

**PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND,
SEA AND AIR (PEOPLE SMUGGLING PROTOCOL), SUPPLEMENTING
THE UNITED NATIONS CONVENTION AGAINST UNITED NATIONS
CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME
(NEW YORK, 15 NOVEMBER 2000)
[2002] ATNIF 5**

Documents tabled on 3 December 2003:

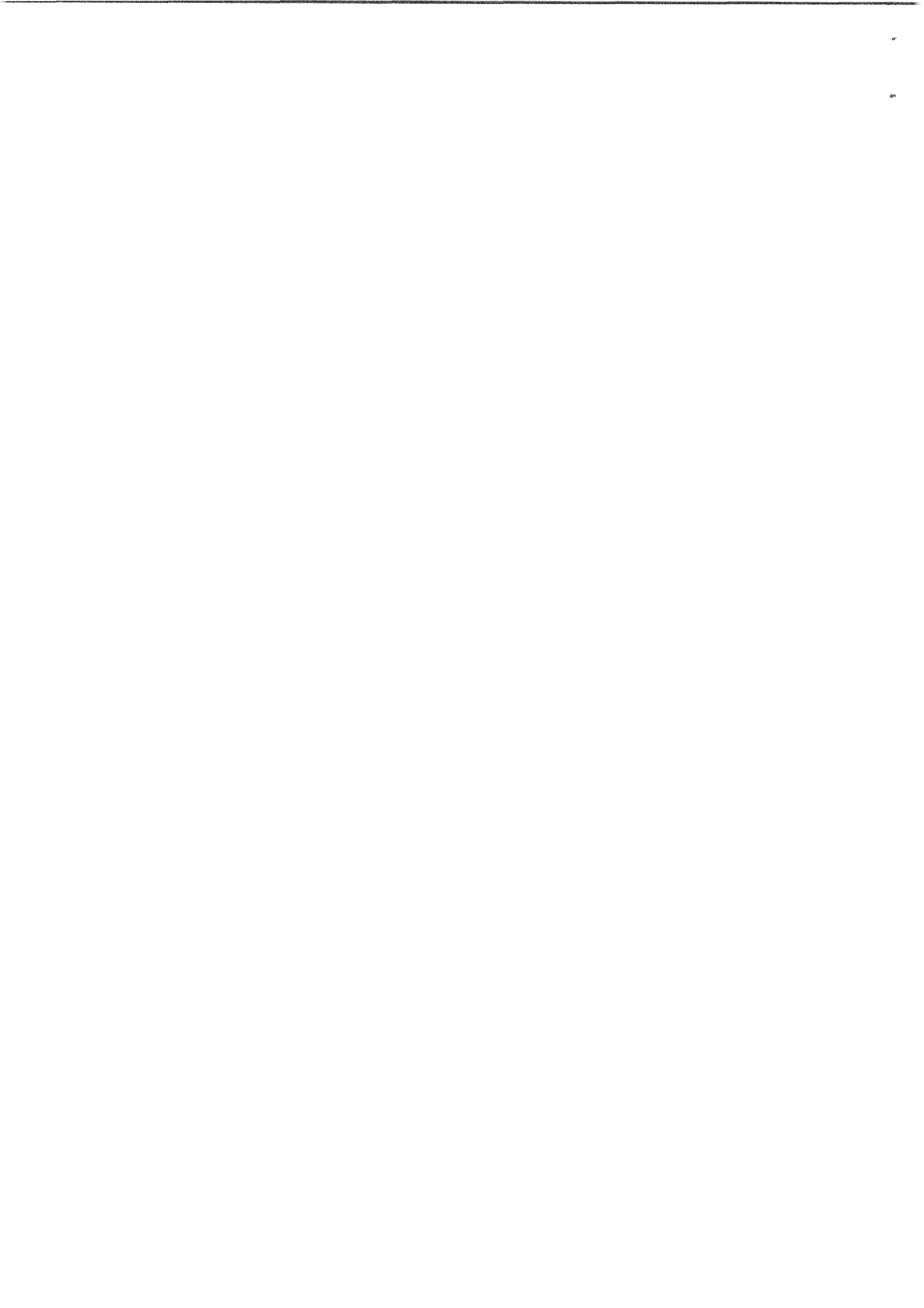
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NATIONAL INTEREST ANALYSIS: CATEGORY B TREATY

SUMMARY PAGE

Protocol against the Smuggling of Migrants by Land, Sea and Air (People Smuggling Protocol), supplementing the United Nations Convention against Transnational Organized Crime, (New York, 15 November 2000) [2002] ATNIF 5

Date of Tabling of Proposed Treaty Action

1. 3 December 2003.

