

Do Loose Lips Bring Ships? The Role of Policy, Politics and Human Rights in Managing Unauthorised Boat Arrivals

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Abstract

This article explores the phenomenon of asylum seekers and irregular migrants presenting as ‘boat people’. We evaluate key aspects of policies introduced to deter and contain these people – namely mandatory detention, temporary protection visas and offshore processing. Given the high rate of deaths and injuries associated with unauthorised boat arrivals, we argue that governments *should* do their best to discourage or prevent people from attempting to enter Australia in this way. However, the available evidence suggests that the rationale underlying deterrent policies is inherently flawed. Most have been totally ineffective in stopping unauthorised boat arrivals. History suggests that the best strategies prevent and rather than deter, stopping the flow of asylum seekers at source and/or diverting desperate people away from dangerous and irregular modes of transport. We argue that no Australian government, acting alone, will be able to beat the people smugglers now plying their trade out of Indonesia. What is needed are cooperative arrangements with ‘source’ or transit governments, coupled with targeted resettlement programs to provide refugees with viable protection options. We challenge claims made about the effectiveness of the Howard government’s Pacific Solution and question Labor’s apparent acceptance that offshore processing in ‘regional’ centres will stop the boats. We ask whether the Conservative’s loud and internationally publicised claims that Labor has ‘gone soft’ on border control are part of the problem: ‘loose lips’ may indeed be bringing the ships.

1 Politics and the ‘Boat People’ Phenomenon

The arrival of boats carrying irregular migrants engenders extraordinary responses in Australians – and in their politicians. This is so even though an average of little more than one ‘boat person’ has arrived for every two days since 1978. Always newsworthy, the stronger and more sustained the flow of boats, the more shrill the headlines and (it would seem) the more pronounced become the reactions from government. This is not a phenomenon unique to Australia,³ although it may reflect this island nation’s long held phobia of invasion by sea. There are very good reasons why governments *should* do everything that is sensibly within power to stop unauthorised boat arrivals. What has driven us to write this piece, however, is the conviction that the way we have responded to the phenomena in recent times is profoundly misconceived.

The problem is that the issues underlying irregular and forced migration are very complex. In this ‘sound bite’ age of instant communication, profound challenges face those wishing to offer nuanced explanations of unfolding phenomena and advocating effective and humane solutions. In contrast, the ‘message’ of those pushing for harsh responses is simple and electorally very powerful. Undocumented arrivals are characterised as ‘illegal’ invaders who pose a threat to society. The binomial division of migrants (forced or otherwise) into ‘legal’ and ‘illegal’, strips asylum seekers of their stories and of their vulnerabilities. It also denigrates the compassionate response as folly, which is aligned in turn with ‘threats’ to national security.

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³ The differential response to boat arrivals can be seen in many countries. The United States of America’s program for interdicting boat arrivals is the first and most obvious example: See Morris (2003). Other countries that have reacted to boat arrivals with special vehemence include New Zealand and Canada.

In government and in Opposition, there have been significant differences between the approaches taken by the major parties. In government, the Conservative Coalition has opted for the most simple and targeted of messages, with no attempt made to explain the complexity of forced migration and the humanitarian obligations attaching to refugee status. In the words of Prime Minister John Howard: 'We will decide who comes to this country and the circumstances in which they come.'⁴ The Labor party, on the other hand, has tried to walk the line between compassion and control by acknowledging the plight of the refugee while directing a string of invectives against those transporting the world's desperate and destitute to Australia's shores. In the mouth of Prime Minister Kevin Rudd, the message was confused and confusing:

Our job, and I make no apology for it, is to take a hardline approach in dealing with the challenge of illegal immigration. I make no apology whatsoever for adopting a hardline approach when it comes to illegal immigration activity, and I make no apology whatsoever having a hardline and humane approach to dealing with asylum-seekers. No apologies whatsoever in dealing with the vermin who are people-smugglers. We will take the harshest and hardest measures possible in dealing with that.⁵

In Opposition, the Labor party has also been diffident and conflicted. Although the party took a stand against 'border control' legislation introduced in the immediate aftermath of the *Tampa* Affair in August 2001,⁶ the party quickly fell in line behind the Howard government in its voting patterns and in its subsequent reluctance to speak out forcefully against control initiatives.⁷ In contrast, the Conservative parties (more recently in Opposition) have refused to show any deference to government initiatives, engaging rather in a sustained and very public campaign linking boat arrivals to the weakening of border controls. Specifically, the Conservatives have claimed that increases in boat arrivals can be linked to the abolition of temporary protection visas and to the dismantling of the Pacific Solution.⁸ It has claimed that the absence of deterrent factors has had the effect of attracting asylum seekers to Australia. In reply, the government has asserted that boat arrivals are determined not by government policy but by conditions in the countries from which the asylum seekers have fled. That is, boat arrivals are driven by 'push' factors, rather than by 'pull' factors.⁹

Fearing a voter backlash to what has been an effective Opposition campaign, the Rudd Labor Government reacted to these assertions in April 2010 by introducing a series of regressive policy measures aimed at toughening its image and deflecting criticism. These included the suspension of refugee claims for asylum seekers from Afghanistan and Sri Lanka;¹⁰ and the re-opening of Curtin Detention Centre in the remote Kimberley region in north Western Australia.¹¹ In taking these steps, it gave tacit credence to Opposition assertions that government policies have affected the number of unauthorised boat arrivals in Australia. Before being ousted by his own party, Prime Minister Rudd responded to Labor's plunging electoral fortunes by appearing to backtrack, claiming that asylum policy should not be a 'race to the bottom'.¹²

⁴ John Howard, Speech delivered at the Federal Liberal Party Campaign Launch, Sydney, 28 October 2001.

⁵ PM Kevin Rudd, Door stop interview, 14 October 2009. See 'PM starts rocking the boatpeople in the old Labor way' *The Australian*, 16 November 2009, available at <http://www.theaustralian.com.au/news/pm-starts-rocking-the-boatpeople-in-the-old-labor-way/story-e6frg71f-1225787299528>.

⁶ Allard (2001), p 10.

⁷ For example see Clennell (2001), p 8; Lawson (2001), p 1; Saunders and Henderson (2001), p 13.

⁸ For example see Kelly (2010) at <http://www.theaustralian.com.au/politics/tony-abbott-warns-millions-of-asylum-seekers-could-arrive-by-boat/story-e6frgczf-1225862132786> (accessed 13 May 2010)

⁹ See, for example, Evans (2010a).

¹⁰ Evans, O'Conner & Smith (2010).

¹¹ Evans (2010b).

¹² Karvelas (2010), p 1.

The change of government in November 2007 did see a departure from the hard line approach to irregular migration that characterised the years of Coalition rule – particularly after September 2001. Whether the change amounted to a major weakening of border control policy is, however, highly debateable. Most of the changes made have occurred at policy level, without major structural alteration to either the legal frameworks governing asylum and border control or the physical arrangements made for arrest and detention of unauthorised arrivals. Even improvements in the culture within the immigration bureaucracy can be traced back to Coalition initiatives. In many respects the Rudd Labor government merely built on trends established in the closing days of conservative rule.¹³ Prime Minister Gillard did nothing to countermand this trend – if anything she favoured increasing alignment with conservative policies. Although it is an established fact that the number of unauthorised boat arrivals has risen steadily since the change of government in 2007, change of policy *alone* does not stand out as an obvious explanation for why this might have occurred.

In the absence of investigative research which is beyond the scope of this piece, it may be impossible to ‘prove’ any of the assertions made about why asylum flows to Australia have fluctuated over the years. Nevertheless, the vehemence of the assertions made by the Conservatives invites examination of what we do know about the role played by contemporary policy ‘events’ relative to the incidence of irregular boat arrivals. In this article we evaluate the effectiveness of laws and policies adopted by successive governments, using international human rights law (and basic notions of human decency) as critical frameworks. Starting from the position that stopping irregular boat arrivals is a laudable objective, we sift through the available evidence in an attempt to identify the real impact of the various initiatives that have been taken over the years.

Measures taken by government to restrict irregular migration can be described generally as either policies of deterrence and/or policies of containment. While some initiatives overlap both categories (interdiction and offshore processing are examples in point), we argue that the greatest costs and worst human rights abuses have been associated with measures designed to *deter* unauthorised boat arrivals. Our central contention is that successive Australian governments have subscribed too heavily to deterrent theories of immigration control. We argue that the available evidence suggests that deterrent measures don’t work but, rather, cause needless inefficiencies and (on occasion) wanton human rights abuse. Conversely, containment measures that are focussed at the *source* of the various asylum flows have generally been successful, especially when coupled with programs providing real protection alternatives for persons in need. However difficult it may be to treat with the countries from which irregular migrants are coming or through which they are transiting, this is where Australia should be directing its efforts.

Deterrent policies have a tendency to be very blunt instruments - mandatory immigration detention being a prime example in point. Of course, this may be why such policies have been favoured by politicians. They are ‘visible’ and easy to explain and accordingly have multiple uses: as well as ostensibly acting to ‘deter’ irregular migrants, they flag to the domestic electorate that the government is doing something proactive. Deterrent policies work well for those condemned to communicate in sound-bites. Our concern is that they also carry with them a disproportionate risk of causing harm - at least three levels.

First, in spite of their divergence on some points, the Labor and Coalition reliance on deterrent policies can both be criticised as ineffective and fiscally irresponsible. Second, such policies either do or would threaten harm and human rights abuse to vulnerable people in disregard of legal obligations Australia has assumed

¹³ See Crock (2010).

under international law. Finally, policies emanating from both sides of the political divide threaten to create or exacerbate divisions both within emergent ethnic communities and between migrant and traditional Anglo-Saxon communities. While immigration status is not easily discernible from a person's physical features, the association of certain ethnic and/or religious groups with irregular migration can have a spill-over effect for broader, established migrant groups. Rhetoric that is heavily critical of refugees and illegal migrants can affect community relations with individuals from ethnic groups associated with these people.

We acknowledge that an 'open border' policy is never likely to gain electoral traction in this country. Unlike in other parts of the world,¹⁴ Australia's geographical isolation and its status as an island continent make immigration control possible, desirable - and an expectation within the electorate. In our view, a preferable approach would be for governments to use containment theory as the basis for policy formulation, using balanced and humane measures of containment to both prevent and circumvent irregular boat arrivals. Containment, according to our formulation, involves two elements: policies aimed directly at stemming the flow of irregular migrants from source or transit countries that are monitored to eschew human rights abuse; and the provision of alternatives that allow for the relief of persons using irregular migration to avoid gross abuse of human rights. It may never be possible to accommodate the protection needs of all of those displaced by war or civil unrest. Nor is it likely that any Western government could remove altogether the market for people smugglers. Our point is that much can and has been done over the years to stop unauthorised boat arrivals *at source* in a manner that allows for the on-going protection of persons at risk of human rights abuse.

The body of the article is an extended examination of unauthorised boat arrivals, looking at the circumstances and possible motivations of those who choose to travel to Australia thus by sea. We begin in part 2 with an examination of the human impact of people smuggling operations, arguing that the toll of death and injury provides reason enough for governments to make every effort to stop the boats. To determine how the government should respond to the phenomenon of irregular arrivals, however, it is important to ask why people might be travelling to Australia by boat when this is such a comparatively risky option. In part 3 we compare the statistical record with known events that might be characterised as 'push' factors for unauthorised boat arrivals. Here, correlations are readily apparent between events overseas and increases in both unauthorised boat arrivals and 'on-shore' asylum claims (or refugee claims made by persons who have entered mainland Australia).

The next step is to evaluate the different measures to contain and deter unauthorised boat arrivals, looking at how effective the measures are relative to the flow of boats and 'cost' issues. We compare changes in asylum flows with the introduction of various deterrent measures. These are: mandatory immigration detention and temporary protection visas. The focus turns then to initiatives more closely aligned with direct 'containment', namely: interdiction, offshore processing and return measures; and bi-lateral agreements where asylum seekers are prevented from embarking upon the journey to Australia. Finally, we examine the statistical record to test assertions made of a link between the removal of various deterrent measures and the increase in boat arrivals. In this context we examine the correlation between the surge in boat arrivals after 2007 and the characterisation of policy through domestic and international media. We ask whether the Conservatives' rhetoric about softened border controls has encouraged more people to try their luck with the people smugglers. The broader societal cost of such strategies is also examined.

¹⁴ Compare debate in US: see Johnson (2007).

The story that emerges is far from straight forward in terms of determining cause and effect, as we explain in the final part of the article. While there may be a clear correlation between the increase in boat arrivals and the ‘push’ factors of events overseas, the relationship between asylum flows and most of the key *deterrent* measures is less evident. The only initiatives that have an obvious impact are *containment* measures that prevent departures in the first place or interdict and return persons en route to Australia. One common feature of all such initiatives is that they involve bilateral agreements between Australia and countries that have control of some kind over the physical movement of aspiring asylum seekers. Of those measures we identify as *sustainable* and worthy of emulation, another aspect is that they have all involved measures that offer durable solutions to persons in need of protection from human rights abuses.

2 Why contain? ‘Boat people’ and the human cost of people smuggling

Irregular migration is a global phenomenon. While geography and relative isolation have protected Australia to some extent, no wealthy Western country is able to achieve perfect control of human movements into and out of its territory. In relative terms, Australia is exceptional in that a vibrant migration program involving the admission of millions results in little more than 50,000 non-citizens being in the country without authorisation at any given time.¹⁵ This compares with the United States, where in 2009 the population of unlawful migrants was estimated at more than 10.8 million.¹⁶ Most of Australia’s unlawful non-citizens are ‘overstayers’ – persons who remain beyond the temporal limits placed on their visas – who return home in due course without drama. A small proportion either enter or remain in Australia without authorisation because they wish to seek protection from persecution or other gross abuse of their human rights. These are the people who invoke obligations Australia has assumed as a party to the 1951 UN Convention relating to the Status of Refugees and subsequent Protocol¹⁷ (the Refugee Convention and Protocol) and to other human rights instruments. These operate to qualify the otherwise absolute nature of Australia’s sovereign power to control immigration. The most important obligation arising out of these instruments is to refrain from returning or *refouling* a Convention refugee to a country where she or he may face persecution for a Convention reason.¹⁸

Throughout Australian history virtually all unauthorised boat arrivals have met the description of ‘asylum seeker’. That is, they have been persons seeking protection as Convention refugees. The statistics show that the overwhelming majority have been found to engage Australia’s protection obligations.¹⁹ For example, in 1998-1999, approximately 97 % of Iraqi and 92 % of Afghan applicants, the vast majority of whom had arrived by boat, were granted refugee status.²⁰ Acceptance rates of recent boat arrivals processed at Christmas Island are at similarly high levels. Of the 1254 claims assessed on Christmas Island between 1

¹⁵ DIAC (2009).

