

To the Committee,

Australia is signatory to the refugee convention, the covenant of civil and political rights, the convention on the rights of the child, the convention against torture and the optional protocol, the convention against discrimination of all descriptions and still we persist in this fiction that we need to lock up those most vulnerable people on earth by pretending it is about border security and people smuggling.

Under the convention of refugees detention is considered inherently undesirable and the so-called smuggling protocol relied on to lock up innocent people has this to say:

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.

11 December 2000

Australia continues to jail those who only provide a taxi service to refugees while pretending that it is legal to jail them and ignoring the specific provisions of this protocol.

It is said that people are "unlawful" but the courts have this to say about the use of the word:

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2002/1009.html?query=al%20masri>

"60 In any event, while it is literally correct to describe the applicant as an "unlawful" entrant and an "unlawful non-citizen" that is not a complete description of his position. The nomenclature adopted under the Act provides for the description of persons as "unlawful non-citizens" because they arrived in Australia without a visa. This does not fully explain their status in Australian law as such persons are on-shore applicants for protection visas on the basis that they are refugees under the Refugees Convention.

61 The Refugees Convention is a part of conventional international law that has been given legislative effect in Australia: see ss 36 and 65 of the Act. It has always been fundamental to the operation of the Refugees Convention that many applicants for refugee status will, of necessity, have left their countries of nationality unlawfully and therefore, of necessity, will have entered the country in which they seek asylum unlawfully. Jews seeking refuge from war-torn Europe, Tutsis seeking refuge from Rwanda, Kurds seeking refuge from Iraq, Hazaras seeking refuge from the Taliban in Afghanistan and many others, may also be called "unlawful non-citizens" in the countries in which they seek asylum. Such a description, however, conceals, rather than reveals,

their lawful entitlement under conventional international law since the early 1950's (which has been enacted into Australian law) to claim refugee status as persons who are "unlawfully" in the country in which the asylum application is made.

62 The Refugees Convention implicitly requires that, generally, the signatory countries process applications for refugee status of on-shore applicants irrespective of the legality of their arrival, or continued presence, in that country: see Art 31. That right is not only conferred upon them under international law but is also recognised by the Act (see s 36) and the Migration Regulations 1994 (Cth) which do not require lawful arrival or presence as a criterion for a protection visa. If the position were otherwise many of the protection obligations undertaken by signatories to the Refugees Convention, including Australia, would be undermined and ultimately rendered nugatory.

63 Notwithstanding that the applicant is an "unlawful non-citizen" under the Act who entered Australia unlawfully and has had his application for a protection visa refused, in making that application he was exercising a "right" conferred upon him under Australian law."

Now those four paragraphs make the law pretty clear and that was upheld by three more judges in the Full Court of the Federal court in April 2003 after Akram had been deported.

So far so good on the "unlawful" = "illegal" story.

So let's wander off to the High Court appeal which became Behrooz, Al Kateb and Al Khafaji and have a look at the meaning of "unlawful".

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/HCATrans/2003/456.html?query=behrooz>

GUMMOW J: *What is the baggage of the word "unlawful"?*

MR BENNETT: *Your Honour, none. It is a word used in a definition provision, it is simply a defined phrase. It is not a phrase which necessarily involves the commission of a criminal offence.*

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/HCATrans/2003/458.html?query=behrooz>

"GUMMOW J: *What is the force of the word "unlawful"?*

MR BENNETT: *It is merely a word which is used in a definition section, your Honour.*

GLEESON CJ: *Does it mean without lawful permission?*

MR BENNETT: *Yes, that is perhaps the best way of paraphrasing - - -*

GUMMOW J: *But in the Austinian sense that is meaningless, is it not?*

MR BENNETT: *Yes, your Honour. The draftsman of the Act is not necessarily taken to be familiar with the - -*

GUMMOW J: *Well, perhaps they ought to be."*

Wow, so the word unlawful is legally meaningless.

Who would have thought. But wait it get's better.

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/HCA/2004/37.html?query=al%20kateb>

Here is the actual judgement. Paragraph 86 is there for all the world to see.

