

ANDREAS SCHLOENHARDT



## **TRAFFICKING IN MIGRANTS**

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### **Illegal Migration and Organised Crime in Australia and the Asia Pacific Region**

Thesis submitted for the  
degree of Doctor of Philosophy  
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Law School, May 2002



**THE UNIVERSITY  
OF ADELAIDE**  
AUSTRALIA

To Liz and Ben

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Andreas Schloenhardt  
May 2002

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## Abbreviations

AAPA	Association of Asia Pacific Airlines
AAT	Administrative Appeals Tribunal (Australia)
ABC	Australian Broadcasting Corporation
ABCI	Australian Bureau of Criminal Intelligence
AFP	Australian Federal Police
AGPS	Australian Government Publishing Service
AI	Amnesty International
AIC	Australian Institute of Criminology
ALEIN	Australian Law Enforcement Intelligence Net
APEC	Asia Pacific Economic Cooperation
art/arts	article(s)
ASA scheme	Asylum Seeker Assistance scheme (Australia)
ASEAN	Association of South East Asian Nations
AUSTRAC	Australian Transaction Reports and Analysis Centre
Aus\$	Australian Dollar(s)
cf	confer (Latin: compare)
CICP	United Nations Centre for International Crime Prevention, Vienna
COMECON	Council for Mutual Economic Assistance
CSCAP	Council for Security Cooperation in the Asia Pacific
CSIS	The Centre for Strategic and International Studies, Washington DC
Cth	Commonwealth (Australia)
DIEA	Department of Immigration and Ethnic Affairs (Australia), now DIMIA
DIMA	Department of Immigration and Multicultural Affairs (Australia), now DIMIA (Department of Immigration Multicultural and Indigenous Affairs)
div/divs	division
doc/docs	document(s)
ed/eds	edition(s), editor(s)
eg	exempli gratia (Latin: for example)
en	endnote(s)
esp	especially
est	estimate/estimated
et al	et altere (Latin: and others)
f/ff	one/or more page(s) following
FATF	Financial Action Task Force, Paris
FFC	Full Federal Court (Australia)
fn	footnote(s)
HEUNI	The European Institute for Crime Prevention and Control, affiliated with the United Nations, Helsinki
HK\$	Hong Kong Dollar(s)
HREOC	Human Rights and Equal Opportunity Commission (Australia)
IAAAS	Immigration Advice and Assistance Scheme (Australia)
IATA	International Air Transport Association, Montreal

IATA/CAWG	IATA Control Authorities Working Group
ICAO	International Civil Aviation Authority, Montreal
ICCPR	International Covenant of Civil and Political Rights
ICMPD	International Centre for Migration Policy Development, Vienna
id	idem (Latin: the same)
ie	id est (Latin: that is)
IGC	Inter-governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia, Geneva
ILO	International Labour Organisation/Office, Geneva
IOM	International Organisation for Migration, Geneva
ISPAC	International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Programme, Milan
MAL	Movement Alert List
na	not available
NCA	National Crime Authority (Australia)
no	Number
OAS	Organisation of American States
OECD	Organisation for Economic Co-operation and Development, Paris
ONA	Office of National Assessments (Australia)
p/pp	page(s)
para/paras	paragraph(s)
PNG	Papua New Guinea
PR China	People's Republic of China
pt/pts	part(s)
rev	Revised
RRT	Refugee Review Tribunal (Australia)
s/ss	section(s)
SAR	Special Administrative Region of the People's Republic of China
sch	schedule(s)
SIEV	Suspect Illegal Entry Vessel
Sin\$	Singapore Dollar(s)
SR	Statutory Rules/Regulations (Australia)
subs/subss	subsection(s)
SUNC	Suspect Unlawful Non-Citizen
transl	translator(s)
UN	United Nations
UNAFEI	United Nations Asia and Far East Institute for the Prevention of Crime and Treatment of Offenders, Tokyo
UNCJIN	United Nations Crime and Justice Information Network
UNDCP	United Nations Drug Control Program
UNHCHR	United Nations High Commissioner for Human Rights, Geneva
UNHCR	United Nations High Commissioner for Refugees, Geneva
UNICEF	United Nations Children's Fund
UNICRI	United Nations Interregional Crime and Justice Research Institute, Rome
UNODCCP	United Nations Office for Drug Control and Crime Prevention, Vienna

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UNRRA	United Nations Relief and Rehabilitation Administration
US	United States of America
US\$	United States American Dollar(s)
USSR	Union of Soviet Socialist Republics
v	Versus
vol/vols	volume(s)



## Journals, Periodicals and Law Reports

A Crim R	Australian Criminal Reports (Sydney (NSW): LBC)
Adl LR	Adelaide Law Review (The University of Adelaide Law School)
Air & Space L	Air and Space Law (The Hague: Kluwer Law)
AJ Admin L	Australian Journal of Administrative Law (Sydney (NSW): LBC)
AJHR	Australian Journal of Human Rights (University of New South Wales)
ALJ	Australian Law Journal (Sydney (NSW): LBC)
ALR	Australian Law Reports (Sydney (NSW): Butterworths)
AltLJ	Alternative Law Journal (Clayton (Vic): Legal Service Bulletin)
Annals AAPSS	Annals of the American Academy of Political and Social Science (Philadelphia (PA))
ANZJ Crim	Australian and New Zealand Journal of Criminology (Sydney (NSW): Butterworths)
Asian Affairs	Asian Affairs (London: Royal Society for Asian Affairs)
ATS	Australian Treaties Series (Canberra (ACT): Department of Foreign Affairs and Trade)
Aus J Forensic Sc	Australian Journal of Forensic Sciences (Sydney (NSW): Australian Journal of Forensic Sciences)
Aust LN	Australian Law News (Melbourne (Vic): Law Council of Australia)
Berk J Int'l L	Berkeley Journal of International Law (University of California at Berkeley)
BJ Crim	British Journal of Criminology, Delinquency and Deviant Social Behaviour (London: Stevens, Quadrangle Books)
CIIC	Current Issues in Criminal Justice (University of Sydney)
CJPR	Criminal Justice Policy Review (Indiana University of Pennsylvania)
CL&SC	Crime, Law and Social Change [formerly Contemporary Crises] (The Hague: Kluwer Law)
CLR	Commonwealth Law Reports (Sydney (NSW): LBC)
Colum HRLR	Columbia Human Rights Law Review (Columbia University Law School)
Comp LR	Comparative Law Review (Waseda University Tokyo)
Contemporary Crises	Contemporary Crises [now CL&SC] (The Hague: Kluwer)
Crim & Del	Crime and Delinquency (New York (NY): National Council on Crime and Delinquency)
Crim LJ	Criminal Law Journal (Sydney (NSW): LBC)
FCR	Federal Court Reports (Sydney (NSW): LBC)
Fletcher Forum	Fletcher Forum of World Affairs (Medford (MA): Fletcher School of Law and Diplomacy)
FORUM	FORUM for Applied Research and Public Policy (Knoxville (TN): University of Tennessee)
Geographical Analysis	Geographical Analysis (Ohio State University)
Hous JIL	Houston Journal of International Law (University of Houston Law Center)
HRQ	Human Rights Quarterly (Baltimore (MD): John Hopkins)

Human Rights Defender	Human Rights Defender (Human Rights Centre, University of New South Wales)
IJCP	International Journal of Criminology and Penology (London: Academic Press)
IJRL	International Journal for Refugee Law (Oxford University)
IJSL	International Journal of the Sociology of Law (San Diego (CA): Academic Press)
ILM	International Legal Materials (Washington (DC): American Society of International Law)
Immi & Nat L&P	Immigration & Nationality Law & Practice [s.n.]
Ind J Global Legal Studies	Indiana Journal of Global Legal Studies (Indiana University Law School, Bloomington)
Int'l Crim Pol Rev	International Criminal Police Review (Lyon: Interpol)
Int'l Migration Rev	International Migration Review (New York (NY): Center for Migration Studies)
Int'l Migration	International Migration (Geneva: IOM)
IRLE	International Review of Law and Economics (Sevenoaks: Butterworths)
J Cont Crim J	Journal of Contemporary Criminal Justice (California State University)
J Crim L & Criminology	Journal of Criminal Law and Criminology (Northwestern University School of Law)
J Int'l Aff	Journal of International Affairs (Columbia University New York)
J Pub L	Journal of Public Law (Emory University, Atlanta (GA))
J Ref Studies	Journal of Refugee Studies (Oxford University Press)
Law Inst J	Law Institute Journal (Melbourne (Vic): Law Institute of Victoria)
LNTS	League of Nations Treaty Series
Loy LA Int'l & Comp LJ	Loyola of Los Angeles International and Comparative Law Journal (Loyola Law School, Los Angeles (CA))
LSJ	Law Society Journal (NSW)
McG LJ	McGill Law Journal (McGill University Montreal)
Melb JIL	Melbourne Journal of International Law (Melbourne University Law Faculty)
Migration News	Migration News (University of California at Davis, available at <a href="http://www.migration.ucdavis.edu">www.migration.ucdavis.edu</a> )
NYLS J Hum Rts	New York Law School Journal of Human Rights
NYUJ Int'l L&P	New York University Journal of International Law and Politics
Pacific Islands Report	Pacific Islands Report (Honolulu (HI): Pacific Islands Development Program/East-West Center (available at <a href="http://www.pipd.ewc.edu/pireport">www.pipd.ewc.edu/pireport</a> ))
Pacifica Review	Pacifica Review: Peace, Security & Global Change (Melbourne (Vic): La Trobe University)
Platypus	Platypus (Canberra (ACT): Australian Federal Police)
Population Bulletin	Population Bulletin (Washington (DC): Population Reference Bureau)
Refugees	Refugees (Geneva: UNHCR)
Rev Int'l Crim & Pol Tech	Revue Internationale de Criminologie et de Police Technique [s.n.]
Rev Int'l Droit Penal	Revue Internationale de Droit Penal/International Review of Penal Law (Pau: Association Internationale de Droit Penal)
Rut LJ	Rutgers Law Journal (Camden (NJ): Rutgers School of Law)
Stat	US Statutes at Large
Survival	Survival (London: International Institute for Strategic Studies)

Trafficking in Migrants	Trafficking in Migrants, Quarterly Bulletin (Geneva: IOM)
Trans Org C	Transnational Organised Crime (Portland (OR): Frank Cass)
Trends & Issues in Crime & Criminal J	Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice (Canberra (ACT))
Trends Org C	Trends in Organized Crime (Washington (DC): National Strategy Information Center)
UN Crime Prevention and Criminal Justice Newsletter	United Nations Crime Prevention and Criminal Justice Newsletter (Vienna: United Nations)
UNAFEI Resource Material Series	UNAFEI — Resource Material Series (Tokyo: UNAFEI)
UNDCP Eastern Horizons	UNDCP Eastern Horizons: News on the Fight against Drugs and Crime in East Asia and the Pacific (Bangkok: United Nations International Drug Control Programme (UNDCP))
Univ Tas LR	University of Tasmania Law Review
UNSW LJ	University of New South Wales Law Journal (Sydney)
UNTS	United Nations Treaty Series
Vand JTL	Vanderbilt Journal of Transnational Law (Nashville (TN): Vanderbilt University, School of Law)
Virg J Int'l L	Virginia Journal of International Law (Charlottesville (VA))
WASCA	Western Australia Supreme Court, Court of Criminal Appeals
Wash LR	Washington Law Review (Seattle (WA))
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg: Insitut für ausländisches öffentliches Recht und Völkerrecht)

*Note: This list does not contain newspapers.*

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## Publications

Parts of this thesis have been the subject of the following publications:

- Schloenhardt, Andreas: "Australia and the Boat-People: 25 Years of Unauthorised Arrivals" (2000) 23(3) (Special Issue Refugees and the Law) *University of New South Wales Law Journal* pp 33-55.
- Schloenhardt, Andreas: "Migrant Trafficking and Regional Security" (2001) 16(2) *FORUM for Applied Research and Public Policy* (University of Tennessee) pp 83-88
- Schloenhardt, Andreas: "Organised Crime and the Business of Migrant Trafficking" (1999) 32(3) *Crime, Law and Social Change* pp 203-233.
- Schloenhardt, Andreas: "The Business of Migration: Organised Crime and Illegal Migration in Australia and the Asia Pacific Region" (1999) 21(1) *Adelaide Law Review* pp 81-114. (This article won the Adelaide Law Review John-Portus-Prize for best article of 1999.)
- Schloenhardt, Andreas: "Trafficking in Migrants: Illegal Migration and Organised Crime in Australia and the Asia Pacific Region" (2002) 29(4) *International Journal of the Sociology of Law* pp 331-378.
- Schloenhardt, Andreas: "Trafficking in Migrants in the Asia Pacific: National, Regional and International Responses" (2001) 5 *Singapore Journal of International and Comparative Law* pp 696-747.
- Schloenhardt, Andreas: "Організована злочинність та економічна діяльність з нелегального переправляння мігрантів" (Organizovana Zlochnynnist ta Economichna Dialnist z Nelegalnogo Pereprawlannia Migrantiv: Economichni Analiz) in *U.S.-Ukraine Regional Law Enforcement Workshop Against Trafficking in Women and Children, June 21-22, 2000, Kiev, Ukraine*, Kiev: US Embassy, 2000.

## Abstract

**“Trafficking in Migrants -  
Illegal Migration and Organised Crime in Australia and the Asia Pacific Region”**

The subject of this study is the phenomenon commonly known as ‘trafficking in migrants’ — the criminal offence of illegally transporting migrants across international borders.

The success in combating migrant trafficking largely depends on a better understanding of the phenomenon, the criminal organisations engaged in trafficking, the participants victims of these organisations, and the legal framework preventing, suppressing and — at other times — enabling migrant trafficking. For Australia and the countries of the Asia Pacific region the successful prevention and repression of this phenomenon requires concerted action by all countries concerned to reinforce security and stability at local, domestic, regional and international levels.

This study provides a comprehensive analysis of migrant trafficking in its different aspects and dimensions. It examines the nature, characteristics and magnitude, the causes, conditions and consequences of migrant trafficking, and the inadequacies of existing policies and legislation. It compiles, reviews and analyses existing and proposed legislation at national, regional and international levels. It forwards a set of specific proposals that can be woven into a coherent and comprehensive strategy to prevent and combat illegal migration and organised crime in Australia and the Asia Pacific region more effectively in the 21<sup>st</sup> century.

## INTRODUCTION

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But finally, whether you succeed or not is up to you.  
Now is the time to decide and see if you believe  
you will succeed like other migrants to Australia.<sup>1</sup>

**T**his topic has no relevance for Australia.”<sup>2</sup> These were the words I was greeted with in April 1998, when I applied to undertake a PhD study into the trafficking of migrants at one of Australia’s leading universities.

Two years earlier, my phone rang late on a Friday night. At the time, I was an undergraduate law student and did some voluntary work in a local immigration detention centre. The caller was phoning on behalf of a young Chinese man who had been placed in immigration detention and had asked for someone to talk to. His claim for asylum had been rejected at both primary and review levels, and now he was awaiting removal to China. A few days later I went to visit this young man. His name was Chang and he was exactly my age. Chang was very distressed and with the few words of English that he knew he asked me “Why am I in prison? I am not criminal.”

Chang left China approximately one year before I met him. He said he was a single child, his mother died when he was young, so he lived alone with his father. During the 1989 student rebellion in China, his father became engaged in protests in the provincial capital Fuzhou. His father was arrested and never returned home. Chang then lived with his uncle, not knowing what happened to his father. Like so many young men from Fujian province, Chang wanted to have a better life in another country. He knew about the

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<sup>1</sup> From the information provided (in Vietnamese) to the refugees by the Australian selection teams in Hong Kong, Singapore and Malaysia — “Brief Points for Vietnamese refugees coming to Australia” reprinted in Australia, Senate Standing Committee on Foreign Affairs and Defence, *Australia and the Refugee Problem* (1976) 118.



wealthy and luxurious lifestyle in North America, Australia and Western Europe, and heard about the Chinese communities that existed there. So he contacted the local 'snakeheads' that offered to take him to the 'golden mountain' he had heard about. His uncle gave Chang money to pay the traffickers a deposit; the rest was to be paid upon arrival in the destination country. Cramped onto a small boat with a few dozen people, Chang left Fuzhou clandestinely and travelled via Vietnam to Bangkok. The traffickers gave him addresses of contact persons in Thailand. Chang spoke to them and they asked for more money, which he was not able to pay until about three months later. He was then given a false Japanese passport and travelled onwards by plane and eventually arrived in the country, which he thought would offer him a new life and a better future than the shanty suburbs of Fuzhou. Chang applied for asylum, but his case was rejected. He then appealed, but the primary decision was upheld. Now he was expecting removal to China.

For a period of seven months I went to see Chang every fortnight and helped him with various issues relating to his detention. During this time I learnt to understand what Chang had felt during his voyage, his hopes, the dreams he was pursuing and the disillusion he was facing. In the 2000-01 financial year, 5,649 people arrived unlawfully in Australia.<sup>3</sup> Many of them have stories similar to that of Chang. Maybe the Professor in Melbourne was right; maybe stories like Chang's have no relevance for Australia. But I believe they should. This is what inspired me to write this thesis.

### ***Trafficking in Migrants***

#### ***— Illegal Migration and Organised Crime in Australia and the Asia Pacific Region***

##### *Background*

For centuries, people have migrated between the countries of the Asia Pacific region and around the world. Colonialism, indentured workers, refugee flows and labour migration in South East Asia and the South Pacific have shaped many nations and exposed them to foreign influences and the challenges of immigration and emigration. Countries such as Australia and Singapore are nations of immigrants. The populations of China, Malaysia,

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<sup>2</sup> Monash University, Melbourne [on file with author].

<sup>3</sup> DIMA, *Fact Sheet 74: Unauthorised Arrivals by Air and Sea* (8 Nov 2001) 1.

the Philippines, Indonesia and Thailand have altered significantly following the arrival of foreign workers and the departure of those who left to find work elsewhere. Many countries of the South Pacific, including Fiji, New Caledonia and Papua New Guinea have lost citizens through the trade in indentured labourers, and gained new inhabitants through the policies of colonial powers. Cambodia, Laos, Myanmar and Vietnam have witnessed large exodi of people following armed conflict and political upheavals.

The fact that people migrate is not new, but the numbers of migrants are increasing more rapidly as a result of global migration pressures, easier travel by land, air and sea, and the globalisation of trade. Rapid population growth, famine, poverty and unemployment, political persecution, war and civil strife, and environmental degradation have led many people to move across international borders in search of survival, food, safety, employment, or simply a better life.

What makes today's migration different from that of earlier centuries is that the number of migrants is growing together with the laws prohibiting immigration. The global imbalance between income levels, socioeconomic standards, political stability, environmental protection and demographic developments has brought with it an attitude of hostility and protectionism among those nations that are more privileged, offering greater wealth, freedom and security. It has led many countries to close their borders and limit, and in some cases abandon, the intake of migrant workers and asylum seekers.

But "desperate people seek desperate solutions."<sup>4</sup> If legal avenues of migration are denied, migrants resort to alternative means and methods, which they often find in the services offered by criminal trafficking organisations. Recent years have witnessed increasing cross-border migration accompanied by growing levels of organised trafficking. In response to persecution, poverty and unemployment in their home countries, and with restrictions placed on legitimate migration systems, hundreds of thousands of people are now moving illegally into other countries with the assistance of professional traffickers.

The restrictions placed on the movements of migrants are playing into the hands of criminal organisations that exploit the differences in national laws and legal systems to

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<sup>4</sup> Senator The Hon Amanda Vanstone, then Minister for Justice and Customs, at the opening of the *South East Asia/Pacific Region People Smuggling Conference*, Canberra, 15 Jan 2001.

their advantage. They create illegal ways of migration using clandestine methods of transporting people and/or by supplying sophisticated false documents, while exploiting those willing or forced to migrate. Trafficking in migrants in the Asia Pacific region has become a multi-billion dollar industry, and illegal migration has become a lucrative source of income for criminal organisations.

### *The role of this study*

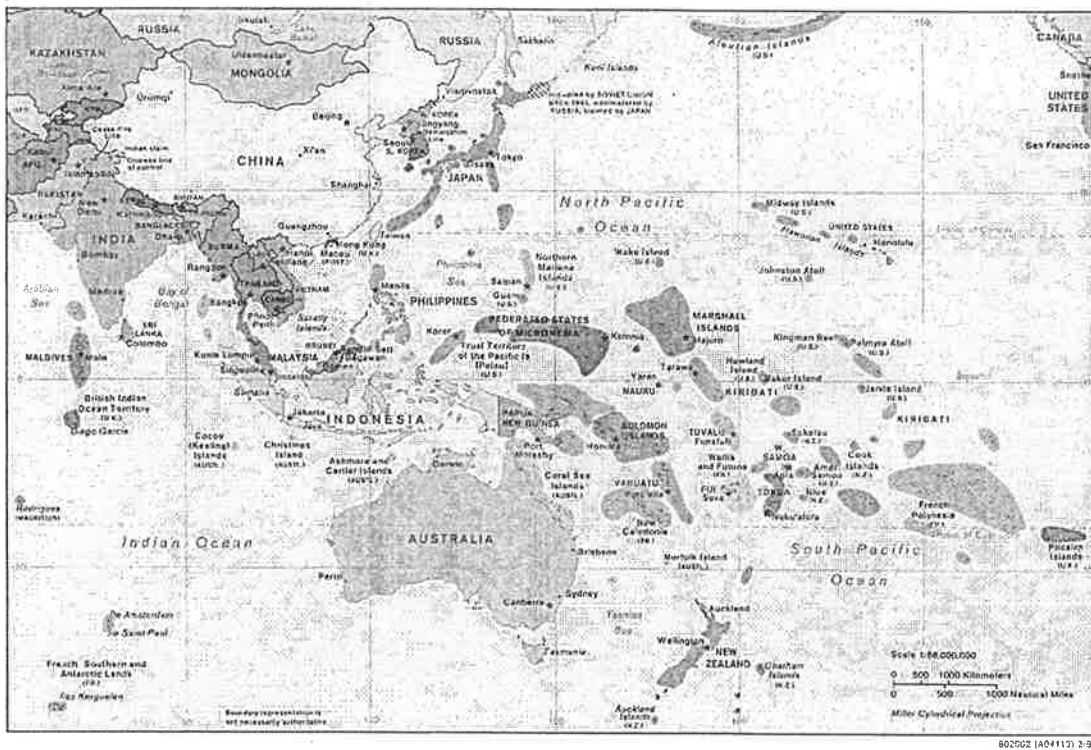
This thesis argues that the rise of migrant trafficking results from growing migration pressures and decreasing avenues for legal migration, and that it can only be effectively combated by concerted and comprehensive efforts at regional and international levels.

This thesis explores migrant trafficking and the legislation that deals with it in a regional context. It analyses migrant trafficking in the light of recent developments in politics, law and law enforcement, both nationally and internationally. It examines national provisions dealing with migrant trafficking in criminal law and immigration law in Australia and fifteen countries of the Asia Pacific region: Brunei Darussalam, Cambodia, People's Republic China and its Special Administrative Regions Hong Kong and Macau, Fiji, Indonesia, Lao People's Democratic Republic, Malaysia, Union of Myanmar (the former Burma), Papua New Guinea, Singapore, Solomon Islands, Taiwan,<sup>5</sup> Thailand, Vanuatu and Vietnam. Moreover, international and regional efforts to combat illegal migration and organised crime are outlined, analysed and compared. Finally, the thesis elaborates recommendations for measures to combat the phenomenon of migrant trafficking more adequately in the future.

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<sup>5</sup> In this thesis "PR China" refers to the Chinese mainland, the People's Republic of China. "Taiwan" refers to the Republic of China or Chinese Taipei. Since the revolution in 1949 both Chinas claim to be the "official" China. Internationally, the PR China is widely recognised as the official China. The Government of the PR China considers Taiwan as a "renegade province".

Figure 1: Asia Pacific region, 1992 (political)



The Asia Pacific region is one of the most culturally, religiously, politically and economically diverse regions of the world. Political systems in the region encompass different types of government such as democracies, communist states, military dictatorships, sultanates and monarchies. Economic systems range from fully planned, government-run economies to liberal, largely unregulated market economies. This diversity is reflected in immigration and criminal justice systems, which set the rules for, and determine the scale of, migrant trafficking.

Despite the attention the phenomenon has received by government authorities, particularly law enforcement agencies, to date, there is still only a small academic literature on migrant trafficking. The quantity of media and anecdotal evidence is growing fast, but the substance of many reports is questionable. Most of the academic literature on migrant trafficking concentrates on North America or Western Europe as destinations for illegal migrants. There is no study of migrant trafficking in the Asia Pacific region. Also, much of the work that has been done in the past approaches the phenomenon either from a solely socio-humanitarian standpoint or from a very narrow law enforcement perspective. To

date, there is no study that examines the criminological and legal issues associated with migrant trafficking. This thesis seeks to fill this gap.

Trafficking in migrants is both a criminal justice and a human rights issue. As a criminal justice issue, migrants are exploited by criminal organisations and transported across borders in violation of national immigration laws. From a human rights perspective, the fundamental rights and dignity of migrants, among them genuine refugees, are shattered. It is in light of growing concern from criminal law, immigration and refugee law, criminology and international law perspectives, that this study seeks to bring together and examine what is still fragmentary information on migrant trafficking in the Asia Pacific region, and to elaborate appropriate measures against trafficking.

The essential questions of this thesis are: What exactly is the phenomenon known as trafficking in migrants? Why does migrant trafficking exist and prosper? How do criminal organisations respond to the demand for illegal migration? Where do the movements take place? What national, regional and international laws exist to combat migrant trafficking? How promising are current efforts to enhance cooperation and harmonise legislation? What instruments exist for the protection of refugees and other victims of trafficking? Which legislative, policy and administrative measures should be recommended to combat organised trafficking in migrants more successfully in the future?

To answer these questions, this thesis:

- (a) establishes a comprehensive definition, description and analysis of organised migrant trafficking in Australia and the Asia Pacific region;<sup>6</sup>
- (b) studies the differences in, and shortcomings of the existing provisions against trafficking and related offences under Australian law and under the criminal and immigration laws of the countries in the Asia Pacific region;<sup>7</sup>
- (c) analyses the international measures undertaken to date with respect to refugee policies, illegal migration and organised crime;<sup>8</sup> and
- (d) recommends a range of legislative, policy and administrative measures against migrant trafficking in Australia and the Asia Pacific region.<sup>9</sup>

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<sup>6</sup> See *infra* Chapters 1-3.

<sup>7</sup> See *infra* Chapters 4 and 5.

### *Specific Objectives*

The study has three specific goals. One is to explain the existence, structures and operations of the migrant trafficking business and of the organisations engaged therein, with specific reference to the situation in Australia and the Asia Pacific region.

For Australia as a major target country, the success in combating migrant trafficking largely depends on the effectiveness of cooperative legal efforts at Commonwealth, regional and international levels. For the community of Asia Pacific nations, the successful prevention and repression of this phenomenon requires concerted action by all countries concerned. Consequently, the second objective of this research is to review and evaluate the existing legislation in Australia and the Asia Pacific region, including the efforts undertaken at regional and international levels.

Thirdly, the study seeks to contribute to a reconciled regional approach by developing a set of specific proposals that can be woven into consistent national and supranational strategies to combat illegal migration and organised crime more successfully and at the same time provide measures to guarantee the fair treatment of refugees and other migrants.

### *Structure of this study*

At the very beginning of this research stands the question, ‘What is trafficking in migrants?’ Although the concern over migrant trafficking is increasing, there is still no clear or universally accepted definition of the term. This has been a long-standing problem mostly because of disparities in the ways different experts in different countries approach the various problems associated with migrant trafficking. Chapter One examines and clarifies the terminology, and sets the boundaries of this study.

In order to explain the emergence of migrant trafficking, and in order to elaborate appropriate measures against it, it is essential to look more closely at the individual and contextual causes and motivations which underlie any migration decision, and in particular the decision to migrate by illegal means such as trafficking. Chapter Two explores and

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<sup>8</sup> See *infra* Chapter 6.

<sup>9</sup> See *infra* Chapter 7.

analyses the principal causes of illegal migration, its characteristics in the Asia Pacific region, and Australia's responses to illegal immigration.

The aim of Chapter Three is to explain the role of organised crime in illegal migration in the Asia Pacific region. The concept of organised crime is contested and the subject of continuing controversy. This Chapter explains what organised crime is, what it is not, and how it can best be understood. It considers why, when and where organised crime and migrant trafficking emerges. This provides the basis for a detailed, conceptual analysis of the organisational and operational features of migrant trafficking in Australia and the Asia Pacific region.

Chapter Four examines Australia's responses to illegal migration and organised crime. Particular attention is paid to the criminal offences under Australian law targeting migrant trafficking, organised crime and illegal immigration. This Chapter also addresses the issue of protection of migrants — and refugees in particular — and the legal framework that governs their status upon arrival and throughout their stay in Australia.

Trafficking organisations systematically exploit the loopholes in law and law enforcement in the region. The laws adopted at the national level to combat illegal migration and organised crime are identified in Chapter Five. That Chapter analyses the immigration and asylum systems in the Asia Pacific region, the offences applying to traffickers, and those applying to illegal migrants.

The subjects of Chapter Six are regional and international initiatives to counteract migrant trafficking. One focus of the Chapter is on the activities of international organisations to combat organised crime and illegal migration in the Asia Pacific region. Secondly, special consideration is given to the *Convention against Transnational Organised Crime* and the *Protocol against the Smuggling of Migrants by Land, Air and Sea*. Chapter Six reviews the work of the Committee that elaborated these instruments and examines the preparatory and final documents. Finally, the Chapter analyses the work of regional organisations and the agreements that have been reached between the countries of the Asia Pacific region to combat illegal migration and organised crime.

The problem of migrant trafficking is complex, multifaceted and defies single or simple solutions. In Chapter Seven, this study develops coherent strategies to successfully reduce

migrant trafficking and to limit the impact of criminal organisations on migration. This Chapter elaborates reconciled recommendations for all countries involved — sending, transit and receiving countries — to reduce and equalise the risks of trafficking throughout the Asia Pacific region. The aim is to show the way ahead for the successful fight against organised migrant trafficking, and the exploitation of migrants, and to provide realistic avenues for refugees in need of protection and asylum while offering fair immigration assessment for regular migrants.

## Research Methods and Data Sources

Most of the conventional wisdom about migrant trafficking derives not from academic research but from the media, from government sources, or from anecdotal evidence reported elsewhere. It is therefore necessary to explain where the information for this study came from, how it was handled, and the problems that have been encountered. The collection of material and data for this study closed on 31 December 2001. Unless stated otherwise, this study reflects the research, data and legislation as at this cut-off date.

The principal difficulties in researching migrant trafficking in Australia and the Asia Pacific region are the lack of substantial scholarly work in this field, discrepancies and controversies between empirical research work and theoretical writings, and the confidentiality of some of the material.

Further problems arise from the clandestine nature of migrant trafficking and organised crime. Participants usually do not want to talk about their activities or admit their involvement, if indeed they can even be identified. Victims and witnesses of trafficking also are very reluctant to report any incidents to official agencies and talk about details of their illegal journey. If the migrants report their cases — by their own free choice or because they are arrested as unlawful non-citizens — they take a great risk while at the same time they cannot count on any protection by the host country.

### *Sources*

The phenomenon of migrant trafficking has attracted little scholarly attention in Australia and the Asia Pacific region. The principal sources for this study are empirical (including



reports by law enforcement agencies, government departments and international organisations, media features, fieldwork reports, and theoretical sources, featuring primarily American and European research, as well as more general publications on organised crime and on migration and refugee flows in the region.

### *Empirical Sources*

The main organisations that gather systematic data and information on organised criminal activity are national law enforcement agencies. Australian authorities have issued a number of reports on migrant trafficking in recent years, starting with a first assessment made by the Australian Federal Police in 1997.<sup>10</sup> Very few reports are available from overseas agencies and official government sources.<sup>11</sup>

The difficulty with many of these documents is that their primary concern is the identification and prosecution of violations of the law, rather than the provision of information for further research. Law enforcement agencies keep files on the activities of suspect individuals and not on conceptual explorations of organised crime. Secondly, much of the information that has been accumulated by law enforcement agencies is confidential and not accessible to the public.

Another difficulty associated with the information provided by government sources is the reliability of published documents. As stated elsewhere, "a country's open announcement to the international arena to the extent of its crime problem and its processing of offenders through the justice system is a major political event."<sup>12</sup> As a result, official reports on

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<sup>10</sup> See, for example, AFP, *Organised Crime Aspects of People Smuggling into Australia*, unclassified version (1998); Australia, External Reference Group on People Smuggling, [untitled document] (1999); Australia, Prime Minister's Coastal Surveillance Task Force, *Report* (1999); DIMA, *Protecting the Border: Immigration Compliance* (2001).

<sup>11</sup> Cf Bai Ping, "Factors behind the Illegal Migration and Prospects for the Future in China" paper presented at the *Transnational Security Threats in Asia* conference, Honolulu, 8-10 Aug 2000; Dadang Garnida, "People Smuggling in Indonesia" paper presented at the *South East Asia/Pacific Region People Smuggling Conference*, Canberra, 14-19 Jan 2001; Jack Jorban, "Republic of the Marshall Islands: Transnational Problems" paper presented at the *Transnational Security Threats in Asia* conference, Honolulu, 8-10 Aug 2000; Greg Talcott & Hamish McCardle, "Human Trafficking Routes through the Asia-Pacific Region: A Sub-Report of a Strategic Assessment on People Smuggling for the New Zealand Customs Service" paper presented at the *Sixth Meeting of the CSCAP Working Group on Transnational Crime*, Wollongong, 5-9 Nov 1999.

<sup>12</sup> *UN Global Report on Crime and Justice*, cited in UN, *The state of crime and criminal justice worldwide. Report of the Secretary-General*, UN Doc A/CONF.187/5 (15 Dec 1999) para 9.

crime sometimes under-report true crime figures, leaving gaps, particularly with regard to non-conventional crime.

Much of the information about migrant trafficking activity comes from the news media.<sup>13</sup> Although some journalists show a great deal of substantial and detailed research in their publications,<sup>14</sup> most articles are highly anecdotal. Unfortunately, some academic writers have based their research primarily on the evidence provided by media reports and often failed to address the broader and underlying issues associated with migrant trafficking.

Many of the studies that were considered for this thesis are based, directly or indirectly, on fieldwork.<sup>15</sup> As such, they offer an invaluable insight into migrant trafficking operations and the experiences of victims and witnesses. Although the fieldwork samples have all been compiled outside the region and are often very small and not representative, some commonalities between trafficking in different regions can be identified. This study attempts to examine these commonalities and draw conclusions about the way in which trafficking organisations operate and about the experiences of trafficked migrants.

#### *Theoretical sources and scholarly work*

Theoretical writing on migrant trafficking, which attempts to embed the analysis of migrant trafficking in broader theories of organised crime and illegal migration, is very limited.

The most substantial information provided is that by international organisations, including reports by the United Nations, IOM, UNHCR and other international organisations.<sup>16</sup> These reports, for the most part, consider migrant trafficking at the global scale. Given the

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<sup>13</sup> See the articles listed under "miscellaneous" in the Bibliography.

<sup>14</sup> See, for example, Peter Mares, *Borderline: Australia's Treatment of Refugees and Asylum Seekers* (2001); ABC Television, "A Well Founded Fear of Persecution" *Four Corners* (14 Mar 2000); id, "People Smuggler's Guide to Australia" *Four Corners* (23 Aug 1999); id, "The Queue Jumpers" *Four Corners* (16 Oct 2000).

<sup>15</sup> For example, Ko-lin Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, (1999); Ko-lin Chin, "Safe House or Hell House? Experiences of Newly Arrived Undocumented Chinese" in Paul J Smith (ed), *Human Smuggling: Chinese Migrant Trafficking and the Challenge to America's Immigration Tradition* (1997) 169-195; Frank Laczko (ed), *Migrant Trafficking and Human Smuggling in Europe: A review of the evidence with case studies from Hungary, Poland and Ukraine* (2000); Sheldon Zhang & Mark Gaylord, "Bound for the Golden Mountain: The Social Organisation of Chinese Alien Smuggling" (1996) 25 *CL&SC* 1 at 1.

<sup>16</sup> See the reports supplied by CSCAP, HEUNI, ICMPD, IGC, IOM, ISPAC, OECD, UN, UNHCR, UNHCHR, UNODCCP. See the Bibliography for details.

mandate of these organisations they are, however, very reluctant to engage in political debates about differences in national migration and criminal justice systems.

In recent years, there have been a number of scholarly attempts to illuminate the causes and characteristics of migrant trafficking in the Americas and Europe. The majority of these studies have been undertaken by social scientists who focus on the humanitarian and demographic aspects of migrant trafficking rather than on the regulatory regime. Much of the American literature, for instance, focuses on trafficking from China to the United States or deals with clandestine border crossings at the US-Mexican border.<sup>17</sup> The European literature has grown substantially following the end of the Cold War, the opening of the Eastern European countries and the debate surrounding an enlargement of the European Union.<sup>18</sup> These publications are primarily concerned with illegal movements through North Africa or the Eastern European countries. Although it must be recognised that migrant trafficking in these regions is driven by different factors, the American and European literature offers an important source for conceptualising trafficking in the Asia Pacific and for the comparison of the phenomenon in different geographical, political, cultural and economic settings.

There are, to date, very few examples of scholarly research on the normative framework of migrant trafficking. In the United States, some studies have examined the connection

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<sup>17</sup> Cf Jennifer Bolz, "Chinese Organized Crime and Illegal Alien Trafficking: Humans as a Commodity" (1995) 22(3) *Asian Affairs* 147-158; Chin, "Safe House or Hell House?" *supra* note 15; Cleo Kung, "Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the US Statutory Definition of 'Refugee'" (2000) 90 *J Crim L & Criminology* 1271-1316; Amy McAllen, "Non-Immigration Visa Fraud: Proposals to End the Misuse of the L Visa by Transnational Criminal Organizations as a Method of Illegal Immigration" (1999) 32 *Vand JTL* 237-270; Paul Smith, "Chinese Migrant Trafficking: A Global Challenge" in Paul J Smith (ed), *Human Smuggling — Chinese Migrant Trafficking and the Challenges to America's Immigration Tradition* (1997) 1-22; Jonathan Winer, "Alien Smuggling: Elements of the Problem and the US Responses" (1995) 3 *Trends in Org Crime* 3-13; Zhang & Gaylord, *supra* note 15.

<sup>18</sup> Cf Kristof van Impe, "People for Sale: The Need for a Multidisciplinary Approach towards Human Trafficking" (2000) 38(3) *Int'l Migration* 113-131; David Kornbluth, "Illegal Migration from North Africa: The Role of Traffickers" in Alex Schmid (ed), *Migration and Crime* (1998) 73-177; Laczko (ed), *supra* note 15; John Morrison, *The Trafficking and Smuggling of Refugees — the end game in European asylum policy?* (2000); John Salt & Jeremy Stein, "Migration as a Business: The Case of Trafficking" (1997) 35(4) *Int'l Migration* 467-494; John Salt, "Trafficking and Human Smuggling: A European Perspective" (2000) 38(3) *Int'l Migration* 31-56; Ernesto Savona, *Illicit Trafficking in Arms, Nuclear Material, People and Motor Vehicles: The Most Important Things We Have Learnt and Priorities for Future Study and Research* (1998); Natalie Siron & Piet van Baeveghem, *Trafficking in Migrants through Poland: Multidisciplinary Research into the Phenomenon of Transit Migration in the Candidate Member*

between the US immigration system and the influx of unlawful non-citizens.<sup>19</sup> More comprehensive studies have been undertaken in Eastern Europe in the late 1990s which concentrate on the legal dimension of the trafficking phenomenon.<sup>20</sup> To date, there is no study analysing the relevant legislative immigration and criminal justice regimes in the Asia Pacific region.

### *Statistical Data*

The very nature of migrant trafficking, organised crime and illegal migration makes it difficult, if not impossible, to obtain reliable data on the persons being trafficked, the scale of trafficking operations, and on the offenders engaged therein.<sup>21</sup>

In April 2000, UNHCR stated that up to one million of the 22 million refugees and other persons that fall within its mandate have used the services of traffickers to apply for asylum in the industrial democracies.<sup>22</sup> A study by the Secretariat of the Budapest Group completed in 1999 suggested that between 10 and 50 percent of today's irregular migration is organised or assisted by traffickers, depending on the geographical region and the policies in place.<sup>23</sup>

Clandestine operations, by definition, are only successful if the activities remain undetected by or immune to law enforcement. Trafficked migrants also have few incentives to report offences and divulge information about how and when they have been transported and at what level of organisation the journey has been carried out.

Also, statistics produced by different agencies in different countries or by different international organisations vary greatly in the ways in which data is collected, in the

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*States of the EU with a View to the Combat of Traffic in Persons* (1999); Christopher Ulrich, *Alien Smuggling and Uncontrolled Migration in Northern Europe and the Baltic Region* (1995).

<sup>19</sup> See, for example, Kung, *supra* note 17; McAllen, *supra* note 17.

<sup>20</sup> See, Siron & van Baeveghem, *supra* note 20; Laczko (ed), *supra* note 15.

<sup>21</sup> On the difficulties surrounding statistical research in this field see generally Kritaya Archavanitkul & Philip Guest, *Managing the Flow of Migration: Regional Approaches* (1999) 134; Fiona David, *Human Smuggling and Trafficking* (2000) 10; John Salt & Jennifer Hoghart, "Migrant Trafficking and Human Smuggling in Europe: A review of the evidence" in Frank Laczko (ed), *Migrant Trafficking and Human Smuggling in Europe: A review of the evidence with case studies from Hungary, Poland and Ukraine* (2000) 11 at 29-38; Salt, *supra* note 18 at 37-39; UNICRI & AIC, *Rapid Assessment: Human Smuggling and Trafficking from the Philippines* (1999) 8; Phil Williams, "Emerging Issues: Transnational Crime and its Control" in G Newman (ed), *Global Report on Crime and Justice* (1999) 221 at 221.

<sup>22</sup> "Smuggling and Asylum in Europe" (2000) 7(5) *Migration News*.

<sup>23</sup> Secretariat of the Budapest Group, *Draft Study on the Relationship between Organized Crime and Trafficking in Aliens* (1999) 13.

terminology that is used, and in the methods and magnitudes in which samples have been taken. Many countries, for reasons of secrecy, lack of resources or expertise, do not collect statistics on migrant trafficking or do not make this information publicly available. In other cases, the only reliable data are the numbers of prosecutions, convictions and deportations, without reflecting the number of migrants that have been apprehended, or any information about the traffickers themselves.

This study provides a comprehensive analysis of the available source material on migrant trafficking in Australia and the Asia Pacific region in its different aspects and dimensions. It examines the nature, characteristics and magnitude, the causes, conditions and consequences of migrant trafficking. It identifies the inadequacies of existing policies and measures. It elaborates a set of specific proposals that can be woven into a coherent and comprehensive strategy to combat illegal migration and organised crime more successfully in the 21<sup>st</sup> century.

The boatpeople who fled Vietnam after the fall of Saigon and who were selected from refugee camps to settle in Australia received 'welcome information' upon arrival here. In this information, refugees are reminded that "whether you succeed or not is up to you. Now is the time to decide and see if you believe you will succeed like other migrants to Australia."<sup>24</sup>

Australia has a proud history of immigration. It has offered refuge to people from around the world. It is home to a unique, vibrant and peaceful multicultural society. I am grateful, inspired and encouraged by the opportunities Australia has offered me. This thesis is guided by the belief that all migrants, regardless of their origin, ethnicity, religion, gender, political opinion, sexual orientation or nationality deserve humane and fair treatment, thorough assessment of their claims, together with an opportunity to use their skills, culture and education to the best advantage.

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<sup>24</sup> See *supra* note 1.

## CHAPTER ONE

### TERMINOLOGY AND SCOPE OF THIS STUDY

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The phenomenon of trafficking in migrants can be approached from a number of different standpoints.

At one extreme, the issue can be seen from the perspective of destination countries. From this standpoint, migrant trafficking is perceived as a threat to national security because it circumvents immigration and border control systems. From this perspective, illegal migration is primarily a criminal offence involving organised crime that needs to be addressed by law enforcement and criminal justice systems.

Migrant trafficking can also be considered from the viewpoint of the migrants who are both voluntary clients and unfortunate victims of trafficking organisations. From this perspective it raises the global problem of socioeconomic, political, demographic and environmental disparities in the world that cause migratory movements and refugee flows.

Finally, from the perspective of criminal organisations, trafficking can be viewed as a business activity that is dealt with in purely economic dimensions of profit and investment.

Although the different approaches to the phenomenon have some common elements, a consensus about the characteristics and terminology has yet to be found. The concern over migrant trafficking, illegal migration and organised crime is growing and numerous institutions at national, international, academic, and non-governmental levels have addressed the phenomenon. However, to date there is still no clear or universally accepted definition of trafficking in migrants.

The objective of this study is to bring together different perceptions and interpretations of trafficking in migrants. To adequately deal with the issues involved in migrant trafficking and formulate effective policy responses, it is necessary to give a clear understanding and sound definition of what trafficking in migrants is and what it is not. This is the objective of Chapter One.

## 1.1. Trafficking in Migrants

Definitions of trafficking in migrants vary widely, as does the terminology that is used to describe this phenomenon. Terms such as ‘human trafficking’, ‘people smuggling’ or ‘alien smuggling’ often intend to describe the same phenomenon, but in many cases definitions of the terms remain unclear, imprecise, overlap with other terms, or describe different phenomena.<sup>1</sup>

The term ‘trafficking’ or ‘traffic’ is generally understood as

1 v.i. Carry on trade, buy and sell; have commercial dealings with a person etc. [...] b Deal or trade in something of an illicit or disreputable nature. 2 v.i. Conduct secret dealings; intrigue or conspire (with a person). [...] 3 v.t. Travel across or frequent for the purpose of trading; carry on trade in (a place) b v.t & i. Pass to an fro[m] (on), frequent [...] 4 v.t. Carry in a trade in; barter, deal in, esp. illicitly.<sup>2</sup>

Smuggling has been defined as

Convey (goods) clandestinely into or out of a country etc, in order to avoid payment of customs duties, or in contravention of some legal prohibition; import or export illegally. [...] <sup>3</sup>

Three common features of trafficking and smuggling can be identified: (a) a business or otherwise economic activity (dealing, trading, buying and selling), (b) the illegal nature of this activity, and (c) a cross-border operation.

In criminal law and criminology, trafficking has for a long time been given a connotation of transnational illegal economic activity, usually conducted by criminal organisations. Drug trafficking, trafficking in arms, trafficking in artefacts, fauna and flora and trafficking in nuclear material in particular have been used to describe organised crime activities across international borders.<sup>4</sup> Similarly, for centuries the term smuggling has been used to describe the clandestine importation of commodities, for example alcohol and firearms.

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<sup>1</sup> For an overview of definitions of ‘trafficking in migrants’/‘people smuggling’ see Appendix A. See also John Salt, “Trafficking and Human Smuggling: A European Perspective” (2000) 38(3) *Int'l Migration* 31 at 33-34; Nathalie Siron & Piet van Baeveghem, *Trafficking of Migrants through Poland* (1999) 6-20.

<sup>2</sup> Lesley Brown, *The New Shorter Oxford Dictionary, Vol 2* (3<sup>rd</sup> ed, 1993) 3360.

<sup>3</sup> *Ibid*, at 2916.

<sup>4</sup> See also Ronald Skeldon, “Trafficking: A Perspective from Asia” (2000) 32(3) *Int'l Migration* 7 at 8.

With respect to human commodities the term trafficking was first used in the 1904 *International Agreement for the Suppression of the 'White Slave Traffic'*.<sup>5</sup> This treaty as well as a number of subsequent international instruments sought to criminalise the illegal cross-border transportation of people, especially women and children.<sup>6</sup> These instruments, however, refer to a condition of coercion of the trafficked persons, particularly involving sexual exploitation and prostitution, which renders the traffic of women and children different from other forms of trafficking and smuggling that generally do not contain an exploitative element.

### 1.1.1. The IOM Definition of Trafficking in Migrants

One of the first international organisations to address the issue of trafficking in migrants, especially the humanitarian concerns associated with it, has been the International Organisation for Migration (IOM). In 1994, IOM began systematic research on the problem, providing support to migrants and victims of trafficking, and organising international and regional cooperation to combat the organised trafficking in migrants and related offences.<sup>7</sup> Moreover, IOM has collected a large body of information on the subject, and has published numerous reports, commentaries and analyses, which established the most widely accepted definition of the phenomenon.

For IOM, trafficking in migrants — the illicit transporting of migrants or trade in them — can be said to exist if the following conditions are met:<sup>8</sup>

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<sup>5</sup> *International Agreement for the Suppression of the 'White Slave Traffic'*, 18 May 1904, 1 LNTS 83, 1949 ATS 19.

<sup>6</sup> See, for example, *International Convention for the Suppression of the White Slave Traffic*, 4 May 1910, 3 LTS 278, 1949 ATS 19; *International Convention for the Suppression of the Traffic in Women and Children*, 30 Sep 1921, 9 LNTS 415, 1922 ATS 10; *International Convention for the Suppression of the Traffic in Women of Full Age*, 11 Oct 1933, 150 LNTS 431; *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 21 Mar 1950, 96 UNTS 271.

<sup>7</sup> For an overview of IOM activities and a bibliography of IOM research see *infra* Section 6.1.2.3, and see the IOM special website on trafficking at [www.iom.net](http://www.iom.net).

<sup>8</sup> Similar criteria are contained in the definitions contained in Secretariat of the Budapest Group, *Draft Study on the Relationship between Organized Crime and Trafficking in Aliens* (1999) 24-25, paras 60-64; Ruwantissa Abeyratne, "Smuggling of Illegal Migrants by Air — Air Carrier Liability" (2000) 25(4-5) *Air & Space L* 148 at 148; Ian Peck, "Removing the Venom from the Snakehead: Japan's Newest Attempt to Control Chinese Human Smuggling" (1998) 31 (4) *Vand JTL* 1041 at 1042; Siron & Baeveghem, *supra* note 1, at 18-19; Paul Smith, "Chinese Migrant Trafficking: A Global Challenge" in Paul Smith (ed),



- ◆ an international border is crossed;
- ◆ departure, transit, entry and/or stay are illegal;
- ◆ the migratory movement is voluntary;
- ◆ a trafficker or trafficking organisation is involved in the movement of migrants; and
- ◆ the traffickers profit from such activities.<sup>9</sup>

Essentially, these five criteria fall within two categories that constitute the major elements of migrant trafficking: (1) illegal migration (voluntary illegal border crossing), and (2) organised crime (involvement of criminal traffickers/migrant smugglers who want to make profit).

This study examines these two aspects of migrant trafficking in Chapters Two (illegal migration) and Three (organised crime). The following sections seek to define more precisely the five criteria of the IOM definition in order to provide a working basis for the following chapters. Unless stated otherwise, the terms migrant trafficking and migrant smuggling are used interchangeably.

### 1.1.2. Illegal Migration

At the heart of trafficking in migrants is the illegal crossing of international borders. Illegal migrants move on a temporary, long-term or permanent basis from one country to another, sometimes through a third country, in contravention of the migration regulations that apply to these movements.

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*Human Smuggling — Chinese Migrant Trafficking and the Challenges to America's Immigration Tradition* (1997) 1 at 9.

<sup>9</sup> From the large number of IOM documents defining migrant trafficking see, for example, IOM, "Trafficking in Migrants: Characteristics and Trends in Different Regions of the World" discussion paper for the *Eleventh IOM Seminar on Migration: International Response to Trafficking in Migrants and the Safeguarding of Human Rights*, Geneva, 26-28 Oct 1994, 2-3; id, "Migrant Trafficking: An Overview" paper submitted for the *Seminar on Migrant Trafficking in Central America*, Panama City, 19-20 Oct 1995, 2; id, *Trafficking and Prostitution: The growing exploitation of migrant women from Central and Eastern Europe* (1995) 6; id, *Trafficking in Migrants: IOM Policy and Activities* (1997) 1-2.

### 1.1.2.1. Migrants and migration

A migrant has been defined as “a person who chooses to move from one country to another for some period of time”.<sup>10</sup> Unlike visitors and travellers, a migrant “crosses an international border with the intention of temporarily or permanently establishing him- or herself in another country”.<sup>11</sup> For the purpose of defining trafficking in migrants, the reasons for migration and the migrants’ motivations are irrelevant; for explaining, understanding and combating migrant trafficking, they are essential.<sup>12</sup>

The terms migrant and migration have neither been defined in international conventions, nor in any of the immigration laws of the Asia Pacific countries.<sup>13</sup> Although the major instrument of Australian immigration law is titled *Migration Act 1958* (Cth), the terms are not used in Commonwealth legislation.<sup>14</sup>

### 1.1.2.2. Border crossing

The concern of migrant trafficking is exclusively with international migration; that is circumstances where one or more international borders are crossed. Although it has to be recognised that legal and illegal migration also occur within the national borders of one country, internal movements of people do not fall within the scope of this study, as they do not violate border, emigration, transit or immigration regulations.

### 1.1.2.3. Illegality of the movement

International migration is illegal if one or more borders are crossed in defiance of national laws and regulations. This may include the violation of emigration restrictions, criminal codes, transit regulations or immigration laws. Hypothetically, if there were no legal

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<sup>10</sup> Peter Nygh & Peter Butt (eds), *Butterworths Concise Australian Legal Dictionary* (1997) 259-260.

<sup>11</sup> IOM, “Trafficking in Migrants: Characteristics and Trends in Different Regions of the World”, *supra* note 9, at 2; id, “Migrant Trafficking: An Overview”, *supra* note 9, at 2.

<sup>12</sup> See the analysis of concepts and causes of migration *infra* Section 2.1.

<sup>13</sup> Cf *infra* Section 5.1.1.1.

<sup>14</sup> Cf Nygh & Butt (eds), *supra* note 10, at 259-260. For the terminology of the *Migration Act 1958* (Cth) see *infra* Section 4.1.1.3.

restrictions on the movements of people in neither sending, transit nor destination countries, the question of illegal migration would not arise. In that respect, illegal migration can be seen as “a product of regulation of migration. Without laws restricting entry to countries or employment of foreign nationals, there would be no [illegal] migration.”<sup>15</sup>

Migration is illegal if any segment of the movement from the home country, through transit places and into the destination country, is against the law of one or more of the countries involved. For example, the migrant may completely avoid contact with border and immigration authorities, may present false, altered or stolen documents, or make false statements as to the circumstances and intentions of the border crossing. In other cases, migration may be illegal because the country of departure has placed obstacles on the free emigration of its citizens or restricted travel to certain specified countries.<sup>16</sup>

From the perspective of the destination country, migration is illegal if it violates the entry and immigration regulations of that country. Therefore, illegal immigrants have been defined as persons who “do not possess the authorisation of the country in whose territories they are required by law in respect of admission or stay or economic activity, or where they cease to fulfil the conditions to which their stay or economic activity are subject”.<sup>17</sup>

The position of illegal migrants in the destination country, and the circumstances surrounding their arrival, entry and stay can be differentiated between:<sup>18</sup>

- ◆ Illegal entry, including clandestine entry, undocumented or fraudulent entry (without any or with incomplete, false or stolen travel documentation (such as passports, visas, residence permits), and entry in contravention of general or individual entry or residence prohibition.<sup>19</sup>

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<sup>15</sup> Kritaya Archavanitkul & Philip Guest, *Managing the Flow of Migration: Regional Approaches* (1999) 3.

<sup>16</sup> See *infra* Sections 2.2.4.1, 4.2.1.1 and 5.3.1.1.

<sup>17</sup> IGC, *Illegal Aliens: A Preliminary Study* (1995) 17, citing W Böhning, “Regularising the Irregular” (1983) 21(2) *Int'l Migration* 159-173.

<sup>18</sup> Cf Bimal Ghosh, *Huddled Masses and Uncertain Shores — Insights into Irregular Migration* (1998) 4. See also the categories of il-/legality established by Margaret Beare: “Illegal Migration” in Carolina Hernandez & Gina Pattugalen (eds), *Transnational Crime and Regional Security in the Asia Pacific* (1999) 231 at 265-268; id, “Illegal Migration: Personal Tragedies, Social Problems or National Security Threats?” (1997) 3 (4) *Trans Org C* 11 at 24-26.

<sup>19</sup> Cf UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions*, UN Doc A/55/383 (2 Nov

- ◆ Illegal residence or stay. That is residence or stay within the territory of a country of which the person is not a national without the authorisation required by law to remain in that country. Illegal residence may also occur in circumstances where these formalities have been complied with initially, but later the conditions to which stay in this country are subject have changed or expired, for example where a person enters a country legally on a temporary visa and fails to leave before the visa expires (often described as “overstayers”).<sup>20</sup>
- ◆ Illegal employment, including unlawful activities, work in defiance of the national laws and regulations governing the employment of non-nationals, regardless whether they are legally or illegally within the territory of the country.

The concern of migrant trafficking is, by definition, only with those people who cross an international border without meeting the necessary migration requirements.<sup>21</sup> Although close links have been found between overstayers, illegal employment and trafficking,<sup>22</sup> the issues of illegal workers and overstayers are beyond the scope of this study.

#### 1.1.2.4. Voluntary nature of migrant trafficking

The key factor that renders migrant trafficking different from other forms of trafficking in human beings, such as, for example, trafficking in women and children, is the fact that the migratory movement must be voluntary.<sup>23</sup> To fall within the definition of migrant trafficking, the initial decision to make use of and pay traffickers for the services they offer must be based on a free decision. Generally, the migrant customers of trafficking

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2000) Appendix III, art 3(b): “‘Illegal entry’ shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State.”

<sup>20</sup> Cf UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Crime, *Revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc A/AC.254/4/Add.1/Rev.3 (22 Nov 1999), art 2(1)(c): “‘Illegal residence’ shall mean residence in the territory of a State without complying with the necessary requirements for legal residence in the State concerned”; and see Alex Schmid, “Manifestations and Determinants of International Migration Pressure” in Alex Schmid (ed), *Migration and Crime* (1998) 29 at 34.

<sup>21</sup> Cf UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft elements for an international legal instrument against illegal trafficking and transport of migrants (Proposal submitted by Austria and Italy)*, UN Doc A/AC.254/4/Add.1 art C(a) (15 Dec 1998).

<sup>22</sup> See *infra* Section 3.4.3.2.

organisations are willing to be trafficked to secure their long-term future. Trafficking in migrants does not refer to situations where people migrate under coercion, by force, deception, or where they are sold or kidnapped.<sup>24</sup>

But it may be doubtful whether the decision to migrate is truly voluntary because complex circumstances surround the decision to migrate. For example, the seemingly free choice of the migrant may be the result of political or economic factors that led the person to emigrate. Or the decision to move may be made by the migrant's family who sends a family member abroad in order to find employment and send remittances back home. In these circumstances, and in the absence of legal avenues for migration, it is often questionable whether the recourse to trafficking organisations is indeed voluntary.

Furthermore, it is difficult to establish voluntariness in circumstances where migrants have inadequate understanding of travel and immigration procedures and of the living conditions in destination countries. Some migrants base their decision to relocate on pictures they have seen on television, in newspapers or magazines, or they rely on the success-stories that have been passed on by relatives and friends in destination countries.<sup>25</sup> Traffickers also frequently contribute to these misperceptions by luring migrants with false promises of job opportunities in destination countries, false information about transit and immigration systems and the dangers involved in the illegal methods of transportation.<sup>26</sup>

Moreover, even if the migrant's decision to move is based on facts, the actual conditions of trafficking and transportation are usually unknown prior to departure. It is arguable that migrant trafficking ceases to be voluntary if the illegal journey involves the deprivation of personal freedom, food and water, confiscation of property, passports and other identity documents, or instances of threat and violence.<sup>27</sup> However, as stated by IOM,

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<sup>23</sup> See the distinction made *infra* Section 1.3.

<sup>24</sup> Cf John Morrison, *The Trafficking and Smuggling of Refugees — the end game in European asylum policy?* (2000) 66-67; Ernesto Savona et al, "Dynamics of Migration and Crime in Europe: New Patterns of an Old Nexus" in Alex Schmid (ed), *Migration and Crime* (1998) 61 at 71; Siron & van Baeveghem, *supra* note 1, at 18; UN General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Crime, *Proposals and contributions received from Governments*, UN Doc A/AC.254/5/Add.3 (8 Feb 1999) 5.

<sup>25</sup> See *infra* Section 2.1.1.5 and 2.1.2.

<sup>26</sup> See *infra* Section 3.4.4.1.

<sup>27</sup> Cf Ghosh, *supra* note 18, at 23; IOM, "Trafficking in Migrants: Characteristics and Trends in Different Regions of the World" *supra* note 9, at 3; id, "Irregular Migration and Migrant Trafficking: An Overview"

migrants are considered to have been 'trafficked' so long as they have chosen to pay a trafficker for entry to another country, even if they would have preferred to stay at home and even if they are exploited [during the journey and] following their arrival in a country of destination.<sup>28</sup>

### 1.1.3. Organised Crime

The second element of trafficking in migrants is organised crime. Only if one or more criminal traffickers are involved in illegal migration and if this activity results in some sort of profit for the individual criminal or the trafficking organisation does it fall within the definition of migrant trafficking.<sup>29</sup>

#### 1.1.3.1. Traffickers and Trafficking Organisations

Traffickers operate as intermediaries in the illegal movement of people from sending to destination country, offering one or more of the following services:<sup>30</sup>

- ◆ Facilitation of illegal exit, transit and/or entry, including:<sup>31</sup>
  - Clandestine guided crossings by foot;
  - Border crossing by unofficial means of transportation, such as private cars, vessels, concealment in boats, trains and trucks;
  - Border crossing by official means of transportation (eg commercial airlines);
- ◆ Provision of fraudulent, stolen or altered genuine travel and identity documentation;<sup>32</sup>

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background paper to the *Seminar on Irregular Migration and Migrant Trafficking in East and South East Asia*, Manila 5-6 Sep 1996, 3; Secretariat of the Budapest Group, *supra* note 8, at 23, 25, paras 57, 63; Skeldon, *supra* note 4, at 9.

<sup>28</sup> IOM, "Migrant Trafficking: An Overview", *supra* note 9, at 3.

<sup>29</sup> Cf G Gunatilleke, "Seminar Report: International Response to Trafficking in Migrants and the Safeguarding of Migrant Rights" (1994) 32(4) *Int'l Migration* 593 at 594; David Kornbluth, "Illegal Migration from North Africa: the Role of Traffickers" in Alex Schmid (ed), *Migration and Crime* (1998) 73 at 174; John Salt & Jennifer Hoghart, "Migrant Trafficking and Human Smuggling in Europe: A review of the evidence" in Frank Laczko (ed), *Migrant Trafficking and Human Smuggling in Europe: A review of the evidence with case studies from Hungary, Poland and Ukraine* (2000) 11 at 53-56.

<sup>30</sup> Cf Savona et al, *supra* note 24, at 71.

<sup>31</sup> For details see "methods of transportation" *infra* Section 3.4.2.3.2.

<sup>32</sup> For details see "travel documents" *infra* Section 3.4.2.2.

- ◆ Provision of information on border control and coastal surveillance, immigration and asylum procedures, including the coaching of migrants as to how deceive immigration and law enforcement authorities;<sup>33</sup>
- ◆ Arrangement of accommodation in departure, transit and destination points, and/or of (illegal) employment in destination countries.

### 1.1.3.2. Profit for the Trafficker

Finally, the trafficker or trafficking organisation involved has to profit from the illegal transportation of migrants. This requirement excludes complimentary services provided by relatives or friends of the migrant from the definition of migrant trafficking.<sup>34</sup>

The profit usually derives from the fees that traffickers charge for their illegal services and that are paid either by the migrants, their families or relatives in the destination country. This payment is usually done up-front in cash, but the larger trafficking organisations have also been found to offer loans or part-payments on departure. They may also ask for further payments at transit and destination points, to the extent that many illegal migrants find themselves in debt bondage once they have reached the destination country.<sup>35</sup>

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<sup>33</sup> For details see “preparation of the migrants” *infra* Section 3.4.2.1.

<sup>34</sup> Cf UN General Assembly, Crime prevention and criminal justice, *Interpretative notes for the official records (travaux préparatoires) of the negotiations of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN Doc A/55/383/Add.1 (3 Nov 2000) para 88: “[T]he intention was to include the activities of organised criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalise the activities of family members or support groups such as religious or non-governmental organisations.”

<sup>35</sup> For details see *infra* Sections 3.4.3 and 3.4.4.2.

## 1.2. The Terminology in International Law

Organised crime has been a subject for concerted activity by the United Nations (UN) and its various sub-organisations since the *Fifth United Nations Congress on the Prevention of Crime and Treatment of Offenders* held in Geneva in September 1975.<sup>36</sup>

The UN General Assembly first addressed the issue of migrant trafficking on 20 December 1993 in Resolution 102 (“Prevention of the smuggling of aliens”) in which the General Assembly expressed its concern

that the activities of criminal organisations that profit illicitly by smuggling human beings and preying on the dignity and lives of migrants contribute to the complexity of the phenomenon of increasing international migration,

recognising that international criminal groups often convince individuals to migrate illegally by various means for enormous profits and use the proceeds from smuggling human beings to finance other criminal activities.<sup>37</sup>

Following this resolution, trafficking in migrants has obtained high-level attention, and has become the subject of many activities of the UN, particularly under the auspices of the Commission on Crime Prevention and Criminal Justice.<sup>38</sup>

Initially, the UN agencies used the term “smuggling in aliens” to describe international illegal migration facilitated by transnational criminal organisations. However, the term remained undefined. Simultaneously, the UN used the term trafficking exclusively for “traffic in women and girls”, referring to the definition set out in article 1 of the *1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of Others*.<sup>39</sup>

The terminology was altered to “trafficking in migrants” in 1997, following the proposal by the Government of Italy to the International Maritime Organisation (IMO) for a multilateral convention to combat illegal migration by sea, which called for the “codification of the

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<sup>36</sup> UN General Assembly, *Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Geneva, 1-12 September 1975*, UN Doc A/CONF.56/3 (1975) paras 51-59.

<sup>37</sup> UN General Assembly, *Prevention of the smuggling of aliens*, UN Doc A/RES/48/102 (20 Dec 1993) paras 1-2.

<sup>38</sup> See *infra* Section 6.2.

<sup>39</sup> Art 1(1) of the *1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* (UN Doc A/Res/317(IV) (2 Dec 1949)) defines traffic in persons as “procuring, enticing or leading away [...] another person, even with the consent of that person.”



notion of an international offence for the illicit traffic and exploitation of illegal migration".<sup>40</sup> The Italian proposal, too, failed to provide a definition of what constitutes migrant trafficking.

The initiative of the Italian Government was later combined with a proposal by the Government of Austria for a *Draft International Convention Against Smuggling of Illegal Migrants* to the UN General Assembly<sup>41</sup> which defined the smuggling of illegal migrants in article 1:

Any person who intentionally procures, for his or her profit, repeatedly and in an organised manner, the illegal entry of a person into another State of which the latter person is not a national or not a permanent resident, commits the offence of 'smuggling of illegal migrants' within the meaning of this Convention.

From July 1998 onwards the phenomenon was referred to as "the illegal trafficking in and transporting of migrants".<sup>42</sup>

When the UN Economic and Social Council (ECOSOC) transferred responsibility to develop legal instruments against migrant trafficking to the UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, the Committee's initial working definition was:<sup>43</sup>

Any person who intentionally procures, for his or her profit, repeatedly and in an organised manner, the illegal entry of a person into another State of which the latter person is not a national or not a permanent resident commits the offence of 'illegal trafficking and transport of migrant' within the meaning of this Protocol.

Confusion about the correct terminology continued. The UN Commission on Crime Prevention called the phenomenon "smuggling of aliens", while the Ad Hoc Committee

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<sup>40</sup> IMO Legal Committee, *Proposed Multilateral Convention to Combat Illegal Migration by Sea, Proposal by the Government of Italy*, IMO Doc LEG 76/11/1 (1 Aug 1997). See *infra* Sections 6.1.2.3 and 6.4.1.1.

<sup>41</sup> UN General Assembly, Crime prevention and criminal justice, *Letter dated 16 Sep 1997 from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General*, UN Doc A/52/357 (17 Sep 1997) Appendix *International Convention against smuggling of illegal migrants (DRAFT)*, art 1. See *infra* Section 6.4.1.2.

<sup>42</sup> UN Economic and Social Council, *Action against illegal trafficking in migrants, including by sea*, UN Doc E/RES/1998/19 (28 July 1998).

<sup>43</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft elements for an international legal instrument against illegal trafficking and transport of migrants (Proposal submitted by Austria and Italy)*, UN Doc A/AC.254/4/Add.1 (15 Dec 1998) art A.

established the term “trafficking and transporting of migrants” as a definition to be included in a *Protocol against Illegal Trafficking and Transport of Migrants*.<sup>44</sup>

At its fourth session (28 June-9 July 1999) the Ad Hoc Committee ultimately changed the terminology from ‘trafficking’ to ‘smuggling’:<sup>45</sup>

‘Smuggling of migrants’ shall mean the international procurement for profit of the illegal entry of a person into and/or illegal residence of a person in a State of which the person is not a national or a permanent resident.

This definition was included in the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime*,<sup>46</sup> which in article 3(a) defines migrant smuggling as

the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.

Additionally, under article 3(b)

‘[i]llegal entry’ shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State.

Although the international community has finally agreed on a common and universal definition of the phenomenon, it has to be noted that this definition only represents the final outcome of lengthy debate and negotiations; it is not necessarily the most adequate characterisation and identification of the phenomenon, and it does not adequately represent the current state of research on migrant trafficking.

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<sup>44</sup> UN Doc A/AC.254/4/Add.1.

<sup>45</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft Protocol against the Smuggling of Migrants by Land Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc A/AC.254/4/Add.1/Rev.1 (13 May 1999) art 2(1)(a).

<sup>46</sup> UN General Assembly, Crime Prevention and Criminal Justice, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions*, UN Doc A/55/383 (2 Nov 2000) Annex III, reprinted in 40 ILM 383.

### 1.3. Trafficking in Women and Children

Given the widespread confusion over the correct terminology, a clear distinction needs to be drawn between trafficking in migrants or migrant smuggling and the phenomenon that is commonly known as trafficking in women (and children) for prostitution and other sexual purposes. Although the terminology and the phenomena partly overlap, some of the conditions and circumstances of these seemingly similar forms of trafficking are indeed very different.<sup>47</sup>

Despite the common terminology, migrant trafficking also includes female migrants and, trafficking for prostitution and other sexual purposes is not exclusive to women and children, but also includes men. The criterion that limited the application of international instruments against trafficking for sexual purposes to women and children has been abandoned as early as 1950.<sup>48</sup> However, many writers in the field as well as drafters of national and international countermeasures continue to refer to the phenomenon as “trafficking in women”, ignoring the fact that many victims of such trafficking are males, especially teenage boys.

Article 3(a) of the UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*<sup>49</sup> defines trafficking in persons as

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the

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<sup>47</sup> On defining ‘trafficking in women’ see generally Yvonne Klerk, “Definition of ‘Traffic in Persons’” in Marieke Klap et al (eds), *Combatting Traffic in Persons* (1995) 13-21.

<sup>48</sup> *Convention on the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others*, *supra* note 6.

<sup>49</sup> UN Doc A/AC.254/4/Add.3. Up until February 1999 the Protocol was titled *Protocol to Prevent and Suppress and Punish Trafficking in Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, UN Doc A/AC.254/4/Add./Rev.1 (22 Feb 1999).

prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>50</sup>

The key criteria that render trafficking in women (or trafficking in persons) different from migrant smuggling are voluntariness and exploitation. As indicated before, in the case of trafficking in women the exploitation of the persons trafficked, especially in the sex industry or as domestic servants — with or without their consent<sup>51</sup> — is a major objective and characteristic of this offence. Migrant trafficking in contrast does not refer to a situation in which the person trafficked has been forced, coerced or kidnapped to be transported to another country; exploitation in the case of migrant trafficking may only arise in the context of the payment of debts or as a result of the illegal status of undocumented migrants in transit and destination countries.<sup>52</sup>

The distinction between the two forms of trafficking has particular relevance for perpetrators as both form of trafficking are criminalised differently and attract different penalties. Also, victims of and witnesses to these crimes are granted different forms of support and protection. For details, see the analysis in Chapter Six.

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<sup>50</sup> UN General Assembly, Crime Prevention and Criminal Justice, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions*, UN Doc A/55/383 (2 Nov 2000) Annex II, reprinted in 40 ILM 377.

<sup>51</sup> The *Convention for the Suppression of the Traffic in Persons and the Exploitation of Others* also criminalises cases that are committed with the victim's consent. Art 3(b) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* states that "[t]he consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used".

<sup>52</sup> Cf Siron & van Baeveghem, *supra* note 1, at 18. For definitions of trafficking for prostitution and other sexual purposes see, for example, DIMA, *Protecting the Border: Immigration Compliance* (1999) 14; IOM, *Trafficking and Prostitution*, *supra* note 9, at 6; UN General Assembly, *Advancement of Women. Traffic in women and girls. Report of the Secretary-General*, UN Doc A/50/369 (24 Aug 1995) para 17; UNICRI & AIC, *Rapid Assessment: Human Smuggling and Trafficking from the Philippines* (1999) 7.

## CHAPTER TWO

### ILLEGAL MIGRATION

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**T**rafficking in migrants is one form of international illegal migration. Broadly speaking, migration — be it legal or illegal — results from unequal development within or among countries and from individual aspirations for a better future. The phenomenon of illegal migration, including migrant trafficking, is, however, mostly dealt with as an issue of crime, control, prevention and punishment, rather than one of individual decisions and structural factors that cause cross-border movements of people.

In order to explain the emergence of migrant trafficking, and for the elaboration of appropriate measures against it, it is essential to look more closely at the circumstances and consequences of illegal migration. The purpose of Chapter Two is to explore and analyse the principal causes of illegal migration, its characteristics in the Asia Pacific region, and Australia's responses to it.

Important features of the phenomenon of migrant trafficking are the individual and contextual causes and motivations which underlie any migration decision and in particular the decision to migrate by illegal means such as trafficking. This Chapter starts in Section 2.1 with a theoretical analysis of concepts of migratory movements. It explores the broader context of illegal migratory movements in the Asia Pacific region and identifies the major political, demographic, environmental, and socioeconomic reasons that cause people to leave their home countries. Section 2.2 examines Australia's responses to illegal immigration and illuminates Australia's immigration policies in the context of irregular migration flows in the Asia Pacific region.

Throughout this Chapter the concern is exclusively with international migration, although it has to be recognised that legal and illegal migration also occurs within the national

borders of one country. However, internal movements of people are beyond the scope of this study, as they do not fall within the definition of migrant trafficking.<sup>1</sup>

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<sup>1</sup> See *supra* Section 1.1.2.2.

## **2.1. Illegal Migration in the Asia Pacific Region**

The Asia Pacific region is home to more than one third of the world population and is also source, transit point and destination for increasing numbers of migrants. Many nations in the region have been formed over the centuries by migratory movements.

The phenomena of undocumented migration, refugee flows and illegal migration are nothing new to the region. Over the past 25 years, almost every country in the region has witnessed unregulated migration flows, and viewed with varying degrees of alarm and anxiety the arrival of irregular migrants by land, air and sea. The world's largest exodus since World War II has occurred in the Asia Pacific region after the fall of Vietnam in 1975. War in Cambodia and Laos and the political developments in Myanmar have caused further displacements of people who fled abroad to find protection. More recently, the People's Republic of China has witnessed large-scale emigration following the events of the year 1989. During 2000, 45 percent or approximately 6 million of the world's 12,100,000 refugees had their origins in Asia and Oceania.<sup>2</sup>

The discrepancy between increasing numbers of people willing or forced to migrate on the one hand, and the barriers preventing them to move abroad on the other, have caused strong migration pressures and high levels of illegal migration in the Asia Pacific region and around the world. The conditions that create migration pressures in sending and destination countries are analysed in this section. In order to explain the emergence of illegal migration in the form of trafficking, and to elaborate appropriate measures to fight it, it is necessary to discuss the reasons why people migrate and identify the major conditions under which international migration is likely to grow.

### **2.1.1. Migration as a Result of Political, Demographic, Socioeconomic and Environmental Factors: The Concept of Push and Pull**

The decision to migrate — be it internally within the national borders of one country, or abroad — can be explained as a rational choice by people who evaluate the costs and

benefits of relocating. In the case of international migration, the factors in the home country that are likely to induce emigration are called push factors if they force migrants to leave or if they arouse the wish to emigrate. Some obvious examples are poverty and unemployment, environmental degradation, persecution and war. Migrants may be directly and physically exposed to these factors and suffer from their consequences, or they may fear that any of these factors will rise and spread.

Factors in countries abroad that are perceived by migrants as beneficial are called pull factors. These may be, for example, a higher income, political or religious freedom, or simply the prospect of a more secure future. Again, these factors may be real, given the significant political, economic and social disparities in the world, or they may only exist in the migrants' imagination, especially in cases where people are lured with false promises and misleading pictures of a better life abroad.

This push and pull consideration of migration regards the initial decision to relocate as the result of a rational process: Migrants choose to leave for a foreign destination if existing or perceived benefits of migration outweigh financial (for example wages and expenses) and non-financial (such as personal freedom) costs, including the risks and — in the case of illegal migration and trafficking — sanctions and penalties that the movement may entail. By concentrating on this reasoning of the individual, the push and pull theory takes a highly individualistic and purely rational view of migration.<sup>3</sup>

The literature on migration and migrant trafficking<sup>4</sup> has widely accepted the concept of push and pull. Due to the complexity of these factors, the following analysis of contemporary factors in the Asia Pacific region is limited to those circumstances that occur on a larger, generalised scale. These key factors that push and/or pull migrants can be

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<sup>2</sup> UNHCR, *2000 Global Refugee Trends* (2001) para 5.