¹⁶ Hoefler, Rytina and Baker (2010).

¹⁷ Convention relating to the Status of Refugees (‘The Refugee Convention’) (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; Protocol relating to the Status of Refugees (‘The Protocol’) (adopted 31 January 1967, entered into force 13 December 1973) 606 UNTS 267.

¹⁸ See Article 33 of the Refugee Convention. The Refugee Convention and Protocol combine to define a refugee as any person who: ‘... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.’ See the Refugee Convention, Art 1A(2); and the Protocol, Art 1(A)(2). The Convention covers events causing a refugee problem before 1 January 1951, while the Protocol extends the definition to events occurring after that date.

¹⁹ See Phillips (2010).

²⁰ Refugee Council of Australia (1999).

July 2009 and 31 January 2010, only 110 people were assessed as not being refugees.²¹ This represents a success rate of approximately 91%. In contrast, asylum seekers who have come to Australia by plane – very often on false passports - have had much lower success rates. This is demonstrated by the much lower onshore refugee recognition rates overall (air and boat combined) of between 20-30 per cent annually.²²

That so many boat arrivals are asylum seekers (who are statistically likely to meet the Convention definition of ‘refugee’) is significant for two reasons. First, this reality makes it relatively easy for the government to track where the people are coming from and why they are travelling by irregular means. Second, it complicates considerably the way in which the Australian government can or should respond. Deterrent responses can be ineffectual because the people in question clearly have good reasons for leaving the countries in which they face persecution. Simply returning the people to the countries from which they have taken flight is also not an option because international law (and human decency) prohibits ‘refoulement’.²³

This article begins from the premise that stopping irregular migration by boat is a laudable policy objective. Boat people enter Australia without the usual pre-screening measures of health and character checks. The popular fear of boat people as potential threat thus has some basis in fact. More significantly, the irregular movement of migrants and asylum seekers all around the world is achieved through the offices of people smugglers. With rare exceptions,²⁴ most people smugglers are motivated by profit in a massive transnational criminal industry worth billions of dollars.²⁵ Australia has played a significant role in mobilising the international community to take cooperative measures to criminalise people smuggling and improve global enforcement measures.²⁶

To appreciate the desirability of anti-people smuggling measures in the context of irregular migration by sea, one only has to consider the toll of deaths and injuries that have accompanied attempts by boat people to reach Australia. In 1979, Minister for Immigration, MJR Mackellar, estimated that 200,000 had died in attempting to flee Vietnam by boat since the fall of Saigon (the event that marked the end of the war in Vietnam) in 1975. He estimated that over half of all those taking to boats were perishing at sea.²⁷ While there has been no event of equivalent gravity in Australia’s region since the end of the Vietnam conflict, this is not to say that the journeys for boat people have become risk free.

Accurate figures on deaths at sea amongst those attempting reach Australia are not available, but we do know that there have been events resulting in massive loss of life. The sinking of the unknown Suspected Illegal Entry Vessel (SIEV) or ‘SIEV X’ on 19 October 2001 is an example in point. In that one incident 353 men, women and children lost their lives.

In the following table, we have collated from press reports an estimate of drowning deaths since 1998. Some figures are not as reliable as others. For example, there were various reports of boats being lost at sea in 2000, with the possible loss of 500 lives. Later reports suggest, however, that at least some of these boats

²¹ Senate Legal and Constitutional Affairs Committee, Answers to questions on notice, Immigration portfolio, Additional Budget Estimates, 9 February 2010, Questions 30 and 32.

²² Phillips (2010). See also the figures compiled in Appendix 1.

²³ See Art 33 of the Refugee Convention discussed above.

²⁴ See, for example, the eventual acquittal of the Vietnamese captain who ferried 53 family and friends to Australia by boat in July 2003, all of whom were found to be refugees: Barnard (2003).

²⁵ See Schloenhardt (2003), p 157; Tailby (2001), p 2; Fabrizio Sarrica (2005), p 9.

²⁶ See the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted by General Assembly resolution A/RES/55/25, entered into force 28 January 2004).

²⁷ Michael Richardson and Patrick Boyce, ‘US Navy may join in ocean pick-up’, *The Age*, July 1975.

were eventually found. While particular incidents cannot be verified (and so are marked with an asterisks) there is enough consistency in the pattern of known tragedies to demonstrate the perils of irregular sea journeys to Australia. What the statistics tell us is that hundreds of people have died at sea trying to seek asylum in Australia. Between December 1998 and December 2001, the death toll is estimated at 891 boatpeople. The Labor record is not much better, with an estimated 150 deaths between January 2009 and June 2010. Although the enormity of these losses has not been given the prominence they deserve in the Australian press, they underscore why governments should be trying to ‘stop the boats’ – but in ways that do not add to this appalling record.

TABLE 1: Deaths at Sea

Date	Vessel codename	Incident	Number of Dead or Missing
24 Dec 1998	Paroo	Boat carrying 53 PRC nationals sinks after hitting a reef near Coburg Peninsula, NT. ²⁸	1
20 July 1999	Augustus	Boat carrying 20 sinks 40 nautical miles from Christmas Island. ²⁹	15
15 December 1999	Xmas	Boat overturns near Cockatoo Island, WA. ³⁰	1
April-May 2000		Reports that three boats have disappeared in storms off WA. ³¹	350*
December 2000		Two boats sunk on route to Ashmore Island in bad weather. ³²	163*
22 December 2000		Boat carrying 40 people lands at Lagrange Island in Admiralty Gulf off Kimberley coast. Three people drown attempting to swim to another island. ³³	3
12 October 2001	SIEV 5	Baby dies on route to Australia. ³⁴	1
19 October 2001	SIEV X	Boat carrying 398 persons sinks in international waters off West Java ³⁵	353
8 November 2001	Sumbar Lestari (SIEV 10)	Vessel catches fire after interception. Two women drown. ³⁶	2
December 2001	SIEV 12	Vessel intercepted and returned to Indonesian waters,. sinks 300 metres off Roti Island . ³⁷	3

²⁸ Answers to Questions taken on notice by DIMA from Committee Hearing on 30 January 2001 – Joint Committee of public accounts and audit – inquiry into Coastwatch- and provided to the Senate in March 2001.

²⁹ Answers to Questions taken on notice by DIMA from Committee Hearing on 30 January 2001 – Joint Committee of public accounts and audit – inquiry into Coastwatch- and provided to the Senate in March 2001.

³⁰ Answers to Questions taken on notice by DIMA from Committee Hearing on 30 January 2001 – Joint Committee of public accounts and audit – inquiry into Coastwatch- and provided to the Senate in March 2001.

³¹ Clennell (2000), p 2; Wright (2000), p 1; Nicholson (2000), p 1. Note comments by Phillip Ruddock that these deaths were never confirmed: Clennell (2009), p 4.

³² DIMA (2000a); ‘Ruddock defends inaction on refugees lost at sea’, *ABC’s World Today*, 14 December 2000, transcript available at <http://www.abc.net.au/worldtoday/stories/s223968.htm>. There are reports that these boats may have been accounted for later: DIMA (2001).

³³ DIMA (2000b).

³⁴ ‘To Deter and Deny’, *ABC’s Four Corners*, 15 April 2002, transcript available at <http://www.abc.net.au/4corners/stories/s531993.htm>.

³⁵ Crock, Saul and Dastyari (2006), p 46-49; Senate Select Committee (2002).

³⁶ CNN.com, ‘Two die after refugee boat set alight’ <http://edition.cnn.com/2001/WORLD/asiapcf/auspac/11/08/aust.refugees.tragedy/>, 9 November 2001.

³⁷ ‘To Deter and Deny’, *ABC’s Four Corners*, 15 April 2002, transcript available at <http://www.abc.net.au/4corners/stories/s531993.htm>.

January 2009		Vessel carrying 18 escapees from an Indonesian immigration detention centre sinks off eastern Indonesia. ³⁸	9
16 April 2009	SIEV 36	Vessel carrying 46 passengers and 2 crew catches fire near Ashmore Reef. ³⁹	5
1 Nov 2009		Boat carrying 39 asylum seekers sinks 350 Nautical Miles north-west of Cocos Islands ⁴⁰	12
October 2009		Boat carrying around 100 asylum seekers departs Indonesia 2 October 2010, vanishes without trace. ⁴¹	106*
23 Dec 2009		Sri Lankan man dies of complications arising from a stomach infection aboard a boat in Merak port in West Java. The boat had been prevented from departing to Australia and the asylum seekers were refusing to disembark. ⁴²	1
9 May 2010		5 Sri Lankan men missing, presumed drowned, when they left their broken down vessel in the Indian Ocean to find help. ⁴³	5
14 June 2010		Small fishing boat carrying 14 Sri Lankan and Afghani asylum seeker capsizes in stormy weather. ⁴⁴	12

*Approximation

3 Why do people take to boats to seek asylum? Articulating the push factors

Typically, many factors combine to determine why and when a person boards a boat in the hope of finding sanctuary or a new life in a foreign land. These can include war, poverty, persecution, repression and environmental degradation. Specific empirical research suggests that the decision to leave in individual cases is often precipitated by an immediate event or threat. The asylum seeker may have lost a family member or may face arrest, detention or other form of harm.⁴⁵ In the Australian context, it is interesting to note that a clear correlation is to be observed between world events and asylum flows. In Appendix 1 we set out the number of unauthorised boat arrivals in each year since 1976 relative to total asylum claims (that is claims involving persons arriving in mainland Australia by plane with or without visas). These figures form the basis for the flow charts that we will use to pinpoint apparent correspondences with policy and other

³⁸ Press TV, '4 Afghan Refugees drown off Indonesia', <http://www.presstv.ir/detail.aspx?id=82390§ionid=351020406>, 15 Jan 2009; Thaindian News, 'Boat Carrying Escaping Refugees sinks off Indonesia', http://www.thaindian.com/newsportal/world-news/boat-carrying-escaping-refugees-sinks-off-indonesia-3-dead_100142660.html, 15 Jan 2009.

³⁹ ABC News online, 'Coroner to release finding into deadly boat blast', <http://www.abc.net.au/news/stories/2010/03/17/2848102.htm>, 17 March 2009.

⁴⁰ Phillips and Spinks (2010); 'Fears for boat people as ship sinks', *Canberra Times*, 3 November 2009, available at <http://www.canberratimes.com.au/news/national/national/general/fears-for-boat-people-as-ship-sinks/1666205.aspx?storypage=1>; News.com.au, 'Asylum seekers spent weeks at sea' <http://www.news.com.au/breaking-news/world/asylum-seekers-spent-weeks-at-sea/story-e6frfkui-1225794423249>, 4 November 2009.

⁴¹ McGuirk (2010).

⁴² Gartrell (2009).

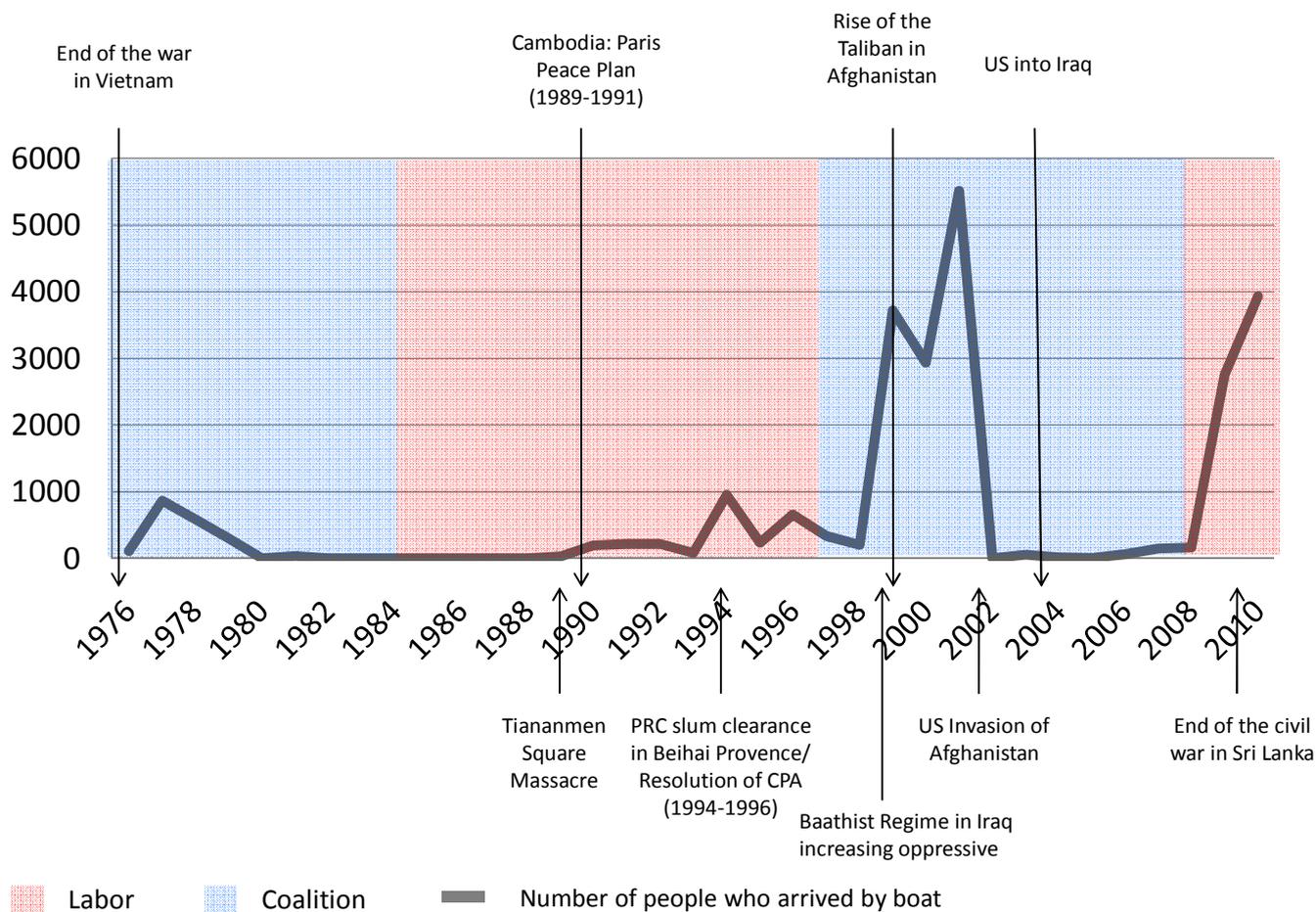
⁴³ Maley (2010).