Nature and Timing of Proposed Treaty Action

2. The proposed binding treaty action is the ratification by Australia of the Protocol against the Smuggling of Migrants by Land, Sea and Air (the Protocol), supplementing the United Nations Convention against Transnational Organised Crime (the TOC Convention). It is proposed that Australia lodge its instrument of ratification with the Secretary-General of the United Nations by mid-2004.
3. The Protocol was adopted by the General Assembly of the United Nations on 15 November 2000. In accordance with Article 22 of the Protocol, the Protocol will enter into force generally on 28 January 2004, following the deposit on 4 November 2003 of the fortieth instrument of ratification, accession, acceptance or approval.
4. Australia signed the Protocol on 21 December 2001. The Protocol would enter into force for Australia thirty days after the date on which Australia's instrument of ratification is deposited with the Secretary-General of the United Nations (Article 22(2)).
5. The Protocol supplements the TOC Convention, which entered into force generally on 29 September 2003. The proposed ratification of the Convention by Australia is the subject of a separate proposed treaty action and national interest analysis.

Overview and National Interest Summary

6. The Protocol forms a key element of a global approach to prevent and combat transnational organised crime established by the TOC Convention. The purpose of the Protocol is to prevent and combat the smuggling of migrants, to promote cooperation among State Parties to that end, and to protect the rights of smuggled migrants.
7. Australia already has extensive domestic policy and legislation designed to combat people smuggling. Ratification of the Protocol would highlight Australia's domestic efforts to combat transnational organised crime in the international arena. It would also demonstrate Australia's commitment to working with other destination, transit and source countries to combat people smuggling and ensure that Australia's approach to smuggling is consistent with the approach of other likeminded states that are States Parties to the Protocol.

Reasons for Australia to Take the Proposed Treaty Action

8. Ratification of the Protocol will strengthen Australia's domestic efforts to combat transnational organised crime. In conjunction with ratifying the TOC Convention and the Protocol Against Trafficking, the Protocol under consideration forms part of a comprehensive package to combat transnational organised crime that will further strengthen Australia's efforts in the region to address terrorism and increase cooperation in combating people smuggling, trafficking in persons and related transnational crime.
9. Ratification of the Protocol will have the benefit of demonstrating Australia's commitment to the prevention of transnational organised crime and, in particular, its commitment to ending the appalling trade in human beings. Ratification may also assist in achieving Australia's overall aim of combating terrorism throughout the region as such a stance may further promote regional cooperation in this area.
10. Ratification of the TOC Convention will also support Australia's work as co-chair of the Bali Conferences on People Smuggling, Trafficking in Persons and Related Transnational Crime. As co-chair of two Ministerial conferences with Indonesia, the Australian Government has taken an active role in promoting regional cooperation to break down the criminal networks responsible for transnational crime. Australia and Indonesia issued co-chairs' statements after both Conferences encouraging states to consider ratifying the TOC Convention and Protocols thereto.
11. Failure to ratify the TOC Convention may weaken Australia's standing in international and regional fora designed to encourage international cooperation against transnational crime.

Obligations

Criminalisation

12. The Protocol requires States Parties to criminalise certain forms of conduct that is transnational in nature when committed intentionally and in order to obtain a financial or other material benefit:
 - The smuggling of migrants (Article 6(1)(a))
 - When committed for the purpose of enabling the smuggling of migrants:
 - producing a fraudulent travel or identity document; or
 - procuring, providing or possessing such a document (Article 6(1)(b))
 - 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 (Article 6(1)(c)).
13. Australia is also obligated to criminalise attempting to commit a people smuggling offence (Article 6(2)(a)), participating as an accomplice in any of the offences established above (Article 6(2)(b)), and organising or directing other persons to commit a people smuggling offence (Article 6(2)(c)).
14. Australia is further obligated to criminalise aggravated people smuggling offences, including the participating, organising or directing a people smuggling offence, in circumstances:

- that endanger, or are likely to endanger, the lives or safety of the migrants concerned;
- or
- that entail inhuman or degrading treatment, including for exploitation, of such migrants (Article 6(3)(a) and (b)).

Smuggling by sea

15. Under Article 8, Australia would be required to cooperate with other States Parties to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea (Article 7). In this respect, the Protocol highlights the need for States Parties to cooperate and provide assistance in suppressing the use of vessels to smuggle migrants by sea (Article 8).

16. Where a State Party to the Protocol takes measures against a vessel it will be required to ensure the safety and humane treatment of the persons on board, take due account of the need not to endanger the security of the vessel or its cargo, take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State, and ensure, within available means, that any measures taken with regard to the vessel is environmentally sound (Article 9)

Prevention, cooperation and other measures

17. Under Article 10 of the Protocol, Australian law enforcement, immigration and other relevant authorities will be required to cooperate with the authorities of other States Parties by exchanging relevant information on matters including embarkation and destination points, identity and methods of organisations or organised criminal groups known to be or suspected of being engaged in people smuggling conduct, means and methods of concealment and transportation of persons, legislative experience and practices and measures to prevent and combat people smuggling conduct.