<sup>3</sup> Cf Stephen Castles, *The Age of Migration: International Population Movements in the Modern World* (2<sup>nd</sup> ed, 1998) 20-21; Bimal Ghosh, *Huddled Masses and Uncertain Shores — Insights into Irregular Migration* (1998) 73; Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (1993) 16-17.

<sup>4</sup> For an introduction on push and pull factors and migrant trafficking see, for example, Ghosh, *ibid*, at 34-70; IOM, "Irregular Migration and Migrant Trafficking: An Overview" background paper to the *Seminar on Irregular Migration and Migrant Trafficking in East and South East Asia*, Manila, 5-6 Sep 1996, 2; Paul Smith, "Chinese Migrant Trafficking: A Global Challenge" in Paul Smith (ed), *Human Smuggling: Chinese Migrant Trafficking and the Challenges to America's Immigration* (1997) 1 at 13.



divided into categories of (1) political, (2) demographic, (3) socioeconomic and (4) environmental factors.

### 2.1.1.1. Political factors

In many countries of the world governments and their policies have acted as push factors, causing large numbers of people to emigrate. Where people feel politically suppressed, and where generalised violence is the rule rather than the exception, people often see 'the only way out' in illegal migration and in the services that migrant traffickers offer. In other instances, political minorities and extremists may be forced to go into exile because they constitute an opposition to the ruling regime.

Generally, politically motivated movements primarily arise because of causes and circumstances in the source country. Unresolved political conflicts have in many cases led to violent discrimination and abuses of human rights which in turn forced individuals or entire populations to flee abroad in search for protection if "one reasonably anticipates that remaining in the country may result in a form of serious harm which [the] government cannot or will not prevent".<sup>5</sup> Often, these conflicts commence as internal disputes within one nation, and over time become increasingly violent. As they grow geographically and turn into armed conflicts and war, they affect several countries, causing refugee flows and uncontrolled migration across international borders.<sup>6</sup>

The conditions that lead people to emigrate and seek protection in another country vary over time, and may include, for example, political and religious conflicts leading to the persecution of selected groups, generalised repression, warfare or other military conflicts. Race, religion, nationality, membership of a particular social group, political opinion, institutional and administrative deficiencies, and war have been identified as the major political factors that have caused migratory flows in the Asia Pacific region.

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<sup>5</sup> James Hathaway, *The Law of Refugee Status* (1991) 105.

<sup>6</sup> See generally, Philip Martin & Jonas Widgren, "International Migration: A Global Challenge" (1996) 51(1) *Population Bulletin* 1 at 13-14.

### *Race and ethnicity*

Persecution on grounds of race, colour, descent, or ethnic origin is a common reason for refugee movements in all parts of the world. Examples from the Asia Pacific region include Myanmar where for a long time government policies discriminated against Muslims and ethnic minorities such as Mons, Shans and Karens, causing thousands to flee to neighbouring Bangladesh, India and Thailand. In Fiji, for instance, the coups in 1987 and 2000 by native Melanesian Fijians have been the result of strong sentiments against the Indian community in Fiji, resulting in emigration of some parts of the Indian population.<sup>7</sup>

### *Religion*

For centuries, religion has been the basis upon which societies and their governments have singled out others for persecution. In some cases, believers of all persuasions have been the targets of persecution of totalitarian and self-proclaimed atheist countries. Given the religious diversity in and among the countries of the Asia Pacific region, it is not surprising that many nations, such as, for example, PR China, Indonesia, Laos<sup>8</sup> and Myanmar have been the scene of religious persecution. In Myanmar, for instance, the Government has been suppressing Muslims. In Indonesia, hostility towards the Chinese minority accelerated when the Muslim majority felt that Chinese Indonesians benefited more from the economic development than others. These tensions caused violent riots and led many ethnic Chinese to move to Malaysia and China between 1965-76, in 1980, and again in 1998.<sup>9</sup> The PR China is also repressing religious minorities, such as Tibetans, Christians and, more recently, followers of the Falun Gong spiritual group.<sup>10</sup>

### *Nationality*

Nationality has often served as a basis for persecution, discrimination and human rights violations. For example, in East Timor following the invasion of Indonesian troops in 1975, people have been singled out because of their nationality as the majority of the East

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<sup>7</sup> Myron Weiner, "Introduction: Security, Stability and International Migration" in Myron Weiner (ed), *International Migration and Security* (1993) 1 at 8, 15; "Australia, New Zealand and Fiji" (2000) 7(9) *Migration News*.

<sup>8</sup> Amnesty International reported that the Lao Government restricts freedom of religious expression and arrests members of smaller, mostly Christian churches; cf Amnesty International, *Report 2001* (2001) 153-154.

<sup>9</sup> Vitit Muntarbhorn, *The Status of Refugees in Asia* (1992) 105-107.

Timorese were regarded as Portuguese citizens. Following the collapse of the Soviet Bloc, persecution based on nationality also arose in response to growing numbers of people who defined their nationality in terms of allegiance to the predecessor states.<sup>11</sup>

#### *Membership of a social group*

Gender, sexual orientation, family, class, caste and voluntary associations have all been criteria for persecution. In many countries, governments secretly or publicly discriminate against women, homosexuals, lower socioeconomic classes, castes, or other sections of the population, and violently suppress any identification with these groups, causing people to flee, if they can. In Vietnam, for example, in the late 1970s the bourgeoisie was considered an obstacle to economic and social restructuring and became the object of discrimination and persecution when the Socialist Government seized power.<sup>12</sup> Singapore is one of the many countries in the region that continues to criminalise and discriminate against homosexuals.<sup>13</sup> In many other nations, gays and lesbians are arrested, and their support groups are prohibited or denied registration.

#### *Political opinion*

Some governments perceive political opinions that differ from their own as a threat to national institutions, to the political agenda, or to individual aspirations, and they often respond to opposition by suppression and violence. Persecution for reasons of political opinion is the most commonly stated cause by asylum seekers when they reach foreign countries.<sup>14</sup>

Within the Asia Pacific region, the PR China has repeatedly been accused of suppressing opposition and political opinion. Rigid policies and a centralised, authoritarian government system have caused hundreds of thousands of Chinese to leave the country and

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<sup>10</sup> See Amnesty International, *supra* note 8, at 70.

<sup>11</sup> Cf Guy Goodwin-Gill, *The Refugee in International Law* (2<sup>nd</sup> ed, 1996) 45-46; Hathaway, *supra* note 5, at 144; Václav Mikulka, "Legal Problems Arising from the Dissolution of States in Relation to the Refugee Phenomenon" in Vera Gowlland-Debbas (ed), *The Problems of Refugees in the Light of Contemporary International Law Issues* (1996) 35 at 42.

<sup>12</sup> See W Courtland Robinson, *Terms of Refuge: The Indochinese Exodus and the International Response* (1998) 26-33; Weiner, *supra* note 7, at 7.

<sup>13</sup> Cf Amnesty International, *supra* note 8, at 213.

<sup>14</sup> Goodwin-Gill, *supra* note 11, at 49.

seek asylum abroad.<sup>15</sup> Myanmar also has a history of persecution on political grounds. Student and workers protests arose in the summer of 1988. Thousands of protesters were killed when the military moved to suppress the demonstrations and seized control of the government. The persecution and suppression of pro-democracy activists in Myanmar have led to waves of refugees who sought asylum in Thailand and other countries in the region. It has been estimated that over two million refugees left Myanmar since 1981.<sup>16</sup> The Lao Government has also been accused of imprisoning anti-government protesters.<sup>17</sup>

Political belief has been a key migration factor in many countries on their way to independence. For example, the independence movements in New Caledonia, Bougainville, Solomon Islands and Vanuatu have caused internal conflicts, sometimes generalised violence and ultimately emigration.<sup>18</sup> Indonesia, too, has witnessed separatists and pro-independence movements throughout the country, particularly in Aceh, Ambon and West Papua. Police and military forces have been accused of torturing and executing members of the independence groups in these regions.<sup>19</sup> Also, following the invasion of East Timor, Indonesian forces repressed and persecuted the independence movement, causing large numbers of people to flee.<sup>20</sup>

#### *Institutional and administrative deficiencies*

Institutional and administrative deficiencies operate as push factors in countries that do not or cannot adequately respond to the needs and demands of their population. This is particularly evident in developing nations, but also in those in transitional stages and those undergoing rapid economic and structural change.

For example, with the economic liberalisation in PR China over the last decade, the country simultaneously underwent significant administrative changes and a decentralisation

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<sup>15</sup> For the human rights situation in China see, for example, Amnesty International, *supra* note 8, at 69-73. For Chinese asylum seekers in Australia see *infra* Section 2.2.4.4.1.

<sup>16</sup> Amnesty International, *supra* note 8, at 175; Kritaya Archavanitkul, *Combating the Trafficking in Children and their Exploitation in Prostitution and Other Intolerable Forms of Child Labour in Mekong Basin Countries* (1998) 30; Muntarhorn, *supra* note 9, at 26; Martin Smith, *Burma: Insurgency and the Politics of Ethnicity* (2<sup>nd</sup> ed, 1999) 355-419.

<sup>17</sup> Amnesty International, *supra* note 8, at 153.

<sup>18</sup> For further reading see, for example, Stephen Henningham, *The Pacific Island States: Security and Sovereignty in the Post-Cold War World* (1995) 52-70; Jocelyn Linnekin, "The Ideological World Remade" in Donald Denoon (ed), *The Cambridge History of the Pacific Islanders* (1997) 407-419.

<sup>19</sup> See Amnesty International, *supra* note 8, at 127-128.

of power. The control and administration in China has increasingly been delegated to the lower and local levels of government, particularly in the coastal provinces and the special economic zones in southeast China. This has led to decreasing control of the central government over the policies and performances of local staff, which also resulted in a rapid growth of corruption of local government officials. Furthermore, many of the social institutions and welfare systems which were introduced after the formation of communist China and which had a strong integrative function for the community, have been abandoned, leaving many people homeless and alienated, thus contributing to migratory movements.<sup>21</sup>

#### *War and armed conflict*

Civil and international armed conflicts have historically been the major factors that caused people to flee. Today, large parts of the refugee movements in developing countries are also caused by war. Many people in the Asia Pacific region have fled as a direct result of warfare, for example in Myanmar (Burma), Cambodia, Laos and Vietnam.<sup>22</sup> More recently, the Solomon Islands have been the scene of armed conflict, when in June 2000 members of the Malaitan paramilitary forces led a coup and took the then Prime Minister hostage. It has been reported, that between 7,000 and 10,000 people fled the main island Guadalcanal during that year.<sup>23</sup>

#### **2.1.1.2. Demographic push factors**

Population growth adds to emigration pressures in developing countries, especially if it combines with political factors, economic stagnation and/or environmental degradation. It has been estimated that 95 percent of the anticipated growth of the world population in the next thirty years will be occurring in developing countries where children are still considered a security for the survival of the elderly.

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<sup>20</sup> Cf *infra* Section 2.2.4.

<sup>21</sup> Smith, "Chinese Migrant Trafficking" *supra* note 4, at 14; Zhang Wang, "Ocean-Going Smuggling of Illegal Chinese Immigrants" (1996) 2(1) *Trans Org C* 49 at 59-60.

<sup>22</sup> On the Vietnam War and its aftermath see *infra* Section 2.2.3.

<sup>23</sup> Cf Amnesty International, *supra* note 8, at 216-217.

Figure 2: Selected demographic indicators in the Asia Pacific region<sup>24</sup>

	Population in million (2001 est)	Population growth (2001 est)	Life expectancy at birth (2001 est).	Net migration rate per 1,000 population (2001 est)
Australia	19.358	0.99%	79.87 y.	4.19
Brunei	0.344	2.11%	73.82 y	4.07
Cambodia	12.2492	2.25%	56.82 y.	0
PR China	1,273.111	0.88%	71.62 y.	-0.39
Fiji	0.844	1.41%	68.25 y.	-3.45
Indonesia	228.438	1.6%	68.27 y.	0
Lao PDR	5.636	2.48%	53.48 y.	0
Malaysia	22.229	1.96%	71.11 y.	na
Papua New Guinea	5.049	2.43%	63.46 y.	0
Philippines	82.842	2.03%	67.8 y.	-1.01
Singapore	4.300	3.5%	80.17 y.	26.45
Solomon Islands	0.480	2.98%	71.55 y.	0
Taiwan	22.3700	0.8%	76.54 y.	-0.34
Thailand	61.798	0.91%	68.86 y.	0
Vanuatu	0.193	1.7	60.95 y.	0
Vietnam	79.939	1.45%	69.56 y.	-0.49

Figure 2 indicates some of the demographic discrepancies in the Asia Pacific region. For example, Australians populate a territory similar in size to that of the PR China, but the Chinese population is more than 65 times higher than the Australian. The life expectancy in Singapore is 24 years higher than in Cambodia; the average person in Thailand lives 15 years longer than in neighbouring Laos.

Not surprisingly, people migrate to places where they can live longer and, as shown below,<sup>25</sup> earn higher wages. This, among multiple reasons, explains why the comparatively wealthier countries in the region such as Singapore, Brunei and Australia experience a positive migration rate (net migration rate 26.45 (Singapore), 4.07 (Brunei), 4.19 (Australia) per 1,000 population), while comparatively poorer countries with a tradition of labour emigration such as Vietnam (-0.49), the Philippines (-1.12) and China (-0.39 net migration rate per 1,000 population) have a negative migration rate.

Especially in the least developed countries, rapid population growth often comes together with decreasing national economies, creating large numbers of unemployed. This

<sup>24</sup> US, Central Intelligence Agency, *CIA Factbook 2001*, [www.odci.gov/cia/publications/factbook](http://www.odci.gov/cia/publications/factbook) (22 Jan 2002).

demographic development has to be seen in contrast with developed nations where populations are decreasing. Once this demographic imbalance between countries is communicated to overpopulated communities, and once awareness of different levels of living standards has grown, people migrate in order to find better opportunities abroad.<sup>26</sup>

For example, the rapid population growth in China, the world's most populous nation, is causing increasing migration within and from China. China's population grew by about 15 million per year between 1995 and 2000. The population is bound to reach 1.5 billion before 2010 despite the rigid One-Child Policy that China implemented in the 1980s. This policy, which imposes harsh penalties on families who produce two or more children, has caused large numbers of forced abortions, and in some cases has led to emigration.<sup>27</sup>

Rural-urban migration has emerged as another key aspect of migration in the region. The enormous growth of many urban centres and industries provides an incentive for people from rural areas to move to the city in the hope of finding employment and higher wages. In many countries, policies of urban industrial development combined with reform of landownership and agriculture have pushed the rural population to the city.

In Thailand, for example, the economic development was uneven and has contributed to widen the gap between rural and urban, and poor and rich areas. Furthermore, the rapid modernisation of manufacturing and growing urbanisation has caused widespread environmental degradation, the growth of slums, and overcrowding. For these reasons, Thailand is witnessing large-scale internal migration and also a high-level of emigration to other countries.<sup>28</sup> In Malaysia, government policies have been strongly to the benefit of urban centres, while rural and remote areas did not share the increasing wealth and at the same time faced severe environmental degradation.

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<sup>25</sup> See *infra* Section 2.1.1.3.2.

<sup>26</sup> See generally, Martin & Widgren, *supra* note 6, at 10-12.

<sup>27</sup> Jack Goldstone, "A Tsunami at the Horizon? The Potential for International Migration from the People's Republic of China" in Paul Smith (ed), *Human Smuggling: Chinese Migrant Trafficking and the Challenges to America's Immigration Tradition* (1998) 48 at 55; Cleo Kung, "Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the US Statutory Definition of 'Refugee'" (2000) 90 *J Crim L & Criminology* 1271 at 1296, 1302-1305; Penelope Mathew, "Conformity or Persecution: China's Once Child Policy and Refugee Status" (2000) 23(3) *UNSW LJ* 103 at 103-113; Ian Peck, "Removing the Venom from the Snakehead: Japan's Newest Attempt to Control Chinese Human Smuggling" (1998) 31(4) *Vand JTL* 1041 at 1051; Smith, *supra* note 4, at 13.

<sup>28</sup> Archavanitkul, *supra* note 16, at 3, 18, 24; John Girling, *Interpreting Development: Capitalism, Democracy and the Middle Class in Thailand* (1996) 19-25, 77-91.

In China, the economic liberalisation was mostly to the benefit of industrialised, urban centres, particularly those at the east coast, while rural areas, the agricultural sector and the majority of low level workers were almost completely neglected or even discriminated against. Wages in the country did not grow apace with urban areas, and in remote places they even stagnated. In 1996, the per capita income for people living in rural areas was placed at about US\$125 per year, less than one fifth of the average income achieved in China.<sup>29</sup> Also, as a result of land reforms and severe environmental degradation, arable land has become scarcer, reducing the number of people that can live on agriculture, creating further unemployment, and forcing people to migrate. Moreover, millions of people have been displaced to make room for massive public construction projects, such as the Three Gorge Dam and other power facilities.<sup>30</sup> Rigid policies, radical economic changes, environmental degradation and rapid population growth have created a floating population of more than 130 million people who are migrating within China as a result of unemployment and underemployment.<sup>31</sup> Most migratory movements occur from rural to urban areas, despite the efforts that authorities have made to reduce such movements, for example, by imposing fees for the permission to reside and work in the big cities.<sup>32</sup> Most urban centres can no longer absorb the growing floating workforce, which has caused large-scale emigration from China.

The creation of special economic and special administrative zones along China's south east coast has further contributed to the disparities between income levels within China. Today, Hong Kong and Macau are Special Administrative Regions (SARs) of the PR China. The local governments of Hong Kong and Macau have kept autonomy over most legislative, judicial, immigration and other executive decisions. Immigration to the SARs is restricted

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<sup>29</sup> Jennifer Bolz, "Chinese Organized Crime and Illegal Alien Trafficking" (1995) 22(3) *Asian Affairs* 147 at 151; Wang, *supra* note 21, at 59. For recent reports see, for example, "China: Rural, Tourism, Hong Kong" (2001) 8(8) *Migration News*.

<sup>30</sup> For the internal displacement of people in China see generally Ko-lin Chin, *Smuggled Chinese* (1999) 16-17; Goldstone, *supra* note 27, at 58-62.

<sup>31</sup> Figures taken from "China, Hong Kong" (2000) 7(7) *Migration News*; "China, Hong Kong, Taiwan" (2002) 9(2) *Migration News*.

<sup>32</sup> Ghosh, *supra* note 3, at 39; John McFarlane, *Transnational Crime and Illegal Immigration in the Asia Pacific Region* (1999) 10. For recent reports see, for example, "China, Hong Kong Migrants" (2001) 8(4) *Migration News*.



by law but the number of people from mainland China seeking access to Hong Kong and Macau is growing which has resulted in high numbers of illegal immigrants.<sup>33</sup>

### 2.1.1.3. Socioeconomic factors

Socioeconomic circumstances act as push factors in countries with comparatively low wages, high unemployment and little welfare benefits; they work as pull factors in countries with relatively high living standards and labour demand.

Economic stagnation has caused internal instability and conflict in many countries, particularly in economically less developed ones. Also, for countries that have overcome socialist governments in the late 1980s and early 1990s the transition from centrally planned and controlled economies with strong public welfare systems to liberal markets with minimum regulations has been the reason for severe social and economic problems, often leading to high unemployment and widening economic disparities within and among these countries.

Poverty and unemployment, famine, economic insecurity, and the perception of better opportunities abroad make people very vulnerable to the promises of traffickers, who nowadays appear to be the only avenue of migration for so-called 'economic migrants', who do not enjoy the same protection as political refugees.<sup>34</sup>

Migration on socioeconomic grounds can be differentiated between (1) forced survival migration, and (2) opportunity seeking migration.

#### 2.1.1.3.1. *Survival migration*

Survival migrants emigrate as a result of necessity or duress. Famine, widespread unemployment often in combination with political instability and environmental disasters give people no choice but to move abroad to secure their lives and those of their friends and families. Survival migration has also emerged in response to national policies of land

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<sup>33</sup> See *infra* Section 3.4.2.3.3.

<sup>34</sup> For the definition of refugees in international law see *infra* Section 4.3.1.

use, pricing of agricultural products, and land reclamation that disfavoured small farmers, which then caused large displacements.

Under these circumstances economic migration cannot be viewed as a matter of personal convenience; it is the only way to survive. Survival migrants take any risk to flee starvation and unemployment and cannot be deterred by restrictive immigration policies abroad. For the majority of survival migrants the services offered by trafficking organisations are perceived as the only way to save their lives. For them, the prospect of a safe life abroad is the only reason to relocate, while levels of income that can be achieved abroad have minor, if any, relevance.<sup>35</sup>

#### 2.1.1.3.2. *Opportunity seeking migration*

For the category of opportunity seeking migrants the socioeconomic differential between two countries operates simultaneously as a pull and as a push factor. If foreign countries offer the prospect of higher wages and better opportunities for employment, these nations become attractive destinations for migrants who do not have the same opportunities to use their education and skills in their home countries. In addition to the prospect of higher earnings abroad, poverty and unemployment in the home country are push factors and facilitate the decision to relocate elsewhere.

Economic disparities within one country are frequently a prelude to cross-border migration. This is demonstrated in the example of rural-urban migration: If the distribution of wealth is unequal and favouring some while discriminating against others, internal conflicts are more likely to arise, often resulting in generalised violence and exodus. The problem of unequal allocation of goods by governments is particularly apparent in economically poorer countries: If “the cake to be divided by the state is too small, the temptation to exclude more groups from non-market resource allocation grows: People who only recently joined a political community are more likely to be excluded”.<sup>36</sup> In countries where there is less to share, people who are marginalised resort to emigration.

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<sup>35</sup> Cf Ghosh, *supra* note 3, at 29, 35; Goldstone, *supra* note 27, at 53.

<sup>36</sup> Alex Schmid, “Manifestations and Determinants of International Migration Pressure” in Alex Schmid (ed), *Migration and Crime* (1998) 52. Cf Ghosh, *supra* note 3, at 43.

The unbalanced distribution of global wealth is the principal factor that causes labour migration of people in search for employment opportunities in countries other than their own. Today, one sixth of the world population possesses as much of the global wealth as the remaining five sixths. And the disparity between industrialised and developing countries is widening: Between 1960 and 1991, the share of the global wealth for the richest fifth of the world population increased from 70.2 to 84.7 percent; over the same period the poorest fifth experienced a decline of their share from 2.3 to 1.4 percent. In 1997, over one quarter of the population of the developing countries lived in poverty, and about one third had to survive on less than US\$1 a day.<sup>37</sup>

With the increasing employment and income differential between developing and industrialised nations, many people in comparatively poorer economies feel disadvantaged. Markets and government programs for insurance, capital, credit and retirement are better developed in some countries than others, leading people to turn to international migration. Whether based on perception or reality, this feeling of relative deprivation often combines with pessimism about the future development of the home economy. This imbalance induces the migration of people who try to benefit from the enormous wealth that is achieved in industrialised nations. If legal avenues of migration to these countries are denied, people make use of the illegal services offered by trafficking organisations that in many cases encourage perceptions of relative deprivation by luring potential migrants with false promises of employment opportunities abroad.<sup>38</sup>

These circumstances also explain why economically driven migration mostly occurs at the intermediate level of economic development, not at the lowest, and why it involves members of the middle-class of the sending country, not of the poorest. This is also reflected in the profile of trafficked migrants.<sup>39</sup> Recent studies have found that it is in this middle range of socioeconomic class and development that people realise the benefits of migration, often illustrated by the media and other communication networks, to which the

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<sup>37</sup> These figures are taken from Ghosh, *supra* note 3, at 59-60; Ernesto Savona et al, *Globalisation of Crime: The Organisational Variable* (1997) 8; and Ernesto Savona et al, *Processi di Globalizzazione e Criminalità Organizzata Transnazionale* (1998) 9.

<sup>38</sup> See generally Ghosh, *supra* note 3, at 42; Nathalie Siron & Piet van Baeveghem, *Trafficking of Migrants through Poland* (1999) 72-73. For research on Chinese migrants see Chin, *supra* note 30, at 21-22; Peck, *supra* note 27, at 1051; Wang, *supra* note 21, at 59.

<sup>39</sup> See *infra* Section 3.4.4.3.

lowest economic classes do not have access. It has been found that with the uneven economic growth in developing countries, more people benefit from transportation and communication facilities, which in many cases, combined with rising expectations towards living standards, initiates and facilitates migration, be it legal or illegal.<sup>40</sup>

### 2.1.1.3.3. *Economic Developments in the Asia Pacific region 1980-2000*

A major driving force behind contemporary migration in the Asia Pacific region is the economic development that has taken place. Over the last twenty years South East Asia has witnessed the strongest economic growth in the world. Brunei, Malaysia, Thailand and the four “tiger economies” Hong Kong, South Korea, Singapore and Taiwan have experienced annual growths of their per capita Gross Domestic Products (GDP) of over 5 percent, with double-digit growth not uncommon for some countries in specific years. These economic developments continue to have a strong impact on population movements in the Asia Pacific.

For example, economic growth has created strong labour demand in some countries and has led to large-scale emigration of workers from other, relatively poorer nations. Labour migration has meant a strong contribution to the emerging economies in South East Asia and has created cross-cultural links among the countries of the Asia Pacific region.<sup>41</sup> In recent years, the region has also witnessed increasing numbers of female migrants seeking employment outside their home country. The majority of Indonesian and Philippine migrants, for instance, are women, contributing to the worldwide feminisation of migration.<sup>42</sup>

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<sup>40</sup> Cf Margaret Beare, “Illegal Migration: Personal Tragedies, Social Problems, or National Securities Threats?” (1997) 3 *Trans Org C* 11 at 20; Goldstone, *supra* note 27, at 51; IOM, “Trafficking in Migrants: Characteristics and Trends in Different Regions of the World” discussion paper for the *Eleventh IOM Seminar on Migration ‘International Response to Trafficking in Migrants and the Safeguarding of Migrant Rights’*, Geneva, 26-28 Oct 1994, 6.

<sup>41</sup> Kritaya Archavanitkul & Philip Guest, *Managing the Flow of Migration: Regional Approaches* (1999) 6; IOM, *Combating Irregular Migration and Trafficking in Persons in East and South East Asia* (c1998) 3; Ronald Skeldon, “East Asian Migration and the Changing World Order” in William Gould & Allan Findlay (eds), *Population Migration and the Changing World Order* (1994) 182.

<sup>42</sup> Archavanitkul, *supra* note 16, at 1-4; IOM, *ibid*, at 3.

In times of growing economies and labour shortage, migration was welcomed and often encouraged by the receiving countries. But with the economic crisis in South East Asia in 1997/98 and stagnating labour demand thereafter, many destination countries have become more reserved and sometimes hostile towards immigration.<sup>43</sup> However, one result of the rapid economic growth in some countries of the Asia-Pacific region was that income disparities have widened significantly. “Simply by crossing a border, an Asian migrant can potentially multiply her or his income.”<sup>44</sup>

Figure 3: Selected economic indicators in the Asia Pacific region<sup>45</sup>

	GDP per capita in US\$ purchasing power parity (2000 est)	Unemployment rate (2000 est)	Population below poverty line <sup>46</sup>
Australia	23,200	6.4%	na
Brunei	17,600	4.9% (1995)	na
Cambodia	1,300	2.8% (1999)	36% (1997)
PR China	3,600	10% <sup>47</sup>	10% (1999)
Fiji	7,300 (1999)	6% (1997)	na
Indonesia	2,900	15-20% (1998)	20% (1998)
Lao PDR	1,700	5.7% (1997)	46.1% (1993)
Malaysia	10,300	2.8%	6.8% (1997)
Papua New Guinea	2,500	na	37% (2000)
Philippines	3,800	9.10%	41% (1997)
Singapore	26,500	na	na
Solomon Islands	2,650	N a	na
Taiwan	17,400	3%	1% (1999)
Thailand	6,700	3.7% (1998)	12.5% (1998)
Vanuatu	1,300 (1999)	na	na
Vietnam	1,950	25% (1995)	37% (1998)

Figure 3 indicates some of the disparities between income levels, poverty and unemployment rates in the Asia Pacific region. For example, the per capita Gross

<sup>43</sup> IOM, *Combating Irregular Migration and Trafficking in Persons in East and South East Asia*, *supra* note 41, at 3; id, “The Impact of the Current Economic Crisis in Asia on Population Migration in the Region” draft paper of the *Second IOM Regional Seminar on Irregular Migration and Migrant Trafficking in East and South East Asia*, Manila, 4-5 Dec 1997 (1998) 1, 2, 4-5.

<sup>44</sup> IOM, “Irregular Migration and Migrant Trafficking: An Overview” *supra* note 4, at 4-5.

<sup>45</sup> US, Central Intelligence Agency, *supra* note 24 (23 Jan 2002).

<sup>46</sup> Note: “National estimates of the percentage of the population lying below the poverty line are based on surveys of sub-groups, with the results weighted by the number of people in each group. Definitions of poverty vary considerably among nations. For example, rich nations generally employ more generous standards of poverty than poor nations.” US, Central Intelligence Agency, *ibid* (7 Apr 2002).

Domestic Product (GDP) of Singapore is over 53 times higher than that of Cambodia. The Australian per capita GDP is US\$23,200 — nearly US\$20,000 more than in China. Thailand's unemployment rate is less than one fifth of the rate of Vietnam. China's unemployment rate is more than three times higher than that of Taiwan. In Vietnam, the Philippines, Papua New Guinea and Laos more than one third of the population lives below the poverty line.

Not surprisingly, these socioeconomic factors are strong incentives for migration and, together with political and environmental factors, have caused regular and irregular outflows of people in search for safe havens and better opportunities abroad.

Brunei and Singapore, for instance, have built up their wealth by importing labour. Malaysia today has one of the world's highest percentages of foreign workers. It has been estimated that approximately 15-25 percent of the eight million workers in Malaysia are foreigners. Many of them arrived illegally to avoid the costs and delays of legal application procedures.<sup>48</sup>

High unemployment (9.1% in 2001), combined with economic difficulties, has caused large numbers of Filipinos to emigrate both legally and illegally. Many of them are women, who work abroad as domestic helpers and entertainers. It has been found that approximately 13,000 people leave the Philippines per year to work illegally in Indonesia, Malaysia and Taiwan, often facilitated by professional traffickers.<sup>49</sup> In 2000, there were approximately seven million Filipinos working abroad, remitting over US\$6 billion a year. About 6 percent of the 15 million Filipino families depend on a relative working overseas.<sup>50</sup>

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<sup>47</sup> This figure is that of urban areas only. The unemployment and underemployment in rural areas is estimated much higher; US, Central Intelligence Agency, *ibid*.

<sup>48</sup> OECD, *Migration and the Labour Market in Asia* (1996) 107; Patrick Pillai, "Labour Market Developments and International Migration in Malaysia" in OECD, *Migration and the Labour Market in Asia* (1996) 137-140; C Mary Turnbull, *A History of Malaysia, Singapore and Brunei* (1989) 269-271, 285-291.

<sup>49</sup> Ghosh, *supra* note 3, at 16; Kristof van Impe, "People for Sale: The Need for a Multidisciplinary Approach towards Human Trafficking" (2000) 38(3) *Int'l Migration* 113 at 117; UNICRI & AIC, *Rapid Assessment: Human Smuggling and Trafficking from the Philippines* (1999) 14-15.

<sup>50</sup> Anselmo Avenido, "Illegal Recruitment and Exfiltration: A Philippine Perspective" paper presented at the *Fifth Meeting of the CSCAP Working Group on Transnational Crime*, Wollongong, 5-9 Nov 1999, 1-2; Stella Go, "Emigration Pressures and the Export of Labour from the Philippines" in OECD, *Migration and the Labour Market in Asia* (1996) 160-163; OECD, *supra* note 48, at 111; "Southeast Asia" (2002) 9(2) *Migration News*.

About 30,000 to 50,000 workers leave Vietnam each year to work, sending about US\$1.25 billion in remittances home.<sup>51</sup> In 2001, Myanmar migrants reportedly remitted US\$300 million.<sup>52</sup> China has recently set up programs to reduce its unemployment problem by encouraging emigration. The Chinese Government is providing training facilities specifically designed to make its citizens more marketable as foreign labourers.<sup>53</sup>

Virtually all the countries of the South Pacific have experienced large-scale emigration throughout the 20<sup>th</sup> century.<sup>54</sup> Relative isolation, rapid population growth and limited economic opportunities are some of the incentives that have led people to leave the island countries and migrate overseas, particularly to New Zealand, Australia and North America. Although the international migration that occurs in the South Pacific is very small in numbers compared to East and South East Asia, the impact of emigration on these countries is much stronger as the populations are very small.

#### 2.1.1.4. Environmental factors

The recognition of environmental circumstances is relatively new in the analysis of migration causes. With population growth and industrialisation in many countries, environmental issues have emerged as a key factor of contemporary migration. Large scale environmental destruction (such as deforestation, desertification, overuse of land, and pollution), natural disasters (for example earthquakes, bushfires, and flooding) and natural fluctuations (such as climate change) destroy settlements and arable land, pushing people to leave their homes and relocate. Although the causal connection between environmental factors and international migration has not been sufficiently researched, it is obvious that

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<sup>51</sup> "Hong Kong, Taiwan, Vietnam" (2001) 8(2) *Migration News*.

<sup>52</sup> "Southeast Asia" (2002) 9(3) *Migration News*.

<sup>53</sup> John Salt, "The Business of International Migration" in Muhammed Siddique & Reginald Appleyard (eds), *International Migration into the 21<sup>st</sup> Century, Essays in Honour of Reginald Appleyard* (2001) 86 at 91.

<sup>54</sup> Cf South Pacific Commission, *Pacific Island Populations* (rev ed, 1998) 12-13, 34-37.

people who are affected by destruction of their environment — be it sudden and violent or slow and chronic — are forced to move elsewhere.<sup>55</sup>

In many cases environmental factors that cause people to migrate come together with political tension and armed conflict, one interacting with the other. If, for example, resource or freshwater scarcity, overpopulation, and pollution combine, conflicts are more likely to arise both within and between countries. Environmental disruption that puts human existence at risk forces people to secure their lives in other places. As they move out of the despoiled areas they may clash with their neighbours in search for scarce sources of food, water and arable land. In other cases destruction of the environment has been a side effect of wars, which led to further population displacements and increasing numbers of migrants.

Environmental degradation has caused many migratory movements in the Asia Pacific region. In Laos, for instance, economic development was pursued at the expense of severe environmental degradation and caused large-scale resettlements. In Malaysia, government policies have been strongly in favour of urban centres while rural areas faced severe environmental degradation, particularly in the form of deforestation. In the Philippines natural disasters, such as the eruption of Mount Pinatubo in 1991, led to displacement and emigration. Also, increasing urbanisation, environmental degradation and rising sea levels caused by global warming have been a common experience in many South Pacific countries, thus contributing to migrant outflows.

#### **2.1.1.5. Technological developments**

Some factors in addition to the pushes and pulls discussed earlier contribute to the decision to migrate. Considered separately, these factors may not be sufficient to induce a person to relocate. But if these factors are dealt with in the context of other migration causes, they can add significantly to the migration decision.

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<sup>55</sup> Cf Margaret Beare, "Illegal Migration" in Carolina Hernandez & Gina Pattugalan (eds), *Transnational Crime and Regional Security in the Asia Pacific* (1999) 231 at 234-235; Alan Dupont, "Unregulated Population Flows in East Asia" (1997) 9(1) *Pacifica Review* 1 at 15-17; Ghosh, *supra* note 3 at 47-50.



For example, better modes of communication and transportation make migration easier. Infrastructure development and increasing international air traffic has lowered the costs of travel. Together with the rapid development in communication technology throughout the Asia Pacific region, potential migrants in sending countries have become more aware of political and economic disparities between countries, thus enforcing the wish to relocate and take advantage of opportunities offered abroad.<sup>56</sup>

As a result of technological development the role of the media is becoming more important. Worldwide satellite television and telecommunication facilities broadcast images of the wealth and luxury of the industrialised world to developing countries. Regardless of whether or not these pictures are consistent with reality, they add to the desire to migrate to the countries of luxury and stability. Although it is too simplistic to think that the pictures produced by the media alone can cause people to migrate, it is obvious that they render the differences between poor and unsafe, and rich and safe countries more visible, which can contribute to the feeling of relative deprivation and to aspirations to move elsewhere.<sup>57</sup>

The perception of better economic prospects abroad is often based on false or incomplete information. The use of misleading information and false promises about employment opportunities and immigration regulations in destination countries is another factor that contributes to the migration decision, particularly in the case of irregular movements. Both legal migration agents and criminal trafficking organisations often lure their customers with false promises about transit and entry regulations, labour markets and housing facilities, and provide little, if any, objective information on living conditions in the destination countries.<sup>58</sup>

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<sup>56</sup> See, for example, Martin & Widgren, *supra* note 6, at 14.

<sup>57</sup> For more on the impact of the media on migration see, for example, Beare, "Illegal Migration" *supra* note 55, at 261.

<sup>58</sup> Cf Ghosh, *supra* note 3, at 67; Chin, *supra* note 30, at 10, 26-27; John Salt & Jeremy Stein, "Migration as a Business: The Case of Trafficking" (1997) 35(4) *Int'l Migration* 467 at 477, 479-480, 490; Sheldon Zhang & Mark Gaylord, "Bound for the Golden Mountain: The Social Organisation of Chinese Alien Smuggling" (1996) 25 *CL&SC* 1 at 6. See also *infra* Section 3.4.4.1.

### 2.1.2. Migration and Social Networks: The Migration Systems Approach

The push and pull theory provides a purely individualistic and rational explanation of migratory movements. The theory focuses solely on the migration decision of the individual migrant, and does not take into account factors that occur on collective and supranational levels beyond the perception and reasoning of the migrant. Also, the push-pull theory does not explain why certain groups of migrants move to particular countries rather than to the geographically closest. Moreover, it does not recognise attitudes and feelings that cannot be rationally explained.<sup>59</sup> Historical and contemporary migration flows show that migratory movements are produced, provoked, shaped and regulated by national policies and international relations which cannot be categorised as push or pull factors. The migration systems approach has been developed over the last two decades to analyse migration factors beyond the scope of the push and pull theory. It considers migration factors in a complex network structure, emphasising the relevance of historical and international relations between countries, collective action of people, and institutional factors.<sup>60</sup>

The starting point of the migration systems approach is the assumption that besides individual motivations, migration is largely determined by links between origin and destination countries based on historical, political, economic, personal or religious ties. The migration systems approach argues that

individuals are embedded in numerous formal and informal networks at origin and destination [countries] that affect migration outcomes and, therefore, that those networks [...] be analysed to identify how they operate to promote or constrain migration.<sup>61</sup>

The existing networks between sending and receiving countries provide a framework that facilitates information, transportation, adaptation, and integration in the destination country.

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<sup>59</sup> For critical assessment of the push and pull model see, for example, Castles, *supra* note 3, at 21-22; Peter Stalker, *The Work of Strangers: A Survey of International Labour Migration* (1994) 21-23.

<sup>60</sup> The migration systems approach was first discussed in an article by Akin Magobunje, "Systems Approach to a Theory of Rural-Urban Migration" (1970) 2 *Geographical Analysis* 1-18. From the rich body of literature see, for example, Castles, *supra* note 3, at 21-26; Mary Kritz & Hania Zlotnik, "Global Interactions: Migration Systems, Processes, and Policies" in Mary Kritz et al (eds), *International Migration Systems* (1992) 1-16.

<sup>61</sup> Castles, *supra* note 3, at 26; cf Martin & Widgren, *supra* note 6, at 14-15.

### 2.1.2.1. Social networks

A key factor of migration are social, particularly family networks which initiate, support and shape migratory movements. In many cases the decision to migrate is not made by the migrant alone, but also by her or his family who may decide to send a family member abroad in order to find employment and eventually support the family financially from overseas. Young men, for example, may be told to emigrate and find labour abroad. If men are less dispensable at home, the family may decide to send their daughter abroad. The growing demand for female factory labour, domestic servants and sex workers in wealthier countries adds to the growing feminisation of migration.<sup>62</sup> For example, a recent study undertaken by the Government of the Philippines found that approximately 1.5 million Filipino women are working abroad, both legally and illegally. In 1997, women accounted for almost 60 percent of the newly hired workers from the Philippines.<sup>63</sup>

Especially in the case of Asian migrants it was found that ties of family and kinship play an important role in creating and sustaining migratory movements. With overseas ethnic communities around the world these social networks (in the case of Chinese society often referred to as 'guanxi') actively assist in arranging emigration, transportation, transit, immigration and integration into the destination countries.<sup>64</sup>

The social networks within which migration occurs are by nature ambivalent. On the one hand they operate as facilitators of migratory movements throughout the journey between hometown and destination community. In this respect, the role of these networks can be viewed as a valuable contribution to easier travel and to the integration of migrants. But on the other hand, with increasing sophistication of these networks (often including the

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<sup>62</sup> Cf Ronald Skeldon, "Trafficking: A Perspective from Asia" (2000) 32(3) *Int'l Migration* 7 at 18, and see *supra* Section 2.1.1.3.2.

<sup>63</sup> Philippines, "International Labour Migration and Trafficking in Women in Asia" paper presented at the *International Symposium on Migration 'Towards Regional Cooperation on Irregular/Undocumented Migration'*, Bangkok, 21-23 Apr 1999, 3. Cf Castles, *supra* note 3, at 25-26; OECD, *supra* note 48, at 110-113.

<sup>64</sup> Beare, "Illegal Migration: Personal Tragedies, Social Problems, or National Security Threats?" *supra* note 40, at 27; Chin, *supra* note 30, at 9-10, 21; Marlowe Houd, "Sourcing the Problem: Why Fuzhou?" in Paul Smith (ed), *Human Smuggling: Chinese Migrant Trafficking and the Challenges to America's Immigration Tradition* (1997) 76 at 76-92; Willard Myers, "The Emerging Threat of Transnational Organized Crime from the East" (1996) 24 *CL&SC* 181 at 185-189.

assistance of recruiters, migration agents, and lawyers) and in times of a growing demand for migration, these social networks have also emerged as exploiters of migrants. With the restrictions that have been placed on international migration these networks sometimes operate as facilitators of illegal migration, exploiting voluntary (in the case of migrant trafficking) and involuntary migrants (such as trafficking in women and children).<sup>65</sup>

#### 2.1.2.2. Overseas communities and family reunification

Secondly, it has been recognised that the existence of overseas communities has a strong impact on international migratory movements. Earlier emigration of relatives and friends to overseas destinations around the world has created linkages between home countries and ethnic communities abroad. The presence of relatives in comparatively wealthier societies makes the decision to migrate to foreign shores easier, especially in circumstances where widespread unemployment is the rule in the sending country, while the success of overseas relatives becomes more evident if they send remittances back home.

A large extent of both legal and illegal migration occurs along the lines of previous movements between sending and receiving countries. This often combines with family reunification: As the duration of residence in the foreign country becomes longer, the status of immigrants becomes more permanent and secure, leading other relatives, spouses and children to follow the initial migrant. Family reunification is a major objective of many migrants and most immigration countries offer facilitated entry and residence to overseas relatives of their citizens and permanent residents. But if migration restrictions are placed on such movements, potential migrants will look for other, possibly illegal avenues of migration.<sup>66</sup>

Examples for migration that follows patterns of earlier movements are common within the Asia Pacific region. For example, political and economic events in China in the 19<sup>th</sup> and 20<sup>th</sup> century have caused a number of migrant outflows from the country and spun the

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<sup>65</sup> See Myers, *supra* note 64, at 212. Similar statements have been made about Indonesian migrants, Graeme Hugo, "Undocumented International Migration in Southeast Asia" in Carunia Firdausy (ed), *International Migration in Southeast Asia* (1998) 73 at 87; Ernst Spaan, "Taikongs and Calos: The Role of Middlemen and Brokers in Javanese International Migration" (1994) 28(1) *Int'l Migration Rev* 93 at 93.

<sup>66</sup> Cf Ghosh, *supra* note 3, at 62; Houd, *supra* note 64, at 90; Hugo, *ibid*, at 90.

overseas Chinese into a global web. It has been estimated that at the end of 1999 about 35 million Chinese were living abroad. Two thirds, or 26.8 million of those are estimated to live in other Asian countries, and over seven million in North America, Australia and Europe.<sup>67</sup> Particularly the coastal provinces of Fujian and Guangdong have a long history of emigration. Many emigrants have successfully settled and established overseas and are encouraging family members in these provinces to follow and emulate the success.<sup>68</sup> Due to Australia's relation to the United Kingdom and the UK's former outpost Hong Kong, the Chinese community in Australia is predominantly Cantonese and Fujianese. Australian immigration policies in the past have accepted many settlers from these southern provinces of China. As links between the Australian-Chinese and the mainland Chinese community have continued to grow, and income disparities between Australia and China have become wider and more obvious,<sup>69</sup> many Chinese are trying to follow their ancestors and immigrate to Australia legally and illegally.<sup>70</sup>

Similar patterns of migratory movements between sending country and overseas communities can be found among Vietnamese and Filipinos. Also, labour migration in the South Pacific has shaped societies and led to the establishment of overseas communities in the big cities of New Zealand and Australia. Particularly the Cook Islands, Niue, Samoa, Tokelau and Tonga have witnessed large-scale movements to overseas destinations.<sup>71</sup>

### 2.1.2.3. Global economic systems

In recent years, globalisation has emerged as a key issue of international movements as migration has become closely intertwined with the integration of national economies into the global market.

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<sup>67</sup> Chin, *supra* note 30, at 9-10; Goldstone, *supra* note 27, at 50; Myers, *supra* note 64, at 193, 205; "China: Migrants, Trade" (2000) 7(6) *Migration News*.

<sup>68</sup> For the US experience of emigration from Fujian province see, for example, Chin, *supra* note 30, at 11-13, 19-20; Houd, *supra* note 64, at 76-92.

<sup>69</sup> See *supra* Figure 3

<sup>70</sup> McFarlane, *supra* note 32, at 10; Myers, *supra* note 64, at 218, note 36; Zhang & Gaylord, *supra* note 58, at 5.

<sup>71</sup> Cf Henningham, *supra* note 18, at 71-90; Karen Nero, "The End of Insularity" in Donald Denoon (ed), *The Cambridge History of the Pacific Islanders* (1997) 439 at 451-465; Ronald Skeldon, "The Relationship between Migration and Development in Asia and the Pacific" in Carunia Firdausy (ed), *International Migration in Southeast Asia* (1998) 7 at 37.

Labour migration of both skilled and unskilled workers is the most obvious and most immediate effect of international economic integration. Employers in receiving countries take advantage of globalisation by recruiting people from overseas or by opening branches in other countries. With the restrictions of national borders declining, people started to move abroad in search for jobs and higher wages. But with increasing unemployment in industrialised countries, which have for a long time recruited workers from other nations, these countries have started to place restrictions on labour migration, particularly reducing the number of low or unskilled workers. However, these restrictions could not reduce the awareness of income disparities between countries. As long as goods, services, money and information are crossing borders easily, people will try to do the same, be it in legal or illegal ways.<sup>72</sup>

### 2.1.3. Summary

International migration — be it legal or illegal, documented or irregular — is the ultimate result of multiple factors which alternatively or cumulatively cause people to leave their home countries for foreign shores. The factors that induce people to migrate are complex and may be perceived as pushing, thus encouraging emigration, or pulling, encouraging immigration, or they may exist in a complex network of social or economic ties.

Political instability and armed conflict, rapid population growth, environmental degradation and widening economic disparities between the countries of the Asia Pacific region have caused severe migration pressures which have led many people to leave their home countries and move abroad in order to find protection, employment, higher wages, or simply a better life. Voluntarily or involuntarily, people are migrating to other countries to secure their lives, their families and friends, or their property.

Almost invariably, migration in the Asia Pacific region has occurred where political, demographic, socioeconomic and environmental push and pull factors combined with growing migration systems. With scarcity of economic resources and the continuing lack

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<sup>72</sup> Cf Beare, "Illegal Migration" *supra* note 55, at 237-238; id, "Illegal Migration: Personal Tragedies, Social Problems, or National Security Threats?" *supra* note 40, at 16; Ghosh, *supra* note 3, at 69-70.

of human rights recognition in some parts of the region, migration pressures are growing and it has to be noted that migratory movements are still small in numbers relative to the growing population in the region.

For the sending country, emigration can provide a temporary relief for its labour market, social welfare system, and for existing internal tensions. But emigration can also cause a 'brain drain' if skilled migrants who are crucial to the countries' economic performance leave. It has to be noted that especially the least economically developed countries have often little to offer for professional labourers who can achieve much higher wages in wealthier countries. Many nations experience migration as damaging as it removes the most dynamic elements of the population, thus aggravating poverty and instability in the sending country.<sup>73</sup>

But in many instances, governments have intentionally induced people to emigrate. Some countries appreciate the relief caused by migration outflows in circumstances where from the government's perspective some parts of the community are considered different or inferior to the majority of society, especially if they can be singled out as ethnic, religious or political minorities. Until today it is not uncommon for some governments to actively force large parts of the population to emigrate or simply avoid or postpone policies that address the root causes of emigration. A study completed in 1987 suggested that "probably more than half of the world's refugees were forced out at least partly because their governments wanted them to leave, or were content to see them leave, or put other priorities ahead of making their return possible."<sup>74</sup>

The benefits of emigration for the sending country may also include the loss of un- and underemployed people. Furthermore, some countries have come to see the exodus of people as an economic resource if overseas communities send money and other remittances back to their home countries. Especially in countries with a large overseas population and

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<sup>73</sup> For the examples from the South Pacific islands see Skeldon, "The Relationship between Migration and Development in Asia and the Pacific" *supra* note 71, at 37.

<sup>74</sup> Alan Dowty, *Closed Borders: The Contemporary Assault on Freedom of Movement* (1987) 188 and 147-166. See also Ghosh, *supra* note 3, at 76-78, 88; Loescher, *supra* note 3, at 18-19; Weiner, *supra* note 7, at 5-6.

with strong links between domestic and overseas communities these remittances mean an important contribution to the national economy of the sending country.<sup>75</sup>

Rising unemployment rates, overpopulation, economic recession, xenophobia, protectionism, and environmental destruction are reasons for many destination countries to discourage and deter immigrants and consider the arrival of migrants solely as a cost or security factor. With growing levels of illegal migration and organised crime, migration is often reduced to a problem of crime, regulation and control, not recognising the many benefits, and the short- and long-term advantages of international migration.

The major issues of illegal migration for the receiving countries are the impacts on their labour markets, their social welfare systems, the general attitude towards immigration, and the effect of illegal immigration on crime.

#### *Labour market*

It has been found that illegal immigrants lend flexibility to the labour markets of receiving countries, especially when the working population is ageing or decreasing, which is the case in many industrialised nations, or where the population is unwilling or unable to engage in particular occupations. Often illegal immigrants play an important economic role in these countries.<sup>76</sup>

Furthermore, the illegal status of unauthorised entrants can be to the benefit of employers as illegal immigrants provide a source of cheap labour. By hiring them, employers can circumvent labourer unions and legal and financial constraints associated with regular employment, and pay lower wages as illegal workers cannot claim the rights and salaries of regular workers. Moreover, employers gain greater flexibility in responding to fluctuations in their businesses, as illegal employees have no protection against sudden dismissal. Particularly in countries where the national legislation does not or not sufficiently sanction the employment of illegal migrants, illegal employees mean an important contribution to

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<sup>75</sup> Cf Go, *supra* note 50, at 160-163; Goldstone, *supra* note 27, at 111; Siron & van Baeveghem, *supra* note 38, at 53-54; Weiner, *supra* note 7, at 6. See *supra* Section 2.1.1.3.

<sup>76</sup> Ghosh, *supra* note 3, at 53, 56-57; Hugo, *supra* note 65, at 88; IOM, "The Impact of the Current Economic Crisis in Asia on Population Migration in the Region" *supra* note 43, at 5.



the economy, but at the same they often become the subject of exploitation and indignities.<sup>77</sup>

It has been found that foreign illegal workers, at least in the first instance, only compete with the illegal workforce that already exists in the country. Also, foreigners, both legal and illegal, are more vulnerable to unemployment than nationals. The perception that illegal immigrants pose a threat to local employees is wrong as long as there is a labour demand which remains unfilled by the local population, and as long as employers find it more lucrative to pay illegal workers and the fines for illegal employment rather than creating legal jobs.<sup>78</sup>

#### *Social welfare system*

Many countries consider illegal immigration as a cost factor in their social welfare systems and too often illegal immigrants, including genuine refugees, have been described as “parasites” who benefit from social welfare, health and education programs without contributing to them financially. The economic impact of illegal immigration on receiving countries is a debatable issue. However, it needs to be stated very clearly that the extent to which illegal migrants use public social services is very small and that in most cases their illegal status prevents them from benefiting from any welfare program.<sup>79</sup>

The permanent fear of apprehension, detention and deportation is usually so strong that illegal immigrants avoid to request public assistance. In the case of migrant trafficking, as discussed in the next Chapter,<sup>80</sup> it has also been found that the majority of illegal migrants are young males who generally do not depend on welfare assistance as they have chances to secure work (though this may often be in the black labour market). Social funding for

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<sup>77</sup> Cf the studies of IGC, *Illegal Aliens: A Preliminary Study* (1995) 10; Ghosh, *supra* note 3, at 53, 56-57; IOM, “The Impact of the Current Economic Crisis in Asia on Population Migration in the Region” *supra* note 43, at 5; Vincenzo Ruggiero, “Transnational Crime: Official and Alternative Fears” (2000) 28 *IJSL* 187 at 194; UN General Assembly, Tenth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Vienna, 10-17 Apr 2000, *International Cooperation in Combating Transnational Crime: New Challenges in the Twenty-First Century*, UN Doc A/CONF.187/6 (15 Dec 1999) para 31.

<sup>78</sup> Cf Mary Crock, “The Peril of the Boat People: Assessing Australia’s Responses to the Phenomenon of Border Asylum-Seekers” in Hugh Selby (ed), *Tomorrow’s Law* (1995) 28 at 30; Ghosh, *supra* note 3, at 79; IOM, “The Impact of the Current Economic Crisis in Asia on Population Migration in the Region” *supra* note 43, at 5. See also the recent statistics in OECD, *Trends in International Migration, Annual Report 2000 Edition* (2001) 49.

<sup>79</sup> For the support and services provided to illegal immigrants in Australia, see *infra* Section 4.3.2.

<sup>80</sup> See *infra* Section 3.4.4.3.

immigrants is only likely to increase once they have resided in the receiving country for some time and family reunification takes place, bringing children, spouses or other dependants into the country.<sup>81</sup>

#### *Attitude towards immigration*

With growing unemployment rates in most destination countries, the last decade has witnessed growing racism and xenophobia. The local population has perceived illegal immigration as a threat to internal stability and national security.

One of the worst consequences of illegal immigration is that it puts the vulnerable group of migrants into social and economic marginalisation, which often combines with defencelessness towards anti-immigrant sentiments and violence. In industrialised countries, xenophobia and hostility towards new, foreign members of society has emerged as one of the key factors dominating immigration policies at the beginning of the 21<sup>st</sup> century,<sup>82</sup> especially at times when a decreasing economy and growing unemployment have coincided with higher numbers of unauthorised arrivals, and in circumstances where illegal migration has become closely linked with organised crime.

#### *Illegal immigration, crime and crime statistics*

The question arises to what extent illegal immigrants are responsible for crimes committed in the host country. The illegal status of the migrants prevents them from entering the legal labour market. Instead, they have no choice but to work illegally to survive. Many migrants find themselves in the black labour market. In more extreme cases they become engaged or are forced to engage in criminal activities such as prostitution and pimping, minor property offences or drug related crime, often organised by the same criminal group that operated throughout the trafficking passage.<sup>83</sup>

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<sup>81</sup> Ghosh, *supra* note 3, at 79-85; cf Schmid, *supra* note 36, at 29-30.

<sup>82</sup> Cf Ghosh, *supra* note 3, at 96-97; Andree Kirchner & Lorenzo di Pepe, "International Attempts to Conclude a Convention to Combat Illegal Migration" (1998) 10(4) *IJRL* 662 at 673; Siron & van Baeveghem, *supra* note 38, at 56. For attitudes towards immigration in Australia see, for example, Savitri Taylor, "Rethinking Australia's Practice of 'Turning Around' Unauthorised Arrivals" (1999) 11(1) *Pacifica Review* 43 at 52-53.

<sup>83</sup> Sabrina Adamoli et al, *Organised Crime around the World* (1998) 79; Adam Graycar et al, "Trafficking in Human Beings" paper presented at the 3<sup>rd</sup> *National Outlook Symposium on Crime in Australia*, Canberra, 22-23 Mar 1999, 5; Savona et al, *Globalisation of Crime*, *supra* note 37, at 9.

A number of writers have suggested that illegal immigration has a direct impact on the level of crime in the receiving country and have stated, “illegal migration as such encourages many other illegal activities”.<sup>84</sup> But there is no evidence to support this hypothesis. Illegal migrants are by definition violators of migration regulations, but they are neither criminal by nature nor do they stimulate further criminal activities in transit and receiving countries. It needs to be emphasised that illegal migrants are not more criminal than other parts of the population. If they happened to be involved in illegal activities in the host country, this has in most cases been a direct result of their illegal status in the host country.<sup>85</sup>

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<sup>84</sup> Cf Siron & van Baeveghem, *supra* note 38, at 56.

<sup>85</sup> Cf David Corlett, “Politics, Symbolism and the Asylum Seekers Issue” (2000) 23(3) *UNSW LJ* 13 at 19-20.

## 2.2. Illegal Migration and Australia's Immigration Policies

Without legal restrictions placed on the free movement of people, the problem of illegal migration cannot arise. Migration legislation is a product of the late 19<sup>th</sup> and early 20<sup>th</sup> century when some countries began to assert an absolute, sovereign right to exclude foreigners from their territories. The United Kingdom, Canada, the United States and Australia were among the first countries to implement entry restrictions based on criteria such as race, ethnicity, nationality, or labour market factors. Simultaneously, governments began to place penalties on unauthorised arrivals, establishing the crucial connection between migration and crime by criminalising the movement of people who do not meet emigration, transit or immigration requirements.

Among the people who are migrating between countries and continents are many refugees who have left their homes for reasons of persecution. International law requires receiving countries to leave their borders open for those in need of protection. A substantial proportion of those entering Australia illegally, for instance, are genuine refugees, causing a major clash between security and humanitarian issues. As a matter of fact, refugee claimants<sup>86</sup> have been perceived as “the single largest source of conflict in the migration field in recent years.”<sup>87</sup>

Australia is a nation of immigrants. Particularly after World War II, Australia has encouraged millions of migrants to populate the nation and contribute to its growing economy and multicultural society. However, those who attempted to come to Australia uninvited have faced a harsh and unwelcoming reality. In retrospective, the one hundred years of Australian immigration policy are characterised by a variety of deterrent and preventive measures employed by the Government to stop unlawful non-citizens, boat refugees in particular, from making their way to Australia. Over time, these measures have become increasingly sophisticated. Policies of enhanced border control, mandatory detention, limitation of rights of asylum seekers, deprivation of recourse to courts, and temporal restriction on the duration of the stay of refugees have made it increasingly

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<sup>86</sup> The terms ‘asylum seeker’ and ‘refugee claimant’ are used interchangeably unless clear reference is made to the refugee terminology of the *Convention* and the *Protocol relating to the Status of Refugees*.

<sup>87</sup> Mary Crock, *Immigration and Refugee Law in Australia* (1998) 124.

difficult for asylum seekers to gain protection in Australia.<sup>88</sup> Moreover, for most of the 20<sup>th</sup> century, extensive ministerial and administrative discretionary powers characterised Australian migration law. The increasing codification of Ministerial decisions in the last decade has, however, resulted in further restrictions placed on refugee determination.

The concern of Section 2.2 is with Australia's regulations dealing with unauthorised arrivals. This Section analyses the history of Australia's migration policies in light of the migratory and refugee movements that occurred in the Asia Pacific region, and examines Australia's responses to them.

### 2.2.1. Early Immigration Restrictions

#### 2.2.1.1. Early developments in Britain

The French Revolution can be said to mark the beginning of immigration control and of the criminalisation of unwanted immigration. In 1792, increasing numbers of refugees from France combined with a widespread Franco-phobia in Great Britain which led the English Parliament in 1792 to pass the *Alien Bill*,<sup>89</sup> introducing a system by which all arriving foreigners had to be registered and the masters of the vessels that carried them had to declare the name and rank of the immigrant passengers to the British port authorities.<sup>90</sup> People who arrived unregistered had to be deported under section 3 of the Act.

The regulations were further tightened in 1848 following the arrival of people fleeing from the revolutionary upheavals in continental Europe. The *Aliens Removal Act 1848* authorised the Secretary of State "to order aliens to depart this realm" and, if they refused to do so, to take them into custody until they are "taken in charge for the purpose of being sent out of the realm",<sup>91</sup> marking the beginning of the detention of illegal immigrants. The 1848 Act remained in force until 1905, when the provisions were replaced by the more

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<sup>88</sup> The current protection regime is discussed *infra* Section 4.4.

<sup>89</sup> *An Act for establishing Regulations respecting Aliens arriving in this Kingdom, or resident therein, in certain Cases 1793* (UK) 33 Geo 3, c4.

<sup>90</sup> *Ibid*, ss 1-3.

<sup>91</sup> Section 1 *Act to authorise for One Year, and to the End of the then next Session of Parliament, the Removal of Aliens from the Realm 1848* (UK) 11: & 12 Vict, c20.

restrictive *Act to amend the Law with regard to Aliens 1905*<sup>92</sup> which introduced a complex system of immigration regulations, aiming at the prevention of undesirable immigration and the expulsion of undesirable immigrants.<sup>93</sup>

### 2.2.1.2. Australia before Federation

In the 1830s, the British Imperial Government moved towards reducing the transportation of convicts to Australia and establishing its southernmost outpost as a colony of free rather than forced settlers. Proclamation on 28 December 1836 made South Australia the first colony to be settled solely by free settlers. The transportation of convicts from Britain to other parts of Australia was finally abandoned in the 1850s. But together with the arrival of convicts ceased a source of cheap labour. To help Australia's industry grow, indentured labourers were imported from the South Pacific islands, India and China.

Though Australia was originally a convict settlement, the British Imperial Government sought to limit settlement to British citizens. Fear of foreign invasion focused mostly on the workers from China, India, Oceania, East and South East Asia. Increasing numbers of Melanesian, Asian and particularly Chinese immigrants were perceived as a threat to Australia's geographic isolation and to the homogeneous background of the first European settlers in Australia.

Immigration restrictions were first introduced in the Australian colonies following the arrival of Chinese diggers after the discovery of gold in Victoria in 1851. The Chinese brought with them a better and more efficient method to wash gold. This, combined the differences in appearance, culture, language and religion, caused resentment among the Australian diggers, who turned hostile and violent towards the growing Chinese population.<sup>94</sup> In 1854, a petition was moved to the Victorian Parliament to legislate against

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<sup>92</sup> 5 Edw 7, c13.

<sup>93</sup> Section 1(3)(a-c) *Aliens Act 1905* (UK) 5 Edw 7, c13. For further reading on early English immigration and aliens regulations, see, for example, Richard Plender, *International Migration Law* (2<sup>nd</sup> ed, 1988) 64-67.

<sup>94</sup> See generally, Jean Gittins, *The Diggers from China: The Story of the Chinese on the Goldfields* (1981) 61-79; Andrew Markus, *Fear And Hatred: Purifying Australia and California 1850-1901* (1979) 15-53; Charles Price, *The Great White Walls are Built: Restrictive Immigration to North America and Australasia 1836-1888* (1974) 67-69.

Chinese immigration. The *Act to make Provisions for Certain Immigrants (Chinese)*<sup>95</sup> was the first migration restriction to be implemented in Australia. It limited the number of Chinese passengers who could be brought into Australia to one person “to every ten tons of the [registered] tonnage of such ship”.<sup>96</sup> Furthermore, a poll tax of £10 was laid on each Chinese immigrant entering Victoria.<sup>97</sup>

But the incentives of the gold rush were so strong that immigration from China continued. In 1857 Victoria counted 25,400 Chinese settlers. With growing Sino-phobia the Victorian Government enacted further laws to restrict immigration from China.<sup>98</sup> This time, the legislation effectively prevented ships from bringing further Chinese to Victoria, but the law was bypassed simply by landing in the ports of other colonies such as South Australia and New South Wales. An early market for trafficking Chinese emerged for the locals who, in return for exorbitant fees, offered to guide the Chinese immigrants from the ports to the Victorian goldfields.<sup>99</sup> South Australia, which began to witness anti-Chinese resentment amongst its own population, later agreed to restrict the entry of Chinese,<sup>100</sup> followed by New South Wales in 1861,<sup>101</sup> which resulted in an immediate drop in the number of Chinese in southern Australia.

In the early 1870s, in response to the restrictive policies in the south, Chinese began to sail to north Queensland to work in the growing local agriculture and mining industries. Between 1871 and 1877 the Chinese population in Queensland grew from 3,300 to 20,000.<sup>102</sup> Soon after, Queensland followed the example of the southeastern colonies and introduced laws to exclude the Chinese. The *Chinese Immigration Act* (Qld), introduced in 1878, imposed a £20 poll tax on Chinese landing in the colony.<sup>103</sup> Furthermore, the *Goldfields Amendment Act 1878* (Qld) attempted to restrict immigration of “Asiatic and

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<sup>95</sup> 18 Vic 39, 12 June 1855.

<sup>96</sup> Section 3 *Act to make Provisions for Certain Immigrants 1855* (Chinese) (Vic).

<sup>97</sup> See generally Gittins, *supra* note 94, at 84-89; Markus, *supra* note 94, at 24-25; Don McMaster, *Asylum Seekers — Australia's Response to Refugees* (2001) 40; Price, *supra* note 94, at 69-70.

<sup>98</sup> *Act to Regulate the Residence of Chinese Population 1857* (Vic), 20 Vic 41.

<sup>99</sup> Gittins, *supra* note 94, at 91-100; Price, *supra* note 94, at 70-73.

<sup>100</sup> *Act to make provisions for levying a charge on Chinese arriving in South Australia 1857* (SA), No 3 of 1857-8, and see Price, *supra* note 94, at 74-76.

<sup>101</sup> *Chinese Immigration Restriction Act 1861* (NSW).

<sup>102</sup> Gittins, *supra* note 94, at 109; Price, *supra* note 94, at 155-163.

<sup>103</sup> *Act to regulate the Immigration of Chinese and to make provisions against their becoming a charge upon colony 1877* (Qld), 41 Vic 8. In 1884, the fee was increased to £30.

African aliens” by imposing a license fee on Chinese who sought to reside on the goldfields.<sup>104</sup>

Chinese immigration declined quickly as the fees were impossible to pay by new immigrants and few loopholes remained as the colonies continued to step up measures against the Chinese.<sup>105</sup> At a conference held in Sydney in June 1888 all Australian colonies agreed, “that traditional Chinese immigration should virtually be prohibited.”<sup>106</sup> The conference resulted in draft legislation that further increased the passenger limit to a ratio of one Chinese to every 500-tonnage ship cargo, and the Chinese were prohibited to move from one colony to another. The legislation was subsequently enacted in all colonies, except Tasmania.<sup>107</sup>

In 1891, the restrictions under the early immigration laws were enforced and extended by a decision of the Privy Council in London, the then highest court of appeal for the Australian colonies. In *Musgrove v Toy* the court ruled that “no authority exists for the propositions that ... an alien has a legal right, enforceable by action, to enter British territory” and its dominions even if colonial legislation was compiled with.<sup>108</sup> Consequently, it was left to the lower levels of colonial officers to exercise discretion over who may and may not enter Australian territory. This ruling marks the beginning of extensive ministerial and administrative discretionary powers over immigration, which became a major characteristic of Australian migration law.

### 2.2.1.3. The Immigration Restriction Act 1901

The desire to control immigration for the whole continent was one of the reasons for the Australian colonies to join together in a federation in 1901. The new Commonwealth Government obtained power over immigration matters and continued in the tradition to

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<sup>104</sup> 42 Vic 2.

<sup>105</sup> See *Act to restrict the Influx of Chinese into NSW 1881* (NSW), 45 Vic 11; *Act to regulate and restrict Chinese Immigration 1881* (SA), No 213 of 1881; *Act to amend the 'Chinese Immigrants Statute 1865' 1881* (Vic), *Chinese Act 1881* (Vic).

<sup>106</sup> Price, *supra* note 94, at 190.

<sup>107</sup> For example, *Chinese Restriction and Regulation Act 1888* (NSW), 52 Vic 4; *Chinese Immigration Restriction Act 1888* (SA), No 439 of 1888; *Chinese Immigration Restriction Act 1888* (Vic).

<sup>108</sup> [1891] AC 272 at 282.



strictly control arrivals in the country.<sup>109</sup> One of the first concerns of the new Government was to completely regulate immigration thereby protecting the emerging nation, its industry and workforce from foreign coloured, particularly Asian labourers.

Within a year of federation, Commonwealth Parliament passed the *Pacific Island Labourers Act 1901* (Cth)<sup>110</sup> which prohibited labour immigration and the importation of indentured workers from South Pacific islands. This piece of legislation was followed six days later by the *Immigration Restriction Act 1901* (Cth)<sup>111</sup> which provided the first comprehensive migration law for the whole of Australia.

The Act combined legislation that had been in force in New South Wales<sup>112</sup> and Western Australia<sup>113</sup> before Federation and also incorporated some immigration regulations copied from the South African province Natal.<sup>114</sup> For new immigrants, s 3(a) *Immigration Restriction Act 1901* introduced a dictation test, which was supervised and assessed by immigration and customs officers. Prospective immigrants were required to “write out at dictation and sign in the presence of the officer a passage of fifty words in length” in selected European languages. The entry of applicants who failed the test was prohibited under section 3. The dictation test soon became the major tool to exclude non-European immigrants. This marks the beginning of the ‘White Australia Policy’<sup>115</sup> which combined “considerations of defence, diplomacy and trade ... with the pursuit of racial homogeneity”.<sup>116</sup>

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<sup>109</sup> The *Commonwealth of Australia Constitution Act* confers the power to enact laws with respect to “naturalisation and aliens”, s 51(xix), and “immigration and emigration”, s 51(xxvii), to the Commonwealth Government.

<sup>110</sup> No 16 of 1901.

<sup>111</sup> No 17 of 1901.

<sup>112</sup> *Immigration Restriction Act 1898* (NSW).

<sup>113</sup> *Immigration Restriction Act 1897* (WA).

<sup>114</sup> See *Natal Immigration Restriction Act 1897*.

<sup>115</sup> Cf Castles, *supra* note 3, at 57; Crock, *Immigration and Refugee Law in Australia*, *supra* note 87, at 11-15; Gary Freemann & James Jupp, “Comparing Immigration Policy in Australia and the United States” in Gary Freemann & James Jupp (eds), *Nations of Immigrants* (1992) 1 at 4; ILO, *Emigration and Immigration* (1922) 177-178.

<sup>116</sup> Gary Freeman, “From ‘Populate or Perish’ to ‘Diversity or Decline’: Immigration and Australian National Security” in Myron Weiner (ed), *International Migration and Security* (1993) 83 at 89, and see 89-92; cf McMaster, *supra* note 97, at 40-42.

The immigration legislation implemented in 1901 stayed in force mostly unchanged until 1958.<sup>117</sup> Throughout this time, the selection of immigrants was almost completely laid in the hands of immigration and customs officers, who could stop entrants to Australia simply by altering the dictation requirements and by refusing the issuance of entry permits.

## 2.2.2. Post-War Australia and the Migration Act 1958

### 2.2.2.1. The World Wars and the refugee crises

The large numbers of refugees and displaced people following World War I led the international community to call for supranational instruments to protect refugees.<sup>118</sup> From this time onwards international law gained increasing influence over national migration legislation. Although the early conventions only offered limited protection to selected groups of refugees, the emergence of refugee law constituted a humanitarian exception to the protectionist immigration laws, much to the benefit of large numbers of otherwise unprotected migrants.

The early refugee flows had no significant impact on Australia and for that reason the Australian Government showed little, if any, interest in joining the international refugee conventions which were designed for the specific situations in Europe. Australia did not sign any refugee agreement prior to December 1946. A 1933 League of Nations' proposal for a *Convention relating to the International Status of Refugees* remained unsuccessful as only eight countries ratified it.<sup>119</sup>

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<sup>117</sup> See *Immigration Restriction Amendment Act 1905* (Cth); *Immigration Restriction Acts 1908* (Cth) and *1910* (Cth); *Immigration Act 1912* (Cth); *Immigration Act 1935* (Cth); *Immigration Act 1940* (Cth); *Immigration Act 1948* (Cth) and *Immigration Act 1949* (Cth).

<sup>118</sup> See, for example, *Arrangement on the Issue of Identity Certificates to Russian and Armenian Refugees*, 12 May 1926 (89 LNTS 47) (not signed by Australia); *Arrangement on the Extension to Other Refugees of Measures Favouring Russians and Armenians*, 30 June 1930 (89 LNTS 63) (not signed by Australia); *Convention concerning the International Status of Refugees*, 28 Oct 1933 (159 LNTS 199) (not signed by Australia); *Convention concerning the Status of Refugees coming from Germany*, 10 Feb 1938 (192 LNTS 59) (not signed by Australia); *Protocol: Addition Concerning the Status of Refugees from Germany*, 14 Sep 1939 (198 LNTS 141) (not signed by Australia).

<sup>119</sup> The first international refugee instruments to be signed by Australia were the *Constitution of the International Refugee Organisation*, 15 Dec 1946 (18 UNTS 3; 1948 ATS 16) and the *Agreement on Interim Measures to be taken in Respect of Refugees and Displaced Persons*, 15 Dec 1946 (1947 ATS 2); cf Marilyn Achiron, "A 'timeless' treaty under attack" (2001) 123(2) *Refugees* 3 at 7-8.

The protection of refugees once again became an issue on the international agenda after World War II. This time massive movements of refugees and displaced people were not exclusive to Europe; they also affected North America, Australia and the Asia Pacific. During the war, Australia accepted about 15,000 refugees from Europe to protect them from persecution by Nazi-Germany. After the war, pursuant to an agreement negotiated with the newly established International Refugee Organisation in 1947,<sup>120</sup> Australia accepted 200,000 displaced persons from war-torn Europe.

Following the end of armed conflicts in Europe and East Asia, the concern about uncontrolled migration led the United Nations Commission on Human Rights to adopt a resolution by which it

expressed the wish that early consideration be given by the United Nations to the legal status of persons who do not enjoy the protection of any government, in particular pending the acquisition of nationality as regards to their legal and social protection and their documentation.<sup>121</sup>

There was obvious need for a long-term international instrument that would protect refugees and define their legal status, particularly in circumstances where the country of nationality failed in its duty to protect its citizens.<sup>122</sup> This led to the creation of the UN High Commissioner's Office for Refugees, which convened a Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons. On 28 July 1951, this conference adopted the *Convention relating to the Status of Refugees* which entered into force on 21 April 1954. Australia acceded to the Convention in January 1954<sup>123</sup> but did not implement the Convention into domestic law until 1980.

Initially, the protection offered under the *Refugee Convention* was limited to persons who had been displaced by the Second World War and had become refugees "as a result of events occurring before 1 January 1951" (art 1A(1), B(1)). Recommendation E of the Final Act of the Conference, however, expressed the intention to establish a permanent universal

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<sup>120</sup> *Constitution of the International Refugee Organisation*; and see *infra* Section 6.1.2.1.

<sup>121</sup> UN Doc E/RES/600 para 46.

<sup>122</sup> An earlier attempt to create an international instrument for the protection of refugees failed in 1933. The *Convention Relating to the International Status of Refugees* was passed by the League of Nations in 1933 but was only ratified by eight countries. See *supra* note 119.

<sup>123</sup> 189 UNTS 150, 5 ATS 1954 [hereinafter *Refugee Convention*]. Australia initially ratified the Convention with reservations to arts 17-19, 26, 28 and 32. In December 1967, the reservations to arts 17-19, 26 and 32 were withdrawn. The reservation to art 28 were withdrawn in March 1971.

instrument,<sup>124</sup> which was concluded eighteen years later. The *1967 Protocol relating to the Status of Refugees*<sup>125</sup> removed the temporal and geographical restrictions of the Convention and in article I(2) recognises persons as refugees if they have

a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, [and are] outside the country of [their] nationality and unable to or, owing to such fear, unwilling to avail [themselves] of the protection of that country.<sup>126</sup>

Australia acceded to the Protocol in December 1973.<sup>127</sup>

It is not surprising that up until today the *Refugee Convention* and the *Protocol* play a major role in the context of migrant trafficking and illegal migration. The concept of refugees under the Convention is based on the particular refugee situation as it was at the end of World War II. It does not, for instance, protect people fleeing for demographic, environmental or socioeconomic reasons, and does not apply to circumstances where the persecutor is a non-state actor.<sup>128</sup> But despite these significant limitations, since their conclusion, the Convention and Protocol have enabled millions of asylum seekers to gain access to foreign countries on humanitarian grounds. For those in need, the *Refugee Convention* has been in many, if not most cases the only way to flee persecution and find protection abroad.

For Australia the commitment to international refugee instruments inevitably created problems. The accession to the Convention and the Protocol established an obligation to adequately host and protect refugees and not send them back to a place where they could face persecution (“non-refoulement”, art 33 *Refugee Convention*).

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<sup>124</sup> Recommendation E “expresses the hope that the Convention would have to value as an example exceeding its contractual scope that all nations would be guided by it in granting as far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention the treatment for which it provides.”

<sup>125</sup> 606 UNTS 267, 37 ATS 1973 [hereinafter *Refugee Protocol*].