⁴⁴ '12 boatpeople reported to have drowned on way to Australia', *Sydney Morning Herald*, 14 June 2010, available at <http://www.smh.com.au/national/12-boatpeople-reported-to-have-drowned-on-way-to-australia-20100614-y99c.html>.

⁴⁵ This was the finding of the researchers in the *Seeking Asylum Alone* project which compared the experience of children seeking asylum in three countries between 2003 – 2006. See Crock (2006), Chapter 3 and Crock and Bhabha (2007), chapter 2.

'events'. Figure 1 plots boat arrivals against what we know to have been significant external events influencing asylum flows to Australia. The events are 'known' to have a 'push' effect for the simple reason that persons directly affected by the events in question dominate the asylum flows at the critical junctures. Table 2 sets out the ethnicity of boat arrivals between 1989 and 1999, while table 3 sets out the ethnicity of the most recent wave of arrivals (starting from 1 July 2008).⁴⁶ The ethnicity of arrivals in these periods reveals a clear correlation between push factors and the identity of asylum seekers arriving by boat.

FIGURE 1: Push Factors



⁴⁶ These are the only periods for which precise data of the ethnicity of arrivals is available.

TABLE 2: Boat arrival by ethnicity 1989-1999⁴⁷

Year	Arrivals by ethnicity⁴⁸
1989	10 Vietnamese; 8 Chinese; 8 Cambodian
1990	138 Cambodian; 49 Chinese; 8 Vietnamese
1991	97 Cambodian; 69 Chinese; 22 Vietnamese; 13 Macau citizens; 8 Sino-Vietnamese; 2 Indonesian; 1 Bangladeshi; 1 Hong Kong Citizen
1992	191 Chinese; 12 Polish; 11 Romanian; 1 Somalia; 1 Nigerian
1993	52 Sino-Vietnamese; 25 Chinese; 4 Turkish
1994	696 Sino-Vietnamese; 133 Chinese; 120 Vietnamese; 4 Bangladeshi
1995	201 Sino-Vietnamese; 18 East Timorese; 6 Turkish; 5 Vietnamese; 5 Afghan; 2 Chinese
1996	528 Chinese; 50 Iraqi; 44 Sino-Vietnamese; 21 Irian Jayan (Indonesian province); 8 Pakistani; 6 Sri Lankan; 1 Algerian; 1 Moroccan
1997	253 Chinese; 26 Iraqi; 26 Afghan; 14 Sri Lankan; 14 Algerian; 2 Sudanese; 1 Iranian; 1 Moroccan; 1 Bangladeshi
1998	70 Chinese; 47 Bangladeshi; 30 Irian Jayan; 22 Afghan; 11 Turks; 7 Sri Lankan; 4 Iraqi; 3 Indian; 2 Indonesian; 2 Senegalese; 1 Algerian; 1 Moroccan
1999	1701 Iraqi; 1086 Afghan; 553 Chinese; 157 Turkish; 62 Iranian; 35 Bangladeshi; 32 Sri Lankan; 20 Indian; 20 Kuwaiti; 16 Pakistani; 12 Algerian; 7 Palestinian; 4 Syrian; 3 Indonesian; 1 Jordanian; 1 Bahrain; 1 Kazakhistani; 1 Papua New Guinean; 1 Myanmar; 1 Stateless

TABLE 3: Boat Arrivals by Ethnicity 1 July 2008 - 18 May 2010⁴⁹

Year	Arrivals by ethnicity
2008 (from 1 July)	118 Afghani; 16 Sri Lankan; 19 Iraqi; 5 Iranian; 3 Kuwaiti.
2009	1411 Afghani; 736 Sri Lankan; 196 Iraqi; 150 Stateless; 96 Iranian; 62 Indonesian; 43 Burmese; 8 Pakistani; 8 Vietnamese; 6 Kuwaiti; 3 Palestinian; 2 Somali; 2 Syrian; 2 Bangladeshi; 63 Unassigned.
2010 (up to 8 May)	1827 Afghani; 351 Sri Lankan; 164 Iraqi; 161 Iranian; 181 Stateless; 60 Burmese; 28 Stateless (Kurdish); 12 Palestinian; 7 Somali; 5 Kuwait; 3 Yemeni; 1 Bangladeshi; 1 Pakistani; 4 Unassigned.

Australia has experienced at least five definable ‘waves’ of irregular boat arrivals that align very precisely with certain international events. Australia’s first experience with asylum seekers arriving in significant numbers was the arrival of South Vietnamese refugees in the aftermath of the Vietnam War. The potential for Australia to experience many, many more ‘boat people’ during those years was great. As we explore in

⁴⁷ DIMIA (2004). The data collected before 1999 was disaggregated so as to reveal the gender, age and ethnicity of each person arriving on an unauthorised boat, together with the numbers seeking asylum and the outcomes of the application. After 1999 the data gradually becomes less specific, with the age and ethnicity omitted, together with the visa outcomes. In September 2004, the data was removed altogether from the internet. See SievX, ‘Database of Asylum Seeker Boats between 1989 and 2003’, http://www.sievx.com/dbs/boats/form.php?&table_name=Boats&function=search&sql=&name_mailing=&page=0&order=,

⁴⁸ Note that in some years, there is a slight discrepancy between the total number of arrivals by ethnicity and the total arrivals quoted in Appendix A. This discrepancy is likely caused by the inclusion of crew members in some years in the figures in Appendix A.

⁴⁹ Department of Immigration and Citizenship, ‘Update to the answer provided to QON 49 from Additional Estimates 2009-10 – Irregular Maritime Arrivals from 1 July 2008 to 18 May 2010’, document tabled to Senate Legal and Constitutional Affairs Legislation Committee, Budget Estimates 2010-2011 (May 2010).

Part 4, the relatively small number of boats that reached Australia stands testament to the effectiveness of the multi-lateral management plans devised to deal with the situation which came to be known as the Orderly Departure Program and Comprehensive Plan of Action (CPA).⁵⁰

The 235 asylum seekers who arrived from Cambodia arrived by boat in 1990 and 1991 represent the second wave. The arrivals coincided with the withdrawal of Vietnamese troops from that country, the organisation of elections and the repatriation of thousands of refugees from neighbouring countries.⁵¹ Just as importantly, 1989 also marked a year of significant civil unrest in the PRC, with the government crack-down on the pro-democracy movement which played out most famously in Tiananmen Square in Beijing.

Asylum seekers from China feature heavily among the third wave of boat arrivals between 1990 and 1995. While this group included a number of 'simple' political and other dissidents from the PRC, a significant proportion of the later arrivals were Sino-Vietnamese who had been resettled in the PRC at the end of the Vietnam War. Many sought asylum in Australia through the offices of smugglers known as 'snake heads' when the coastal shanty towns in which they had been living in Beihai Province were demolished in slum-clearance operations. These events coincided with the closure of refugee camps housing fugitives from Vietnam, under the auspices of the CPA. Persons facing repatriation to Vietnam are represented amongst the boat arrivals in Australia during those years. In most instances the individuals involved had had their refugee claims rejected under the (somewhat flawed) status determination processes used in the CPA.⁵²

The fourth wave, starting in the mid-1990's, was dominated by fugitives from Iraq and later Afghanistan who made their way to Australia via Indonesia. This represented Australia's first experience of 'out of region' asylum seekers and/or 'secondary movement' refugees. Boat arrivals in these years can be linked directly to the deterioration in conditions within Iraq in the lead up to American's invasion and the start of the second Iraq war. An increase in the incidence of persecution of Iraq's Kurdish and Shia population at the hands of Saddam Hussain's Bathist regime combined with the growing humanitarian emergency caused by the strict economic sanctions imposed by the UN Security Council caused a mass exodus from Iraq during the mid to late 1990's.⁵³ The specific impact of the persecution meted out by the Bathist regime of Saddam Hussein is reflected in case law from that period.⁵⁴ The increase in boat people from Afghanistan coincided with rise of the Taliban in Afghanistan in the late 1990's. Many of the Afghani arrivals during this period were ethnic Hazaras fleeing the Taliban's systematic program of persecution against this group.⁵⁵

The fifth wave of boat arrivals in and after 2009 can also be matched against deteriorating conditions in the countries from which people were coming. Between 1 July 2008 and 8 May 2010, there were a total of 5755 unauthorised arrivals by boat. Of these, 3356 were Afghani and 1103 Sri Lankan. This means more than three quarters of these boat arrivals were from either Afghanistan or Sri Lanka.⁵⁶ Hazaras again made up a significant portion of the arrivals - fleeing an escalation in Taliban insurgent activity in Afghanistan and in Pakistan where many had taken refuge. The deteriorating situation for Tamils in Sri Lanka after the defeat of the LTTE by the Sri Lankan army translated into a marked increase in Tamil arrivals from that country.⁵⁷

⁵⁰ For an excellent account of Vietnamese arrivals and the policy response during this period see Viviani (1984).

⁵¹ For an account of these events, see Hamilton (1993a) and Hamilton (1993b).

⁵² See part 5.3.1 below.

⁵³ UN Security Council Resolution 661 and 666; Alnasrawi (2000); Simons (1999); Cordesman and Hashim (1997).

⁵⁴ See, for example, N94/05530 [1995] RRTA 2118 (21 September 1995); N95/08801 [1996] RRTA 845 (16 April 1996) V97/06044 [1997] RRTA 2529 (2 July 1997); N97/19704 [1998] RRTA 2036 (16 April 1998); N99/27138 [1999] RRTA 1022 (22 April 1999); N99/29063 [1999] RRTA 1823 (21 September 1999).

⁵⁵ See Sparrow (2005), p 27-3; Human Rights Watch (1998); Human Rights Watch (2001).

⁵⁶ See also, Evans (2010a).

⁵⁷ For an outline of situation for Tamils in Sri Lanka after the civil war see: US Department of State (2010).

4 Unauthorised boat arrivals and ‘pull’ factors

It is often clear why asylum seekers want to leave their countries of origin. The next question to ask is why they might want to seek refuge in *Australia*. The ‘pull’ factors that might help to explain the asylum flows are both general and specific. Australia is one of the most economically prosperous and stable countries in the Asia-Pacific. It is one of very few in the region which is a signatory to the Refugee Convention. More particularly, Australia has a very multicultural society. The existence of vibrant migrant communities has acted as a pull factor: many (indeed, probably most) asylum seekers who make it to Australia probably come because they have family, friends or acquaintances here. In this respect, movements to Australia parallel experiences in other countries of asylum.⁵⁸ These connections are almost invariably related to the creation or operation of people smuggling syndicates which facilitate both the travel to Australia and the communication of information between communities in target and source countries.

As these pull factors (the attractions of Australian society and the existence of smuggling routes) are relatively constant they cannot account for the dramatic increases and decreases in the number of unauthorised boat arrivals over the years. There are two additional factors that have been suggested as having a bearing on unauthorised boat arrivals. The Conservatives have argued loudly that the removal of various deterrent factors is the cause of recent boat arrivals. This view is premised on the notion that asylum seekers are aware of government policies and that they take action when they see that the national door has been left ajar. Accepting this latter premise, we offer the suggestion that the Conservatives’ rhetoric is itself acting as a pull factor – insofar as the message being conveyed through the international press is that Australia has dropped its guard. Put colloquially, loose lips bring ships.

We will defer discussion of these arguments for the moment for the simple reason that both beg questions about the impact government policies might have on boat arrivals. It is to these matters that we now turn.

5 Evaluating policies of deterrence and containment

5.1 Locating human rights in the debate

While it is relatively easy to match asylum flows with ‘push’ factors and even with many ‘pull’ factors, the correspondence between unauthorised boat arrivals and policy measures in reception states is less obvious. In this section we examine in turn various initiatives taken by Australian governments in an attempt to either deter or to block unauthorised boat arrivals. To locate the critique within a human rights framework, we will begin with a brief discussion of the extent to which international law permits states to deter or deny admission to individuals in situations of dire need.

The Refugee Convention and the 1967 Protocol remain the most significant legal mechanisms ensuring the protection of refugees and asylum seekers. Articles 32 and 33 of the Refugee Convention create basic obligations that refugees should neither be refouled nor returned to the ‘the frontiers of territories where his [or her] life or freedom would be threatened.’ Article 31 prohibits contracting states from imposing penalties on refugees by reason of unlawful arrival and presence.⁵⁹ Australia has argued that this provision only applies to refugees *coming directly* from a state in which they face persecution and so has no application for

⁵⁸ See Robinson and Segrott (2002), p 42; Thielemann, (2006), pp 450 & 462.

⁵⁹ Goodwin-Gill (2001).

states like Australia where refugees transit through a number of countries before arrival.⁶⁰ Even so, the Convention places inherent limits on the extent to which states can refuse to assist refugees who present at their borders in search of asylum. The central problem for the refugee is that the Refugee Convention leaves states considerable wriggle room when it comes to the detail of what can be done to prevent refugees from reaching the border in the first place. Unlike the Universal Declaration of Human Rights, the Refugee Convention does not extend to the world's displaced and desperate a right to *enter* a foreign country for the purpose of seeking asylum.⁶¹ In other words, this Convention does not operate to displace altogether the primacy of a state's sovereign power to control its own borders.