“From 1901 to 1994, federal law contained offence provisions respecting unlawful entry and presence in Australia, which was punishable by imprisonment as well as by liability to deportation. The legislation gave rise to various questions of construction which reached this Court[90]. The first of these provisions was made by the Immigration Restriction Act 1901 (Cth) (“the 1901 Act”)[91]. Section 7 thereof stated:

“Every prohibited immigrant entering or found within the Commonwealth in contravention or evasion of this Act shall be guilty of an offence against this Act, and shall be liable upon summary conviction to imprisonment for not more than six months, and in addition to or substitution for such imprisonment shall be liable pursuant to any order of the Minister to be deported from the Commonwealth.

Provided that the imprisonment shall cease for the purpose of deportation, or if the offender finds two approved sureties each in the sum of Fifty pounds for his leaving the Commonwealth within one month.”

As enacted in 1958, s 27 of the Act continued this pattern. That provision eventually became s 77 of the Act, but this was repealed by s 17 of the [Migration Reform Act 1992](#) (Cth) (“the [1992 Act](#)”). It has not been replaced[92].”

Want a bit of icing on the cake, all of which I sent to the editors of the Australian, the Press Council and Media Watch.

<http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/2004/1267.html?query=hamdan>

*“30 It is important to emphasise that the client did not escape from custody. It would have been an offence for him to have done so: see 197A of the [Act](#). He was released from detention pursuant to a court order. Neither was he committing or proposing to commit an offence simply because he was taking steps to avoid being detained. As Gummow J indicated in *Al-Kateb* at [86] ff, the current [Migration Act](#), unlike its precursors, does not make it an offence for an unlawful non-citizen to enter or to be within Australia in contravention of, or in evasion of, the [Act](#).*

*31 Further, as Hayne J observed in *Al-Kateb* at [207]-[208] the description of a person’s immigration status as “unlawful” serves as no more than a reference to a non-citizen not having a “valid permission to enter and remain in Australia”. The use of the term “unlawful” does not as such refer to a breach of a law.”*

Add to that the request recently from the Committee on Civil and Political Rights:

1. While noting with satisfaction the State party’s commitment to use detention in immigration detention centres only in limited circumstances and for the shortest practicable period, the Committee remains concerned at its mandatory use in all cases of illegal entry, the retention of the excise zone, as well as at the non-statutory decision-making process for people who arrive by boat to the Australian territory and are taken in Christmas Island. The Committee is also concerned at the lack of effective review process available with respect to detention decisions. (art. 9 and 14)

The State party should: a) consider abolishing the remaining elements of its mandatory immigration detention policy; b) implement the recommendations of the Human Rights Commission made in its Immigration Detention Report of 2008; c) consider closing down the Christmas Island detention centre; and d) enact in legislation a comprehensive immigration framework in compliance with the Covenant.

I respectfully put it to the committee that no amount of making jail nice will make it legal or non-arbitrary.

The provision of the excised stuff should be repealed immediately as it has always been a legal fiction and the ALP already voted once to repeal it. It serves no purpose except to spend vast amounts of money on nothing much while we have 105,000 homeless people in our country, we have tens of thousands of aborigines in 4th world conditions and we simply don't need detention for anyone and certainly not for the bogus purpose of health and security. If that had ever been remotely true why don't the committee explain why the people of Christmas Island have never had their security considered.

There is simply no point in continuing this and there is no point sending emissaries running all over the world preventing the arrival of refugees and then pretending it is about people smuggling.

In recent months we have had the dreadful spectacle of the AFP being given \$40 million to "stop people smuggling" when 3 million Pakistanis have been forced to flee their homes, more money to stop Tamils fleeing a war in Sri Lanka and now we see Mr Rudd and Mr Smith whining to Malaysia after a report that Malaysia is not protecting refugees and is actually torturing them or allowing them to be sold into slavery.

In Indonesia people are arrested like criminals at our request and we dare to call it "preventing people smuggling" when the above protocol and Indonesians non-signatory status tells us that is not true.

<http://www.theage.com.au/world/malysias-traffickers-prey-on-refugees-20090703-d7tz.html?page=-1>

Instead of supporting Malaysia and demanding they keep refugees in their territory without legal rights is to breach the refugee convention, aid and abet torture and

Malaysia's traffickers prey on refugees

Tom Allard, Kuala Lumpur

July 4, 2009

RAMESHWAREN, a young Tamil asylum-seeker from Sri Lanka, speaks quietly, with a painful melancholy that belies his years.