<sup>126</sup> Article 1A *Refugee Convention*, art I(2) *Refugee Protocol*. This definition has been implemented into Australian law, s 36 *Migration Act 1958* (Cth).

<sup>127</sup> For Australia’s obligations under the *Refugee Convention* see *infra* Section 4.4.1.

<sup>128</sup> The *Refugee Convention* has often been criticised for being outdated and for not adequately dealing with contemporary forms of refuge and forced migration. For further reading see, for example, Achiron, *supra* note 120, at 18-23; Mary Crock, “A Sanctuary under Review: Where to from here for Australia’s Refugee and Humanitarian Program?” (2000) 23(3) *UNSW LJ* 246 at 252-253.

### 2.2.2.2. **Populate or perish**

Although the Australian continent was only peripherally affected by active warfare, World War II demonstrated Australia's vulnerability to armed conflict and foreign invasion. The perception of the Government was that 7.5 million Australians were not enough to defend the nation and that the population had to be increased for strategic and economic reasons. The slogan "populate or perish" arose, reflecting the attitude of post-war Australia towards immigration.

In 1945, the Government established the Department of Immigration and subsequently developed comprehensive immigration programmes to increase the population.<sup>129</sup> Initially, the immigration intake was planned to be 70,000 settlers per year. Although Australia adopted its own citizenship in 1949, immigration regulations remained strongly in favour of British citizens, and, once again, regulations were based on racial appearance rather than on criteria such as skills and education.

Only a few years after the beginning of the new immigration policies, it proved to be impossible to attract enough people from the UK. The Immigration Department began with the recruitment of people from the Baltic and Slavic countries and a few years later from Mediterranean countries, particularly from Greece, Italy and Malta. However, despite this positive attitude towards immigration, the White Australia Policy remained in force and the discriminatory legal and administrative provisions against non-European immigration were left unchanged.<sup>130</sup>

### 2.2.2.3. **The Migration Act 1958**

By 1958 it was apparent that the *Immigration Restriction Act 1901* was obsolete. Regulation of the growing volume of migrants required clear and comprehensive legislative measures. In 1958, the Commonwealth Government implemented the

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<sup>129</sup> For background and objectives of the "populate or perish" policy see, for example, Freeman, *supra* note 116, at 84-85.

<sup>130</sup> Cf Robert Birrell, "Immigration Control in Australia" (1994) 534 *Annals AAPSS* 106 at 108; Castles, *supra* note 3, at 75-76; Crock, *Immigration and Refugee Law in Australia*, *supra* note 87, at 5; Freemann & Jupp, *supra* note 115, at 5.

*Migration Act 1958* (Cth).<sup>131</sup> The new legislation clarified many administrative obscurities and finally abolished the dictation test. With respect to unauthorised entrants, the *Migration Act* prescribed that immigrants without valid entry or temporary permits were “prohibited immigrants”,<sup>132</sup> and subject to arrest, detention,<sup>133</sup> and removal.<sup>134</sup> The principal feature of the new legislation was that the decision about who might or might not enter Australia remained almost completely in the hands of the Minister and his/her officers who were given “absolute”<sup>135</sup> discretionary power over the decisions to grant,<sup>136</sup> refuse, cancel and renew<sup>137</sup> entry permits, as well as over deportation decisions.<sup>138</sup> The *Migration Act* failed to provide a statutory basis for immigration policies and the Act did not provide a legal basis on which immigration decisions could be made. The Government continued to exercise close control over immigration and left the White Australia Policy mostly unchanged.<sup>139</sup>

#### 2.2.2.4. The 1960s and the end of organised labour migration

Between 1950 and 1973 the real Gross Domestic Product<sup>140</sup> in the OECD countries, including Australia,<sup>141</sup> grew at an average of nearly 5 percent per annum, and with this

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<sup>131</sup> No 62 of 1958 [hereinafter *Migration Act*].

<sup>132</sup> Section 6(1), now s 14 *Migration Act*.

<sup>133</sup> Sections 36-39, now ss 188-197 *Migration Act*.

<sup>134</sup> Section 18, now ss 198-199 *Migration Act*. Initially, the *Migration Act* did not distinguish between removal and deportation.

<sup>135</sup> Section 7(1) *Migration Act*, now substituted.

<sup>136</sup> *Ibid*, s 6(2), now ss 65-69.

<sup>137</sup> *Ibid*, s 7(1), (2), now ss 119 ff.

<sup>138</sup> *Ibid*, s 18, now substituted.

<sup>139</sup> Cf Australia, Human Rights Commission, *Human Rights and the Migration Act 1958* (1985) 5; Sean Cooney, *The Transformation of Migration Law* (1995) 14; Crock, *Immigration and Refugee Law in Australia*, *supra* note 87, at 19; Patricia Hyndman, “Australian Immigration Law and Procedures Pertaining to the Admission of Refugees” (1988) 33 *McG LJ* 716 at 723-726.

<sup>140</sup> The GDP is “the value of final goods and services, produced within a country during a specified period, usually a year.” W S Ipp et al (eds), *Butterworths Business and Law Dictionary* (1997) 222.

<sup>141</sup> Organisation for Economic Cooperation and Development, established by the *Convention on the Organisation for Economic Co-operation and Development*, signed at Paris, 14 Dec 1960 (888 UNTS 0). Australia ratified the convention and became member of the OECD on 7 June 1971 (11 ATS 1971). The main purpose of OECD is to achieve the highest possible economic growth, employment, and a rising standard of living in member countries. The organisation has attempted to reach this goal by liberalising international trade and the movement of capital between countries. It is for that reason, that OECD has been described as the “club of rich nations” and has been used to compare living standards in OECD Member Countries.

economic boom the demand for foreign workers increased rapidly. Of all the immigration countries, Australia was the most active in recruiting settlers. The country received over two million settlers between 1945 and 1964 and recorded the highest number of permanent arrivals in 1970 when 180,000 people immigrated.<sup>142</sup>

The belief in immigration as a key to Australia's economic growth and the continuing labour demand in Australia's emerging industry led to gradual modifications and the eventual abolition of the White Australia Policy. Following the example of Canada and the US (which abolished obstacles for non-white immigrants in the early 1960s), and after a review of Australian migration law, on 9 March 1966 the Immigration Minister, Mr Opperman, announced changes to the *Migration Act* which allowed naturalisation and skilled immigration of non-Europeans under equal conditions.<sup>143</sup> The restrictions that had effectively excluded non-white immigrants for the past seventy years were gradually removed and by 1973 the White Australia Policy was completely abolished.<sup>144</sup>

For many industrialised nations the rapid economic growth of the 1950s and 60s came to an end with the first oil crisis in the wake of the Yom Kippur War of 1973. As a result of decreasing national economies, increasing automation and new technologies, the demand for unskilled manufacturing labour in many countries declined, and foreign workers now also competed with the local population for scarce jobs. Restrictions were placed on immigration to the industrialised nations, and in some cases efforts were made to encourage foreign workers to leave.<sup>145</sup> Although the demand for immigration to Australia increased sharply after the abolition of the White Australia Policy, the number of permanent settlers decreased to an all-time low with 52,752 immigrants in the 1975-76 financial year.<sup>146</sup>

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<sup>142</sup> Cf Castles, *supra* note 3, at 76; Crock, *Immigration and Refugee Law in Australia*, *supra* note 87, at 5; Stalker, *supra* note 59, at 17-18.

<sup>143</sup> Australia (Cth), House of Representative, *Parliamentary Debates* (9 Mar 1966) 68-70 (Mr Opperman, Minister for Immigration and Ethnic Affairs).

<sup>144</sup> For further reading on the end of the White Australia Policy see, for example, Crock, *Immigration and Refugee Law in Australia*, *supra* note 87, at 33-34; Freeman, *supra* note 116, at 92-94; Stalker, *supra* note 59, at 182.

<sup>145</sup> For details on the restrictions implemented by the Australian Government see, for example, Crock, *Immigration and Refugee Law in Australia*, *supra* note 87, at 92-94.

<sup>146</sup> Cf Crock, *ibid.*, at 5; Stalker, *supra* note 59, at 18.

### 2.2.3. The Fall of Vietnam and the Boat-People

#### 2.2.3.1. The end of the Vietnam War

The Vietnam War and the fall of Saigon on 30 April 1975 caused one of the largest refugee exodi in world history. The war made millions of people homeless, caused millions of deaths, and forced millions to flee into other countries.

Many escaped by sea, using small, overcrowded vessels to save their lives and find refuge abroad, bringing the term 'boatpeople' into the language. Many people found asylum in neighbouring countries, but when some Asian nations refused to accept refugees from Vietnam, some were resettled in the United States, and in smaller numbers in Canada, Europe and Australia. The Sino-Vietnamese War in 1978 brought a new wave of refugees from Vietnam. Initially, Vietnam did little to prevent the exodus, particularly in its early stages when most of the boatpeople were Chinese from southern Vietnam who were persecuted for political and ethnic reasons.<sup>147</sup>

Following the 1978 exodus, the United Nations called for a Meeting on Refugees and Displaced Persons in South East Asia, which convened in Geneva in July 1979.<sup>148</sup> As a result of the meeting, a number of countries, including Australia, pledged for the establishment of resettlement places and the institution of an orderly departure program for Vietnam.

In the late 1970s and 1980s, Vietnam, along with Laos and Cambodia, remained politically and economically isolated. Throughout the 1980s, Vietnamese continued to flee from food shortage, drought and flood, and from the re-education programs imposed by the new government. The number of refugees exceeded the pledges for resettlement allocated in the 1979 Plan and some countries even forced boat refugees back to sea.<sup>149</sup> Throughout the

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<sup>147</sup> Cf Yen Tran, "The Closing of the Saga of the Vietnamese Asylum Seekers" (1995) 17 *Hous JIL* 463 at 466-469.

<sup>148</sup> *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). For further reading see Ann Barcher, "First Asylum in Southeast Asia: Customary Norm or Ephemeral Concept?" (1992) 3 *NYU J Int'l L&P* 1253 at 1254; Robinson, *supra* note 12, at 50-58.

<sup>149</sup> For example, Malaysia 'redirected' boats with Vietnamese asylum seekers out to sea; Arthur Helton, "The Malaysian Policy to Redirect Vietnamese Boat People" (1992) 24 *NYUJ Int'l J L&P* 1203-1217; Robinson, *supra* note 12, at 189-191; UNHCR, *Report*, UN Doc A/AC.96/751 (1990) 2. Also, Brunei,



1980s, the Asia Pacific region repeatedly witnessed mass migration from Vietnam, and, after two years of widespread famine, a further sharp rise in 1988. This again led to the implementation of entry restrictions and further push-back policies in many destination countries. Thousands of Vietnamese perished in the South China Sea.<sup>150</sup>

Calls from ASEAN member countries led the UN to hold a second conference, the International Conference on Indochinese Refugees, in Geneva in July 1989. The principal result of this conference was the conclusion of the *1989 Comprehensive Plan of Action*,<sup>151</sup> forcing Vietnam to prevent uncontrolled emigration and to introduce an orderly departure programme in return for financial aid. Under the plan, the Contracting Nations were obligated to honour the principles of first asylum and allow asylum seekers to land. The plan also sought to repatriate the remaining Indochinese who had been living in refugee camps in the Asia Pacific region. Formal procedures for the repatriation of the remaining Indochinese refugees were implemented in accordance with the *Refugee Convention*, the *Refugee Protocol* and the UN Handbook on Procedures and Criteria for Determining Refugee Status.<sup>152</sup> Those who were determined to be refugees had to be resettled in countries that agreed to accept them. Those who were considered not to be refugees had to be returned to Vietnam.

Despite the intention to bring an end to the long-lasting refugee crisis, in practice, the Plan was utilised as a tool to empty the refugee camps in the region and soon became the subject of widespread criticism. Many countries were quick to label the Indochinese living in the camps as 'economic migrants' and in sending them back to Vietnam, without proper assessment of their claims. Although the determination process under the *1989 Comprehensive Plan of Action* prescribed the application of the refugee definition of the

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Singapore and Thailand adopted policies of no-entry towards refugees from Indochina in the late 1980s; Muntarbhorn, *supra* note 9, at 97, 122, 139; Robinson, *ibid*, 181-183.

<sup>150</sup> For the history of the 1979 Meeting on Refugees and Displaced Persons in South-East Asia and the period before the *1989 Comprehensive Plan of Action*, see Arthur Helton, "The Comprehensive Plan of Action for Indo-Chinese Refugees" (1990) 8 *NYL Sch J Hum Rts* 111 at 111-113; Loescher, *supra* note 3, at 87; and Tran, *supra* note 147, at 471-480.

<sup>151</sup> *Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees*, Geneva, 13-14 June 1989, UN Doc A/44/523 (22 Sep 1989) [hereinafter *1989 Comprehensive Plan of Action*].

<sup>152</sup> UN, Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention & the 1967 Protocol relating to the Status of Refugees* (1992).

*Refugee Convention* and the *Protocol*, it did not stop individual countries from applying more restrictive standards when deciding whom to allow in and whom to send back. Furthermore, the plan put those who were not adequately assessed in danger of involuntary repatriation.<sup>153</sup>

The *1989 Comprehensive Plan of Action* terminated on 30 June 1996. By then, Australia had accepted some 19,500 people from overseas refugee camps for resettlement.

### 2.2.3.2. Australia and the boatpeople

Until 1975, illegal immigration and the arrival of refugees and asylum seekers were largely unknown phenomena in Australia. Australia also had no formal system for determining refugee status. The very small number of people who had sought asylum in Australia prior to 1975 were dealt with on an individual basis by the Minister for Immigration in exercise of the discretion to grant entry permits under section 6 *Migration Act*.

As refugees fled from Vietnam in ever-increasing numbers, Australia suddenly found itself forced to act as a country of first asylum.<sup>154</sup> Between 1976 and 1978, 55 boats carrying a total of 2,087 people arrived in Australia. Initially, the Australian Government accepted very few refugees, most of them Vietnamese and Cambodian students already residing in Australia at the time North Vietnamese forces moved into Saigon. By 31 July 1979 Australia had accepted a total of approximately 6,000 Laotian, Cambodian and Vietnamese refugees.

The Government tried to prevent the arrival of further boatpeople from Indochina by signing bilateral agreements with Hong Kong, Indonesia and Malaysia. Australia offered to accept refugees selected on the basis of skill and education from the camps in these countries if, in return, their governments took steps to stop the boatpeople from travelling

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<sup>153</sup> James Hathaway, "Labelling the 'Boat People'" (1993) 5 *HRQ* 686 at 686-91, 696. See also Fernando Chang-Muy, "International Refugee Law in Asia" (1992) 3 *NYU J Int'l L&P* 1171 at 1178; Helton, "The Comprehensive Plan of Action for Indo-Chinese Refugees" *supra* note 150, at 115-117; Robinson, *supra* note 12, at 187-222; Tran, *supra* note 147, at 505-516.

<sup>154</sup> A country of first asylum has been defined as a country "that receives a refugee on a temporary basis directly from the country of origin." Colin Fieman, "A State's Duty to Protect Refugees under Customary International Law: A Case Study of Thailand and the Cambodian 'Displaced Persons'" (1989) 21(1) *Colum HRLR* 287 at 287, note 1.

to Australia. This move gave an early indication that Australia would be unwilling to accept onshore refugee claims and rather select individual asylum seekers through offshore humanitarian programs; a principle that, together with deterrence and prevention strategies would soon become characteristic of Australia's immigration policy.<sup>155</sup>

The arrival of Indochinese boatpeople in Australia coincided with the landing of refugees from East Timor who left the island following the invasion by Indonesian troops in 1975 and the brutal military rule in the following years. Initially, Australia accepted asylum claims of East Timorese, but after recognising Indonesia's rule over East Timor in 1979, the Government gradually changed its policies and until the late 1990s expected refugees from East Timor to claim asylum in Portugal, the former colonial power in East Timor. In total, Australia allowed about 1,300 East Timorese to stay.<sup>156</sup>

In 1977, in response to the arrival of Indochinese refugees, the Government established the inter-departmental Determination of Refugee Status Committee (DORS) to consider refugee claims and make recommendations to the Minister.

The establishment of DORS crystallised the increasingly strict approach of the Government to refugees.<sup>157</sup> The Minister's discretion continued to be almost completely unlimited, particularly as DORS was not given any statutory basis and its recommendations were not binding on the Minister. The applications that were brought to DORS were decided only on an ad hoc basis. Applicants were also left without a chance to verbally defend and illuminate their claims and had no right of appeal or review. Essentially, DORS was not designed to assist those fleeing persecution and make decisions on humanitarian grounds, and the ministerial guidelines prohibited the Committee from granting a protection visa to any person fleeing from a natural or ecological disasters or from general political or social

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<sup>155</sup> For details on the selection of refugees from camps overseas and the admission of Indochinese refugees see Australia, Senate Standing Committee on Foreign Affairs and Defence, *Australia and the Refugee Problem* (1976) 31-36, 46-78.

<sup>156</sup> Cf Karyn Anderson, "East Timorese refugees not Portuguese" (1999) 73(2) *Law Inst J* 50-54; Penelope Mathew, "Lest We Forget: Australia's Policy on East Timorese Asylum Seekers" (1999) 11 *IJRL* 7 at 8, 19.

<sup>157</sup> Birrell, *supra* note 130, at 109-10; Crock, *Immigration and Refugee Law in Australia*, *supra* note 87, at 131; Crock, "The Peril of the Boat People" *supra* note 78, at 31-32; Asha Hans & Astri Suhrke, "Responsibility Sharing" in James Hathaway (ed), *Reconceiving International Refugee Law* (1997) 83 at 100; Hyndman, *supra* note 139, at 727-729.

upheaval. In practice, DORS determinations were simply an administrative process and, due to the composition of the Committee,<sup>158</sup> strongly influenced by political considerations.

At about the same time, the Australian Government commenced a deterrence policy which has characterised practices and policies dealing with refugees and undocumented migrants to this day. To prevent further people from coming to Australia, the Government responded to the increasing number of boatpeople by tightening entry control and enforcing immigration offences. For example, s 4 *Migration Amendment Act 1979* (Cth)<sup>159</sup> repealed the option to grant entry permits to persons such as boatpeople after they entered Australia.<sup>160</sup> The Act imposed all deportation and accommodation costs upon the “prohibited immigrants”<sup>161</sup> and barred them from entering the country again (s 27(1)(a)(aa)).<sup>162</sup> Furthermore, the Act criminalised the carriage and the employment of unauthorised non-citizens.<sup>163</sup>

The sharp rise of refugee arrivals, and the lack of regulations and facilities to deal with them, led the Senate Standing Committee on Foreign Affairs and Defence to recommend changes to the immigration law and the formulation of a new refugee policy for Australia.<sup>164</sup> This resulted in the announcement of the following four principles of a new Australian refugee policy on 24 May 1977:

1. Australia fully recognises its humanitarian commitment and responsibility to admit refugees for resettlement.
2. The decision to accept refugees must always remain with the Government of Australia.
3. Special assistance will often need to be provided for the movement of refugees in designated situations or for their resettlement in Australia.

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<sup>158</sup> The DORS Committee had one member each from the Department of Immigration and Ethnic Affairs (DIEA), the Department of Foreign Affairs, the Attorney General's Department, the Department of Prime Minister and Cabinet, and a UNHCR representative who did not have voting rights.

<sup>159</sup> No 117 of 1979.

<sup>160</sup> Formerly s 6(5) *Migration Act 1958*.

<sup>161</sup> Section 21A *Migration Act*, s 12 *Migration Amendment Act 1979* (Cth), now ss 207 ff *Migration Act*.

<sup>162</sup> Section 15(a) *Migration Amendment Act 1979* (Cth), now repealed.

<sup>163</sup> Sections 9, 17, 19 *Migration Amendment Act 1979*, ss 11C, 31B *Migration Act 1958*, now substituted.

<sup>164</sup> Australia, Senate Standing Committee on Foreign Affairs and Defence, *Australia and the Refugee Problem* (1976) 89-98.

4. It may not be in the interest of some refugees to settle in Australia. Their interests may be better served elsewhere. The Australian Government makes an annual contribution to the UNHCR which is the main body associated with such resettlement.<sup>165</sup>

Three years later, the Government formally implemented some of the obligations arising from the *Refugee Convention* and *Protocol* into national law. New s 6A(1)(a), (c), (e) *Migration Amendment Act (No 2) 1980*<sup>166</sup> exempted immigrants from the requirement to hold a visa upon arrival in Australia if they had been granted territorial asylum, refugee status or temporary entry permits on "strong compassionate or humanitarian grounds". This was followed by the introduction of a Special Humanitarian/Special Assistance immigration category to allow individuals beyond the refugee definition to settle if Australia had a humanitarian obligation towards them. This includes, for instance, victims of human rights abuses who remained in their country of origin, and persons who suffered gross discrimination rather than individual persecution.

Despite the attempts to deter further illegal arrivals, in 1979 and 1980 Australia continued to witness the arrival of large numbers of boatpeople, most of them ethnic Chinese who were fleeing persecution in Vietnam. Approximately 2,000 people arrived illegally in Australia in the 1979-80 financial year. This led the Government to take further steps to prevent boatpeople from coming. The *Immigration (Unauthorised Arrivals) Act 1980 (Cth)*<sup>167</sup> amended the *Migration Act* by creating a complex ensemble of immigration offences. This time, the new legislation targeted commercial carriers and other transporters who brought unauthorised persons to Australia.<sup>168</sup> The amending Act created and extended the powers of immigration officers, Federal Police and courts to board, search, detain and seize vessels and arrest illegal immigrants.<sup>169</sup> The 1980 amendments were followed in

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<sup>165</sup> Australia (Cth), House of Representatives, *Parliamentary Debates* (24 May 1977) 1714. See also McMaster, *supra* note 97, at 71.

<sup>166</sup> No 175 of 1980. Section 6A(1) reads "An entry permit shall not be granted to an immigrant after his entry into Australia unless one or more of the following conditions is fulfilled in respect of him, that is to say — (a) he has been granted, by instrument under the hand of a Minister, territorial asylum in Australia; (b) ...; (c) he is the holder of a temporary entry permit which is in force and the Minister has determined, by instrument in writing, that he has the status of refugee within the meaning of the *Convention relating to the Status of Refugees* that was done at Geneva on 28 July 1951 or of the *Protocol relating to the Status of Refugees* that was done at New York on 31 January 1967; (d)...; or (e) he is the holder of a temporary entry permit which is in force and there are strong compassionate or humanitarian grounds for the grant of an entry permit to him."

<sup>167</sup> No 112 of 1980.

<sup>168</sup> See, for example, ss 6, 8 *Immigration (Unauthorised Arrivals) Act 1980 (Cth)*, now repealed.

<sup>169</sup> *Ibid*, ss 12, 16, 17, 20, 26, now substituted.

1983 by the *Migration Amendment Act 1983* (Cth)<sup>170</sup> which increased the penalties for offences of document forgery and misuse<sup>171</sup> and facilitated the deportation of non-citizens.<sup>172</sup>

### 2.2.3.3. The 1985 and 1987 review of migration law

Humanitarian concerns led the Australian Government to review the *Migration Act* in 1985.<sup>173</sup> The Human Rights Commission was asked to undertake an inquiry into the recognition of human rights in Australian immigration law.<sup>174</sup> The Commission reviewed the entire *Migration Act* and the overall principles of Australia's migration policies. With respect to the latter, the Commission found

no statement of objectives or principles of immigration policy, no guidelines for selection of migrants, no indication as to how immigration levels should be determined and no statement of the rights of those who have settled in Australia.<sup>175</sup>

The Commission particularly criticised the broad discretion the Minister and his officers were given when deciding immigration applications. The inquiry also found that the way in which the arrest and detention of illegal immigrants were carried out was discriminatory against certain "racially visible" minorities, particularly against those from East Asian and South Pacific countries.<sup>176</sup>

In summary, the Commission suggested that

there are significant areas of practice, and of law, where prohibited non-citizens appear to receive less than the standard of treatment required for a full observance of human rights. The irregular and undefined status of prohibited non-citizens means that their treatment is very much at the discretion of DIEA officers and those administering migration detention centres. Thus they may be arrested without warrant and taken into custody where they may be held for periods substantially in excess of the one week envisaged in the [*Migration*] Act. Those who apply for change of status may find themselves in substantial difficulties while

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<sup>170</sup> No 112 of 1983.

<sup>171</sup> Sections 14, 18 *Migration Amendment Act 1983* (Cth), now ss 233A-234 *Migration Act*. Cf Australia, Human Rights Commission, *supra* note 139, at 55; Birrell, *supra* note 130, at 109-110. For details of the offences under the *Migration Act 1958* (Cth), their history and their enforcement see *infra* Section 4.1.

<sup>172</sup> Section 15 *Migration Amendment Act 1983* (Cth), now substituted.

<sup>173</sup> For more see, for example, Cooney, *supra* note 139, at 18-24.

<sup>174</sup> The report of the Human Rights Commission has been published as Australia, Human Rights Commission, *supra* note 139.

<sup>175</sup> *Ibid*, at 5, para 18.

<sup>176</sup> Cf *ibid*, at 56.

processing, often very lengthy, is being completed. Those who do not have, or are not subsequently granted, a temporary entry permit have an ambiguous legal status. They are frequently not permitted to work and may be ineligible for social security benefits. Thus they may be forced into debt and to live in conditions which do not necessarily respect their dignity as persons. ... They may also suffer deportation notwithstanding the fact that they have children born in Australia who as such have the status of Australian citizens and may not be deported.<sup>177</sup>

The inquiry of the Human Rights Commission was followed by further reviews of Australia's immigration system. Two years after the Commission's report had been released, the Government created a Committee to Advise on Australia's Immigration Policies, chaired by Mr Stephen Fitzgerald, to examine the impact of immigration on the country and to review the administrative and legal structures of the existing immigration regulations. The report of this inquiry was released in May 1988. It recommended fundamental changes to the policies and legislation dealing with immigration and with the administration of migrants.<sup>178</sup> The inquiry also found that public support of immigration schemes was fading and xenophobia growing, leading the Committee to recommend a reform of Australian migration law in order to restore confidence in the Government and its policies.<sup>179</sup> The *Migration Act* underwent minor amendments in 1987 and 1988.<sup>180</sup> Significant changes to the policies and law on immigration followed one year later.

#### 2.2.4. The Events of 1989

After a period of relatively low levels of unauthorised arrivals, two major events combined in the year 1989 which gave rise to illegal migration in new, unknown dimensions: first, the end of the Cold War and the change of governments in many countries of the former Soviet Bloc; and second, the violation of human rights in the People's Republic of China, particularly the massacre in Tiananmen Square in Beijing in June 1989. The former incident brought an end to long-standing exit restrictions and opened the borders for many

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<sup>177</sup> *Ibid.*, at 16-17.

<sup>178</sup> The report was released as Australia, Committee to Advise on Australia's Immigration Policies (Chairman: Stephen Fitzgerald), *Immigration: A Commitment to Australia* (1988).

<sup>179</sup> Richard Bedford, "International Migration in the South-Pacific Region" in Mary Kritz et al (eds), *International Migration Systems* (1992) 41 at 57; Cooney, *supra* note 139, 24-26.

<sup>180</sup> *Migration Amendment Act 1987* (Cth), *Migration Amendment Act 1988* (Cth), *Migration Amendment Act (No 2) 1988* (Cth).

people willing to leave political turbulence and economic despair in their home countries and seek a better life abroad, while the latter event caused increasing numbers of Chinese to seek asylum in nations around the world.

#### 2.2.4.1. The end of the Cold War

The division of the world in Socialist and Western blocs after the Second World War, known as the Cold War era, almost completely prevented migration and travel between the two blocs. The governments of the Socialist bloc under the leadership of the USSR severely restricted international travel of their citizens. Most of the Socialist countries denied free emigration either by hermetically sealing the borders or simply by the absence of a statutory entitlement for a passport without which it was unlawful to leave the country. Harsh penalties were placed on any attempt to cross the border illegally.

The most common example for restrictive emigration policies could be found in the former USSR. Despite its international obligations,<sup>181</sup> article 83 of the *Criminal Code of the Russian Soviet Federated Socialist Republic (RSFSR) 1960*<sup>182</sup> made it an offence to “exit abroad, enter into the USSR, or cross the border without the requisite passport or the permission of the proper authorities”. Furthermore, article 84 proscribed that flying out of the USSR without the requisite permit is punishable by deprivation of freedom for up to fifteen years. It has been reported that, prior to the law reform of 1987, Soviet citizens were subjected to several penalties, including loss of employment and imprisonment simply by making applications for passports and exit visas.<sup>183</sup> In later years it appears that

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<sup>181</sup> The USSR (succeeded by the Russian Federation) signed the *ICCPR* on 18 Mar 1968 and ratified it on 16 Oct 1973 (recorded in *Vedomosti Verchovnogo Soveta SSR 1973* No 40 Item 564). The recognition of the right to leave in international law began in the aftermath of the Second World War. The rights is explicitly guaranteed in art 13(2) of the *1948 Universal Declaration of Human Rights* (UN Doc A/811 (10 Dec 1948)), in art 12(2) *ICCPR* (999 UNTS 0, 1980 ATS 23), and in art 5(d) of the *1965 Convention on the Elimination of All Forms of Racial Discrimination* (660 UNTS 194, 1975 ATS 40), as well as in regional conventions in Europe, America and Africa. For further reading on the right to emigrate see, for example, Guy Goodwin-Gill, “The Right to Leave, the Right to Return and the Question of a Right to Remain” in Vera Gowlland-Debbas (ed), *The Problems of Refugees in the Light of Contemporary International Law Issues* (1996) 93 at 95-100; Rainer Hofmann, *Die Ausreisefreiheit nach Völkerrecht und Staatlichem Recht* (1988) 9-185, especially 29-176.

<sup>182</sup> *Criminal Code of the RSFSR*, 27 Oct 1960, *Vedomosti RSFSR* No 40 Item 591.

<sup>183</sup> Cf art 33 *Statute on the Passport System 1974 (USSR)* (*Sobranie Postanovlenii Praviel'stva SSSR* (1974) No 19 Item 109); arts 23-25 of the *Statute on Entry into and Exit from the USSR 1987*.



exit visas for emigration were not issued unless a capital sum was paid to repay “the Soviet Union’s investment in the education of the emigrant”.<sup>184</sup> Similar conditions existed in Vietnam, Lao PDR, North Korea, and, up until 1997, in PR China.<sup>185</sup>

In addition to the legal obstacles imposed on travel and emigration, many countries made use of physical obstacles such as the creation of ‘death-strips’ and by installing spring-guns along national borders to prevent people from leaving the country. These harsh measures imposed such barriers to departures that the numbers of refugees and migrants were minimal. From the viewpoint of most Western countries this was seen as a violation of human rights and international obligations. The very few people who managed to escape from the countries of the Socialist Bloc and slip through the ‘iron curtain’ were granted asylum almost immediately upon arrival. Not surprisingly, the clandestine trafficking of people from Socialist into Western countries was given a positive connotation and the traffickers — then called “refugee smugglers” and “escape agents” — were celebrated heroes.<sup>186</sup>

The relative political stability of the Cold War era came to a sudden end with the collapse of the Soviet Union and the fall of the Berlin Wall in late 1989. The disintegration of the former Soviet Bloc and the formation of new governments in ex-Socialist countries caused profound change, leading to liberalisation and more freedom, but also to increasing anarchy in some countries and growing nationalism in others, often involving generalised violence and armed conflict. For example, a study conducted in 1990-91 found that 164 ethno-territorial disputes erupted within the Commonwealth of Independent States, the successor organisation of the USSR.<sup>187</sup>

For the Asia Pacific region, the collapse of the Soviet Bloc was less dramatic than it was for the Soviet Union and the countries of Eastern Europe. Today, the PR China, the largest

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<sup>184</sup> Harold Berman, *Soviet Criminal Law and Procedure* (2<sup>nd</sup> ed, 1972) 1, 12-14, 152-156. See Dowty, *supra* note 74, at 63-76, 195-205; Hofmann, *supra* note 181, at 261-271; Plender, *supra* note 93, at 107-111; Mark Robin, “Soviet Emigration Law and International Obligations under United Nations Instruments” (1978) 13 *J Int’l L & Econ* 403-431 for comprehensive studies of Soviet emigration law.

<sup>185</sup> See *infra* Section 5.3.1.1.

<sup>186</sup> Loescher, *supra* note 3, at 21-22; Goodwin-Gill, *The Refugee in International Law*, *supra* note 11, at 53; Hofmann, *supra* note 181, at 313; Secretariat of the Budapest Group, *The Relationship between Organised Crime and Trafficking in Aliens* (1999) 26; Jerzy Sztucki, “Who is a refugee?” in France Nicholson & Patrick Twomey (eds), *Refugee Rights and Realities* (1999) 55 at 55-56.

socialist country in the world, is still governed by the Communist Party that successfully defended its rule against any attempt to introduce democracy and establish opposition. The Lao PDR, North Korea and Vietnam also remain under socialist rule. The transition in this part of the world was more subtle as some governments tried to economically liberalise their countries without opening them for democracy.<sup>188</sup> Many countries abandoned the exit restrictions of the past and opened their borders for trade and travel.<sup>189</sup> In circumstances where easier travel and migration coincided with decreasing political and social control, people took advantage of the new opportunities and moved to Western countries in search of freedom and employment, often beyond the control of governments.

#### 2.2.4.2. The Chinese student revolt

In early 1989, student protests demanding democracy and political freedom emerged throughout the PR China. The Chinese Government quickly sought to put down the protests that obtained much public attention around the world. Police and military forces responded to the protests with violence, persecution and imprisonment. The suppression of the protests reached a peak in June 1989 with the massacre on Beijing's central Tiananmen Square when the military killed many of the student demonstrators.<sup>190</sup>

Since the 1989 incidents, China has continuously been accused of violently repressing opposition and gaoling dissidents. The ongoing persecution caused many students and others involved in pro-democracy movements to seek asylum in Western countries, particularly Australia, Canada and the United States, which initially offered protection to many Chinese dissidents. Also, those already studying and working abroad at the time of the student revolt sought refugee status in their host countries.

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<sup>187</sup> Ghosh, *supra* note 3, at 44-46; cf Loescher, *supra* note 3, at 114-119; Schmid, *supra* note 36, at 53; Weiner, *supra* note 7, at 6.

<sup>188</sup> Cf Dupont, *supra* note 55, at 6; Skeldon, "East Asian Migration and the Changing World Order" *supra* note 41, at 174.

<sup>189</sup> For example, the *Criminal Law* 1997 of the People's Republic of China repealed the offence of "illegal emigration", formerly art 176 of the *Criminal Law* 1979.

<sup>190</sup> See, for example, the reports in "China erupts: 1400 shot dead, soldiers lynched" (5 June 1989) *The Australian* 1, 4-5; "Thousands run for their lives as troops open fire" (8 June 1989) *The Australian* 1, 8; "The Purge Begins!" (9 June 1989) *The Australian* 1, 8; Jim Pringle, "Secret police raid campuses" (10-11 June 1989) *The Australian* 1, 9; Pringle Wilson, "700 snatched as China sets up hotline to death" (12 June 1989) *The Australian* 1, 7.

### 2.2.4.3. Responses by receiving countries

The majority of the receiving countries of the post-1989 migratory movements, including Australia, responded to the increasing numbers of asylum seekers by placing legal and administrative restrictions on immigration and asylum. The shift in governments and policies in the (former) Socialist countries also caused a fundamental change of attitude towards those who had escaped from these countries: Formerly seen as refugees fleeing totalitarian political systems, they were now perceived as “economic migrants” who sought to benefit from opportunities offered by residence in wealthier economies. Many receiving countries witnessed decreasing tolerance towards asylum seekers, especially when public budgets became smaller and unemployment rates higher. Particularly disturbing to many countries such as Australia has been the fact that, since 1989, more and more asylum applicants have dared to independently take the initiative to migrate, rather than applying from overseas or waiting for their opportunity in refugee camps abroad. It is for that reason that refugees who seek onshore protection have been labelled “queue jumpers”.<sup>191</sup>

Stricter visa requirements, heavy border control, restrictive selection criteria and so-called safe third country policies implemented since 1989 have successfully reduced the number of legal immigrants and asylum seekers in most countries. But at the same time these policies have pushed asylum seekers into illegal avenues of migration such as migrant trafficking.

### 2.2.4.4. Australia's responses to the 1989 events

#### 2.2.4.4.1. *The Chinese students*

The Australian public, media and government were shocked by the events that took place in China in June 1989. Within 24 hours of the massacre that occurred on Tiananmen Square on 4 June 1989, the Australian Senate condemned “the brutality of the [Chinese]

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<sup>191</sup> Former Prime Minister Bob Hawke as cited in Glenn Nicholls, “Unsettling Admissions: Asylum Seekers in Australia” (1998) 11(1) *J Ref Studies* 61 at 76. Cf the analysis in Corlett, *supra* note 85, at 17-18.

army and the intransigence of the political hard-liners, which have been the cause of so many deaths and injuries".<sup>192</sup> The then Prime Minister, Mr Bob Hawke, in his speech before the House of Representative on 15 June 1989, expressed his "outrage at the massive and indiscriminate slaughter of thousands of unarmed Chinese pro-democracy demonstrators and bystanders" by a "regime of barbarity [and] callousness".<sup>193</sup>

At the time the Chinese army put down the protests in China, some 8,500 Chinese studied in Australia and in addition 7,000 Chinese held temporary working visas. Most of those supported the student protests in China and many feared for their safety if they had to return to China.<sup>194</sup> On 16 June, Mr Hawke announced that the visas of all 15,500 Chinese in Australia would be extended for twelve months and that the refugee quota would be boosted to allow more Chinese nationals to apply for permanent residence in Australia.<sup>195</sup> The twelve-months extension of entry permits granted to Chinese nationals gave the Government time to work on long-term solutions for the Chinese living in Australia. The answer was found in a temporary permit, valid until 30 June 1994, for all Chinese citizens who were living in Australia on 20 June 1989, provided they abandoned any refugee claims they submitted previously.<sup>196</sup> By the time the expiration of the entry permits came closer, the Government realised that temporary protection left the Chinese in great uncertainty and that many of those who had lived here since 1989 had been well integrated into Australian society. In November 1993, the Government repealed its policy of temporary protection and offered permanent residence to all Chinese nationals who arrived in Australia before 20 June 1989.<sup>197</sup>

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<sup>192</sup> See Australia (Cth), Senate *Parliamentary Debates* (5 June 1989) 3296-3297 (Senator Dunn); and see Australia (Cth), Senate *Parliamentary Debates* (6 June 1989) 3387 (Senator Macklin); Australia (Cth), Senate *Parliamentary Debates* (7 June 1989) 3499-3500 (Senator Evans); Australia (Cth), Senate *Parliamentary Debates* (8 June 1989) 3613-3614 (Senator Ray).

<sup>193</sup> Australia (Cth), House of Representatives, *Parliamentary Debates* (15 June 1989) 3523-3525 (Mr Hawke, Prime Minister).

<sup>194</sup> See, for example, the reports in Stuart Rintoul "Australia's Chinese in mourning as tourists warned to stay home" (5 June 1989) *The Australian* 8.

<sup>195</sup> Mark Chipperfield & Tracey Aubrey, "Hawke's haven for frightened Chinese" (17-18 June 1989) *The Australian* 1.

<sup>196</sup> Reg 18 *Migration Regulations*, 1990 No 1.

<sup>197</sup> Class 815 *Migration (1993) Regulations*. See generally Jean-Pierre Fonteyne "Refugee Determination in Australia" (1994) 6 *IJRL* 253 at 261; Nicholls, *supra* note 191, at 63; Australia, Senate Legal and

#### 2.2.4.4.2. *The 1989 reform of migration law*

Although the Hawke Government showed much compassion for the Chinese students, it demonstrated a firm stand on illegal immigration by seeking to deter those who applied for refugee status onshore rather than going through Australia's humanitarian offshore program.<sup>198</sup> Moreover, the Government moved to limit the broad, open-ended discretion to decide on entry, stay and removal, and replace it by a detailed codified system now in the *Migration Act* and the *Migration Regulations*.

The main features of the 1989 reforms introduced by the *Migration Legislation Amendment Act 1989* (Cth)<sup>199</sup> included the tightening of immigration and border controls and stricter provisions with respect to illegal entrants. Sections 6(1), (2), (3) and 11A *Migration Act* were amended so that any person who gained entry to or resided in Australia without any immigration documents or with false documentation automatically became a 'prohibited non-citizen' and subject to mandatory detention and removal.<sup>200</sup> Secondly, the *Migration Legislation Amendment Act 1989* removed some of the Minister's and immigration officers' discretion by codifying the grounds on which entry permits and refugee status are granted. Finally, the amendments introduced mandatory detention of unauthorised arrivals and their deportation after a 28-day "period of grace". Once a deportation order had been made, an entry permit could no longer be granted and even the Minister had no discretion to revoke the order.<sup>201</sup>

Many who had called for a humanitarian reform of Australian immigration law considered the amendments made by the *Migration Legislation Amendment Act 1989* unsatisfactory. The limitation of the Minister's discretion made refugee determination more predictable, but the procedure also became much more inflexible, streamlined and bureaucratic, rather than introducing an asylum system that would enable a quick, humanitarian solution for

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Constitutional References Committee, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (2000) 10.

<sup>198</sup> For further reading on the 1989 reform see James Crawford, "Australian Immigration Law and Refugees: The 1989 Amendments" (1990) 2 *IJRL* 626 at 626-627; Mary Crock, "Immigration: Understanding the New System" in Paul Baker & Mary Crock, *Immigration Law & Procedures* (1990) 1 at 2; id, *Immigration and Refugee Law in Australia*, *supra* note 87, at 127-128, 130-131; Hyndman, *supra* note 139, at 746-747; Arthi Patel, "Migrant Rights: Time to Reassess" (1996) 21(2) *Alt LJ* 67 at 68.

<sup>199</sup> No 59 of 1989.

<sup>200</sup> Now "unlawful non-citizen", s 14 *Migration Act*.

those in need. Moreover, the amendments to the *Migration Act* did not introduce the *Refugee Convention* definition of refugees into the Act and some of the new regulations were considered incompatible with the provisions of the Convention and the Protocol. Furthermore, the policy of mandatory detention and removal raises continuing concern about breaches of Australia's international obligations.<sup>202</sup> Ever since 1989, the policy of mandatory detention and the immediate removal of illegal entrants has been utilised in Australian immigration politics with bipartisan support as a deterrent to other boatpeople. While the countries of the European Union, the United States and Canada witnessed even higher numbers of unauthorised arrivals following the 1989 events, these nations primarily sought to fight abuse of their asylum systems, while Australian Labor and Liberal Governments have actively sought to prevent asylum seekers from coming to Australia.<sup>203</sup>

Soon after the 1989 reforms, as a result of the high number of asylum applications and the increasing workload of the DORS Committee in 1989 and 1990 (the number of asylum applications rose from 1,260 in 1989 to 12,130 in 1990),<sup>204</sup> the Minister further streamlined the procedure of asylum applications, gave the Committee more responsibilities and staff, and eventually renamed DORS to Refugee Status Review Committee (RSRC).<sup>205</sup>

### 2.2.5. Immigration Policies in the 1990s

The year 1989 marked the beginning of a new era of refugee flows and unregulated migration to Australia, Western Europe and North America. Since that year, hundreds of thousands of people have moved to Western countries where many of them applied for protection and asylum. In Australia, within one year the number of asylum applications

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<sup>201</sup> Section 8 *Migration Legislation Amendment Act* 1989 (Cth). The 28-day period was substituted by "removal as soon as practicable", s 13 *Migration Reform Act* 1992 (Cth), now s 198(1) *Migration Act*.

<sup>202</sup> Australia, Joint Standing Committee on Migration Regulations, *First Report to the Minister for Immigration, Local Government and Ethnic Affairs* (1989) 5, para 1.17, and 13-21; Crock, "Immigration: Understanding the New System" *supra* note 198, at 4; Hyndman, *supra* note 139, at 747-748; Brian Murray, "Australia's New Refugee Policies" (1990) 2(4) *IJRL* 620 at 622; Patel, *supra* note 198, at 70; and see *infra* Section 4.3.4.2.

<sup>203</sup> See, for example, Australia (Cth), House of Representatives, *Parliamentary Debates* (5 May 1992) 2371 (Mr Hand, Minister for Immigration); Richard McGregor, "Minister warns of boatpeople flood" (16 Nov 1999) *The Australian* 1.

<sup>204</sup> See *infra* Appendix D, Figure 28.

<sup>205</sup> For details see McMaster, *supra* note 97, at 77-78.

increased by over 10,000 cases from 1,260 in 1989 to 12,130 in 1990 and by another 4,610 to 16,740 in 1991.<sup>206</sup> Many of the applicants were Chinese citizens who initially entered the country as students and who, as a consequence of the June 1989 events in the People's Republic, became refugees 'sur place'.<sup>207</sup>

The number of asylum applications dropped again to 6,050 in 1992, but it remained at a high level throughout the 1990s. Some of the applicants (15.63% 1990-99) fell within the ambit of the *Refugee Convention* and were given protection visas to stay in Australia.<sup>208</sup> But the majority fled as a result of factors that are not recognised in international refugee law such as generalised violence, civil disorder and conditions of poverty. Consequently, their applications were rejected and most of the unsuccessful applicants were removed from Australia. The number of rejections reached its peak in 1997 when 14,170 applicants were refused and only 6.6% were granted refugee status. As illustrated in Figure 29,<sup>209</sup> throughout the 1990s the majority of applicants were nationals of the PR China, but only few of them have been granted protection visas (eg 2.8% in 1992-93, 1.3% in 1997-98). Following the Persian Gulf War and the Taliban rule in Afghanistan, many onshore refugee claimants arrived from the Middle East and the majority of them have been granted refugee status (eg 81.6% of all Iraqi applicants in 1995-96, 70.6% of Afghan applicants in 1998-99).

Starting with the events of the year 1989, the number of onshore asylum seekers reached an unprecedented level. That same year, the Australian Government commenced what retrospectively can be regarded as a policy of outlawing irregular migrants and deterring refugees. Progressively, unauthorised arrivals have been stripped of their rights and legal avenues for appeal against refusal of refugee status. Australian immigration policies in the 1990s have been characterised by measures that seek to stop people from entering Australia, and to detain and remove those who manage to reach Australian territory, rather than by attempts to find humanitarian solutions for international migration and refugee crises.

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<sup>206</sup> See *infra* Appendix D, Figure 28.

<sup>207</sup> Sur place refugees are refugees who are unable or unwilling to return to their country of origin because of events occurring after their departure from that country.

<sup>208</sup> See *infra* Appendix D, Figure 28.

<sup>209</sup> See *infra* Appendix D, Figure 28.

### 2.2.5.1. The 1991-93 amendments

With growing numbers of unauthorised arrivals in Australia, the Government continued to increase border surveillance and immigration controls to prevent illegal migrants from entering the country.

In an attempt to deter further arrivals and reduce the number of asylum applications, the Government severely restricted the protection offered to refugees. In 1990, the validity of refugee (restricted) visas was limited to "a period not exceeding 4 years".<sup>210</sup> One year later, a new category of entry permits for onshore applicants was established ("Domestic Protection (Temporary) Entry Permit") which provided that successful applicants would only be granted temporary visas, allowing them to stay in Australia for up to four years, and then apply for permanent residence.<sup>211</sup>

Throughout the years 1990-91 the large number of asylum applications created massive problems for the refugee determination system. In some cases, people who entered the country legally became illegal simply because their initial temporary permit expired and immigration authorities failed to decide their refugee claims in time. Those who arrived illegally and had been detained upon arrival remained in custody for up to four years before their cases were finalised.<sup>212</sup> Furthermore, the high influx of illegal entrants and their prolonged detention exceeded the capacities of the existing detention centres in Australia. The quick answer the Government found for overcrowded facilities was the opening of a

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<sup>210</sup> Reg 21 *Migration Regulations (Amendment) 1990* (No 237), repealed by Reg 8 *Migration Regulations (Amendment) Act 1991* (No 25).

<sup>211</sup> *Migration Regulations (Cth) Class 784, Reg 9 Migration Regulations (Amendment) 1991* (No 25). Cf Murray, *supra* note 202, at 621-624; Crawford, *supra* note 198, at 627; Nicholls, *supra* note 191, at 74.

<sup>212</sup> For example: The case of a Cambodian refugee who applied for refugee status on 13 Dec 1989, taken into detention on 21 Dec 1989 and who wasn't released and granted refugee status until Jan 1994, was brought to the UN Human Rights Committee. In April 1997 the Committee found that Australia had breached some of its obligations under the *ICCPR*; UN Doc CCPR/C/59/D/1993 (1993), reprinted in UN, Human Rights Committee, "Communication No.560/1993, A v Australia" (1997) 9 *IJRL* 506-527. Cf Australia, "Response of the Australian Government to the Views of the Human Rights Committee in Communication No.560/1993 (A v Australia)" (1997) 9 *IJRL* 674-678; Ryszard Piotrowicz, "The Detention of Boat People and Australia's Human Rights Obligations" (1998) 72 *ALJ* 417-425.



new large detention centre in the remote, disused mining camp of Port Hedland, Western Australia, in 1991.<sup>213</sup>

Humanitarian and international organisations criticised the handling of illegal immigrants in Australia, but the Government initially remained irresponsive. The *Migration Amendment Act 1992* (Cth),<sup>214</sup> passed in May 1992, sought, once again, to deter clandestine travel to Australia by enforcing the detention of unauthorised entrants<sup>215</sup> and prohibiting their release until their claims were finalised.<sup>216</sup>

Finally, in 1992, an attempt was made to reduce the processing delays and change the way in which immigration decisions were made and reviewed. Legislation was passed in December 1992 (*Migration Reform Act 1992* (Cth)<sup>217</sup>) and came into force on 1 September 1994. The *Migration Reform Act* continued the trend to codify the grounds for Ministerial action by reducing Ministerial discretion and regulating immigration decisions.

With respect to refugees, the Act inserted s 26B into the *Migration Act*, finally establishing a statutory category of protection visas for refugees:

26B (1) There is a class of temporary visas to be known as protection visas.

(2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.<sup>218</sup>

During 1993-94 the Australian Government realised that temporary protection caused too much uncertainty for refugees. The category of Domestic Protection (Temporary) Entry Permits was abandoned, and the Government returned to offer permanent protection to refugees, including those who applied onshore.<sup>219</sup>

Simultaneously, the Government stepped up its deterrence policy towards unauthorised arrivals by introducing new Division 4C ("Detention of unlawful non-citizens") into the

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<sup>213</sup> Cf Australia, Joint Standing Committee on Migration, *Asylum, Border Control and Detention* (1994) 2; Crock, "The Peril of the Boat People" *supra* note 78, at 33-34.

<sup>214</sup> No 24 of 1992.

<sup>215</sup> Section 3 *Migration Amendment Act 1992* (Cth), now ss 176-187 *Migration Act*.

<sup>216</sup> See s 54R *Migration Act* as amended by the *Migration Amendment Act 1992* (Cth), s 183 now *Migration Act*. Cf Australia, HREOC, *Those Who've come across the Seas: Detention of Unauthorised Arrivals* (1998) 23-24.

<sup>217</sup> No 184 of 1992 [hereinafter *Migration Reform Act*].

<sup>218</sup> Now s 36 *Migration Act*.

*Migration Act*. The changes tightened detention regulations drastically by prohibiting any release from detention without explicit authority and further limited the court's power to release 'unlawful non-citizens'.<sup>220</sup> Moreover, immigration officers were given broader authority to detain and remove all persons who arrive or stay in Australia without valid permission,<sup>221</sup> and all costs for detention and removal were laid upon illegal immigrants.<sup>222</sup>

The 1992 amendments also led to major changes for the review of refugee status decisions. The *Migration Amendment Act 1991* (Cth)<sup>223</sup> finally adopted the international definition of refugees of the *Refugee Convention*.<sup>224</sup> Subsequently the *Migration Amendment Act (No 2) 1992* (Cth)<sup>225</sup> formally introduced a normative framework for the determination of refugee status.<sup>226</sup>

The *Migration Reform Act* also created a new, independent administrative tribunal — the Refugee Review Tribunal (RRT) — to review decisions that refused or cancelled protection visas, replacing the Refugee Status Review Committee, which was established only three years earlier.<sup>227</sup> On the one hand, unlike the predecessor DORS and RSRC committees, the procedures of the new Tribunal were rather informal. Applicants now had to be heard before the Tribunal<sup>228</sup> and decisions had to be made on the basis of the *Refugee Convention* definition.<sup>229</sup> Cases that were refused by the RRT could be brought by appeal to the Federal Court, resulting in a major increase in the number of applications at review stage between the 1991-92 (229 cases) and 1992-93 financial year (2,339).<sup>230</sup> Also,

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<sup>219</sup> Section 9 *Migration Legislation Amendment Act 1994* (Cth): "Section 26B of the Principal Act is amended by omitting from subsection (1) "temporary".

<sup>220</sup> Section 54ZD(3), now s 196(3) *Migration Act*.

<sup>221</sup> *Ibid*, ss 54W, 54ZF, now ss 189, 198. For further reading see, for example, Australia, HREOC, *Those Who've come across the Seas*, *supra* note 216, at 17-18; Birrell, *supra* note 130, at 115.

<sup>222</sup> Div 5A — Costs etc of Detention, Removal and Deportation, s 16 *Migration Reform Act*, now Div 10, ss 209 ff *Migration Act*.

<sup>223</sup> No 86 of 1991.

<sup>224</sup> Section 3(e) *Migration Amendment Act 1991* (Cth).

<sup>225</sup> No 84 of 1992.

<sup>226</sup> Section 8 *Migration Amendment Act (No 2) 1992* (Cth), ss 22AA-22AD *Migration Act*, now substituted by *Migration Regulations 1994* (Cth), Subclass 200 — Refugee.

<sup>227</sup> Now ss 411-473 *Migration Act*.

<sup>228</sup> *Ibid*, s 166DB, now s 425.

<sup>229</sup> For an assessment of the operation and jurisdiction of the Refugee Review Tribunal see Susan Kneebone, "The Refugee Review Tribunal and the Assessment of Credibility: an Inquisitorial Role?" (1998) 5 *AJ Admin L* 78-96; cf Crock, *Immigration and Refugee Law in Australia*, *supra* note 87, at 129.

<sup>230</sup> Pt 8 *Migration Reform Act 1992*, now Pt 8 — Review of Decisions by Federal Court, *Migration Act*, ss 475-486. Figures from DIEA/DIMA, *Population Flows: Immigration Aspects* (1996/1997).

s 166BE *Migration Act* provided that the Minister could substitute the decision of the Tribunal with one more favourable to the applicant.<sup>231</sup> But on the other hand, the review of refugee claims was further streamlined. Also, the powers of the Tribunal to review Departmental and Ministerial decisions were limited.

### 2.2.5.2. 1994-1998

Starting in late 1994 the number of unauthorised arrivals Australia increased further. In the 1994-95 financial year the Immigration Department recorded 1,089 people arriving illegally by boat in addition to 485 unauthorised arrivals by air.<sup>232</sup> Simultaneously the number of onshore refugee applications reached a new peak with 10,490 cases in the 1993-94 financial year.<sup>233</sup> The implementation of the 1989 *Comprehensive Plan of Action* and the repatriation of Vietnamese refugees who were detained in camps throughout the Asia Pacific region led some of them to flee from the camps to Australia. Also, many of the new arrivals were Vietnamese who had been resettled in China and became displaced when the Chinese Government moved to redevelop the areas where the Vietnamese lived.

Once these migrants reached Australia, most of them applied for refugee status, which caused a significant increase in the number of asylum seekers (6,260 (1994), 7,630 (1995), 9,760 (1996)),<sup>234</sup> and also in the rate of refugee recognition (13.3% (1994), 9.1% (1995), 18.1% (1996)<sup>235</sup>). The growing rate of successful refugee applications caused fears that this would "send the wrong message abroad",<sup>236</sup> thus encouraging others to come to Australia. Calls were made for additional measures to reduce the number of asylum claims. Once again, these motions resulted in further amendments to the *Migration Act*.

The answer to increasing numbers of asylum claims was found in the 'safe third country' policy, a legal instrument that derives from the law of several European countries.<sup>237</sup> The

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<sup>231</sup> Now s 417 *Migration Act*.

<sup>232</sup> Figures taken from DIMA, *Fact Sheet 81: Unauthorised Arrivals by Air and Sea* (22 Nov 1999).

<sup>233</sup> See *infra* Appendix D, Figure 28.

<sup>234</sup> See *infra* Appendix D, Figure 29.

<sup>235</sup> *Ibid.*

<sup>236</sup> Crock, "The Peril of the Boat People" *supra* note 78, at 40-44.

<sup>237</sup> See, for example, the art 30 of the *Convention Applying the Schengen Agreement of 14 June 1985 between the Governments of the States of the BENELUX Economic Union, the Federal Republic of*

*Migration Legislation Amendment Act (No 4) 1994* (Cth)<sup>238</sup> introduced sections 91B-91D into the *Migration Act*. The changes to the legislation provided that applicants fell within the ambit of the *1989 Comprehensive Plan of Action* and had been assessed overseas for refugee status prior to arrival in Australia would not be reassessed by Australian authorities. Secondly, applicants who had arrived in Australia from designated safe third countries that are regarded as non-refugee producing countries or countries in which refugees can enjoy asylum without danger, became ineligible for refugee status,<sup>239</sup> and “should not be allowed to apply for a protection visa or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal”<sup>240</sup>

In addition to the implementation of the safe third country policy, the Government further restricted the availability of protection visas by inserting provisions to bar unsuccessful applicants from lodging any further applications for protection visas.<sup>241</sup>

The new policies soon became the subject of criticism.<sup>242</sup> It was argued that the safe third country practice would delegate the responsibility of protecting and determining refugees to countries which may have no or only questionable asylum procedures. Concern was also expressed that the removal of illegal migrants to third or transit countries could breach of

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*Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders*, 19 June 1990 (30 ILM 1991, 84); *Convention Determining the State Responsible for Examining Applications for Asylum Lodged on One of the Member States of the European Communities*, signed in Dublin, 15 June 1990 (30 ILM 1991, 425). See also the references in Joan Fitzpatrick, “Flight from Asylum: Trends Toward Temporary ‘Refuge’ and Local Responses to Forced Migrations” (1994) 35(1) *Virg JIL* 13 at 33, fn 91.

<sup>238</sup> No 136 of 1994.

<sup>239</sup> Sections 91D, 91E *Migration Act*. For Australia’s ‘safe third country’ provisions see Crock, *Immigration and Refugee Law in Australia*, *supra* note 87, at 154-155; McMaster, *supra* note 97, at 89-91; Savitri Taylor, “Australia’s ‘Safe Third Country’ Provisions: Their Impact on Australia’s Fulfilment of Its Non-Refoulement Obligations” (1996) 15 *Univ Tas LR* 196-235; and see also Australia, HREOC, *Those Who’ve come Across the Seas*, *supra* note 216, at 24-25.

<sup>240</sup> Section 91A *Migration Act*.

<sup>241</sup> *Ibid*, ss 48A, 48B; s 14 *Migration Legislation Amendment Act (No 6) 1995* (No 102 of 1995).

<sup>242</sup> See, for example, Nazaré Albuquerque Abell, “The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees” (1999) 11(1) *IJRL* 60 at 62-64; Australia, HREOC, *Those Who’ve Come Across the Seas*, *supra* note 216, at 22-23, 32-34; Fiona McKenzie, “What have we done with the Refugee Convention?” (1996) 70 *ALJ* at 820-821; Penelope Mathew, “Recent Diminution of Refugee Rights” (2000) 9(1) *Human Rights Defender* 18 at 19; Nick Poynder, “Recent Implementation of the Refugee Convention in Australia and the Law of Accommodations to International Human Rights Treaties” (1995) 2 *AJHR* 75 at 82-85; Taylor, “Australia’s Safe Third Country’ Provisions” *supra* note 239, at 209-231. See also Australia (Cth), Senate Legal and Constitutional Legislation Committee, *Hansard* (30 Sep 1994) 146-151 (Pierre M Fontaine, UNHCR Regional Representative); and UNHCR Executive Committee, *Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection*, UNHCR Doc Excom No 58 (XL) (1989).

the non-refoulement obligation under article 33 of the *Refugee Convention*.<sup>243</sup> This requires Australian authorities to be satisfied that the third country is willing and able to provide protection and offers a meaningful opportunity for the refugee to be heard before removal of an asylum seeker.<sup>244</sup> Since most of Australia's neighbours are not parties to the *Refugee Convention*, the *Refugee Protocol* and to most other major international human rights, it is a matter of serious concern if people are sent back to these countries.<sup>245</sup>

The new policy was first activated in early 1995 following the arrival of further boatpeople from PR China.<sup>246</sup> Since the safe third country provisions initially did not cover Chinese asylum seekers, the 1994 amendments were followed in January 1995 by a bilateral Memorandum of Understanding between Australia and the PR China<sup>247</sup> by which the latter became a designated safe third country for Vietnamese refugees who had been resettled in China.<sup>248</sup> As a consequence, applications for protection visas made by Vietnamese refugees from China were invalidated and the applicants immediately returned to China. Consequently, the number of refugee applications by Chinese citizens dropped from 8,912 by June 1994 to 4,335 by June 1995 and to 2,223 applications by June 1996.<sup>249</sup> Australia is currently seeking other possible countries with which to negotiate safe third country

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<sup>243</sup> Art 33(1) (Prohibition of expulsion or return ("refoulement")) *Refugee Convention* states that "no Contracting State shall expel or return ("refoule") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

<sup>244</sup> See *infra* Section 4.3.1.1.

<sup>245</sup> Cf Jens Vedsted-Hansen, "Non-admission policies and the right to protection: refugees' choice versus states' exclusion?" in Frances Nicholson & Patrick Tworney, *Refugee Rights and Realities, evolving International Concepts and Regimes* (1999) 269 at 270; Taylor, "Rethinking Australia's Practice of 'Turning Around' Unauthorised Arrivals" *supra* note 82, at 44-48. Similar criticism arose with respect to Australia's policy on refugees from East Timor, as Australia required them to apply for asylum in Portugal. For details see Mathew, "Lest We Forget" *supra* note 156, at 9. The UNHCR Executive Committee has expressed its concern about safe third country policies in EXCOM Conclusion No 58(XL) and 87 (XLX), but it approved of the Australian provisions in 1994; cf Australia, Senate Legal and Constitutional References Committee, *supra* note 197, at 68.

<sup>246</sup> The number of onshore refugee applicants from the PR China reached 10,677 in June 1993 and 8,912 in June 1994; DIMA, *Population Flows: Immigration Aspects* (1994) 14, (1995) 14.

<sup>247</sup> "Understandings on special arrangements for dealing with current unauthorised arrivals in Australia of Vietnamese refugees settled in China", Beijing, 25 Jan 1995, *Migration Regulations (Cth)* sch 11, reprinted in Taylor, "Australia's Safe Third Country' Provisions" *supra* note 239, at 234-235. Under the provisions of international refugee law, the allocation of responsibility for determination of refugee status from one country to another requires agreement between these countries to prevent disputes over responsibility and refoulement. Mathew, "Lest We Forget" *supra* note 156, at 38.

<sup>248</sup> *Migration Legislation Amendment Act (No 2) 1995* (Cth), No 1 of 1995, now Reg 2.12 *Migration Regulations 1994* (Cth). Cf Nicholls, *supra* note 191, at 66-67; Poynder, *supra* note 242, at 84-85.

<sup>249</sup> DIMA, *Population Flows: Immigration Aspects* (1995) 14, (1996) 14, (1997) 14.

agreements, including New Zealand, the United States, Canada and countries of the European Union.<sup>250</sup> This extension of the safe third country policy has to be seen in connection with a string of recent cases in which Australian courts have interpreted Australia's obligations under the *Refugee Convention* more restrictively, particularly in circumstances where applicants had access to protection elsewhere.<sup>251</sup>

The Government's rigid attitude towards illegal entry caused criticism on national and international levels. Critics argued that the mandatory detention of illegal entrants would infringe article 31(1) *Refugee Convention*.<sup>252</sup> Secondly, it was stated that the universal visa requirement did not recognise the fact that the majority of refugees have no time and no opportunity to obtain valid travel documentation and comply with emigration and immigration formalities. Furthermore, critics held that the Australian policy would not take into account that the transit points have in many cases been unsafe for the migrants.<sup>253</sup>

As a consequence of the restrictive measures towards onshore asylum claimants that had been implemented since 1993, the number of boatpeople entering the formal refugee determination status fell dramatically, while many others have been removed without having their cases assessed.

Figure 4: Entry of boatpeople into the formal refugee determination process, Australia 1993-1996<sup>254</sup>

Year of arrival	Entering refugee process		Not entering refugee process		Total
	number	%	number	%	
1993-94	199	100	-	-	199
1994-95	162	14.8	935	85.2	1,097
1995-96	61	10.4	528	89.6	589

<sup>250</sup> Crock, "The Peril of the Boat People" *supra* note 78, at 40-44; DIMA, *Protecting the Border: Immigration Compliance* (1999) 20; DIMA, *Fact Sheet 46: Australia's International Protection Obligations* (3 May 2000); Australia, External Reference Group on People Smuggling (1999) 22-23.

<sup>251</sup> See Jonathan Hunyor, "Warra Warra: Refugees and Protection Obligations in Relaxed and Comfortable Australia" (2000) 25(4) *Alt LJ* 227 at 228 and the cases cited there. For the case of East Timorese who have been sent back to Portugal see Anderson, *supra* note 156, at 50-54; Mathew, "Lest We Forget" *supra* note 156, at 33-37.

<sup>252</sup> Art 31(1) reads: "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence." See *infra* Section 4.3.4.

<sup>253</sup> Cf Crock, *Immigration and Refugee Law in Australia*, *supra* note 87, at 177-202; Goodwin-Gill, *The Refugee in International Law*, *supra* note 11, at 152.

<sup>254</sup> Australia, HREOC, *Those Who've Come Across the Seas*, *supra* note 216, at 33.

In the 1993-94 financial year, all boatpeople arriving in Australia entered the formal refugee determination process. One year later, only 14.8 percent did so, while the majority of boatpeople did not enter the process at all. In the 1995-96 financial year only 10.4 percent entered the formal refugee determination process. Concern grew over the fact that unauthorised entrants who were held in detention centres would not lodge asylum applications as a result of insufficient assistance with their claims and inadequate access to legal advice and to human rights organisations.<sup>255</sup> A recent study stated that, according to DIMA statistics, in 1996/97 80 percent of illegal boat arrivals who had been removed did not request legal advice while held in detention.<sup>256</sup>

The detention practice caused large numbers of complaints against the Immigration Department and its policies in general. This led the Australian Human Rights and Equal Opportunity Commission (HREOC) to conduct an inquiry into the human rights dimension of the detention of unauthorised arrivals. The report, released in 1999, found a number of human rights violations and breaches of international law by the current policy of mandatory detention practice and its implementation practice.<sup>257</sup>

### 2.2.6. Recent Developments: 1999 and after

In 1999, Australia witnessed the largest number of illegal immigrants arriving by boat since the landing of Indochinese boatpeople in the late 1970s. DIMA apprehended 4,174 unauthorised arrivals on 75 boats in the 1999-2000 financial year, compared with 920 people and 42 boats in 1998-99.<sup>258</sup> The number of boatpeople arriving in Australia grew rapidly towards the end of 1999. Within the month of November, 13 boats carrying 1,179 asylum seekers landed at Ashmore Reef and Christmas Island<sup>259</sup> placing further pressure on Australia's onshore humanitarian program and on the existing detention facilities. Anxiety over illegal immigration grew particularly with the detection of the Chinese vessel *Kayuen*

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<sup>255</sup> For details about the legal advice available to asylum seekers in detention see *infra* Section 4.3.2.

<sup>256</sup> Taylor, "Should Unauthorised Arrivals in Australia have Free Access to Advice and Assistance?" *supra* note 34, at 43. See also *infra* Section 4.3.4.

<sup>257</sup> See *infra* Section 4.3.4.

<sup>258</sup> DIMA, *Fact Sheet 81: Unauthorised Arrivals by Air and Sea* (27 Oct 2000).

<sup>259</sup> DIMA, Border Protection Branch, *Refused Immigration Clearance Report, December 1999* (2000) 30-31.

near Port Kembla (NSW) in April 1999 as it had landed further south than any other illegal vessel recorded.

Unlike earlier boat landings in Australia, the majority of the migrants who arrived in Australia illegally by boat during and after 1999 were of Middle Eastern origin, particularly from Iraq and Afghanistan. Many of the Iraqi refugees left the country during or after the Persian Gulf War 1990-91 in which Australia actively participated. Some fled as a result of the war, others were persecuted for ethnic or religious reasons, as the regime under President Hussein moved to suppress the Kurd minority in northern Iraq and the Shia Muslims in the south. Others again left Iraq for economic reasons as the embargo imposed on the country after the war, and enforced by the Australian Government, had a severe impact on the Iraqi population.<sup>260</sup>

Many refugees fled from Afghanistan after the Soviet invasion in 1979. More followed when the fundamentalist Taliban overthrew the government in 1994. Between 1994 and 2001, the Taliban regime imposed a radical Islamic rule on the country with severe punishments for non-conformists and discrimination against women and various religious and ethnic minorities.<sup>261</sup>

The majority of refugees from Iraq and Afghanistan initially found protection in neighbouring countries such as Jordan, Turkey, Iran and Pakistan. But when Jordan and Iran withdrew the protection offered to refugees, many people became displaced again and moved on in search for safer shores, which some of them were hoping to find in Australia. As mentioned earlier, Australia recognised many of them as refugees under the *Refugee Convention*.<sup>262</sup> However, given the growing number of unauthorised arrivals, public sentiments turned against the new immigrants, often subtly supported by the media and government statements.

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<sup>260</sup> Hossein Esmali & Belinda Wells, "The 'Temporary' Refugees: Australia's Legal Response to the Arrival of Iraqi and Afghan Boat-People" (2000) 23(3) *UNSW LJ* 224 at 226, 232.

<sup>261</sup> Esmali & Wells, *ibid*, at 227; UNHCR, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action* (2000) 115-116.

<sup>262</sup> See *supra* Section 2.2.5.1.



The Government responded to the high number of unauthorised arrivals with the passing of the *Migration Legislation Amendment Act (No 1) 1999* (Cth)<sup>263</sup> and the *Border Protection Legislation Amendment Act 1999* (Cth).<sup>264</sup> The *Migration Legislation Amendment Act (No 1) 1999* created new offences relating to migrant trafficking,<sup>265</sup> further reduced the rights of detainees and repealed the obligations to provide unlawful non-citizens with visa and refugee status information unless explicitly requested.<sup>266</sup>

The *Border Protection Legislation Amendment Act 1999* followed on 8 December 1999, implementing the recommendation of a Task Force on Coastal Surveillance that was established by the Prime Minister in response to the series of unauthorised boat arrivals that occurred along Australia's east coast. The Task Force's report, released in June 1999,<sup>267</sup> concluded a list of eighteen recommendations that called for stricter controls of Australia's coastline,<sup>268</sup> for better cooperation with overseas and international agencies<sup>269</sup> and for a stronger legal framework.<sup>270</sup>

On the basis of this report, Coastwatch, Australia's principal civil coastal surveillance agency was restructured, Coastwatch's budget heavily increased and the new position of Director General of Coastwatch created. The *Border Protection Legislation Amendment Act 1999* was the response to the Task Force's call for a new legal framework. The Act introduced a catalogue of rigid measures that sought to prevent and deter the arrival of further boatpeople. The Act created new and broader powers for law enforcement and immigration agencies to chase, board, move and destroy foreign vessels, within and beyond Australia's territorial and contiguous maritime zones if they are suspected of carrying illegal migrants to Australia.<sup>271</sup>

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<sup>263</sup> No 89 of 1999; previous title: *Migration Legislation Amendment Bill (No 2) 1998* (Cth). Cf Michael Head, "The Kosovar and Timorese 'Safe Haven' Refugees" (1999) 24(6) *Alt LJ* 279 at 280. An earlier (unsuccessful) attempt to repeal the obligations to inform illegal immigrants about their rights and reduce their rights to complain was undertaken by the *Migration Legislation Amendment Bill (No 2) 1996* (Cth).

<sup>264</sup> *Border Protection Legislation Amendment Act 1999* (Cth), No 160 of 1999.

<sup>265</sup> See *infra* Section 4.1.

<sup>266</sup> See *infra* Section 4.3.4.

<sup>267</sup> Australia, Prime Minister's Coastal Surveillance Task Force, *Report* (1999).

<sup>268</sup> *Ibid*, Attachment A, Consolidated List of Recommendations, recommendations 8-16.

<sup>269</sup> *Ibid*, recommendations 1-7.

<sup>270</sup> *Ibid*, recommendations 17-18.

<sup>271</sup> Div 12A — Chasing, Boarding etc Ships and Aircraft, ss 245A-245H *Migration Act*.

Further restrictions were imposed on asylum seekers in pursuit of the Government's deterrence policy. The *Migration Amendment Regulations 1999 (No 12)*<sup>272</sup> created a category of temporary protection visas for successful onshore applicants, which excludes them from welfare benefits and family reunification and limits the protection to a maximum of three years if the applicant arrived in Australia illegally.<sup>273</sup>

Part 6 of the *Border Protection Legislation Amendment Act 1999* (Cth) sought to prevent 'forum shopping', a term used to label migrants who have chosen Australia as their destination rather than trying to seek asylum in geographically closer countries.<sup>274</sup> The amendments introduced ss 91M-91Q into the *Migration Act*, which provide that

a non-citizen who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country, should seek protection from the third country instead of applying in Australia for a protection visa, or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.<sup>275</sup>

In the eyes of the Minister this measure was "very important in sending an appropriate signal to people who are intent on travelling to Australia unlawfully and bypassing places where they can make asylum claims, or leaving situations where they are otherwise safe — breaching our law, engaging with organised crime."<sup>276</sup> Moreover, people who unsuccessfully applied for protection visas in Australia, who had then been removed and later re-entered the migration zone have been barred from lodging further applications.<sup>277</sup>

The introduction of the provisions under ss 91M-91Q must be seen in connection with the existing safe third country regulation. Together, these measures are an attempt to shift Australia's protection obligation to other countries and facilitate the immediate removal of unauthorised arrivals. The practice has drawn strong criticism. A recent Senate inquiry

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<sup>272</sup> No 243 of 1999.

<sup>273</sup> For details see *infra* Section 4.3.1.2.

<sup>274</sup> Cf DIMA, *Protecting the Borders: Immigration Compliance* (1999) 8: Migrants "with a bonafide protection need [who] seek to choose a particular migration outcome as well as gain protection"; and see Australia (Cth), House of Representatives, *Parliamentary Debates* (22 Nov 1999) 9194 (Mr Ruddock, Minister for Immigration and Multicultural Affairs): People "who have tried to migrate to Australia and other countries before and had their applications refused." On the argument whether or not refugees can choose the country of asylum see generally Vedsted-Hansen, *supra* note 245, at 276-279.

<sup>275</sup> Section 91M *Migration Act*.

<sup>276</sup> Australia (Cth), House of Representatives, *Parliamentary Debates* (22 Nov 1999) 9194 (Mr Ruddock, Minister for Immigration and Multicultural Affairs). See also Australia, External Reference Group on People Smuggling (1999) 22; Fitzpatrick, *supra* note 237 at 16, 18; Sztucki, *supra* note 186, at 65, 73.

found no evidence “that there are substantial numbers of forum shoppers” and that “it is important to distinguish between forum shopping — which implies an element of choice — and the loss of refuge in another country.”<sup>278</sup> The present legislation does not adequately establish this distinction. In this context, one critic has suggested that

[i]t is yet to be argued that Australia would be fulfilling its Convention obligations by sending asylum seekers to a desert island, from where there would be no risk of being returned to a place where they would be persecuted — but such is the logic of the approach.<sup>279</sup>

The harsh measures introduced by the *Border Protection Legislation Amendment Act 1999* led to protests, unrest, hunger strikes and suicide threats in the detention centres.<sup>280</sup> Although the amendments responded to strong public sentiments against boatpeople, the creation of the new, “secondary” class of refugees has been heavily criticised by humanitarian and refugee organisations.<sup>281</sup> Concern has been expressed that the target of these rigid measures are genuine refugees and not the criminal traffickers who facilitate their travel. The fact that successful applicants cannot bring their family members to Australia can interfere with the right of family life as set out in article 17 of the *International Covenant on Civil and Political Rights (ICCPR)*.<sup>282</sup> Furthermore, no

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<sup>277</sup> Section 3 *Border Protection Legislation Amendment Act 1999* (Cth), s 48A(1A) *Migration Act*.

<sup>278</sup> Australia, Senate Legal and Constitutional References Committee, *supra* note 197, at 19.

<sup>279</sup> Hunyor, *supra* note 251, at 228. Hunyor continues by saying “The provision confirm that no connection to a third country is required for Australia to be able to defer its protection obligations. Furthermore, the asylum seekers must take all possible steps to avail themselves of a right to go elsewhere — it would seem it is not good enough that they have taken all reasonable steps. ... They raise the very real possibility of ... ‘refugees in orbit’, whereby asylum seekers are sent from country to country, each denying responsibility.” at 229, 230. See also Albuquerque Abell, *supra* note 242, at 68.

<sup>280</sup> See, for example, the reports in David Reardon, “Boat People Starve for Better Conditions” (5 Feb 2000) *The Age*; Penelope Debelle, “Woomera stand-off” (9 June 2000) *The Age*; Megan Saunders & Matthew Spencer, “Refugees Riot in Desert” (29 Aug 2000) *The Australian* 1, 6; “Woomera riot reflects poor refugee policy” (30 Aug 2000) *The Australian* 12. See also the reports on ABC Television, “A Well Founded Fear of Persecution” *Four Corners* (14 Mar 2000); *id*, “The Queue Jumpers” *Four Corners* (16 Oct 2000).