In practice, there is virtually no Western State that has not put in place a variety of measures aimed at restricting unauthorised migration. As noted earlier, these measures can be divided into two main categories: containment and deterrence.⁶² Containment policies aim to directly prevent people from making the journey to a country in the first place, either by preventing them from leaving their country of origin, or preventing their admission upon arrival at the country's borders. The most widely used containment policies include visa requirements, carrier sanctions, and anti-people smuggling measures. Then there are the more exotic inventions that involve playing around with the very concepts of borders and physical and juridical territories.⁶³ These include Australia's 'excision' laws;⁶⁴ interdiction measures; and multilateral and bilateral agreements with source and transit countries which seek to limit departures from those countries. These policies are intended to localise migration flows and 'contain' them in the region, country of origin, or failing that, in transit countries.⁶⁵ In contrast, deterrence combines restriction and punitive measures taken in a country of asylum aimed at either discouraging would be asylum seekers from coming or encouraging asylum seekers to leave once they have come. Examples of such measures include mandatory detention and temporary protection visas, denial or limitation of welfare benefits and other aid to asylum seekers, limited access to appeal procedures and the use of negative propaganda and language (deterrent rhetoric).

Neither containment nor deterrent measures necessarily violate international law. As Professor David Martin, explains, discouraging and even preventing the unqualified from applying for refugee status is a legitimate policy objective.⁶⁶ Moreover, policies which encourage self-selection by discouraging those without strong cases from leaving their home country do not necessarily violate a country's non-refoulement obligations. The same can be said about policies which limit the ability of persons without *bona fide* refugee claims from arriving to a country's shores through the implementation of containment measures. The problem is that deterrent and containment methods are inevitably indiscriminate in their impact, deterring and preventing the arrival of not only abusive claimants, but deserving refugees as well. Given their indiscriminate impact, deterrent and containment measures must be implemented with great caution and consideration.

Even if the Refugee Convention may provide uncertain guidance on the precise rights and entitlements of refugees, it is well to recall that Australia is a party to a range of international human rights treaties and other instruments that operate to qualify its ability to act with impunity to prevent undocumented migration. For a country girt by sea, the UN Convention on the Law of the Sea, with its overarching obligations to act wherever possible to save life at sea, is of critical importance. So too are the other instruments that speak to

⁶⁰ See Crock (2003), p 73.

⁶¹ See Gummow J in *Ruddock v Ibrahim* (2000) 204 CLR 1 at [137]; Mathew (2002), p 668.

⁶² Hassan (2000), p 185.

⁶³ Kesby (2007).

⁶⁴ *Migration Act* 1958 (Cth) ss 5(1).

⁶⁵ Hassan (2000), p 185.

⁶⁶ Martin (1990), p 1290.

Australia's obligation to preserve life and to respect the right of *every person* not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.⁶⁷ These instruments serve as a reminder that irregular migrants are people first, with inherent entitlements to be treated with dignity and humanity. These principles should operate to qualify any measures taken to prevent or discourage irregular migration.

Until recently, there appears to have been an understanding among Australia's policy makers that border control measures should be tempered by care for human rights. The release of Cabinet papers relating to the refugee crisis at the end of the war in Vietnam showed that the Conservative government in 1979 considered –and rejected as inappropriate – many of the measures put in place in subsequent years. These included mandatory immigration detention; temporary visas; direct return of refugee boats; and public praise of countries engaging in the harsh treatment of fugitives from Vietnam.⁶⁸ A memorandum of advice prepared for cabinet expressly recommended against implementing deterrent measures as they would be 'inconsistent with Australia's international legal obligations and its declared humanitarian commitment towards refugees' and would not act as an effective solution.⁶⁹ Instead, led by Prime Minister Malcolm Fraser, the Conservative government chose to engage in multilateral burden sharing arrangements characterised by containment coupled with orderly resettlement. The success of this policy in dealing with the Vietnamese asylum seeker exodus is discussed below in part 5.3.1.

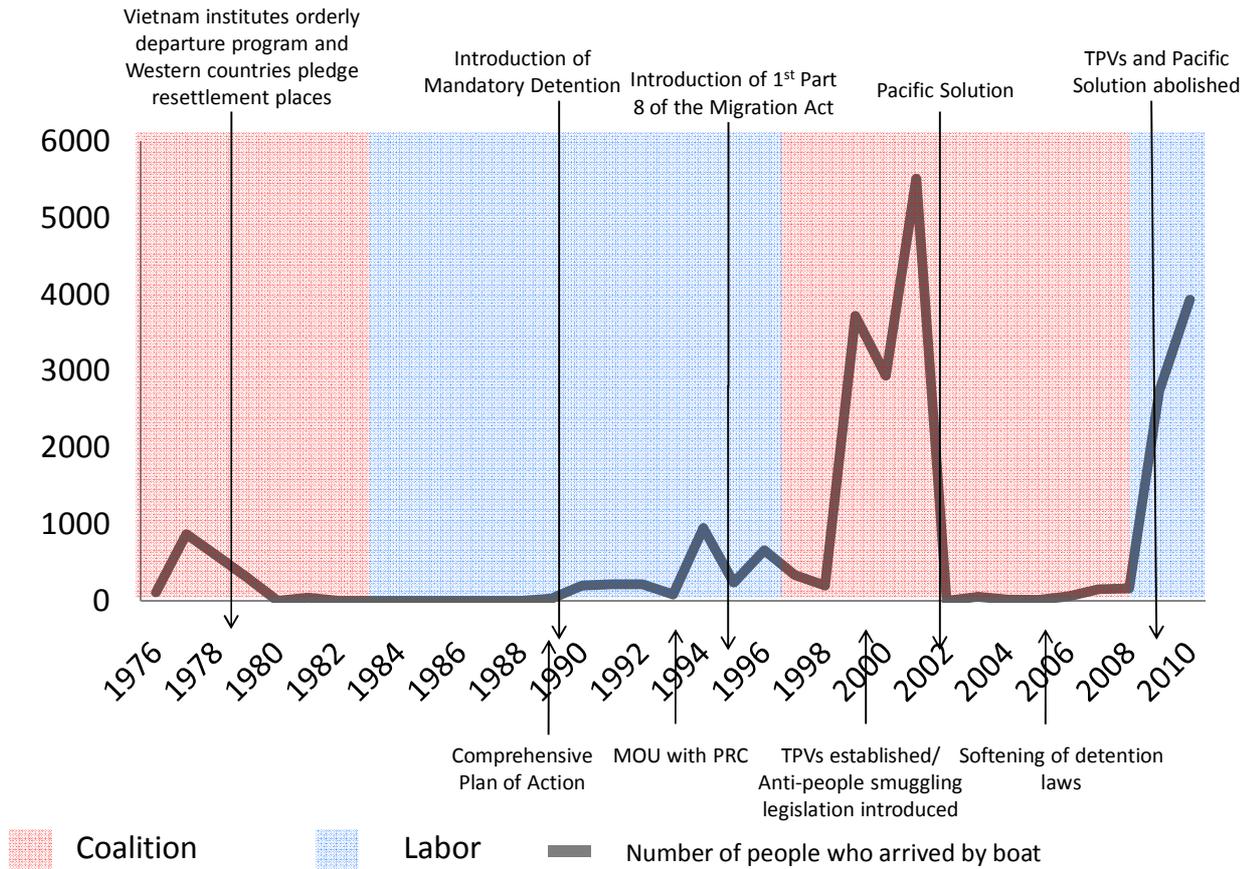
This balanced policy of containment and resettlement was abandoned in the late 1980s. Since then, Australian governments have favoured policies of containment and deterrence, seeking to deter and deny unauthorised arrivals. Less attention has been paid to providing alternates for those likely to make the journey by boat to Australia: asylum seekers waiting in transit countries in the Asia Pacific. In the following sections, we analyse policy measures taken over the years. Acknowledging the criticisms made of Australia's compliance with norms of international human rights law, our intention is to provide a broader cost-benefit analysis of the various policies. We evaluate policies against flow data, fiscal costs and other 'outcome' information to examine the apparent effectiveness and social worth of each measure. We begin with two policies that we identify squarely as deterrent measures: mandatory detention and the grant of temporary protection only to Convention refugees. A discussion follows of measures that constitute direct containment (as well as being designed to deter unauthorised boat arrivals).

⁶⁷ See, for example, International Convention on Civil and Political Rights ('ICCPR') (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Article 6 & Article 7; Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment ('CAT') (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

⁶⁸ 'Memorandum 380: Indo-Chinese refugees', 1979 Cabinet Records – Selected Documents, p 181 – 182 available at http://www.naa.gov.au/Images/6-Refugees%20and%20migration_tcm2-27151.pdf.

⁶⁹ 'Memorandum 380: Indo-Chinese refugees', 1979 Cabinet Records – Selected Documents, p 181 – 182 available at http://www.naa.gov.au/Images/6-Refugees%20and%20migration_tcm2-27151.pdf.

FIGURE 2: Policy Changes Relative to Boat Arrivals



5.2 Deterrent Measures

5.2.1 Mandatory detention

If one moment can be identified as the watershed point at which Australian policy shifted most noticeably from containment to deterrence, it would have to be in 1989 when the Hawke Labor government determined that (without exception) unauthorised boat arrivals should be detained until either granted a visa or removed from the country. Under the *Migration Act* 1958 it was always possible to detain people who arrived in Australia without permission while their circumstances were determined. However, until 1989 the period of detention was usually brief and the detention practice was a matter of policy, not law.⁷⁰ The impetus for the change was the arrival of boats carrying fugitives from Cambodia.⁷¹ In response to the campaign of legal resistance that grew up around these asylum seekers, moves were made to put physical space between the detainees and their supporters. The Cambodians were moved first from Melbourne to Sydney and later to Darwin. In 1991 the first remote detention facility was established in a disused mining camp at Port Hedland.

The decision not to release the Cambodians enjoyed bipartisan support, but ultimately the policy did not sit easily with the *Migration Act* as it stood in 1989. A legal challenge brought on behalf of 15 of the detained

⁷⁰ Betts (2001), p 37; Richardson (1993); For an account of the development of the legal framework underpinning the mandatory detention regime in Australia see Crock (1993).

⁷¹ See McKiernan (1993).

Cambodians who had been held for more than two years prompted amendments to the legislation that were rushed through Parliament in less than 48 hours in 1992. The amendments reinforced and formalised the policy of mandatory detention, albeit with a nominal limit of 273 days on the period for which a person could be incarcerated.⁷²

The *Migration Reform Act* 1992 (Cth) replaced these provisions with a scheme that provided simply that all ‘unlawful non-citizens’ must be detained until either granted a visa or removed from Australia. This Act came into force on 1 September 1994.⁷³ Ten years later the High Court affirmed that the legislative scheme could operate to detain indefinitely undocumented migrants who had no entitlement to a visa but who could not be removed to another country. The detention provisions were constitutionally valid.⁷⁴ This ruling has been of particular relevance to unauthorised boat arrivals.

The practice of putting physical distance between immigration detainees and their legal advisors was adopted and extended when the Conservatives came to power in 1996. These years saw the opening of detention centres in some of the most remote and inhospitable parts of Australia. The centre at Port Hedland was replaced with detention camps at Curtin Airbase near Derby in Western Australia’s Kimberly region; and at Woomera in South Australia’s desert outback. These were later supplemented by an installation in that state at Baxter, near Whyalla. The Coalition Government’s ‘Pacific Strategy’ (discussed below) moved the location of detention again, creating holding centres on Nauru and Manus Island Papua New Guinea. It also initiated the construction of a high security detention facility on Christmas Island that was completed and opened by the Labor government in 2008. Under the pressure of mounting criticism surrounding the wrongful detention of lawful residents and Australian citizens and concern about the effect of detention on the mental health of children and detainees, the Conservative Coalition began introducing policy reforms in July 2005. Children were released from detention, visas were introduced to provide an alternative for indefinite detention of persons who could not be removed and the commonwealth ombudsman was given oversight of persons held in detention for more than 2 years. These reforms were endorsed and extended by the Labor party which committed itself in 2007 to using detention as a last resort and for the shortest period of time, avoiding indefinite detention and the detention of children.⁷⁵ Sadly, the Rudd government been slow to act on this commitment. While many of the detention centres on mainland Australia have been mothballed, Christmas Island has remained as the centrepiece of the government’s continuing deterrent policy. Overflows from that facility have been detained in Darwin, at Curtin Airbase and other remote townships.⁷⁶

Is detention a deterrent?

While the *Migration Act* 1958 on its face applies equally to all ‘unlawful non-citizens’, in practice it is those who arrive without visas by boat who are (and always have been) represented most strongly in the population of long term immigration detainees. Bipartisan support for mandatory detention has persisted for 20 years despite the fact that there is no evidence to indicate that it has any effect on reducing unauthorised boat arrivals. Arrivals increased from 26 in 1989 to 198 in 1990. While the formalisation of mandatory

⁷² *Migration Amendment Act* 1992 (Cth).

⁷³ See *Migration Act* 1958 (Cth) 54Q inserted by *Migration Amendment Act* 1992 (Cth).

⁷⁴ *Al-Kateb v Godwin* (2004) 219 CLR 562.

⁷⁵ See Evans (2008).

⁷⁶ Sydney Morning Herald, ‘Boat arrivals open door to NT processing’, 23 March 2010, <http://news.smh.com.au/breaking-news-national/boat-arrivals-open-door-to-nt-processing-20100323-qtp2.html>; ABC News Online, ‘Asylum seekers to be sent to be sent to WA mining camp’, <http://www.abc.net.au/news/stories/2010/06/01/2915054.htm>, 1 June 2010.

detention laws did coincide with a dip in arrivals from 216 in 1992, to 81 in 1993, the numbers jumped to 953 in the following year. In subsequent years, there is no obvious correlation at all between unauthorised boat arrivals and detention policy.