"I feel castrated," he says, looking up from the floor. "All of this is unbearable. I am on the edge of a mental breakdown."

One of an estimated 100,000 refugees living precariously in Malaysia, and one of 16 million recognised asylum seekers worldwide, Rameshwaren's helplessness is a frustration felt around the world.

Just one of every 250 people who have been forced to flee their countries because of war, famine and persecution can expect to be resettled as a refugee this year.

And this is why, he says, he is prepared to chance his arm and take a boat to Australia.

"I can't return to Sri Lanka but there is no life for me here in Malaysia," he says. "I cannot work here legally, there is no medical (care), there is no education. I don't think that the UN will be able to resettle us. So we have to find somewhere else, we have to find some way to get there by ourselves. That is why I want to take a boat to Australia.

"It is a land of freedom. It is somewhere safe for me, my mother, my sisters and brother."

Along with Afghans and Pakistanis, Sri Lankans are making up an increasing share of the asylum seekers paying thousands of dollars to reach Australia. Almost 200 Sri Lankans arrived last weekend, taking a vessel direct from Malaysia to Christmas Island.

While Indonesia looms large for many Australians as the staging point for boat people crossing into its territory, almost all of them come to Malaysia first, either flying directly to Kuala Lumpur, or, more recently, landing in Singapore and heading across by boat. For Sri Lankans, a large Tamil population here provides them with a community to tap into. Afghans and Pakistanis, similarly, find support from a considerable Middle Eastern population and, as people from Islamic countries, have relatively easy access through Malaysian immigration on tourist visas.

But the other attraction is a vast network of people traffickers that operate out of Malaysia. In its annual survey released last month, the US State Department put Malaysia on a blacklist of 16 nations judged to be the worst for people trafficking.

Malaysia, the report said, "does not fully comply with the minimum standards for the elimination of trafficking and is not making significant efforts to do so". Moreover, there were "credible" reports that immigration officials and police were involved in the networks.

There is a long-standing, and extremely busy, trade in shipping illegal immigrants between Malaysia and Indonesia, mainly servicing the 1 million illegal Indonesians who work in Malaysia. There is a popular route used by people smugglers from Kuala Lumpur to Indonesia, a journey that can take less than four hours.

It involves an hour-long drive to Port Klang, followed by a 30-minute ferry to Pulau Ketam off Malaysia's west coast that requires no immigration checks. From there, dozens of fishermen in the prosperous fishing village will take anyone willing to pay and drop them off in Sumatra in Indonesia, less than two hours away.

Yet, for all the infrastructure for illegal migrants, many refugees find Malaysia profoundly unwelcoming. It does not recognise the UN convention for refugees and its corrupt and sometimes brutal immigration officials, police and a paramilitary civilian volunteer corps

known as RELA are accused of frequently harassing migrants, even those with UN Commission for Refugees cards.

It is another motivation for people to jump the long queue for resettlement by the UNHCR and take on the services of a people smuggler. Ravindran, another Sri Lankan Tamil, says the constant harassment means he is reluctant to leave the decrepit, two-bedroom home his family shares with two other Tamil refugee families in Satapak, a Kuala Lumpur suburb.

"When you go out, they ask to see your UNHCR card," he says. "They say they will cut the card up if you don't give them money. RELA, any of the authorities will do this. They know I'm not a Malaysian Tamil. It's obvious by the way I look."

Asylum seekers, including those registered as refugees, have been thrown in prison or detention camps.

There have also been cases, according to a recent US Senate report, of refugees — mostly those fleeing Burma — who have been sold to people traffickers and forced into prostitution or slave labour on fishing boats or plantations if they do not pay Malaysian authorities up to \$575 for their freedom.

The Malaysian Government has said it is investigating the claims, which it initially rejected as false.

Allard reports that there are 16 million refugees registered of concern to the UNHCR, only 67,000 got resettlement last year and only 6,000 of them here. Now we can pat ourselves on the back and claim that is generous if we dare but that is only 1:2650 refugees will ever get here and they will rot and die waiting.

We could stop the detention and bring ourselves into line with the refugee convention and almost the entire planet instead of continuing with the lie of border security - the convention is humanitarian law and binding, it has nothing at all to do with border security and it never has.

Yours sincerely

Marilyn Shepherd