<sup>281</sup> Cf Mathew, “Recent Diminution of Refugee Rights” *supra* note 242, at 18-19. For public views on the unauthorised arrivals in 1999 see the summary and analysis in Corlett, *supra* note 85, at 13-16.

<sup>282</sup> Art 17 *ICCPR* provides that everyone has the right to the protection of interference or attacks of family life. In 1989 the UN Human Rights Committee stated that “the exclusion of a person from a country where close members of family are living can amount to an interference within the meaning of Article 17(1).” Richard Plender & Nuala Mole, “Beyond the Geneva Convention: constructing a de facto right of asylum from international human rights instruments” in Frances Nicholson & Patrick Twomey (eds), *Refugee Rights and Realities* (1999) 81 at 99.

evidence has been found that limiting protection to a period of three or four years deters desperate migrants who are fleeing persecution or poverty.<sup>283</sup>

### 2.2.7. The Tampa Incident and the Pacific Solution

Australia's increasingly restrictive refugee policy and the hostility towards unauthorised arrivals caused news headlines around the world in August 2001, when an Indonesian ferry with 433 Afghan and Sri Lankan boatpeople sank near Christmas Island en route to Australia. The MV Tampa, a Norwegian cargo ship, rescued the migrants. Indonesia, Australia, and Norway debated who was responsible for the migrants. When the captain of the Tampa refused to turn away from Australia, the Government sent armed Special Air Services (SAS) troops to seize the Tampa and prevent it from approaching Christmas Island.<sup>284</sup> After six days, approximately 300 migrants were taken to the tiny island nation of Nauru, and 160 migrants were taken to New Zealand, to determine if they are refugees.

The legality of the action taken against the MV Tampa was uncertain and six hours after the seizure of the Tampa, the Government introduced the *Border Protection Bill 2001* into Parliament to retrospectively legalise its actions. If enacted, the Bill would have also authorised the Government to tow any ship out to sea, including those sinking or otherwise in distress, thus putting people at risk and their lives in jeopardy. UNHCR expressed the view that the enforcement action under the Bill could violate the obligations under the *Refugee Convention* if ships were forcibly removed from Australian waters.<sup>285</sup> Moreover, the Bill, if enacted, would discourage ships from rescuing people in distress at sea, as in the late 1970s when merchant vessels refused to rescue Vietnamese boatpeople in the South China Sea and the Pacific Ocean. This *Border Protection Bill* was rejected in the Senate on 30 August 2001.

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<sup>283</sup> See the discussion *infra* Section 4.3.4.1. For comments and reviews of the *Border Protection Legislation Amendment Bill 1999* see for example, "Refugee Visa no Answer to Crisis" (20-21 Nov 1999) *The Weekend Australian* 18; Richard McGregor, "Riding the Refugee Wave" (20-21 Nov 1999) *The Weekend Australian* 21; James Murray, "They're Refugees not Invaders" (23 Nov 1999) *The Australian* 15; "Refugee Plan Cruel, Unjust and offensive" (27-28 Nov 1999) *The Weekend Australian*.

<sup>284</sup> Vanda Carson & Natalie O'Brien, "The storming of the Tampa" (30 Aug 2001) *The Australian* 3.

<sup>285</sup> UNHCR, "UNHCR voices growing concern over ship saga" (29 Aug 2001) *UNHCR Press Release*.

On 17 September, the Government introduced four new Bills into Parliament and in addition reintroduced the *Migration Legislation Amendment (Judicial Review) Bill 1998* and the *Migration Legislation Amendment Bill (No 1) 2001*. Both Houses of Parliament passed all six Bills on 27 September 2001.<sup>286</sup>

The handling of the Tampa incident and the legislation passed in the aftermath demonstrated Australia's unwillingness to accept onshore asylum seekers who arrive in Australia unlawfully. Instead, the Government sought to prevent and deter people from coming, and turn around those who are migrating irregularly.

Additionally, the Government attempted to coordinate its deterrence policy with neighbouring countries and establish arrangements under which these nations agree to accept asylum seekers temporarily until they are granted refugee status and find resettlement places. Given Indonesia's strong reservations towards accommodating refugees for Australia, the Government negotiated a so-called "Pacific Solution" by reaching agreements with Nauru and Papua New Guinea to accommodate asylum seekers for processing in return for substantial financial aid.<sup>287</sup> Discussions have also been held with Fiji,<sup>288</sup> Kiribati, Niue and Palau.<sup>289</sup> At the time this study was completed, these plans had not materialised.

The *Border Protection (Validation and Enforcement Powers) Act 2001* introduced a range of amendments to the *Migration Act* and the *Customs Act*. These measures retrospectively legalised the action taken against the MV Tampa and other vessels that had been turned

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<sup>286</sup> *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth), No 126 of 2001; *Migration Act (Excision from Migration Zone) Act 2001* (Cth), No 127 of 2001; *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth), No 128 of 2001; *Migration Legislation Amendment Act (No. 1) 2002* (Cth), No 129 of 2001; *Migration Legislation Amendment Act (No. 5) 2001* (Cth), No 130 of 2001; *Migration Legislation Amendment Act (No. 6) 2001* (Cth), No 131 of 2001.

<sup>287</sup> Cf the reports in Sian Powell, "Nauru makes \$20m in cash and kind" (11 Sep 2001) *The Australian* 5; id, "Paying guests welcome" (14 Sep 2001) *The Australian* 17; id, "Nauru baulks at third batch of asylum-seekers" (1 Oct 2001) *The Australian*; Megan Saunders, "PNG plan for latest refugees" (10 Oct 2001) *The Australian* 1; id, "PNG to take boatpeople" (12 Oct 2001) *The Australian*; Robert Garran & Megan Saunders, "Nauru rescues PM again" (12 Dec 2001) *The Australian*; "Australia, New Zealand" (2002) 9(1) *Migration News*.

<sup>288</sup> Robert Garran, "Fiji may be next stop for boatpeople" (19 Oct 2001) *The Australian*; Mary-Louise O'Callaghan, "Fiji says 'no' to boatpeople" (1 Nov 2001) *The Australian*.

<sup>289</sup> Megan Saunders & Matt Price, "Refugee 'Pacific solution' in limbo" (27 Oct 2001) *The Australian*; Mary-Louise O'Callaghan, "Misadventures in paradise" (2 Nov 2001) *The Australian* 13; Michael Madigan & Mark Dunn, "New offshore deal for boatpeople" (13 Nov 2001) *The Australian*.

around.<sup>290</sup> The Bill introduced new provisions regarding the powers of Commonwealth officers in relation to persons aboard suspect vessels and regarding the detention and relocation of such persons. Under the new provisions officers have authority to search and detain any person suspect of entering Australia unlawfully and return the person to a ship or aircraft, if necessary using reasonable force.<sup>291</sup> The Act prevents any legal challenges of any action taken under the new provisions,<sup>292</sup> but unlike the earlier *Border Protection Bill 2001*, Commonwealth officers are not authorised to tow vessels into international waters. Finally, the new amendments brought further changes to the trafficking offences under the *Migration Act*.<sup>293</sup>

The *Migration Legislation Amendment (Excision from Migration Zone) Act* sought “to discourage unauthorised arrivals, people smuggling and to promote the integrity of Australia’s entry and visa processes”.<sup>294</sup> Essentially, the Act removed Australia’s north and northwestern overseas territories, the key landing sites for unauthorised boat arrivals, from Australia’s international responsibilities for refugees. Asylum seekers who arrive at these offshore territories can no longer apply for protection visas. The Bill declared the territories of Christmas Island, Ashmore and Cartier Islands, Cocos (Keeling) Islands and any other offshore territory prescribed as “excised offshore places”,<sup>295</sup> and prevents non-citizens who enter Australia at one of these places unlawfully (“offshore entry persons”) from making a valid visa application.<sup>296</sup> With the excisions of Ashmore and Cartier Islands, Christmas Island and Cocos (Keeling) Island, and the attempts to establish processing centres in South Pacific nations, some observers stated that the Government intended to process all future asylum seekers outside Australia’s migration zone.<sup>297</sup>

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<sup>290</sup> Sections 5, 6 *Border Protection (Validation and Enforcement Powers) Bill 2001*.

<sup>291</sup> Sections 185AA, 185AB *Customs Act*, ss 245F(9), (9A), 245FA, 245FB *Migration Act*.

<sup>292</sup> Sections 185(3AAA), (3AAB), (3AB), 185AA(6) *Customs Act*, ss 245F(8A), (8B), (9B), 245FA(6) *Migration Act*.

<sup>293</sup> See *infra* Section 4.1.

<sup>294</sup> Australia (Cth), House of Representatives, *Migration Amendment (Excision from Migration Zone) Bill 2001, Explanatory Memorandum* (2001) 2.

<sup>295</sup> Section 5(1) *Migration Act* (as amended).

<sup>296</sup> *Ibid*, s 46A(1). The Minister can, however, grant exceptions and accept applications from offshore entry persons if the Minister thinks “it is in the public interest to do so”,

<sup>297</sup> Megan Saunders & Natalie O’Brien, “Little boats that broke Howard’s line in the water” (21 Sep 2001) *The Australian* 9; Sian Powell & Megan Saunders, “Stubborn illegals hold ship hostage” (22-23 Sep 2001) *The Weekend Australian* 17.

The *Migration Amendment (Excision from Migration Zone) Consequential Provisions Act 2001* (Cth) introduced legislation that allows Government officials to detain any non-citizen suspected of entering an excised offshore place unlawfully until the person is removed from Australia. Under new s 198A *Migration Act* offshore entry persons can no longer be taken into immigration detention in Australia and they do not enjoy the (limited) rights of immigration detainees. Moreover, they are precluded from instituting or continuing any proceeding against Commonwealth action relating to their entry, status, detention and removal, leaving the people completely at the mercy of the executive officers.<sup>298</sup>

For those offshore entry persons who are found to be subject to persecution, substantial discrimination or gross violation of human rights in their home countries, the *Migration Amendment (Excision from Migration Zone) Consequential Provisions Act 2001* (Cth) created a new visa class (secondary movement offshore entry (temporary) visa) which allows applicants to obtain temporary protection in Australia for a period of three years.<sup>299</sup> Secondly, a new visa class has been created for applicants who apply for protection in Australia from transit countries (secondary movement relocation (temporary) visa),<sup>300</sup> which allows them to enter Australia for a period of five years. Successful applicants can also apply for a permanent protection visa after 4½ years.<sup>301</sup>

The new visa classes seek to encourage people to apply for protection visas from overseas rather than attempting to travel to Australia and apply for asylum upon arrival. Persons who apply from transit countries such as Indonesia are entitled to a greater range of benefits, including family reunion and the opportunity to apply for permanent protection after a period of 54 months. However, these measures place additional strain on transit countries. Moreover, the new arrangements may put people at risk of removal and refoulement, as it remains unclear in what way the transit country is expected to offer effective protection. For instance, it is not required that the transit country is a signatory to

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<sup>298</sup> Section 494AA *Migration Act*.

<sup>299</sup> Subclass 447 *Migration Regulations*; see *infra* Section 4.3.4.2.

<sup>300</sup> *Ibid*, subclass 451.

<sup>301</sup> Cf Australia (Cth), House of Representatives, *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Bill 2001, Explanatory Memorandum* (2001) 3.

the *Refugee Convention*. In that respect, the new arrangements circumvent the safe transit country/safe third country provisions that were introduced in 1995.

The Government also believed that by excising Australia's offshore territories and thus widening the geographical distance between Indonesia and the Australian migration zone, the journeys of prospective boatpeople will not only be much longer, but they also be more easily deterred. It is predictable that these changes will further increase the expenses for and sophistication of trafficking operations and the income of criminal organisations. The amendments will also make the journey more dangerous, putting further people at risk and their lives in jeopardy.

The *Migration Legislation Amendment Act (No 6) 2001* introduced, inter alia, new ss 91R-91X into the *Migration Act*, which determine the interpretation of the terms "persecution", "membership of a particular social group", "non-political crime" and "particularly serious crime" as contained in the definition of refugees under article 1 of the *Refugee Convention*. By creating these provisions, the Government sought to restrict judicial interpretation of the refugee definition. These amendments responded to Ministerial concern that courts interpret the refugee definition too generously, particularly in circumstances "where hardship or serious inconvenience has been considered to be persecution and situations where mistreatment is feared for reasons other than those intended to be covered by the [Refugee] Convention", thus causing "increasing numbers of attempts to misuse Australia's onshore protection processes".<sup>302</sup>

At the same time these four Acts were passed, the Government also reintroduced two Bills that had been proposed earlier, but were not enacted because they lacked support from the Opposition: The *Migration Legislation Amendment (Judicial Review) Bill 1998*, which prevents access to judicial review of migration cases in the higher courts, and the *Migration Legislation Amendment Bill (No 1) 2001*, which bans class actions in migration cases. By 31 December 2001, these two Bills had been referred to a Senate Committee for further consideration.

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<sup>302</sup> Australia (Cth), House of Representatives, *Migration Legislation Amendment Bill (No. 6), Explanatory Memorandum* (2001) 2.



## 2.3. Conclusion

Migration within the Asia Pacific region is the result of complex circumstances, conditions, perceptions and motivations which cause people to leave their home country and seek protection, employment, or simply a better a life abroad. For centuries people have moved across international borders and settled in foreign countries. Population movements have been integral parts of the social and economic developments in the region.

International instruments provide only limited safeguards for migrants. The *Convention and Protocol relating to the Status of Refugees* are important measures for the protection of those fleeing persecution, but there is no equivalent instrument for those fleeing generalised violence, economic hardship and environmental disasters. While the causes that generate migration have grown in their intensity and complexity, the policy mechanisms on international, regional and national levels have barely kept pace with the expanding problem.<sup>303</sup>

Australia's wealth, stability and multicultural society are the major features that make this country an important destination for migrants from around the world. Particularly under the 'populate or perish' policies after World War II, Australia has witnessed large scale immigration in the form of family reunification and under the humanitarian and skilled migrants programs. Following the First Oil Crisis, increasing unemployment, and the arrival of asylum seekers from 1975 onwards, Australia — as most other western nations — began to place restrictive measures on immigration. A survey undertaken in 1998, analysing the immigration policies of the major destination countries of migratory movements, found that over the last twenty years the majority of these countries have continuously lowered the immigration intake regardless of the growing demand for access to these countries.<sup>304</sup> The changes in migration law and regulations effectively reduced the

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<sup>303</sup> See *infra* Chapters Five and Six.

<sup>304</sup> Schmid, *supra* note 36, at 36, referring to the *Population Policy Data Bank* maintained by the Population Division of the Department for Economic and Social Information and Policy Analysis of the UN Secretariat.:

number of legal immigrants. Irregular immigration has been further criminalised and detention and deportation have become the simplistic answers to unwanted arrivals.

The concern about the phenomenon of asylum seekers and unauthorised arrivals in Australia appears to be out of proportion. It needs to be reminded that the world's poorest countries carry the world's refugee burden overwhelmingly. Secondly, the majority of illegal foreigners in Australia are not unauthorised immigrants. For example, on 30 June 2000 DIMA estimated that 58,748 people overstayed their visas. The largest groups of overstayers are UK (5,759) and US citizens (4,649).<sup>305</sup> This compares to 5,870 unauthorised arrivals in the 1999-2000 financial year. It seems unjust to criminalise the few fleeing persecution and economic hardship while ignoring the many who arrive from wealthy countries and continue to stay after their visas have expired.

It is very questionable that Australia continues to be hostile towards accepting onshore refugee claims and rather select individual asylum seekers through offshore humanitarian programmes. Although Australia, like any other country, has legitimate reasons to maintain control over who does and who does not enter the country, the offshore humanitarian programme appears to be a way that circumvents the key principal of international refugee law: that is to protect people outside their country.

The increasing criminalisation of migration has not reduced the incentives for moving to safe and wealthy countries. It meant rather that potential migrants started looking for illegal ways of migration, which they found in professional traffickers. As stated elsewhere:

Where no local protection exists, people escape however they can, and they will resort to desperate measures to seek refuge in Western countries. The lack of any real opportunity to apply for resettlement has made such measures necessary.<sup>306</sup>

Figure 5: Government policies concerning level of immigration, 1976-1993

Year	Immigration			
	to raise (%)	to maintain (%)	to lower (%)	total (%)
1976	7.1	86.5	6.4	100
1983	4.0	77.9	16.7	100
1986	3.5	77.1	19.4	100
1989	4.7	63.7	31.8	100
1993	4.2	60.5	35.3	100

<sup>305</sup> DIMA, *Protecting the Border: Immigration Compliance* (2001) 103, 106.

<sup>306</sup> Loescher, *supra* note 3, at 94.

Tightening up borders and outlawing irregular arrivals has so far been unsuccessful in reducing the number of persons seeking to enter Australia illegally. None of the amendments that have been made to the Australian *Migration Act* in recent years has taken into account the migration pressures that exist in the Asia Pacific region, and none of the amendments have addressed the incentives for illegal migration. As long as the governments of industrialised countries, including Australia, fail to do so, illegal migration will continue to increase to yet unknown scales.

## CHAPTER THREE

### ORGANISED CRIME

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**G**rowing migration pressures and increasing numbers of people willing or forced to move abroad have caused many destination countries, including Australia, to place restrictions on legal ways of immigration, and to criminalise those who attempt to arrive in irregular or clandestine ways. The lack and limitations of legal migration opportunities has led people to look for other, illegal ways to migrate. Often, and in growing numbers, this way is found migrant trafficking. Over the last two decades, trafficking in migrants has become a significant source of income for criminal organisations. Every year, thousands of migrants are being trafficked to Australia, throughout the Asia Pacific region and around the world by increasingly sophisticated criminal enterprises that earn billions of dollars by exploiting those fleeing poverty and persecution.

The aim of this Chapter is to explain the organised crime aspect of migrant trafficking in the Asia Pacific region. In order to develop appropriate and effective countermeasures, this Chapter seeks to identify and investigate the structural patterns of migrant trafficking.

Generalisations about migrant trafficking operations and about the organisations engaged therein are difficult to make. A large part of the current knowledge on trafficking in migrants derives from media or law enforcement reports and only very few analytical studies have been undertaken to examine the structure and activities of migrant trafficking organisations. Furthermore, law enforcement action against trafficking operations is relatively new, especially compared to efforts against other aspects of organised crime. Consequently, the activities of migrant trafficking organisations are constantly changing.

From an Australian perspective, however, two types of trafficking can be identified: overt and covert arrivals. Especially the final part of the illegal voyage is largely determined by the question whether the persons trafficked seek to immigrate clandestinely and undetected and then disappear in the community (so-called covert arrivals) or whether they seek to

reach the territory of the destination country and then claim asylum (often referred to as overt arrivals). This has major implications for the way in which trafficking is carried out. Overt arrivals, for instance, require little sophistication and are usually done by boat. They predominantly involve asylum seekers from the Middle East who seek refuge in Australia. Particularly the final part of the journey, the boat trip from Indonesia to Australia, is often organised only in a very rudimentary way and there is no obvious connection to other organised crime activities. Fees for trafficking are usually paid in full prior to arrival, and contact with the traffickers ceases once the migrants reach Australia. In contrast, covert arrivals require sophisticated means such as high quality forged identity documents or hidden compartments in boats to circumvent border controls and arrive undetected. Most covert arrivals in Australia have been of East Asian origin. Upon arrival at the final destination contact to the trafficking organisation continues as most of the migrants owe money to the traffickers for the illegal services which they provided.

The impact of this distinction must not be overstated, but the following Sections illustrate that the phenomenon of migrant trafficking, particularly the way in which overt arrivals are carried out, differs, at least in part, quite significantly from traditional concepts of organised crime.

For this reason, Sections 3.1 and 3.2 feature a brief discussion of what organised crime is, what it is not, and how it can best be approached. Secondly, the Chapter gives answer to the questions why, when and where organised crime and migrant trafficking emerge. This provides the theoretical background for a detailed analysis of the organisational and operational aspects of migrant trafficking in Australia and the Asia Pacific region in Sections 3.3 and 3.4.

## 3.1. Concepts and Characteristics of Organised Crime

### 3.1.1. Defining Organised Crime

The question what organised crime is has been a long-standing problem for criminologists, legislators and law enforcement agencies. Many attempts have been undertaken to develop comprehensive definitions and explanations that recognise the various manifestations of organised crime. The spectrum of approaches to organised crime is very broad as governments, law enforcement agencies and researchers have very different objectives when fighting, sanctioning and analysing organised crime.

A detailed analysis of the variety of criminal organisations and their activities goes beyond the scope of this study. Recognising the rich and often controversial body of research in the field, the following paragraphs give a synopsis of the different attempts that have been undertaken in the past to approach and define organised crime.

#### 3.1.1.1. Concepts of organised crime

The concepts that have been developed to explain and examine organised crime can be differentiated between six principal types:<sup>1</sup> (1) milieu studies, (2) conspiracy theories, (3) defining organised crime by its activities, (4) defining organised crime by the perpetrators, and (5) institutional theories. (6) The economic theory of organised crime is the most recent and probably most successful attempt to examine the activities of criminal organisations. The economic approach is the subject of Section 3.2.

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<sup>1</sup> This categorisation of organised crime definitions is based on the study by Michael Bersten, "Defining Organised Crime in Australia and the USA" (1990) 23 *ANZJ Crim* 39 at 40 ff. Bersten sorts the definitions of organised crime into four types: (1) defining organised crime by description, (2) definition in terms of the criminal act in relation to the criminal actor, (3) definition in terms of the criminal actor, and (4) definition in terms of the criminal act in relation to matters not going to the criminal actor, exploring the context of the crime. See also Howard Abadinsky, *Organized Crime* (6<sup>th</sup> ed, 2000) 32-48; Colin Thorne, "'Big Business' — Organised Crime" in Kayleen Hazlehurst (ed), *Crime and Justice* (1996) 283 at 285-288.

*Category 1: Milieu studies*

Milieu studies of organised crime stand in the tradition of sociological explanations of criminal behaviour and have been an early attempt to explain offences committed by gangs and peer groups of lower socioeconomic classes. The theories link criminality with social factors such as unemployment,<sup>2</sup> working-class culture,<sup>3</sup> the urban environment<sup>4</sup> or general poverty.<sup>5</sup> The underlying assumption of these studies is that social conduct is largely determined by a person's milieu. If this milieu is of a criminal nature or if it shows higher tolerance towards crime, the person is more likely to commit crime.

Milieu studies focus on the environment and nature of organised crime and the position of perpetrators within society. Essentially, organised crime is considered to result from the development of communities or neighbourhoods where criminal offenders fill in the position of role models for underprivileged residents.<sup>6</sup>

*Category 2: Conspiracy theories*

Until the late 1970s, researchers, the media and the general public often viewed organised crime as a conspiracy of alien crime syndicates. Conspiracy theories first came to prominence in the United States and were based on the belief that organised crime has been imported to America by Italian, Chinese and other immigrants and did not emerge within the white Anglo-American society. Hence, organised crime has been perceived as a foreign, external threat to society, the nation state and to its economy.<sup>7</sup>

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<sup>2</sup> For a summary of the studies carried out in this field see, for example, Stephen Box, *Recession, Crime and Punishment* (1987).

<sup>3</sup> See, for example, the studies of urban areas in the UK by John Mays, *Crime and its Treatment* (2<sup>nd</sup> ed, 1975).

<sup>4</sup> See, for example, the work of the Chicago School of Human Ecology, eg Clifford Shaw & Henry McKay, *Juvenile Delinquency and Urban Areas* (1969). For an overview see Anthony Bottoms, "Environmental Criminology" in Mike Maguire et al (eds), *The Oxford Handbook of Criminology* (1994) 585-656; George Vold, *Theoretical Criminology* (2<sup>nd</sup> ed, 1979) 181-200.

<sup>5</sup> See, for example, Katherine Williams, *Textbook on Criminology* (2<sup>nd</sup> ed, 1994) 282-283, 413.

<sup>6</sup> Cf Abadinsky, *supra* note 1, at 34-38; Duog Greaves & Susan Pinto, "Redefining Organised Crime: Commentary on a recent paper by Phil Dickie and Paul Wilson" (1993) 5(2) *CIIC* 218 at 223.

<sup>7</sup> Cf Petrus van Duyn, "Organized Crime, Corruption and Power" (1997) 26 *CL&SC* 201 at 201-202: "The perception of organised crime is that 'they' threaten 'us'. In the US 'they' were for a long time conveniently mainly organised criminals from Italian descent." For further examples see Mark Findlay, *The Globalisation of Crime* (1999) 147-149; Boronia Halstead, "The Use of Models in the Analysis of Organized Crime and Development of Policy" (1998) 4(1) *Trans Org C* 1 at 5-7; Stephen Mastrofski & Gary Potter, "Controlling Organized Crime: A Critique of Law Enforcement Policy" (1987) 2(3) *CJPR* 269 at 270-272; US President's Commission on Crime in the District of Columbia (1966) in Bill Palmer

### *Category 3: Defining organised crime by its activities*

This category of theories approaches organised crime by focusing on the offences committed by criminal organisations and on the fields of crime where organised crime appears to be predominant. The starting points of this approach are individual or serial criminal offences or types of offences from which conclusions about perpetrators and organisational structures are made. These explanations argue that specific forms of organised crime, for instance the provision of an illegal service such as trafficking, requires a characteristic form of illegal suppliers.

This type of approach has frequently been used for organised crime definitions in different criminal laws. For example, the *National Crime Authority Act 1984* (Cth), the key legislative instrument to investigate organised crime in Australia, contains a definition of “relevant criminal activity”.<sup>8</sup> This definition is based on a seriousness/relevance test that specifies certain “relevant offences” and general characteristics of organised crime to ensure that the Authority’s investigations are limited to significant criminal activities.<sup>9</sup> Similar conceptualisations of organised crime have been discussed during the elaboration of the *Convention against Transnational Organised Crime*.<sup>10</sup>

### *Category 4: Defining organised crime by the perpetrator*

This approach perceives organised crime and criminality in general as an individual matter rather than as an organisational. This approach must be viewed as a mindset which does not require theoretical speculations about organised crime and criminal organisations. Criminal acts are considered and dealt with as a problem of individual maladjustment, not as a consequence of participation in social systems. This viewpoint is particularly common among law enforcement agencies.<sup>11</sup> Generally, the objective of law enforcement investigations is the prosecution of individual offenders, and conclusions about criminal

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& Lindsay McGillicuddy, *Organised Crime (Definitions)* (1991) 23; Peter Reuter, *Research on American Organized Crime* (1999) 112; US President’s Commission on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime* (1967) 1.

<sup>8</sup> Section 4 *National Crime Authority Act 1984* (Cth) reads: “‘Relevant criminal activity’ means any circumstances implying, or any allegations, that a relevant offence may have been, or may be being, committed against a law of the Commonwealth, of a State or a Territory.”

<sup>9</sup> Cf the definition of “relevant offence” in s 4 *National Crime Authority Act 1984* (Cth).

<sup>10</sup> See *infra* Section 6.3.2.1.

<sup>11</sup> See the examples in Sabrina Adamoli et al, *Organised Crime around the World* (1998) 4.



organisations are made on the basis of intelligence deriving from investigative operations in relation to individual cases and circumstances.

#### *Category 5: Institutional theories*

The various approaches that can be summarised as institutional theories define organised crime by the association of offenders and the division of labour among them. These theories focus on the structural features of organised crime, the relationships among perpetrators and only to a lesser degree on the criminal activities. The institutional understanding of organised crime pays particular attention to formation, size, internal hierarchy, stability, transformations and dissolution of criminal organisations.<sup>12</sup>

#### **3.1.1.2. Problems and critique**

Institutional, ethnic, milieu, perpetrator- and crime-based explanations of organised crime each contain some truth about some aspects of the phenomenon of organised crime and the organisations engaged therein. Together, these theories make up a large body of literature and have undoubtedly contributed to the knowledge on criminal organisations, their structure and activities. However, considered separately, these approaches are facing the same problem in that they are unable to respond to continuously changing patterns of organised crime.

Milieu studies, for instance, fail to identify any objective of organised crime and the conditions of its emergence and existence. Furthermore, many milieu studies rely on data that links, for example, income and employment levels with crime rates, without recognising the shortcomings of official statistics, thereby failing to prove a causal connection between these factors and organised crime.<sup>13</sup>

The conspiracy approach is highly moralistic, as it determines a particular connotation of organised crime and it differentiates the world into good and evil. Moreover, this theory

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<sup>12</sup> Cf Abadinsky, *supra* note 1, at 4-8; A Cohen, "The Concept of Criminal Organisation" (1977) 17(2) *BJ Crim* 97 at 98; Donald Cressey, *Theft of a Nation* (1969) 319; id, *Criminal Organizations: Its Elementary Forms* (1972) 27; Mark Moore, "Organized Crime as a Business Enterprise" in Herbert Edelhertz (ed), *Major Issues in Organized Crime Control* (1987) 51 at 52. See also *infra* Section 3.3.1.

lends plausibility to the assumption that organised crime could be successfully eliminated by removing designated persons, in particular foreigners, from society, thus ignoring the integral connection between organised crime and the society in which it exists.<sup>14</sup>

The major failure of approaches focusing on the activities of organised crime is that they seek to cover such a wide range of criminal activities that the definition is almost meaningless. While the spectrum of some approaches appears to be too broad, in other cases it is too narrow, omitting other activities in which criminal organisations may engage. Especially in cases where definitions of organised crime are statutory provisions, enumerative lists of criminal activity necessarily fail to keep pace with rapidly changing forms of organised crime; the phenomenon of migrant trafficking is one of the most recent examples.<sup>15</sup>

In the context of approaches that concentrate on the perpetrators it needs to be noted that much of the information available on organised crime originates from law enforcement investigations that are traditionally designed for the control of individual offenders. As mentioned earlier, this approach indicates a mindset — particularly common among law enforcement agencies — that does not, or not sufficiently, focus on structural patterns or on regional or global networks within which organised crime occurs. The main purpose of the investigations of law enforcement agencies is the prosecution of offenders, and not the accumulation of analytical knowledge, which makes the reliance on material deriving from investigations difficult.<sup>16</sup>

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<sup>13</sup> Cf Bersten, *supra* note 1, at 41; van Duyne, *supra* note 7, at 204; K Williams, *supra* note 5, at 280-281, 290-291.

<sup>14</sup> Cf Phil Dickie & Paul Wilson, "Defining Organised Crime: An Operational Perspective" (1995) 4(3) *CIIC* 215 at 216; van Duyne, *supra* note 7, at 201; Mark Findlay, "Crime and Globalisation: An Australian Organised Crime?" in Duncan Chappel & Paul Wilson (eds), *Crime and Criminal Justice System in Australia: 2000 and Beyond* (2000) 273 at 283; Mastrofski & Potter, *supra* note 7, at 274-280.

<sup>15</sup> See also the discussions *infra* Sections 4.1.3.1, 5.2.2, and 6.3.2.1.

<sup>16</sup> Cf Claudio Bessozi, *Organisierte Kriminalität und Empirische Forschung* (2<sup>nd</sup> ed, 1997) 47, 52-53; Gerald Caiden & Herbert Alexander, "Introduction: Perspectives on Organized Crime" in Herbert Alexander & Gerald Caiden (eds), *The Politics and Economics of Organized Crime* (1985) 1 at 8; Donald Cressey, "Methodological Problems in the Study of Organized Crime as a Social Problem" in Nikos Passas (ed), *Organized Crime* (1995) 3 at 4, 10; John Martin & Anne Romano, *Multinational Crime: Terrorism, Espionage, Drug & Arms Trafficking* (1992) 9; Alfred McCoy, "Organised Crime in Australia: An Urban History" in Robert Kelly (ed), *Organized Crime: A Global Perspective* (1986) 234 at 236.

Institutional theories generally fail to distinguish between organised crime and other crimes committed by organisations, such as, for example, corporate and white-collar crime.<sup>17</sup> Furthermore, defining organised crime as crimes committed by institutions excludes activities by loose-knit and non-hierarchical criminal organisations. Finally, these theories pay too little attention to the social, economic and legal circumstances that determine size, sophistication and operations of criminal organisations.

A clear and universal understanding of organised crime — which has so far proven to be difficult to agree on<sup>18</sup> — has to address the cultural, national and structural differences of organised crime in different parts of the world. It must take into account the critical factors and characteristics of criminal organisations in order to understand their environment, development, structure, and their impact on and position in society.<sup>19</sup> The case of migrant trafficking, for instance, illustrates that this offence is characterised by a diverse range of perpetrators, customers, victims and operations. The theories on organised crime listed above fail to recognise that organised crime is a process or method of committing crimes; it neither involves a distinct type of offender, nor is organised crime a distinct type of crime. Many of the theories focus on particular issues of organised crime in certain locations and circumstances. They largely ignore the increasing globalisation and sophistication of contemporary criminal organisations and the fact that these organisations vary considerably in size, range of activities, geographical scope, and internal and external structures.

### 3.1.2. Characteristics of Organised Crime

Much of the criminal behaviour that is commonly regarded and dealt with as organised crime also fits within the context of other categories of crime. For a better understanding

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<sup>17</sup> See the distinction *infra* Section 3.1.2.

<sup>18</sup> See also *infra* Sections 6.3.2.1 and 6.3.2.2.

<sup>19</sup> Cf Alan Block & William Chambliss, *Organizing Crime* (1981) 13; (see also the critique in Pat O'Malley, "The Illegal Sector of Capital: A theoretical examination of 'Organizing Crime'" (1985) 9 *Contemporary Crises* 81 at 83); Dickie & Wilson, *supra* note 14, at 218, 224; Greaves & Pinto, *supra* note 6, at 219-220.

of what organised crime is, and what it is not, it is necessary to identify some of the characteristics of organised crime by distinguishing it from other criminal activities.<sup>20</sup>

#### *Organised crime v ordinary crime*

The objective of what can be regarded as 'ordinary' crime is typically some sort of unlawful distribution of resources, money in particular. The proceeds deriving from ordinary crime are usually appropriative; they remain with and are used by the perpetrator(s) of the criminal act. Ordinary crime also includes affective criminal conduct that does not serve economic purposes. Organised crime, in contrast, is planned and responds to a particular demand. The profit of organised crime activities goes to people who stand back and are not directly involved in the commission of crime.<sup>21</sup>

#### *Organised crime v criminals in organised groups*

People may gather in a group for the purpose of organising a single, planned criminal activity on an ad hoc basis such as, for example, a group planning a bank robbery. Organised crime, however, is not isolated; it operates on a sustained basis, seeks control of an area of business and strives for goals beyond the individual criminal act.<sup>22</sup>

#### *Organised crime v white-collar crime*

White-collar or corporate crime is committed by otherwise legitimate organisations that employ criminal business practices in order to maximise the profitability of a production process within the legal market, for example planned bankruptcy, tax evasion and industrial espionage. The major source of income for these enterprises, however, remains in the provision of legitimate goods and services. In contrast, the income of criminal organisations primarily derives from activities in the illegal market, which in some

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<sup>20</sup> See also UN General Assembly, Tenth United Nations Congress on the Prevention of Crime and Treatment of Offenders, *International Cooperation in Combating Transnational Crime: New Challenges in the Twenty-First Century*, UN Doc A/CONF.187/6 (15 Dec 1999) paras 4-6.

<sup>21</sup> Cf Marion Bögel, *Strukturen und Systemanalyse der Organisierten Kriminalität in Deutschland* (1994) 86; Gianluca Fiorentini & Sam Peltzman, "Introduction" in Gianluca Fiorentini & Sam Peltzman (eds), *The Economics of Organized Crime* (1995) 3; G Fitzgerald (1989) in Dickie & Wilson, *supra* note 14, at 217; Vold, *supra* note 4, at 343.

<sup>22</sup> Cf M Cherif Bassiouni & Eduardo Vetere, "Organized Crime and its Transnational Manifestations" in M Cherif Bassiouni (ed), *International Criminal Law, Vol I Crimes* (2<sup>nd</sup> ed, 1999) 883 at 883; Donald Hermann, "Organised Crime and White Collar Crime: Prosecution of Organised Crime Infiltration of Legitimate Business" (1985) 16 *Rut LJ* 589 at 591; Reuter, *Research on American Organized Crime*, *supra* note 7, at 95-96; Vold, *supra* note 4, at 344.

circumstances may include legitimate business practices to avoid investigations and prosecutions.<sup>23</sup>

In many instances, however, organised crime and white-collar crime overlap, particularly when criminal organisations engage in legitimate activities to launder profits of their crimes, or where they use legitimate enterprises to commit offences, for example when fraudulently documented migrants are placed aboard commercial airlines. The distinction between organised and white-collar crime has major implications on legislation and law enforcement: Generally, regulatory regimes and administrative sanctions are used to prevent abuses of legitimate markets, such as financial institutions and commercial airlines, while the criminal justice systems serves to eliminate illegal markets and the activities of criminal organisations therein.<sup>24</sup>

#### *Organised crime v terrorism*

Essentially, terrorism can be regarded as ideologically motivated crime designed to ultimately achieve some political goal. Terrorists usually engage in particular criminal activities such as bombing in public places, hijacking, or assassinations and kidnapping of public figures to threaten governments for political reasons. Organised crime, in contrast, has no political goals and is committed only for the purpose of economic gain.<sup>25</sup>

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<sup>23</sup> Cf Bassiouni & Vetere, *ibid*, at 883; Michael Maltz, "On Defining 'Organized Crime'" (1976) 22 *Crim & Del* 338 at 342-344; O'Malley, *supra* note 19, at 85; Mittie Southerland & Gary Potter, "Applying Organization Theory to Organized Crime" (1993) 9(3) *J Cont Crim J* 251 at 252; Taiwan, "Introduction to the 'Organized Crime Control Act'" (1997) 68 (3-4) *Rev Int'l Droit Penal* 1019 at 1021.

<sup>24</sup> See *infra* Sections 4.1.2.3, 5.2.1.4 and 6.1.1.

<sup>25</sup> Bassiouni & Vetere, *supra* note 22, at 883, 894-896; Douglas Meagher, *Organised Crime* (1983) 21-22.

## 3.2. Economic Analysis of Organised Crime

Organised crime is a phenomenon that has emerged in different cultures and countries around the world. Organised crime is ubiquitous; it is global in scale and not exclusive to certain geographical areas, to singular ethnic groups, or to particular social systems.

Economic analyses are the most recent — and probably most successful — attempt to examine the environment, structure and operations of organised crime, and to explore how criminal organisations respond to changing opportunities and market pressures. Economic analyses explore the legal, social and political conditions which make the existence and emergence of organised crime possible, emphasising the financial, commercial and market choice dimensions of criminal organisations.

### 3.2.1. Background

#### 3.2.1.1. The economics of crime

The recognition of economic features in criminal behaviour started in the United States in the late 1960s. Gary Becker's article "Crime and Punishment: An Economic Approach", published in 1968,<sup>26</sup> is considered the earliest study of crime from an economic standpoint. In his studies, Becker sought to examine criminal behaviour in the light of purely economic factors, based on the assumption that crime is the result of rational calculations of the offender:

According to the economic explanation of criminality, the individual calculates (1) all his practical opportunities of earning legitimate income, (2) the amounts of income offered by these opportunities, (3) the amounts of income offered by various illegal methods, (4) the probability of being arrested if he acts illegally, and (5) the probable punishment should he be caught. After making these calculations, he chooses the act or occupation with the highest discounted return.<sup>27</sup>

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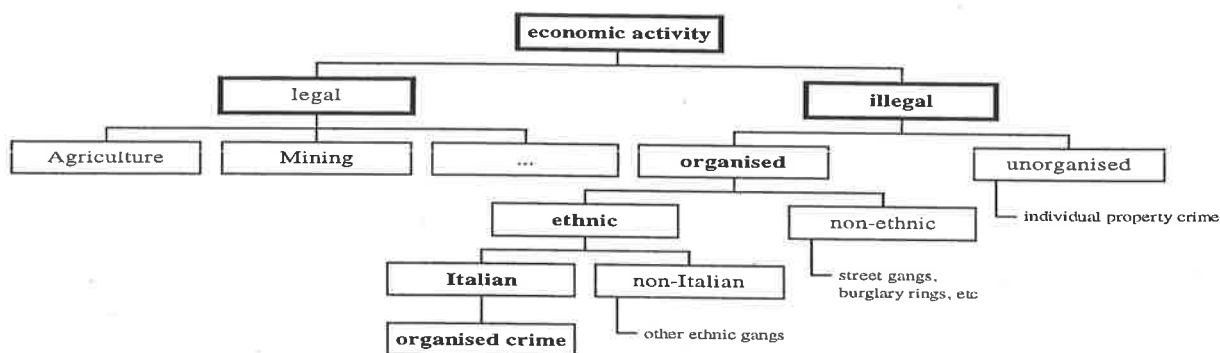
<sup>26</sup> Gary Becker, "Crime and Punishment: An Economic Approach" (1968) 3 *Journal of Political Economy* 169-217.

<sup>27</sup> Gary Becker, as cited in Richard Sullivan, "The Economics of Crime: An Introduction to the Literature" (1973) 19 *Crim & Del* 138 at 141.

The underlying assumption of economic analyses of crime is that crime can be considered as illegal economic activity, and that the perpetrators are “rational and normally calculating people maximising their preferences subject to given constraints ... like the rest of us.”<sup>28</sup>

A wide range of economic studies of crime has been undertaken since Becker’s initial work, which significantly changed the understanding of crime in public, law enforcement and academic circles.<sup>29</sup> The changing attitude towards crime and criminals is best illustrated in the studies on crime and entrepreneurship conducted by Dwight Smith jr in the late 1970s. After investigating criminal activity in the United States, Smith suggested that crime and its various manifestations could be positioned in the following taxonomy:

Figure 6: A taxonomy of all economic activity<sup>30</sup>



Smith’s taxonomy of economic activity classified organised crime as an ethnic organised illegal economic activity conducted by Italians in the United States. Though Smith overstated the relevance of ethnicity,<sup>31</sup> the major novelty of his studies was to be found in the description of organised crime as the illegal expression of economic activity. According to Smith, the spectrum of economic activity ranges from legal to criminal activities, from legitimate to illegitimate businesses. Crime and economy are no longer viewed as totally distinct, and crime is no longer portrayed as the evil, irrational conduct of

<sup>28</sup> *Ibid*, at 140.

<sup>29</sup> For an overview of the early literature on the economics of crime see Sullivan, *supra* note 27, at 138-149. For more recent studies see, for example, R Adreano, & J Siegfried (eds), *The Economics of Crime* (1980); Halstead, *supra* note 7, at 8-23; Daryl Hellmann, *The Economics of Crime* (1980); Simon Rottenberg (ed), *The Economics of Crime and Punishment* (1973); Vold, *supra* note 4, at 341-358.

<sup>30</sup> Dwight Smith, “Paragons, Pariahs, and Pirates; A Spectrum-Based Theory of Enterprise” (1980) 26 *Crim & Del* 358 at 369; cf *id*, “Organized Crime and Entrepreneurship” (1978) 6 *IJCP* 161 at 169. See also the work by R T Naylor (1996) as cited in Halstead, *supra* note 7, at 17-18.

<sup>31</sup> For the relevance of ethnicity in organised crime and migrant trafficking see *infra* Section 3.3.2.3.

born criminals. Furthermore, Smith suggests that organised crime will be a reality as long as society considers personal gain to be more important than equity, as some groups of people will always take advantage of economic opportunities in pursuit of their own wealth and power, regardless of whether or not these goals be achieved through criminal means.<sup>32</sup>

### 3.2.1.2. Early economic approaches to organised crime

With increasing crime levels and growing concern about organised crime in the United States in the late 1960s, criminologists and government authorities started to look for new explanations of organised crime. On the basis of the economic considerations of crime, assumptions were made about crime as a business.

Following a number of inquiries, the US Government's Task Force on Organized Crime published a report in 1967 which for the first time explicitly stated that "the core of organised crime activity is the supplying of illegal goods and services ... to countless number of citizen customers."<sup>33</sup> Four years later, Harvard economist Thomas Schelling wrote: "It is becoming widely accepted that the business of organised crime is to provide the public with illicit goods and services." He went on to quote a report by Mark Furstenberg stating that "it is well known that organised crime exists and thrives because it provides services the public demands. Organised crime depends not on victims, but on customers."<sup>34</sup>

The number of economic studies of organised crime increased rapidly throughout the 1970s,<sup>35</sup> 1980s,<sup>36</sup> and continues today.<sup>37</sup> Economic analyses have been very successful in

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<sup>32</sup> Smith, "Paragons, Pariahs, and Pirates" *supra* note 30, at 369.

<sup>33</sup> US President's Commission on Law Enforcement and the Administration of Justice, *supra* note 7, at 1.

<sup>34</sup> Thomas Schelling, "What is the Business of Organized Crime?" (1971) 20 *J Pub L* 71 at 71; cf *id*, "Economic Analysis and Organized Crime" in US President's Commission on Law Enforcement and the Administration of Justice, *supra* note 7, at 114-115; Andrew Dick, "When Does Organized Crime Pay? A Transaction Cost Analysis" (1995) 15(1) *IRLE* 25 at 25.

<sup>35</sup> See, for example (in order of publication), Donald Cressey, *Criminal Organisation: Its Elementary Forms* (1972); Cohen, *supra* note 12, at 97-111; Annelise Anderson, *The Business of Organized Crime* (1979).

<sup>36</sup> See, for example, Peter Reuter, *Disorganized Crime: The Economics of the Visible Hand* (1983); Herbert Alexander & Gerald Caiden (eds), *The Politics and Economics of Organized Crime* (1985); O'Malley, *supra* note 19, at 81-92; Moore, *supra* note 12, at 51-64.

<sup>37</sup> See, for example, Martin & Romano, *supra* note 16; Ulrich Sieber & Marion Bögel, *Logistik der Organisierten Kriminalität* (1993); Bögel, *supra* note 21; Fiorentini & Peltzman (eds), *supra* note 21; Ernesto Savona et al, *Organised Crime across the Borders* (1995); Federico Iasco, *Conflitto Criminale e*



providing an understanding of the objectives and the operational and organisational features of organised crime.

### 3.2.2. Principles and Objectives of Economic Activity

The major objective of organised crime is maximum economic gain. Organised crime responds to a particular consumer demand. Profits of the activities often go to financiers who stand back and are not directly involved in committing the crime. In this respect, organised crime does not differ from the activities of commercial organisations. “Crimes are to criminal organisation as legal activities are to legal enterprise.”<sup>38</sup> In trying to understand organised crime, the starting point of economic theories is to view criminal organisations as entrepreneurs in the illegal market and consider in particular the similarities and differences between legal and illegal economic activities.<sup>39</sup>

#### 3.2.2.1. General principles

The organisational and operational functions of any enterprise follow a rational principle: achieving the maximum output by using the minimum input. All enterprises — legitimate and criminal — share a number of rationally selected attributes:<sup>40</sup>

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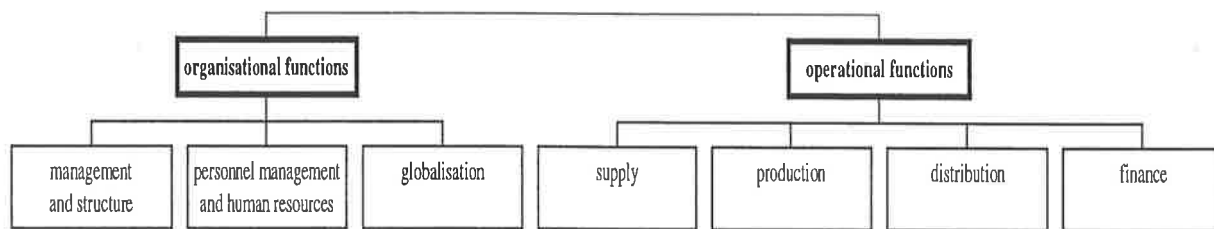
*Attività Economiche* (1996); Bessozi, *supra* note 16; Pino Arlacchi, “Some Observations on Illegal Markets” in Vincenzo Ruggiero et al (eds), *The New European Criminology* (1998) 203-215; Findlay, *The Globalisation of Crime*, *supra* note 7, at 138-166; Ernesto Savona, *L’Uso delle Sanzioni Patrimoniali contro le Organizzazioni Criminali* (2001) 5-24.

<sup>38</sup> Ernesto Savona et al, *Globalisation of Crime: The Organisational Variable* (1997) 2.

<sup>39</sup> Cf Dick, *supra* note 34, at 25-28; Dickie & Wilson, *supra* note 14, at 219; Savona et al, *Organised Crime across the Borders*, *supra* note 37, at 5; Savona, *L’Uso delle Sanzioni Patrimoniali contro le Organizzazioni Criminali*, *supra* note 38, at 5; Vold, *supra* note 4, at 342.

<sup>40</sup> Cf Bögel, *supra* note 21, at 79-88; Ulrich Sieber, “The Strategic Structures of Organised Crime: The Outcome of a new Research Approach” (1995) 28(2) *Comp LR* 61 at 76; Southerland & Potter, *supra* note 23, at 251-267; Werner Vahlenkamp & Peter Hauer, *Organisierte Kriminalität: Täterlogistik und Präventionsansätze* (1994) 6-7.

Figure 7: The concept of the business enterprise



The elements illustrated in Figure 7 govern any enterprise, irrespective the nature of the products and services provided, the geographical location of the business, and regardless of whether or not the enterprise operates in legal or illegal markets. All businesses incorporate organisational functions including organisation schemes (management and structure), an extensive division of labour, and positions assigned on the basis of skill (personnel management). Furthermore, in response to new economic and business opportunities in foreign markets, businesses modify their structure and operations to adapt to the challenges of globalisation. The operational functions of the business, including supply, production, distribution and finance, seek to maximise the financial return of the business activities and minimise the resources and time spent on the production of goods and provision of services.

### 3.2.2.2. Objectives of economic activity

Financial gain and the pursuit of profit are the primary objectives of any economic activity, be it legal and conducted by legitimate enterprises, or illegal and conducted by criminal organisations. Attaining power, influence and status can be considered as subsidiary goals, for they serve to protect the wealth already won and allow the accumulation of even greater profit.

In many respects, much of what classifies as organised crime can also be considered as small business because it is the most efficient way of exploiting a particular market. As new markets emerge, small operators explore their opportunities and adjust their businesses accordingly. As profit margins grow, businesses enlarge by expanding activities geographically, by employing additional staff and diversifying the labour.

For the purpose of maximising the financial gain of the business, both criminal organisations and legal businesses

- ◆ seek to earn money by selling the goods and services which they provide;
- ◆ use their profits to pay their employees and to invest them in new technology, machinery and human resources in order to increase the financial return of their operations;
- ◆ diversify the investments among different fields to increase profits; and
- ◆ seek to expand into new geographical or product markets.<sup>41</sup>

On the basis of to these underlying objectives, it is assumed — and now widely recognised — that the theories and models used for the analysis of legitimate businesses and the legal market can also be applied to criminal organisations and the illegal market.<sup>42</sup>

### 3.2.3. Positioning Organised Crime

All organisations, legal and illegal, seek to maximise their profits within their environments. Legal enterprises exist for the purpose of profit making from the provision of legal goods and services in the legal market. Conversely, criminal organisations seek to make their profits by providing illegal goods and services in illegal markets, often described as the ‘underground economy’.

Defining criteria for economic theories of organised crime are the economic issues of criminal activity and criminal organisation. Criminologists such as David Hellmann have described organised crime as “a group of large-scale enterprises operating within the illegal markets to maximise profits.”<sup>43</sup> Sabrina Adamoli considered organised crime “as a form of economic commerce which uses threats, physical force and violence, extortion,

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<sup>41</sup> Cf Adamoli et al, *supra* note 11, at 17, 18; Bassiouni & Vetere, *supra* note 22, at 883; Bögel, *supra* note 21, at 86; Hermann, *supra* note 22, at 591; Maltz, “On Defining ‘Organised Crime’” *supra* note 23, at 342; Meagher, *supra* note 25, at 21; Savona et al, *Organised Crime across the Borders*, *supra* note 37, at 6; Smith, “Organized Crime and Entrepreneurship” *supra* note 30, at 164; Thorne, *supra* note 1, at 290.

<sup>42</sup> Bögel, *supra* note 21, at 17; Dick, *supra* note 34, at 25-45; Sieber, *supra* note 40, at 66; Southerland & Potter, *supra* note 23, at 251-267.

<sup>43</sup> Hellmann, *supra* note 29, at 172.

intimidation or corruption, as well as supplying illicit goods and services.”<sup>44</sup> Australian criminologist Michael Bersten defined organised crime as

the field of transactions materially connected to markets in illegal goods and services, including activities beyond the crimes themselves which wittingly or unwittingly are required to constitute the illegal markets, excluding transactions which are only incidentally or remotely connected to the illegal markets.<sup>45</sup>

The activities of criminal organisations must not be seen in isolation from legitimate economic activity. According to Dwight Smith, organised crime can be regarded as entrepreneurial activities past the point of legitimacy in an area normally proscribed: the spectrum of economic activity goes beyond the ‘edge of law’ into illicit fields.<sup>46</sup> Prohibition may affect the size and scale of activities in the illicit spectrum, but it also provides opportunity for the exploitation of illegal markets.

Criminal organisations can be considered as illegal counterparts to legitimate enterprises. For example, the drug dealer can be regarded as a purveyor for narcotics in the illegal market, the fence as a retailer, and the migrant trafficker as the illegal counterpart of a migration agent.<sup>47</sup> But unlike their legal counterparts, to achieve their goals criminal organisations favour criminal means, which for them are more effective and more lucrative relative to licit opportunities.<sup>48</sup>

In applying economic theories to analyse and eventually combat organised crime it is essential to focus on the fundamental economic conditions that govern every commercial organisation — be it legal or illegal. These conditions include economic opportunities and regulations that, in the case of criminal organisations, can be summarised as the illegal market.

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<sup>44</sup> Adamoli et al, *supra* note 11, at 7.

<sup>45</sup> Bersten, *supra* note 1, at 53.

<sup>46</sup> Smith, “Organized Crime and Entrepreneurship” *supra* note 30, at 173; cf Southerland & Potter, *supra* note 23, at 251; and see Smith, “Paragons, Pariahs, and Pirates” *supra* note 30, at 375.

<sup>47</sup> Cf Bersten, *supra* note 1, at 51; John Salt, “The Business of International Migration” in Muhammed Siddique & Reginald Appleyard (eds), *International Migration into the 21<sup>st</sup> Century, Essays in Honour of Reginald Appleyard* (2001) 86 at 90; Smith, “Organized Crime an Entrepreneurship” *supra* note 30, at 164.

<sup>48</sup> This viewpoint brings to mind the so-called Anomie-theory. This theory claims that criminal behaviour is “innovative” if it seeks to reach commonly accepted goals by taking every (legitimate and illegitimate)

### 3.2.4. The Illegal Market

Illegal markets have been defined as

places within which goods and services are exchanged whose production, sale and consumption are forbidden or strictly regulated by the majority of national states and/or by international legislation.<sup>49</sup>

Illegal markets constitute the source of income for organised crime. Crime — like any other economic activity — can be supplied through various market structures. For there is no law against markets, the criminal law prohibits activities in illegal markets.

#### 3.2.4.1. The emergence of illegal markets

The logic of the market is to locate economic activities where they are most productive and profitable. Products and services that are offered in illegal markets are those that have been singled out as harmful or sinful because they are considered as a threat to individuals or the general public.<sup>50</sup>

The determination of which goods and services are available in illegal markets solely depends on the relevant regulations. A common and early example of the creation of illegal markets through legislative measures is the prohibition of the manufacture and sale of “intoxicating drinks” for common consumption in the United States between 1920 and 1933.<sup>51</sup> The forbidding of liquor by US Federal law created an illegal market and thereby an economic opportunity for criminal organisations to produce, import and sell alcohol illegally since the public’s demand for alcohol did not decrease following the introduction

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opportunity. Cf Abadinsky, *supra* note 1, at 32-34. For further reading on Anomie see Emile Durkheim, *The Division of Labour in Society* (1933); and Robert Merton, *Social Theory and Social Structure* (1949).

<sup>49</sup> Arlacchi, *supra* note 37, at 203.

<sup>50</sup> Cf the so called ‘labelling approach’, especially Howard Becker, *Outsiders* (1963). Becker points out that no behaviour is deviant or criminal until so defined and thereby labelled by a section or by the whole of the society. Deviance “is created by society. [...] Social groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labelling them as outsiders. From this point of view, deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an ‘offender’. The deviant is one to whom that label has successfully been applied; deviant behaviour is behaviour that people so label.” at 8-9.

<sup>51</sup> *US National Prohibition Act*, often referred to as the *Volstead Act* after its sponsor, Congressman Andrew Volstead of Minnesota. The Act defined all beverages containing more than 0.5% alcohol as intoxicating and prohibited its manufacturing, sale and transportation.

of prohibition.<sup>52</sup> In a similar example, the criminalisation of the trade and trafficking in, and production, use and possession of narcotics did not eliminate or reduce the demand for these substances; it only resulted in the emergence of a global market for illicit drugs beyond the control of law enforcement and drug control authorities.

With this understanding of organised crime, it has been suggested that it is ultimately the decision of legislative authorities — and of the society that appointed them — that prohibits certain economic activities and thereby, directly or indirectly, determines the existence of illegal markets and the economic opportunities these markets entail.<sup>53</sup>

In some instances, the phenomenon of growing organised crime activities in times of prohibition appears to apply conversely to circumstances in which formerly illegal goods and services are legalised. There is some evidence that criminal organisations withdraw from criminal activities if they are no longer illegal. For example, after the prohibition of liquor was repealed in the United States in 1933, criminal organisations suspended their alcohol producing and retailing activities. Also, following the diminution of soliciting and procuring offences in New York City in 1967, criminal organisation widely withdrew from the protection of brothels.<sup>54</sup> But examples of that kind are somewhat limited and in other cases the level of organised crime remained unaffected by the legalisation of formerly criminal activities.<sup>55</sup>

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<sup>52</sup> Cf Abadinsky, *supra* note 1, at 74-81; Hellmann, *supra* note 29, at 168; Reuter, *Disorganized Crime*, *supra* note 36, at 1; Schelling, "What is the Business of Organized Crime?" *supra* note 34, at 71.

<sup>53</sup> Cf Arlacchi, *supra* note 37, at 203; Bögel, *supra* note 21, at 35; Thomas Schelling "Economics and Criminal Enterprise" in Ralph Anderson & John Siegfried (eds), *The Economics of Crime* (1980) 377 at 391. See also Fiorentini & Peltzman, *supra* note 21, at 26: "The larger is the area of markets in which the transactions are regarded as illegal by the government, the greater are the incentives for the criminal organisation to compete to establish local monopolies over coercion. (b) The heavier is the fiscal and regulatory pressure on the legal markets, the greater are the incentives for legal firms to shift resources to the illegal market or to undertake transactions which are out of the control of the collective decision maker. (c) The investment in deterrence activities can have a destabilising effect on criminal organisations, thereby increasing their investment in violence and corruption." For the case of drug offences see, for example, Sullivan, *supra* note 27, at 140-141: "In accordance with this reasoning, a heroin addict is no more abnormal or deviant than a nicotine addict. Through a historical accident, the act of possessing heroin has been declared criminal while the act of possessing the dangerous drug nicotine has not. The nature of the addictions is not so very different, in that, given our present knowledge, the heroin user is no less rational than the nicotine user. The law has simply driven up the price for the heroin addict's article of consumption, and, as a result, has often forced the addict to resort to illegitimate earnings."

<sup>54</sup> Dick, *supra* note 34, at 36.

<sup>55</sup> The legalisation of brothels and some forms of prostitution in Victoria, Australia starting in 1985, for instance, was followed by a significant rise in organised crime. See, generally, Matthew Goode, *The Law*

But not only does prohibition determine the existence of illegal markets, it also has a significant impact on the organisational schemes of illicit enterprises and on the way their operations are carried out. As in the legal market, the regulatory framework is a determining factor for the way goods and services are provided and, especially on the transnational level, for the location of the business.<sup>56</sup>

A further criterion determining the opportunities for criminal organisations is the efficiency of control and law enforcement mechanisms that seek to prevent and combat the activities in illegal markets. If these mechanisms break down, for example in times of political struggle and internal conflict, organised crime can emerge as a result of non-existent monitoring and law enforcement activity. This explains why especially developing countries and those in transient stages have become the target for criminal organisations. A recent example for the vulnerability of developing societies is Russia: Following the collapse of the Soviet Union and its government authorities, criminal organisations rapidly took advantage of the country's weakness and spread into various fields of criminal activity including migrant trafficking, drug trafficking, large-scale corruption and trafficking in arms and nuclear material.<sup>57</sup> Similar conditions have emerged in Cambodia and, to some extent, in Vietnam.<sup>58</sup> The institutions of these countries are only in the process of formation and their criminal justice systems are not developed enough to adequately respond to the sophisticated methods of transnational organised crime.<sup>59</sup>

Finally, in the context of contemporary illegal market conditions, it needs to be noted that with the restrictions of national borders declining and the increasing mobility of goods,

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*and Prostitution* (1991). Also, the legalisation of gambling did not reduce the opportunities for organised crime; it only increased competition. Cf Ernesto Savona, "La Réglementation du Marché de la Criminalité" (1992) 4 *Rev int'l crim & pol tech* 455 at 470.

<sup>56</sup> Cf Bersten, *supra* note 1, at 50; Duncan Chappel, "From the Rum Rebellion to the Nugan Hand: Perspectives on 'Australian Roguery' and Organised Crime" in Duncan Chappel & Paul Wilson (eds), *The Australian Criminal Justice System — the mid 1980s* (1987) 274 at 274; Dick, *supra* note 34, at 25; Reuter, *Disorganized Crime*, *supra* note 36, at 113, 123.

<sup>57</sup> For further reading on Russian organised crime see, for example, Adamoli et al, *supra* note 11, at 49-57; Savona et al, *Organised Crime across the Borders*, *supra* note 37, at 20; Louise Shelley, "Transnational Organized Crime" (1995) 48(2) *J Int'l Aff* 463 at 481-485.

<sup>58</sup> See *infra* Section 3.4.2.3.3.

<sup>59</sup> See generally Bassiouni & Vetere, *supra* note 22, at 896-900; Phil Williams, "Transnational Criminal Organisations and International Security" (1994) 36(1) *Survival* 96 at 109. For the case of the former Socialist countries see Australia, Review of Commonwealth Law Enforcement Arrangements, *Report of the Review of Commonwealth Law Enforcement Arrangements* (1994) 26-27; Shelley, *supra* note 57, at 466-467.

money and services, transnational business opportunities, both legal and illegal, have received wider recognition and created new global markets. The globalisation of trade facilitated access to foreign markets, and the advantages offered by technological innovations led many enterprises to expand their activities across international borders and seek to develop their activities on a global scale. But these opportunities are not exclusive to legitimate organisations. Although some criminal organisations appear to operate predominantly at the national level, there is growing evidence that these organisations systematically creates international structures and violates the legislation of more than one country to benefit from the changes in world markets. Criminal organisations have quickly responded to the emergence of global trading and international financial networks by adapting organisational and operational structures to the challenges of global activities. In order to exploit illegal market opportunities in other countries and in different parts of the world, criminal organisations have learned to use the discrepancies that occur between different legal and financial systems to their best advantage.<sup>60</sup>

Organised crimes comes into existence and flourish because of the dynamics of the illegal markets in which they operate. Organised crime can be considered as the rational response to substantial economic opportunities in areas that are proscribed by government regulation.<sup>61</sup>

#### 3.2.4.2. Special Features of the Illegal Market

Some functional problems arise with the prohibition of goods and services. The illegal status of a product or service has significant organisational and operational consequences for the provider.

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<sup>60</sup> Adamoli et al, *supra* note 11, at VIII; Bassiouni & Vetere, *supra* note 22, at 888-889; Willard Myers, "The Emerging Threat of Transnational Organized Crime from the East" (1996) 24 *CL&SC* 181 at 183; Vincenzo Ruggiero, "Transnational Crime: Official and Alternative Fears" (2000) 28 *IJSL* 187 at 190-191; Ernesto Savona et al, *Processi di Globalizzazione e Criminalità Organizzata Transnazionale* (1998) 2-4, 6-9; Williams, "Transnational Criminal Organisations and International Security" *supra* note 59, at 97-98.

<sup>61</sup> Cf Savona, *L'Uso delle Sanzioni Patrimoniali contro le Organizzazioni Criminali*, *supra* note 38, at 12-13; Smith, "Paragons, Pariahs, and Pirates" *supra* note 30, at 383; Southerland & Potter, *supra* note 23, at 259.



For example, government authorities are not available to assist participants in illegal markets. The regulations that cover activities in legal markets do not apply to entrepreneurs in illegal markets. Ownership and contracts in illegal markets are not legally recognised and therefore cannot be legally transferred and enforced. Moreover, access to capital, banking facilities and modes of transportation is not available to criminal organisations in the same way it is to enterprises in the legal market.<sup>62</sup>

Consequently, criminal organisations have to develop ways, such as money laundering, to circumvent the regulations of the financial sector. Also, they have to resort to alternative, non-legitimate tools to ensure that their contracts with business partners and employees are upheld, and to settle disputes within the organisation and between competing organisations.<sup>63</sup>

A major issue related to organised crime is the use of threats, intimidation and violence as enforcement tools. The creation of fear is used to maintain order and discipline, to prevent disobedience and also to facilitate the conduct of the organisation's criminal activities. Intimidation and violence are crucial instruments for resolving conflicts, silencing potential witnesses and eliminating business rivals and law enforcement agents who interfere with the criminal organisation's operations.<sup>64</sup>

Unlike legitimate enterprises, participants in organised crime face a permanent risk of detection and arrest. Also, assets related to the criminal activities may be seized at any time by law enforcement agencies or in some cases by competing criminal organisations. Because organised crime activities are the subject of law enforcement investigations and prosecution, criminal organisations need to find mechanisms to disguise their offences, their members and the proceeds of their crimes.<sup>65</sup>

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<sup>62</sup> Cohen, *supra* note 12, at 107; Reuter, *Disorganized Crime*, *supra* note 36, at 114.

<sup>63</sup> Anderson, *supra* note 35, at 44; Bessozi, *supra* note 16, at 16-17; Block & Chambliss, *supra* note 19, at 92; Bögel, *supra* note 21, at 151-152; Halstead, *supra* note 7, at 19; Smith, "Organized Crime and Entrepreneurship" *supra* note 30, at 167

<sup>64</sup> Meagher, *supra* note 25, at 26; Martin & Romano, *supra* note 16, at 115; Moore, *supra* note 12, at 56; Reuter, *Disorganized Crime*, *supra* note 36, at 132-150; Savona et al, *Organised Crime across the Borders*, *supra* note 37, at 6.

<sup>65</sup> Cf Adamoli et al, *supra* note 11, at 19; Peter Reuter, *The Organization of Illegal Markets: An Economic Analysis* (1985) 7; J Tobias, "The Crime Industry" (1968) 8 *BJ Crim* 247 at 249.

Systematic corruption and bribery have become essential features of contemporary organised crime. As organised crime involves activities across international borders, the corruption and bribery of customs, law enforcement and immigration officials are important tools to facilitate criminal activities and to enable the criminal organisation to operate with impunity.

As in the legal economy, crime also depends on market conditions such as competition. Monopolisation and extortion are the most commonly used tools to respond to competition in illegal markets. The question of whether or not criminal organisations seek to obtain monopolistic control over their part of the illegal market has been discussed extensively among economists and criminologists. For the purpose of this study it is sufficient to point out that criminal organisations — like their legal counterparts — attempt to gain maximum control over their environment including their competitors. Especially in the sex industry and among drug traffickers, extortion, intimidation and elimination of business rivals are widespread.<sup>66</sup>

### 3.2.5. Customers of the Criminal Enterprise

Essential to the existence and survival of organised crime is a consumer population that provides a continuous demand for the goods and services that are on offer. Organised crime provides those goods and services that some members of the community desire and which they cannot obtain otherwise. Organised crime activities increase or decrease in response to growing or declining consumer demand for these products and services. Members of the public may be the victims of criminal organisations, but they are also their customers.<sup>67</sup>

The activities of criminal organisations are characterised by a provider-consumer relationship. For example, the drug dealer exists because the legal market does not satisfy

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<sup>66</sup> Dick, *supra* note 34, at 26; Halstead, *supra* note 7, at 10; Mastrofski & Potter, *supra* note 7, at 271-272; Schelling, "Economics and Criminal Enterprise" *supra* note 53, at 379; id, "What is the Business of Organized Crime" *supra* note 34, at 73-74.

<sup>67</sup> Cressey, "Methodological Problems in the Study of Organized Crime as a Social Problem" *supra* note 16, at 9; Bill Palmer and Lindsay McGillicuddy (1991) as cited in Thorne, *supra* note 1, at 288; Savona, "La

the demand for certain narcotics. The money launderer exists because proceeds of crime must be disguised before they can be negotiated without risk. The migrant trafficker exists where legal ways of cross-border migration are denied to people willing or forced to move to another country.<sup>68</sup>

The fact that organised crime emerges in response to growing consumer demand highlights the difference between organised crime and other forms of criminal behaviour. As mentioned earlier, isolated, 'ordinary' criminal acts of individual offenders are usually designed to meet the immediate desire of the perpetrator. Organised crime instead is designed to generate profits by serving potential customers and by satisfying a public demand for illegal goods and services.<sup>69</sup>

### 3.2.6. The Market for Migrant Trafficking

By definition, illegal migration depends on laws regulating who may and who may not cross international borders. The combination of strict border controls and restrictive immigration systems constitute the legal conditions that create an illegal market and economic opportunity for criminal organisations. A significant economic or political differential between countries provide trafficking organisations with a consumer population that seeks to migrate to another country. For example, where there is a significant disparity in income levels between two economies, or significant unemployment in one country, but not the other, economically motivated migration will occur despite immigration laws that outlaw these movements.<sup>70</sup>

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Réglementation du Marché de la Criminalité" *supra* note 55, at 470; Southerland & Potter, *supra* note 23, at 252.

<sup>68</sup> Cf Hellmann, *supra* note 29, at 173; Schelling, "Economics and Criminal Enterprise" *supra* note 53, at 393; id, "What is the Business of Organized Crime?" *supra* note 34, at 72; Smith, "Organized Crime and Entrepreneurship" *supra* note 30, at 171. This approach brings to mind the anomie theory by Robert K Merton (*supra* note 48) which holds that society creates organised crime within itself, by extolling certain common success goals while simultaneously preventing a considerable part of society from achieving those goals by legitimate means; cf Greaves & Pinto, *supra* note 6, at 223.

<sup>69</sup> Meagher, *supra* note 25, at 25; cf Smith, "Organized Crime and Entrepreneurship" *supra* note 30, at 167.

<sup>70</sup> Margaret Beare, "Illegal Migration" in Carolina Hernandez & Gina Pattugalan (eds), *Transnational Crime and Regional Security in the Asia Pacific* (1999) 231 at 263; id, "Illegal Migration: Personal Tragedies, Social Problems, or National Security Threats?" (1997) 3 *Trans Org C* 11 at 22-23; Jon Vagg, "The Borders of Crime" (1992) 32 *BJ Crim* 310 at 310-311, 319; and see generally *supra* Section 2.1.

Trafficking in migrants has become a growing illegal market and a lucrative source of income for criminal organisations for three principal reasons:<sup>71</sup> (a) the growing demand for international migration,<sup>72</sup> (b) the restrictions on legal immigration imposed by industrialised countries, which have created the demand for alternative, illegal avenues of migration,<sup>73</sup> (c) the relatively low risks of detection and arrest attached to trafficking compared to those in other activities of organised crime.<sup>74</sup>

For many people, traffickers have become the only avenue to escape persecution, poverty and unemployment. It is a sad reality that potential migrants have come to accept offers by criminal traffickers to flee from unacceptable living conditions at home. Many migrants are so desperate that a dangerous voyage, long-term debt and loss of freedom have become a price worth paying. This situation is worsened by criminal organisations that, to increase their income, abuse this desperation and delude migrants with promises of a better life abroad.

### 3.2.7. Summary

Economic studies of transnational organised crime and illegal markets have contributed substantial knowledge on the organisational and operational features of organised crime. Looking at the methods by which criminal organisations provide illegal goods and services to a potential consumer population brings to light the fact that organised crime follows the same rational and economic principles in the illegal market that govern participants in the legal market.<sup>75</sup> Economic theories and research techniques that have been developed to

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<sup>71</sup> Cf John Salt, "Trafficking and Human Smuggling: A European Perspective" (2000) 38(3) *Int'l Migration* 31 at 32, 35; Ernesto Savona et al, "Dynamics of Migration and Crime in Europe: New Patterns of an Old Nexus" in Alex Schmid (ed), *Migration and Crime* (1998) 61 at 68, 70; Paul Smith, "Chinese Migrant Trafficking: A Global Challenge" in Paul Smith (ed), *Human Smuggling: Chinese Migrant Trafficking and the Challenges to America's Immigration Tradition* (1997) 1 at 9.

<sup>72</sup> See *supra* Section 2.1.

<sup>73</sup> See *supra* Section 2.2.

<sup>74</sup> See *infra* Section 5.2.

<sup>75</sup> Cf Fiorentini & Peltzman, *supra* note 21, at 3; UN General Assembly, *Discussion guide for the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, UN Doc A/Conf.169/PM.1 and Corr.1 para38 [no dates specified] (reprinted in Phil Williams & Ernesto Savona, *The United Nations and Transnational Organised Crime* (1996) 6).

study legitimate enterprises also apply to criminal organisations, with some additional features the illegal market requires.<sup>76</sup>

Organised crime adapts to the changing demands of potential customers and exploits the loopholes and legislative discrepancies present in some areas of the world. Organised crime moves into sectors where the risk of being arrested and heavily punished is relatively low, especially compared to the attractive economic return.

Apart from being highly profitable, migrant trafficking in the Asia Pacific region is surprisingly low-risk, as countermeasures in many countries are inappropriate or non-existent.<sup>77</sup> The significant inequality of economic wealth and the differences in the political and legislative systems in this part of the world provide organised crime with a lucrative illegal market and — unless efficient countermeasures are taken — secure the traffickers a stable source of income.

The objective of the following two Sections is to apply the economic theory of organised crime to migrant trafficking in order to identify the organisational and operational functions of the emerging business of illegal migration.

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<sup>76</sup> Cressey, "Methodological Problems in the Study of Organized Crime as a Social Problem" *supra* note 16, at 11; Schelling "Economics and Criminal Enterprise" *supra* note 53, at 377; Smith, "Organized Crime and Entrepreneurship" *supra* note 30, at 164.

<sup>77</sup> See *infra* Chapter 5.

### 3.3. Organisational Features of Migrant Trafficking

Organised crime and migrant trafficking can be regarded as a transnational business. To demonstrate how trafficking organisations are structured and how they operate Sections 3.3 and 3.4 present the traffickers as providers of illegal migration services between origin and destination countries. The object of this economic analysis is to identify the elements and mechanisms of migrant trafficking and assess the scale of the operations in order to provide a working basis for the future elaboration of successful legislation and law enforcement strategies.<sup>78</sup>

Section 3.3 examines the major organisational elements of migrant trafficking groups, such as structural features, human resources and the impact of globalisation on the criminal organisation.

#### 3.3.1. Structure and Management

Structure and management are the internal functions of a business enterprise to control the business and its operations. In any organisation, sophisticated organisation schemes are developed to ensure that the enterprise, be it legal or criminal, operates in accordance with the objectives and goals set, and that it reaches maximum profitability, stability, and growth.<sup>79</sup>

##### 3.3.1.1. Control and organisation schemes

In the analysis of organised crime, issues about the management, size and structure of criminal organisations have been very controversial. On one side are those writers who

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<sup>78</sup> For other models of trafficking organisations see, for example, “Analyse der Funktionsbereiche krimineller Organisationen” in Bögel, *supra* note 21, at 86-188; “Trafficking constituted as a business” John Salt & Jeremy Stein, “Migration as a Business: The Case of Trafficking” (1997) 35(4) *Int’l Migration* 467 at 490, and Salt, “The Business of International Migration” *supra* note 47, at 103-105; “Modus operandi of international migrant-trafficking criminal networks” in Ernetso Savona, *Illicit Trafficking in Arms, Nuclear Material, People and Motor Vehicles* (1998) 10.

consider organised crime groups as large hierarchical organisations that are structured like corporations. On the other side are those who see organised crime groups as loosely structured, flexible and highly adaptable networks.<sup>80</sup>

#### *The hierarchical, corporate model*

Many studies by criminologists<sup>81</sup> and law enforcement agencies<sup>82</sup> have described the internal organisation of organised crime groups as a hierarchical, centralised bureaucratic structure similar to that of commercial corporations. According to this model, criminal organisations are characterised by vertical relations between the members and are governed by a set of rules and regulations. It has been argued that criminal organisations use a centralised, pyramid-like structure to engage in comparatively stable illegal markets and simple environments which require little or no sophisticated knowledge of the lower levels of staff. The advantages arising from hierarchy and centralisation are, for example, a better ability to control the members and operations of the organisation, better management of resources, and easier exploitation of monopolies in illegal markets which are less open to competition.<sup>83</sup>

#### *The network model*

More recent studies of organised crime tend to describe the structure of criminal organisations as diverse, loosely structured, decentralised associations of criminals. The relations between the core members of the criminal group are designed horizontally rather than vertically. This network model is said to apply primarily to criminal organisations

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<sup>79</sup> Cf the definition of "management" in Jae Shim et al (eds), *The Dictionary of International Business Terms* (1998) 189.

<sup>80</sup> See also the distinction made in Halstead, *supra* note 7, at 2-4; and in Shledon Zhang & Mark Gaylord, "Bound for the Golden Mountain: The Social Organisation of Chinese Alien Smuggling" (1996) 25(1) *CL&SC* 1 at 3.