The cost of detention

While detention policy has probably not been a factor affecting the incidence of irregular migration by boat, there can be no doubt that Australian practice in this area has had considerable impact within Australia. In financial terms it has cost the country a literal fortune. Abroad, accounts of the sometimes appalling conditions in the detention centres has tarnished Australia's image as a generous and humanitarian country that is respectful of international human rights law. Within the country, the policy has been socially divisive, tearing at the multicultural fabric of Australian society by encouraging mistrust and denunciation of anyone with an appearance and or cultural affect at variance with the Anglo-Saxon norm.

The financial cost

The incarceration of asylum seekers and irregular migrants in detention centres has always been more expensive than community based housing arrangements. Over the years, however, the construction of centres in more and more remote locations has lead to costs spiralling wildly out of control. In 2004, the the following estimates were provided of the money that was likely to be spent on detaining asylum seekers across Australia, based on a notional average number of detainees in the various centres⁷⁷:

TABLE 4: Immigration Detention Costs - 2004

	Average population	per day cost	total year cost
Baxter	280	310	\$31,595,200
Port Hedland	100	286	\$10,410,400
Villawood	600	111	\$24,242,400
Maribyrnong	60	248	\$5,416,320
Perth	10	589	\$2,143,960
Christmas Island	50	725	\$13,195,000
Total	1100		\$87,003,280

These figures do not include the cost to Australia of constructing and running the detention centres on Nauru and Manus Island which, over the life of the Pacific Solution, exceeded one billion dollars spent to detain and process 1501 asylum seekers.⁷⁸ Nor does it include the \$400 million+ that was spent later building the high security facility on Christmas Island begun in 2004 and commissioned under the Labor government in 2008. More recent statistics indicate that offshore asylum seeker processing cost the federal government

⁷⁷ Additional Estimates Hearing: 17 February 2004; Immigration and Multicultural and Indigenous Affairs Portfolio; Situation Reports from GSL site summaries & DIMIA.

⁷⁸ Kazimierz Bem et al (2007), p 4.

\$304.3 million in the 2009-2010 financial year, a figure which is forecast to rise to \$471.2 million in 2010-2011.⁷⁹ This figure includes part of the \$202 million committed over five years to expand accommodation for asylum seekers.⁸⁰ However they are viewed, these are huge amounts of money relative to Australia's size and to the number of boat arrivals.

The financial costs of immigration detention policy have not been confined to the outlays associated with running the detention facilities. Huge sums of money have been paid out over the years to persons who were harmed by their detention experiences, either as asylum seekers⁸¹ or because they had been wrongfully detained in the first place.⁸²

The human cost

From the time of its introduction, mandatory detention has been criticised as being in violation of Australia's international legal obligations and an affront to basic notions of human dignity. The prolonged and unqualified detention of undocumented migrants has been criticised for contravening the prohibition of arbitrary detention⁸³ and of cruel, inhuman or degrading treatment in the International Covenant on Civil and Political Rights (ICCPR),⁸⁴ the Convention Against Torture⁸⁵ and the Convention on the Rights of the Child.⁸⁶ The UN Human Rights Committee has upheld a whole series of complaints alleging arbitrary detention and/or cruel and inhuman treatment of both adults and children held in Australian immigration detention centres.⁸⁷ The incarceration of people in remote areas and matters such as lack of access to legal

⁷⁹ Department of Parliamentary Services (2010), p 203.

⁸⁰ Commonwealth of Australia (2010), p 326.

⁸¹ See, for example, the payout to the child Shayan Badraie who was so traumatised by his time in detention that he was reduced to a catatonic state. For an account of his story, see Everitt (2008).

⁸² See, for example, the payouts made to Cornelia Rau and Vivian Solon. Cornelia Rau was paid \$2.6 million in compensation: 'Rau wins \$2.6m compo', Sydney Morning Herald, 7 March 2008, available at <http://www.smh.com.au/news/national/rau-wins-26m-compo/2008/03/07/1204780046361.html>; Vivian Solon received \$4.5 million in compensation: Topsfield and Jackson (2006), p 1. For details of the circumstances surrounding their wrongful detention see Palmer (2005).

⁸³ See ICCPR, Art 9, including Art 9(4) which speaks of entitlement to judicial review of any measures involving the deprivation of liberty.

⁸⁴ See ICCPR, Arts 7 and 10. Note that the terms of this instrument apply to individuals both within the territory of a signatory state and *subject to its jurisdiction*. See ICCPR, Art 2.

⁸⁵ See CAT, Art 3 (which also has extraterritorial operation).

⁸⁶ Article 37(b) of the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 requires State Parties to ensure that:

'no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used as a measure of last resort and for the shortest appropriate period of time.' Danyal Shafiq v Australia Communication No. 1324/2004: Australia. CCPR/C/88/D/1324/2004 (13 November 2006); Applicants D and E v Australia Communication No. 1050/2002: Australia. (9 August 2006). CCPR/C/87/D/1050/2002; Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v Australia, Communication No 1069/2002: Australia. CCPR/C/79/D/1069/2002 (6 November 2003); Baban v Australia, Communication No 1014/2001: Australia. CCPR/C/78/D/1014/2001 (18 September 2003); C v Australia Communication No. 900/1999: Australia. CCPR/C/76/D/900/1999 (13 November 2002); and A v Australia Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 April 1997).

⁸⁷ Danyal Shafiq v Australia Communication No. 1324/2004: Australia. CCPR/C/88/D/1324/2004 (13 November 2006); Applicants D and E v Australia Communication No. 1050/2002: Australia. (9 August 2006). CCPR/C/87/D/1050/2002; Ali Aqsar Bakhtiyari and Roqaiha Bakhtiyari v Australia, Communication No 1069/2002: Australia. CCPR/C/79/D/1069/2002 (6 November 2003); Baban v Australia, Communication No 1014/2001: Australia. CCPR/C/78/D/1014/2001 (18 September 2003); C v Australia Communication No. 900/1999: Australia. CCPR/C/76/D/900/1999 (13 November 2002); and A v Australia Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (30 April 1997).

advice and human rights organisations have been criticised as interfering with a variety of other rights under international law.⁸⁸

Concerns have been raised also about the impact of mandatory detention on the mental health of detainees.⁸⁹ In fact, over the years immigration detention would have to be one of the most studied and scrutinised areas of public administration in Australia. In view of the fact that an overwhelming number of the reports on the subject have been critical of government practices, it is quite extraordinary that so little real change has been made. As psychiatrist Professor McGorry notes: 'Indefinite detention is definitely a health hazard'.⁹⁰

Social cost

Immigration detention has inevitably harmed Australian society. Locking up vulnerable and damaged people has a brutalising effect on community attitudes, promoting the idea that asylum seekers pose a threat to society and that they are unworthy of sympathy. The inhumanity of Australia's response has done little to facilitate the integration and rehabilitation of the detainees who, with relatively few exceptions, are usually recognised as refugees and admitted into Australian society. Australia's detention practices have compounded pre-existing post traumatic stress, laying the foundations for psycho-social problems that are likely to play out over many years.

In sum, mandatory detention has had no appreciable impact on the rate of unauthorised boat arrivals. What is clear is that the policy has high financial, human and social costs and potentially places Australia in breach of its international legal obligations. The enduring support for the policy probably owes most to the policy's domestic political function in assuring the Australian public that the government is control of arrivals to Australia.

5.2.2 Temporary Protection Visas (TPV's)

The second policy initiative that has been claimed to affect asylum flows to Australia (most particularly, flows of boat people) is the practice of awarding temporary protection only to persons found to be Convention refugees. Temporary Protection Visas (TPVs) are designed to deter prospective unauthorised arrivals by providing only a limited period of protection after which the holder must go through the refugee determination process afresh. Persons awarded TPVs are also denied many of the rights afforded to permanent residents – most importantly, the right to sponsor family members through regular immigration channels; rights to English language training and to other forms of education.

Temporary visas were first introduced by the Labor Government in 1990-1991 in response to the large number of Chinese students stranded in Australia after the massacre of pro-democracy demonstrators in June 1989.⁹¹ Then Prime Minister Bob Hawke had made a public pledge to these students that none would be forced to go home. The visas were introduced to make good on this promise, while depriving the students of family reunification rights that would come with permanent visas. Realising the difficulties caused by these visas for young (and generally talented) students who were not going to be able to return to China, the visas

⁸⁸ Schloenhardt (2002), p 325.

⁸⁹ Green and Eagar (2010); Silove, Steel and Watters (2000); Steel and Silove (2001); Dudley (2003).

⁹⁰ See Packham (2010).

⁹¹ *Migration Regulations (Amendment)* (1990) (No 237), reg 21; The Refugee (restricted) visa was replaced by another temporary visa, the Domestic Protection (Temporary) Entry Permit in 1991: *Migration Regulations (Cth) Class 84, Migration Regulations (Amendment) 1991* (No 25) reg 9.

were quietly abandoned in 1994 through the announcement of a quasi amnesty.⁹² Temporary visas were introduced again in 1999 when they became a key feature of the deterrent measures introduced by the Conservative Coalition. The *Migration Amendment Regulations* 1999 (No 12) created a new category of temporary protection visas for successful on-shore applicants. The subclass 785 visas restricted welfare benefits and family reunification and limited the protection offered to refugees to a maximum of three years.⁹³

Is temporary protection a deterrent?

As a policy initiative, there is no evidence that the grant of temporary status to refugees has ever deterred boat arrivals. Table 2 shows that between 1990-1994, while Labor's temporary protection visas regime was in force, rather than reducing numbers, unauthorised boat arrivals increased steadily. This did not prevent the Coalition Government from re-introducing a tougher version of the scheme following the surge in boat arrivals in 1999. Again, these measures were ineffective in reducing the number of unauthorised boat arrivals. The following two years saw the highest number of arrivals ever seen in Australia with more than 8455 unauthorised arrivals.

What did change, however, was the composition of the boat arrivals. Restrictions on family reunification meant that it was no longer possible for adult males to make the arduous journey alone and then sponsor their family to come out to Australia. In other words, in 1999 this policy change may well have had the effect of *encouraging* asylum seekers to try their hand with the people smugglers. The apparent effect of the change was to encourage the departure for Australia of whole families and/or wives and children whose husbands and fathers were already in the country. In 1999 children made up only 13 per cent of asylum seekers arriving by boat. After the introduction of the temporary protection visa, (by) 2001 the proportion of children on boats rose to 30 per cent.⁹⁴

The Cost of temporary protection

Interestingly, the public political discourse on temporary protection visas has rarely included a discussion of the fiscal costs of the scheme. These are obvious, if only because the issue of any temporary visa brings no finality to the involvement of immigration in the lives of grantees. Temporary visas mean that immigration authorities must monitor the location of visa holders. Towards the end of the visa period, the entire machinery for determining refugee claims – both at first instance and on appeal from merits review through judicial review – are engaged once again. The sheer number and complexity of refugee cases appearing before the courts between 1999 and 2006 stand testament to this aspect of the regime.

The human and societal costs of the temporary protection regime introduced in 1999 were analysed by a team of social scientists based at Melbourne's RMIT University. They found that the scheme had mental health implications for visa holders; that it created barriers to employment and access to health services.⁹⁵

Although the Labor government has acknowledged that TPVs are ineffective, the Conservatives are clinging to the fiction that this socially cruel policy did have the effect of deterring boat arrivals.⁹⁶

⁹² Schloenhardt (2000), p 46.

⁹³ Note that under Labor, protection visa were granted for 4 year periods.

⁹⁴ Crock, Saul and Dastyari (2006), p 169.

⁹⁵ Greg Marston (2003), p 4.

⁹⁶ Liberal Party of Australia (2010).

5.3 Containment measures

5.3.1 Bilateral/Multilateral Agreements and MOU's

If any measures can be claimed with certainty to have stopped unauthorised boat arrivals, the most effective have always involved direct dialogue and co-operation with what might be called 'provenance' or source countries. Over the years, the Australian government has entered into various bilateral and multilateral agreements with countries which have been able to operate with Australia to prevent the departure of would-be asylum seekers and irregular migrants.

Such agreements were used to great effect in stemming and/or managing the exodus of refugees from Vietnam after the war in that country. The first agreement arose out of the 1979 Conference on Indo-Chinese refugees⁹⁷ and involved four separate, but interrelated measures. First, Vietnamese asylum seekers were presumed to be refugees. Second, countries in the region agreed to provide temporary refuge to the fugitives. Third, countries such as Australia and the United States agreed to introduce generous resettlement programs to take in the refugees. Finally, Vietnam agreed to introduce an orderly departure program and security measures aimed at restricting irregular boat departures. During the 1980s, 177,000 Vietnamese were visaed to enter Australia as refugees or as part of the country's official migration program.⁹⁸ Due in part to this policy, only 39 asylum seekers arrived by boat between 1980 and 1988. Sadly, this plan began to unravel in 1987 when fresh outflows from Vietnam outstripped diminishing resettlement commitments, resulting in a concerted policy of push-back by countries of first asylum in the Asian region.⁹⁹

An effort to reach a new arrangement was made at a conference in 1989¹⁰⁰ which gave rise to the multilateral treaty known as the Comprehensive Plan of Action ('CPA').¹⁰¹ Like the 1979 agreement, this plan provided for orderly departures, temporary asylum in the region and resettlement abroad. The major difference was that asylum seekers from Vietnam were no longer presumed to be refugees. The CPA introduced a region-wide system of individual refugee status determination in each first asylum country. Arrangements were also made to return to Vietnam those found not to be in need of international protection. While the processing procedures have been criticised for being crude and inaccurate and concerns have been raised about refoulement caused by the involuntary return program,¹⁰² the CPA proved extremely effective both in reducing the exodus from Vietnam and controlling the number of unauthorised arrivals in Australia. Between the CPA's inception in 1989 and its end 1996, only 1,159 Vietnamese nationals/former nationals arrived without authorisation on Australian shores.¹⁰³ Of these, 1001 were Sino-Vietnamese resettled in China who were nominally covered by the CPA. The Australian Government's policy response to these 'secondary movement' Vietnamese refugees represents another successful use of bilateral agreements as means of reducing unauthorised boat arrivals.

⁹⁷ Meeting on Refugees and Displaced Persons in South-East Asia, convened by the Secretary General of the UN at Geneva, on 20 and 21 July 1979, UN Doc A/34/627 (1979).

⁹⁸ Manne and Corlett (2004) at 2.

