL OF AUSTRALIA 2009 AGM PUBLIC FORUMS**

Tuesday 17 November, 2009

**Australian co-operation in South-East Asia: disaster or opportunity?**

**PROFESSOR JAMES HATHAWAY**

Dean and William Hearn Chair of Law, Law School, University Of Melbourne

Co-operation between states to protect refugees is lawful. The preamble of the Refugee Convention calls upon states to find ways to share responsibility toward refugees. It is perfectly right for Australia and other states to negotiate agreements among states that accept and live by the same obligations to refugees, so as to arrange more fairly distributed protection responsibilities.

However, in order for Australia to share responsibility:

\_ The state with which Australia proposes to share responsibility has to be a party to the 1951 Convention and its Protocol. It is not possible to share responsibility with a state which has no responsibilities under the Convention and is therefore not bound by anything.

\_ The 'receiving' state has to be accountable formally and must live up to the obligations which are being transferred to it. Refugee law is not concerned with abstract niceties but with the reality on the ground.

The problem for Australia is that it is virtually surrounded by states which have not ratified the 1951 Convention or do not have the capacity or willingness to abide by it. This poses a significant challenge for Australian governments wishing to share the responsibility for refugee protection with these states. Despite an indication from Indonesia 12 months ago that ratification was imminent, it is clear that Indonesia does not want to be vulnerable to responsibilities which emanate from the Convention.

This therefore leaves only New Zealand, Korea and the Philippines, each of which has signed the Convention and has proven administrative capacity to abide by it, which Australia can consider for the sharing of responsibilities within the region. The debate though should shift away from the notion of regional-sharing to global-sharing. As a global movement, the idea of responsibility on a global level makes more sense. Governments cannot trade off offers of resettlement for their duties of protection. Deals should not be made with international law as international law exists as the bedrock. Australia may wish to show leadership by going beyond its responsibilities under international law but it cannot trade away its protection responsibilities."

In real terms doing dirty deals with Indonesia is illegal and must be stopped now.

Marilyn Shepherd

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**Australian Government**  
**Department of Immigration and Citizenship**

Ms Frederika Steen  
15 Accrington Place  
CHAPEL HILL QLD 4069

Dear Ms Steen

Thank you for your email of 16 April 2009 to the Minister for Immigration and Citizenship, Senator Chris Evans, regarding Australia's stance against people smuggling and human trafficking, Australia's approach to asylum seekers, and the Australian Government's arrangements with UNHCR and IOM for operations in the Republic of Indonesia to support displaced persons in the region. The Minister has asked me to reply on his behalf.

In the first part of your email you have asked questions about what laws are being broken by people (those seeking asylum and the vessel operators) who enter Australian territory by boat.

In answer to your questions, it is not an offence under the Migration Act 1958 ('the Act') to enter Australia without a visa that is in effect. However, by doing so a person becomes an unlawful non-citizen, and will be liable to be detained for the purposes of conducting health, identity, and security checks.

Activities such as the carriage of non-citizens to Australia without documentation, or the carriage of concealed persons to Australia, known commonly as people smuggling, are offences under the Act and the people involved in these activities may be prosecuted.

The Australian Government recognises that where an asylum-seeker has entered Australian territory (which includes the territorial sea), Australia has a responsibility to assess his or her claim for refugee status, regardless of his or her mode of arrival in Australia. As you would be aware, as a signatory to the Refugees Convention, Australia owes protection obligations to those persons who are found to be refugees. If a person is found to be in need of Australia's protection through a Refugee Status Determination process, they will receive it.

It is important to note that there is a difference between a non-citizen who enters Australia at an excised offshore place without a visa that is in effect and a non-citizen who enters Australia other than at an excised offshore place without a visa that is in effect. The main difference is that a non-citizen who arrives at an excised offshore place without a visa that is in effect is barred from making a valid visa application (including a protection visa) unless the Minister lifts the bar, whereas a non-citizen

who enters Australia other than at an excised offshore place without a visa that is in effect is not.

Notwithstanding that a non-citizen who enters Australia at an excised offshore place without a visa that is in effect cannot make a valid application for a visa (including a protection visa), such a person is still assessed to see whether they are owed protection obligations. If they are assessed as being a refugee it is usually the case that the Minister will lift the bar on them making a valid visa application (including a protection visa).