<sup>81</sup> See, for example, Francis Ianni (1972) in Abadinsky, *supra* note 1, at 2; Douglas Meagher in Bersten, *supra* note 1, at 45; Moore, *supra* note 12, at 52-53; Vold, *supra* note 4, at 347.

<sup>82</sup> See, for example, André Bossard, *Transnational Crime and Criminal Law* (1990) 110-111; UN General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Draft United Nations Convention against Transnational Organised Crime*, UN Doc A/AC.254/4 (15 Dec 1998) art 1, option 2(2), option 3(1), (2); US President's Crime Commission (1967) in Smith, "Organized Crime and Entrepreneurship" *supra* note 30, at 161.

<sup>83</sup> Cf Fiorentini & Peltzman, *supra* note 21, at 5-6; Hellmann, *supra* note 29, at 173; Savona et al, *Organised Crime Across the Borders*, *supra* note 37, at 25. This hierarchical model was also used as the background for the US *Racketeer Influenced and Corrupt Organization (RICO)* statute; cf Halstead, *supra* note 7, at 5.

that engage in complex and dynamic illegal markets with multiple competitors, such as prostitution and the sex industry, loan sharking and smuggling of prohibited goods. The advantages that arise from this network model are, for example, independence from the decisions and knowledge of head managers and greater flexibility, thereby allowing immediate reorganisation of criminal activities in response to changing consumer demand and law enforcement activities.<sup>84</sup>

In summary, it has to be noted that “the complexity of transnational organised crime does not permit the construction of simple generalisations”.<sup>85</sup> There is no single model of transnational organised crime; “there is no prototypical crime cartel”.<sup>86</sup> The structure of criminal organisations depends on multiple factors such as the accessibility and barriers of illegal markets, the number of competitors, pricing and marketing strategies of different organisations and their attitude towards the use of threats and violence. Criminal organisations vary considerably in structure, size, geographical range and diversity of their operations. They range from highly structured corporations to dynamic networks, which change constantly in order to adapt to the environment in which they operate.<sup>87</sup>

The very limited knowledge that is available on the structural patterns of criminal organisations engaged in the business of migrant trafficking is very controversial, too. The findings of recent studies cover a spectrum that ranges from individual operators to large, highly sophisticated enterprises. Trafficking organisations operate in a dynamic environment that is constantly changing due to altering demand for illegal migration, different law enforcement activities, and unpredictable shifts in border surveillance.<sup>88</sup> The

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<sup>84</sup> Adamoli et al, *supra* note 37, at VIII, 11-12; Fiorentini & Peltzman, *supra* note 21, at 6, 10; Hellmann, *supra* note 29, at 174; Mastrofski & Potter, *supra* note 7, at 275; Moore, *supra* note 12, at 53; Savona et al, *Organised Crime across the Borders*, *supra* note 37, at 25; Williams, “Transnational Criminal Organisations and International Security” *supra* note 59, at 105-106. For an Australian perspective see Findlay, “Crime and Globalisation” *supra* note 14, at 277.

<sup>85</sup> Shelley, *supra* note 57, at 464.

<sup>86</sup> *Ibid.*

<sup>87</sup> Fiorentini & Peltzman, *supra* note 21, at 6; Southerland & Potter, *supra* note 23, at 251; Vold, *supra* note 4, at 343.

<sup>88</sup> Cf Ruggiero, *supra* note 60, at 193; John Salt & Jennifer Hoghart, “Migrant Trafficking and Human Smuggling in Europe: A review of the evidence” in Frank Laczko (ed), *Migrant Trafficking and Human Smuggling in Europe: A review of the evidence with case studies from Hungary, Poland and Ukraine* (2000) 11 at 46-49; UN General Assembly, Tenth United Nations Congress on the Prevention of Crime



organisations engaged in migrant trafficking can be categorised as amateur traffickers, small groups of criminals, and international networks.<sup>89</sup>

◆ *Amateur traffickers*

This category features people who provide a single, isolated service to migrants such as transport for crossing a border or locating employers in the destination country willing to engage them despite the illegal entry. Some of these small operators, especially in border areas, are only occasional traffickers who use their own vessels or vehicles if demand for illegal transport arises. For example, they take migrants on board their vessels against payment, depart from secluded coastal areas in one country and unload the people clandestinely in the territory of another country. It has been found that sometimes the transporters are unaware that their action is an offence in the destination country.<sup>90</sup> Despite the local and amateur character of these operations, many of the individual traffickers have been found to be hired by large trafficking organisations that operate internationally.<sup>91</sup>

◆ *Small groups of organised traffickers*

This category features small, organised groups of traffickers that specialise in transporting migrants from one country to another. These groups show a higher level of specialisation and sophistication and operate on a more permanent basis than amateur traffickers, but

and Treatment of Offenders, *International Cooperation in Combating Transnational Crime: New Challenges in the Twenty-First Century*, UN Doc A/CONF.187/6 (15 Dec 1999) para 27.

<sup>89</sup> First published in Andreas Schloenhardt, "The Business of Migration; Illegal Migration and Organised Crime in Australia and the Asia Pacific Region" (1999) 21(1) *Adl LR* 81 at 90-91. See also G Gunatilleke, "Seminar Report: International Response to Trafficking in Migrants and the Safeguarding of Migrant Rights" (1994) 32(4) *Int'l Migration* 593 at 594; IOM, "Trafficking in Migrants: Characteristics and Trends in Different Regions of the World" discussion paper for the *Eleventh IOM Seminar on Migration: International Response to Trafficking in Migrants and the Safeguarding of Human Rights*, Geneva, 26-28 Oct 1994 (1994) 3; Salt, "Trafficking and Human Smuggling" *supra* note 71, at 42; Savona, *Illicit Trafficking in Arms, Nuclear Material, People and Motor Vehicles*, *supra* note 78, at 10; Richard Skeldon, "Trafficking: A Perspective from Asia" (2000) 32(3) *Int'l Migration* 7 at 12.

<sup>90</sup> Cf the reports in Rory McCarthy et al, "New cargo cult produces a new entrepreneur" (2 Sep 2001) *Sunday Age* 4.

<sup>91</sup> Ko-lin Chin, *Smuggled Chinese: Clandestine Immigration to the United States* (1999) 32-33; Bimal Ghosh, *Huddled Masses and Uncertain Shores: Insights into Irregular Migration* (1998) 23; IOM, *Trafficking in Migrants: IOM policy and activities* (1997) www.iom.net (13 Aug 1998); Vincenzo Ruggiero, "Trafficking in Human Beings: Slaves in Contemporary Europe" (1997) 25 *IJSL* 231 at 235; Savona et al, "Dynamics of Migration and Crime in Europe" *supra* note 71, at 73; Nathalie Siron & Piet van Baeveghem, *Trafficking in Migrants through Poland* (1999) 30. See also the recent examples of Indonaesian fishermen hired by criminal organisations, *Cita v R* (2001) WASCA 5.

their structure and organisation are less professional and complex than the internationally operating trafficking networks.<sup>92</sup>

◆ *International trafficking networks*

The category of international trafficking networks includes large criminal organisations which have the ability to arrange and supervise the entire trafficking process and which are able to respond to the whole spectrum of needs of illegal migrants, including the provision of fraudulent documents, and the arrangement of accommodation and support in transit countries. Given the wide range of source countries of migrants, it is not surprising that complex international organisations have formed which can react quickly to changing legislation, law enforcement activities and unforeseen situations. The trafficking routes these organisations use are often well tested by other transnational criminal activities such as drug trafficking. In many cases it has been found that migrant trafficking is just one of the organisations' versatile criminal activities.<sup>93</sup>

### 3.3.1.2. Diversification of trafficking organisations

The degree of integration and interdependence within and between organisations is a major issue for the structure and operations of legal and illegal enterprises. Diversification of the business includes such factors as the range of clients, products and services, and the geographic areas in which the organisation operates. Some markets are characterised by large, diversified organisations that cover a wide range of activities while other markets feature numerous small, specialised organisations.<sup>94</sup>

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<sup>92</sup> For a case example see Australian National Audit Office, *The Management of Boat People — Department of Immigration and Multicultural Affairs, Australian Protective Service, Australian Customs Service-Coastwatch* (1998) 22.

<sup>93</sup> Beare, "Illegal Migration" *supra* note 70, at 272-275; Chin, *Smuggled Chinese*, *supra* note 91, at 29-32; Ghosh, *supra* note 91, at 23; IOM, *Trafficking in Migrants: IOM policy and activities*, *supra* note 91; Ruggiero, "Trafficking in Human Beings" *supra* note 91, at 235; Savona et al, "Dynamics of Migration and Crime in Europe" *supra* note 71, at 73; Siron & van Baeveghem, *supra* note 91, at 34; UN Commission on Crime Prevention and Criminal Justice, *Additional information on measures to combat alien-smuggling*, E/CN.15/1995/3 (26 Apr 1995) para 2.

<sup>94</sup> For further reading on the diversification of criminal organisations see, for example, Dickie & Wilson, *supra* note 14, at 220; Reuter, *Disorganized Crime*, *supra* note 36, at 109; id, *The Organization of Illegal Markets*, *supra* note 65, at 11; Southerland & Potter, *supra* note 23, at 259.

Criminal organisations generally show a diversified rather than a specialised pattern. In the case of migrant trafficking some connections have been found to drug trafficking activities. Not surprisingly, criminal organisations with well tested trafficking routes and with personnel located in different countries along these routes will use their knowledge and experience to take new market opportunities and engage in new criminal activities.<sup>95</sup> Although no intercepted boatload of illegal migrants in Australia has ever been found carrying drugs, the Department of Immigration reported that “there are some indications that in some cases the same criminal syndicates who may be involved in the international movement of illicit drugs are also smuggling people”.<sup>96</sup>

Overseas research suggests that that especially Asian organised crime groups use routes, means and methods of transportation simultaneously for the trafficking of people and narcotics.<sup>97</sup> Furthermore, a number of recent studies have suggested that criminal organisations which engage in migrant trafficking often plan the systematic exploitation of migrants in the destination countries.<sup>98</sup> However, given the ad hoc nature of many trafficking operations, great caution has to be taken when establishing links between migrant trafficking and other forms of organised crime. Without denying the existence of sophisticated and versatile criminal networks, there is little, if any, evidence to support assumptions that individual (amateur) traffickers are simultaneously engaged in other criminal activities.<sup>99</sup>

Secondly, to facilitate their operations, trafficking organisations are involved in a range of legitimate activities. These activities include the operation of travel agencies, language schools and freight companies that are run in association with the trafficking organisation

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<sup>95</sup> Adamoli et al, *supra* note 37, at VIII; Carrie Donigan Guymon, “International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention” (2000) 18 *Berk J Int’l L* 53 at 65.

<sup>96</sup> DIMA, *Protecting the Border: Immigration Compliance* (1999) 14; id, *Protecting the Border: Immigration Compliance* (2000) 15.

<sup>97</sup> Adamoli et al, *supra* note 37, at 17; Skeldon, “Trafficking” *supra* note 89, at 12. See also Chin, *Smuggled Chinese*, *supra* note 91, at 7, 38-42.

<sup>98</sup> Adamoli et al, *supra* note 37, at 17; Reuter, *Disorganized Crime*, *supra* note 36, at 117-118.

<sup>99</sup> Tony McNerny, “People smuggling — an inhuman trade” (2000) 68 *Platypus* 2 at 7; Secretariat of the Budapest Group, *The Relationship between Organized Crime and Trafficking in Aliens* (1999) 27.

to disguise and enable the transportation of migrants. Furthermore, these businesses serve to collect payments and launder profits.<sup>100</sup>

The horizontal interdependencies between different criminal activities engaged in by the same criminal organisation must be distinguished from the vertical chains of crimes. The latter include, for instance, corruption and the provision of fraudulent documents, which are intermediary crimes committed in the process of trafficking. These vertical connections are examined further below.

### 3.3.1.3. Criminal organisations in Australia

Organised crime flourished in Australia since the early days of federation.<sup>101</sup> Today, organised crime is a widespread phenomenon throughout the country with many links to overseas organisations and facilities. Conversely, several criminal organisations abroad have been linked to Australian organised crime. Criminal organisations in Australia are involved in a wide range of illegal activities as and when opportunities arise. In Australia, organised crime is committed by people from many different ethnic backgrounds and is not exclusive to any particular group of the population.<sup>102</sup>

Today, the criminal organisations most widely active both domestically and regionally are those of East and South East Asian origin. Criminal organisations from China and Hong Kong (often referred to as the 'Triads'),<sup>103</sup> Japanese organised crime (generally referred to as 'Yakuza'<sup>104</sup> or 'Boryokudan'<sup>105</sup>), Sino-Vietnamese gangs and Malaysian and Singaporean Secret Societies pose the most significant organised crime threat in Australia. Asian

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<sup>100</sup> Secretariat of the Budapest Group, *ibid*, at 30-31.

<sup>101</sup> For the history of organised crime in Australia see, for example, McCoy, *supra* note 16, at 234-285.

<sup>102</sup> On organised crime in Australia see generally Australia, Review of Commonwealth Law Enforcement Arrangements, *supra* note 59, at 29-30; Adamoli et al, *supra* note 37, at 88; F X Costigan (1984) in Chappel, *supra* note 56, at 286; Meagher, *supra* note 25, at 18-20; Thorne, *supra* note 1, at 299; John Valentin, "Present Issues for Organised Crime Control: The Australian Perspective" (1993) 4 *UNAFEI Resource Materials Series* 92 at 93.

<sup>103</sup> The term Triad refers to the Chinese societies' common symbol, an equilateral triangle representing the three basic Chinese concepts of heaven, earth and man.

<sup>104</sup> The term Yakuza represents the Japanese words for 8, 9 and 3 which total 20. It means 'good for nothing' and derives from 20, the worst possible score in the Japanese card game Hanafuda; the player automatically loses, thus he is a loser.

<sup>105</sup> The term Boryokudan means 'the violent ones' and is the term mostly used by the Japanese National Police Agency.

organised crime first came to notice in Australia with the increasing number of migrants from Asia in the late 1970s, particularly from PR China and Vietnam. More recently, it was found that the economic crisis in South East Asia and stricter law enforcement and money laundering control in many Asian countries has pushed more Asian criminal organisations to Australia.<sup>106</sup>

Italian organised crime also had a sophisticated national network in Australia which included the Calabrian 'Ndrangheta, Sicilian Mafia and diverse Italian-Australian criminal organisations. Furthermore, there is evidence that Colombian cartels and Lebanese, Korean and Russian organised crime are active in Australia, though at lower-scale than Asian organisations.<sup>107</sup>

With respect to migrant trafficking, for a long time Australian law enforcement authorities ignored the connection between transnational organised crime and illegal migration, suggesting that unauthorised boat arrivals and illegal immigration by air have been arranged by largely independent operators who only provide limited services.<sup>108</sup> More recent studies support the assumption that much of the illegal immigration to Australia by boat is organised on a very simple and low level only. The most common example of operators on the individual level are Indonesian fishermen who transport migrants from ports in southern Indonesia to Ashmore Reef, Christmas Island or Australia's northern coast.<sup>109</sup>

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<sup>106</sup> For the example of legislation in Japan against Boryokudan and Yakuza see Australia, Parliamentary Joint Committee on the NCA, *Asian Organised Crime in Australia* (1995) 47; Savona et al, *Organised Crime across the Borders*, *supra* note 37, at 11; Valentin, *supra* note 102, at 98.

<sup>107</sup> Adamoli et al, *supra* note 37, at 88-89; Australia, Parliamentary Joint Committee on the NCA, *ibid*, at 6-7; Australia, Review of Commonwealth Law Enforcement Arrangements, *supra* note 59, at 29-38; Valentin, *supra* note 102, at 98-100.

<sup>108</sup> The 1994 *Report of the Review of Commonwealth Law Enforcement Arrangements* (*supra* note 59) and a discussion paper on *Asian Organised Crime in Australia* released by the Parliamentary Joint Committee on the National Crime Authority in February 1995 (*supra* note 106) left the phenomenon of migrant trafficking completely unmentioned. A 1997 assessment "of the criminal environment relating to people smuggling activities impacting on Australia" by the Australian Federal Police (AFP, *Organised Crime and Aspects of People Smuggling into Australia* (unclassified version, 1998)) came to the conclusion that "there has been little evidence found of established organised crime groups engaging in people smuggling into Australia" (at 9). Interestingly, the same report stated that "[t]here is ample evidence of many ... groups engaging in the prolonged, systematic, low risk and highly profitable activity of smuggling PRC nationals ... to numerous destinations, including Australia."

<sup>109</sup> Australian National Audit Office, *The Management of Boat People*, *supra* note 92, at 21; DIMA, *Protecting the Border*, (1999) *supra* note 96, at 34, 36-37. See *infra* Section 3.4.2.4.1.

But despite the often local and amateur character of these operations, many of the individual traffickers have been found to be hired by large trafficking organisations that operate internationally.<sup>110</sup> With increasing numbers of illegal arrivals in Australia in recent years there is growing evidence that international organised crime groups actively engage in trafficking migrants to Australia, particularly illegal immigration by air and clandestine arrivals of vessels at the east coast.<sup>111</sup> Chinese and Middle Eastern criminal organisations have been found to be the predominant groups involved in the trafficking of migrants to Australia and throughout the Asia Pacific region. Many of the internationally operating trafficking organisations simultaneously engage in related offences such as trafficking in women for prostitution and other sexual purposes, and document fraud, sometimes involving unregistered and unlicensed migration agents.<sup>112</sup>

### 3.3.2. Recruitment and Personnel Management

As with their legal counterparts, personnel management in illegal enterprises “involves staffing, training, management development, motivation, performance evaluation, compensation activities and maintenance of employees so as to achieve organisational goals.”<sup>113</sup> To improve their operations and seek maximum profit, some organisations, be it legitimate or criminal, attempt to reach a maximum division of labour and specialisation of its employees. Depending on market structures, sophisticated organisations differentiate vertically by implementing different levels of employees and horizontally by separating tasks.<sup>114</sup>

The larger, internationally operating trafficking organisations often have specialised recruitment and management schemes. But, as mentioned before, many illegal migration services are provided on an ad hoc basis by individual operators, who neither have the abilities nor the resources to develop sophisticated management schemes. Also, the

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<sup>110</sup> Cf ABC Television “People Smuggler’s Guide to Australia” *Four Corners* (23 Aug 1999).

<sup>111</sup> See *infra* Section 3.4.2.4.1.

<sup>112</sup> AFP, *supra* note 108, at 3; Australia, Parliamentary Joint Committee on the NCA, *supra* note 106, at 8, 10, 56; Thorne, *supra* note 1, at 301; Valentin, *supra* note 102, at 96.

<sup>113</sup> “Personnel management” as defined in Shim et al (eds), *supra* note 79, at 147.

information that is available on human resources of migrant trafficking is very limited and too often derives from anecdotal rather than from systematic evidence.

### 3.3.2.1. Vertical differentiation

The illegal status of organisations engaged in criminal activities generates particular problems that are also reflected in the management of staff. One significant difference between legitimate and illegitimate enterprises is that the former can rely on commercial bonds between members of the organisation for these are enforceable in the legal process. Criminal organisations, in contrast, depend far more on shared ideology, loyalty and terror. Employees present a major threat to the criminal organisation, as they possess some knowledge about the structure and operations of the enterprise and about the participation of other members, which they could provide to law enforcement agencies or to competing organisations.

Secrecy, money and, as mentioned earlier,<sup>115</sup> the creation of fear in the form of threat and intimidation are the major tools to ensure loyal performance of the employees and to prevent detection, arrest and seizure of assets. To protect the core arrangers and investors of organised crime it is essential to differentiate between different levels of staff and keep the information that is given to lower levels of employees at a minimum. It has been found that criminal organisations try to restrict the number of people with detailed knowledge concerning the participation of high-ranking members and future operations.<sup>116</sup> To prevent treason, criminal organisations may also reward employees by paying higher wages or offering other benefits. Money is an important tool to ensure loyal performance and stop participants from informing against the enterprise as a whole, some sub-unit of it or against individual members. Furthermore, the creation of fear by the use of threats and

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<sup>114</sup> Reuter, *Disorganized Crime*, *supra* note 36, at 115; *id.*, *The Organization of Illegal Markets*, *supra* note 65, at 10, 12.

<sup>115</sup> See *supra* Section 3.2.4.2.

<sup>116</sup> Reuter, *Disorganized Crime*, *supra* note 36, at 115-116; *id.*, *The Organization of Illegal Markets*, *supra* note 65, at 9; Southerland & Potter, *supra* note 23, at 257.

intimidation are used to act against employees who are suspect of acting disloyally by informing law enforcement agencies or competing organisations.<sup>117</sup>

### 3.3.2.2. Horizontal differentiation: division of labour

The division of labour is essential for the existence of the criminal organisation. Separating tasks and filling functional positions with qualified members protects the organisation as a whole: Should there be an investigation by a law enforcement agency, only small units of the organisation are exposed.<sup>118</sup>

From the information that is available on the division of labour within the migrant trafficking organisation, participants can be categorised as follows:<sup>119</sup>

- ◆ Positioned at the top of the migrant trafficking enterprise is the category of *arranger/financiers* who are highly competent people who invest money in the trafficking operation and supervise the whole criminal organisation and its activities. Persons in this category are rarely, if ever, known to the lower levels of employees or to the migrants who are trafficked. A hierarchical structure usually insulates the arrangers from being connected with the commission of specific offences.<sup>120</sup>

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<sup>117</sup> Mastroski & Potter, *supra* note 7, at 271; Reuter, *Disorganized Crime*, *supra* note 36, at 116; id, *The Organization of Illegal Markets*, *supra* note 65, at 9-10.

<sup>118</sup> Abadinsky, *supra* note 1, at 2; John Salt & Jeremy Stein, "Migration as a Business: The Case of Trafficking" (1997) 35(4) *Int'l Migration* 467 at 478; Salt, "The Business of International Migration" *supra* note 47, at 105.

<sup>119</sup> Schloenhardt, "The Business of Migration" *supra* note 89, at 93-95; and cited in UNICRI & AIC, *Rapid Assessment: Human Smuggling and Trafficking from the Philippines* (1999) 10-11. This classification is based on the work of Chin, *Smuggled Chinese*, *supra* note 91, at 33-34 and id, "Smuggling of Chinese Aliens and Organised Crime" in Alex Schmid (ed), *Migration and Crime* (1998) 137 at 139. See also Reuter, *The Organization of Illegal Markets*, *supra* note 65, at 8; Secretariat of the Budapest Group, *supra* note 99, at 35-36; Sieber, *supra* note 40, at 75. Other models of the structure of migrant trafficking organisations can be found in Alexander Gordon, "Transnational Crime Trends in the Asia-Pacific" paper presented at the *Transnational Security Threats in Asia* conference, Honolulu, 8-10 Aug 2000, 12-13; Cleo Kung, "Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the US Statutory Definition of 'Refugee'" (2000) 90 *J Crim L & Criminology* 1271 at 1274.

<sup>120</sup> Bersten, *supra* note 1, at 53; Chin, *Smuggled Chinese*, *supra* note 91, at 29; Donald Cressey, *Criminal Organization: Its Elementary Forms* (1972) 53-58, 57; Southerland & Potter, *supra* note 23, at 253; Thorne, *supra* note 1, at 284; UN Commission on Crime Prevention and Criminal Justice, *Implementation of the Naples Declaration and Global Action Plan against Organized Transnational Crime. Report of the Secretary-General*, E/CN.15/1996/2 (4 Apr 1996) para 36.



- ◆ The category of *recruiters* includes people who work as middlemen between the arrangers and the customers of the criminal enterprise. Recruiters are responsible for finding and mobilising potential migrants, organising them into small groups, collecting their payments and arranging the preparation of travel document. The recruiters who work in the country of departure are usually not informed about the precise trafficking passage. They are paid for casual jobs only and not on a permanent basis. Investigations have shown that in many cases recruiters come from the same region as the migrants, and frequently they are members of the same culture and respected people within the local community.<sup>121</sup>
- ◆ *Transporters* are the people in charge of assisting migrants in leaving the country of origin. In destination countries, transporters bring undocumented immigrants from an airport, seaport or coast to a big city. The carriers have to be technically sophisticated to change their operations in reaction to law enforcement and border surveillance activities. Transporters usually do not obtain inside information on the criminal organisations and their structures. They stay in contact with the organisation through intermediaries who contract them casually.<sup>122</sup>
- ◆ The next category of participants is that of *corrupt public officials*. Traffickers often pay government officials to obtain travel documents for their customers. Government officials in immigration and law enforcement authorities in many transit countries have been found accepting bribes to enable migrants to enter and exit countries illegally. The corrupt officials individually or collectively protect the criminal organisation through abuses of their position, status and privileges. In many departing countries corruption of low-paid government officials is sometimes the only way to obtain travel documentation for migrants.<sup>123</sup> International trafficking organisations have been found to have a string

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<sup>121</sup> Ruggiero, "Trafficking in Human Beings" *supra* note 91, at 236; Salt & Stein, *supra* note 118, at 477; Sieber, *supra* note 40, at 75; Ernst Spaan, "Taikongs and Calos: The Role of Middlemen and Brokers in Javanese International Migration" (1994) 28(1) *Int'l Migration Rev* 93 at 93; Zhang & Gaylord, *supra* note 80, at 6.

<sup>122</sup> Bögel, *supra* note 21, at 153-158; Salt & Stein, *supra* note 118, at 480; Vahlenkamp & Hauer, *supra* note 40, at 15, 17.

<sup>123</sup> For the example of the PR China see, for example, Marlowe Houd, "Sourcing the Problem: Why Fuzhou?" in Paul Smith (ed), *Human Smuggling: Chinese Migrant Trafficking and the Challenges to America's Immigration Tradition* (1997) 76 at 80-81; Smith, "Chinese Migrant Trafficking" *supra* note 71, at 14.

of corrupt government employees along common trafficking routes featuring customs, immigration and airline staff who in return for the bribes 'turn a blind eye' to the operations of the traffickers, for example, by ignoring illegal border crossings or fraudulent travel documents.<sup>124</sup>

- ◆ *Informers.* For the trafficking operations to be successful it is necessary to systematically gather information on border surveillance, immigration and transit procedures and regulations, asylum systems and law enforcement activities. In some cases it has been found that this information gathering resides with a core group of informers who manage the information flow and have access to sophisticated international communication systems.<sup>125</sup>
- ◆ *Guides and crew members* move illegal migrants from one transit point to the other or help them to enter another country by sea or air. Crew members are people employed by the traffickers to charter trafficking vessels and accompany migrants throughout the illegal journey.
- ◆ *Enforcers*, who are sometimes illegal migrants themselves, are primarily responsible for policing staff and migrants and for maintaining order among them, often involving the use of violence. Enforcers are also in charge of communication, financial transactions and the distribution of food and water as necessary during the illegal passage.<sup>126</sup>
- ◆ *Debt-collectors* are the people in charge of collecting the fees from the migrants in transit and destination countries, often using threats, coercion and violence to obtain overdue payments.<sup>127</sup>
- ◆ *Money-launderers* find ways of legalising the proceeds of their activities which are not reinvested in other operations. This means that the money deriving from the

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<sup>124</sup> Beare, "Illegal Migration: Personal Tragedies, Social Problems, or National Security Threats?" *supra* note 70, at 34-36; Bessozzi, *supra*, note 16, at 9-10; Cressey, *Criminal Organization*, *supra* note 120, at 37, 50; Alan Dupont, "Unregulated Population Flows in East Asia" (1997) 9(1) *Pacific Review* 1 at 14; Salt & Stein, *supra* note 118, at 482; Savona et al, *Organised Crime across the Borders*, *supra* note 37, at 6; Phil Williams, "Human Commodity Trafficking" (1997) 3 *Trans Org C* 1 at 4. For more on corruption as a systematic tool of organised crime see *supra* Section 3.2.4.2.

<sup>125</sup> Salt & Stein, *supra* note 118, at 477-478; Salt, "The Business of International Migration" *supra* note 47, at 105. See also Jon Vagg, "The Borders of Crime" *supra* note 70, at 326.

<sup>126</sup> Chin, *Smuggled Chinese*, *supra* note 91, at 73; Zhang Wang, "Ocean-Going Smuggling of Illegal Chinese Immigrants" (1996) 2(1) *Trans Org C* 49 at 56.

commission of crime must somehow be made legitimate. The money-launderers are experts at transferring the proceeds of crime through different bank accounts and countries, disguising the origin of money through a string of transactions or investing the proceeds in legitimate businesses.<sup>128</sup>

- ◆ *Supporting personnel and specialists.* Local people at embarkation and transit points support the organisation by harbouring and concealing illegal migrants. It has been found that participants at the lower levels of the organisation possess little, if any particular skills. Tasks and duties are usually interchangeable and do not require specific knowledge or abilities. Also, by keeping the 'street level' of offenders separated from the strategic arrangers the organisation as a whole is protected. But traffickers also depend on skilled individuals with a high level of knowledge who find and exploit new opportunities for criminal activities. These individuals are often paid for casual duties only and do not share a continuing commitment to the organisation.<sup>129</sup>

### 3.3.2.3. Human resources and recruitment

Little research has been undertaken with respect to the way in which criminal organisations, especially trafficking organisations, recruit their members. The existing literature is highly anecdotal and often focuses on myths of initiation rituals of 'secret societies' rather than providing a sound analysis of this aspect of organised crime.<sup>130</sup>

From the very limited information that is available, it appears that ethnic enclaves in transit and immigration countries provide one source for recruitment by transnational criminal organisations. The fact that many migrants face language difficulties in the host countries limits their opportunities for regular employment and consequently makes them more vulnerable to recruitment by organised crime groups. Moreover, ethnic networks are more

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<sup>127</sup> For details of post-immigration activities and the collection of debts see *infra* Section 3.4.3.

<sup>128</sup> For more on money laundering and the finances of trafficking organisation see *infra* Section 3.4.4.

<sup>129</sup> Bögel, *supra* note 21, at 159-164, 186; Sieber, *supra* note 40, at 75; US Presidents Commission on Organised Crime (1986) in Palmer & McGillicuddy, *supra* note 7, at 35.

<sup>130</sup> For more about initiation of membership in the criminal organisation see Abadinsky, *supra* note 1, at 12-20, 27-30. For an overview of the existing American literature see, for example, Reuter, *Research on American Organized Crime*, *supra* note 7, at 100-102.

difficult to penetrate for national authorities as the barriers of language and culture provide mechanisms that make investigations more difficult.<sup>131</sup>

But the relevance of ethnicity as a criterion must not be overstated. Recent studies have found that many organised crime groups are ethnically diverse. Criminal organisations that cannot rely on cross-border networks of ethnic associates and overseas enclaves spread their activities at the international level by cooperating with other criminal groups abroad.<sup>132</sup>

With respect to criminal organisations operating in Australia and the Asia Pacific region, recent studies have suggested that membership in Chinese Triads is indeed exclusive to Chinese nationals, including Hong Kong and Taiwan. The relationships among the participants engaged in Chinese organised crime is characterised by secretive fraternities with strong ties between different levels of employees. In the case of Vietnamese organised crime, it is unclear whether membership is limited to ethnic Vietnamese or if these groups also employ non-Vietnamese members, especially Chinese and Cambodians.<sup>133</sup>

### 3.3.3. Globalisation

As mentioned earlier, evidence is increasing that criminal organisations exploit the economic opportunities which have arisen from the globalisation of the world's markets.<sup>134</sup> In the case of migrant trafficking, globalisation opened the doors for criminal organisations to easily access other countries and create transnational networks of trafficking routes with multiple modes of transporting illegal migrants. Not surprisingly growing interdependencies between countries have fostered both legal and illegal cross-border

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<sup>131</sup> Australia, Parliamentary Joint Committee on the NCA, *supra* note 106, at 6; Halstead, *supra* note 7, at 20; Valentin, *supra* note 102, at 95; Zhang & Gaylord, *supra* note 80, at 13.

<sup>132</sup> Arlacchi, *supra* note 37, at 209; Halstead, *supra* note 7, at 4; UN General Assembly, Tenth United Nations Congress on the Prevention of Crime and Treatment of Offenders, *International Cooperation in Combating Transnational Crime: New Challenges in the Twenty-First Century*, UN Doc A/CONF.187/6 (15 Dec 1999) para 18.

<sup>133</sup> Australia, Parliamentary Joint Committee on the NCA, *supra* note 106, at 9-10, 29.

<sup>134</sup> Cf Findlay, "Crime and Globalisation" *supra* note 14, at 285-286; Martin & Romano, *supra* note 16, at 2-3; Savona et al, *Organised Crime across the Borders*, *supra* note 37, at 5; Shelley, *supra* note 57, at 465-466. Cf *supra* Section 3.2.4.1.

migration. The emergence of the economies in East and South East Asia and the rapid internationalisation of financial markets have given organised crime groups the opportunity to engage in criminal activities at the international level.<sup>135</sup>

As a result of increasing global trade, investment and communication, migrant trafficking now involves criminal elements in many different countries: those in which the operations are planned, countries from which the migrants originate, countries of embarkation, transit countries and destination countries. Trafficking organisations systematically exploit the discrepancies between different jurisdictions and legal systems. Their information schemes quickly find loopholes in law enforcement, border control and legislation. This enables the traffickers to adapt the trafficking routes to changing permeability of borders and migration systems.<sup>136</sup> Also, due to the increasing global trade, immigration and customs officers can only control a small proportion of the people and goods crossing international borders which in return makes it easier for criminal organisations to hide illegal transactions.

Moreover, the increasing engagement of criminal organisations in global activities has brought with it a higher degree of sophistication and reduced vulnerability to investigations and prosecution by national law enforcement agencies. While criminal organisations have become increasingly transnational, law enforcement in Australia and the Asia Pacific region has remained mostly local and national.<sup>137</sup>

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<sup>135</sup> Cf Myers, *supra* note 60, at 182-183; Zhang & Gaylord, *supra* note 80, at 2.

<sup>136</sup> Cf the statement of Partizia Troja, Senator, Under-Secretary of State for Foreign Affairs, Italy in Alex Schmid (ed), *Migration and Crime — Proceedings of the International Conference on 'Migration and Crime. Global and Regional Problems and Responses'* (1998) 15; UN Economic and Social Council, *Criminal justice action to combat the organized smuggling of illegal migrants across national boundaries*, UN Docs E/RES/1994/14 (23 July 1994), and E/RES/1995/10 (24 July 1995).

<sup>137</sup> See *infra* Chapter 5.

### 3.4. Operational Features of Migrant Trafficking

Section 3.4 analyses the operational functions of migrant trafficking such as supply, production (provision of the illegal service), distribution (post-immigration activities) and finances,<sup>138</sup> and investigates the activities of trafficking organisations in a range of locations and circumstances in Australia and the Asia Pacific region.

#### 3.4.1. Supply: Mobilisation of Migrants

In the context of migrant trafficking, supply describes the mechanisms of contacting and mobilising potential migrant customers and maximising the demand for migration in sending countries.

##### 3.4.4.1. Contacting migrants

The promotion of their services is essential for traffickers. Trafficking organisations advertise their services in the same ways as legitimate businesses do. With huge profits in prospect, these organisations have become expert in shaping the desires and needs of their migrant customers. The ways in which the traffickers find and attract people willing to leave their home countries include newspaper advertising, the use of legitimate travel agencies and contacting people individually or through relatives and friends.<sup>139</sup>

To create further incentives, criminal groups often lure potential migrants with false promises of job opportunities abroad and misleading information about immigration procedures and about the dangers involved in the clandestine journeys. Also, the migrants are told they will easily be able to recover the fare once they have secured work in the

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<sup>138</sup> Cf the four stages of the migrant trafficking process identified in John Morrison, *The Trafficking and Smuggling of Refugees — the end game in European asylum policy?* (2000) 66: entrance into the process, journey, arrival, interruption.

<sup>139</sup> For examples see Adamoli et al, *supra* note 11, at 14; Kristof van Impe, "People for Sale: The Need for a Multidisciplinary Approach towards Human Trafficking" (2000) 38(3) *Int'l Migration* 113 at 119; Salt & Hoghart, *supra* note 88, at 61; Salt & Stein, *supra* note 118, at 477, 479-480, 490; Zhang & Gaylord, *supra* note 80, at 6.

destination country. For example, some boatpeople who landed in Australia in 1998 and 1999 had been told they would work at the Sydney 2000 Olympic Games.<sup>140</sup> Another method of luring potential migrants is to circulate rumours in departing countries that illegal immigrants would be allowed to stay in Australia under a new amnesty.<sup>141</sup>

To date, there is no information available on whether or not it is more common for traffickers to contact migrants or vice versa. However, despite the false promises which are made by traffickers, many migrants need not be lured with prospects of opportunities and wealth in the destination countries. For instance, a recent study of Chinese illegal immigrants in the United States suggested that in most cases the migrants take the initiative to contact their traffickers.<sup>142</sup> Similar statements have been made about Afghani refugees who fled to Karachi where they contacted the recruiters of trafficking organisations that brought them to Australia.<sup>143</sup> In other cases, however, recruiters actively contacted persons in refugee camps in Pakistan.<sup>144</sup>

As indicated earlier, a major difference can be found between the mobilisation, transportation and immigration methods that are used to smuggle persons who flee persecution, starvation and death, and those who fall within the category of opportunity seeking migrants.<sup>145</sup> The former group of migrants does not need to be persuaded to relocate, as they are generally willing to emigrate at all costs and take any risk to save their lives by leaving poverty, unemployment or persecution. For the latter group, too, criminal organisations offer illegal migration services in response to a demand for them, but at the same time it is noticeable that trafficking organisations also create and stimulate such demand. Furthermore, the existence of overseas communities is another strong incentive to migrate and it has been found that in many cases illegal migrants have contact with

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<sup>140</sup> Janine MacDonald, "People Smuggling on Rise" (20 Jan 1993) *The Age* 3; Elisabeth Wynhausen, "Rusty boat beat leaky security" (12 Apr 1999) *The Australian* 1; Les Kennedy & Mark Metherell, "Call to stop the people smugglers" (12 Apr 1999) *Sydney Morning Herald* 3; "Australia/New Zealand" (1999) 6(9) *Migration News*.

<sup>141</sup> David Tanner & Megan Saunders, "Minister's Message to China" (7 June 1999) *The Australian* 3. See also *supra* Section 2.1.1.3.2. For the a case study of the Philippines see Anselmo Avenido, "Illegal Recruitment and Exfiltration" paper presented at the *Sixth Meeting of the CSCAP Working Group on Transnational Crime*, Wollongong, 5-9 Nov 1999, 4-8.

<sup>142</sup> Chin, *Smuggled Chinese*, *supra* note 91, at 36.

<sup>143</sup> Vanda Carson et al, "The human face of our rising tide of refugees" (24 Aug 2001) *The Australian* 1.

<sup>144</sup> McCarthy et al, *supra* note 90, at 4.

<sup>145</sup> See the distinction established *supra* Section 2.1.1.3.2.

relatives and friends in ethnic communities in the destination countries who contact the traffickers from abroad.<sup>146</sup>

For the majority of the people involved, by definition, there is no element of coercion when the first contact with the recruiters is established.<sup>147</sup> The migrants voluntarily seek the services of the traffickers because that is their only available avenue to escape intolerable conditions in their home countries.

In most cases, the migrant customers sell all their belongings and borrow money wherever they can to pay the price that trafficking organisations charge for their services.<sup>148</sup> Sometimes, the migrants' families who sponsor the illegal voyage pay the traffickers. Generally, neither the migrants nor their relatives can offer any security to obtain loans from ordinary banks with reasonable interest rates. This forces them to enter contracts with the traffickers, who allow loans or the payment of deposits on departure (ranging from approximately 5-20% of the fee) and offer to defer payment of the full cost until after the trip is made.<sup>149</sup> Hence, the migrants fall into debt by borrowing money at exorbitant interest rates, or by taking an advance payment from the traffickers.

#### 3.4.4.2. Sending countries

To date, no coherent study on the major countries of origin of trafficked migrants in the Asia Pacific region has been undertaken. As mentioned earlier, some evidence exists that illegal migratory movements generally occur between relatively poorer or politically unstable nations and richer, safer ones.

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<sup>146</sup> See, for example, Beare, "Illegal Migration: Personal Tragedies, Social Problems, or National Security Threats?" *supra* note 70, at 21; Christopher Ulrich, *Alien Smuggling and Uncontrolled Migration in Northern Europe and the Baltic Region* (1995) 4. See also *supra* Section 2.1.2.2.

<sup>147</sup> See the definition *supra* Section 1.1.2.4.

<sup>148</sup> See the estimates *infra* Section 3.4.4.2.

<sup>149</sup> See the reports and examples in Jennifer Bolz, "Chinese Organized Crime and Illegal Alien Trafficking" (1995) 22(3) *Asian Affairs* 147 at 149; Chin, *Smuggled Chinese*, *supra* note 91, at 5, 101-103; DIMA, *Protecting the Border* (1999) *supra* note 96, at 15; IOM, "There are ways to curb the worldwide traffic in migrants" (2000) 21 *Trafficking in Migrants* 1 at 1; Kung, *supra* note 119, at 1275; Salt & Hoghart, *supra* note 88, at 59; Salt & Stein, *supra* note 118, at 479; Savona et al, "Dynamics of Migration and Crime in Europe" *supra* note 71, at 75; Wang, *supra* note 126, at 53; Zhang & Gaylord, *supra* note 80, at 7.



Refugee flows and asylum claims recorded by UNHCR and the immigration statistics of destination countries such as Australia give some indication about the direction of illegal migration flows and about the major sending countries of trafficked migrants. Additionally, some research has been undertaken on individual nations and on the circumstances that make illegally assisted departures from these countries possible and likely.<sup>150</sup>

Figure 8: Principal refugee nationalities from the Asia Pacific and illegal entrants in Australia, 1997-2000<sup>151</sup>

Country of origin/nationality	UNHCR			DIMA: unauthorised arrivals		
	Refugee population end of 1999	Refugee population end of 2000	% of all refugees worldwide	1997-98	1998-99	1999-2000
Afghanistan	2,585,900	3,567,200	29.4%	60	149	1,312
Cambodia	36,800	36,700	0.3%	6	6	na
PR China	110,200	107,800	0.9%	277	588	208
East Timor	162,500	122,200	1%	na	na	na
Iraq	617,700	497,400	4.1%	148	446	2,454
Lao PDR	21,100	17,200	0.1%	-	-	na
Myanmar	130,000	135,600	1.1%	-	-	na
Sri Lanka	96,300	101,200	0.8%	116	79	78
Tibet	20,300	20,900	0.2%	na	na	na
Vietnam	401,000	369,100	3%	6	13	na

Figure 8 highlights some of the major source countries of refugees in the Asia Pacific region and sets these figures in comparison to the number of illegal entrants from these countries in Australia. In summary, the data supports the suggestion that some connection exists between the nationality of refugees and asylum seekers and those of unauthorised arrivals in Australia: Those nationals who are represented in comparatively high numbers among the refugee populations of the world are also among the major nationalities of illegal immigrants in Australia.

For example, among the countries of the Asia Pacific region PR China is one of the major countries of origin of asylum applicants. Simultaneously, the PR China has been the

<sup>150</sup> See generally *supra* Section 2.1.

<sup>151</sup> "Table 5 Top-40 refugee nationalities" in UNHCR, *2000 Global Refugee Trends* (2001); and "Arrivals by air refused immigration clearance", "Unauthorised boat arrivals" DIMA, Unauthorised Arrivals Section, *1998-1999 Financial Year Report* (1999) 5, 6, 18; "Top 10 Countries and Territories of

largest source country for trafficked migrants in the Asia Pacific region and perhaps in the world. Australia recorded 277 unauthorised arrivals of Chinese nationals in the 1997-98 financial year and 588 in 1998-99. For many years, nationals of the PR China have represented the majority of Australia's illegal entrants (18.92% of all unauthorised arrivals, and 51.3% of all unauthorised arrivals by sea in 1998-99).

A similar connection between asylum applications and trafficking can be established in the case of Sri Lankan nationals. In Australia, North America and Western Europe, Sri Lankans have been one of major group of refugees throughout the 1980s and 1990s. Simultaneously, Sri Lanka is an important source country of illegal entrants to Australia and there is evidence that professional traffickers have facilitated many, if not most, of these arrivals.<sup>152</sup>

Not surprisingly, geographically more distant source countries of refugees are represented in smaller numbers among the people trafficked to Australia. However, many illegal migrants from Afghanistan and Iraq, for example, were found entering Australia illegally by air and increasingly on the sea route. Figure 8 also illustrates that in Australia, the number of unauthorised entrants from these countries went up together with growing numbers of Afghan and Iraqi refugees worldwide.<sup>153</sup>

In other cases, however, there is no apparent connection between refugee producing situations and illegal immigration in Australia. For example, Myanmar nationals only make up for a small number of people trafficked in the Asia Pacific region although the ongoing violation of human rights by the military regime has led to the presence of large numbers of Myanmar refugees in many South East Asian nations. Some cases were uncovered in which migrants from Myanmar tried to reach the coast of Malaysia by boat illegally, and in other cases workers from Myanmar have been detected paying professional traffickers to be smuggled into Thailand.<sup>154</sup>

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Citizenship for Unauthorised Air and Boat Arrivals 1998-99" DIMA, *Protecting the Border* (1999) *supra* note 96, at 69, 70, 75; id, *Protecting the Border* (2001) *supra* note 96, at 93.

<sup>152</sup> AFP, *supra* note 108, at 5; UNHCR, *Zur Lage der Flüchtlinge in der Welt* (1996) 210-211.

<sup>153</sup> AFP, *supra* note 108, at 4-5; DIMA, *Protecting the Borders* (1999) *supra* note 96, at 22, 26, 35. For the background of the arrival of Afghan and Iraqi asylum seekers see *supra* Section 2.2.6.

<sup>154</sup> IOM, "Myanmar — Malaysia" (1994) 3 *Trafficking in Migrants* 3; "Thailand: August 4" (1999) 6(8) *Migration News*.

Similarly, despite the internal turmoils in East Timor in recent years, the country has never been a significant source of illegal entrants in Australia. Also, there is some information that people from other South Pacific nations have entered Australia illegally,<sup>155</sup> but their number is comparatively small and there is yet no information on the causes of these arrivals and whether or not they have been facilitated by trafficking organisations.

Given the data analysed above, it is impossible to establish a clear and unequivocal connection between circumstances that occur in the major sending countries of illegal migrants and the levels of migrant trafficking in the Asia Pacific region. There are some indications that a connection between refugee flows and trafficking exists. This lends plausibility to the assumption that the most desperate migrants resort to traffickers as a result of non-existing ways for legal migration.<sup>156</sup> In other cases, the major push for illegal migrants appears to be socioeconomic and demographic reasons thereby supporting suggestions that migrant trafficking often falls within the category of opportunity seeking migration.<sup>157</sup> These assumptions are also reflected in the profile of the migrants: It appears that political refugees and economic migrants who are trafficked are usually members of the middle and higher social classes who have the education to understand the political and economic realities in their countries and also have access to the necessary resources to pay to escape from them.

#### 3.4.4.3. Profile of the migrants

Little is known on the areas and locations where recruitment occurs and on the profile of the 'trafficking clientele'. While some studies suggest that most migrants originate from remote areas of the sending country, others claim that migrants initially move to the big cities of the departing countries where they contact trafficking agents.<sup>158</sup> Also, there is disagreement about the educational level and social background of trafficked migrants. Some studies state that traffickers generally recruit young people with above-average

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<sup>155</sup> Sansy Cuthbertson & Rodney Cole, *Population Growth in the South Pacific Island States* (1995) 39-40.

<sup>156</sup> See *supra* "survival migration", Section 2.1.1.3.1.

<sup>157</sup> See *supra* Section 2.1.1.3.2.

education who are given the prospect of high-ranking positions in the destination country. Furthermore, it has been stated that trafficking is not exclusive to poor and unemployed people since the migrants and their families spend considerable amounts of money for the illegal passage and some travel with large sums of cash.<sup>159</sup> Other reports, however, have rejected these speculations.<sup>160</sup>

To date, there is no data available on the social and educational background of trafficked migrants in the Asia Pacific region. However, some assumptions about the profile of trafficked migrants can be made on the basis of information collected by the Australian Department of Immigration on the unauthorised arrivals detected in Australia. Although these figures are not representative, they can give some indication about the kind of people that are trafficked through the region.

Figure 9: Total unauthorised arrivals by age on arrival in Australia, 1998-2000<sup>161</sup>

Age on arrival	1998-99		1999-2000	
	total	%	Total	%
under 20 y.	237	8%	465	8%
20-34 y.	1821	60%	3427	59%
34-49 y.	869	29%	1722	29%
50-64 y.	91	3%	181	3%
65y and over.	14	0.04%	30	1%

Figure 9 shows that most people arriving in Australia illegally are under the age of 34 (c 68% in 1998-99). This is not surprising, as migration, both legal and illegal, usually involves people who have the physical ability to face the challenges of migration and for whom the advantages of relocating and the opportunities abroad are much more obvious and promising.

<sup>158</sup> Cf Bögel, *supra* note 21, at 153-158; UN Commission on Crime Prevention and Criminal Justice, *Additional information on measures to combat alien-smuggling*, UN Doc E/CN.15/1995/3 (26 Apr 1995) para 6; Vahlenkamp & Hauer, *supra* note 40, at 17.

<sup>159</sup> Beare, "Illegal Migration: Personal Tragedies, Social Problems, or National Security Threats?" *supra* note 70, at 21; Ghosh, *supra* note 91, at 19; IOM, "There are ways to curb the worldwide traffic in migrants" (2000) 21 *Trafficking in Migrants* 1 at 1; Salt & Stein, *supra* note 118, at 479.

<sup>160</sup> Vanda Carson & Natalie O'Brien, "His country's gatekeeper" (25-26 Aug 2001) *The Weekend Australian* 7; UN Commission on Crime Prevention and Criminal Justice, *Additional information on measures to combat alien-smuggling*, UN Doc E/CN.15/1995/3 (26 Apr 1995) para 6.

<sup>161</sup> DIMA, *Protecting the Border* (1999), *supra* note 96, at 15, 69, *id.*, *Protecting the Border* (2001), *supra* note 96, at 16, 94.

According to other data by the Department of Immigration, the majority of unauthorised arrivals are male. For example, 3,209 or 88.7 percent of the 3,617 unauthorised boat arrivals in 1999 were men. Only 165 or 4.6 percent were women and 243 or 6.7 percent children (no gender specified).<sup>162</sup> These figures support the assumption that the majority of trafficked migrants are young male.<sup>163</sup>

### 3.4.2. The Illegal Services

The illegal services that trafficking organisations provide can be differentiated into four elements: (1) preparation of the migrants, (2) provision of travel documents, (3) transportation and routing, and (4) arrival (immigration).<sup>164</sup> The services sought and offered change depending on the distance between the country of departure and the destination country and on the immigration, emigration, asylum and transit systems in force.<sup>165</sup>

#### 3.4.2.1. Preparation of the migrants

The information that is available on how the migrants are prepared by their traffickers before they leave the country of departure is very limited. In some cases it has been found that migrants are given names and phone numbers of people at transit points and in destination countries.<sup>166</sup> Furthermore, traffickers sometimes provide coaching to the migrants in how to avoid border controls, how to answer immigration officers or law

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<sup>162</sup> DIMA, Unauthorised Arrivals Section, *Refused Immigration Clearance Report, December 1999* (2000) 29.

<sup>163</sup> On the issue of gender and migration, see also *supra* Section 2.1.1.3.2.

<sup>164</sup> Cf John McFarlane, *Transnational Crime and Illegal Immigration in the Asia-Pacific Region* (1999) 12; Zhang & Gaylord, *supra* note 80, at 6.

<sup>165</sup> Cf IOM, "Irregular Migration and Migrant Trafficking" background paper submitted to the *Seminar on Irregular Migration and Migrant Trafficking in East and South East Asia*, Manila, 5-6 Sep 1996, 5; id, "Trafficking in Migrants: Characteristics and Trends in Different Regions of the World" *supra* note 89, at 3; Savona et al, "Dynamics of Migration and Crime in Europe" *supra* note 71, at 73.

<sup>166</sup> Jennifer Sexton & John Stapleton, "Fears some illegals slipped police net" (12 Apr 1999) *The Australian* 2.

enforcement agencies if they get questioned or detained, and how to claim asylum in the receiving countries.<sup>167</sup>

The customers of the traffickers also represent the major risk of detection and arrest for the criminal organisation. At the same time, the illegal migrants, particularly those who classify as covert arrivals, must fear detection and arrest for illegally entering foreign countries. The fact that illegal migrants are simultaneously customers and victims of the traffickers as well as violators of the law places them in a very complex and dangerous situation. Threats and intimidation are the major tools to control the migrants and prevent them from inhibiting the organisation's activities. Violence is used to control and maintain order among the migrants as well as employees. It is also used to silence potential witnesses to crimes or as a punishment and warning to others.<sup>168</sup>

### 3.4.2.2. Travel documents

#### 3.4.2.2.1. General observations

Migrants, regardless of their country of origin and their legal status, need high-quality travel documentation to move from one country to another. Such documents are required, for example, for visa applications, for obtaining passports and exit authorisations, for transportation by air, for border controls and immigration clearance.

But the circumstances that cause people to flee their home countries often make it impossible for them to obtain genuine documents.<sup>169</sup> Consequently, the services of transnational traffickers, particularly in the case of trafficking by air, frequently include the production and/or supply of fraudulent travel or identity documents.<sup>170</sup> This has become a

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<sup>167</sup> IOM, *Trafficking in Migrants: IOM policy and activities*, *supra* note 91; Salt & Stein, *supra* note 118, at 483; Secretariat of the Budapest Group, *supra* note 99, at 15-16; Sieber, *supra* note 40, at 75-76; Smith, "Chinese Migrant Trafficking" *supra* note 71, at 16; Zhang & Gaylord, *supra* note 80, at 9.

<sup>168</sup> Cf *supra* Section 3.2.4.2.

<sup>169</sup> Although many immigration countries have legislated against undocumented arrivals, it is inappropriate to require valid travel documents from genuine refugees. This has been recognised in the *Convention relating to the Status of Refugees*, art 27 and Annex Specimen Travel Document. For further reading see, for example, Ghosh, *supra* note 91, at 6-7; Erika Feller, "Carrier Sanctions and International Law" (1989) 1(1) *IJRL* 48 at 56-57.

<sup>170</sup> Fraudulent travel or identity documents are defined in art 3(c) *Protocol against the Smuggling of Migrants by Land, Sea and Air*; see *infra* Section 6.4.1.2.3.

growing criminal activity, as the ability to migrate largely depends on the possession of the necessary documentation. Although modern technology has facilitated the apprehension and seizure of forged passports and visas, at the same time the equipment to make more convincing fraudulent documents has improved rapidly.

Trafficking organisations show a high level of sophistication and variety in the ways in which they obtain or produce the necessary documents. The major ways include photo-substitution, visa transposing, and producing forged visas, residence permits and passports. Investigations have also found that blank, unissued passports are stolen from passport-issuing authorities. Other documents are sometimes stolen from travel agencies, and corrupt officials have been found providing passports to trafficking organisations. In order to meet visa requirements traffickers also issue fraudulent business invitations from non-existing companies in the destination countries.<sup>171</sup>

In preparation of the illegal journey, migrants are also often given return tickets in order to meet entry and transit requirements and make the migrants appear as tourists or business travellers.<sup>172</sup> Where applicable, migrants are also given cash, traveller's cheques and credit cards for countries whose immigration laws require evidence for sufficient funds for the duration of the stay in that country.<sup>173</sup>

#### 3.4.2.2.2. Document fraud and misuse in the Asia Pacific region

The use of fraudulent and stolen travel documentation is a major characteristic of migrant trafficking in the Asia Pacific region, particularly of airborne trafficking. This phenomenon is also closely linked with the corruption of local government, law

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<sup>171</sup> In 1999/2000 three cases were detected in which colleges in Australia advertised for students but were found to have no teaching facilities; "Australia/New Zealand" (1999) 6(9) *Migration News*; "Australia/New Zealand" (2000) 7(4) *Migration News*. See also Adam Graycar et al, "Trafficking in Human Beings" paper presented at the 3<sup>rd</sup> *National Outlook Symposium on Crime in Australia*, Canberra, 22-23 Mar 1999, 8; IOM, "Organised Crime moves into Migrant Trafficking" (1996) 11 *Trafficking in Migrants* 1-2; Amy McAllen, "Non-Immigration Visa Fraud" (1999) 32 *Vand JTL* 237 at 253-260; Sieber, *supra* note 40, at 75; Ulrich, *supra* note 146, at 4; UN General Assembly, *Measures to combat alien smuggling. Report of the Secretary-General*, UN Doc A/49/350 (30 Aug 1994) para 7.

<sup>172</sup> See, for example, s 5(4) *Immigration Act 1971* (Vanuatu) and for the Philippines see Ronaldo Ledesma, *An Outline of Philippine Immigration and Citizenship Laws* (1998) 57.

<sup>173</sup> See, for example, s 14 *Immigration Act 1979* (Thailand). Sieber, *supra* note 40, at 75-76; Sexton & Stapleton, *supra* note 166, at 2; Vahlenkamp & Hauer, *supra* note 40, at 17.

enforcement, border control and customs officials. The following examples illustrate the variety and sophistication of document fraud and misuse in the region.

Chinese criminal organisations, for instance, have been found using counterfeit travel documents to pass illegal migrants through border controls. The increasing decentralisation of China's administration makes it easy for traffickers to obtain passports and travel documents by corrupting local government employees. Officials have been found providing both genuine and fraudulent documents in exchange for money or, in more recent cases, for the trafficker's promise to smuggle a member of the corrupt official's family abroad. In other cases, officials have sold their own government identification to traffickers.<sup>174</sup>

Because Chinese and Taiwanese are similar in appearance and speak the same language, it is not surprising that traffickers seek to obtain Taiwanese travel documents for their customers from China. Recent investigations have found that trafficking organisations are using Taiwanese identity cards for photo-substitution and then to apply on behalf of their Chinese customers for visas for third countries to which Taiwanese nationals have easier access. Once the visas are granted the travel documents are sent to the PR China for further use.<sup>175</sup> In cases that have been uncovered in Myanmar, citizens were selling the identity papers of their recently deceased relatives to Chinese traffickers who manipulated them by photo-substitution.<sup>176</sup> The Myanmar documents were then used to obtain refugee status in third countries.

Hong Kong, as analysed later, is a major transit point in the region. Many people travelling through Hong Kong's airport have been found using false passports, documents and airline boarding passes. In 1998 the Hong Kong Immigration Department detected 3,594 and in 1999 3,530 cases of forged travel documents.<sup>177</sup> Most of the forged documents found in

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<sup>174</sup> AFP, *supra* note 108, at 3, 4; Beare, "Illegal Migration: Personal Tragedies, Social Problems, or National Securities Threats?" *supra* note 70, at 35; Chin, *Smuggled Chinese*, *supra* note 91, at 42-46; Houd, *supra* note 123, at 80; Ian Peck, "Removing the Venom from the Snakehead: Japan's Newest Attempt to Control Chinese Human Smuggling" (1998) 31 *Vand JTL* 1041 at 1054; Wang, *supra* note 126, at 54.

<sup>175</sup> Chin, *Smuggled Chinese*, *supra* note 91, at 142-143; "Taiwan's Foreign Workers" (1999) 6(5) *Migration News*.

<sup>176</sup> IOM, "Burma — Thailand" (1993) 1 *Trafficking in Migrants* 3; Smith, "Chinese Migrant Trafficking" *supra* note 71, at 1.

<sup>177</sup> Hong Kong Immigration Department, *Facts and Statistics* (3 Apr 1998, 18 Aug 1999, 1 Dec 2000) [www.info.gov.hk/immd](http://www.info.gov.hk/immd). Cf AFP, *supra* note 108, at 3; and see also Adamoli et al, *supra* note 11, at 86;



Hong Kong are forged PRC passports and travel permits (c 42% in 1998-99), but fake Philippine (c 3%) and Sierra Leone (6%) documents have also been apprehended.<sup>178</sup> Corruption of immigration and law enforcement officials is also an important issue in Hong Kong. For example, in 1997 some foreign consulates were suspected of taking bribes for granting visas to trafficking organisations.<sup>179</sup>

Bangkok is considered a major centre for the production of fraudulent documents, often conducted by highly specialised criminal organisations.<sup>180</sup> Investigations have found that falsified passports in Bangkok are available for about US\$3,000 and stolen blank Malaysian passports for US\$8,000.<sup>181</sup>

Malaysia is a major source of unissued passports and fraudulent working permits that have been stolen or obtained from corrupt government officials.<sup>182</sup> Malaysian police has also reported that traffickers are buying fraudulent passports from Hong Kong, Indonesia and Myanmar and then use Kuala Lumpur as a transit point for illegal migrants on their way to third countries.<sup>183</sup>

Recent studies reported that Government agencies in Nauru and Tonga have sold passports to Chinese nationals who have used them to illegally enter other countries.<sup>184</sup> The Marshall Islands, for instance, a country with only 62,000 population, has experienced large-scale illegal immigration from China, often including the use of fraudulent documents. Initially, the Marshall Island Government sold passports to Chinese in return for investment into the country, but as this attracted too few investors, the investment requirement was dropped and almost immediately the passport sales went up. By the time the Government stopped

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Peck, *supra* note 174, at 1046; Smith, "Chinese Migrant Trafficking" *supra* note 71, at 7; Vagg, "The Borders of Crime" *supra* note 70, at 313.

<sup>178</sup> Hong Kong Immigration Department, *Facts and Statistics* (1 Dec 2000) [www.info.gov.hk/immd](http://www.info.gov.hk/immd).

<sup>179</sup> Beare, "Illegal Migration: Personal Tragedies, Social Problems, or National Securities Threats?" *supra* note 70, at 35. Cf Chin, *Smuggled Chinese*, *supra* note 91, at 45.

<sup>180</sup> Adamoli et al, *supra* note 11, at 87; AFP, *supra* note 108, at 4, 7; DIMA, *Fact Sheet 83: People smuggling* (17 Mar 1999) 2; IOM, "Prostitution in Asia Increasingly Involve Trafficking" (1997) 15 *Trafficking in Migrants* 1.

<sup>181</sup> AFP, *supra* note 108, at 7.

<sup>182</sup> AFP, *supra* note 108, at 3-4; DIMA, *Protecting the Border* (1999) *supra* note 96, at 22; Ghosh, *supra* note 91, at 68. See also Adamoli et al, *supra* note 11, at 86; Smith, "Chinese Migrant Trafficking" *supra* note 71, at 8.

<sup>183</sup> IOM, "Trafficking in Migrants: Characteristics and Trends in Different Regions of the World" *supra* note 89, at 9; id, "Assisting women trafficked for prostitution" (1994) 4 *Trafficking in Migrants* 2.

<sup>184</sup> "Canada: Chinese Migrants" (1999) 6(10) *Migration News*.

the selling of passports in 1996, about 1,200 registered passports were issued and another 2,000 unaccounted passports had been found.<sup>185</sup>

### 3.4.2.3. Transportation and routing

#### 3.4.2.3.1. General patterns

Adaptation of methods of illegally moving people in response to legislative and law enforcement activities is essential for the survival of the trafficking organisation and for disguise of their activities. Trafficking organisations exploit loopholes in legislation, coastal surveillance and border controls, or simply cross borders at times when control points are short-staffed. Borders and other gateways may also be temporarily closed or heavily controlled, thus requiring a change of routes via other countries. In the case of trafficking by sea, seasonal weather patterns may prevent departures of boats. Consequently, traffickers may use simple and direct routes and at other times complex and circuitous ones. Also, it has been found that traffickers have 'sold' their migrants to other trafficking organisations in transit countries.<sup>186</sup> For these reasons the time between departure from the country of origin and arrival at the final destination varies from several weeks to months or even years.<sup>187</sup>

The information that is available on trafficking routes is highly anecdotal and little is known on how criminal organisations establish their routes. As stated before, several studies suggest that the large transnational networks often use routes that are also used for drug trafficking and smuggling. The trafficking of migrants seems to follow certain trends depending upon information about transit and entry controls. It has also been found that

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<sup>185</sup> Jack Jorban, Marshall Island Ambassador to the UN, "Republic of the Marshall Islands: Transnational Problems" paper presented at the *Transnational Security Threats in Asia* conference, Honolulu (HI), 8-10 Aug 2000, 2; Richard Skeldon, "The Relationship between Migration and Development in Asia and the Pacific" in Carunia Firdausy (ed), *International Migration in Southeast Asia: Trends, Consequences, Issues and Policy Measures* (1998) 7 at 38-39.

<sup>186</sup> Chin, *Smuggled Chinese*, *supra* note 91, at 92.

<sup>187</sup> Salt & Stein, *supra* note 118, at 477-478. See also the case examples of migration from China to the US in Chin, *Smuggled Chinese*, *supra* note 91, at 50-51, 70-72; Kung, *supra* note 119, at 1285; and from China to Hong Kong in Vagg, "The Borders of Crime" *supra* note 70, at 326.

routes often reflect the local knowledge of traffickers and the locations of members along the route.<sup>188</sup>

#### 3.4.2.3.2. Modes of transportation

Migrant trafficking is carried out by land, air and sea. Often the means of transportation is changed several times en route.

- ◆ Trafficking by land is the easiest way to move from one country to another. The spectrum ranges from simply walking migrants across ‘green borders’<sup>189</sup> to sophisticated methods of clandestine trafficking in trains and trucks. Trafficking by land offers the advantage that many people can be moved in a single venture if buses or trucks are used. If people cross borders clandestinely, for example, at night or beyond control points, land trafficking also removes the need for bribery and fraudulent documents.
- ◆ Trafficking by air is the fastest growing method of organised illegal migration in the Asia Pacific region due to increasing international air traffic as well as inadequate control of passengers at many transit and immigration points. The number of migrants that can be trafficked at a time is limited and the illegal passengers have to be prepared as to how to deceive officials at control points. Trafficking by air usually requires sophisticated travel documents or alternatively the bribery of border and immigration officials or airline personnel. In many cases trafficking organisations facilitate the onward travel of their customers by switching documents, tickets and boarding passes in the transit lounges of international airports to enable them to board flights to destination countries.<sup>190</sup>
- ◆ Trafficking by sea involves much lower risks of detection and arrest than land and air trafficking, especially regarding the geographical particularities of many countries in the Asia Pacific region. Also, it enables traffickers to transport many people in a single

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<sup>188</sup> Graycar et al, “Trafficking in Human Beings” *supra* note 171, at 4; Salt & Stein, *supra* note 118, at 474; cf Bögel, *supra* note 21, at 91-99, 185; Sieber, *supra* note 40, at 75-76.

<sup>189</sup> An expression frequently used to describe international borders without barriers.

<sup>190</sup> Beare, “Illegal Migration: Personal Tragedies, Social Problems, or National Security Threats?” *supra* note 70, at 31; UN General Assembly, *Measures to combat alien smuggling. Report of the Secretary-General*, UN Doc A/49/350 (30 Aug 1994) para 8.

venture, which means higher profit. Beyond that, the logistics of trafficking by sea are much simpler as it removes the need for travel documents, and there is no need to bribe border officials, as the illegal migrants do not pass through immigration control points.<sup>191</sup> A common method of trafficking by sea appears to be what has been described as a 'two-boat procedure': A boat with the illegal migrants leaves the overseas port, accompanied by an unladen vessel. At a predetermined point in international waters, the migrants are transferred to the trafficking vessel, or the crew on the boat carrying the migrants transfers to the accompanying boat and returns to the port of embarkation, sometimes leaving the migrants stranded. Another method that has been used is to set off the migrants on offshore islands where they await the arrival of another vessel.<sup>192</sup>

The experience of many destination countries has shown that the means and methods of transportation largely depend on the kind of the people who are trafficked and on the objective of their journey. Especially the final part of the illegal voyage is largely determined by the question whether the persons trafficked seek to immigrate clandestinely and undetected and then disappear in the community (so-called covert arrivals) or whether they seek to reach the territory of the destination country and then claim asylum (often referred to as overt arrivals). In the former case, sophisticated means of trafficking such as high quality forged papers or hidden compartments in boats, trains and trucks are necessary to circumvent border controls and arrive undetected. In the latter case, migrants can simply be dropped off at the coast of the destination country, or they are told to lodge their asylum claims immediately upon arrival at the destination airport.

Migrant trafficking is sometimes described as a way to circumvent migration regulations and, therefore, as a victimless crime. But it also has to be noted that a major concern in the field of migrant trafficking is the victimisation of migrants, their physical safety and the violation of their dignity and human rights. During the journey the migrants are completely in the hands of the traffickers and often subject to deprivation and indignities. The

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<sup>191</sup> UN General Assembly, *Measures to combat alien smuggling. Report of the Secretary-General*, UN Doc A/49/350 (30 Aug 1994) para 9; Wang, *supra* note 126, at 49.

<sup>192</sup> Chin, *Smuggled Chinese*, *supra* note 91, at 68-70; DIMA, "Drowning Tragedy Highlights Hazards of People Smuggling" DIMA Doc MPS 108/99 (22 July 1999); McInerney, *supra* note 99, at 7; Wang, *supra* note 126, at 54-55.

transportation of illegal migrants, especially in the case of trafficking by sea, mostly takes place under inhumane conditions, causing great number of accidents, casualties and sometimes fatalities during the dangerous passages. The common methods of seaborne trafficking pose a particularly serious danger for the migrants. In some cases they have been found crammed into vessels which were not seaworthy or locked in freight containers without enough air, water or food.<sup>193</sup> In other cases, traffickers have simply abandoned the migrants en route and put them at risk because they feared being caught by the authorities.<sup>194</sup>

#### 3.4.2.3.3. Regional analysis

The Asia Pacific region including East and South East Asia, Australia and Oceania is an area in which every form of criminal behaviour associated with trafficking in migrants can be observed. This is mainly due the political and economic discrepancies between the countries in the region which combines with the presence of well-established international criminal organisations that operate throughout the region.<sup>195</sup> Many countries in the Asia Pacific region play more than one role for migrant trafficking: they are simultaneously sending and transit or transit and receiving countries.<sup>196</sup>

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<sup>193</sup> See generally IOM, "Trafficking in Migrants: Characteristics and Trends in Different Regions of the World" *supra* note 89, at 4; UN Commission on Crime Prevention and Criminal Justice, *Additional information on measures to combat alien-smuggling*, UN Doc E/CN.15/1995/3 (26 Apr 1995) para 6; UN Economic and Social Council, *Action against illegal trafficking in migrants, including by sea*, UN Doc E/RES/1998/19 (28 July 1998); UN General Assembly, *Measures to combat alien smuggling. Report of the Secretary-General*, UN Doc A/49/350 (30 Aug 1994) para 5.

<sup>194</sup> For case studies see Chin, *Smuggled Chinese*, *supra* note 91, at 72-77; Peck, *supra* note 174, at 1047; Smith, "Chinese Migrant Trafficking" *supra* note 71, at 11; UNICRI & AIC, *supra* note 119, at 12-13.

<sup>195</sup> For an overview of organised crime in Australia and the Asia Pacific region see, for example, Adamoli et al, *supra* note 11, at 73-91; Meagher, *supra* note 25, at 15-17; Savona et al, *Organised Crime across the Borders*, *supra* note 37, at 23-24.

<sup>196</sup> For a regional study of migrant trafficking routes see, for example, Greg Talcott & Hamish McCardle, "Human Trafficking Routes through the Asia Pacific Region: A Sub-Report of a Strategic Assessment on People Smuggling for the New Zealand Customs Service" paper presented at the *Sixth Meeting of the CSCAP Working Group on Transnational Crime*, Wollongong, 5-9 Nov 1999.

Figure 10: Migrant trafficking routes in the Asia Pacific region

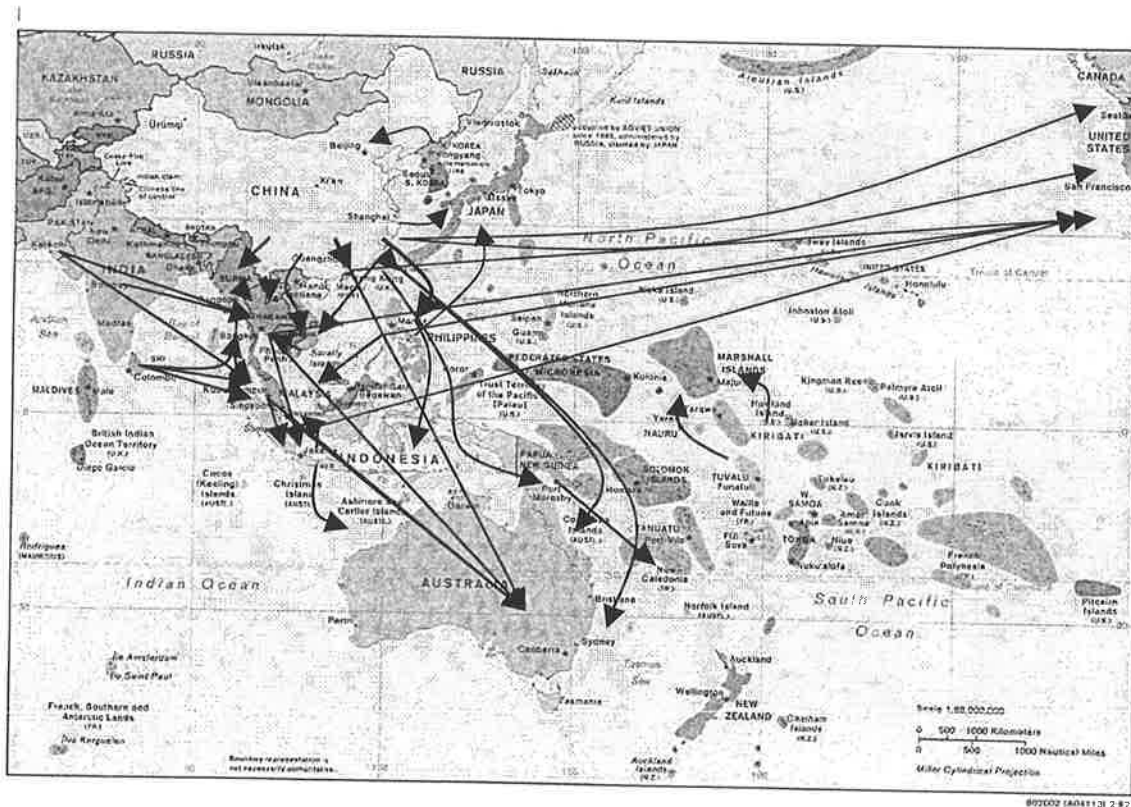


Figure 10 illustrates some of the principal routes used by trafficking organisations in the Asia Pacific region. The following analysis summarises the findings of national and international police investigations and academic research in the Asia Pacific region.

#### *PR China*

China is the principal source country of illegal migrants in the Asia Pacific region and in North America. Recent studies by IOM and UNHCR estimate that between 100,000 and 500,000 migrants leave or attempt to leave China each year with the help of organised trafficking rings.<sup>197</sup> But only few traffickers and illegal migrants are apprehended: In 1999, for instance, Chinese authorities reportedly detected only 925 “smugglers” and detained 9,129 people who were trying to leave the country illegally.<sup>198</sup> Police in Fujian province

<sup>197</sup> “China, Hong Kong, Taiwan” (2000) 7(12) *Migration News*; IOM, “Deaths in Trafficking/Smuggling” (2000) 21 *Trafficking in Migrants 2*. The US Immigration and Naturalization Service estimated in March 2000 that at least 100,000 Chinese are smuggled abroad each year; “Chinese Migrants: Canada and US” (2000) 7(3) *Migration News*.

<sup>198</sup> “China, Hong Kong” (2000) 7(2) *Migration News*.

reported that they broke up 30 smuggling rings, arresting 300 migrants and 280 smugglers in the first eight months of 2001.<sup>199</sup>

Chinese trafficking organisations maintain global networks to transport and accommodate people. Members of the organisations are located in overseas communities and strategic transit points such as Bangkok, Hong Kong, Manila and Singapore to facilitate the illegal journey to Australia and other destination countries.<sup>200</sup>

The major trafficking route by land appears to run through the southern provinces of China into Myanmar where immigration control is almost non-existing due to increasing border trade.<sup>201</sup> Trafficking by sea usually commences in the ports of the southern Guangzhou and Fujian provinces where the migrants embark on boats that are registered in Hong Kong or Taiwan and which have legitimate access to Chinese ports.<sup>202</sup>

#### *Hong Kong and Macau*

Illegal migration and organised crime have been long-standing problems for Hong Kong and Macau.<sup>203</sup> The cities' special status as British and Portuguese colonies and now as Special Administrative Regions of China, combined with their infrastructure and exposure to the sea, make Hong Kong and Macau attractive destinations and transit points for trafficking of illegal migrants from mainland China and many different Asian countries. Hong Kong's international airport is one of the major hubs in the region and is also one of the principal ports of embarkation of people arriving in Australia illegally by air.<sup>204</sup>

Figure 30 illustrates the levels and nature of illegal immigration in Hong Kong.<sup>205</sup> In the late 1990s, Hong Kong authorities apprehended large numbers of illegal arrivals, particularly Chinese nationals who fled to the British outpost prior to Hong Kong's handover to China in 1997. This number decreased significantly in recent years, but

<sup>199</sup> "China, Taiwan, Hong Kong" 8(10) *Migration News*.

<sup>200</sup> AFP, *supra* note 108, at 3, 4; Chin, *Smuggled Chinese*, *supra* note 91, at 50-51, 56-57.

<sup>201</sup> Chin, *Smuggled Chinese*, *supra* note 91, at 52, 56.

<sup>202</sup> DIMA, *Protecting the Border* (1999) *supra* note 96, at 22; McFarlane, *supra* note 164, at 13; Wang, *supra* note 126, at 54-55; "Taiwan: Chinese Smuggling" (1999) 6(12) *Migration News*.