⁹⁹ Helton (1991), p 111.

¹⁰⁰ Office of the United Nations High Commissioner for Refugees: International Conference on Indo-Chinese Refugees, Report of the Secretary-General (Item 111(c) of the Provisional Agenda), UN Doc A/44/523 (1989).

¹⁰¹ Done at Geneva by the International Conference on Indo-Chinese Refugees, 13-14 June 1989.; For comprehensive critique see Towle (2006); Tran (1995); Helton (1990).

¹⁰² See, for example, Towle (2006), p 539; Hathaway (1993).

¹⁰³ DIMIA (2004).

In 1993, Australia entered into a Memorandum of Understanding with the Peoples Republic of China (PRC) facilitating the return of Sino-Vietnamese asylum seekers to the PRC.¹⁰⁴ A legislative scheme was introduced to designate the PRC as a ‘safe third country’ in respect of Vietnamese refugees who sought refuge in or were resettled in the PRC since 1979. These measures had the effect of blocking asylum claims by such persons.¹⁰⁵ The agreement was justified on the basis that the asylum seekers in question had either been resettled in the PRC as refugees (and so in leaving that country were deemed to be seeking a better life rather than refugee protection) or they had had refugee claims denied under the CPA processes. The Memorandum of Understanding (MOU) was undertaken with the approval of UNHCR which had overseen both the CPA status determinations throughout South East Asia and the resettlement of the Sino-Vietnamese in the PRC after the Vietnam War. The MOU was highly effective in stopping the flow of boats carrying asylum seekers from the PRC to Australia in and after 1994.¹⁰⁶

As we explore below, bilateral agreements were an essential part of the ‘Pacific Solution’, and ‘Operation Reflex’, the package of measures that did indeed stop the boats in 2001-2. Interdiction would have been futile had Indonesia not agreed to accept returned boats and the off-shore processing would not have been possible without agreements with Nauru and Papua New Guinea. We would argue, however, that the strategy was not sustainable because it was prohibitively expensive and abusive – both of the human rights of asylum seekers and of the interests of the countries relied upon to warehouse those found to be refugees.

5.3.2 The ‘Pacific Solution’: Interdiction, Excision and Off-shore Processing

In the aftermath of the *Tampa* incident in 2001,¹⁰⁷ the Coalition Government introduced a range of policy measures aimed at both containing and deterring unauthorised boat arrivals which collectively came to be known first as the ‘Pacific Solution’ and later as the ‘Pacific Strategy’. The scheme involved three main containment initiatives. The first was reactive to the Tampa crisis itself and involved the ‘excision’ of territories from Australia’s ‘migration zone’ with the effect that the migration legislation pertaining to the mainland no longer applies in these places. A legislative framework was introduced which allowed the Minister for Immigration to issue a declaration that certain Australian territories are ‘excised offshore places’ and hence no longer part of Australia’s migration zone. Initially, Christmas Island, Ashmore Reef, Cartier Island and Cocos Islands were ‘excised’. Later, the excision zone was extended to include almost all but mainland Australia. A new category of ‘offshore entry person’ was then created to catch all asylum seekers who landed without a valid visa or authority on an excised territory.¹⁰⁸ The second initiative involved the establishment of off-shore detention facilities in Nauru and Manus Island, to which ‘off-shore entry persons’ were transferred. . The third strategy was an interdiction program dubbed ‘Operation Relax’ that saw unauthorised boats intercepted on the high seas by Australian Navy boats and escorted back into Indonesian waters.

¹⁰⁴ The text of the Memorandum is contained in Schedule 11 of the *Migration Regulations* 1994 (Cth).

¹⁰⁵ See ss 91F-91G of the *Migration Act* 1958 (Cth) and *Migration Regulations* 1994 (Cth), regs 2.12A-2.12B.

¹⁰⁶ This is not to say, however, that it occurred without the *refoulement* of some genuine Convention refugees. The record of outcomes for status determinations before and after the statutory change is stark. A boat arriving on 4 June 1994 carrying 51 Sino-Vietnamese asylum seekers resulted in the grant of 51 protection visas. Similar results are recorded in respect of 17 Vietnamese from the CPA camp at Galang in Indonesia who arrived on 17 July 1994: all were granted protection visas as Convention refugees. In contrast, a boat arriving on 9 September 1994 with 31 Vietnamese asylum seekers saw 1 escape and the balance removed from the country. With the exception of the odd escapee, the vast majority of subsequent arrivals in 1994 and 1995 are recorded as having been removed. See DIMIA (2004).

¹⁰⁷ For detailed analysis of the incident see Crock (2003); Willheim (2003); Tauman (2002); Bostock (2002).

¹⁰⁸ *Migration Act* 1958 (Cth) s 5(1)

There are some reports indicating that Australian officials have been involved over the years in a fourth containment strategy, known colloquially as ‘disruption’ activities.¹⁰⁹ Put simply, these involve direct action to sabotage the efforts of people smugglers – sometimes by going so far as to compromise the structural integrity of the boats involved in a smuggling enterprise. Old newsreel footage records a former departmental officer boasting of using a brace and bit to ensure the sinking of Vietnamese asylum seeker boats in the late 1970’s and early 1980’s before they could reach Australia.¹¹⁰ Such activities have always been shrouded in secrecy. Where evidence that asylum boats have been sabotaged has emerged, the typical response is for all government agencies to deny either knowledge of or involvement in whatever has occurred. In 2002 reports emerged that the Australian Federal Police (AFP) had engaged in clandestine disruption activities in Indonesia to stop asylum seekers from making their way to Australia. The investigative journalist Ross Coultard elicited assertions by an AFP ‘operative’ that he had taken money from would-be boat people for proposed voyages to Australia, splitting the proceeds with Indonesian officials who would act to ensure that the boats in question never reached their destination. The AFP confirmed that the individual named was employed by them and that he was authorised to engage in disruption activities.¹¹¹ The statistics on boat arrivals from this period suggest that disruption activities were successful in discouraging the small operators, although not the ‘big fish’.

It is possible that the demise of the SIEV X – the worst maritime disaster following the *Tampa* affair - involved disruption activities, although at whose instigation is unclear. Allegations were made of Indonesian officials forcing asylum seekers onto the doomed and overloaded vessel at gunpoint and of the vessel being ‘holed’ and un-seaworthy at the time it left port in Indonesia.¹¹² If the boat was sabotaged, the Australian government has always denied strenuously any knowledge of or involvement in the matter.

What is clear is that Operation Relex represented the first official policy authorising direct action against vessels carrying asylum seekers aimed at preventing them from reaching Australia. In accordance with a Memorandum of Understanding reached with Indonesia,¹¹³ the Australian Navy would first attempt to tow or escort unauthorised boats back into Indonesian waters. If these attempts failed, the asylum seekers aboard the vessels were transferred to Manus Island or Nauru under for processing of their claims.

Between August and November 2001, thirteen boats carrying asylum seekers tried and failed to reach Australia. One was the ill-fated SIEV-X which sank with the loss of 353 lives. Four boats, with some 600

¹⁰⁹ The Australian National Audit Office list the following agencies as being involved in a four-part strategy to reduce unauthorised migration to Australia: the Department of Immigration, the Australian Customs Service, the Australian Federal Police, the Australian Quarantine and Inspection Service, the Department of Foreign Affairs and Trade, Coastwatch, the Department of Defence, the Department of Prime Minister and Cabinet, and the Attorney General’s Department. Australia’s security and intelligence agencies are also involved. The four part strategy has the following elements: (1) prevention of the problem by minimising outflows from countries of origin and secondary outflows from countries of origin; (2) working with other countries to disrupt people smugglers and intercept their clients en-route to Australia; (3) minimising incentives to travel illegally to Australia; and (4) international cooperation aimed at strengthening the international system of protection and disrupting people smuggling and refugee forum shopping.

See Australian National Audit Office (2002), p 30.

¹¹⁰ See the ABC television documentary, *Admission Impossible* (1992).

¹¹¹ See Sunday Program ‘Kevin John Enniss: The AFP Cover Up’, available at: http://www.sievx.com/archives/2002_08-09/20020827.shtml. For the transcript of the Sunday program’s interview with Enniss, see <http://sunday.ninemsn.com.au/sunday/section/transcripts.asp>.

¹¹² See Tony Kevin, ‘Reply to Tam Long On SIEV X’, published as part of the ‘Webdiary’ series of the Sydney Morning Herald. The article is available at: <http://www.smh.com.au/articles/2002/09/20/1032054962047.html> (accessed 10 June 2010). See also Clennell (2002), p 2. See generally Kevin (2004).

¹¹³ Details of the documents are set out in: Francis (2008), n1.

asylum seekers on board, were intercepted and successfully forced back to Indonesia.¹¹⁴ The other eight were intercepted but could not safely make the journey back to Indonesia, either because they had broken down or been sabotaged by asylum seekers in an attempt to force the Australians to take them on board. Of those rescued by the *Tampa* and these eight boats, a total of 1501 asylum seekers were transferred to Manus Island and Nauru for processing.¹¹⁵

As Prime Minister Gillard has rightly pointed out,¹¹⁶ the Coalition's promise to resume a policy of 'pushing back the boats' is hollow and heartless. This is because push back initiatives have always resulted in deaths at sea. Australia's naval forces do not deserve to be exposed again to the stress they experienced during Operation Relex.

Did the Pacific Solution contain and/or deter unauthorised boat arrivals?

Working together, there can be no doubt that the policies of interdiction, excision and off-shore processing, were successful in reducing the number of unauthorised boat arrivals between 2002 and 2005. In 2002, one year after the policies were implemented, only one person without a visa made it to the Australian mainland by boat. This compares with 2939 arrivals in 2000 and 5516 in 2001. The policies certainly prevented people from making it to Australia. The fact that boat people did not make it to Australia did not mean, however, that asylum seekers stopped trying to find protection in the region. The statistics most often cited are at least a little misleading in that no account is given to the number of asylum seekers who continued to make their way to Indonesia. By the time government changed hands in Australia in 2007, UNHCR and the IOM had taken responsibility for the processing and care of thousands of asylum seekers from the world's hot spots. With Australia footing the bill for these operations, some have referred to these people as Australia's 'warehoused' refugees. The problem for the successor Labor government is that the earlier strategy did not involve finding durable solution for the interdicted refugees. In the result, at least some of those taken in and processed by UNHCR in Indonesia returned inevitably to the people smugglers – emerging anew as asylum seekers on Christmas Island.

The Cost

As noted earlier, the fiscal cost of the Pacific Solution – over one billion dollars to process 1501 asylum seekers -can only be described as breathtaking. The policy also had a devastatingly high human cost and was fundamentally incompatible with international legal norms and standards. Taking unseaworthy boats under tow or forcing them back to sea as occurred during Operation Relex placed the lives of asylum seekers at risk, contrary to the fundamental obligation to protect life at sea. In addition to Art 98 of UNCLOS, the International Convention for the Safety of Life at Sea (SOLAS)¹¹⁷ and the International Convention on Maritime Search and Rescue (SAR)¹¹⁸ oblige ship masters to render assistance when aware of an emergency at sea, regardless of the nationality or status of the persons on board the vessel in distress. The danger in which the passengers of interdicted boats were placed was highlighted by the deaths linked to the operation.¹¹⁹ Documentary footage obtained by Australian journalists suggest that the interdiction operation

¹¹⁴ Manne (2004), p 45

¹¹⁵ Manne (2004), pp 45-46.

¹¹⁶ **Find reference**

¹¹⁷ (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 1, regulation 33(1).

¹¹⁸ (adopted 27 April 1979, entered into force 22 June 1985) 1405 UNTS 97, Annexe §2.1.10.

¹¹⁹ Senate Select Committee (2002) 'Final Report: A Certain Maritime Incident', 23 October 2002. See also Weller (2002); 'To Deter and Deny', *ABC's Four Corners*, 15 April 2002, transcript available at <http://www.abc.net.au/4corners/stories/s531993.htm>.

exacerbated rather than relieved the distress experienced on board at least some of the boats interdicted and towed back to Indonesia. What is even more worrying were admissions by an AFP informant that he had used AFP funds to pay Indonesian locals to scuttle people-smuggling boats with passengers aboard on four or five occasions.¹²⁰ These incidents during the course of the interdiction program arguably placed Australia in breach of Art 3 of the UN Convention Against Torture and All forms of Cruel, Inhumane and Degrading Treatment or Punishment 1984 (CAT)¹²¹ and Arts 6 and 7 of the ICCPR.¹²² These are the articles that enshrine the right to life and the obligation not to commit acts that constitute torture or cruel, inhuman and degrading treatment.

Further, as others have explored at great length,¹²³ Operation Relex – like other interdiction programs before and after it – placed Australia in breach of *non-refoulement* and other provisions enshrined in the Refugee Convention, CAT and the ICCPR. The obligation not to *refouler* refugees to a place where they face persecution extends to *indirect* as well as direct return.¹²⁴ The country to which interdicted persons were returned – Indonesia – was not (and in 2010 still was not) a signatory to the Refugee Convention.

Insofar as the Pacific Solution prevented asylum seekers from reaching Australia and/or from leaving Indonesia by boat it is clear that the package of policies did reduce the number of unauthorised boat arrivals reaching Australia's shores between 2002 - 2005. The central problems with the strategy, however, were twofold. First, and perhaps most importantly, the costs – fiscal, human and social - outweighed any gains that were made. Second, the strategy was not sustainable because it did not produce durable solutions for any of the parties involved. The claim by then Prime Minister John Howard that no asylum seeker rescued by the *Tampa* would be permitted to set foot in Australia proved hollow. In fact, most of the asylum seekers recognised as Convention refugees who were sent to Nauru and Manus Island were ultimately resettled in Australia because third countries could not be found to take them. Indonesia found itself burdened with thousands of asylum seekers that it regarded as being Australia's problem. The basic issue is that containment measures such as the Pacific Solution – and its successor strategy - will only work if the people interdicted are provided with protective outcomes that will truly dissuade them from attempting the perilous sea journey to Australia.