In the second part of your email, you have asked about how the Australian Government works with international organisations to provide assistance and protection to refugees and asylum seekers in Indonesia. The Australian Government works with Indonesia and IOM to provide temporary protection for irregular migrants intercepted *en route* to Australia. Australia funds IOM to provide humanitarian assistance (including food, accommodation and medical provisions) to these persons. Persons who raise a protection claim are referred to UNHCR for assessment. These arrangements provide an opportunity for them to have their protection claims assessed in a safe environment rather than resorting to the services of people smugglers and undertake dangerous maritime ventures.

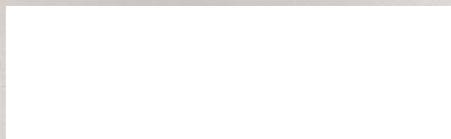
Since 1999 the department has provided approximately AUD 30 million to support these arrangements that support displaced persons in the region and minimise the risk that they will attempt dangerous maritime ventures.

In addition the department has provided nearly AUD 2 million since 2007 to UNHCR to undertake refugee status determinations in Indonesia. Recognising the importance of UNHCR's work in Indonesia, the Minister also recently committed to provide an additional AUD 2 million to support its operations.

The Australian Government also provides significant support to displaced persons in the region under the Displaced Persons Program. The program funds education and livelihood activities which prepare displaced persons and refugees for successful return and reintegration, local integration or third country resettlement.

Working with our regional neighbours and with international organisations such as UNHCR and IOM to assist refugees and asylum seekers are some of the key ways the Australian Government protects and provides assistance to refugees and displaced persons in our region. Thank you for raising your concerns with the Minister.

Yours sincerely



Cathy Maurer  
Acting Assistant Secretary  
International Cooperation Branch

17 May 2009



**Australian Government**  
**Department of Immigration and Citizenship**

Ms Frederika Steen

**Via Email:**

Dear Ms Steen

Thank you for your email of 2 December 2009 to the Minister for Immigration and Citizenship, Senator Chris Evans, concerning the Government's asylum policy. The Minister has asked me to reply on his behalf.

Under Australian and international law, any person has the right to come to Australia and make a claim for refugee status. Once a person has entered Australian territory or Australia's territorial seas, Australia has a responsibility under the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol* (the *Refugees Convention*), to assess the claims of a person who claims protection, regardless of their mode of arrival in Australia, or whether they have passed through a country where they may have claimed asylum en route to Australia. It may not be possible for a person to seek asylum in the first safe country they reach, as there may be no refugee determination system for them to access, or they may have no entitlement to live in that country.

The Rudd Government was elected on a platform which included that all people arriving irregularly on boats will be detained and processed on Christmas Island. This policy is an integral part of a strong border security framework which is in Australia's national interest and ensures that Australia fulfils its international human rights obligations through fair and humane arrangements for asylum seekers. All people who arrive irregularly on boats will be subject to detention for the management of health, identity and security checks while their protection claims are assessed as expeditiously as possible. Only those boat arrivals who are found to be refugees will be granted permanent Protection visas and brought to the Australian mainland. Boat arrivals who do not raise protection claims or who are not found to be refugees will be subject to removal or voluntary return.

The Government is committed to the principles of the International Convention for the Safety of Life at Sea and the United Nations Convention on the Law of Sea, as well as to its responsibilities as a signatory to the International Convention on Maritime Search and Rescue.

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The current numbers of people coming to Australia seeking asylum are low by historical standards. The situation has been similar in other industrialised countries. The total number is only a small percentage of the more than ten million refugees and displaced people in the world. All those who seek asylum have their claims assessed by well-trained departmental officers according to Australian law, and if not found to be genuine refugees, are not granted a Protection visa.

The Government believes that strong border security measures and the fair and humane treatment of asylum seekers are not mutually exclusive. The Government recognises that irregular maritime arrivals who have entered Australian territory (which includes the territorial sea), may raise claims that engage Australia's protection obligations under various human rights treaties.

All irregular maritime arrivals are treated fairly and humanely and, under enhanced processing arrangements, have their asylum claims assessed as expeditiously as possible.

I hope that you will find this information useful.

Thank you for writing on this matter.

Yours sincerely

Stephen Allen  
Acting First Assistant Secretary  
Border Security Division  
// December 2009