<sup>203</sup> For the history of organised and illegal migration in Hong Kong see, for example, Meagher, *supra* note 25, at 17; Myers, *supra* note 60, at 192; Jon Vagg, "Sometimes a Crime: Illegal Immigration and Hong Kong" (1993) 39 *Crim&Del* 355-372; id, "The Borders of Crime" *supra* note 70, at 310-328.

<sup>204</sup> DIMA, *Protecting the Border* (1999) *supra* note 96, at 69. For trafficking through Macau's new airport see Smith, "Chinese Migrant Trafficking" *supra* note 71, at 8.

<sup>205</sup> See Appendix D, Figure 30.

remained at comparatively high levels, with approximately 9,000 illegal immigrants apprehended in 2000 and 2001.

### *Taiwan*

As a result of increasing air and sea traffic passing through Taipei's ports, Taiwan has become a major destination and transit point for illegal migrants. It has been estimated that the number of people illegally residing in Taiwan exceeds 200,000, including circa 38,000 mainland Chinese, many of whom are young men from nearby Fujian province.<sup>206</sup> The cultural and historical ties as well as the political and economic disparities with the People's Republic explain why Chinese criminal organisations are well established in Taiwan and use the "renegade province" as a destination and transit point for illegal migrants from the mainland. It has also been reported that some of Taiwan's major shipping companies and airlines have been engaged in migrant trafficking. Furthermore, cases of corruption of immigration and customs officials in Taiwan's seaports have been reported.<sup>207</sup>

### *Myanmar*

For many years Myanmar has been a notorious source for illicit drugs and there is increasing evidence that drug trafficking organisations, supported and protected by corrupt government officials, use their experience and trafficking channels to transport illegal migrants in and out of the country.<sup>208</sup> Hundreds of thousands of Myanmar nationals have entered Thailand illegally to find protection and, more recently, to seek employment. Myanmar is also an important transit country for Chinese nationals who travel across the border into Myanmar, usually at night and on foot or horseback, and then travel on to Thailand.<sup>209</sup>

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<sup>206</sup> Ghosh, *supra* note 91, at 16; Peck, *supra* note 174, at 1046; "Taiwan: Chinese Smuggling" (1999) 6(12) *Migration News*.

<sup>207</sup> Myers, *supra* note 60, at 195, 196, 198, 219 (en 50); Chin, *Smuggled Chinese*, *supra* note 91, at 142.

<sup>208</sup> Adamoli et al, *supra* note 11, at 87; Martin & Romano, *supra* note 16, at 131-134; McFarlane, *supra* note 164, at 3.

<sup>209</sup> McFarlane, *supra* note 164, at 13; Richard Skeldon, "East Asian Migration and the Changing World Order" in William Gould & Allan Findlay (eds), *Population Migration and the Changing World Order* (1994) 188; Smith, "Chinese Migrant Trafficking" *supra* note 71, at 1.



### *Cambodia*

Decades of political and economic turbulence have made Cambodia an easy target for trafficking organisations which benefit from inadequate law enforcement, immigration and border control. Some senior police and immigration officials are believed to be actively involved in trafficking operations. Despite recent attempts to combat illegal migration and illegal employment, international trafficking rings have been found using Cambodia as a transit zone for illegal migrants. It has been found that the people trafficked through Cambodia are often Middle Eastern nationals who enter via Thailand, or they are Chinese nationals travelling through Laos and Vietnam. From Cambodia they seek to embark onto boats destined for Hong Kong and Australia.<sup>210</sup>

### *Thailand*

From regional and the global perspectives, Thailand appears to be one of the world's major trafficking centres. Since the early 1990s, the country has been used as an important transit point for trafficking to other Asian nations, to Western Europe, the United States and Australia. Bangkok's airport is one of the major embarkation points of people travelling to Australia illegally.<sup>211</sup> Simultaneously, Thailand is a destination for migrants from around the region, and is also a source of Thai migrants who are smuggled abroad.

Studies undertaken by international organisations and the Royal Thai Police in the mid 1990s estimate that traffickers move as many as 1,000-2,000 illegal migrants per month through Thailand, and that approximately 50,000 people are waiting in Bangkok to be trafficked to overseas destinations. The majority of illegal migrants travelling through Thailand come from Bangladesh, Cambodia, PR China, India, Lao PDR, Myanmar, Nepal, Pakistan and Sri Lanka.<sup>212</sup>

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<sup>210</sup> Smith, "Chinese Migrant Trafficking" *supra* note 71, at 8; IOM, *Combating Irregular Migration and Trafficking in Persons in East and South East Asia* (c 1998) 6; "Cambodia: Crackdown" (1999) 6(12) *Migration News*; "China/Hong Kong" (1999) 6(9) *Migration News*; Mark Baker, "New people-smuggling pipeline shut down" (10 July 2001) *Sydney Morning Herald*.

<sup>211</sup> In the 1999-2000 financial year, 20.5% of all unauthorised air arrivals in Australia departed from Bangkok Dong Muang airport, up from 10.9% in 1998-99; DIMA, *Protecting the Border* (1999), *supra* note 96, at 69; *id*, *Protecting the Border* (2001), *supra* note 96, at 95; cf the reports in McCarthy et al, *supra* note 96, at 4.

<sup>212</sup> Graeme Hugo, "Undocumented International Migration in Southeast Asia" in Carunia Firdausy (ed), *International Migration in Southeast Asia: Trends, Consequences, Issues and Policy Measures* (1998) 73 at 83-84; Peck, *supra* note 174, at 1046; IOM, "Irregular Migration and Migrant Trafficking" *supra* note

### *Philippines*

Organised crime and the trafficking of migrants to, through and from the country has been a long-standing problem in the Philippines. The long archipelagic coastline makes border surveillance extremely difficult and make clandestine arrivals and departures by sea very easy. Manila is a major transit point for migrant trafficking and has also been identified as a regional hub for criminal organisations. The majority of migrants trafficked through the Philippines appear to be Chinese nationals, but Algerians and Iraqis have also passed through the country before they attempted to illegally enter other countries, including Australia.<sup>213</sup>

### *Malaysia*

Malaysia is a major economic center in South East Asia and large numbers of passengers and cargo are passing through the country by air and sea. With its booming economy and growing levels of air traffic through Kuala Lumpur's new airport, Malaysia has become an important staging post for migrant trafficking. Malaysia is primarily a transit point for trafficking from East Asia, Sri Lanka, Pakistan, Afghanistan and Iraq to Australia,<sup>214</sup> the United States and Europe. Among the people who transit through Malaysia are many Muslim migrants from the Middle East who do not need visas to enter Malaysia.<sup>215</sup> But Malaysia is also a destination country for refugees from Myanmar and for large numbers of illegal workers who are brought in from the Philippines and Indonesia by professional trafficking organisations. The Malaysian Government estimates that about 500,000-1,000,000 foreigners reside in Malaysia illegally, 70 percent of them Indonesians and 10 percent from Myanmar.<sup>216</sup>

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165, at 5; Smith, "Chinese Migrant Trafficking" *supra* note 71, at 8; IOM, *Combating Irregular Migration and Trafficking in Persons in East and South East Asia*, *supra* note 210, at 6.

<sup>213</sup> AFP, *supra* note 108, at 4, 6, 7; Melitta Salvador, "Emerging Transnational Crime Threats and Government Responses — Country Report: Philippines" presentation to the *Fifth Meeting of the CSCAP Working Group on Transnational Crime*, Bangkok, 23-25 May 1999, 7-8.

<sup>214</sup> In the 1999-2000 financial year, 30.1% of all unauthorised air arrivals in Australia departed from Kuala Lumpur Kuching airport, up from 16.1% in 1998-99; DIMA, *Protecting the Border* (1999) *supra* note 96, at 69; *id.*, *Protecting the Border* (2001) *supra* note 96, at 95.

<sup>215</sup> "Australia: Detention" (2001) 8(2) *Migration News*. Afghan refugees have been found flying to Malaysia from Karachi, cf Carson et al, *supra* note 143, at 1.

<sup>216</sup> Ghosh, *supra* note 91, at 16; IOM, "Irregular Migration and Migrant Trafficking" *supra* note 165, at 5; Smith, "Chinese Migrant Trafficking" *supra* note 71, at 10; Spaan, *supra* note 121, at 98; "Australia, New

*Singapore*

With one of Asia's major airports, Singapore is used as a transit point by many trafficking organisations. Singapore is among the major embarkation points of people arriving in Australia illegally by air.<sup>217</sup> Airline boarding pass swapping within the transit area of Changi Airport appears to be a common method for many illegal migrants who board Australia-bound flights. The nationalities found to transit through Singapore to reach Australia are primarily Chinese, Sri Lankan, Afghan and Iraqi.<sup>218</sup>

Simultaneously, Singapore is an important destination for illegal migrants in the region. In 1999, for instance, the Singapore Immigration and Registration authority arrested approximately 17,000 illegal immigrants and overstayers, down from 23,000 in 1998, and up from 14,000 in 1997.<sup>219</sup> In 2000, the Singapore Police arrested 307 illegal immigrants attempting to enter the country, up from 52 in 1999.<sup>220</sup>

*Indonesia and East Timor*

Indonesia's geographic particularities pose particular difficulties for law enforcement and border surveillance and make the country very vulnerable to and attractive for seaborne trafficking. The recent incidents of unauthorised boat arrivals in Australia have presented Indonesia as a major transit point for illegal migrants by sea. Indonesian authorities reported that they have stopped over 1,100 people headed for Australia between March 2000 and March 2001.<sup>221</sup> Investigations suggest that most illegal migrants travel from Middle Eastern countries and China to Indonesia where they easily obtain entry. From

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Zealand, Fiji" (2000) 7(8) *Migration News*; and "Malaysia, Singapore" (2000) 7(9) *Migration News*; "Southeast Asia" (2002) 9(2) *Migration News*.

<sup>217</sup> Singapore is the major airport of embarkation for passengers arriving in Australia illegally. In the 1999-2000 financial year 38% all unauthorised air arrivals in Australia departed from Singapore, up from 20.8% in 1998-99; DIMA, *Protecting the Border* (1999) *supra* note 96, at 69; id, *Protecting the Border* (2001) *supra* note 96, at 95.

<sup>218</sup> AFP, *supra* note 108, at 3-5; Australia, External Reference Group on People Smuggling, [unpublished document] (1999) 12.

<sup>219</sup> Singapore, Closing address by Mr Wong Kan Seng, Minister for Home Affairs, at the *Home Team 2000 Flagship Workshop*, 18 Feb 2000 [copy held with author]; Singapore Immigration & Registration, "Tough Enforcement Action against Immigration Offenders" News Release (Feb 1999). Cf Adamoli et al, *supra* note 11, at 86; IOM, "Irregular Migration and Migrant Trafficking" *supra* note 165, at 5; Smith, "Chinese Migrant Trafficking" *supra* note 71, at 8; Spaan, *supra* note 121, at 94, 98.

<sup>220</sup> "Southeast Asia: Malaysia, Thailand" (2001) 8(7) *Migration News*.

<sup>221</sup> "Southeast Asia" (2001) 8(6) *Migration News*; Don Greenless, "People-trade syndicates make millions" (23-24 June 2001) *The Weekend Australian* 6; and see id, "People who move people" (23-24 June 2001) *The Weekend Australian* 19.

Indonesia, they proceed to Australia by boat, usually departing from the southeastern parts of Indonesia such as West Timor and Bali.<sup>222</sup>

Simultaneously, Indonesia is a major sending country of illegal migrants in the region, as large numbers of Indonesian workers move abroad illegally, particularly to Malaysia and Singapore.<sup>223</sup>

East Timor, which lacks efficient law enforcement, also has become a transit point for migrant trafficking.<sup>224</sup>

#### *Papua New Guinea and the South Pacific*

There is some evidence that Papua New Guinea is used as a transit country for migrant trafficking. Recent investigations have found that illegal migrants heading for Australia, New Zealand and also Canada transit via Papua New Guinea in response to increased surveillance of the Torres Strait and the Tasman Sea. The migrants trafficked through Papua New Guinea are predominantly Chinese, Sri Lankan and Iraqi nationals.<sup>225</sup>

Little information is available on the level of migrant trafficking in and among the South Pacific islands. New Caledonia reported the landing of two vessels with 110 undocumented Chinese migrants in 1997.<sup>226</sup> In March 2001, Fijian authorities confirmed the existence of a trafficking ring that smuggled mostly Asian migrants through South

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<sup>222</sup> AFP, *supra* note 108, at 3-5; Australia, External Reference Group on People Smuggling, *supra* note 218, at 12; DIMA, *Fact Sheet 81: Unauthorised arrivals by air and sea* (17 Mar 1999) 3-4; DIMA, *Protecting the Border* (1999) *supra* note 96, at 22; Dadang Garnida, "People Smuggling in Indonesia" paper presented at the *South East Asia/Pacific Region People Smuggling Conference*, Canberra, 14-19 Jan 2001, 1; IOM, "Turkey — Indonesia — Australia" (1995) 8 *Trafficking in Migrants* 3; Rebecca Tailby, "Organised Crime and People Smuggling/Trafficking to Australia" (2001) 208 *Trends & Issues in Crime and Criminal Justice* 1 at 3; "Australia/New Zealand" (1999) 6(9) *Migration News*; "Australia, New Zealand, Fiji" (2000) 7(8) *Migration News*; "Southeast Asia: Migrants" (2001) 8(1) *Migration News*; ABC-TV, "People Smuggler's Guide to Australia" *Four Corners* (23 Aug 1999).

<sup>223</sup> Spaan, *supra* note 121, at 93-104; "Malaysia, Singapore" (2000) 7(9) *Migration News*.

<sup>224</sup> See the recent report in Megan Saunders, "E Timor feared as illegals' hotspot" (14 May 2001) *The Australian* 5.

<sup>225</sup> AFP, *supra* note 108, at 5; Mick Keelty, "Bilateral Cooperation in Cross-Border Crime: An Australian Perspective" in Beno Boeha & John McFarlane (eds), *Australia and Papua New Guinea: Crime and Bilateral Relationship* (2000) 76 at 78-79; Talcott & McCardle, *supra* note 196; "Thailand: August 4" (1999) 6(8) *Migration News*; personal communication with Mr Tokam Kamene, Director General, National Intelligence Organisation (Papua New Guinea), Honolulu, 9 Aug 2000.

<sup>226</sup> Personal communication with Ms Christine Capron, Chef de la Division Ressources à la Direction de la Police Au Frontières en Nouvelle Calédonie, Canberra, 14 Jan 2001; "New Caledonia still processing Chinese boat people" (19 Sep 2001) *Pacific Islands Report*.

Pacific nations.<sup>227</sup> Recent reports show that the Marshall Islands are affected by illegal immigration from China by the use of fraudulent documents, and, to a lesser extent, from neighbouring countries such as Kiribati and Tuvalu.<sup>228</sup> Similar cases have been reported in Manila, where ethnic Chinese arrived with Nauru passports that had been sold to them in official and unofficial ways.<sup>229</sup>

US authorities have reported that the island of Guam, along with many other Micronesian islands, serve as transit points for Chinese migrants on their way to North America and Australasia. Guam offers the additional advantage of being US territory and having fast and easy access to the US mainland. For example, in 1998-99 the US Coastguard in Guam detected 1,869 unauthorised migrants who have been trafficked by Chinese groups.<sup>230</sup>

#### 3.4.2.4. Illegal immigration in Australia

Australia is among the major destination countries for migrant trafficking in the region. The country's wealth, a relatively stable economy and its geographical proximity to South East Asia and the Pacific are the principal factors that make the country an important destination for migrants from various countries of the region. A coastline of 36,835 km and a landmass of 7,682,300 km<sup>2</sup> make border surveillance and the apprehension of illegal arrivals extremely difficult. Australia does not share a land border with any other country. Coastal surveillance and immigration control at Australia's seven international airports are the only ways to prevent and detect illegal immigration. Hence, the remote and less populated north and northwestern areas of Australia are particularly vulnerable to undetected arrivals of sea vessels and small aircraft.

After the arrivals of Indochinese boatpeople ceased in the early 1980s, Australia recorded no unauthorised boat arrivals. A boat that was intercepted near the northwest coast in November 1989 carrying 26 asylum seekers was the first unauthorised arrival by sea for a

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<sup>227</sup> "Authorities confirm existence of people smuggling ring" (2001) 5 *UNDCP Eastern Horizons* 15.

<sup>228</sup> Jorban, *supra* note 185, at 2-3.

<sup>229</sup> Personal communication with Mr Angelito Q Tan, Chief of Intelligence Division, Bureau of Immigration, Department of Justice, Philippines, Canberra, 15 Jan 2001.

<sup>230</sup> Data provided by the US Coast Guard, Law Enforcement and Intelligence Branch, Honolulu, (15 Aug 2000) [on file with author]; and see Kung, *supra* note 119, at 1281.

period of eight years. The landing of this vessel marks the beginning of the latest period of unauthorised arrivals. Figure 11 shows the number of illegal arrivals by air and sea that have been detected by Australian authorities since 1989.

Figure 11: Unauthorised arrivals to Australia by boat and air, 1989-2001<sup>231</sup>

	1989-90	1990-91	1991-92	1992-93	1993-94	1994-95	1995-96	1996-97	1997-98	1998-99	1999-2000	2000-01
boat arrivals	243	172	81	198	200	1,089	591	36	157	926	4,175	4,141
air arrivals	na	na	529	452	409	485	669	1,347	1,550	2,106	1,695	1,508
total	na	na	610	650	606	1,574	1,260	1,383	1,707	3,032	5,870	5,649

The number of unauthorised arrivals in Australia has significantly increased in recent years. The total number of illegal arrivals multiplied by nearly ten between the 1991-92 (610 unauthorised arrivals) and the 1999-2000 financial years (5,870). Up until 1998-99 this increase was due mainly to growing numbers of unauthorised air arrivals, particularly between 1995-96 and 1998-99. Although most public attention has been drawn to the illegal arrival of boats, between the 1991-92 and the 1998-99 financial year the majority of illegal immigrants arrived in Australia by air (62.16% or 12,242 unauthorised arrivals, between 1991-92 and 1998-99). The total number of unauthorised arrivals has increased steadily over the last decade. The decrease in the 1995-96 and 1996-97 financial years has been explained as a direct result of the signing of the Memorandum of Understanding between Australia and the PR China that enabled the immediate return of Sino-Vietnamese people to China.<sup>232</sup>

#### 3.4.2.4.1. Boat arrivals

Broadly speaking, unauthorised boat arrivals to Australia commenced in 1975 with the arrival of Indochinese boatpeople. Most of them travelled via Malaysia, Indonesia, Thailand and China prior to arriving on Australia's shores. Investigations by the Australian Federal Police (AFP) and the Department of Immigration and Multicultural Affairs

<sup>231</sup> Australia, Prime Minister's Coastal Surveillance Task Force, *Report* (1999) attachment B-1; DIMA, *Protecting the Border* (1999) *supra* note 96, at 69; id, *Protecting the Border* (2001) *supra* note 96, at 93; id, *Fact Sheet 74: Unauthorised Arrivals by Air and Sea* (8 Nov 2001).

<sup>232</sup> Nelly Siegmund, "Illegal Immigration — an Australian perspective" presentation at the *South East Asia/Pacific Region People Smuggling Conference*, Canberra, 14-19 Jan 2001. See *supra* Section 2.2.5.2.

(DIMA) show that the majority of the early unauthorised boat arrivals to Australia originated from Cambodia and Vietnam. The people aboard were mainly Vietnamese, Cambodian and Chinese nationals.<sup>233</sup> These arrivals dried up in 1982 with the establishment of an orderly departure programme in Vietnam.

In the twelve years since 1989 most boat arrivals have departed from locations in the southern provinces of China (9 boats or 10.5% of all unauthorised boat arrivals in 1999) or Indonesian ports (75 or 87.2%, 1999)<sup>234</sup> with mostly Chinese, Iraqi, Afghan and other Middle Eastern nationals.

As with all forms of clandestine activity, the true number of illegal arrivals in Australia is difficult to assess. With respect to the dark-figure of unauthorised boat arrivals, in June 1999 Australian authorities stated, "since its establishment in 1988-89 Coastwatch has detected 108 suspected illegal entry vessels and [is] aware of 15 vessels undetected by Coastwatch at sea that have reached Australia."<sup>235</sup> According to statements by DIMA and Coastwatch,<sup>236</sup> to date, Australia does not share the experience of Canada and the United States, where abandoned boats suspected of bringing in unauthorised entrants have been found at secluded beaches or in other remote locations. Also, interviews with illegal migrants in Australia found no connection between people found working illegally and unauthorised boat arrivals.<sup>237</sup>

Figure 12: Unauthorised boat arrivals in Australia 1989-2001<sup>238</sup>

	1989-90	1990-91	1991-92	1992-93	1993-94	1994-95	1995-96	1996-97	1997-98	1998-99	1999-2000	2000-01
No. of boats	3	5	3	4	6	21	14	13	13	42	75	54
No. of people	224	158	78	194	194	1,071	589	365	157	920	4,174	4,141
max. no. on board	119	77	56	113	58	118	86	139	30	112	353	231

<sup>233</sup> Australia, HREOC, *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals in Australia* (1998) 6.

<sup>234</sup> DIMA, Unauthorised Arrivals Section, *Refused Immigration Clearance Report, December 1999* (2000) 27.

<sup>235</sup> Australia, Prime Minister's Coastal Surveillance Task Force, *supra* note 231, at 5.

<sup>236</sup> Mr Andrew Metcalfe, Deputy Secretary, DIMA, in ABC, "People Smuggler's Guide to Australia" *supra* note 110, and repeated in an interview with the author, Canberra, 3 Nov 1999. Similar statements have been made by RADM Russ Shalders, Director-General of Coastwatch in an interview with the author, Canberra, 3 Nov 1999.

<sup>237</sup> Personal communication with RADM Russ Shalders, Director-General of Coastwatch, Canberra, 18 Jan 2001.

<sup>238</sup> DIMA, *Fact Sheet 81: Unauthorised arrivals by air and sea* (16 Feb 2001).

Figure 12 shows that the number of unauthorised arrivals remained at relatively low levels throughout the 1990s, with the highest number recorded in 1994 with 21 boats carrying 1,071 passengers. The 1999-2000 financial year witnessed the highest number of unauthorised boat arrivals. The number increased particularly towards the end of 1999 when 2,406 people arrived in October, November and December that year. As mentioned earlier, most of these arrivals were Iraqi, Afghani and other Middle Eastern nationals, who fled after countries such as Iran and Jordan withdrew from offering temporary protection and actively dissuaded Afghans and Iraqis from being within their borders.<sup>239</sup>

Studies conducted by the AFP and DIMA in 1998 and 1999 suggest that those attempting seaboard entry to Australia mostly arrive in small groups. They usually sail through the Arafura Sea and the Torres Strait to reach Australia's coast. The fact that the vessels arriving this way mostly hold groups of mixed nationalities, has led to the assumption that traffickers at the final point of embarkation operate on an ad hoc basis.<sup>240</sup>

Figure 13: Major landing sites of unauthorised arrivals by boat, Australia, 1998-2000<sup>241</sup>

Landing site	1998-99	1999-2000
Ashmore Islands	17	49
Western Australia	11	15
Queensland	3	0
Torres Strait	4	0
Christmas Island	3	10
New South Wales	3	0
Darwin	1	1
<b>Total</b>	<b>42</b>	<b>75</b>

Figure 13 shows that Australia's less populated western and northern coasts, including Christmas Islands (13.3% of all boat arrivals in 1999-2000)<sup>242</sup> and Ashmore Reef<sup>243</sup> (65.3%,

<sup>239</sup> Cf Amnesty International, *Report 2001* (2001) 25. See *supra* Section 2.2.6.

<sup>240</sup> AFP, *supra* note 108, at 5; DIMA, *Fact Sheet 81: Unauthorised arrivals by air and sea* (17 Mar 1999) 3-4; *id*, *Protecting the Border* (1999) *supra* note 96, at 34; Australian National Audit Office, *The Management of Boat People*, *supra* note 92, at 5. Cf Graycar et al, "Trafficking in Human Beings" *supra* note 171, at 4; Adrian Joel, "Australia: The Ideal Target" (1990) 25(9) *Aust LN* 47, 47; *id*, "Why Australia is an ideal target for boat people" (1991) 29(2) *LSJ* 63, 63.

<sup>241</sup> DIMA, *Protecting the Border* (2001) *supra* note 96, at 100.

<sup>242</sup> DIMA, Unauthorised Arrivals Section, *Refused Immigration Clearance Report, December 1999* (2000) 28.



1999-2000) have been the major detection points of illegal boat arrivals in the past. These remote islands are the closest Australian territories to Indonesia and only a short boat trip away from Indonesia's southern ports of Kupang, West Timor and Denpasar, Bali.<sup>244</sup>

The experience of Australia has shown that the means and methods of trafficking by sea are largely determined by the nationality of the people on board and the objective of their journeys. As mentioned earlier, the final part of the illegal voyage is primarily determined by the question whether the persons trafficked seek to arrive covertly or overtly in Australia.

It has been found that the people arriving on the western sea route are mostly of Middle Eastern, Sri Lankan and Bangladeshi origin. This lends plausibility to the assumption that people arriving this way seek to land anywhere on Australian territory in order to seek protection. They often use old, wooden Indonesian fishing vessels that are simply left for Australian authorities to destroy after arriving in Australia. It has been found that particularly Iraqi and Afghan nationals have migrated from the Middle East all the way to Australia, as Australia is the only country in the region that offers asylum and protection under the *Refugee Convention*. The major objective of this group of migrants is to reach a safe haven and then apply for asylum. They usually do not attempt to arrive clandestinely and circumvent border and immigration controls.<sup>245</sup>

The incidents that occurred at the coasts of New South Wales and Queensland indicate that traffickers have attempted to arrive directly from the east on routes which until 1999 were outside Coastwatch's usual area of surveillance. Prior to 1997, most of these boats were comparatively small wooden vessels that only carried small numbers of passengers. It has been stated that the majority of these early arrivals "were either village-based or conducted at a fairly primitive level of capitalisation and sophistication, even if they were carried out by organised crime groups."<sup>246</sup> The landing of a Chinese vessel on Thursday Island on 13 June 1997 was the first steel body ship to be involved in an illegal passage to Australia. In

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<sup>243</sup> Until July 1997, Australia did not exercise immigration control over the three islands of Ashmore Reef, which are uninhabited. Following a series of ten unauthorised boat-arrivals, Ashmore Reef is now under surveillance by Coastwatch; Australian National Audit Office, *The Management of Boat People*, *supra* note 92, at 21.

<sup>244</sup> Cf DIMA, *Protecting the Border* (2001) *supra* note 96, at 100.

<sup>245</sup> McNerny, *supra* note 99, at 4. See also the case example in *Cita v R* (2001) WASCA 5.

recent years, larger and heavier boats with sophisticated navigation technique and communication technology have been used. There is evidence that these boats have been equipped for use in more than one venture and were sometimes fitted with hidden compartments for the clandestine transportation of migrants.<sup>247</sup> The methods and sophistication used for unauthorised arrivals via the eastern route indicate that traffickers try to arrive in Australia clandestinely.<sup>248</sup> This route offers the additional advantage of fast and easy transport links to the big cities on Australia's east coast, which makes it easier for the immigrants to disembark undetected and disappear in the community of cities such as Sydney, Brisbane and Cairns. This explains why the majority of people trying to land on the coast of New South Wales and Queensland are Chinese nationals. Since Chinese have little, if any chance, to be admitted as refugees in Australia,<sup>249</sup> they need to remain undetected and avoid any contact with immigration and law enforcement agencies.<sup>250</sup>

#### 3.4.2.4.2. Air arrivals

Public attention and concern about unauthorised arrivals in Australia mostly focus on illegal boat arrivals. However, up until 1998 the majority of unauthorised arrivals arrived by air; in 1998, ten times the number of boat arrivals.<sup>251</sup> Of the 1,555 people refused entry at Australia's airports in the 1997-98 financial year 75 percent were believed to have been assisted by traffickers.<sup>252</sup>

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<sup>246</sup> Gordon, *supra* note 119, at 9.

<sup>247</sup> Fiona David, *Human Smuggling and Trafficking* (2000) 8; Gordon, *supra* note 119, at 9; Adam Graycar, "Trafficking in Human Beings" paper presented at the *International Conference on "Migration Culture and Crime"* Jerusalem, 7 July 1999, 5; Tailby, *supra* note 222, at 4.

<sup>248</sup> McInerny, *supra* note 99, at 4.

<sup>249</sup> See *supra* Section 2.5.5.2.

<sup>250</sup> Australia, Prime Minister's Coastal Surveillance Task Force, *supra* note 231, at 1; Australian Customs Service, *Submission to the Joint Committee of Public Accounts and Audit: Inquiry into Coastwatch* (2000) 19; Alan Heggen, *Independent Inquiry into Circumstances Surrounding the Arrival of Suspected Illegal Entry Vessels near Cairns, North Queensland and Nambucca Heads, New South Wales March/April 1999* (1999); AFP National Operation General Manager in Elisabeth Wynhausen, "All dressed up and nowhere to go" (13 Apr 1999) *The Australian* 4. For all full listing of all unauthorised boat arrivals that have been detected since 1989 see DIMA, *Fact Sheet 81: Unauthorised arrivals by air and sea*, available at [www.immi.gov.au](http://www.immi.gov.au) (updated regularly). Cf McFarlane, *supra* note 164, at 13.

<sup>251</sup> Max Moore-Wilton in Australia, Prime Minister's Coastal Surveillance Task Force, *supra* note 231, at i.

<sup>252</sup> DIMA, *Fact Sheet 83: People trafficking: Australia's response* (9 Sep 1997) 1; *id* *Fact Sheet 83: People smuggling* (17 Mar 1999) 2; Graycar et al, "Trafficking in Human Beings" *supra* note 171, at 4.

Figure 14 shows that the number of illegal air arrivals has more than doubled between 1995 and 1998. An all-time high of 2,106 unauthorised air arrivals was recorded in the 1998-99 financial year.<sup>253</sup> At the same time the number of detected cases of illegal immigration that involved document fraud has increased rapidly.

Figure 14: Undocumented or improperly documented air arrivals in Australia, 1995-2001<sup>254</sup>

Type of document fraud	1995-96	1996-97	1997-98	1998-99	1999-2000	2000-01
<b>People refused entry</b>	<sup>255</sup> 663	<sup>256</sup> 1,350	1,555	2,106	1,695	1,508
No passport or visa	115	516	495	715	361	136
Improper documents	184	308	342	363	106	49
◆ photo substitution	na	na	na	148	77	na
◆ transposed visas	na	na	na	8	5	na
◆ imposters	na	na	na	26	15	na
◆ bogus passports	na	na	na	54	7	na
◆ counterfeit passports	na	na	na	21	2	na

Approximately 55 percent of the people arriving illegally by air travelled with bogus or otherwise inadequate documents. The majority of unauthorised arrivals detected at Australian airports arrived with no documentation. Among those who arrive with forged documents, most persons used forged documents that have been manipulated by photo-substitution.

The number of forged documents that are detected at Australian airports has decreased significantly in recent years. It can be speculated that this is a direct result of better controls at transit and embarkation points abroad, but there is also reason to believe that more sophisticated documents have been used and have not been apprehended.

There is a small body of anecdotal evidence that a number of so-called unidentified aircraft movements have occurred in northern Australia. According to information provided by the

<sup>253</sup> Statement by Immigration Minister Philip Ruddock in Penelope Green, "More illegals over horizon: Ruddock" (21 May 1999) *The Australian* 3.

<sup>254</sup> DIMA, *Fact Sheet 74: Unauthorised Arrivals by Air and Sea* (8 Nov 2001); id, *Fact Sheet 81: Unauthorised arrivals by air and sea* (17 Mar 1999) 3; id, *Fact Sheet 81: Unauthorised arrivals by air and sea* (9 Aug 1999) 2, 74; id, *Protecting the Border* (2001) *supra* note 96, at 99.

<sup>255</sup> AFP, *supra* note 108, at 7.

<sup>256</sup> *Ibid.*

Australian Customs Service in June 2000, very few of the alleged illegal movements have substantiated and to date there is no evidence that suggests that these movements carried illegal immigrants.<sup>257</sup>

### 3.4.3. Distribution: Post-Immigration Activities

At the end of the chain of services that trafficking organisations provide is the introduction of the clients into the destination country and, if possible, their insertion into the labour market of this country. In market terms this can be described as distribution.

#### 3.4.3.1. Arriving in the destination country

To make return to their home countries impossible and protect the trafficking organisation, all identity documents must be removed from the trafficked migrants prior to arrival in the destination country. Passports, work permits, cash, contact addresses and return tickets that were initially given to the migrants to meet transit and immigration requirements or to make them appear as tourists are usually confiscated by the traffickers after check-in for Australia-bound flights at overseas airports. In other cases these documents are destroyed en route or dumped upon landing in Australia by the people being trafficked. But if possible, both genuine and fraudulent documents are returned to the trafficking organisation for further use or resale.<sup>258</sup>

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<sup>257</sup> Australian Customs Service, *supra* note 250, at 71; cf Christopher Dore, "Busted Borders" (25-26 Aug 2001) *The Weekend Australian* 17 at 20.

<sup>258</sup> AFP, *supra* note 108, at 5; Beare, "Illegal Migration" *supra* note 70, at 275; id, "Illegal Migration: Personal Tragedies, Social Problems, or National Security Threats?" *supra* note 70, at 32; DIMA, *Fact Sheet 83: People Smuggling* (17 Mar 1999) 1; Graycar et al, "Trafficking in Human Beings" *supra* note 171, at 3; Salt & Stein, *supra* note 118, at 483; UN Commission on Crime Prevention and Criminal Justice, *Additional information on measures to combat alien-smuggling*, UN Doc E/CN.15/1995/3 (26 Apr 1995) para 5.

### 3.4.3.2. Post-immigration situation

For the migrants, the contact with the trafficking organisation does not necessarily end after entering Australia or other destination countries. Once again, two major groups of migrants can be distinguished: those who seek to claim refugee status upon arrival and those who attempt to immigrate clandestinely.

For the group of overt arrivals, contact with the traffickers ceases once they reach their destination. Since their major objective is to go through official channels of immigration to apply for asylum, traffickers can no longer control them. This implies that asylum seekers pay their debts to the traffickers in full prior to arrival. It may also explain why traffickers frequently abandon boatloads of people before they reach their destination: After full payment has been received, these migrants are no longer of any interest to the trafficking organisation.

For covert arrivals, contact with the trafficking organisation continues. Upon arrival at the final destination most of the migrants owe large amounts of money to the traffickers for the illegal services which they provided. This implies that traffickers offer credit to covert arrivals.<sup>259</sup> As a result of the accumulation of large debts and the powerless position resulting from their illegal and clandestine status, many of those who have used the services of trafficking organisations find themselves in a 'debt-bondage' situation once they have reached the destination country. The findings of overseas research suggest that many migrants remain in the hands of the traffickers who often respond to the inability to repay debts by charging exorbitant interest rates or with forced labour, threats and violence.<sup>260</sup> For example, studies conducted in the United States, often focusing on the particular situation of illegal Chinese immigrants, give examples of how trafficking organisations "detain" their customers upon arrival, accommodate them in so-called "safe houses" and control and threaten the migrants for several years after the trip is made. It is

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<sup>259</sup> See *supra* Section 3.4.4.1.

<sup>260</sup> Generally, see IOM, *Trafficking in Migrants: IOM policy and activities*, *supra* note 91; Salt & Stein, *supra* note 118, at 483; UN Economic and Social Council, *Criminal justice action to combat the organized smuggling of illegal migrants across national boundaries*, UN Docs E/RES/1994/14 (25 July 1994), and E/RES/1995/10 (24 July 1995); UN General Assembly, *Prevention of the smuggling of aliens*, UN Doc A/RES/48/102 (20 Dec 1993); UN General Assembly, *Measures to combat alien smuggling. Report to the Secretary-General*, UN Doc A/RES/49/350 (30 Aug 1994) para 5. For the situation in

questionable whether or not the same practises occur in Australia.<sup>261</sup> To date, no in-depth studies have been undertaken about the situation of illegal immigrants in Australia. There is only little evidence that the practices found in the US also apply to illegal immigrants in Australia. One recent report claimed, however, that illegal immigrants who have fallen behind in their payment to the trafficking organisation have been kidnapped for extortion and murder.<sup>262</sup>

The illegal status of the migrants prevents them from entering the legal labour market of the host country. Instead, they have no choice but to work illegally to survive. Hence, many of the migrants find themselves in the black labour market of the big cities or as illegal workers in the agricultural sector.<sup>263</sup> Unable to pay their debts, in the more extreme cases they become engaged or are forced to engage in criminal activities such as prostitution and pimping, minor property offences or drug-related crime, often organised by the same criminal group that operated throughout the trafficking passage.<sup>264</sup> This lends plausibility to the assumption that migrant trafficking is not just the business of transporting people into another country, but also of exploiting them once they are there.<sup>265</sup>

Not only are illegal migrants unable to obtain legitimate employment, they are also ineligible for social welfare, health insurance and education benefits from the host country. Moreover, a different culture and language often set the illegal immigrants apart from the rest of society and discourages them from obtaining public services. The migrants find

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Japan, see Peck, *supra* note 174, at 1048. For the situation of illegal Chinese in the US see Chin, *Smuggled Chinese*, *supra* note 91, at 5-6, 111-131.

<sup>261</sup> For US studies see, for example, Charles Chaiyarachta, "El Monte is the promised land: Why do Asian immigrants continue to risk their lives to work for substandard wages and conditions?" (1996) 19 *Loy LA Int'l & Comp LJ* 173 at 174-177; Ko-lin Chin, "Safe House or Hell House? Experiences of Newly Arrived Undocumented Chinese" in Paul Smith (ed), *Human Smuggling: Chinese Migrant Trafficking and the Challenge to America's Immigration Tradition* (1997) 169 at 169-189; id, *Smuggled Chinese*, *supra* note 91, at 97-131. However, Cleo Kung (*supra* note 119, at 1275) states that in most cases "relatives or friends of the migrants (their sponsors) will pay their debts as soon as the migrants arrive in the US".

<sup>262</sup> McFarlane, *supra* note 164, at 14. Cf the view expressed in Ruggiero, "Transnational Crime" *supra* note 60, at: 193-194.

<sup>263</sup> In 1999 and 2000 a number of illegal immigrants were found fruit picking in South Australia, Victoria and New South Wales. See, for example, Judy Hughes & Michael Bachelard, "Swoop on illegal labour" (20 Feb 1999) *The Australian* 1. See generally DIMA, *Review of Illegal Workers in Australia: Improving Immigration Compliance in the Workplace* (1999) 19-23.

<sup>264</sup> Adamoli et al, *supra* note 11, at 79; Graycar et al, "Trafficking in Human Beings" *supra* note 171, at 5; Savona et al, *Globalisation of Crime*, *supra* note 38, at 9; Williams, "Transnational Criminal Organisations and International Security" *supra* note 59, at 104.

themselves in a position of 'social marginality' which in some cases may encourages illegal conduct.

As a consequence of their clandestine, illegal status and of the continuing exploitation by the traffickers, illegal immigrants, according to crime statistics, commit more crimes in host countries than the rest of their population. For those who remain undetected, it is inevitable that they violate immigration, employment and taxation laws. And organised crime breeds well among communities which have no possibility to recourse to police. In some countries this has led to xenophobia and the call for further immigration restrictions.

However, it must be stated very clearly that although a disproportionate number of illegal immigrants can be found engaged in criminal activities in the host countries, there is no doubt that most undocumented migrants are law-abiding people. For clandestine immigrants the price of breaking the law in the host country — even for a minor offence — is much higher than for the rest of the population as they constantly have to fear detection, arrest and deportation. Also, relatives and friends support many of them before, during and after their journey, and only a minority engage in illegal activities.<sup>266</sup>

#### 3.4.4. Finance

Financing its activities and managing the funds deriving from successful operations is an essential feature for any organisation, be it legal or illegal. With the vast amounts of money that can be made in the business of illegal migration, trafficking organisations have accumulated enormous profits. These are the subject of this section.

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<sup>265</sup> Adamoli et al, *supra* note 11, at 14; Peck, *supra* note 174, at 1048; Skeldon, "East Asian Migration and the Changing World Order" *supra* note 209, at 189-191.

<sup>266</sup> Cf Ghosh, *supra* note 91, at 81, 93; Alex Schmid, "Manifestations and Determinants of International Migration Pressure" in Alex Schmid (ed), *Migration and Crime* (1998) 29 at 29-30. See also the findings of Chin, *Smuggled Chinese*, *supra* note 91, at 126-127. Despite the lack of sound evidence, many writers continue to presume a direct link between (illegal) immigration and crime. For example, a recent article by Richard Basham ("Asian Crime — A Challenge for Australia" (1999) 31 *Aus J Forensic Sc* 29-44) stated that "people who have entered Australia under false names and pretences provide a ready reservoir of criminal labour and are unlikely ever to cooperate fully with police, taxation and other authorities" and that "[t]he arrival of large numbers of 'boat people' during the late 1970's and early 1980's brought violent Asian street gangs to Australia." (at 35, 37),

#### 3.4.4.1. Financing organised crime

Any operation of a business enterprise requires investments in order to buy the necessary equipment, arrange transportation and pay employees. Due to their illicit status, criminal organisations face substantial problems if they try to obtain capital for their operations, as access to legitimate banking and investment facilities is not available to them.

Criminal organisations have two different ways to finance their illegal activities: using the proceeds of crime to finance other criminal activities, or inducing investment of legally acquired money.

Investments can be made internally by using the profits of previous activities; ie reinvesting cash generated from trafficking migrants or channelling money deriving from other criminal activities such as drug trafficking.<sup>267</sup> For example, Chinese criminal organisations were found to maintain international underground banking systems. Money is collected from the customers by members of the organisation in one country and then put together in bank-like institutions abroad.<sup>268</sup>

Alternatively, criminal organisations can obtain money in the external legitimate capital market. But the fact that these organisations can neither present audited books for borrowing money nor offer any security for the lending institution may prevent criminal organisations from acquiring money legally.<sup>269</sup> However, there is increasing evidence that traffickers utilise the legal banking system for illicit purposes. For instance, it has been found that criminal organisations have been able to borrow money from legitimate banks and open accounts in countries where the monitoring of money and banking regulations are not stringent or simply non-existent.<sup>270</sup>

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<sup>267</sup> Cf Keith Bryett et al, *An Introduction to Policing, Vol 1: Criminal Justice in Australia* (1993) at 66; UN General Assembly, *Prevention of the smuggling of aliens*, UN Doc A/RES/48/102 (20 Dec 1993); Moore, *supra* note 12, at 58.

<sup>268</sup> Valentin, *supra* note 102, at 95.

<sup>269</sup> Bögel, *supra* note 21, at 128-136; Reuter, *Disorganized Crime*, *supra* note 36, at 120-121; id, *The Organization of Illegal Markets*, *supra* note 65, at 13-14.

<sup>270</sup> See, for example, Savona et al, *Organised Crime across the Borders*, *supra* note 37, at 7; UN General Assembly, *Report of the World Ministerial Conference on Organized Transnational Crime. Note by the Secretary-General*, UN Doc A/49/748 (2 Dec 1994) Annex para 32.



### 3.4.4.2. Profit estimations

Estimates about the money that is achieved in the business of migrant trafficking are difficult to make as the illicit proceeds are usually laundered to become indistinguishable from legitimate profits. Aside from the non-availability of reliable data concerning the true extent of migrant trafficking, attempts to assess and calculate the price and profit of the trafficking business vary widely, depending on factors such as the types and range of activities covered by the payment, the distance travelled, the nature of the related risks and the countries involved.

In general, it appears that the further the distance between departure and destination countries and the more sophisticated the trafficking operation, the higher is the trafficking fee. The fact that the payment, as discussed above, does not always take place in a single transaction adds to the difficulty in calculating fees and profits.<sup>271</sup>

In 1995, studies placed worldwide profits of migrant trafficking organisations at US\$3 billion per year. More recent investigations estimate the profit to be between US\$3.5 billion and US\$7 billion or even US\$10 billion per annum.<sup>272</sup> In 2001, Interpol officials stated that migrant trafficking is a “[US]\$30 billion global business”, making it both one of the fastest-growing and most profitable organised crime activities in the Asia Pacific region and around the world.<sup>273</sup> Moreover, it is predictable that the financial attractiveness of trafficking in migrants will increase if this activity becomes more closely intertwined with drug trafficking, arms trafficking and other transnational criminal activities.

A study conducted by the University of Bangkok in 1995-96 reported that in Thailand migrant trafficking generates approximately US\$3.2 billion annually.<sup>274</sup> The global profits of Chinese trafficking organisations have been estimated to exceed US\$2.4 to 3.5 billion,

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<sup>271</sup> Cf Ghosh, *supra* note 91, at 30-31; Savona et al, “Dynamics of Migration and Crime in Europe” *supra* note 71, at 75; UN Commission on Crime Prevention and Criminal Justice, *Additional information on measures to combat alien-smuggling*, UN Doc E/CN.15/1995/3 (26 Apr 1995) para 3.

<sup>272</sup> For world-wide profit estimations see, for example, Ghosh, *supra* note 91, at 32; IOM, *Trafficking in Migrants: IOM policy and activities*, *supra* note 91; Peck, *supra* note 174, at 1044; Savona et al, “Dynamics of Migration and Crime in Europe” *supra* note 71, at 75; Smith, “Chinese Migrant Trafficking” *supra* note 71, at 9; UN Commission on Crime Prevention and Criminal Justice, *Additional information on measures to combat alien-smuggling*, UN Doc E/CN.15/1995/3 (26 Apr 1995) para 3.

<sup>273</sup> “Smuggling, Slavery, WTO” (2001) 8(10) *Migration News*.

making trafficking a priority activity of many Chinese criminal organisations.<sup>275</sup> Chinese migrants have reportedly paid US\$1,000 for illegal transportation to Taiwan.<sup>276</sup> Filipinos pay between US\$1,500 and 3,500 for the illegal passage to Taiwan and up to US\$3,500 to gain illegal entry to Malaysia or Indonesia.<sup>277</sup> Upon questioning, Myanmar migrants said they had paid 100 Kyats (c Aus\$30) for clandestine transportation to Penang, Malaysia,<sup>278</sup> and about 5,000-6,000 Baht (US\$75-150) to get across the border to Thailand and on to Bangkok.<sup>279</sup> The average amount paid by Thai migrants travelling illegally to Singapore is approximately 47,000 Baht (US\$1,240) with a large variation between the highest and lowest figures.<sup>280</sup>

With respect to people arriving in Australia illegally, Chinese boatpeople have told Australian officials that they paid between Aus\$3,900<sup>281</sup> to Aus\$40,000<sup>282</sup> to board the boat that carried them to Australia. Other Chinese nationals travelling through Hong Kong have paid between Aus\$10,000 and Aus\$50,000 each for false documents and coaching on how to evade immigration controls on their way to Australia. For migrants using the sea-route via Indonesia, it has been estimated that the fee to travel from Jakarta via Bali or West-Timor to Australia is between Aus\$2,000 and Aus\$6,000 per person.<sup>283</sup> The trip from the southern parts of Indonesia to Ashmore Reef and Christmas Island is said to cost approximately Aus\$1,600-\$3,800.<sup>284</sup> In May 1999, a group of 2,000 Somalis were found to have paid around Aus\$3,000 each for the trip from Mogadishu to Australia, which generated a taking of Aus\$2.76 million for the trafficking organisation.<sup>285</sup> Recent reports stated that people from Afghanistan, Iraq and Iran pay between Aus\$6,000 and \$17,000 to

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<sup>274</sup> IOM, [untitled] (1996) 10 *Trafficking in Migrants* 3.

<sup>275</sup> Adamoli et al, *supra* note 11, at 78; Bolz, *supra* note 149, at 148; Donigan Guymon, *supra* note 95, at 60; Dupont, *supra* note 124, at 13; Kung, *supra* note 119, at 1273.

<sup>276</sup> "Taiwan: Chinese Smuggling" (1999) 6(12) *Migration News*.

<sup>277</sup> UNICRI & AIC, *supra* note 119, at 16-17; Salt & Hoghart, *supra* note 88, at 96.

<sup>278</sup> IOM, "Myanmar — Malaysia" (1994) 3 *Trafficking in Migrants* 3.

<sup>279</sup> "Malaysia, Thailand, Singapore" (2000) 7(6) *Migration News*; "Thailand, Vietnam" (2000) 7(9) *Migration News*.

<sup>280</sup> Skeldon, "Trafficking: A Perspective from Asia" *supra* note 89, at 9.

<sup>281</sup> Penelope Green, "Boat people stung for \$26,000 each" (5 May 1999) *The Australian* 3 ("\$3,800"); Kennedy & Metherell, *supra* note 140, at 4 ("US\$2,500").

<sup>282</sup> DIMA, *Protecting the Border* (1999) *supra* note 96, at 23; Graycar, "Trafficking in Human Beings" *supra* note 247, at 11.

<sup>283</sup> ABC, "People Smuggler's Guide to Australia" *supra* note 110; DIMA, *Protecting the Border* (1999) *supra* note 96, at 23; *Cita v R* (2001) WASCA 5

<sup>284</sup> "Australia: Asylum Seekers" (2001) 8(11) *Migration News*.

fly from Pakistan to Malaysia and between US\$1,500 and \$5,000 each to be smuggled from Malaysian and Indonesian ports to Australia.<sup>286</sup> Illegal migrants recently apprehended in Cambodia are each believed to have paid between US\$5,000 and 10,000 for their journey to Australia.<sup>287</sup>

These illustrations confirm that some part of the trafficking industry in the Asia Pacific is small, amateur business. The illegal passages from Myanmar into Thailand, Indonesia into Malaysia and from Indonesia to Australia do not generate large amounts of money. Most of these operations are carried out overtly by local operators and require little, if any sophisticated technical equipment. It appears that the 'big money' is made by covert operations across the Pacific to North America, from the Middle East to South East Asia or from China or to Australia's east coast. With approximately 5,000 unauthorised arrivals in Australia in recent years, 75% of who are believed to be assisted by traffickers, migrant trafficking to Australia has become a multi-million dollar business.

#### 3.4.4.3. Money laundering

In the last decade organised crime has become more sophisticated and increasingly international in nature. It has also become more profitable. Criminal organisations must find ways of legalising the proceeds of their crimes that are not reinvested in other criminal activities. This means that the illegal, 'dirty' money deriving from the commission of crime must somehow be made indistinguishable from licit business profits, hence the term money laundering.

To disguise the money trail, assets deriving from criminal activities are transferred to countries which have less stringent banking regulations or which completely lack monitoring and control mechanisms for the banking and financial sectors. In many countries of the world the financial market is not supervised by monetary or law enforcement agencies. Consequently, countries that have no or only marginal legislation to

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<sup>285</sup> Graycar, "Trafficking in Human Beings" *supra* note 247, at 11.

<sup>286</sup> McInerny, *supra* note 99, at 7; "Australia, New Zealand, Fiji" (2000) 7(8) *Migration News*; "Australia: Detention" (2001) 8(2) *Migration News*; Sian Powell, "Afghans tell of pain and persecution" (21 Sep 2001) *The Australian* 10.

<sup>287</sup> Baker, *supra* note 210.

sanction money laundering and related offences are particularly attractive for and more vulnerable to the investment and transfer of illegally earned money.<sup>288</sup>

To date, very little research exists that pays particular attention to the profits deriving from trafficking in migrants. From the very limited information that is available it appears that money is mostly transferred to countries that provide greater banking secrecy, lesser taxation of financial transactions, and which have privacy laws that protect account holders from investigations by national and international law enforcement agencies. Moreover, many countries still have few, if any, reporting requirements for large-scale cash transactions. But in countries that do have such provisions, illegal transfers are simply made through a large number of small transactions (so-called 'smurfing') or by physically smuggling the money into countries where the requirements are less stringent.<sup>289</sup> In some cases, criminal organisations were also found transferring money through non-banking financial institutions (eg bureaux de change) or non-financial businesses that are subject to fewer regulatory requirements than banks.<sup>290</sup>

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<sup>288</sup> Cf Bassiouni & Vetere, above note 22, at 902; UN Commission on Crime Prevention and Criminal Justice, *Implementation of the Naples Declaration and Global Action Plan against Organized Transnational Crime. Report of the Secretary-General*, UN Doc E/CN.15/1996/2 (4 Apr 1996) paras 17 ff; and see generally FATF, *Review to Identify Non-Cooperative Countries or Territories: The Worldwide Effectiveness of Anti-Money Laundering Measures* (2001).

<sup>289</sup> See Rick McDonnell, "Money Laundering Methodologies and International and Regional Counter-Measures" paper presented at the conference *Gambling, Technology and Society: Regulatory Challenges for the 21<sup>st</sup> Century*, Sydney, 7-8 May 1998, 5; Australia, National Crime Authority, *Taken to the Cleaners: Money Laundering in Australia, Vol 1* (1991) 95.

<sup>290</sup> See the examples in McDonnell, *ibid*, at 5, 7.

### 3.5. Summary and Conclusion

All criminal organisations, legal or illegal, seek to maximise their profits within their environments. Criminal organisations make profits from activities in illegal markets by providing illegal goods and services. Criminal organisations exist because of a demand for illegal goods and services.

Criminal organisations — and migrant trafficking organisations in particular — exist in dynamic environments, both as a function of the illegal market and as a result of the changing nature of law enforcement activities and policies. In summary, the market for migrant trafficking has arisen for three main reasons: (1) the restrictions on legal immigration imposed by industrialised countries, (2) the increasing demand for entry into these countries, and (3) the comparatively low risks and high profits involved in migrant trafficking.

In many instances the evidence suggests that migrant trafficking does not always fit in the traditional understanding of criminal organisations. Migrant trafficking organisations have little in common with the traditional picture of Italian Mafia or Colombian cartels. For example, the fact that migrant traffickers deal with human beings and not with goods such as drugs or firearms has significant consequences for the ways in which traffickers structure the organisation and its operations. The application of traditional models of organised crime on migrant trafficking groups has on several occasions resulted in ignorance towards its organisational and operational characteristics, thus hindering successful counteraction. In this context, referring to the findings of this Chapter, ABC journalist Peter Mares stated:

It may be comforting to think of people smugglers as the embodiment of evil, but it is probably more useful to regard them as rational calculating business figures who make a sober assessment of ratio between profit and risk in relation to their trade.<sup>291</sup>

The analysis in this Chapter shows that the organisational and operational patterns of migrant trafficking are similar to that of a provider of legitimate services with some

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<sup>291</sup> Peter Mares, *Borderline: Australia's Treatment of Refugees and Asylum Seekers* (2001) 17-18, referring to Andreas Schloenhardt, "Organised Crime and the Business of Migrant Trafficking" paper presented at the *Australian Institute of Criminology*, Canberra, 10 Nov 1999.

additional features the illegal market requires. In order to maximise the economic return of their activities, traffickers adopt the structures of legal businesses through organisation, globalisation, human resources, supply, production, distribution and finance.

Furthermore, it is important to recognise the fact that the migrants involved are simultaneously customers and victims of the trafficking organisations. Any legislative and law enforcement activity dealing with what is often simply described as “human cargo” needs to take into consideration that migrant trafficking, unlike many other organised crime activities, involves human beings and that many illegal migrants are in fact genuine refugees.

The findings suggest that for the purpose of the examination and elaboration of existing and future countermeasures it is necessary to recognise the economic dimension of organised crime and consider trafficking in migrants as a business conducted by transnational criminal organisations. Certainly, the most, if not only effective way to combat organised crime is to reduce the demand for illegal goods and services and thereby deprive organised crime of its profits. Legislation and law enforcement should be directed against the profitable market conditions of organised crime. As stated by Mittie Southerland and Gary Potter (1993):

Law enforcement policy should be aimed at disrupting the organisational environment of the enterprise rather than at jailing mythical corporate masterminds believed to be manipulating a criminal syndicate. The market and its environment are the most appropriate points of intervention to combat and control criminal enterprise.<sup>292</sup>

It must always be remembered that criminal organisations are as capable of failure as those in the legitimate business community.

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<sup>292</sup> Southerland & Potter, *supra* note 23, at 258-259.

## CHAPTER FOUR

### MIGRANT TRAFFICKING IN AUSTRALIAN LAW

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Chapter Four examines Australia's responses to illegal migration and organised crime. Particular attention is paid to the criminal offences under Australian law targeting migrant trafficking, organised crime and illegal immigration. Chapter Four analyses the way in which the *modi operandi* of trafficking identified in Chapter Three are criminalised in Australia. This Chapter also addresses the issue of protection of migrants — and refugees in particular — and the legal framework that governs their status upon arrival and throughout their stay in Australia.

It is not surprising that the law governing illegal migration and organised crime is not confined to one single piece of legislation. A phenomenon as multifaceted as migrant trafficking involves activities that fall within different categories of law and that are dealt with by multiple government agencies.

For the analysis and assessment of trafficking, immigration and organised crime offences, it is useful to distinguish between different aspects and stages of migrant trafficking and different kinds of offences. Based on the findings of the previous Chapters, the criminal elements contained in migrant trafficking activities can be differentiated between (a) offences applying to traffickers, transporters and facilitators and to criminal organisations generally, and (b) offences applying to the illegal migrants. The former category contains activities such as assisting, harbouring, concealing illegal migrants and providing fraudulent documents. The legal provisions governing these activities are the subject of Section 4.1. The latter category is that of offences committed by migrants themselves, such as illegal departure and entry, false claims and the use of false documents. These are examined in Section 4.2.

As mentioned in previous Chapters a large part of the person who are trafficked to Australia are genuine refugees. The humiliating experiences during the clandestine voyage often further traumatise those who are fleeing for reasons of persecution, human rights

violations, famine, torture or war. Australia is party to the major international human rights treaties including the *Convention relating to the Status of Refugees* and, consequently, has assumed certain obligations towards people who are protected under international law. Section 4.3 addresses the issue of protection of migrants, asylum seekers in particular, and the legal framework that governs their status upon arrival and throughout their stay in Australia.

With the growing number of illegal immigrants in Australia and the increasing involvement of criminal organisations, migrant trafficking offences and the protection of asylum seekers in Australia underwent significant changes while this study was taking shape. For example, the amendments introduced in 1999 following the undetected landing of vessels at Australia's east coast brought major changes to the immigration offences contained in Australian criminal law, to the scope of law enforcement operations, and to the rights and status of unauthorised arrivals in Australia. Further significant changes followed the Tampa incident in August 2001. Therefore, throughout the Chapter, the measures that Australia has taken to combat illegal migration and organised crime are put in the context of the developments and levels of unauthorised arrivals in Australia over the past decade. It is, however, too early to make any definite assumptions about the effect the amendments had on the prosecution of offenders and on the level of crime.



## 4.1. Migrant Trafficking Offences

Australian law, to the most part, is concerned with the criminal aspect of migrant trafficking, using the criminal law as a tool to prevent and combat the activities that constitute and accompany migrant trafficking. The provisions that criminalise the activities of trafficking organisations have grown in number and in scope together with the increasing numbers of unauthorised arrivals in Australia.

On the basis of the criminal elements of migrant trafficking that have been identified in Chapter Three, Section 4.1 analyses how these elements are criminalised in Australia. The analysis commences in Section 4.1.2 with the operational side of trafficking, including (1) the mobilisation and preparation of migrants, (2) organising and facilitating illegal migration, (3) transporting illegal migrants, (4) harbouring and concealing illegal migrants, (5) immigration fraud by false statement, and (6) producing and providing fraudulent documents. This is followed by Section 4.1.3 which examines the way in which organisational features such as (1) organised crime and conspiracy, (2) financing organised criminal activity, and (3) the participation of officials are criminalised under Australian law.<sup>1</sup> This differentiation is continued in the analysis of foreign and international law in Chapters Five and Six.

### 4.1.1. Sources and General Remarks

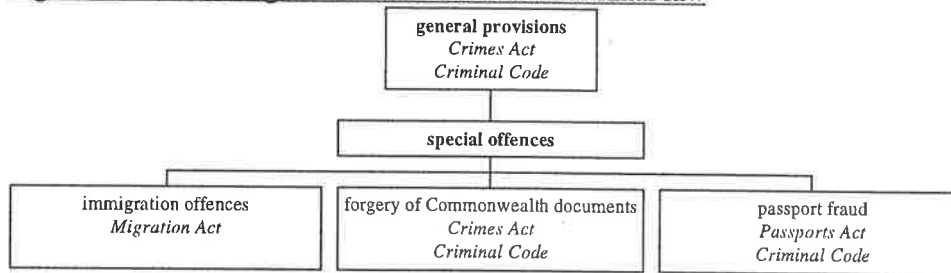
Given the complexity of migrant trafficking, it is not surprising that the legislation criminalising the relevant activities is not restricted to one particular piece of legislation. To fully understand and examine the provisions under Australian law, it is necessary to briefly outline where these provisions can be found, the scope of their application and the terminology they use.

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<sup>1</sup> Cf the differentiation in John Salt & Jennifer Hoghart, "Migrant Trafficking and Human Smuggling in Europe: A review of the evidence" in Frank Laczko (ed), *Migrant Trafficking and Human Smuggling in*

#### 4.1.1.1. Structure and developments

Figure 15: Trafficking offences in Australian criminal law



#### *Migration Act 1958 (Cth)*

The *Migration Act 1958 (Cth)*<sup>2</sup> contains the principal migrant trafficking offences under Australian law. Subdivision 12A of the Act, ss 228A-236, is primarily concerned with the punishment of people who are responsible for bringing “unlawful non-citizens”<sup>3</sup> to Australia or who otherwise aid and abet contraventions of Australian immigration law.

When the *Migration Act* was enacted in 1958 “offences in relation to entry” under ss 27-31 of that Act provided comparatively low penalties for immigration offences, ranging from fines of two hundred pounds<sup>4</sup> to a maximum prison term of six months. The original Act focused primarily on illegal immigrants rather than on traffickers: Up until 1989 only the bringing of undocumented migrants and stowaways (ss 28, 29, 30(1)) and the harbouring of prohibited immigrants and deportees (s 30(2)) were criminalised.

The offences under the *Migration Act* underwent many changes after their creation in 1958. The most recent wave of reforms began in 1999, following the arrival of large numbers of illegal immigrants by boat. The *Migration Legislation Amendment Act (No 1) 1999*<sup>5</sup> significantly raised the penalties under ss 229-234 *Migration Act* and created new offences to combat migrant trafficking. Further amendments followed with the enactment of the

*Europe: A review of the evidence with case studies from Hungary, Poland and Ukraine* (2000) 11 at 56-57.

<sup>2</sup> No 62 of 1958 [hereinafter *Migration Act*]. The Australian Constitution empowers the Commonwealth Parliament to make laws “for the peace, order and good government of Australia” with respect to immigration and emigration (s 51(xxvii)), nationality and aliens (s 51 (xix)), and external affairs (s 51 (xxix)). These powers have been interpreted as the foundation for legislation controlling the treatment of non-citizens by Australia involving their admission, stay, detention and removal.

<sup>3</sup> Section 14 *Migration Act*, see *infra* Section 4.1.1.3.

<sup>4</sup> The *Migration Act 1966 (Cth)* (No 10 of 1966) amended the fines in relation to decimal currency.

<sup>5</sup> *Migration Legislation Amendment Act (No 1) 1999 (Cth)*, No 89 of 1999.

*Border Protection Legislation Amendment Act 1999*.<sup>6</sup> Most recently, the *Migration Act* has been changed significantly following the Tampa incident and the introduction of the so-called Pacific Solution.<sup>7</sup>

#### *Criminal Code (Cth) and Crimes Act 1914 (Cth)*

Commonwealth criminal law was subjected to comprehensive reform during the course of this study. Provisions of the *Crimes Act 1914 (Cth)*,<sup>8</sup> which covered many of the general principles of criminal responsibility, have been superseded by the provisions under Chapter 2 of the Commonwealth *Criminal Code*.<sup>9</sup>

The *Criminal Code* has since been complemented by the enactment of other Chapters which codify substantial body of Commonwealth criminal law. For the purpose of this study, the most significant chapters of the Code are Chapter 2, “General Principles of Criminal Responsibility” and Chapter 7 “The Proper Administration of Government”<sup>10</sup>. As its title indicates, Chapter 2 of the *Criminal Code* codifies the general principles of criminal responsibility and the law of complicity, conspiracy, attempt and incitement. Chapter 7 codifies the federal offences of fraud, forgery and bribery.

#### 4.1.1.2. Geographical application

The scope and geographical application of the offences under the *Migration Act* are not identical with Australia’s territorial boundaries. The provisions of the *Migration Act* apply to the “migration zone” as set out in s 5 of the Act. This zone includes all States and Territories of Australia as well as Australian sea installations and the external territories listed in s 7: Coral Sea Islands Territory, Cocos (Keeling) Islands and the Territory of Christmas Island. Up until 1997, the territory of Ashmore and Cartier Islands, a major landing point for unauthorised boat arrivals,<sup>11</sup> was not part of the migration zone. In that

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<sup>6</sup> *Border Protection Legislation Amendment Act 1999 (Cth)*, No 160 of 1999.

<sup>7</sup> See also *supra* Section 2.2.7.

<sup>8</sup> *Crimes Act 1914 (Cth)*, No 12 of 1914 [hereinafter *Crimes Act*].

<sup>9</sup> No 12 of 1995, hereinafter *Criminal Code*. And see *Criminal Code Amendment (Application) Act 2000*, No 4 of 2000.

<sup>10</sup> *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000 (Cth)*, No 137 of 2000.

<sup>11</sup> See *supra* Section 3.4.2.4.1.

year, Ashmore Reef became a “prescribed territory” to which offences under the *Migration Act* now apply.<sup>12</sup>

The only Australian territory not covered by the *Migration Act* is Norfolk Island. Norfolk Island, although part of Australia under international law,<sup>13</sup> is not part of the migration zone and has its own migration law, the *Immigration Act 1980*.<sup>14</sup> The Act contains distinct provisions regarding “prohibited immigrants” and “offences in relation to entry” that are set out separately in the following sections. Up until 1999 unauthorised arrivals in Norfolk Island were not liable under the provisions of the Commonwealth *Migration Act*. The relation between the Commonwealth and Norfolk Island in immigration matters has been changed by the *Border Protection Legislation Amendment Act 1999*. New s 42(2A)(f) *Migration Act* provides that the Minister can make a declaration that a non-citizen can be brought from Norfolk Island to Australia if that person would be an unlawful non-citizen in the migration zone. Once that person is in the migration zone, she/he must then be detained.<sup>15</sup> Interestingly, to date, local and Commonwealth authorities have not recorded any unauthorised arrivals in Norfolk Island.

With respect to trafficking-related offences under Subdivision 12A of the *Migration Act*, s 228A, introduced in 1999,<sup>16</sup> has extended the geographical applicability of this Subdivision beyond the limitation of the migration zone to offences that are committed “in and outside Australia”. Section 228A — similar to s 3A *Crimes Act 1914*<sup>17</sup> — clarifies that the offences under ss 229-236 *Migration Act* operate extra-territorially and that their application is not limited to offences committed on Australian territory or within the boundaries of the migration zone.<sup>18</sup>

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<sup>12</sup> See sch 1, s 48 *Environment, Sport and Territories Legislation (ESTLA) Act 1997* (Cth), No 118 of 1997. For details see Australian National Audit Office, *The Management of Boat People* (1998) 20-25 and see *Rutu and Ladjilu v Dalla Costa* (1997) 93 A Crim R 425.

<sup>13</sup> See the provisions and preambles of the *Norfolk Island Act 1913* (Cth), No 15 of 1913.

<sup>14</sup> Hereinafter *Immigration Act* (Norfolk Island).

<sup>15</sup> Section 189 *Migration Act*. For details see Australia (Cth), House of Representatives, *Border Protection Legislation Amendment Bill 1999: Explanatory Memorandum* (1999) paras 244-245; Kathryn Cronin et al (eds), *Australian Immigration Law, Vol 1* (1994-) paras 1015, 1075.

<sup>16</sup> Schedule 1, Part 4 *Border Protection Legislation Amendment Act 1999*.

<sup>17</sup> Section 3A *Crimes Act* reads: “This Act applies throughout the whole Commonwealth and the Territories and also applies beyond the Commonwealth and the Territories”.

<sup>18</sup> Cf Australia (Cth), House of Representatives, *Border Protection Legislation Amendment Bill 1999: Explanatory Memorandum* (1999) para 251; Australia (Cth), Parliament of Australia, *Border Protection Legislation Amendment Bill 1999, Bills Digest No 70 1999-2000* (1999) sch 1, pt 4.

Chapter 2, Part 2.7 “Geographical Jurisdiction” of the *Criminal Code* provides a comprehensive scheme of provisions which determine the jurisdictional reach of Commonwealth criminal laws. It permits the Commonwealth to select from a menu of five, progressively widening jurisdictional regimes when an offence is enacted. To date, offences against the *Migration Act* (and those under the *Passports Act*) have not been brought within the Chapter 2 jurisdictional scheme.

#### 4.1.1.3. Definition of terms

In its original form, the *Migration Act 1958* used the terms “aliens” and “immigrants” to regulate the entry, stay and departure of foreigners in Australia. Under s 5(1) of the Act “aliens” included all non-citizens except (a) British subjects, (b) Irish citizens, and (c) protected persons. In the tradition of the *Immigration Restriction Act 1901*,<sup>19</sup> s 5(1) *Migration Act 1958* defined the term “immigrant” as “a person intending to enter, or who has entered, Australia for a temporary stay only, where he [she] would be an immigrant if he [she] intended to enter, or has entered, Australia for the purpose of staying permanently”. In 1983, the definition of “alien” was omitted and the term immigrant substituted throughout the entire Act by “non-citizen”, meaning “a person who is not an Australian citizen”.<sup>20</sup>

Section 6(1) *Migration Act 1958* established a universal visa requirement by prescribing that “[a]n immigrant who, not being holder of an entry permit that is in force, enters Australia thereupon becomes a prohibited immigrant.” Section 6 *Migration Amendment Act 1983* substituted the term “prohibited immigrant” by “prohibited non-citizen”. Six years later, the *Migration Legislation Amendment Act 1989* repealed this part of the *Migration Act* and inserted new s 6(1).<sup>21</sup> Following these amendments, the *Migration Act* then contained four different categories of persons who enter Australia unlawfully:

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<sup>19</sup> *Immigration Restriction Act 1901* (Cth), No 16 of 1901.

<sup>20</sup> Section 4 *Migration Amendment Act 1983* (Cth), No 114 of 1983.

<sup>21</sup> Subsection 6(1) *Migration Act* read: “Illegal entrants (1) On entering Australia, a non-citizen becomes an illegal entrant unless: (a) he or she is the holder of a valid entry permit; or (b) the entry was authorised by section 9.”

“deemed illegal entrants”, “prohibited entrants”, “prohibited non-citizens” and deemed non-entrants.

Section 7 of the *Migration Reform Act 1992* again repealed s 6 *Migration Act* and introduced the current distinction between “lawful” and “unlawful non-citizens” in ss 14, 15 *Migration Act* (now ss 13, 14). These categories subsume all other statuses of illegal/legal and unauthorised/authorised presence in Australia:<sup>22</sup>

13. (1) A non-citizen in the migration zone who holds a visa is a lawful non-citizen.
- (2) An allowed inhabitant of the Protected Zone<sup>[23]</sup> who is in a protected area in connection with the performance of traditional activities is a lawful non-citizen. ...
14. (1) A non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen.

#### 4.1.2. Operational Offences

##### 4.1.2.1. Mobilisation of illegal migrants

Australian law does not contain provisions that criminalise the mobilisation and recruitment of illegal migrants. In most cases such activity takes place abroad.<sup>24</sup> Luring people with false promises and taking up-front payments for the illegal services provided by trafficking organisations falls outside the scope of the *Migration Act*, unless such activity can be characterised as organising illegal immigration within the meaning of s 232A.<sup>25</sup>

##### 4.1.2.2. Organising and facilitating illegal immigration

Up until 1999 the *Migration Act* did not contain any provisions that focused specifically on the core organisers of illegal immigration.<sup>26</sup> In response to the increasing numbers of

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<sup>22</sup> Australia (Cth), House of Representatives, *Migration Reform Bill 1992, Explanatory Memorandum* (1982) 9; Mary Crock, *Immigration and Refugee Law in Australia* (1998) 178.

<sup>23</sup> See the definition in s 5 *Migration Act*.

<sup>24</sup> See *supra* Section 3.4.1.

<sup>25</sup> See *infra* Section 4.1.2.2.

<sup>26</sup> Cf IGC, *infra* note 127 and accompanying text.

boatpeople arriving in Australia in the years 1998 and 1999, and growing evidence of sophisticated trafficking organisations engaged in migrant trafficking, the Government implemented new s 232A<sup>27</sup> to specifically target persons who organise and facilitate the bringing of groups of illegal migrants to Australia, particularly by sea.<sup>28</sup> Section 232A makes it an offence to organise or facilitate the trafficking of five or more un-visaed persons<sup>29</sup> into Australia.

Section 232A contains a specific fault element. Initially, when introduced in 1999, it was required that the organiser or facilitator had knowledge that the group of illegal migrants “would become, upon entry into Australia, unlawful non-citizens”. The *Border Protection Legislation Amendment Act 1999* reduced the fault requirement to “recklessness as to whether the group of illegal migrants had, or have a right to come to Australia”<sup>30</sup> to ensure “that a person cannot avoid liability under s 232A on the basis that they did not have technical knowledge that the people being trafficked would become, in Australia, ‘unlawful non-citizens’.”<sup>31</sup>

Offences under s 232A attract a penalty of up to 20 years imprisonment and a minimum mandatory penalty of five years for first time offenders.<sup>32</sup>

In instances, where less than five persons are brought into Australia, organisers and facilitators can be held responsible under s 233(1)(a). The section creates a general offence for taking part in the bringing or coming of unauthorised non-citizens to Australia,<sup>33</sup> punishable by imprisonment for ten years or 1,000 penalty units (\$110,000) or both.<sup>34</sup> The

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<sup>27</sup> Section 5 *Migration Legislation Amendment Act (No 1) 1999* (Cth).

<sup>28</sup> Australia (Cth), Senate, *Migration Legislation Amendment Bill (No 2) 1998* [= *Migration Legislation Amendment Act (No 1) 1999*] *Replacement Supplementary Explanatory Memorandum* (1998-99) outline and para 9; Fiona David, *Human Smuggling and Trafficking* (2000) 20.

<sup>29</sup> Section 3, sch 1 pt 4 *Border Protection Legislation Amendment Act 1999* amended s 232A(a) *Migration Act* by limiting its application to the bringing of people who do not possess a valid visa as prescribed in s 42(1) *Migration Act*.

<sup>30</sup> Section 3, sch 1 pt 4 *Border Protection Legislation Amendment Act 1999*. Recklessness is defined in s 5.4 *Criminal Code*.

<sup>31</sup> Australia (Cth), House of Representatives, *Border Protection Legislation Amendment Bill 1999: Explanatory Memorandum* (1999) para 266; Australia (Cth), Parliament of Australia, *Border Protection Legislation Amendment Bill 1999, Bills Digest No 70 1999-2000* (1999) sch 1, pt 4.

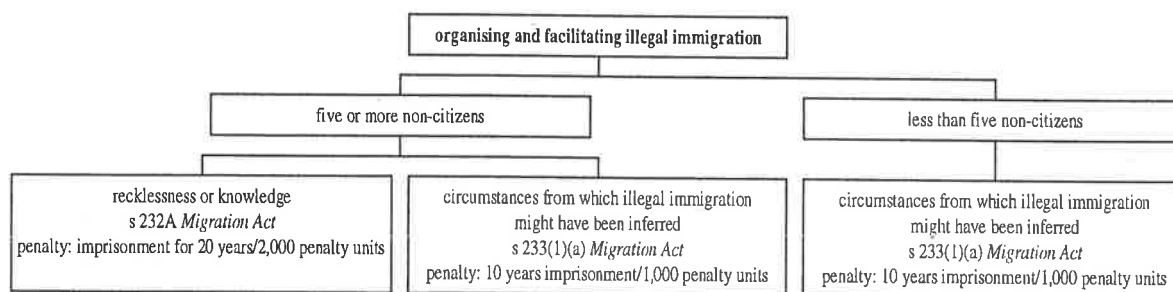
<sup>32</sup> Section 233C *Migration Act*, introduced by *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth), No 126 of 2001. The minimum penalty for repeat offenders is 8 years. The minimum non-parole period for first time offenders is 3 years, and 5 years for repeat offenders.

<sup>33</sup> The offence under now s 233(1)(a) *Migration Act* was introduced by the *Migration Act 1958* as s 30(1)(a).

<sup>34</sup> Penalty increased by s 6 *Migration Legislation Amendment Act (No 1) 1999* (Cth).

application of the offence under s 233(1)(a) is slightly broader than s 232A in that it covers any form of participation and any form of contraventions of the *Migration Act* by non-citizens who seek to enter Australia. Perpetrators can be held responsible under s 233(1)(a) if they ignored “circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of the Act”. It is not essential that the perpetrators achieve the result that the migrants arrive in Australia, but arrival in Australia “has to have been [the perpetrator’s] intention throughout his actions, ie that his actions would in fact result in the non-citizens reaching Australia.”<sup>35</sup>

Figure 16: Offences: Organising and facilitating illegal immigration



The scope of ss 232A and 233(1)(a) goes beyond, for example, that of the offences under ss 229 and 232 *Migration Act*,<sup>36</sup> in that their application is not restricted to the carriers of illegal migrants. Since offences under both sections can be committed in and outside Australia (s 228A) it has become possible to prosecute overseas organisers of migrant trafficking.<sup>37</sup> While s 232A is limited to organisers and facilitators of illegal immigration of five or more unlawful non-citizens, s 233 applies to any person who engages and participates in the organisation and facilitation of migrant trafficking. This also enables the prosecution of recruiters who operate in sending countries if their activity can clearly be linked to the intended arrival of illegal immigrants in Australia.