5.3.3 Christmas Island and the 'Indian Ocean' Strategy

In spite of the best efforts of the advocacy community to present a united front on this matter in 2007, the Rudd Labor government could not be persuaded to abandon altogether the deterrent strategies devised by the Conservative Coalition. The government has maintained the legislative provisions underpinning the Pacific Strategy. Australia's offshore territories remain 'excised' from the 'migration zone'. Agreements also remain in place with Indonesia to stop or impede people smuggling operations. The only major change to

¹²⁰ 'The Australian People-Smuggler', *Sunday*, 17 February 2002 transcript available at <http://sievx.com/articles/psdp/20020217Sunday.html>; The Senate Questions Without Notice, Immigration: Border Protection, Thursday, 26 September 2002, available at http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2002-09-26/0089/hansard_frag.pdf;fileType%3Dapplication%2Fpdf (accessed 10 June 2010)

¹²¹ (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85.

¹²² See UN Human Rights Committee, General Comment No 20: Art 7 (prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), UN doc. HRI/GEN/1/Rev 7, 10 March 1992 at [9]; and Francis (2008), p 277, n 18.

¹²³ See for example, Francis (2008); Goodwin-Gill and McAdam (2007), pp 244-53; Legomsky (2006) (and other articles in this symposium issue on off-shore processing); and Noll (2003).

¹²⁴ See Goodwin-Gill and McAdam (2007), pp 252-53, 389 and 400.

the offshore processing regime implemented by PM Rudd, was the closure of the facilities on Nauru and the transfer of ‘offshore entry persons’ to the Australian territory of Christmas Island in the Indian Ocean. As such, the Labor government has maintained a two tiered system that discriminates between persons who enter Australia’s migration zone without a visa and those who are interdicted before making landfall on the Australian mainland.¹²⁵

This two-tiered processing system is undesirable in that it results in unequal access to the Protection Visa application process and review of adverse refugee determinations.¹²⁶ The result is a refugee processing system for off-shore entry persons that is both unfair and in violation of Australia’s international obligations. The dependency on the exercise of ministerial discretion and the failure to provide access to judicial review violates Australia’s commitment under international law to provide for *non-refoulement* of refugees. A state cannot avoid its obligation not to *refouler* by attaching a legal designation to a place or person.¹²⁷ The creation of ‘excised areas’ cannot circumvent Australia’s international obligations. By making the right of off-shore entry persons to apply for a Protection Visa dependent on a non-compellable discretionary ministerial power, refugees classed as off-shore entry persons have no effective legal protection from *refoulement*. The obligation not to discriminate between refugees and the prohibition against imposing penalties on refugees on the basis of illegal entry or presence are also fundamental to the Refugee Convention.

Like its predecessor policy, the ‘Indian Ocean Strategy’ also comes at an extremely high financial cost. Aside from the \$400 million spent in building the detention centre on Christmas Island,¹²⁸ the government faces exorbitant costs flying in food and personnel such doctors, psychiatrists and government funded lawyers. Analysis of departmental figures from 2007 reveal that in that year it cost \$1830 per day to detain a person on Christmas Island, compared to \$238 per detainee per day at Villawood detention centre in Sydney.¹²⁹ That is an extra cost of \$1600 per detainee per day. Sadly, the government has little to show for this extraordinary fiscal outlay: the boats just keep on arriving.

5.3.4 Cooperation with Indonesia

In 2001, the Howard Coalition Government entered into a tripartite agreement called the Regional Cooperation Model (RCM) with the Government of Indonesia and the International Organisation for

¹²⁵ Where undocumented asylum seekers who enter mainland Australia (and the ‘migration zone’) are entitled as of right to apply for a Protection Visa under s 36 of the *Migration Act* 1958, those who arrive at an excised offshore place can only apply for a Protection Visa if the Minister exercises a non-reviewable, non-compellable discretion under s46(A)(2) of the *Migration Act* 1958. Unlike persons who reach mainland Australia, off-shore entry persons have no right to merits review of an unfavourable status decision in the RRT. Under the ‘Pacific Solution’, off-shore entry applicants were not afforded any opportunity for merits review of unfavourable decisions. The Rudd government relaxed policies in this area by introducing a non-statutory advisory body to conduct informal reviews. The ‘Refugee Status Assessment Review Panel’ (RSARP) reviews the merits of negative departmental refugee status assessments: see DIAC (2009), p 52. Unlike the RRT, which has the power to grant Protection Visas in its own right, the RSARP reviews are purely advisory and the minister is under no obligation to act on the panel’s recommendation. Judicial review by the Federal Courts of adverse RSA outcomes is precluded by legislation, Section 494AA(1) of the *Migration Act* provides for a comprehensive bar against proceedings against the Commonwealth relating to an offshore entry by an offshore entry person. with the result that judicial oversight of the process can only be sought in the High Court of Australia under s 75(v) of the Constitution. It is a measure of the honeymoon enjoyed by the Rudd Labor government that the first High Court challenges to adverse Christmas Island RSAs were not made until June 2010. See Waters (2010).

¹²⁶ See Senate Legal and Constitutional Committee, p 16.

¹²⁷ Goodwin-Gill (1993), p 89.

¹²⁸ Smiles (2008), p 6.

¹²⁹ Bem (2007), p 4.

Migration (IOM). Under this agreement Indonesia agreed to the return of asylum seekers intercepted by Australian authorities under the interdiction program and to work with Australia to prevent the departure of asylum seeker boats.¹³⁰ While the Oceanic Viking incident illustrates the Indonesia may no longer be willing to accept the return of asylum seeker boats to its shores, Indonesian authorities have continued to cooperate with the Rudd government to intercept and prevent irregular boat departures and disrupt people smuggling networks. Since 2008, this cooperation has led to the disruption of 125 smuggling operations, with 3362 foreign nationals being detained by Indonesian authorities and 60 facilitators or organisers being arrested.¹³¹

Under the RCM, intercepted asylum seekers are referred to the IOM for material assistance. In turn, the IOM (whose role in the RCM is funded by Australia) refers those who indicate a wish to claim asylum to UNHCR. IOM provides individuals with accommodation, food and medical assistance pending determination of their claims by the UNHCR.¹³² A recent report by Jesse Taylor, criticises both the conditions of IOM assisted asylum seekers who are awaiting determination and the UNHCR determination process itself.¹³³

The UNHCR is grossly under-resourced in Indonesia. As a result it is not uncommon for people to wait 24 to 36 months between their initial registration and their refugee status determination.¹³⁴ Negative determinations of refugee status are often made without issuing reasons. Those that stick it out and are determined to be refugees, continue to languish in Indonesia as there is little prospect of third country resettlement. Given these appalling conditions and the dire chances of resettlement, it is no surprise that asylum seekers continue to find ways to make the perilous journey by sea to Australia, despite the disruption and interception activities of the Indonesian authorities.

5.3.5 A regional processing centre?

During the 2010 election campaign, the policy debate between Labor and the Coalition saw broad agreement emerge on the desirability of establishing a 'regional' processing centre, with PM Gillard proposing East Timor as the focal point and the Coalition suggesting a return to Nauru and Manus Island. In theory, there is at least something to commend the idea of providing an alternative destination for 'maritime' asylum seekers if this involves removing the need to undertake a perilous sea journey. East Timor is a signatory to the Refugee Convention and it is a country regarded by Australians historically with considerable goodwill. The problem with the Labor proposal, however, is that what we know of the processing regimes planned by both parties are riddled with shortcomings.

Both parties would seek to strip the Australian courts of jurisdiction to review refugee cases by inviting UNHCR and IOM to undertake status determinations. While Labor is anxious to avoid the politics of returning to Nauru, with all the emotional baggage that would entail, the truth is that both policies are problematic in equal measure. Neither would work, for all the same reasons that the Pacific Strategy did not work in the longer term. If the centre was to be used to process only those asylum seekers attempting to enter Australia, it is not obvious that any of these places would act as deterrents any more than Christmas Island has.

¹³⁰ See Howard (2003), p 42.

¹³¹ Sydney Morning Herald, 'Another Asylum Seeker Boat arrives' (10 April 2010), available at <http://www.theaustralian.com.au/news/nation/another-asylum-seeker-boat-arrives/story-e6frg6nf-1225852118356>.

¹³² See Savitri Taylor (2009).

¹³³ Jesse Taylor (2009), p 5.

¹³⁴ Jesse Taylor (2009), p 5.

East Timor, it has to be said, is a spectacularly bad choice because the country is in such a parlous state of development. The notion that a processing centre could somehow benefit the country is based more in fantasy than in reality. That country lacks even the basic infrastructure to support its own people. If PM Gillard tells us that Australians resent the idea of refugees being given an ‘inside track’ and ‘special privileges’, how would the East Timorese be expected to respond to the refugees thrust into their midst? While the number of persons caught up in this process is relatively small for Australia, for the East Timorese the burden would be considerable. It is not immediately apparent to us why such a poor country should be asked to assume this role.

In our view the critical problems with the Pacific strategy can be reduced to two points. The first was that it provided a degraded regime for status determinations, with the result that genuine refugees were denied the protection to which they were entitled by law. The second was that the scheme provided no durable solutions for those who were recognised as Convention refugees. Sadly, the likelihood that either party could devise a regional system that addresses both of these failings seems remote.

A key rationale for such a centre seems to be to exclude asylum seekers from the procedural safeguards embedded in Australian administrative law. This inevitably prompts the question of whether either party is committed to upholding the central tenet of the Refugee Convention which is to ensure that refugees are not returned to a place where they would face death or persecution. Devolving responsibility to UNHCR to operate in a degraded and under resourced environment (replicating the scenario already operating in Indonesia) can only be described as tricky and mean. Suggestions that the rights of asylum seekers in Australia might be sacrificed in some sort of procedural compromise is equally deserving of contempt.

For those recognised as refugees through a regional process, third country resettlement would continue to pose difficulties unless Australia agreed to assume this responsibility. Given that this is likely to be the reality, it is hard to see what gains would be made by creating a regional scheme. In this respect, there would be no appreciable difference between the plans proposed by the major parties. Australia would still be the end destination in most cases. Given this reality, it is difficult to see why it is assumed that the scheme would deter asylum seekers any more than Christmas Island has had this effect. The new centres – wherever they are located – would continue to act as ‘honey pots’, just like Christmas Island.

5.3.5 Domestic Anti-people smuggling measures

Domestic anti-people smuggling measures aim to contain unauthorised asylum flows by criminalising the facilitation of such movements into Australia. Such measures were introduced first in 1999,¹³⁵ and strengthened in 2001¹³⁶ by the Conservative Coalition government. People smuggling offences were inserted into the Commonwealth Criminal Code and amendments to the *Migration Act* 1958 imposed 20-year jail terms and fines of up to \$220,000 for people convicted of organising the illegal entry of five or more non-citizens in a group. Individual instances of smuggling attract ten year jail terms and fines of up to \$110,000.¹³⁷ According to the Minister for Home Affairs, Brendan O’Connor MP, there were 88 arrests and 25 people smuggling convictions between September 2008 and February 2010, resulting in sentences of

¹³⁵ *Border Protection Legislation Amendment Bill* 1999 (Cth); *Migration Amendment Act* (No. 1) 1999 (Cth)

¹³⁶ *Border Protection (Validation and Enforcement Powers) Act* 2001 (Cth)

¹³⁷ *Criminal Code* 1995 (Cth), division 73; *Migration Act* 1958 (Cth) ss 232A & 233A,

between five and six years in prison.¹³⁸ The recently enacted, *Anti-People Smuggling and Other Measures Act 2010* (Cth), expanded the law still further.¹³⁹ The Act creates the new offence of providing material support or resource for a people smuggling venture and introduces mandatory minimum penalties. While the provisions are ostensibly based on the 2004 The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime,¹⁴⁰ the proposed laws part company with the Protocol by omitting from the definition of people smuggling either a fault element or the requirement that the activity be undertaken ‘for profit’. The legislation is cast so broadly that any person who brings an undocumented migrant into Australia – whether knowingly or otherwise – could be faced with a people smuggling charge. Nor is any exception made for persons who act with humanitarian motives.¹⁴¹

The statistical record provides no evidence to suggest that anti-people smuggling laws have had any effect at all in reducing the number of unauthorised arrivals. Anti-people smuggling legislation was introduced in 1999, the same time as the temporary visa scheme was reintroduced. The two years that followed saw record numbers of unauthorised boat arrivals, in vessels carrying progressively larger numbers of asylum seekers. Although numbers began to decline after the introduction of the 2001, this reduction is far more likely attributable to the interdiction program than to the rather minor reforms to Australia’s people smuggling laws. The nature of smuggling networks is such that even the harshest and most punitive measures can have only a marginal affect. This is because the people most likely to be caught and prosecuted are the crew members of the unauthorised boats, not the leaders of the smuggling organisations. Those charged are generally poor, unemployed, illiterate or mostly illiterate, and members of the Indonesian fishing communities around the island of Roti. Many are very young – chosen by the smuggler because they are likely to attract lesser penalties.¹⁴² Economic desperation and deliberate misinformation from people smuggler organisers will ensure that no matter how punitive or harsh the penalties may be, there will be no shortage of such people willing to crew smuggling boats.

6. Pull factors reprised: Do Loose Lips Bring Ships?

The focus of both the major parties on changes in bare policy masks the complex factors that influence boat arrivals. The one matter that has not been acknowledged in much of discourse is the role played by modern technology and the significance of the messages that are being sent out not just by the government but by other players also. We live at a time when the transfer of information and communication between people and between countries has never been easier. The prevalence of internet and mobile technology has given asylum seekers and their facilitators unprecedented access to news casts and other information sources. Asylum seekers often have mobile phones. Refugees in Australia report that they know when friends and relatives are making an ‘undocumented’ trip to Australia because the practice is to call a contact in Australia at point of departure.

¹³⁸ ‘The government’s new anti-people smuggling measures’, *Sky News*, 24 February 2010, transcript available at http://www.ema.gov.au/www/ministers/oconnor.nsf/Page/Transcripts_2010_24February2010-TheGovernmentsNewAnti-People-SmugglingMeasures. See also: O’Conner (2009).

¹³⁹ Enacted 30 May 2010.