18. Under Article 11 of the Protocol, Australia would be required to strengthen border controls as may be necessary to prevent and detect the smuggling of migrants (Article 11(1)). Australia would also be required to adopt legislative or other appropriate measures to prevent means of transport operated by commercial carriers from being used in the commission of trafficking offences, and sanctions for breaches (Article 11(2)).

19. Under Article 12 of the Protocol, Australia would be required to take such measures as may be necessary to ensure that its travel or identity documents cannot readily be falsified or unlawfully altered, replicated or issued (Article 12(1)). Australia would be required also to ensure the integrity and security of its travel or identity documents and prevent their unlawful creation, issuance and use and to verify the legitimacy and validity of travel or identity documents issued or purported to have been issued by Australia and suspected of being used for trafficking (Article 13).

20. Australia would also be required to provide or strengthen specialised training for immigration and other relevant officials to prevent, combat and eradicate people smuggling (Article 14(1)).

Other prevention measures

21. Under Article 15, Australia would be required to take measures to provide or strengthen information programs to increase public awareness of the fact that people smuggling is a crime and to cooperate in the field of public information for the purpose of preventing potential migrants from falling victim to organised criminal groups (Article 15(1) and (2)).

22. States Parties to the Protocol are also required to promote or strengthen development programs and cooperation at the national, regional and international levels in order to combat the root socio-economic causes of the smuggling of migrants (Article 15(3)).

Protection and assistance measures

23. Under Article 16 of the Protocol Australia would be required to take appropriate measures to preserve and protect the rights of persons who have been the object of people smuggling as accorded under international law, taking into account the special needs of women and children.

Return of smuggled migrants

24. Under Article 18 (1) of the Protocol Australia would be required to facilitate and accept the return of a person who has been smuggled and who is an Australian national or who has the right of permanent residence in Australian territory at the time of return. A requested State Party shall also verify, at the request of the receiving State, whether a person who has been the object of people smuggling is an Australian national or has the right of permanent residency in Australia (Article 18(3)).

Agreements and arrangements

25. Article 17 of the Protocol requires States Parties to consider the conclusion of bilateral or regional agreements or operational arrangements or understandings aimed at establishing appropriate and effective measures to prevent and combat people smuggling conduct or to enhance the provisions of the Protocol among themselves.

Dispute settlement

26. Article 20 of the Protocol provides that any dispute between States Parties concerning the interpretation or application of the Protocol that is not resolved through negotiations within a reasonable time may be submitted to arbitration at the request of a party to the dispute. It further provides that in the event that the parties are unable to agree on the organisation of the arbitration within six months of the request for arbitration, any of the parties to the dispute may refer the dispute to the International Court of Justice.

27. A State Party to the Protocol may declare at the time of signature, ratification, acceptance or approval of the Protocol that it is not bound by the procedure set out in Article 20. It is not proposed that Australia make such a declaration at the time of ratifying the Protocol.

Implementation

28. Australia's obligations under the Protocol can be implemented administratively or under existing Commonwealth legislation, in particular through the *Migration Act 1958*, the *Criminal Code* and the *Proceeds of Crime Act 2002*.

Costs

29. There are no foreseeable financial costs to Australia that will be imposed by ratification of the Protocol.
30. Costs of participation in the Conference of the Parties are borne by individual states.

Consultation

31. The Commonwealth Government consulted with the States and Territories on the Protocol through the Standing Committee on Treaties and relevant ministerial committees. Details of the consultation process are at **Attachment A**.

Regulation Impact Statement

32. The Office of Regulation Review (Productivity Commission) has been consulted and confirms that a Regulation Impact Statement is not required.

Future Treaty Action

Amendment procedures

33. Under Article 23, amendments to the Protocol may be proposed by a State Party to the Protocol at any time after 28 January 2009 (five years after the entry into force of the Protocol). The agreement of a two-thirds majority of States Parties present and voting at a Conference of the Parties is required for the adoption of a proposed amendment to the Protocol. An adopted amendment to the Protocol would be binding only upon those States Parties that express their consent to be bound by it and is subject to ratification, acceptance, accession or approval by States Parties.
34. An amendment will enter into force 90 days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of the amendment.
35. Amendment to the Protocol would be subject to the Australian treaty process.

Withdrawal or Denunciation

36. Article 24 provides that a State Party may denounce the Protocol by written notification to the Secretary-General of the United Nations. Denunciation would take effect one year after the date of receipt of the notification by the Secretary-General.
37. Denunciation would be subject to the Australian treaty process.

Contact details

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