<sup>35</sup> *Rutu and Laadjilu v Dalla Costa* (1997) 93 A Crim R 425 at 431.

<sup>36</sup> See *infra* Section 4.1.2.3.

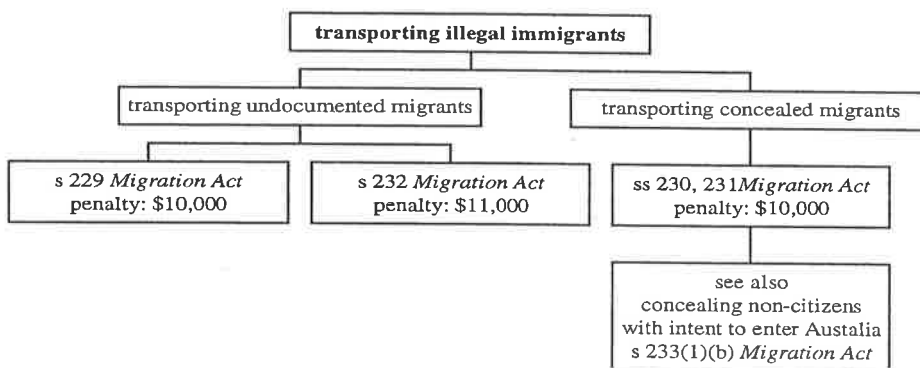
<sup>37</sup> For the extraterritorial application of s 233 prior to the introduction of s 288A see *Rutu and Laadjilu v Dalla Costa* (1997) 93 A Crim R 425.



Section 64 of the *Immigration Act* (Norfolk Island) provides an offence largely identical to that under s 233 *Migration Act*, punishable by ten penalty units (\$1,100)<sup>38</sup> or imprisonment for six months.

#### 4.1.2.3. Transporting illegal immigrants

Figure 17: Offences: Transporting illegal immigrants



In criminalising the transportation of illegal immigrants, Australian law differentiates between the transportation of migrants who possess no documents, those who hold forged documents, and migrants who are transported clandestinely. Sections 229 and 232 *Migration Act* contain provisions that make carriers criminally liable for transporting non-citizens who do not possess valid documentation to enter Australia. Sections 230 and 231 make it an offence to bring concealed migrants to Australia. If persons are found to intentionally conceal migrants so that they enter Australia, they are also liable under s 233(1)(b). There is no specific offence for the transportation of migrants travelling on fraudulent documents.

##### 4.1.2.3.1. Transporting undocumented migrants

The transportation of passengers who do not hold valid visas to enter Australia is prohibited under ss 229 and 232. Section 232 was contained in the *Migration Act* when it

<sup>38</sup> Section 17 *Crimes (Sentencing Procedure) Act 1999* (NSW). Under the *Criminal Ordinance 1960* (Norfolk Island) the criminal law of NSW also applies to Norfolk Island.

was enacted in 1958,<sup>39</sup> while s 229 was introduced in 1989 in response to the growing numbers of unauthorised arrivals.<sup>40</sup>

The wording, penalty and objective of the two provisions are largely identical. Both sections seek to prevent illegal immigration by imposing criminal liability on “masters, owners, agents and charterers” of vessels, including aircraft,<sup>41</sup> who are expected to ensure that their passengers are in possession of valid entry documents and that those passengers who do not possess the required documents do not disembark from and/or hide on vessels travelling to Australia. The offences apply to any person who transports undocumented immigrants to Australia, regardless of whether the carrier is a legitimate or illegal, commercial or private operator.

The sections seek to impose a duty of care on carriers to determine the admissibility of their passengers in the destination country. Since commercial airlines, for instance, can access computer systems to check if their passengers hold valid visas, those who bring unauthorised non-citizens to Australia are served with infringement notices. In the case of commercial air carriers, the provisions reflect the requirements established under international civil aviation law.<sup>42</sup> In Australia, 5,099 infringement notices were issued in the 1999-2000 financial year, up from 4,945 in 1998-99.<sup>43</sup> The current penalty attached to each infringement notice is \$5,000 per passenger.<sup>44</sup>

The key criterion of the offences is the legal status of the person transported, not the way in which the transportation is carried out. For instance, for s 229 to apply it is essential that on arrival in Australia the person carried is a non-citizen and neither (a) in possession of a valid visa, (b) of a special purpose visa, (c) is not eligible for a special category visa, (d) does not hold an enforcement visa,<sup>45</sup> and (e) is not covered by s 42(2), (2A) or (3).<sup>46</sup>

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<sup>39</sup> Section 28 *Migration Act 1958*.

<sup>40</sup> Section 13 *Migration Legislation Amendment Act 1989* (Cth), No 59 of 1989.

<sup>41</sup> See the definition of vessel in s 5 *Migration Act*.

<sup>42</sup> See art 37(j) *Convention on International Civil Aviation*, Chicago, 7 Dec 1944, 15 UNTS 295, 157 ATS 5; cf *infra* Section 6.1.1.2.

<sup>43</sup> David, *supra* note 28, at 27; DIMA, *Protecting the Border: Immigration Compliance* (2001) 99.

<sup>44</sup> DIMA, *ibid*, at 38.

<sup>45</sup> Inserted by s 3, sch 1 pt 3 *Border Protection Legislation Amendment Act 1999*. Cf Australia (Cth), House of Representatives, *Border Protection Legislation Amendment Bill 1999: Explanatory Memorandum* (1999) para 231.

Similarly, s 232 only applies to non-citizens who arrive without valid visas (ss 232(1)(a), 42(1)) or who have previously been removed or deported from Australia (s 232(1)(b)).

Only the “master, owner, agent, charterer and operator” of the transporting vessel are liable under ss 229 and 232, not, for example, the crew and other staff members aboard or at departure and destination points.

Sections 229 and 232 are offences of absolute liability as defined in section 6.2 *Criminal Code*.<sup>47</sup> Neither provision requires a fault element concerning the physical elements of the offences, and mistake of fact is not an available defence. Section 229(5), which is identical with s 232(2), provides, however, defences for the carrier (a) if the cancellation of a visa was not evident,<sup>48</sup> (b) if the carrier had reasonable grounds to believe the passenger would be eligible for special visas upon arrival in Australia,<sup>49</sup> or (c) if the carrier entered Australia for circumstances beyond his or her control.<sup>50</sup>

It needs to be stressed that the key objective of ss 229 and 232 is not the creation of a criminal offence and the prosecution of offenders. Although the provisions are designed as criminal offences, they primarily seek to impose a duty of care on carriers to verify the admissibility of passengers prior to their arrival in Australia. The *Migration Act* makes carriers responsible for transporting inadequately documented passengers, and lays all expenses attached to the processing of undocumented migrants, their detention and removal on those who transport them to Australia. The offenders targeted by the legislation are in most, if not all cases commercial companies and not criminal organisations.

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<sup>46</sup> Note that s 229 *Migration Act* does not use the terminology of “lawful” and “unlawful” non-citizens as defined in ss 13, 14 *Migration Act*. Instead, the section applies to (undocumented) non-citizens who do not possess any of the documentation listed in paras (a)-(e).

<sup>47</sup> Subsections 229(3), 232(1A) *Migration Act*, inserted by *Migration Legislation Amendment (Application of Criminal Code) Act 2001*(Cth) No 97 of 2001.

<sup>48</sup> Sections 229(5)(a), 232(2)(a) *Migration Act*.

<sup>49</sup> Sections 229(5)(b), 232(2)(b) *Migration Act*. New subparas 229(5)(b)(iv) and 229(5)(b)(v), introduced by s 3, sch 1 pt 3 *Border Protection Legislation Amendment Act 1999* provide a defence if the carrier had reasonable grounds to believe that the non-citizen would be or become the holder of an enforcement visa. Cf Australia (Cth), House of Representatives, *Border Protection Legislation Amendment Bill 1999: Explanatory Memorandum* (1999) para 232.

<sup>50</sup> Sections 229(5)(c), 232(2)(c) *Migration Act*.

#### 4.1.2.3.2. *Transporting concealed migrants*

As outlined in Chapter Three, for covert trafficking operations to be successful it is necessary that the illegal migrants remain undetected, and, especially in the case of seaborne methods of trafficking, arrive clandestinely in Australia.

Section 230 *Migration Act* contains a special provision that makes carriers criminally liable for the entry of stowaways (“concealed persons”) into the migration zone. In contrast to ss 229 and 232, the focus of s 230 is on clandestine entry into Australia, while the former offences deal with cases of undocumented entry. The offence, which replaced former s 79 *Migration Act*, was introduced in 1992 in reaction to increasing numbers of clandestine unauthorised arrivals.<sup>51</sup>

Section 230 must be seen in connection with s 231 *Migration Act*, which requires carriers to submit lists of crewmembers and passengers upon arrival in Australia. Under s 231(2) passengers and crew whose names are not on the list are deemed to have been concealed and the master of the vessel is liable to the penalty of \$10,000 under s 230.<sup>52</sup> Carriers can, however, escape criminal liability, if they notify immigration authorities about the stowaway upon arrival and prevent that person from disembarking.<sup>53</sup> The offence under s 230 is one of strict liability; mistake of fact is a defence for the accused.<sup>54</sup>

An offence similar to s 230 is contained in s 59 *Immigration Act (Norfolk Island)*.<sup>55</sup>

#### 4.1.2.4. *Harbouring and concealing illegal migrants*

To disguise the presence of illegal immigrants in embarkation, transit and destination points, traffickers may provide accommodation to their migrant customers. The provision

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<sup>51</sup> Added as s 77 *Migration Act* by s 17 *Migration Reform Act 1992* and renumbered to s 230 in 1994. Australia (Cth), House of Representatives, *Migration Reform Bill 1992, Explanatory Memorandum* (1982) 57, paras 260-262.

<sup>52</sup> Added as s 77A *Migration Act* by s 17 *Migration Reform Act 1992*. Australia (Cth), House of Representatives, *Migration Reform Bill 1992, Explanatory Memorandum* (1982) 57, para 263.

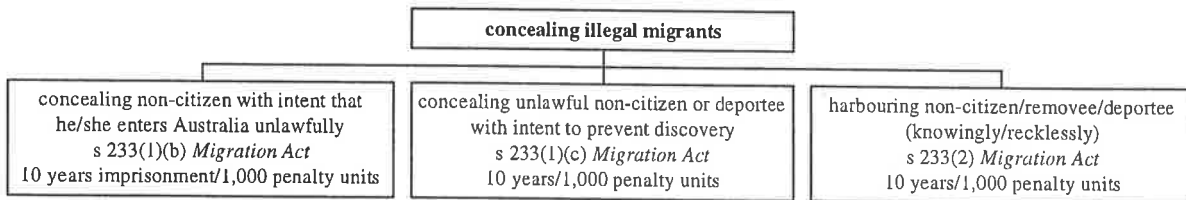
<sup>53</sup> Subsections 230(2), (2A) *Migration Act*. Cf Crock, *Immigration and Refugee Law in Australia*, *supra* note 22, at 202.

<sup>54</sup> Subsection 230(1B) *Migration Act*; ss 6.1, 9.2 *Criminal Code*.

<sup>55</sup> Carriers who are found having stowaways on board their vessels upon arrival in Norfolk Island are punishable by a fine not exceeding ten penalty units per stowaway, or, if the carrier has been convicted of

of accommodation may also serve the further purpose of enabling economic exploitation of the illegal migrants. Australian law criminalises the harbouring and concealing of illegal immigrants in s 233. The concealed transportation of illegal migrants is, as mentioned before, an offence under s 230.

Figure 18: Offences: Harbouring and concealing illegal migrants



Section 233 *Migration Act* contains provisions that criminalise three distinct types of concealment and harbouring illegal migrants: Under s 233(1)(b) it is an offence to conceal a non-citizen who is about to enter — but has not yet entered — Australia. Paragraph (c) makes it an offence to conceal unlawful non-citizens and persons who are awaiting deportation from Australia. Subsection 233(2) criminalises the harbouring of unlawful non-citizens, removees and deportees.

The *Migration Act* does not explain the difference between harbouring and concealing which causes some confusion regarding the requirements of each offence. Given the wording of s 233(2) it can be assumed, however, that the offence of harbouring is limited to persons who are already in Australia, such as unlawful non-citizens, removees and deportees. Concealing, however, extends to include both non-citizens outside (“to enter”, s 233(1)(b)) and inside (para (c)) the migration zone.

The offences under s 233(1) primarily seek to criminalise persons who knowingly smuggle illegal migrants into Australia. For that reason, in comparison to s 230, s 233(1) provides a much higher penalty and also requires intent as a fault element.<sup>56</sup> Section 64(1)(b) and (c) *Immigration Act* (Norfolk Island) contains an offence identical to that under s 233(1).<sup>57</sup>

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that offence within one year preceding the (new) offence, a fine not exceeding twenty penalty units (\$2,200) per stowaway; subs 59(1), (2) *Immigration Act* (Norfolk Island).

<sup>56</sup> Cf s 5.2 *Criminal Code*.

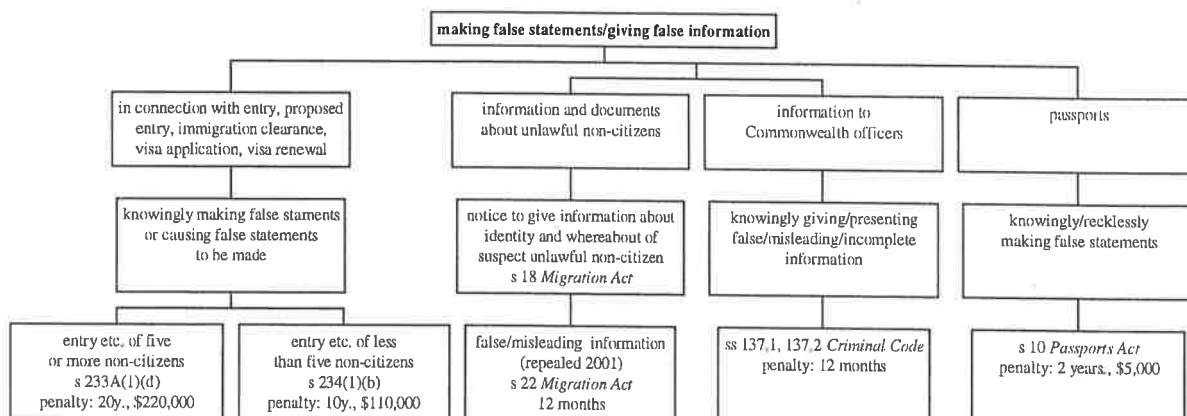
<sup>57</sup> Paragraphs 64(1)(b) and (c) *Immigration Act* (Norfolk Island) criminalise the concealing of (prohibited) immigrants and deportees with intent to enable them to clandestinely enter Norfolk Island.

Subsection 233(2) *Migration Act* makes it an offence to harbour an unlawful non-citizen, removee or a deportee, punishable by “imprisonment for 10 years or 1,000 penalty units [\$110,000] or both”. The principal focus of this provision is to criminalise the concealment of persons who either overstay their visas or who are expecting removal or deportation from Australia. It also criminalises the harbouring of illegal immigrants in ‘safe houses’ or otherwise secret accommodation. Section 64(2)(a) *Immigration Act* (Norfolk Island) contains an offence similar to that under s 233(2) *Migration Act*.

#### 4.1.2.5. Making false statements for another person and causing false statements to be made

Chapter Three has shown that Australia witnesses two different forms of organised illegal immigration: Clandestine arrivals of people who seek to remain undetected and ‘disappear’ into the community, and overt arrivals of migrants who seek to claim asylum upon arrival in Australia and go through official channels of immigration.<sup>58</sup> The former case, the concealing and harbouring of people, is covered by the provisions under ss 230 and 233 (see above). For the latter case, special provisions in ss 233A and 234 criminalise traffickers who make false statements to enable or facilitate the illegal immigration of their migrant customers.

Figure 19: Offences: Making false statements/giving false information



<sup>58</sup> See *supra* Section 3.4.2.4.1.

Australian criminal law contains a comparatively large number of offences that criminalise the making of false statements. False statements made in the context of immigration are criminalised in ss 233A and 234 *Migration Act*. False statements in connection with applications for and renewals of passports are offences under s 10 *Passports Act*. Section 22 *Migration Act* contains special provisions for false and misleading information about the identity and whereabouts of unlawful non-citizens. Sections 137.1 and 137.2 *Criminal Code*, which replaced s 22 *Migration Act*, introduced a general offence of making false verbal and written statements to Commonwealth officers.

*False statements to obtain entry, immigration clearance, visas for another person*

The growing numbers of asylum seekers in the late 1990s, together with high number of rejected asylum claims,<sup>59</sup> led the Government to explore options to reduce the number of unsuccessful applicants and of applications on false grounds. This resulted in the introduction of s 233A into the *Migration Act* in 1999.<sup>60</sup>

Under s 233A(1)(d) it is an offence to

make, or cause to be made, to an officer or a person exercising powers or performing functions under this Act a statement that the person knows is false or misleading in a material particular

if this statement is made in connection with

- (a) the entry or proposed entry into Australia, or the immigration clearance, of a group of 5 or more non-citizens (which may include that person), or of any member of such a group; [or]
- (b) an application for a visa or a further visa permitting a group of 5 or more non-citizens (which may include that person), or any member of such a group, to remain in Australia.”.

If false statements are made in circumstances that involve four or less non-citizens, the perpetrator can be held liable under s 234(1)(b).

Under these provisions it has become a separate offence (not just a case of participation) to make false statements in order to mislead immigration officers and facilitate the unauthorised entry and stay of non-citizens or to fraudulently obtain visas for them. The provisions extend criminal liability for false claims beyond the claimant (who is liable under s 233A(1)(d) or s 234(1)(b))<sup>61</sup> to any person who “causes” the claimant to knowingly

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<sup>59</sup> See *supra* Section 2.2.6.

<sup>60</sup> Section 7 *Migration Legislation Amendment Act (No 1) 1999*.

<sup>61</sup> See *infra* Section 4.2.2.

make a false or otherwise misleading statement, regardless of whether or not this incitement is made in Australia or abroad: s 228A. In this case it is possible to prosecute traffickers who coach migrants in how to deceive immigration and customs officers.

#### *False information about illegal immigrants*

To give false or misleading information about illegal immigrants in Australia is an offence under ss 21 and 22 *Migration Act*. These provisions were introduced in 1991<sup>62</sup> “to enhance the compliance strategy by assisting in the increased location and reduction of the number of people in Australia illegally.”<sup>63</sup>

The offences under ss 21 and 22 enforce the provision under s 18 *Migration Act* which prescribes that the Minister may require any information and documents from a person (called the “first person”) concerning the identity and whereabouts of another person which the Minister has reason to believe may be an unlawful non-citizen. If the first person refuses or fails to comply with a notice given to her/him under s 18(1), the person is liable to the offence under s 21 and to a penalty of imprisonment for six months. Giving false or misleading information is an offence under s 22, punishable by imprisonment for twelve months.

In many instances, the information required under s 18 also incriminates the first person him/herself, particularly in cases where the first person is a friend or relative. The first person is, however, not excused from providing the information required even if this may incriminate her or him. But s 24 limits the use of that information, as it is not admissible in evidence against the person in any criminal proceedings other than those under ss 18-27 *Migration Act*. Consequently, the information cannot be used in criminal proceedings against the first person for trafficking offences under s 229 ff *Migration Act*.<sup>64</sup>

Sections 21 and 22 primarily seek to facilitate the location and removal of unlawful non-citizens. Unlike the offences contained in subdivision 12A *Migration Act*, they do not focus on trafficking and illegal immigration, which explains the significant difference between penalties.

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<sup>62</sup> Section 3 *Migration Amendment Act (No 2) 1991*.

<sup>63</sup> Australia (Cth), Senate, *Migration Legislation Amendment Bill (No 2) 1991, Explanatory Memorandum* (1991) 1.



The *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* repealed s 22 *Migration Act*<sup>65</sup> and centralised offences concerning false or misleading information or documents in new Part 7.4 *Criminal Code*, titled “False or misleading statements”.<sup>66</sup> Sections 137.1 and 137.2 *Criminal Code* make it an offence to give written or verbal information to a Commonwealth officer (including immigration officials), or a person acting under Commonwealth power, knowing that the information is false, misleading or incomplete, and knowing that this is a criminal offence.<sup>67</sup> Amended s 18(2) *Migration Act* now refers to section 137.1 *Criminal Code*. From now on, people who provide false, incomplete or otherwise misleading information and documents concerning the identity and whereabouts of a suspect unlawful non-citizen are liable to a penalty of imprisonment of up to twelve months. The new provisions also apply to circumstances where the offender makes the respective statements in the course of another person’s immigration application.

#### *False statements to obtain passports*

The Commonwealth *Passports Act* contains offences that involve the production and use of fraudulent passports, including those issued by foreign authorities. Essentially, the Act seeks to protect the Commonwealth’s power to issue and cancel Australian passports as part of its authority to grant, control and protect Australian citizenship and its appearance.<sup>68</sup>

For that purpose, s 10(1) *Passports Act* criminalises persons who make false statements to obtain a passport for another person or to support another person’s application for a passport. It is an offence to “knowingly<sup>69</sup> or recklessly<sup>70</sup> make any false or misleading

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<sup>64</sup> Cf Crock, *Immigration and Refugee Law in Australia*, supra note 22, at 203.

<sup>65</sup> Schedule 2, Part 1 *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*.

<sup>66</sup> See Australia (Cth), House of Representatives, *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999, Explanatory Memorandum* (1999) paras 206, 207; Australia (Cth), Senate, *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 2000, Revised Explanatory Memorandum* (2000) paras 211-214.

<sup>67</sup> See subs 137.1(4) and Australia (Cth), House of Representatives, *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 2000, Supplementary Explanatory Memorandum* (1998-2000) paras 22-23; Australia (Cth), Senate, *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 2000, Revised Explanatory Memorandum* (2000) para 211.

<sup>68</sup> Section 51(xix) *Commonwealth of Australia Constitution Act*. Cf *R v Yu* (CCA (NSW), 1 Sep 1995 (unreported) reprinted in Neil Williams et al, *Federal Criminal Law Vol 2* (1994-) 116,202, para 12-12,110.5.

<sup>69</sup> Inserted by s 13 *Passports Amendment Act 1984* (Cth), No 168 of 1984.

<sup>70</sup> Inserted by sch 1 *Foreign Affairs and Trade Legislation Amendment Act 1997* (Cth), No 150 of 1997.

statement” in order to obtain an Australian passport, or in support of an application by another person, a renewal, or an endorsement. Subsection 10(2) contains similar provisions for foreign passports. The penalty for offences under s 10 is \$5,000 or imprisonment for two years.

#### 4.1.2.6. Production and provision of false documents

Producing and providing fraudulent travel and identity documentation are integral parts of migrant trafficking, particular in the case of trafficking by air.<sup>71</sup> The Australian Department of Immigration estimates that approximately 55% of all illegal immigrants who arrive in Australia by air make use of fraudulent travel documents, often provided by transnational trafficking organisations.<sup>72</sup>

Offences that deal with the production, provision and use of false documentation can be found in the *Migration Act*, the *Passports Act* and the *Criminal Code*. The *Migration Act* contains provisions with respect to false immigration documents. The *Passports Act* criminalises the production and use of forged Australian and foreign passports. The *Criminal Code* makes it an offence to produce forged Commonwealth documents, superseding similar provisions under the *Crimes Act*.

The offences that involve forged or otherwise fraudulent documentation can be differentiated between three categories: (1) producing such documents (forgery), (2) providing and transferring them to another person, and (3) using and possessing forged documents.

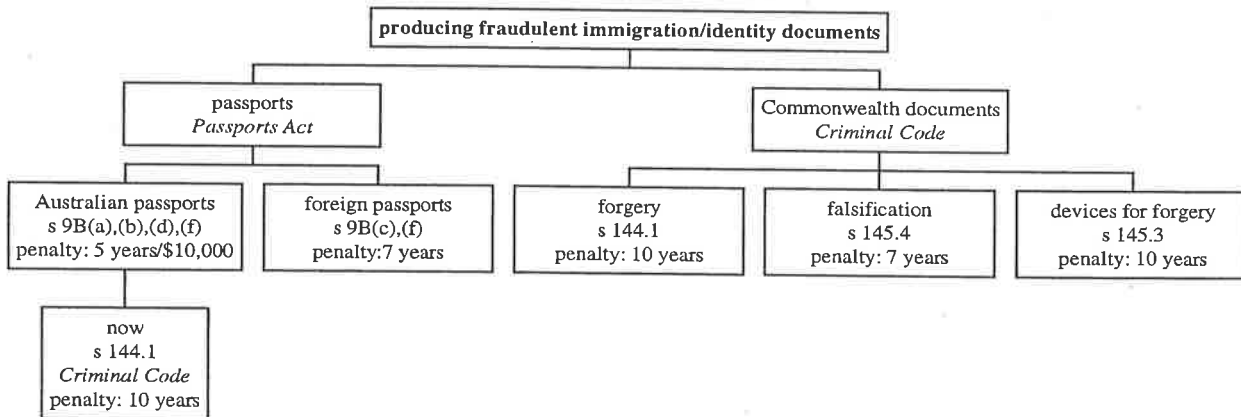
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<sup>71</sup> See *supra* Section 3.4.2.4.2.

<sup>72</sup> DIMA, *Protecting the Borders: Immigration Compliance* (1999) 74, table 4.3; Australia (Cth), *Parliamentary Debates*, House of Representatives, 11 May 1999, 5084 (P Ruddock, Minister for Immigration and Multicultural Affairs); and see *supra* Section 3.4.2.4.2.

#### 4.1.2.6.1. Producing fraudulent documents (forgery)

Figure 20: Offences: Producing fraudulent documents, Australia



Australian law criminalises the production of fraudulent passports in the *Passports Act*. The unlawful production of Commonwealth documents generally (including passports and visas) is a crime under the *Criminal Code*. The *Migration Act* does not criminalise the forgery of Australian visas.<sup>73</sup>

#### *Passport forgery*

The unlawful production of passports is prohibited in ss 9B and 9C *Passports Act*.

Under s 9B *Passports Act* it is an offence to falsify passports (s 9B(b) and (c)), to make false endorsements of passports (s 9B(d)), and to falsify a document that “may be used, acted on or accepted as if it were” a passport (s 9B(e) and (f)). Moreover, to knowingly make, use, possess or dispose paper or other material that is specifically provided for the purposes of an Australian passport or that resembles such paper and material are offences under s 9B(a). With the exception of subsections (a) and (d), s 9B makes the same provisions for foreign<sup>74</sup> and Australian passports.<sup>75</sup>

The *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* replaced the provisions contained in s 9B *Passports Act* in order to simplify the provisions

<sup>73</sup> The *Immigration Act* (Norfolk Island) does not contain offences criminalising the production of fraudulent immigration documents.

<sup>74</sup> Subsections 9B(c), (f) *Passports Act*.

<sup>75</sup> Subsections 9B(b), (e) *Passports Act*.

and bring them in line with other Commonwealth offences.<sup>76</sup> The application of new s 9B(a) *Passports Act* is now limited to foreign passports. It is an offence to “within Australia, falsify a passport issued by or on behalf of the government of a foreign country” and to make “a document that is false with intent that the false document may be used, acted on or accepted as if it were a passport issued by or on behalf of a government of a foreign country”. The remainder of former s 9B, including the forgery of Australian passports, are replaced by *Criminal Code* offences.<sup>77</sup>

Section 9C *Passports Act* contains three offences “relating to the issue of passports”. Under s 9C(1) it is an offence to “to issue an Australian passport or a document (not being an Australian passport) that purports to be an Australian passport.” Subsection 9C(2), which only applies to government officials with authority to issue Australian passports, makes it an offence to (a) knowingly issue an Australian passport in contravention of the Act; or (b) “issue an Australian passport to a person knowing that the person is not an Australian citizen.”

#### *Forgery of Commonwealth documents*

In addition to the forgery offences under the *Passports Act*, the *Crimes Act* and now the *Criminal Code* contain general provisions that criminalise the unlawful production and falsification of “any” Commonwealth documents. This includes visas, which are issued by DIMA, as well as passports, issued by the Department of Foreign Affairs (DFAT).

Section 67(b) *Crimes Act* made it an offence to forge “any document issuable by, or deliverable to, any Department of the Commonwealth or any public authority under the Commonwealth, or any Commonwealth officer”, punishable by imprisonment for ten years. Section 69 *Crimes Act* contained provisions similar to that of s 9B(a) *Passports Act*, criminalising the making, use and possession of material “which is specially provided by proper authority for the purposes of any Commonwealth document”.

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<sup>76</sup> Australia (Cth), House of Representatives, *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999*, Explanatory Memorandum (1999) item 313; Australia (Cth), Senate, *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 2000*, Revised Explanatory Memorandum (2000) para 543.

<sup>77</sup> See *infra* Section 4.2.3.

The *Criminal Code* substituted ss 67 and 69 *Crimes Act*<sup>78</sup> and combined and harmonised forgery offences at the Commonwealth level. Under s 144.1 *Criminal Code* it is an offence to make false documents “with the intention that the person or another will use it” to dishonestly induce a third person<sup>79</sup> or a computer<sup>80</sup> to accept the document as genuine<sup>81</sup> and influence the exercise of a public duty or function.<sup>82</sup> The new provisions are broader than those under the *Crimes Act* in that they cover all Commonwealth duties (including border control and immigration clearance) and all sorts of Commonwealth documents (for example, passports and visas). But while the former offences criminalised the production of fraudulent documents without a fault element, under the new offence it has become necessary that the act is committed with intention that someone will use the fraudulent document.<sup>83</sup>

Additional provisions are contained in new ss 145.3 and 145.4 of the *Criminal Code*. Section 145.3 criminalises the possession, making or adaptation of devices et cetera for making forgeries, punishable by imprisonment for ten years, replacing former s 69 *Crimes Act*. Under s 145.4 it is an offence to “dishonestly damage, destroy, alter, conceal or falsify” Commonwealth documents, punishable by imprisonment for seven years.

#### 4.1.2.6.2. *Transferring identity and immigration documents*

The transfer of identity documents to another person for the purpose of obtaining entry or immigration clearance in Australia is criminalised in ss 234(2) and 233A(2) *Migration Act*. Subsection 234(2) *Migration Act* makes it an offence to intentionally “transfer or part with possession of a document” to help another person to gain entry, immigration clearance or

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<sup>78</sup> Schedule 2, items 153, 313 *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*. Cf Australia (Cth), House of Representatives, *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999, Explanatory Memorandum (1999)* item 313; Australia (Cth), Senate, *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 2000, Revised Explanatory Memorandum (2000)* para 543.

<sup>79</sup> See s 144.1(1) and (5) *Criminal Code*.

<sup>80</sup> See *ibid*, s 144.1(3) and (7).

<sup>81</sup> See *ibid*, s 144.1(1)(a)(i), (3)(a)(i), (5)(a)(i), and (7)(a)(i).

<sup>82</sup> See *ibid*, s 144.1(1)(a)(ii), (3)(a)(ii), (5)(a)(ii), and (7)(a)(ii).

<sup>83</sup> *Ibid*, s 5.2.

remain in Australia.<sup>84</sup> Paragraph 234(2)(b) extends criminal liability to suspicious circumstances in which the document may be so used. The 1999 amendments of the immigration offences increased the penalty for offences under s 234 *Migration Act* to imprisonment for ten years or 1,000 penalty units (\$110,000) or both.<sup>85</sup> An offence identical to that under s 234(2) is contained in s 65(2) *Immigration Act* (Norfolk Island).

The *Migration Legislation Amendment Act (No 1) 1999* created a new offence to impose higher penalties on traffickers who provide fraudulent documents to multiple migrants.<sup>86</sup> Section 233A(2) makes special provisions for the transfer of documents if this is done with the intention to help a group of five or more persons or any member of such a group to apply for a visa, gain entry, immigration clearance or to remain in Australia. The offence is identical with that under s 234(2) except for the additional criterion of “a group of five or more people”. It is, however, not required that the whole group has arrived on fraudulent documents. Paragraphs 233A(1)(a) and (b) render clear that it is sufficient that the documents have been used for “any member of such group”, regardless of whether or not the visa, the entry or stay in Australia is granted to any member of the group. The penalty for offences under s 233A(2) is imprisonment between five and twenty years<sup>87</sup> or 2,000 penalty units (\$220,000) or both.

The *Passports Act* and the *Criminal Code* do not contain provisions that criminalise the transfer of passports or other Commonwealth documents.

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<sup>84</sup> Section 234(2) *Migration Act* reads: “A person shall not transfer or part with possession of a document with intent that the document be used to assist a person, being a person not entitled to use it, to gain entry to, or to remain in Australia or where he has reason to suspect that the document may be so used.”

<sup>85</sup> Section 8 *Migration Legislation Amendment Act (No 1) 1999*.

<sup>86</sup> Section 7 *Migration Legislation Amendment Act (No 1) 1999*. Cf Australia (Cth), Senate, *Migration Legislation Amendment Bill (No 2) 1998* [= *Migration Legislation Amendment Act (No 1) 1999*] *Replacement Supplementary Explanatory Memorandum* (1998-99) para 11.

<sup>87</sup> Cf s 233C *Migration Act*.

#### 4.1.2.6.3. Use and possession of fraudulent documents

The use and possession of fraudulent documents is usually an offence committed by the illegal migrant.<sup>88</sup> There are, however, some offences under Australian law that can apply simultaneously to illegal migrants and to their traffickers.

Section 234 *Migration Act*, for instance, contains provisions that penalise the use of false visas and other immigration documents. Paragraphs 234(1)(a) and (b) make it an offence, punishable by imprisonment for ten years or 1,000 penalty units (\$110,000) or both,<sup>89</sup> to use (“present or cause to be presented”, “deliver or cause to be delivered”) forged and false documents to an immigration officer or other person acting under the *Migration Act*. Under paragraph 234(1)(b) it is an offence to “furnish” such documents or “cause them to be furnished”. The offences listed in s 234(1) do not distinguish whether or not these documents are used by “that person himself or herself” or provided to other non-citizens. Hence, it is possible to make those persons liable who present or furnish false documents in order to smuggle another person. Identical provisions can be found in s 65(1)(a), (c) and (d) *Immigration Act* (Norfolk Island).

In circumstances that involve five or more non-citizens, special provisions are made under s 233A(1)(c)-(e) *Migration Act*, which have been introduced by the *Migration Legislation Amendment Act (No 1) 1999*.<sup>90</sup> In order to criminalise the use of fraudulent documents in the context of migrant trafficking, s 233A(1) *Migration Act* criminalises the use and furnishing of forged and false documents with intention to help a group of five or more people, or any member of such a group (which may include that person himself or herself) to apply for a visa, gain entry, immigration clearance or remain in Australia. The offence is otherwise identical with that under s 234(1) except for the additional criterion of “group of 5 or more people”, and attracts a higher penalty of “imprisonment for 20 years or 2,000 penalty units (\$220,000) or both”.<sup>91</sup>

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<sup>88</sup> See *infra* Section 4.2.3.

<sup>89</sup> Last amended by s 8 *Migration Legislation Amendment Act (No 1) 1999*.

<sup>90</sup> Section 7 *Migration Legislation Amendment Act (No 1) 1999*. Cf Australia (Cth), Senate, *Migration Legislation Amendment Bill (No 2) 1998* [= *Migration Legislation Amendment Act (No 1) 1999*] *Replacement Supplementary Explanatory Memorandum* (1998-99) para 11.

<sup>91</sup> For mandatory penalties see s 233C *Migration Act*.

Finally, s 236(2) *Migration Act* can apply to members of trafficking organisations if they are found in possession of a visa that has been issued to another person.<sup>92</sup>

### 4.1.3. Organisational Offences

#### 4.1.3.1. Organised crime and conspiracy

Organised crime and participating in criminal organisations are not designated crimes under Australian law. Following the rise of organised crime in Australia in the late 1970s and early 1980s, the Government chose to legislate against key aspects and activities of organised crime rather than specifically criminalising organisations that are active in common fields of organised criminal activity, such as, for instance, prostitution, illegal gambling, drug trafficking and migrant trafficking. Section 4 of the *National Crime Authority Act 1984*, which established and regulates Australia's premier anti-organised crime law enforcement agency, outlines some of the features that characterise organised crime as "relevant criminal activity".<sup>93</sup> These features, isolated or cumulative, are, however, not necessarily criminal offences themselves.

Though Australian law has so far not legislated directly against organised crime, the law of conspiracy is frequently invoked against members of criminal organisations. The comparatively broad provisions that criminalise conspiracy in Commonwealth<sup>94</sup> and State criminal law<sup>95</sup> generally envisage the criminalisation and prevention of crimes committed by groups or other criminal organisations. Some Australian jurisdictions limit the application of conspiracy to "serious" offences that attract higher penalties, for instance offences "punishable by imprisonment for more than 12 months or by a fine of 200 penalty

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<sup>92</sup> Introduced by item 36, sch 1 *Migration Legislation Amendment (Application of Criminal Code) Act 2001* (Cth).

<sup>93</sup> Section 4 *National Crime Authority Act 1984* (Cth) reads: "Relevant criminal activity' means any circumstances implying, or any allegations, that a relevant offence may have been, or may be being, committed against a law of the Commonwealth, of a State or a Territory." See also *supra* Section 3.1.1.1.

<sup>94</sup> Section 86 *Crimes Act 1914* (Cth), s 11.5 *Criminal Code*.

<sup>95</sup> See ss 282-294 *Criminal Code* (NT); Chapter 56 *Criminal Code 1899* (Qld); s 297 *Crimes Act* (Tas); Div 10 *Crimes Act 1958* (Vic); Chapter LVIII *Criminal Code* (WA). Conspiracy is a common law offence in New South Wales and South Australia.



units or more”.<sup>96</sup> Moreover, in most jurisdictions the application of the conspiracy provisions depends on an agreement between the conspirators<sup>97</sup> (including corporate bodies),<sup>98</sup> intention to commit the principal offence by at least one of the conspirators,<sup>99</sup> and on an overt act that at least one of the conspirators has committed pursuant to the agreement.<sup>100</sup> It is not required that the offence to which the conspiracy relates to is possible,<sup>101</sup> or that it has reached the stage of attempt or completion. Penalties for conspiracy range from seven to fifteen years,<sup>102</sup> or are punishable “as if the offence to which the conspiracy relates had been committed”.<sup>103</sup>

Although the conspiracy offences have sometimes served to prosecute participants in criminal organisations, their application as a tool to fight organised or otherwise group related crime is only rudimentary.<sup>104</sup> As such, its usefulness in the fight against organised crime remains limited.

#### 4.1.3.2. Financing organised crime

With the growing concern over organised crime in Australia in the late 1970s and early 1980s, the Government also set up a number of Royal Commissions to investigate various aspects of organised criminal activity in Australia. In their findings all three commissions concluded that to combat the activities of criminal organisations successfully, it is essential to deprive them of any profits and criminalise the laundering of money, but that Australian

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<sup>96</sup> Section 86 *Crimes Act* (Cth), s 11.5 *Criminal Code*.

<sup>97</sup> See s 86(3)(a) *Crimes Act 1914* (Cth); s 11.5(2)(a) *Criminal Code*; s 321(1) *Crimes Act 1958* (Vic).

<sup>98</sup> See s 86(4)(b) *Crimes Act 1914* (Cth); s 11.5(3)(b) *Criminal Code*; s 321(2) *Crimes Act 1958* (Vic).

<sup>99</sup> See s 86(3)(b) *Crimes Act 1914* (Cth); s 11.5(2)(b) *Criminal Code*. Cf Peter Gillies, *The Law of Criminal Conspiracy* (2<sup>nd</sup> ed, 1990) 64-66.

<sup>100</sup> See s 86(3)(c) *Crimes Act 1914* (Cth); s 11.5(2)(c) *Criminal Code*.

<sup>101</sup> See s 86(4)(a) *Crimes Act 1914* (Cth); s 11.5(3)(a) *Criminal Code*; s 292(e) *Crimes Act* (NT); s 321(3) *Crimes Act 1958* (Vic). Cf Gillies, *supra* note 99, at 164-168.

<sup>102</sup> Section 282 *Criminal Code* (NT) and s 541.1(2) *Criminal Code 1899* (Qld): imprisonment of 7 years if no other punishment is provided. Section 558(2)(a) *Criminal Code* (WA): imprisonment for 14 years. Section 321C(b) *Crimes Act 1958* (Vic): 15 years.

<sup>103</sup> See s 86(1) *Crimes Act 1914* (Cth); s 11.5(1) *Criminal Code*; and see also s 321C(a) *Crimes Act 1958* (Vic); s 558(2)(b) *Criminal Code* (WA).

<sup>104</sup> Cf Gillies, *supra* note 99, at 4-9 and see the discussion *infra* Section 5.2.2.2.

law placed too little emphasis on targeting the ‘money trail’ of organised crime.<sup>105</sup> Following the recommendations made by the commissions and a change of law enforcement arrangements at the Commonwealth level, the Australian Government introduced a series of legislative initiatives aiming to reduce the profits, and ultimately the activities, of criminal organisations.<sup>106</sup>

Today, the *Proceeds of Crime Act 1987* (Cth)<sup>107</sup> is the key instrument to seize the profits generated by the activities of criminal organisations and their members. The Act contains provisions to facilitate the confiscation, seizure and forfeiture “of the proceeds of, and benefits derived from, the commission of offences against the laws of the Commonwealth or the Territories” and to criminalise the laundering of money deriving from criminal activity. While the primary target of the Act has originally been the profits accumulated by drug trafficking, the key provisions of the Act simultaneously apply to other fields of organised crime.<sup>108</sup>

The principal offences under the *Proceeds of Crime Act* are contained in ss 81-83<sup>109</sup> which criminalise the laundering of money: s 81; the reception, possession, concealment, disposal and import of money or property suspected of deriving from crime: s 82; and organised fraud: s 83. The offences contain special provisions for corporate criminal liability.<sup>110</sup> Legislation similar to the *Proceeds of Crime Act* has been enacted in all States and Territories.<sup>111</sup>

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<sup>105</sup> Australia, Royal Commission into Drug Trafficking, *Report* (1979) 1879; Australian Royal Commission of Inquiry into Drugs, *Report* (1980) 365, 375; Australia, Royal Commission of Inquiry into Drug Trafficking, *Report* (1983) 629, 636.

<sup>106</sup> For the history of the legislative changes that occurred in the 1980s see, for example, Australia, National Crime Authority (NCA), *Taken to the Cleaners: Money Laundering in Australia, Vol 1* (1991) 13-15, 19-21.

<sup>107</sup> No 160 of 1987 [hereinafter *Proceeds of Crime Act*].

<sup>108</sup> For an outline of the *Proceeds of Crime Act* see, for example, Australian Law Reform Commission, *Confiscation that Counts — A Review of the Proceeds of Crime Act 1987* (1999) 23-30.

<sup>109</sup> See the detailed analysis in NCA, *supra* note 106, at 84-92.

<sup>110</sup> See ss 81(2)(b), 82(1)(b) and 83(1)(b) *Proceeds of Crime Act*.

<sup>111</sup> See *Proceeds of Crime Act 1991* (ACT); *Confiscation of Proceeds of Crime Act 1989* (NSW); *Crimes (Forfeiture of Proceeds) Act 1988* (NT); *Crimes (Confiscation of Profits) Act 1989* (Qld); *Crimes (Confiscation of Profits) Act 1986* (SA); *Crimes (Confiscation of Profits) Act 1992* (Tas); *Crimes (Confiscation of Profits) Act 1986* (Vic); and *Crimes (Confiscation of Proceeds) Act 1988* (WA).

In addition to the measures introduced by the *Proceeds of Crime Act*, in 1988, Parliament passed the *Financial Transactions Reports Act 1988* (Cth)<sup>112</sup> to facilitate the identification of proceeds of crime that are placed in the financial system.<sup>113</sup> Although “the principal object of this Act is to facilitate the administration and enforcement of taxation laws”,<sup>114</sup> it simultaneously serves to prevent clandestine transactions of large sums of money, including those suspected of being proceeds of organised crime. Section 3 of the Act establishes a mandatory reporting requirement for “significant cash transactions” involving the transfer of currency of more than \$10,000 in value. Section 31 targets activities that try to circumvent existing banking and reporting regulations, particularly the phenomenon earlier described as smurfing.<sup>115</sup> The section makes it an offence “to conduct transactions so as to avoid reporting requirements” by making two or more non-significant or exempted transactions.

#### 4.1.3.3. Participation of officials

Corruption and bribery are phenomena that are closely connected to organised crime and illegal migration.<sup>116</sup> Government officials who ‘turn a blind eye’ to the activities of criminal organisations are characteristic for trafficking operations in the Asia Pacific region and can be found equally in sending, transit and destination countries.

Australian criminal law contains numerous provisions dealing with corruption and bribery at State<sup>117</sup> and Commonwealth levels.<sup>118</sup> Many, if not most, of the provisions, however, do not or only rudimentarily apply to the activities of trafficking organisations.

The *Migration Act* does not contain particular provisions that sanction the participation of officials in the trafficking offences of the Act. There are no special offences if immigration officers facilitate the illegal entry of non-citizens, if they provide fraudulent documents, or

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<sup>112</sup> No 64 of 1988, formerly *Cash Transactions Reports Act 1988* (Cth).

<sup>113</sup> See the more detailed analysis in NCA, *supra* note 106, at 101-113.

<sup>114</sup> Subsection 4(1) *Financial Transactions Reports Act 1988* (Cth).

<sup>115</sup> See *supra* Section 3.4.4.3.

<sup>116</sup> See *supra* Sections 3.3.2.2 and 3.4.2.2.2.

<sup>117</sup> Cf ss 249B, 249D, 249E *Crimes Act 1900* (NSW); s 77 *Criminal Code* (NT); s 87 *Criminal Code* (Qld); s 249 *Criminal Law Consolidation Act 1935* (SA); ss 83, 86 *Criminal Code* (Tas); s 176 *Crimes Act 1958* (Vic); s 83 *Criminal Code* (WA).

if they are negligent towards unauthorised arrivals. If government officials participate in immigration offences they are liable under the general provisions of the *Migration Act* and not in their position as public servants.

The only offence in relation to immigration decisions made by government officials is contained in s 335 *Migration Act*, which has been added in 1992.<sup>119</sup> This section places a penalty of imprisonment for two years on the taking and accepting of bribes in return for migration decisions “in a particular way”. Section 335 applies to any official who is involved in the making of decisions under the *Migration Act*, also including tribunal members and migration agents.<sup>120</sup> The person offering the bribe is liable under the general offences under the *Criminal Code*.<sup>121</sup>

The offence under s 9C(2) *Passports Act*, as mentioned earlier, applies to government officials with authority to issue Australian passports who knowingly issue an Australian passport (a) in contravention of the *Passports Act*, or (b) to a non-citizen. The offence is punishable by a fine of \$5,000 or imprisonment for two years.

The *Criminal Code* in ss 141.1 and 142.2 contains offences for bribery of a Commonwealth public official. To bring Australian law in line with other international measures,<sup>122</sup> the Commonwealth Government also introduced additional offences for the bribery of foreign public officials in s 70.2 *Criminal Code*.<sup>123</sup> This provision extends Australia’s jurisdiction over transnational corruption cases that involve foreign public officials.<sup>124</sup> In the context of migrant trafficking, this offence is particularly relevant if, for

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<sup>118</sup> Cf ss 70.1-70.6, 140.1-142.3 *Criminal Code* (Cth);

<sup>119</sup> Added as s 114ZZN *Migration Act* by *Migration Amendment Act (No 3) 1992*, No 85 of 1992.

<sup>120</sup> Crock, *Immigration and Refugee Law in Australia*, *supra* note 22, at 205.

<sup>121</sup> Sections 70.2, 141.1 *Criminal Code*.

<sup>122</sup> See the 1997 *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 1999 ATS 21.

<sup>123</sup> *Criminal Code Amendment (Bribery of Public Foreign Officials) Act 1999* (Cth), No 43 of 1999.

<sup>124</sup> Section 70.2 reads “(1) A person is guilty of an offence if: (a) the person: (i) provides a benefit to another person; or (ii) causes a benefit to be provided to another person; or (iii) offers to provide, or promises to provide, a benefit to another person; or (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and (b) the benefit is not legitimately due to the other person; and (c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official’s duties as a foreign public official in order to: (i) obtain or retain business; or (ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person). Penalty: Imprisonment for 10 years.”

example, government officers abroad are bribed to issue false passports or sell blank travel documents.

#### 4.1.4. Summary Remarks

In summary, Australian criminal law penalises most of the activities of trafficking organisations in a comprehensive manner. The operational issues such as supply, service, distribution and finance — that have been identified as integral aspects of migrant trafficking in Section 3.4 — are largely covered by the provisions contained in the *Migration Act*, *Crimes Act/Criminal Code*, *Passports Act* and additional Commonwealth and State legislation.

But this has not always been the case. Prior to the enactment of the *Migration Legislation Amendment (No 1) Act 1999* and the *Border Protection Legislation Amendment Act 1999* the relevant laws covered the operations of trafficking organisations only rudimentarily. Also, the early offences under the *Migration Act* provided only very minor penalties for the organisation and facilitation of illegal immigration.<sup>125</sup> For example, a report on immigration laws in industrialised countries, completed by IGC, the Inter-governmental Consultations on Asylum, Refugee and Migration Policies, in December 1995, found that in Australia

[t]here are currently no proposals to introduce legislation to deal specifically with alien trafficking. There are no legal provisions that would enable prosecution of organisations outside Australia identified as engaging in trafficking or smuggling aliens into Australia.<sup>126</sup>

The high number of unauthorised arrivals in 1999 resulted in radical changes to the law. The very rapid developments in law and law reform over the past three years demonstrate complacent attitudes towards the phenomenon prior to 1999, which is also reflected by the non-existence of research and critical analysis dated 1998 and before.

Growing concern over illegal immigration and the increasing numbers of unauthorised arrivals in Australia have recently led to calls for higher penalties, as the fines under ss 229,

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<sup>125</sup> For example, as on 21 Mar 1998, the penalty for offences under ss 233 and 234 was imprisonment for 2 years.

<sup>126</sup> IGC, *Trafficking in Aliens* (1995) 12.

230 and 232 *Migration Act* are considerably lower than, for example, penalties imposed on the carriage of drugs into Australia.<sup>127</sup> But these statements ignore the fact that the scope of these sections also includes commercial or otherwise legitimate carriers and, unlike s 232A, are not solely focussed on organised crime. It is true, however, that there is a similarity to drug offences in that some provisions may apply simultaneously to criminal traffickers and to legitimate transporters who knowingly or unknowingly carry undocumented migrants or unreported amounts of narcotics.<sup>128</sup> For that reason it is important that the relevant provisions make a clear distinction between passenger transport regulations that require commercial carriers to ensure that all passengers are documented, and criminal offences that seek to prevent and penalise the organised trafficking of migrants.<sup>129</sup>

A major deficiency of the present law is that it fails to make any exception for the transportation of refugees. People who bring genuine refugees to Australia are criminally liable under Subdivision 12A *Migration Act* regardless of the fact that their passengers may all be granted protection visas in Australia. It seems cynical that the “refugee smugglers” of the Cold War era are now designated criminals,<sup>130</sup> and that refugees are expected to apply and be selected from abroad rather than being processed in safe countries such as Australia.

A unique situation is that of Norfolk Island. Given the less comprehensive immigration legislation and the significantly lower penalties for immigration and trafficking offences, it is surprising that traffickers have not yet exploited the opportunity to smuggle migrants to and through the island territory. Although the geographical application of Norfolk Island law may seem insignificant in national and regional contexts, it is necessary to bring the provisions in line with Australian law to avoid discrepancies in legislation and law enforcement as well as in the protection of asylum seekers.

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<sup>127</sup> See, for example, Adam Graycar, “Trafficking in Human Beings” paper presented at the *International Conference on “Migration, Culture & Crime”*, Jerusalem, 7 July 1999, 14-15.

<sup>128</sup> For a discussion of this distinction in the case of drug offences see, for example, Australia, Model Criminal Code Officers Committee, *Chapter 6: Serious Drug Offences — Report* (1998) 2-6.

<sup>129</sup> See generally Erika Feller, “Carrier Sanctions and International Law” (1989) 1(1) *IJRL* 48-65.

<sup>130</sup> See the discussion *supra* Section 2.2.2.

Finally, the existing provisions under Australian law place great emphasis on the operational side of trafficking, while paying too little attention to organisational issues. The legislature intentionally refrained from defining organised crime and from making the participation in criminal organisations an offence. In the early 1980s, it was decided not to introduce laws similar to that of the US *RICO* legislation,<sup>131</sup> which, for the most part, is concerned with the organisational and financial aspects of organised crime, and which has in many instances been successfully utilised to combat migrant trafficking.<sup>132</sup> Although, as indicated before and further analysed below,<sup>133</sup> there are many difficulties surrounding definitions of organised crime, the recognition of organised crime in Australian criminal law, at least in some cases, can potentially prevent and stop criminal offences at inchoate stages, while operational provisions, to be wholly and successfully applicable, generally depend on the actual commission of a crime.

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<sup>131</sup> *Federal Racketeer Influenced and Corrupt Organisations Act (RICO)* (US) 18 U.S.C.A. § 1961(1)(F) (1999), see also the discussion *infra* 5.2.2.

<sup>132</sup> See Cleo Kung, "Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the US Statutory Definition of 'Refugee'" (2000) 90 *J Crim L & Criminology* 1271 at 1287-1288.

<sup>133</sup> See *supra* Section 3.1 and see the comparative analysis *infra* Section 5.2.2.

## 4.2. Offences Applying to Illegal Migrants

Traditionally, the major focus of immigration law has been on the individual migrant rather than on those who organise and finance illegal immigration. Australian law contains a number of offences that apply to illegal migrants and make them criminally liable for entering Australia without authorisation. The offences can be differentiated between provisions relating to (1) illegal departure from and entry to Australia, (2) false statements in the context of entry and immigration clearance, and (3) the use and possession of fraudulent documents.

### 4.2.1. Illegal Departure & Illegal Entry

#### 4.2.1.1. Emigration offences

Up until 1973 Australian law criminalised the departure from Australia in certain circumstances. In 1910, the Commonwealth Government passed the *Emigration Act* (Cth)<sup>134</sup> which in s 3 prohibited the emigration of children and “aboriginal natives” from Australia. Contraventions of these prohibitions were, however, not penalised. But “any person who takes or attempts to take any child or aboriginal native out of the Commonwealth” was guilty of a criminal offence under s 3(2). This provision, essentially, criminalised the trafficking of people out of Australia.

The *Emigration Act 1910* was repealed with the enactment of the *Migration Act* in 1958. However, under s 64 *Migration Act 1958* certain provisions continued to restrict the emigration of Aborigines. These provisions were repealed by s 6 *Migration Act 1973*.

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<sup>134</sup> No 26 of 1910 [hereinafter *Emigration Act 1910*].



#### 4.2.1.2. Illegal immigration as an offence

As will be seen in the next Chapter, most jurisdictions in the Asia Pacific criminalise immigration in contravention of the countries' entry regulations.<sup>135</sup> Under these provisions it is an offence, for instance, to arrive undocumented or secretly.

Up until recently, Australian law, too, made it an offence to arrive in the country without a valid visa. When the *Migration Act* was enacted in 1958, it became a criminal offence to enter Australia without a valid entry permit "punishable upon conviction by imprisonment for a period not exceeding six months".<sup>136</sup> In 1979 the application of this section was extended to circumstances in which a deportee re-entered Australia and in which temporary entry permits expired.<sup>137</sup> Minor amendments followed in 1983,<sup>138</sup> 1984,<sup>139</sup> 1989<sup>140</sup> and 1992.<sup>141</sup>

Since 1 September 1994 illegal entry is no longer a criminal offence<sup>142</sup> although Australia continues to impose a universal visa requirement on all non-citizen immigrants.<sup>143</sup> People who now arrive in Australia without a valid visa become "unlawful non-citizens" (s 14 *Migration Act*)<sup>144</sup> and are subject to mandatory detention (ss 189, 190) and removal (s 198).<sup>145</sup> They are also liable for all costs associated with the detention and any enforcement action taken against them (s 210). But it is not an offence to be or become an unlawful non-citizen.<sup>146</sup> Also, illegal re-entry after removal from Australia is no longer a punishable offence.

It is unclear what drove the Australian Government to repeal the provisions which made illegal immigration an offence. The legislative material on the *Migration Reform Act 1992*

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<sup>135</sup> See *infra* Section 5.3.1.1.

<sup>136</sup> Section 27(1) *Migration Act 1958*.

<sup>137</sup> Section 27(1)(a)(aa), (ab) *Migration Act 1958*.

<sup>138</sup> Section 18 *Migration Amendment Act 1983* substituted Para 27(1)(c).

<sup>139</sup> Section 21 *Torres Strait Treaty (Miscellaneous Amendments) Act 1984* (Cth), No 22 of 1984; s 173 *Taxation Laws Amendment Act 1984*, No 123 of 1984.

<sup>140</sup> The *Migration Legislation Amendment Act 1989* renumbered the section to s 77.

<sup>141</sup> Section 2 (sch 2) *Migration Amendment Act 1992* changed the penalty under subss 77(1) and (2) to "imprisonment for (a period not exceeding) 2 years".

<sup>142</sup> Section 17 *Migration Reform Act 1992*.

<sup>143</sup> Citizens of New Zealand and Norfolk Island are excluded from the universal visa requirement, see *Migration Regulations*, reg 2.06.

<sup>144</sup> Cf "prohibited immigrant" s 40(1) *Immigration Act* (Norfolk Island).

<sup>145</sup> Cf s 45 *Immigration Act* (Norfolk Island).

<sup>146</sup> See also the statements made in *Rutu and Laadjilu v Dalla Costa* (1997) 93 A Crim R 425 at 430.

does not contain any information on the reasons why unauthorised entry has been decriminalised.<sup>147</sup> In the context of migrant trafficking, this decriminalisation can be regarded as a step towards shifting the focus of criminal law and law enforcement from individual migrants to traffickers and criminal organisations, by criminalising those who organise and exploit migrants rather than punishing the people who enter Australia illegally in order to flee from catastrophic political, economic or environmental circumstances. However, in the light of the 1992 reforms and the increasing number of unauthorised arrivals at that time,<sup>148</sup> the decision to decriminalise illegal immigration must also be seen as a way to save Australian authorities from investigating the arrivals, to prevent the activation and involvement of the criminal justice system and ultimately to facilitate the immediate removal of illegal immigrants.<sup>149</sup>

#### 4.2.2. False Claims

As mentioned in earlier parts of this study, one characteristic of migrant trafficking is the making of false statements to immigration officials upon arrival in the destination country.<sup>150</sup> Australian law contains provisions in ss 234 and 233A *Migration Act* that criminalise false statements in the context of entry and immigration clearance.<sup>151</sup>

Section 234(1)(b), as analysed before, applies to any false statements made in the context of that person's (or someone else's) immigration. It is an offence for immigrants if they

in connection with the entry, proposed entry or immigration clearance ... into Australia or with an application for a visa or further visa permitting ... to remain in Australia ...

(b) make, or cause to be made, to an officer or a person exercising powers or functions under this Act, a statement that, to the person's knowledge, is false or misleading in a material particular. ...

Penalty: Imprisonment for 10 years or 1,000 penalty units or both.

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<sup>147</sup> Neither the *Explanatory Memorandum* on the Act nor the *Parliamentary Debates* provide any information on this matter.

<sup>148</sup> See *supra* Section 2.2.5.1.

<sup>149</sup> See also the discussion *infra* Section 4.3.4.2.

<sup>150</sup> See *supra* Sections 3.4.2.1 and 4.1.2.5 and accompanying references.

<sup>151</sup> Under s 57(2)(b) *Immigration Act* (Norfolk Island) it is an offence, punishable by imprisonment for up to six months, to make false or misleading statements for immigration purposes.

Criminal liability under this provision is limited to circumstances where the immigrant has “knowledge” that the information given to an immigration officer is wrong or misleading.<sup>152</sup> Statements that are false as a result of negligence, misinformation, or mere ignorance are not criminalised.

Section 233A(1)(d) *Migration Act*, introduced in 1999,<sup>153</sup> created a new offence if false statements are made in connection with the entry or immigration clearance of a group of five or more non-citizens. The penalty for offences under s 233A is five to twenty years imprisonment,<sup>154</sup> 2,000 penalty units (\$220,000), or both.

Similar to the *Migration Act* provisions, under s 10(1)(a) *Passports Act* it is an offence to “knowingly<sup>155</sup> or recklessly<sup>156</sup> make any false or misleading statement” for the purpose of obtaining an Australian passport, a renewal or an endorsement. Subsection 10(2) contains similar provisions concerning foreign passports. The penalty for offences under s 10 is \$5,000 or imprisonment for two years.

Sections 137.1 and 137.2 *Criminal Code*, introduced in 2000,<sup>157</sup> make it an offence to present verbal or written information to a Commonwealth officer (including immigration officials) or any other person acting under Commonwealth power, knowing that this information is false, misleading or incomplete, punishable by up to twelve months imprisonment.

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<sup>152</sup> Cf s 5.3 *Criminal Code*.

<sup>153</sup> Schedule 1, para 7 *Migration Legislation Amendment Act (No 1) 1999*.

<sup>154</sup> For mandatory penalties see s 233C *Migration Act*.

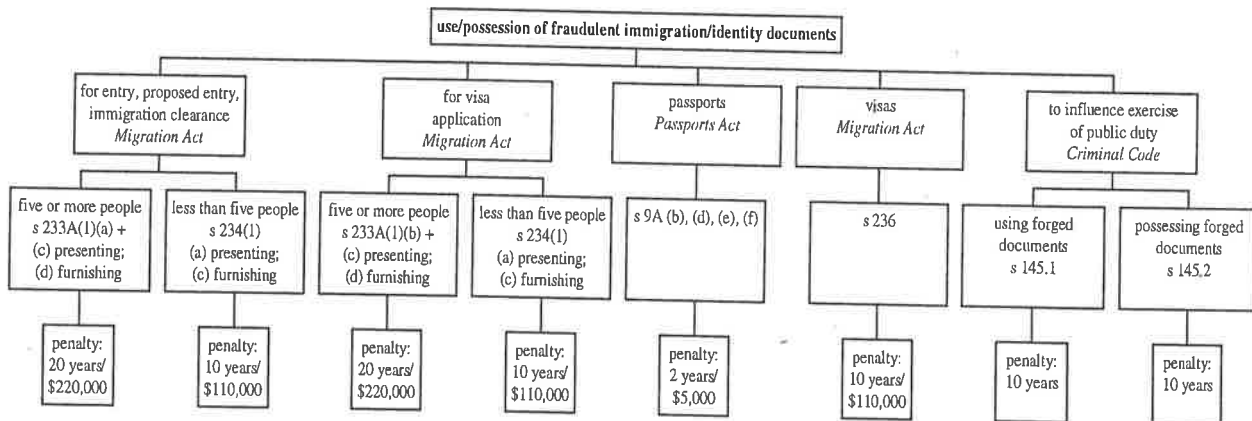
<sup>155</sup> Inserted by s 13 *Passports Amendment Act 1984* (Cth), No 168 of 1984.

<sup>156</sup> Inserted by sch 1 *Foreign Affairs and Trade Legislation Amendment Act 1997* (Cth), No 150 of 1997.

<sup>157</sup> *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth). Cf Australia (Cth), House of Representatives, *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 1999, Explanatory Memorandum* (1999) paras 206, 207.

### 4.2.3. Possession and Use of Fraudulent Documents

Figure 21: Offences: Use and possession of fraudulent documents



Australian law contains a wide range of offences that criminalise the use and possession of fraudulent identity and immigration documents. The offences under the *Migration Act* focus on documents used for immigration and visa application purposes. The *Passports Act* criminalises the use and possession of fraudulent passports. The new offences under the *Criminal Code* deal with forged Commonwealth documents.

#### *Migration Act*<sup>158</sup>

As mentioned earlier, ss 234 and 233A *Migration Act* penalise the use of fraudulent documents in connection with immigration into Australia. The *Migration Act* does not differentiate whether fraudulent documents are used for the entry of another person, or for the entry of the person presenting the document.

Non-citizen immigrants in Australia are liable for offences under s 234(1) if they (para (a)) present forged or otherwise false documents, or (c) deliver or otherwise furnish a document containing false or misleading information. Offences under the subsection are punishable by imprisonment for ten years, 1,000 penalty units (\$110,000), or both.

New s 233A(1) criminalises the same conduct as s 234(1) in circumstances that involve a group of five or more non-citizen immigrants. Although the wording of the provision is not unequivocal, it can be assumed, that subsection 233A(1) only applies in circumstances

<sup>158</sup> Sections 57, 65 *Immigration Act* (Norfolk Island) criminalise the use and possession of false documents and the transfer of genuine documents to another person.

where the document in question is used for the purpose of the entry or stay of five or more people.<sup>159</sup> Immigrants who arrive in Australia in a group and present fraudulent documents solely for the purpose of their own immigration application are criminally liable only under subsection 234(1) *Migration Act*.

In addition to the offences under ss 233A and 234, s 236 *Migration Act*, introduced in 1992,<sup>160</sup> makes special provisions for visa fraud. Section 236(1) provides that a person is guilty of an offence if the person uses a visa that has been issued to another person with the intention to travel to or remain in Australia. Secondly, persons who are found in possession of a visa that has been granted to another person are criminally liable under subsection (2). In 1999, the penalty for offences under s 236 has been increased to imprisonment for ten years, 1,000 penalty units (\$110,000), or both.<sup>161</sup>

The provisions under s 236 target the use and the possession of another person's genuine visa for the purpose of establishing identity, travelling to or remaining in Australia.<sup>162</sup> Similar to ss 233A(2) and 234(2), s 236 aims to prevent and punish the transfer of immigration documents from one person to another, but the former sections only criminalise the use of such documents, while the latter also criminalises the possession.

In addition to the penalty imposed on offences under s 236, ss 97-115 *Migration Act* provide that visas that have been granted on the basis of incorrect information, false statements, or bogus documents<sup>163</sup> may be cancelled.

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<sup>159</sup> Cf Australia (Cth), Senate, *Migration Legislation Amendment Bill (No 2) 1998* [= *Migration Legislation Amendment Act (No 1) 1999*] *Replacement Supplementary Explanatory Memorandum* (1998-99) para 11.

<sup>160</sup> Section 3 *Migration (Offences and Undesirable Persons) Amendment Act 1992* (Cth), No 213 of 1992, introduced the s 83AA *Migration Act*.

<sup>161</sup> Sch 1, para 9 *Migration Legislation Amendment Act (No 1) 1999*.

<sup>162</sup> Australia (Cth), House of Representatives, *Migration (Offences and Undesirable Persons) Amendment Bill 1992*, *Explanatory Memorandum* (1992) para 3; Australia (Cth), House of Representatives, *Migration Legislation Amendment (Application of Criminal Code) Bill 2001*, *Explanatory Memorandum* (2001) para 118.

<sup>163</sup> Section 97 *Migration Act* defines the term "bogus document" as "a document that the Minister reasonably suspects is a document that: (a) purports to have been, but was not, issued in respect of the person; or (b) is counterfeit or has been altered by a person who does not have authority to do so; or (c) was obtained because of a false or misleading statement, whether or not made knowingly." Interestingly, this term is not used in the context of the offences under ss 233A and 234.

### *Passports Act*

Sections 9-10 *Passports Act* contain provisions that criminalise the production and use of forged Australian passports, false statements to obtain an Australian passport, and the transfer of a passport to another person.

The most relevant offence for improperly documented persons is contained in s 9A *Passports Act*. This section contains a list of “offences relating to [the] improper use or possession of passports etc”, including the possession of passports that (para (a)) are invalid, (b) and (d) have been issued to someone else, or (e) and (f) are falsified, including falsified foreign passports. The penalty for offences under the subsections is “a fine not exceeding \$5,000 or imprisonment for a period not exceeding 2 years.” This penalty is significantly lower than the penalty for the equivalent offences under the *Migration Act*. The application of the *Passports Act* is broader as it also extends to Australian citizens, but it remains unclear why the 1999 amendments increased the penalty for the use and possession of another person’s visa, but failed to make the same amendment for the possession and use of another person’s passport.

### *Criminal Code*

The *Criminal Code* makes persons using false documents criminally liable, if they use the document with intention to dishonestly induce a Commonwealth officer to influence the exercise of the officer’s public duties: s 145.1 *Criminal Code*. The possession of forged documents is a criminal offence under s 145.2 if the person knows that the document is false and if he or she has it in possession with intention to dishonestly induce a Commonwealth officer in his or her capacity as a public official and influence the exercise of the officer’s public duties. The offences under ss 145.1 and 145.2 are punishable by imprisonment for ten years.

### 4.3. Protection of Trafficked Migrants

Previous Chapters have illustrated how many, if not most, migrants are exploited, abused and in many instances physically assaulted by trafficking organisations. The humiliating experiences and the dangers involved in the illegal journey further traumatise migrants who leave their home countries for reasons of persecution, human rights violations, famine and poverty. For these reasons, it is important that receiving countries not only prosecute trafficking offenders, but also protect migrants from further violations and assess their claims very thoroughly.

Australia has signed the *Convention* and the *Protocol relating to the Status of Refugees* and is party to the major international human rights treaties. Consequently, it has accepted certain obligations towards the protection of persons arriving in Australia, including those who arrive unlawfully and in particular those who classify as refugees. In the aftermath of World War II and again in the mid-1970s, Australia has displayed a good record as an international citizen. It has accepted hundreds of thousands of refugees from around the world and has actively engaged in the promotion and recognition of human rights both nationally and internationally.

But, the growing number of boat people arriving after the year 1989 has brought with it a change of Australia's treatment of refugees. The introduction of mandatory detention of unauthorised arrivals in particular marks the beginning of a gradual slide into a policy of 'deterrence and denial' by systematically discriminating against asylum seekers. Since 1989, the status and rights of persons seeking asylum in Australia have been significantly restricted. Moreover, the protection of those who are found to be refugees has been limited to a period of three years and they no longer have access to family reunification and a range of welfare benefits.

This section analyses the legal framework that governs the status of onshore asylum seekers in Australia, the support they can obtain from government authorities, and their legal rights upon arrival and throughout their stay in Australia. It outlines Australia's protection obligations under international refugee and human rights law and the way in which Australia has implemented these obligations. Particular emphasis is placed on the

categories of protection visas that are available to persons who apply for asylum onshore and who are found to be refugees within the meaning of the *Refugee Convention*. These protection visa provisions have obtained much criticism since 1999 when the Government limited the protection granted to onshore applicants to a period of three years. The differences between permanent and temporary protection and the concern associated with this distinction are discussed in Section 4.3.1.

Along with the time limit placed on protection granted to onshore asylum seekers, the Government has severely restricted the legal rights of persons held in immigration detention and the support and welfare benefits available to them during detention and after their release. Governmental support and legal assistance available to unauthorised arrivals are the subject of Section 4.3.2. Further restrictions have been placed on the resort to legal review of refugee claims that have been rejected at primary level. Section 4.3.3 examines the rights of appeal and review available to protection visa applicants.

The principal object of domestic and international critique of Australia's refugee policy has undoubtedly been the mandatory detention of unauthorised arrivals. Starting in the 1990s and up until this day, the Australian immigration detention centres have been described as "concentration camps" because of the inhumane treatment of detainees, prolonged detention, the limitation of their rights and their remote and isolated location. Not surprisingly the detention centres have repeatedly been the scene of riots, violence, hunger-strikes and suicide attempts by detainees. Despite international criticism, Australia maintains its mandatory policy with bipartisan support. Section 4.3.4 outlines the current detention practice and discusses its rationale and legitimacy in the light of international human rights standards.

#### 4.3.1. The Refugee and Humanitarian Immigration Regime in Australia

In the aftermath of World War II, Australia started to offer protection to refugees fleeing persecution and other serious human rights violations. Australia is one of the few countries in the world that actively maintains a refugee and humanitarian program to "assist in



alleviating the plight of refugees and others in humanitarian need".<sup>164</sup> The program comprises arrangements to determine the eligibility of refugees within the meaning of the *Refugee Convention and Protocol*, and people in humanitarian need wanting to settle or remain in Australia.<sup>165</sup>

The majority of refugees in Australia that have been resettled here from abroad have undergone assessment overseas, approximately 82% in the 1999-2000 financial year.<sup>166</sup> Australia, although under no international obligation, allocates approximately 12,000 asylum places each year for persons who apply from abroad and who, if their applications are successful, come to Australia as permanent residents on humanitarian grounds.<sup>167</sup>

This offshore humanitarian program is unavailable to people who lodge their applications for protection in Australia. Broadly speaking, these onshore asylum seekers fall into two categories: (a) people who become refugees *sur place*, that is because of events occurring after their departure from their country of origin,<sup>168</sup> and (b) people who have come to Australia to seek protection, most of them unauthorised arrivals by sea and air.

In the former case, unless repatriation is feasible in the short term, the protection provided by Australia is a permanent residence visa, for example, as granted to the Chinese students in Australia after the 1989 events in the PR China.<sup>169</sup> In the latter case, Australia has established a complex onshore protection regime to accept those applicants who flee for reasons recognised in international refugee law, and to remove those who don't. In recent years, the number of persons granted protection onshore has been deducted from the asylum places set aside for offshore applicants.

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<sup>164</sup> DIMA, *Annual Report 1998-99* (1999).

<sup>165</sup> See generally, Australia, Senate Legal and Constitutional References Committee, *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (2000) 11-12.

<sup>166</sup> DIMA, *Annual Report 1999-2000* (2001).

<sup>167</sup> For an outline of the offshore humanitarian program see Crock, *Immigration and Refugee Law in Australia*, *supra* note 22, at 124-125.

<sup>168</sup> *Sur place* refugees are refugees who are unable or unwilling to return to their country of origin because of events occurring after their departure from that country.

<sup>169</sup> See *supra* Section 2.2.4.4.

#### 4.3.1.1. Australia's obligations under international refugee law

The *1951 Convention relating to the Status of Refugees*<sup>170</sup> and the *1967 Protocol*<sup>171</sup> are the key instruments to protect refugees and safeguard their rights and liberties. The *Refugee Convention* recognises a person as a refugee if he or she

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his/her nationality and is unable to or, owing to such fear, is unwilling to avail him/herself of the protection of that country.<sup>172</sup>

In a nutshell, the *Refugee Convention* seeks to protect specific types of refugees from the country from which they fear persecution by placing obligations on Signatory Nations to provide refuge. The Convention contains provisions relating to the definition of refugee (art 1), provisions that define the rights and legal status of refugees (arts 2-24), and provisions dealing with the implementation of the instruments (arts 25-46).

The key aspect of the protection granted under the *Refugee Convention* is that a refugee<sup>173</sup> must neither be expelled (“refouled”)<sup>174</sup> nor returned to “the frontiers of territories where his [or her] life or freedom would be threatened”.<sup>175</sup> A country is in breach of this non-refoulement obligation if its authorities fail to properly identify and protect persons who are entitled to the benefits of refugee status. Moreover, Contracting States are asked not to penalise refugees for their illegal entry and presence,<sup>176</sup> to give them free access to courts of law,<sup>177</sup> and assist in their naturalisation.<sup>178</sup> Finally, the Convention provides that Member Countries provide refugees with welfare, including housing, public education<sup>179</sup> and opportunity for employment.<sup>180</sup>

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<sup>170</sup> 189 UNTS 150 [hereinafter *Refugee Convention*].

<sup>171</sup> 606 UNTS 267.

<sup>172</sup> Article 1A(2) *Refugee Convention* as amended by the *Refugee Protocol*.

<sup>173</sup> See the definition in art 1A and the exemptions clauses in art 1C-F *Refugee Convention*. From the large body of literature on the refugee definition under the *Refugee Convention* see generally Guy Goodwin-Gill, *The Refugee in International Law* (2<sup>nd</sup> ed, 1996) 40-79; James Hathaway, *The Law of Refugee Status* (1991) 6-11. For interpretations of the definition by Australian courts see Crock, *Immigration and Refugee Law in Australia*, *supra* note 22, at 135-153.

<sup>174</sup> Article 32 *Refugee Convention*, “save on grounds of national security”.

<sup>175</sup> *Ibid*, art 33.

<sup>176</sup> *Ibid*, art 31.

<sup>177</sup> *Ibid*, art 16.

<sup>178</sup> *Ibid*, art 34.

<sup>179</sup> *Ibid*, arts 20-24.

<sup>180</sup> *Ibid*, arts 17-19.

Australia acceded to the Convention in January 1954<sup>181</sup> and to the Protocol in December 1973.<sup>182</sup> The refugee definition was implemented in domestic law in 1980.<sup>183</sup> The other provisions under the Convention have not been implemented by legislation.

The accession to the Convention and the Protocol created the obligation to adequately protect and host refugees. This has few consequences for the selection of refugees through Australia's offshore humanitarian program, but it creates important responsibilities towards asylum seekers who lodge refugee claims on or after arrival in Australia, as they must not be sent back to a place where they may face persecution.

In addition to the *Refugee Convention* and *Protocol*, the non-refoulement obligation also arises from a number of other international human rights treaties to which Australia acceded. For example, article 7 of the *International Covenant on Civil and Political Rights (ICCPR)*<sup>184</sup> implies that no one shall be returned to a country where she or he may be "subjected to torture or to cruel, inhuman or degrading treatment or punishment".<sup>185</sup> Article 45 of the *1949 Geneva Convention relative to the Protection of Civilians in Time of War*<sup>186</sup> provides that a protected civilian, as defined in article 4,<sup>187</sup> "in no circumstances shall [...] be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs". Also, the *1984 Convention against*

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<sup>181</sup> 1954 ATS 5.