¹⁴⁰ The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted by General Assembly resolution A/RES/55/25, entered into force 28 January 2004).

¹⁴¹ Saul (2010).

¹⁴² Project Safecom (2010), p 8.

This free flow of information through the media and mobile communication takes on particular significance in light of the campaign waged by the Conservative Opposition decrying the government's 'soft' approach to border control. Changes in policy can only impact on asylum seekers decision to make the journey by boat to Australia to the extent that asylum seekers are led to believe that the changes are in their favour. In this context, trumpeting charges that the government has opened the door to irregular migration obviously acts as a strong pull factor for prospective asylum seekers. Such rhetoric plays into the hands of the people smugglers who are able to sell their service more effectively to people desperate to get out of the situations in which they find themselves.

The point we seek to make here is that using debates over asylum seekers and border control to score political points is destructive at many levels. As Prime Minister Howard demonstrated in 2001, the strategy of 'getting tough' on irregular boat arrivals makes for powerful politics. This is reflected in the fact that the Labor party was prepared to fall in line with the Coalition in 2001 in spite of grave reservations about what the government was doing at that time. Irregular boat arrivals have always made politicians from both major parties nervous – witness the contortions that surrounded the boats from Cambodia and China in and after 1989. The difference today is that the Conservatives are showing no compunction in 'wedging' Labor on the issue. The fact that their rhetoric may be exacerbating the problem seems to be of no consequence to them: on the contrary, each new boat arrival is a cause for celebration!

If the Conservatives genuinely believed that Australia's security is threatened by the more recent boat arrivals, we suggest that they would be taking a similar approach to that adopted by Labor in 2001. Our view is that the Conservatives should button their lips and fall in behind government efforts to stop or slow boat arrivals. The fact that asylum seekers continue to die at sea in the effort to reach Australian territory underscores that the current dilemma facing Australia is not a game.

Christmas Island as magnet and magnifying glass

The rhetoric of the Conservative politicians raises further questions about the wisdom of maintaining Christmas Island as a detention and processing centre. As the boats continue to arrive, it may be time to ask whether the detention facility on Christmas Island has come to act as a 'pull' factor for both prospective asylum seekers and people smugglers. The island is within comparatively easy reach of Indonesia (relative to the Australian mainland). The limited capacity of the detention facility on the island has provided ready ammunition to the Opposition in its fear mongering campaign – and easy access for journalists to newsworthy stories. As the facility edges closer to capacity, media attention intensifies, as do the Opposition's accusations that the government has gone 'soft' on asylum seekers. In this age of instant international communication and globalised media, these messages are likely to be heard by the smugglers and their prospective clients. The island is acting as both magnet and magnifying glass.

5 The Way Forward – Effective Policies

Controlling the arrival of unauthorised boats carrying asylum seekers is complex and challenging for all countries facing the phenomenon of irregular migration. Australia is not alone in the dilemmas it faces. If one thing is clear, it is that the problem cannot be addressed while the policy debate continues to be dominated by fear-mongering, sensationalism and a desire to score cheap political points. While it cannot be said with any certainty that recent increases in boat arrivals have been *caused* by changes in asylum policy,

one can say that Labor Government has not been effective in reducing number of boat arrivals. One can also say with conviction that the Conservatives in Opposition have done nothing to help the situation and may well be exacerbating things with the persistent assertions that Australian has opened its borders to irregular migrants.

The suspension in the processing of asylum claims for applicants from Sri Lanka and Afghanistan for a period of three months and six months respectively had a negligible impact on asylum flows. Between the announcement of the policy on 9 April 2010 and 30 July 2010, no less than 44 boats arrived carrying 2061 asylum seekers made their way to Australian offshore territories. This is almost identical figure to the 2078 who arrived over a similar period before the suspension.¹⁴³

This is not to suggest that the Conservatives are better placed to offer viable solutions. The resurrection of the Coalition policies presupposes that regional countries such as Nauru and Indonesia would be prepared to enter once more into bi-lateral agreements with Australia. Although the impecunious state of Nauru may be happy to re-open its detention facilities, Indonesia has shown no enthusiasm for extending its agreement with Australia. The central problem is that the Pacific Solution was aptly renamed the Pacific Strategy – because ultimately it did not offer durable solutions. In spite of the assertions made by Prime Minister John Howard that the interdicted refugees would be sent anywhere but Australia, this is precisely where most of them ended up. While the strategy was successful in temporarily reducing the number of unauthorised boat arrivals, it was not sustainable policy. In fact, rather than offering solutions, it exacerbated the problem by creating a backlog of warehoused refugees (and bad blood) in transit countries. Indonesia was left with close to 10,000 refugees who were always regarded as ‘Australia’s’ refugees and Australia’s problem. The suggestion that Nauru be the location for a ‘regional’ processing centre is somewhat of a misnomer. While East Timor is at least geographically proximate to Indonesia (and therefore a reasonable prospect for the re-direction of boats), Nauru is nowhere near the seat of action. In practice, unauthorised arrivals would continue to target Australian offshore territories with the result that lives would continue to be placed at risk. Asylum seekers would have to be transported by sea or by air to Nauru (at great cost of course).

While some are giving cautious support to the idea of a regional processing centre for unauthorised boat arrivals,¹⁴⁴ it is our view that the game is just not worth the candle. A return to the inhumane and financially costly policies of TPVs and offshore processing will not offer a durable solution to controlling unauthorised boat arrivals. The uncritical acceptance of assumptions that offshore processing will stop the boats underscores the raw politics that continues to drive the discourse on border control.

Although not a point that is often made, it is well to note that the policies of the Howard Coalition years were not only cruel to the refugees directly affected. They were also socially divisive, having a lasting impact on the fabric of Australian society. The plaintive observation by a young Afghan boy in 2006 is one example in point:

I used to like this girl at TAFE and I used to talk to her. When she say “where are you from?”, I say “Afghanistan” and she say “Oh, a terrorist”. Sometime I feel like I’m nothing.¹⁴⁵

Two other examples are worthy of mention that are of broader societal import. There is more than a passing coincidence that the years of extraordinarily harsh border control policies under the Howard Coalition government culminated in, first, an unprecedented number of wrongful arrests, detention and removals of

¹⁴³ Comparable period is taken to be 18 Dec 2009 – 9 April 2010.

¹⁴⁴ See Brennan (2010)

¹⁴⁵ See Crock (2006), p 224.

citizens and lawful permanent residents and, second, in inter-racial rioting that made headlines all over the world.¹⁴⁶ Over 240 non-citizens – and citizens – were subjected to unlawful arrest and detention between 1997 and 2004.¹⁴⁷ The two cases that grabbed the attention of the nation were those of permanent resident Cornelia Rau, detained in spite of her mental illness at Woomera Detention Centre;¹⁴⁸ and Vivian Solon-Alvarez, an Australian citizen who was both mentally ill and physically handicapped when removed from Australia and left destitute at a Philippines airport.¹⁴⁹ It is not possible to vilify one section of the migrant community and then expect the broader society not to extend the disapprobation to other minority groups. In a multi-cultural, multi-racial society like Australia, vilifying minority groups inevitably tears at the very fabric of community, threatening the stability and cohesion of the society.

In one of her first speeches as Prime Minister, Julia Gillard – herself a migrant – did nothing to dispel or calm community antagonism towards the continuing boat arrivals. Instead she acknowledged the antipathy felt by those who see asylum seekers as ‘queue jumpers’. She said:

I submit we can agree on these principles.

That hardworking Australians who themselves are doing it tough want to know that refugees allowed to settle here are not singled out for special treatment;

That people like my own parents who have worked hard all their lives can't abide the idea that others might get an inside track to special privileges;

And that finally, if this were to happen, it would offend the Australian sense of fair play.¹⁵⁰

For the Prime Minister to assert that it is somehow wrong to afford ‘special treatment’ to refugees - a title that by law only goes to the most vulnerable and dispossessed of people – is problematic in itself. Of greater concern is the dog whistle implicit in the ‘principles’. This is clearly directed at voters like the man from Western Sydney interviewed by *The Australian* in mid July 2010. Described as unemployed, with a wife who is studying and a four year old daughter, the man nominated ‘asylum seekers’ as his biggest concern. He went on immediately, however, to draw the link between refugees and his discomfort at the admission of groups whose cultural and religious practices differ from his own. He is reported as saying:

There is already so much pressure on resources out here, and letting more and more refugees in just makes it harder for us all....I don't want more Islamic schools to start popping up either.¹⁵¹

The announcement by Prime Minister Gillard that Labor favours the establishment of a regional processing centre acknowledges the need for dialogue and cooperation if Australia is to stop the boat arrivals. While the provision of an alternative to the perilous sea journey to Australia is welcome, the plan will only work if asylum seekers are afforded the right to tell their stories and to have their cases determined before a credible tribunal. The best deterrent for the asylum seekers is to offer a regional regime that mirrors the one operating in mainland Australia: it should complement rather than replace the onshore scheme. Only then will the incentive to reach Australia be removed.

The main problem, in our view, is that the policy debate on unauthorised boat arrivals is misguided in its focus in two respects. First, the discourse needs to shift to identifying root causes and finding durable

¹⁴⁶ See ‘Mob Violence envelops Cronulla’, *Sydney Morning Herald*, 11 December 2005, available at <http://www.smh.com.au/news/national/mob-violence-envelops-cronulla/2005/12/11/1134235936223.html> and ‘Riot and Revenge’, *ABC's Four Corners*, 13 March 2006, transcript available at <http://www.abc.net.au/4corners/content/2006/s1588360.htm>.

¹⁴⁷ Reports on the findings made by the Immigration Ombudsman are available at http://www.comb.gov.au/commonwealth/publish.nsf/Content/publications_immigrationreports.

¹⁴⁸ See Palmer (2005).

¹⁴⁹ See Comrie (2005).

¹⁵⁰ Gillard (2010).

¹⁵¹ See Vasek (2010), p 7.

solutions. More attention needs to be paid to the events that cause asylum movements, and to the plight of asylum seekers warehoused in transit countries. However difficult this may be, the government needs to open or re-open dialogues with Afghanistan, Pakistan, Sri Lanka and Indonesia in an effort to find a way to short circuit people smuggling operations. Although some of these countries are dealing with huge numbers of refugees and displaced persons, the potential for dialogue should not be dismissed on these grounds alone.

The second problem lies in the failure to work with communities in Australia, with the tendency to adopt policies that actually threaten to frighten and alienate people who could play a significant role in stopping the boats. In our experience, the individuals who engage people smugglers for the dangerous sea voyage to Australia do not come from an amorphous mass of needy humanity. Even when they are children travelling alone, most of Australia's boat people seem to make the voyage to Australia because they have pre-existing connections with people already in this country. This fact is given tacit recognition in the new offences introduced by the *Anti-People Smuggling Act 2010* which criminalise a range of activities involving the support of persons seeking to enter Australia by irregular means. Rather than penalising members of emergent communities, the government would do better to work with these people and to use these connections to find solutions for the friends and relatives left behind in situations of dire need.

In this context, it is well to note that containment strategies will only succeed in the long term if coupled with resettlement programs that provide asylum seekers with an alternative to indefinite wait in transit countries. As noted earlier, the key to the success of the Orderly Departure Program and the CPA was the underlying massive resettlement program that underpinned these schemes. In contrast, resettlement figures for recognised refugees from Indonesia to Australia have been poor – 32 people in 2006-2007, 89 in 2007-2008 and 35 in 2008-2009.¹⁵² The Rudd Government allocated 13,750 humanitarian places in the 2010-11 financial year. As a percentage of Australia's overall immigration program, this intake is less than under the Conservative Coalition, and half that of the Keating government. If there is to be any hope of stopping the flow of boats to Australia, serious consideration needs to be given to increasing the humanitarian intake and to focusing the intake more heavily on those countries associated with recent boat arrivals (either as source or transit countries).

Of course, even if greater efforts are made to address root causes and to offer viable resettlement alternatives, it is likely that refugees will continue to make the perilous journey to Australia by boat. The central point is that no single policy – and no government acting alone – can work to stop the boats and/or to stop the deaths at sea. Cooperation is the key. If we need to look for this to foreign governments, it is of equal importance to secure this also at home. With another 12 drowning deaths reported as we write these last words, it is time enough for politicians of all colours and persuasions to button their lips and to refocus their energy into helping government politicians unravel the Gordian knot they have collectively created.

Appendix A¹⁵³

Year	Number of Boats	Number of people (excludes crew)	Total asylum claims (incl on-shore) ¹⁵⁴
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¹⁵² Jesse Taylor (2009), p 5.

¹⁵³ Phillips and Spinks (2010); UNHCR *Global Trends*; DIAC, 'Update to the answer provided to QON 49 from Additional Estimates 2009-10 – Irregular Maritime Arrivals from 1 July 2008 to 18 May 2010', document tabled to Senate Legal and Constitutional Affairs Legislation Committee, Budget Estimates 2010-2011 (May 2010)

1976	n/a	111	n/a
1977	n/a	868	n/a
1979	n/a	304	n/a
1980	n/a	0	n/a
1981	n/a	39	139#
1982	n/a	0	147#
1983	n/a	0	137#
1984	n/a	0	201#
1985	n/a	0	315 (319#)
1986	n/a	0	488 (504#)
1987	n/a	0	488 (413#)
1988	n/a	0	39 (465#)
1989	1	26	564 (388#)
1990	2	198	3590 (449#)
1991	6	214	13954 (287#)
1992	6	216	n/a
1993	3	81	9032 (3638#)
1994	18	953	6,262 (7747#)
1995	7	237	7632 (7474#)
1996	19	660	9,758 (7625#)
1997	11	339	9,312 (15180#)
1998	17	200	8,156 (10470#)
1999	86	3721	9,451 (7814#)
2000	51	2939	13,065 (12408#)
2001	43	5516	12,366 (11062#)
2002	1	1	5,863 (8995#)
2003	1	53	4295 (4993#)
2004	1	15	4201 (3069#)
2005	4	11	3204 (3381#)
2006	6	60	3515 (3323#)
2007	5	148	3980 (3662#)
2008	7	161	4771 (4264#)
2009	62	2753	n/a
2010 (as 30/7)	82	3932	n/a

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