<sup>182</sup> 1973 ATS 37.

<sup>183</sup> See *supra* Section 2.2.3.2.

<sup>184</sup> 993 UNTS 3. Signed by Australia on 18 Dec 1972; 1976 ATS 5.

<sup>185</sup> Cf Australia, HREOC, *Immigration Detention: Human Rights Commissioner's 1998-99 Review* (1999) 33; id, *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals in Australia* (1998) 39; Australia, Senate Legal and Constitutional References Committee, *supra* note 165, at 54-55; Mary Crock, "A Sanctuary under Review: Where to from here for Australia's Refugee and Humanitarian Program?" (2000) 23(3) *UNSW LJ* 246 at 255; Susan Kneebone, "The Refugee Review Tribunal and the Assessment of Credibility" (1998) 5 *AJ Admin L* 78 at 82.

<sup>186</sup> 75 UNTS 287. Signed by Australia in January 1950; 1958 ATS 21. Other regional instruments, such as the *Organisation of African Unity Convention, Governing the Specific Refugee Problems in Africa*, 10 Sep 1969, and the *1984 Cartagena Declaration* include war and internal civil strife in their definition of refugees, thus protecting those who flee from external and internal military threats. Cf Don McMaster, *Asylum Seekers — Australia's Response to Refugees* (2001) 27-28.

<sup>187</sup> Article 4 reads: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are."

*Torture and other Cruel or Degrading Treatment or Punishment*<sup>188</sup> states in article 3(1) that no one shall be returned to a country “where there are substantial grounds for believing that he [or she] would be in danger of being subjected to torture.” Similar provisions can be found in article 3(1) of the *1967 Declaration on Territorial Asylum*<sup>189</sup> and in article 22 of the *1989 Convention of the Rights of the Child*.<sup>190</sup> Finally, article 14 of the *Universal Declaration of Human Rights* provides that every person has a right to seek and enjoy in other countries asylum from persecution.

Unlike most other Western countries, Australian law contains no provisions to grant protection to persons who fall outside the narrow refugee definition of the *Refugee Convention*. Instead, Australia has chosen to meet the non-refoulement obligations arising from the *1984 Convention against Torture*, the *ICCPR* and the *1989 Convention of the Rights of the Child* through the provision of Ministerial discretion contained in s 417 *Migration Act*.<sup>191</sup>

#### 4.3.1.2. Protection of onshore applicants in Australia

The *Refugee Convention* contains no information about the appropriate method for determining refugee status. The final arbiter of whether a person is a refugee is the International Court of Justice (ICJ),<sup>192</sup> but in the absence of a ruling from the ICJ it is left to the Contracting State to decide the way in which refugee status is determined and the protection that it granted to refugees.<sup>193</sup>

To meet its obligations under the Convention, Australia offers protection visas to refugees who apply for asylum in Australia. At present, four different kinds of visa exist for

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<sup>188</sup> 1465 UNTS 85. The Convention entered into force in Australia in September 1989; 1989 ATS 21, *Crimes (Torture) Act* 1988 (Cth), No 148 of 1988. Cf Australia, Senate Legal and Constitutional References Committee, *supra* note 165, at 52-54; Mary Crock & Penelope Mathew, “Immigration Law and Human Rights” in David Kinley (ed), *Human Rights in Australian Law* (1998) 141 at 146.

<sup>189</sup> UN General Assembly Res 2312(XXII) (14 Dec 1967).

<sup>190</sup> 1577 UNTS 3, 1991 ATS 4. Cf Australia, Senate Legal and Constitutional References Committee, *supra* note 165 at 55-56.

<sup>191</sup> See *infra* Section 4.3.3.1. And see generally the discussion in Australia, Senate Legal and Constitutional References Committee, *supra* note 165, at 57-60.

<sup>192</sup> Article 38 *Refugee Convention*, art IV *Refugee Protocol*.

<sup>193</sup> Cf Crock, *Immigration and Refugee Law in Australia*, *supra* note 22, at 126; Fiona McKenzie, “What Have We Done with the Refugee Convention?” (1996) 70 *ALJ* 813 at 815.

onshore applicants. The principal visa class is a permanent protection visa under s 36 *Migration Act*, subclass 866 *Migration Regulations*. Secondly, persons who arrive in Australia unlawfully, and who are found to be refugees, can be granted a temporary three-year protection visa: subclass 785 *Migration Regulations*. In 2001, the Government introduced two additional visa categories for applicants who are in one of the “excised offshore places” (Ashmore and Cartier Island, Christmas Island, and Cocos (Keeling) Islands): subclass 447, or who apply for protection from a transit country: subclass 451.

### *Permanent Protection*

In s 36 the *Migration Act*<sup>194</sup> provides a visa class (“protection visa”) for non-citizen immigrants who meet the refugee definition of article 1A of the Convention.<sup>195</sup> If people apply for a protection visa, the Department of Immigration and Multicultural Affairs (DIMA) assesses their applications against the *Refugee Convention*.<sup>196</sup> Additional legislation to clarify and limit the interpretation of the refugee definition by immigration officials and at the review level was introduced in 2001.<sup>197</sup> Applicants who are found to be refugees within the meaning of the *Refugee Convention*, and who meet Australia’s health and character requirements, are granted protection visas which give permanent residence in Australia.<sup>198</sup>

There are, however, significant exceptions and limitations to the protection visas granted under s 36. Under legislation introduced in 1999,<sup>199</sup> onshore asylum seekers are not eligible for protection visas if they have failed to seek effective protection in countries in which they resided, temporarily or permanently, prior to arriving in Australia (s 36(3)), unless they had a well-founded fear of persecution or refoulement in the that country (s 36(4)),

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<sup>194</sup> No 62 of 1958 [hereinafter *Migration Act*].

<sup>195</sup> Section 36 *Migration Act* reads: “(1) There is a class of visas to be known as protection visas. (2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.” For general information see DIMA, *Fact Sheet 61: Seeking Asylum within Australia* (13 Nov 2001).

<sup>196</sup> For the interpretation of the refugee definition in Australia, see, for example, Australia, Senate Legal and Constitutional References Committee, *supra* note 165, at 5-8, 42-49; Crock, *Immigration and Refugee Law in Australia*, *supra* note 22, at 135-153.

<sup>197</sup> Section 91R *Migration Act*, introduced by *Migration Legislation Amendment Act (No 6) 2001* (Cth), No 131 of 2001.

<sup>198</sup> For the criteria of protection visas see *Migration Regulations 1994*, subclass 866 — Protection.

<sup>199</sup> Schedule 1, pt 6 *Border Protection Legislation Amendment Act 1999* (Cth), No 160 of 1999.

(5)). Furthermore, the persons listed in articles 1C-1F of the *Refugee Convention* are ineligible for refugee status although they may have a well-founded fear of persecution.<sup>200</sup> These exceptions include persons who have acquired a new nationality outside the persecuting country, persons who receive protection from UNHCR and other UN agencies, and those who have committed crimes against humanity, war crimes, or other serious non-political crimes. Also, applicants who arrive in Australia from designated safe third countries<sup>201</sup> and persons who are covered by the *1989 Comprehensive Plan of Action* approved by the International Conference on Indochinese Refugees<sup>202</sup> and who have previously been assessed overseas for refugee status are ineligible for refugee status.

#### *Temporary protection*

The high number of unauthorised boat arrivals in 1999, which resulted in a large increase of applications for protection visas, led the Australian Government to amend the provisions governing the protection offered to onshore applicants. Most of the new arrivals were Iraqi and Afghan nationals who fled persecution in their home countries and had been denied protection by neighbouring countries such as Iran and Jordan.<sup>203</sup> Hence, they had substantiated grounds to be granted refugee status, but the Government feared that allowing successful applicants to remain in Australia permanently would attract even more refugees.

In October 1999, the *Migration Amendment Regulations 1999 (No 12)*<sup>204</sup> came into operation, introducing a new category of temporary protection visas for successful onshore applicants (subclass 785).<sup>205</sup> The amendments provide that asylum seekers who are found to be genuine refugees within the meaning of the *Refugee Convention* and who have arrived in Australia without a valid visa are no longer eligible for permanent residence.

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<sup>200</sup> For more on the details exclusion clauses of the *1951 Refugee Convention* see Chaloka Beyani et al (eds), "Special Supplementary Issue: Exclusion from Protection" (2000) 12 *IJRL* and the articles therein; Jens Vedsted-Hansen, "Non-admission policies and the right to protection: refugees' choice versus states' exclusion?" in Frances Nicholson & Patrick Tworney, *Refugee Rights and Realities, Evolving International Concepts and Regimes* (1999) 269 at 271.

<sup>201</sup> Section 91E *Migration Act*. For Australia's 'safe third country' provisions see *supra* Section 2.2.5.2.

<sup>202</sup> See *supra* Section 2.2.3.1.

<sup>203</sup> For details of the origin and background of the Iraqi and Afghan asylum-seekers, see Hossein Esmaeli & Belinda Wells, "The 'Temporary' Refugees: Australia's Legal Response to the Arrival of Iraqi and Afghan Boat-People" (2000) 23(3) *UNSW LJ* 224 at 226-227; and see *supra* Section 2.2.5.2.

<sup>204</sup> No 243 of 199.

<sup>205</sup> See generally DIMA, *Fact Sheet 64: Temporary Protection Visas* (13 Mar 2002); Esmaeli & Wells, *supra* note 203, at 234-241.

Instead, they can only obtain temporary protection visas that are valid for a maximum of three years. Those who obtain a temporary protection visa do not have access to family reunion. The visa also does not allow persons who leave Australia to re-enter the country; if the holder of a temporary protection visa decides to leave, the visa will cease automatically.

Further restrictions have been introduced in the aftermath of the Tampa incident in August 2001.<sup>206</sup> The *Migration Amendment (Excision from Migration Zone) Act 2001* bars unauthorised entrants from applying for any visa, including protection visas, if they land in one of the excised offshore places,<sup>207</sup> including Ashmore and Cartier Islands, Christmas Island and Cocos (Keeling) Islands, which have been the major landing points for illegal boat arrivals.<sup>208</sup> The amendments introduced in 2001 also allow the immediate detention and removal of unauthorised arrivals.<sup>209</sup> If, however, persons entering excised offshore places unlawfully are found to be fleeing persecution, they can be granted temporary protection visas valid for three years. At the end of the three-year period, they can renew their application for a temporary visa, but they are barred from obtaining permanent residence.<sup>210</sup>

In order to discourage persons from applying for refugee status onshore, a second new visa class has been established for persons who are found to be refugees and who are applying from transit countries. Unlike excised offshore entrants, successful applicants from transit countries are granted protection for 4.5 years and can subsequently apply for permanent residence if protection is still needed.<sup>211</sup>

The temporal limitation placed on the protection granted to onshore asylum seekers has been a key feature of Australia's policy to deter unauthorised arrival and gradually restrict their legal rights. There are, however, strong humanitarian objections to this regime and to the concept of temporary protection of refugees. Although international refugee law does

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<sup>206</sup> See *supra* Section 2.2.7.

<sup>207</sup> Sections 5(1), 46A *Migration Act*.

<sup>208</sup> See *supra* Section 3.4.2.4.1.

<sup>209</sup> Sections 189(3)-(5), 198A *Migration Act* introduced by *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth), No 128 of 2001.

<sup>210</sup> Subclass 447 *Migration Regulations* (secondary movement offshore entry (temporary)) introduced by *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*.

not explicitly oblige receiving countries to offer permanent protection,<sup>212</sup> the limitations of the new visa classes and barring temporary protection visa holders from applying for permanent protection creates severe uncertainties for people who are already traumatised by persecution and war. In particular the distinction between permanent protection offered to offshore applicants and temporary protection available to refugees who apply onshore appears to be a way to circumvent international obligations, disregarding the basic element of refugee law: that is to protect refugees outside their country of origin. Moreover, the fact that successful onshore applicants cannot bring their family members to Australia can interfere with the right of family life as set out in article 17 of the *ICCPR*.<sup>213</sup> Also, if people are removed from Australia when it is found that protection is no longer necessary this does not take into account the relationships and links that have been formed during the time in Australia.<sup>214</sup>

#### 4.3.2. Government Assistance and Legal Support

Until recently, unauthorised arrivals who sought to enter Australia by sea were met by an official vessel and escorted to the nearest harbour on the mainland and then placed into immigration detention. In a series of events starting in September 2001, suspect illegal

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<sup>211</sup> Subclass 451 *Migration Regulations* (secondary movement relocation (temporary)) introduced by *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*.

<sup>212</sup> On 19 Nov 1999, UNHCR issued a statement which confirmed that the temporary visa subclass is consistent with Australia's international obligations; Australia, Senate Legal and Constitutional References Committee, *supra* note 165, at 21. On the obligations under international refugee law see Manuel Castillo & James Hathaway, "Temporary Protection" in James Hathaway (ed), *Reconceiving International Refugee Law* (1997) 1 at 2.

<sup>213</sup> Article 17 *ICCPR* provides that everyone has the right to the protection of interference or attacks of family life. In 1989 the UN Human Rights Committee stated that "the exclusion of a person from a country where close members of family are living can amount to an interference within the meaning of article 17(1)." Richard Plender & Nuala Mole, "Beyond the Geneva Convention: constructing a de facto right of asylum from international human rights instruments" in Frances Nicholson & Patrick Twomey (eds), *Refugee Rights and Realities: Evolving Concepts and Regimes* (1999) 81 at 99.

<sup>214</sup> Cf Joan Fitzpatrick, "Flight from Asylum: Trends Toward Temporary "Refuge" and Local Responses to Forced Migrations" (1994) 35(1) *Virg JIL* 13 at 16, 18; Jonathan Hunyor, "Warra Warra: Refugees and Protection Obligations in Relaxed and Comfortable Australia" (2000) 25(4) *Alt LJ* 227 at 230; Glenn Nicholls, "Unsettling Admissions: Asylum Seekers in Australia" (1998) 11(1) *J Ref Studies* 61 at 74; Jerzy Sztucki, "Who is a refugee?" in Frances Nicholson & Patrick Twomey (eds), *Refugee Rights and Realities, Evolving International Concepts and Regimes* (1999) 55 at 65, 73. For further reading see Crock, *Immigration and Refugee Law in Australia*, *supra* note 22, at 131, 153; Jean-Pierre Fonteyne, "Refugee Determination in Australia" (1994) 6 *IJRL* 253 at 261-262.



boat arrivals have been transferred to Australian Navy vessels and transported to Nauru and Papua New Guinea for detention and processing.<sup>215</sup> It is yet unclear whether these persons will obtain access to Australia's protection system.

In the case of unauthorised arrivals by air, illegal immigrants are brought directly to the nearest detention facility.<sup>216</sup>

DIMA officers then interview all detained immigrants individually. The initial interview seeks to establish the identity of immigrants, the reasons why they left their home country and came to Australia, and whether they have reasons for not wishing to return. On the basis of written summaries of the interviews, senior DIMA officers in Canberra determine whether an immigrant has *prima facie* engaged Australia's obligation not to return that person, or whether that person can be removed.<sup>217</sup>

Many of the people who arrive in Australia illegally are refugees fleeing persecution.<sup>218</sup> Hence, it is important that their cases are assessed carefully. But even if their claims do not fall within the narrow scope of the *Refugee Convention*, they may be traumatised by war, famine or environmental disasters in their home country, or by the clandestine journey to Australia. Although these persons may not be granted refugee status, it is necessary to consider all aspects of their cases as they may invoke Australia's protection obligations under other international human rights treaties.

Naturally, new immigrants — both legal and illegal — are unfamiliar with the Australian legal and immigration system and the technical requirements of international refugee and human rights law. Also, many migrants do not understand English and know little about Australia which makes it even more difficult for them to express their claims and explain

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<sup>215</sup> See *supra* Section 2.2.7.

<sup>216</sup> For details of the detection and reception of "suspect illegal entrant vessels" see Australian National Audit Office, *supra* note 12, at 11-14, 25-27. Australia's policy of mandatory detention is discussed *infra* Section 4.3.4.

<sup>217</sup> See *infra* Figure 22. For details of the initial interview and primary decision see, for example, Australia, HREOC, *Those Who've Come Across the Seas*, *supra* note 185, at 23-29; Australia, Senate Legal and Constitutional References Committee, *supra* note 165, at 110-141; Crock, "A Sanctuary under Review" *supra* note 185, at 272-277; *id.*, *Immigration and Refugee Law in Australia*, *supra* note 22, at 12-130; Savitri Taylor, "Rethinking Australia's Practice of 'Turning Around' Unauthorised Arrivals" (1999) 11(1) *Pacifica Review* 43 at 46-47

<sup>218</sup> See *infra* Figure 23.

why they migrated. For these reasons it is important that they obtain access to interpreters as well as legal and humanitarian assistance.<sup>219</sup>

The Australian Government provides assistance and legal support to asylum seekers. The support schemes, however, differentiate between persons who are held in immigration detention and those who are not. In a deliberate attempt to deter unauthorised arrivals, the Government has significantly restricted the assistance available to persons who arrive in Australia unauthorised, while persons who live in the community have access to a greater range of support schemes. The following Sections outline the different kinds of assistance available to immigrants in detention and to those who are not detained. The group of asylum seekers who are held in Papua New Guinea and Nauru for processing obtain assistance from international organisations such as IOM and UNHCR; they do not have access to the Australian assistance schemes.

#### 4.3.2.1. Asylum seekers in immigration detention

After arrival in Australia, it is important to familiarise new immigrants with their environment and their status and legal rights, and provide them with information about Australia's legal and immigration system. For that reason, s 194 *Migration Act* requires an immigration officer to ensure "as soon as possible" that people, when they arrive in immigration detention, are made aware that they may apply for a visa (s 195) and that they will be removed from Australia unless they obtain a visa (s 196).

This information, however, is not made available to persons who arrive in Australia unlawfully. Subsection 193(1), introduced in 1992,<sup>220</sup> prescribes that s 194 does not apply to unlawful non-citizens (ss 189, 14). A range of additional provisions effectively leaves unauthorised arrivals completely uninformed about their status, the circumstances of their detention and about the few legal rights they have. For example, s 193(2) provides that immigration officers are under no obligation to advise unauthorised arrivals that they can

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<sup>219</sup> Cf Australia, HREOC, *Those Who've Come Across the Seas*, *supra* note 185, at 25-29; Nick Poynder, "The Incommunicado Detention of Boat People" (1997) 3(2) *AJHR* 53 at 64; Savitri Taylor, "Should unauthorised arrivals in Australia have free access to advice and assistance?" (2000) 6(1) *AJHR* 34 at 35.

<sup>220</sup> *Migration Reform Act 1992* (Cth), No 184 of 1992.

apply for a visa. Also, “[n]othing in this Act or in any other law (whether written or unwritten) requires the Minister or any officer” to give them any opportunity to apply for a visa, give them visa application forms, or to allow them to obtain legal or other advice on these matters.<sup>221</sup> Section 256 *Migration Act* restricts access to visa application forms and legal advice to detainees who explicitly request such facilities or advice. In order to reduce the number of visa applications, DIMA does not ask unauthorised arrivals if they wish to apply for a (protection) visa or if they want to contact lawyers or independent advisers. A recent study stated that, according to DIMA, approximately 80 percent of the unauthorised boat arrivals who were removed from Australia in 1996 and 1997 did not request legal advice.<sup>222</sup> In 1996, the Federal Court approved this practice by rejecting “any proposition” that immigration officers are “obliged to inform [unauthorised entrants] that they may apply for a visa”.<sup>223</sup>

This “incommunicado detention” has led to harsh criticism by lawyers, academics and human rights organisations and has been regarded as a breach of international law.<sup>224</sup> It has been stated, that the current practice fails to recognise the difficulties that new immigrants face and that it leaves all unauthorised arrivals, including those who may be genuine refugees, uninformed about their rights.<sup>225</sup> Competent advice and assistance is essential for all members of society, including those who are new to it, and those who arrive with claims for asylum. No evidence has yet been found to support DIMA’s position that informing detainees would result in more unfounded claims and thereby lengthen and complicate the determination process. DIMA, in return, declared that the legislation prevents its officers from informing asylum seekers about their rights.

But — contrary to DIMA’s view — if people remain unaware of their rights and the assistance they can obtain, it becomes more likely that they may be refouled. In other cases, the administrative procedures, including refugee determination and detention, are prolonged unnecessarily simply because authorities are dealing with uninformed

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<sup>221</sup> Cf Poynder, *supra* note 219, at 63. See also Taylor, “Should unauthorised arrivals in Australia have free access to advice and assistance?” *supra* note 219, at 42.

<sup>222</sup> Taylor, *ibid*, at 43.

<sup>223</sup> *Wu v Minister for Immigration and Ethnic Affairs* (1996) 64 FCR 245 at 291.

<sup>224</sup> See *infra* Section 4.4.4.

<sup>225</sup> Cf Hunyor, *supra* note 214, at 239; Taylor, “Should unauthorised arrivals in Australia have free access to advice and assistance?” *supra* note 219, at 42, 43; Crock & Mathew, *supra* note 188, at 161.

applicants. A recent Senate inquiry, too, supported the suggestion that it is preferable to inform persons in immigration detention about their status, their rights, the deadlines they have to meet, and also about the legal and financial assistance they can obtain. Not only would it help applicants to give them access to this information irrespective of language and literacy; it would also accelerate the application process and ultimately save resources.<sup>226</sup>

Despite the adversarial process, many immigration detainees apply for protection visas, presumably because they obtain information and assistance from other detainees and the few lawyers and human rights groups who have access to the detention centres. Those immigrants who express their intention to apply for a protection visa, and who after the initial interview have been assessed as *prima facie* engaging Australia's protection obligations, can obtain assistance in preparing and lodging their applications under the Immigration Advice and Application Assistance Scheme (IAAAS).<sup>227</sup> IAAAS is, however, not designed "to provide universal assistance to all visa applicants."<sup>228</sup> The assistance provided under the scheme usually gives applicants free access to migration agents, lawyers, community and legal aid organisations that have been selected and are contracted by DIMA. But the decision about which lawyer or organisation is contacted remains with DIMA, and generally DIMA will not change the primary adviser unless serious errors or misconduct occur.<sup>229</sup>

The assistance provided under IAAAS also includes application assistance at the merits review stage when a primary application has been refused, but does not provide funding for attendance of hearings of the Refugee Review Tribunal and for judicial review through the Federal Court.<sup>230</sup>

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<sup>226</sup> Australia, Senate Legal and Constitutional References Committee, *supra* note 165, at 84-85; Crock, "A Sanctuary under Review" *supra* note 185, at 269-270.

<sup>227</sup> See generally Australia, HREOC, *Those Who've Come Across the Seas*, *supra* note 185, at 209-211; Australia, Senate Legal and Constitutional References Committee, *supra* note 165, at 69-70, 72-76; Crock, "A Sanctuary under Review" *supra* note 185, at 265-266; DIMA, *Fact Sheet 70: Immigration Advice and Application Assistance Scheme* (16 May 2000).

<sup>228</sup> DIMA, *Fact Sheet 70: Immigration Advice and Application Assistance Scheme* (16 May 2000).

<sup>229</sup> Australian National Audit Office, *supra* note 12, at 67-68; Taylor, "Should unauthorised arrivals in Australia have free access to advice and assistance?" *supra* note 219, at 44-45.

<sup>230</sup> DIMA, *Fact Sheet 70*, *supra* note 228.

Apart from IAAAS, asylum seekers could also apply for legal assistance through the Attorney-General Department's Legal Aid branch. This option was discontinued after July 1998 as it partly overlapped with the support provided under IAAAS. But Legal Aid assistance remains available for judicial review of decisions of the Refugee Review Tribunal if "the issues to be raised are issues about which 'there are differences of judicial opinion which have not been settled by the Full Court of the Federal Court or the High Court'."<sup>231</sup>

#### 4.3.2.2. Non-detained immigrants

People who have been released from immigration detention and those who have not been detained have access to a greater variety of assistance and support schemes. The kind of support they can obtain depends on whether they hold temporary or permanent protection visas.

##### *Permanent protection visa*

People who hold permanent protection visas and the few immigrants who have been released from immigration detention on bridging visas while their applications for protection visas are determined<sup>232</sup> have access to a broader range of assistance than holders of temporary protection visas.

During the applications process, applicants can obtain financial assistance through the Asylum Seeker Assistance Scheme (ASA). This scheme provides food, accommodation and health care for applicants who are unable to meet their most basic needs while their cases are considered. The scheme is administered by DIMA through contractual arrangements with the Australian Red Cross. Since 1 July 1999, unsuccessful applicants in

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<sup>231</sup> Australia, Senate Legal and Constitutional References Committee, *supra* note 165, at 70-72; Crock, "A Sanctuary under Review" *supra* note 185, at 266; Taylor, "Should unauthorised arrivals in Australia have free access to advice and assistance?" *supra* note 219, at 48.

<sup>232</sup> Section 72 *Migration Act*, reg 2.20 *Migration Regulations 1994* provide a "prescribed class" of certain unlawful non-citizens who are eligible for a bridging visa. Also, under s 72(3) of the Act, the Minister may independently determine that an unlawful non-citizen is eligible for a bridging visa. However, both options are very limited in practice. Cf Australia, HREOC, *Those Who've Come Across the Seas*, *supra* note 185, at 19-21.

financial hardship whose cases are under review are also eligible for support under the ASA scheme.<sup>233</sup>

People who have been granted a permanent protection visa have full work rights in Australia and unrestricted access to Medicare, Australia's government health insurance scheme.<sup>234</sup> Applicants and bridging visa holders cannot seek employment unless individual exceptions are made. They are ineligible for Medicare, unless they have work rights or they are the spouse, child or parent of an Australian citizen or permanent resident. Some State and Local Governments offer additional assistance to onshore asylum seekers.<sup>235</sup>

Immigrants who arrive in Australia illegally and who are granted protection visas (temporary and permanent) do not have access to the On-Arrival Accommodation Program (OAA) and to the Community Refugee Settlement Scheme (CRSS). Assistance under these schemes is exclusive to persons who apply from outside Australia and come here as permanent residents under the Refugee and Special Humanitarian Program.<sup>236</sup>

#### *Temporary protection visa*

The vast majority of people who successfully apply for protection onshore are now granted temporary protection visas. As mentioned earlier, in an attempt to deter further arrivals, this visa category has been specifically designed to deprive unauthorised arrivals of the benefits and support mechanisms that are available to persons who apply from outside Australia and/or who are granted permanent protection.

Temporary protection visas, including the new categories established in 2001,<sup>237</sup> entitle the holders to receive Special Benefit payments, rent assistance, maternity and family allowances and family tax payment. They also have the right to work and can gain access to Medicare. Temporary protection visa holders are eligible for referral to the Early Health

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<sup>233</sup> DIMA, *Fact Sheet 42: Assistance for Asylum Seekers in Australia* (12 May 2000); Savitri Taylor, "Do On-Shore Asylum Seekers Have Economic and Social Rights? Dealing with the Moral Contradictions of Liberal Democracy" (2000) 1(1) *Melb JIL* 70 at 76.

<sup>234</sup> DIMA, *Fact Sheet 42: Assistance for Asylum Seekers in Australia* (12 May 2000); Taylor, *ibid*, at 73-75, 77.

<sup>235</sup> For the assistance available in New South Wales, Queensland and Victoria see Taylor, *ibid*, at 77-82.

<sup>236</sup> See DIMA, *Fact Sheet 43: Settlement Assistance for Refugees and Humanitarian Program Entrants* (22 Mar 2000); *id*, *Fact Sheet 44: The Community Refugee Settlement Scheme* (21 June 2000).

<sup>237</sup> Subclasses 447 and 451 *Migration Regulations* introduced by *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001*.

Assessment and Intervention Program, and for torture and trauma counselling. Persons holding subclass 785 (Temporary Protection) or subclass 451 (Secondary Movement Relocation (Temporary)) visas can also apply for permanent visas if protection is still needed when the temporary visa expires.<sup>238</sup> Persons who arrive in one of the offshore excised places and who have been granted Secondary Movement Offshore Entry (Temporary) protection visas (subclass 447) do not have access to permanent protection; if protection is still required, they can apply for another temporary visa.

Compared with the permanent protection visas, the temporary visas do not entitle to obtain English language training, or access the mainstream social welfare system to obtain pensions and new-start allowances. Holders of temporary protection visas also do not have access to the settlement services provided to refugees who enter Australia lawfully.

The severe limitation of support available to holders of temporary protection visas has been criticised as creating a “second class” of refugees.<sup>239</sup> Most persons are released into the community by simply transporting them from the detention centre to the central bus station of a capital city and abandoning them without assistance.<sup>240</sup> Local volunteer groups around the country usually take care of released refugees, but since they cannot obtain new start allowance it is very difficult, and in some cases impossible, to organise accommodation, furniture and other basic supplies. The lack of English language training also creates great difficulties for newly arrived immigrants, especially when they start looking for work. The Government is well aware of these difficulties and the dangers they entail. Asked, for example, why English tuition has been denied to onshore refugees, the Immigration Minister responded:

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<sup>238</sup> DIMA, *Fact Sheet 63: Temporary Protection Visas* (21 Jan 2000).

<sup>239</sup> See the sources cited *supra* Section 2.2.6; and see also Esmali & Wells, *supra* note 203, at 235-238; and the comments made by Mr John Olsen, Premier of South Australia, on ABC Television, “The Queue Jumpers” *Four Corners* (16 Oct 2000): “I think the point is if they are granted refugee status after due process, then there is only one class of refugees. You shouldn’t have two classes.” and “My view is if you’re going to give the people temporary permits as refugees and you want them to assimilate and make their own way within the Australian society, then they’ve got to have English language as a prerequisite to be able to do so.”

<sup>240</sup> ABC Television, *ibid.*

Why would I knowingly allow that situation [unauthorised arrivals] to go on by putting in place programs which I know were going to add an additional layer of incentive for people to seek to come to Australia. Why would I do it?<sup>241</sup>

It has been argued earlier, that marginalising new immigrants by excluding them from Government assistance, health insurance, language training, and work rights not only renders their integration more difficult, it also forces them to look for other sources of income which in some cases may entail illegal activities.<sup>242</sup>

### 4.3.3. Rights of Appeal and Review

Although the *Refugee Convention* contains no information as to whether or not asylum seekers should be given the right to appeal against refugee determination decisions, the Australian High Court held that “refugee decisions are reviewable”<sup>243</sup> and that “onshore asylum seekers are entitled to be heard” before being removed.<sup>244</sup>

Asylum seekers whose applications for protection visas have been rejected by DIMA at primary level can seek review from the Refugee Review Tribunal, and, depending on the basis and stage of the refusal, from the Administrative Appeals Tribunal, the Federal Court or the High Court of Australia.

Figure 22 provides an overview of the refugee determination system in Australia at primary and review/appeal levels as it was on 15 August 2001.<sup>245</sup>

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<sup>241</sup> Mr Phillip Ruddock, Minister for Immigration and Multicultural Affairs, on ABC Television, *ibid.*

<sup>242</sup> See the discussion *supra* Section 2.3; and the arguments made in Taylor, “Do On-Shore Asylum Seekers Have Economic and Social Rights?” *supra* note 233, at 82-84.

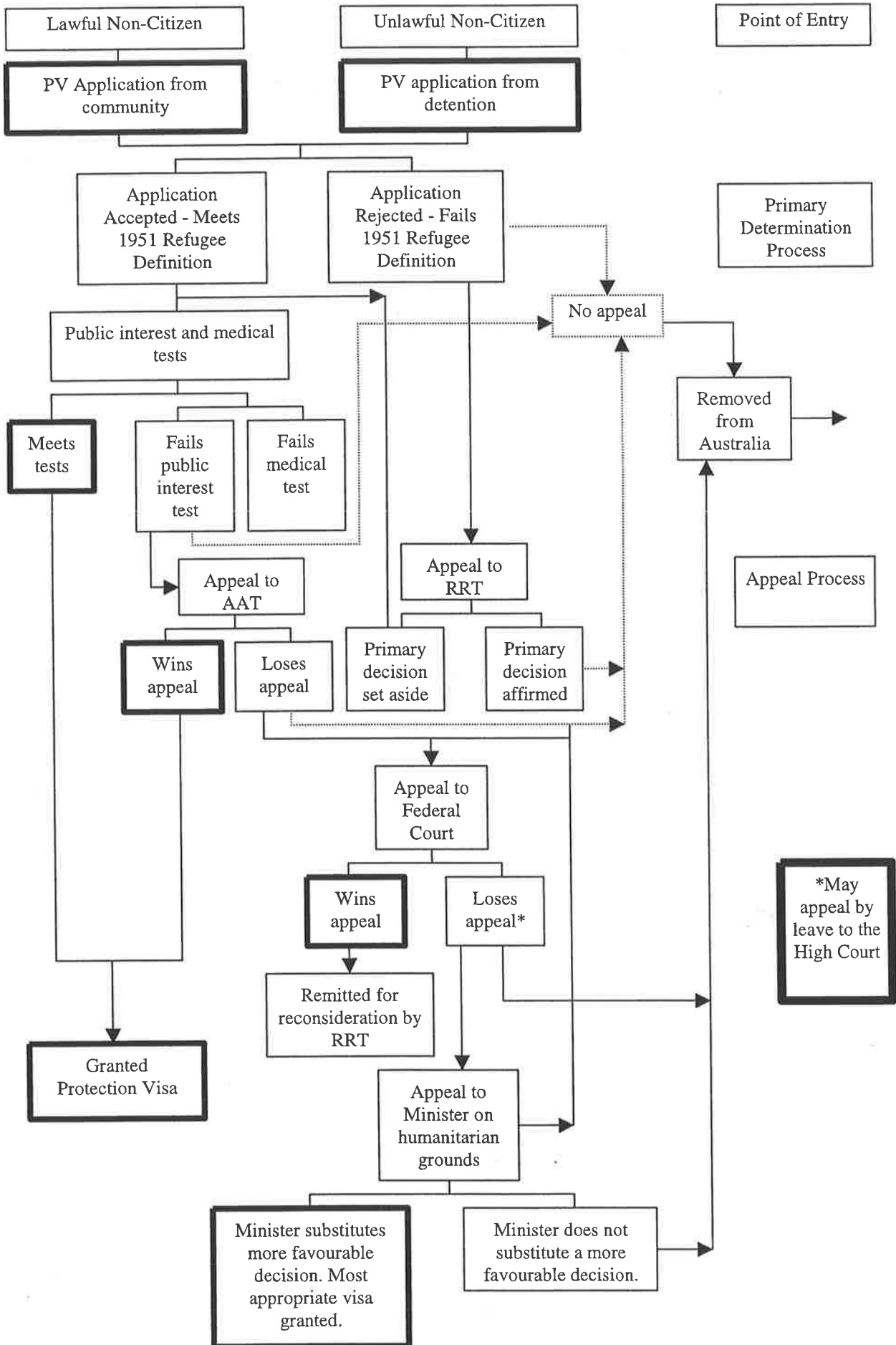
<sup>243</sup> *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290.

<sup>244</sup> *Kioa and Others v West and Another* (1985) 159 CLR 550.

<sup>245</sup> Australia, Senate Legal and Constitutional References Committee, *supra* note 165, at 111.



Figure 22: Refugee Determination Process, Australia 2001



### 4.3.3.1. Refugee Review Tribunal

Merits review of a decision to refuse to grant or cancel a protection visa is available from the Refugee Review Tribunal (RRT): s 411 *Migration Act*. The RRT has been established as an independent, administrative merits review tribunal in 1992 and is set up along lines similar to the Migration Review Tribunal.<sup>246</sup>

After notification that refugee status has been denied, applicants in detention are given seven working days to apply for review to the RRT, and 28 days in any other case.<sup>247</sup> The RRT has no discretion to consider an out-of-time application.

As a merits review tribunal the RRT “exercises all the powers and discretions” and applies the same criteria as those of the primary decision maker: s 415 *Migration Act*. The Tribunal examines the application for a protection visa against the *Refugee Convention* in a comparatively informal, non-adversarial setting to hear evidence. In its decision, the RRT must take into account all available information and evidence, including new evidence that was unavailable at the primary stage. If the Tribunal cannot make a favourable decision on the basis of the written submissions, it must give the applicant the opportunity for a personal hearing.<sup>248</sup>

It is interesting to note that in the early years of the RRT, more applicants were granted protection visas at review stage than at primary level. For example, in 1994-95, the first full financial year of RRT operation, 662 applicants or 15.7% of reviewed cases were successful at review stage while only 503 or 10.4% of all primary applicants were granted protection visas.<sup>249</sup> In recent years, this imbalance appears to have been overcome with less applications being successful at review than at primary stage.<sup>250</sup> However, concern has

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<sup>246</sup> See Pt V *Migration Act*.

<sup>247</sup> Section 412(1)(b) *Migration Act*, Reg 4.31(1), (2) *Migration Regulations 1994*.

<sup>248</sup> Section 425 *Migration Act*. For details of the RRT, its structure and operation, see Australian National Audit Office, *supra* note 12, at 88; Australia, Senate Legal and Constitutional References Committee, *supra* note 165, at 143-179; Crock, “A Sanctuary under Review” *supra* note 185, at 277-280; *id*, *Immigration and Refugee Law in Australia*, *supra* note 22, at 130-132; Fonteyne, *supra* note 214, at 255; Kneebone, *supra* note 185, at 80-81.

<sup>249</sup> See *infra* Appendix D, Figure 25. See also Australian National Audit Office, *supra* note 12, at 90; and *Kioa and Others v West and Another* (1985) 159 CLR 550.

<sup>250</sup> For details see *infra* Appendix D, Figure 25.

been expressed about the fact that refugee determination remains the only administrative decision making system with higher approval rates at review than at primary level.<sup>251</sup>

If the protection visa application remains unsuccessful at review stage, applicants are charged a fee of \$1,000 for the review and have 28 days to leave Australia voluntarily. Otherwise they are removed forcibly.

#### *Ministerial discretion under s 417 Migration Act*

The Minister for Immigration can overrule a rejection by the RRT if he or she thinks “it is in the public interest to do so”.<sup>252</sup> Section 417 *Migration* authorises the Minister to substitute a RRT decision by a more favourable one. In that respect, the section provides a humanitarian exception to the narrow scope of the *Refugee Convention* to which the RRT is bound under ss 411 and 415. Most writers in the field agree that s 417 serves as an option to grant protection visas to applicants who must not be refouled for reasons contained in the *Convention against Torture*, the *Convention of the Rights of the Child* and the *ICCPR*.<sup>253</sup> This is also emphasised by the Guidelines for the exercise of the discretion granted under s 417, which outline the main criteria to be considered in relation to the three conventions.<sup>254</sup>

Unsuccessful visa applicants at primary and review stage are not officially informed about the right to request intervention under s 417. However, in the 1998-99 financial year, 62.0% of all failed RRT applications requested such intervention. In that financial year, the Minister received 4,236 requests for intervention and granted 154 visas (3.6%) under s 417.<sup>255</sup>

The Minister’s powers under s 417 cannot be delegated or compelled. In practice, the RRT makes recommendations to the Minister if it has found that a refugee claim falls outside the

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<sup>251</sup> Australian National Audit Office, *supra* note 12, at 90.

<sup>252</sup> See generally Australia, Senate Legal and Constitutional References Committee, *supra* note 165, at 237-267.

<sup>253</sup> See *supra* 4.3.4.1; and Australia, Senate Legal and Constitutional References Committee, *supra* note 165, at 57-64; Crock, “A Sanctuary under Review” *supra* note 185, at 282.

<sup>254</sup> See paras 4.2.2-4.2.4 *Ministerial Guidelines for the Identification of Unique or Exceptional Cases Where it May Be in the Public Interest to Substitute a more Favourable Decision under Ss 354, 351, 391, 417, 454 of the Migration Act 1958*, issued on 4 May 1999, reprinted in Australia, Senate Legal and Constitutional References Committee, *supra* note 165, at Appendix 9, 399-400.

<sup>255</sup> Australia, Senate Legal and Constitutional References Committee, *supra* note 165, at 255.

*Refugee Convention*, but nevertheless has strong humanitarian grounds to be granted protection.<sup>256</sup> These recommendations are, however, not enforceable and they can be overruled and ignored by the Minister at any time although there may be international obligations to protect the asylum seeker. It raises serious concerns that absolute obligations under international law, such as the non-refoulement obligations, are based on the non-reviewable discretion granted to the Minister under s 417, and that the Minister has no enforceable duty to exercise this discretion.<sup>257</sup>

#### 4.3.3.2. Federal Court

Part 8, ss 474-486 *Migration Act* give asylum seekers the right to appeal on points of law to the Federal Court if the Refugee Review Tribunal affirms the primary decision. Appellants may lodge their application to the Federal Court within 28 days of notification of the RRT decision (s 477(1)) and there is no explicit prohibition on the Court to consider out of time applications. Appeal to the Federal Court is limited to reasons specified in s 474; the Federal Court may not review the merits of a case. In its decision, the Federal Court can uphold the RRT's refusal, vary the decision made by the RRT, or, if the appeal is successful, refer the application back to the RRT for reassessment.<sup>258</sup>

#### 4.3.3.3. Administrative Appeals Tribunal

The Administrative Appeals Tribunal (AAT) plays a very limited role in the context of refugee status determination. If a review of the RRT "involves an important principle, or issue, of general application" the Tribunal can refer the decision to the AAT: s 443 *Migration Act*. Secondly, the Federal Court decided in 1998 that decisions to refuse or cancel protection visas on the basis of s 502 *Migration Act*, articles 1F, 32 and 33(2)

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<sup>256</sup> Cf Australia, Senate Legal and Constitutional References Committee, *supra* note 165, at 179; Fonteyne, *supra* note 214, at 255-256; Kneebone, *supra* note 185, at 82; Taylor, "Rethinking Australia's Practice of 'Turning Around' Unauthorised Arrivals" *supra* note 217, at 46.

<sup>257</sup> See Australia, Senate Legal and Constitutional References Committee, *supra* note 165, at 64.

<sup>258</sup> Section 481 *Migration Act*.

*Refugee Convention*<sup>259</sup> are reviewable by the AAT and not the RRT.<sup>260</sup> New s 501J *Migration Act*, introduced in 2001,<sup>261</sup> provides that the Minister has authority to set aside an AAT protection visa decision by a more favourable one.

#### 4.3.3.4. High Court of Australia

If an applicant has missed the opportunity for review of a Refugee Review Tribunal decision in the Federal Court, judicial review can be sought directly in the High Court. Under s 75(v) of the *Constitution* the High Court has jurisdiction with respect to decisions made under the *Migration Act* in which a writ of mandamus or prohibition is sought against any primary decision maker. There are no restrictions as to the grounds of review and there is no time limit for seeking review from the High Court.<sup>262</sup>

#### 4.3.4. Detention and Removal

##### 4.3.4.1. The Australian practice

Australian law provides that people who arrive without authority are to be placed in immigration detention until they are granted a visa or removed from Australia.<sup>263</sup> Under s 273 *Migration Act* the Minister for Immigration established immigration detention centres in Sydney, Melbourne, Perth, and in the isolated country towns of Port Hedland (WA), Derby (WA), and Woomera (SA). In May 2000, the Minister announced the creation of additional facilities in Darwin and Brisbane.<sup>264</sup> Most unauthorised air arrivals are held in the facilities in Villawood, Sydney, and Maribyrnong, Melbourne, while most people at the other centres are unauthorised boat arrivals.

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<sup>259</sup> See *supra* Section 4.3.4.2.

<sup>260</sup> Crock, *Immigration and Refugee Law in Australia*, *supra* note 22, at 157 referring to *Vaitaki* (unreported, FFC, 15 Jan 1998).

<sup>261</sup> *Migration Legislation Amendment Act (No 6) 2001* (Cth).

<sup>262</sup> Cf Taylor, "Should unauthorised arrivals in Australia have free access to advice and assistance?" *supra* note 219, at 40.

<sup>263</sup> Sections 176-197 *Migration Act 1958* (Cth).

<sup>264</sup> DIMA, "Ruddock introduces tough new measures to reduce illegal entrants" DIMA Media Release 046/2000 (9 May 2000).

### Removal

Great caution needs to be exercised when decisions are made about the status of unlawful non-citizens and about their removal. If genuine refugees or other persons protected under international human rights law are removed, Australia violates the non-refoulement obligations and puts the removees at risk of further persecution. But even if there are no international law objections against removal, there may be other humanitarian concerns if persons are removed forcibly.

Figure 23: Status and departures of boatpeople in Australia, 1989-16 February 2000<sup>265</sup>

Status of boat people	% of total	number
<b>TOTAL NO OF BOATPEOPLE</b>	<b>100 %</b>	<b>10,224</b>
<b>Total granted entry</b>	<b>48.9%</b>	<b>4,991</b>
◆ Granted refugee status	11.8%	1,201
◆ Granted Temporary Protection Visa	36.6%	3,737
◆ Entry on other grounds	0.5%	53
<b>Total remaining in Australia</b>	<b>18.9%</b>	<b>1,936</b>
◆ Released on bridging visa	0.2%	24
◆ Escaped from custody	0.1%	8
◆ In custody	18.6%	1,904
<b>Departures</b>	<b>32.2%</b>	<b>3,297</b>

Of the 10,224 persons who arrived in Australia illegally by boat between 1989 and 16 February 2001, 4,991 or 48.9 percent have been granted visas to stay in the country, most of them on temporary protection visas.<sup>266</sup> 3,297 persons or 32.2 percent have left Australia voluntarily or have been removed or deported forcibly. A substantial number of the cases contained in Figure 26 have not yet been finalised (1,936 cases or 18.9%). It is, however, noticeable that the majority of boatpeople who arrive in Australia have genuine claims for asylum. 60.2 percent of all cases that have been finalised have been granted protection or other humanitarian visas.

Consequently, statements that the majority of illegal immigrants come to Australia as opportunity seeking economic migrants (who are not recognised by Australia's protection

<sup>265</sup> DIMA, *Fact Sheet 81: Unauthorised arrivals by air and sea* (25 July 2000). No equivalent data is available for unauthorised arrivals by air.

<sup>266</sup> See *infra* Appendix D, Figure 26 "Status and departures of boatpeople in Australia, 1989-16 Feb 2000".

system) are wrong.<sup>267</sup> In other words: A significant portion of persons arriving in Australia unauthorised are found to evoke Australia's protection obligation. It is therefore particularly important that the claims of unauthorised entrants are carefully assessed. Also, asylum seekers need to be given immediate and appropriate access to lawyers, human rights organisations and interpreters, so that they can express their claims and avoid refoulement to a country where they may be in danger of further persecution.

#### 4.3.4.2. Legitimacy of the current practice

In recent years, there have been numerous court decisions<sup>268</sup> and substantial academic<sup>269</sup> and public<sup>270</sup> debate surrounding the legitimacy of Australia's detention policies and practice.

The Australian Government argues that it is necessary to place all illegal immigrants in detention centres in order to monitor their whereabouts, as otherwise the migrants may simply disappear into the wider community. Secondly, detention facilitates the removal of applicants should their applications for asylum be rejected.<sup>271</sup> Essentially, the Government considers its decision to detain all unauthorised arrivals as an issue of national sovereignty and security. From this perspective, mandatory detention of illegal immigrants is necessary for "compelling reasons of domestic policy" and to secure the integrity of Australia's immigration programs.<sup>272</sup>

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<sup>267</sup> Cf the analysis in David Corlett, "Politics, Symbolism and the Asylum Seekers Issue" (2000) 23(3) *UNSW LJ* 13 at 17.

<sup>268</sup> From the large body of cases see, for example, *Chu Kheng Lim and others v The Minister for Immigration, Local Government and Ethnic Affairs and Another* (1992) 176 CLR 1; *Fang and Others v Minister for Immigration and Ethnic Affairs and Another* (1996) 135 ALR 583; *HREOC and Another v Secretary, DIMA* (1996) 41 ALD 325.

<sup>269</sup> See, for example, Fonteyne, *supra* note 214, at 259-260; Poynder, *supra* note 219, at 53-77; Ryszard Piotrowicz, "The Detention of Boat People and Australia's Human Rights Obligations" (1998) 72 *ALJ* 417 at 417-425; Taylor, "Rethinking Australia's Practice of 'Turning Around' Unauthorised Arrivals" *supra* note 217, at 48-51.

<sup>270</sup> See, for example, Australia, HREOC, *Those Who've Come Across the Seas*, *supra* note 185; *id*, *Submission to the Senate Legal and Constitutional References Committee inquiry into Australia's refugee and humanitarian program* (2000); Australian National Audit Office, *supra* note 12, at 99-101; UN Human Rights Committee, *A v Australia*, *Communication No. 560/1993*, UN Doc CCPR/C/59/D/560/1993 (30 Apr 1997); "Woomera riots reflect poor refugee policy" (30 Aug 2000) *The Australian* 12.

<sup>271</sup> Cf Piotrowicz, *supra* note 269, at 417.

<sup>272</sup> Cf the summary in Piotrowicz, *ibid*, at 422-425; and Crock & Mathew, *supra* note 188, at 159.

On the other hand, it has been argued that the fact that and the way in which unauthorised migrants are detained are breaches of Australia's international obligations. Moreover, the length of the detention, the treatment of detainees and the remoteness of the immigration detention facilities have been criticised for further traumatising and alienating those fleeing persecution and poverty.

First, it must be reminded that people who arrive in Australia without a visa do not commit a crime and the vast majority does not represent a risk to community safety. Immigration detention, despite the way in which it is currently practised and perceived in Australia, is not a correctional service, does not have punitive character, and immigration detention centres are not prisons. The sole purpose of immigration detention is a purely administrative one: It seeks to accelerate the determination of the legal status of asylum seekers and the facilitation of their removal if visa applications fail. Accordingly, the accommodation and treatment of persons in detention must be as humane as possible and must not resemble that of correctional institutions.<sup>273</sup> Detention centres should provide basic, humane support and accommodation to unauthorised immigrants, and offer detainees maximum personal freedom while recognising the security and safety issues that may arise.

It has to be questioned whether immigration detention in general is lawful and necessary. Countries with similar legal systems to Australia which experience the same, if not greater, problems surrounding illegal immigration and refugee determination, such as the United States, New Zealand the United Kingdom and many Western European nations, do not have mandatory detention. Furthermore, there is serious concern that prolonged and unjustified detention of unauthorised immigrants can amount to "arbitrary arrest or detention" as prohibited under article 9(1) of the *ICCPR*.<sup>274</sup> Moreover, the detention of immigrants in remote areas and the lack of access to legal advice and human rights organisations interfere with the rights of accused individuals under international law.<sup>275</sup> In

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<sup>273</sup> See also the broader discussion in Australia, HREOC, *Immigration Detention*, *supra* note 185, at 6; Australian National Audit Office, *supra* note 12, at 29; Castillo & Hathaway, *supra* note 212, at 7-8; and Taylor, "Rethinking Australia's Practice of 'Turning Around' Unauthorised Arrivals" *supra* note 217, at 47.

<sup>274</sup> Australia, HREOC, *Submission to the Senate Legal and Constitutional References Committee*, *supra* note 270 at 2-4.

<sup>275</sup> Cf arts 9(4), 14 *ICCPR*; rules 93, 94 *Standard Minimum Rules of the Treatment of Prisoners*, UN ECOSOC Res 663C (XXIV) (31 July 1957); principles 13, 15, 18(1) *Body Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, UN GA Res 43/173 (9 Dec 1988).



particular, DIMA's practice of not informing detainees about their rights breaches principles 13 and 17(1) of the *UN Standard Minimum Rules for the Treatment of Prisoners* (which equally apply to people placed in administrative detention)<sup>276</sup> and can amount to a violation of article 10(1) *ICCPR*.<sup>277</sup> The incommunicado detention of leaving refugees uninformed about their rights also creates the risk that genuine refugees are sent back to a country "where [their] lives or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion", thus contravening article 33 of the *Refugee Convention*.<sup>278</sup>

Also, as illustrated in Chapter Two,<sup>279</sup> the mandatory detention of unauthorised arrivals has repeatedly been utilised in Australian immigration policies as a method to deter further immigrants,<sup>280</sup> which contravenes UNHCR guidelines that prohibit the detention of asylum seekers as part of a policy to deter future arrivals.<sup>281</sup>

A further issue that has become a major point of attention in the public debate of immigration detention are the costs created by Australia's practice of mandatory detention.<sup>282</sup> For example, the Federal budget for the 2001-02 financial year allocated \$250 million for processing unauthorised boat arrivals, plus an extra \$147 million in the mid-

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<sup>276</sup> UN GA Res 2858 of 1971 and 3144 of 1983; UN Doc A/Conf/611 (1983) Annex I. Principle 13 reads: "Any person shall at the moment of arrest and at the commencement of detention or imprisonment, or promptly thereafter, be provided by the authority responsible for his arrest, detention or imprisonment, respectively with information on and an explanation of his rights and how to avail himself of such rights." Principle 17(1) reads: "A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after his arrest and shall be provided with reasonable facilities for exercising it."

<sup>277</sup> Art 10(1) *ICCPR* reads: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person." For further reading see Australia, HREOC, *Those Who've Come Across the Seas*, *supra* note 185, at 215.

<sup>278</sup> Cf Mary Crock, "The Peril of the Boat People: Assessing Australia's Responses to the Phenomenon of Border Asylum-Seekers" in Hugh Selby (ed), *Tomorrow's Law* (1995) 46 at 49; Arthi Patel, "Migrant Rights: Time to Reassess" (1996) 21(2) *Alt LJ* 67 at 68; Poynder, *supra* note 219, at 63; Taylor, "Rethinking Australia's Practice of 'Turning Around' Unauthorised Arrivals" *supra* note 217, at 43, 46-48; id, "Should Unauthorised Arrivals in Australia have Free Access to Advice and Assistance?" *supra* note 219, at 41-43; Kerry Taylor, "Detainees denied rights" (20 July 2000) *The Age*.

<sup>279</sup> See *supra* Section 2.2.

<sup>280</sup> See, for example, Australia (Cth), House of Representatives, *Parliamentary Debates* (5 May 1992) 2371 (G Hand, Minister for Immigration); Richard McGregor, "Minister warns of boatpeople flood" *The Australian* (16 Nov 1999) 1.

<sup>281</sup> See Australia, HREOC, *Those Who've Come Across the Seas*, *supra* note 185, at 42-46 with further examples. And see Piotrowicz, *supra* note 269, at 419

<sup>282</sup> For estimates of the costs for detention and removal see, for example, Australian National Audit Office, *supra* note 12, at 39-40; 103-120. See also the comments made by Mary Crock in "A Sanctuary under Review" *supra* note 185, at 285-286.

year economic review and an extra \$85 million to the Pacific Solution.<sup>283</sup> The public's view is, naturally, that the Australian taxpayer should not pay for the accommodation of illegal, unwanted immigrants. The Australian Government has in many instances fuelled the public's hysteria about rising expenses for the reception, processing and removal of unlawful non-citizens, often by the use of unsubstantiated and one-sided statements.<sup>284</sup> But the expenses that arise are solely the result of Australia's mandatory detention provisions. It is not the immigrants' choice to create the costs for detention and removal. Also, ss 209 and 210 *Migration Act* make illegal immigrants liable for the costs of their detention and removal if they are refused visas to remain in Australia.

Calls for a change of its rigid detention policy led the Government to release a very limited number of women and children from the Woomera detention centre in May 2001, to be housed on a trial basis in private homes in Woomera.<sup>285</sup> There is, however, no indication that this trial demonstrates a change of Australia's detention policy. At the time this study was completed, no information was available as to whether or not this programme will be further expanded in the future.

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<sup>283</sup> Megan Saunders, "Costs soar for island detainees" (16 Apr 2002) *The Australian* 1.

<sup>284</sup> Cf the reports in Megan Saunders, "Illegals bill faces blow-out to \$200m" (18 Jan 2000) *The Australian* 2; id, "Illegals double and stay longer" (24 Apr 2000) *The Australian* 5; id, "\$117m to staunch overflow of illegals" (10 May 2000) *The Australian* 8.

<sup>285</sup> "Australia: Detention" (2001) 8(7) *Migration News*.

## 4.4. Conclusion

In Australia, the phenomenon of migrant trafficking is primarily dealt with as an issue of national security and transnational crime. Particularly over the past three years, Australia has implemented a comprehensive set of offences that criminalises most aspects of migrant trafficking. Since the large influx of unauthorised arrivals beginning in 1999, the provisions place special emphasis on the punishment of participants in large scale trafficking operations who are facing penalties of up to 20 years imprisonment if they are caught.

Australia offers a comprehensive response to all aspects of illegal migration and organised crime. Australian law contains provisions that cover most of the criminal aspects of migrant trafficking and primarily targets traffickers rather than punishing illegal immigrants for their unlawful entry.

One problem that remains is the prosecution of recruiters and of other activities that exclusively take place abroad. To successfully combat migrant trafficking, Australia largely depends on the cooperation of transit and sending countries. The efficiency of the steps taken abroad is crucial to reduce the number of those who arrive in the destination country. So far, Australia has dealt with illegal immigration as an issue of national security and tried to curb migrant trafficking with defensive strategies developed at the national level. As the following Chapters will show, there is to date too little cooperation among the countries of the region, which prevents any measure taken at the national level from being fully successful.

Although, unlike most other countries in the region, Australia decriminalised illegal entry, with respect to the trafficked migrants, Australia's response has been characterised by a rigid deterrence policy. With the growing number of people who land at Australia's shores "uninvited", who attempt to arrive clandestinely, or who are found trying to enter with false identity documents, the Australian public has become more hostile and government authorities more aggressive in fighting and preventing illegal entry. Higher penalties, tighter border controls, mandatory detention and speedy removal, limited review of asylum

claims, and, most recently, the introduction of temporary protection visas are just some of the measures which have been implemented to deter further arrivals.

There are, however, a number of limitations to the Australian deterrence strategy. Law enforcement and deterrence alone can never control, or even reduce, a phenomenon as complex and multifaceted as migrant trafficking. The deterrence policy does not recognise that migrant trafficking is demand driven. It cannot take away the incentives to flee from places where persecution, famine, unemployment and environmental degradation are the rule rather than the exception. It cannot disguise the fact that Australia is a very wealthy, politically stable and multicultural nation. The deterrence policy that has characterised Australia's onshore refugee programme for the past 25 years has failed to take into account the political, social and economic realities that have caused the enormous growth of illegal migration and organised crime.

It is not yet clear how effective the recent measures that have been implemented in Australia are in the long-term. However, there is evidence that large numbers of trafficked migrants continue to arrive. And with growing migration pressures in the Asia Pacific region and around the world it is most likely that the number of people willing to migrate irregularly will continue to rise, as long as Australia, along with other countries in the region, fails to address the root causes of illegal migration.

## CHAPTER FIVE

### IMMIGRATION AND ORGANISED CRIME LEGISLATION IN THE ASIA PACIFIC REGION

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The Asia Pacific region, including the countries of East and South East Asia, Australia and the South Pacific, is one of the culturally, politically and economically most diverse regions of the world. Not surprisingly, this is also reflected in the ways in which the countries of the region deal with matters of migration, border control, and crime. While most countries share similar economic and security interests and cooperate in regional and international economic fora, to date, there is little harmony between immigration, refugee and criminal laws and the policies of the countries concerned.

The discrepancies in law and law enforcement in the region are systematically exploited by transnational criminal organisations as manifested in the increasing trafficking activities in the region and the growing profits these activities generate. Nathalie Siron and Piet van Baeveghem provide a succinct statement of the relationship between trafficking and the law:

Trafficking ... has to a certain degree a symbiotic relationship with the legislation in several domains but especially with the legislation concerning migration issues. ... [L]egislation is to a certain degree a cause of the phenomenon of transit-migration, trafficking and smuggling in human beings.<sup>1</sup>

The analysis of illegal migration and organised crime in Chapters Two and Three has shown that the legal framework of a given country determines the way in which trafficking organisations are structured and operate.<sup>2</sup> In the Asia Pacific region, generally speaking, commitment to combat and eradicate migrant trafficking is strong, however, very few countries have comprehensive strategies on domestic, regional and international levels. The lack of harmonised and unequivocal legislation in the region creates significant

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<sup>1</sup> Nathalie Siron & Piet van Baeveghem, *Trafficking in Migrants through Poland* (1999) 86.

loopholes, which are exploited by trafficking organisations. The objective of Chapter Five is to identify and analyse the ways in which legislation creates these loopholes.

Following the pattern of previous Chapters, attention is drawn to three principal aspects of migration and organised crime legislation: (1) general issues of immigration and refugee regulations, (2) offences applying to traffickers, and (3) offences applying to illegal migrants.

This Chapter examines the legislation of nineteen countries and territories in the Asia Pacific region, including Brunei Darussalam,<sup>3</sup> Cambodia,<sup>4</sup> People's Republic of China (PR China)<sup>5</sup> and its Special Administrative Regions (SARs)<sup>6</sup> Hong Kong<sup>7</sup> and Macau,<sup>8</sup> Fiji,<sup>9</sup>

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<sup>2</sup> See *supra* Section 3.2.6.

<sup>3</sup> *Immigration Act 1958*, Chapter 17 [hereinafter *Immigration Act 1958* (Brunei)]; *Penal Code*, Chapter 22 [hereinafter *Penal Code* (Brunei)]. Reprints of Brunei law were unavailable at the time this study was taking shape. The analysis of Brunei law is based on the information contained in Vinit Muntarbhorn, *The Status of Refugees in Asia* (1992) 98-101; and UNCJIN, *Central Repository on Organised Crime*, [www.uncjin.org/Documents/Crtoc/cenrep.html](http://www.uncjin.org/Documents/Crtoc/cenrep.html) (12 Feb 2001).

<sup>4</sup> *Law on Immigration*, Act No 05/NS 94, adopted 26 Aug 1994 [hereinafter *Law on Immigration 1994* (Cambodia)], reprinted in Sok Siphana (ed), *Laws of Cambodia 1993-1998, Adopted by the National Assembly of the Kingdom of Cambodia, Vol II* (1998) 113-129; *Provisions dated September 10, 1992 relating to the Judiciary and Criminal Law and Procedure Applicable in Cambodia during the Transitional Period* [hereinafter *Criminal Law Provisions 1992* (Cambodia)], available at [www.bigpond.com.kh/Council\\_of\\_Jurists/Judicial/jud005g.htm](http://www.bigpond.com.kh/Council_of_Jurists/Judicial/jud005g.htm) (9 Mar 2001). Note that the *Criminal Law Provisions 1992* (Cambodia) have been developed by the Supreme National Council in cooperation with UNTAC, the United Nations Transitional Authority in Cambodia, and continue to stay in force until "the Legislative Assembly resulting from the elections amends them or adopts new legislation in this area".

<sup>5</sup> *Law of the People's Republic of China on Control of the Entry and Exit of Aliens 1986*, entry into force 1 Feb 1986, *Law of the People's Republic of China on Control of the Exit and Entry of Citizens 1986*, entry into force 1 Feb 1986, copies provided by the Ministry of Foreign Affairs, Beijing, PR China; *Criminal Law of the People's Republic of China 1997*, entry into force 1 Oct 1997, reprinted in Wei Luo, *The 1997 Criminal Code of the People's Republic of China* (1998) 23-226; *Criminal Law 1979*, entry into force 1 July 1979, reprinted in Ralph Folsom & John Minan, *Law in the People's Republic of China* (1989) 1015 ff.

<sup>6</sup> Special agreements have been made between the former colonial powers Portugal and the United Kingdom and the PR China under which Hong Kong and Macau retained full autonomy on immigration control matters. See *Joint Declaration of the Government of the United Kingdom and the PR China on the Question of Hong Kong 1984*, Annex I: Elaboration by the Government of the PR China of its Basic Policies regarding Hong Kong, s XIV; *Joint Declaration of the Government of the People's Republic of China and the Government of the Republic of Portugal on the Question of Macao 1987*, Annex I Elaboration by the Government of the PR China of its Basic Policies regarding Macao, s IV.

<sup>7</sup> *Immigration Ordinance 1972* (Hong Kong), Chapter 115, No 62 of 1972 entry into force 1 Apr 1972; *Crimes Ordinance 1971* (Hong Kong), Chapter 200, No 60 of 1971 entry into force 19 Nov 1971, available at Hong Kong SAR, Department of Justice, *Bilingual Laws Information System*, [www.justice.gov.hk](http://www.justice.gov.hk) (14 Mar 2001). It has to be noted that after the reunification with the PR China on 1 July 1997, the Government of the Hong Kong SAR retained full autonomy on immigration control matters; see *Joint Declaration of the Government of the United Kingdom and the PR China on the Question of Hong Kong 1984*, Annex I: Elaboration by the Government of the PR China of its Basic Policies regarding Hong Kong, s XIV. Also, the entry of persons from other parts of China into Hong

Indonesia,<sup>10</sup> Lao People's Democratic Republic (Lao PDR), Malaysia<sup>11</sup>, Myanmar,<sup>12</sup> Papua New Guinea,<sup>13</sup> Philippines,<sup>14</sup> Singapore,<sup>15</sup> Solomon Islands,<sup>16</sup> Taiwan (Republic of China),<sup>17</sup> Thailand,<sup>18</sup> Vanuatu<sup>19</sup> and Vietnam.<sup>20</sup>

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Kong continued to be regulated in accordance with the previous practice; Hong Kong Information Services Department, *Hong Kong: The Facts. Immigration* (1998) 1.

<sup>8</sup> *Imigração Clandestina*, Act No 2/90/M of 3 May 1990 [hereinafter *Clandestine Immigration Act 1990* (Macau)]; *Entry and Residence Act 1999*, Act No 55/95/M of 31 Oct 1999; *Código Penal*, Act No 11/95/M [hereinafter *Penal Code 1995* (Macau)], available at Macau, Imprensa Official, www.imprensa.macaugov.mo (9 Mar 2001). English translations of Macau law were not available. The following analysis is based on the original text in Portuguese. It has to be noted that after the reunification with the PR China on 20 Dec 2000, the Government of the Macau SAR retained full autonomy on immigration control matters; *Joint Declaration of the Government of Portugal and the PR China on the Question of Macau 1987*, Annex I: Elaboration by the Government of the PR China of its Basic Policies regarding Macau.

<sup>9</sup> *Penal Code 1945*, Chapter 17, entry into force 1 May 1945, available at University of the South Pacific Law School, *Pacific Law Materials*, www.vanuatu.usp.ac.fj/paclawmat/.

<sup>10</sup> *Immigration Act No 9/199*, State Gazette No 33/1992 [no English translation available].

<sup>11</sup> *Immigration Act 1959/1963*, Act 155 entry into force 1 May 1959 [hereinafter *Immigration Act 1959/1963* (Malaysia)], *Passport Act 1966*, Act 150 entry into force 1 Apr 1966, reprinted in Malaysia, Legal Research Board, *Immigration Act 1959/1963 (Act 155) & Regulations & Orders & Passports Act 1966 (Act 150)* (1997) 1-48, 147-157; *Penal Code*, Act 574, revised 1997, reprinted in [Malaysia], *Laws of Malaysia, Penal Code* (1997), copy provided by University of Hawaii at Manoa.

<sup>12</sup> *The Burma Immigration (Emergency Provisions) Act 1947*, entry into force 4 Jan 1948 [hereinafter *Immigration (Emergency Provisions) Act 1947* (Myanmar)], reprinted in UNHCR, *Refworld* (9<sup>th</sup> issue, 2000) [Legal Information].

<sup>13</sup> *Migration Act*, Chapter No 16 entry into force 12 Sep 1978 [hereinafter *Migration Act 1978* (PNG)]; *Criminal Code Act*, Chapter No 262 entry into force 1 Nov 1975 (commencing 1974) [hereinafter *Criminal Code 1974* (PNG)], reprinted in Papua New Guinea, *Laws* (as on 20 Mar 2001).

<sup>14</sup> *An Act to Control and Regulate the Immigration of Aliens into the Philippines 1940*, Commonwealth Act No 613 entry into force 2 May 1940 [hereinafter *Immigration Act 1940* (Philippines)], reprinted in Ronaldo Ledesma, *An Outline of Philippine Immigration and Citizenship Law* (1999) 3-468; *An Act Revising the Penal Code and other Penal Laws 1932*, Act No 3815 entry into force 1 Jan 1932 [hereinafter *Penal Code 1932* (Philippines)], reprinted in Dominador Buhain et al (eds), *The Revised Penal Code of the Philippines with Related Special Laws* (rev ed 1999).

<sup>15</sup> *Immigration Act 1959* (Singapore), entry into force 1959, reprinted in UNHCR, *Refworld*, *supra* note 12.

<sup>16</sup> *Immigration Act*, No 27 of 1978, entry into force on 29 Sep 1978 [hereinafter *Immigration Act 1978* (Solomon Islands)], copy provided by the Attorney-General's Chamber, Honiara, Solomon Islands; *Penal Code*, No 12 of 1963, entry into force 1 Apr 1963 [hereinafter *Penal Code 1963* (Solomon Islands)], copy provided by the Queensland Supreme Court Library, Brisbane (Qld).

<sup>17</sup> *Immigration Law* (Republic of China on Taiwan), available at Bureau of Immigration, Taiwan, www.immigration.gov.tw/scripts/docs/eng/4.htm last modified 23 Oct 2000 [hereinafter *Immigration Law* (Taiwan)]; *Criminal Code 1935* (Taiwan), reprinted in James Liu et al, *Major Laws of the Republic of China on Taiwan* (1991) 1019-1135.

<sup>18</sup> *Immigration Act B.E. 2522*, entry into force 24 Feb 1979 [hereinafter *Immigration Act 1979* (Thailand)], reprinted in UNHCR, *Refworld*, *supra* note 12; *Act promulgating the Penal Code B.E. 2499*, entry into force 13 Nov 1956 [hereinafter *Penal Code 1956* (Thailand)], reprinted in Suchart Jivachart (ed), *The Penal Code* (Luang Dulayastpativaet transl) (1992).

<sup>19</sup> *Immigration Act 1971*, Chapter 66, entry into force 24 Mar 1972; *Penal Code 1981*, No 17 of 1981, Chapter 135, entry into force 7 Aug 1981, copies provided by the National Library of Australia, Canberra.

<sup>20</sup> *Ordinance on Exit, Entry, Residence and Travel of Foreigners in Vietnam 1992*, Decree No 65-LCT/HDNN 8 entry into force 1 May 1992, available at Vietnam Web, *Legal Documents*, http://home.vnd.net/english/legal\_docs (25 Jan 2001); *Penal Code 2000* (Vietnam), No 15/1999/QH10,

The focus of this Chapter is on the immigration, refugee and criminal laws in the Asia Pacific region. Different laws adopted at the national level to combat illegal migration and organised crime are analysed, and existing policies dealing with migrant trafficking and immigration, both criminal and regulatory, are examined. This analysis offers a basis for understanding the conditions and limitations of the present laws.

This Chapter seeks to provide a comprehensive analysis of immigration and criminal laws in the region. There are, however, certain limitations that prevent this study from being complete. Firstly, despite many attempts, no recent reprints of legislation from countries such as Brunei,<sup>21</sup> Indonesia, Lao PDR and New Caledonia (France) could be obtained. The only information that is available on these countries and New Caledonia is that provided by agencies of third countries or international organisations. Secondly, the legislation of some countries may have been amended, but more recent editions were unavailable. The legislation obtained from Vanuatu, Myanmar and Fiji are particularly old editions. Thirdly, when enacted, the laws of most countries are not in English language. In these cases, the analysis in this Chapter is based on translations made by government agencies, independent editors and academics, or by the author of this study. Given the diversity of languages in the region, and the difficulties in translating them correctly, words and meanings may have been altered or misinterpreted. Finally, given the large number and variety of provisions dealing with illegal migration and organised crime, the analysis in this Chapter has to be limited to the core aspects of migrant trafficking as identified in previous Chapters. The study of anti-corruption, bribery and money laundering provisions, for instance, has to be left for future research. The analysis is based on sources available to the author, after careful enquiry, as at 31 December 2001.

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Order No 01/L-CTH, entry into force 4 Jan 2000, copy provided by the Australian Embassy, Hanoi, Vietnam.

<sup>21</sup> See *supra* note 3.



## 5.1. Immigration and Asylum Systems in the Asia Pacific

Immigration and asylum systems have a strong impact on creating, sustaining, directing and preventing migration flows. They also, directly and indirectly, determine the scale of illegal migration and migrant trafficking.

Section 5.1 takes a closer look at the immigration and asylum systems of the countries in the Asia Pacific region, and their impact on the levels of migrant trafficking. The concern of this section is with all migrants, who have been defined as “persons who choose to move from one country to another for some period of time” “with the intention of temporarily or permanently establishing him or herself in another country”,<sup>22</sup> though particular attention is drawn to the law applicable to asylum seekers and illegal immigrants.

Essentially, the measures to regulate enable immigration can be categorised under four headings: (1) pre-arrival regulations that seek to prevent the arrival of certain migrants, (2) arrival procedures to control those who physically enter the country, (3) post-arrival regulations to single out and remove unwanted foreigners from the country, and (4) provisions for asylum that provide exceptions to the other three categories.

### 5.1.1. Pre-Arrival Regulations

Countries have a range of legislative tools and mechanisms to prevent the arrival of unwanted foreigners. Visa requirements enable countries to select immigrants well before they arrive at the border. Exclusion clauses and other prohibitions render those people ineligible for immigration who are unwanted for reasons of a broader and more generalised nature.<sup>23</sup> Moreover, countries can facilitate and/or complicate immigration simply by altering the legal definition of foreigners and the criteria that qualify persons as nationals and residents.

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<sup>22</sup> See *supra* Section 1.1.2.1.

<sup>23</sup> See generally Jend Vedsted-Hansen, “Non-admission policies and the right to protection: refugees’ choice versus states’ exclusion?” in Frances Nicholson & Patrick Tworney (eds), *Refugee Rights and Realities, evolving International Concepts and Regimes* (1999) 269 at 269-270.

This Section examines three aspects of pre-arrival immigration regulations: First, how are foreigners and immigrants defined under immigration laws in the Asia Pacific region? Secondly: What requirements do countries impose on foreigners seeking to enter? And thirdly: What categories of foreigners are excluded from entering per se?

#### 5.1.1.1. Defining foreigners

Different countries have different concepts of citizenship, nationality and residence. These concepts are used to distinguish between those who are native or otherwise connected with the country, and those who are not. Nationals, citizens and residents are usually eligible for a range of government services, assistance and protection schemes, which are unavailable to foreigners. Also, nationals usually have unrestricted entry to their home country, while non-nationals do not.

The countries of the Asia Pacific region use similar criteria in defining and determining foreigners. Essentially, under the immigration laws of all countries in the region a foreigner or alien is defined as a person not being a citizen (or national) of that country.<sup>24</sup> Citizenship and nationality are defined under the citizenship acts of the countries. Minor variations of this concept can be found as for example under the *Immigration Act 1958* (Brunei), which extends the meaning of non-alien beyond citizens to include other people “subject of HM the Sultan”.<sup>25</sup>

As Special Administrative Regions of the PR China, Hong Kong and Macau do not have sovereignty over citizenship. The SARs, however, have the power to control immigration.<sup>26</sup> The definition of “immigrants” under Hong Kong law is limited to persons not being permanent residents of Hong Kong, thereby applying different rules to citizens of

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<sup>24</sup> Article 2 *Law on Immigration 1994* (Cambodia); art 31 *Law on Control of the Entry and Exit of Aliens 1986* (PR China); s 2(1)(e) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 50(b) *Immigration Act 1940* (Philippines); s 4 *Immigration Act 1979* (Thailand); s 1 *Immigration Act 1971* (Vanuatu); art 1(1) *Ordinance on Exit, Entry, Residence and Travel of Foreigners in Vietnam 1992* (Vietnam).

<sup>25</sup> Section 2(d) *Immigration Act 1958* (Brunei). Consequently, the Sultan has discretion to determine that non-citizens have equal status as citizens of Brunei.

<sup>26</sup> See *supra* notes 7 and 8.

the mother country than to Hong Kong residents.<sup>27</sup> This has led to great controversies since the handover of Hong Kong in 1997, as mainland Chinese, although citizens of the same country, only have restricted rights to enter and settle in Hong Kong.<sup>28</sup>

Some countries differentiate in their immigration laws between “immigrants” and other groups of foreign arrivals. For example, in the Philippines and Thailand, the term “immigrant” is understood as foreigners who are entering the country from outside.<sup>29</sup> Consequently, those who are prohibited from entering are deemed non-immigrants, although they may in some instances physically reside in the territory of that country.<sup>30</sup> Cambodian immigration law also distinguishes between immigrant and non-immigrant aliens, the latter including foreign diplomats, members of the military, their families, travellers in transit, tourists, business visitors, crews, and foreigners from neighbouring border regions, while immigrant aliens are those who do not fall in any of these categories.<sup>31</sup> The distinctions established under Cambodian, Philippine and Thai immigration law determine the availability of benefits to immigrants which are not available to other foreigners and non-immigrants. The question of different availability of benefits is discussed in later parts of this Chapter.

### 5.1.1.2. Entry and Visa Regulations

All countries in the region require valid travel and identity documentation before entry is permitted. Most countries have additional visa and entry requirements to limit immigration and prevent the arrival and entry of certain groups of foreigners. This section examines the entry requirements of the countries in the Asia Pacific; it does not examine additional requirements for permanent settlers and persons who enter as private or corporate investors.

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<sup>27</sup> Section 2(1) *Immigration Ordinance 1972* (Hong Kong).

<sup>28</sup> See the recent reports in “China, Hong Kong, Taiwan” (2001) 8(7) *Migration News*.

<sup>29</sup> Section 50(j) *Immigration Act 1940* (Philippines); s 4 *Immigration Act 1979* (Thailand).

<sup>30</sup> Cf Ledesma, *supra* note 14, at 340 and fn 1008. See also the different concepts of immigrants used in Australian law until 1992, *supra* Section 4.1.1.3.

<sup>31</sup> Articles 7, 10 *Law on Immigration 1994* (Cambodia).

Universally throughout the region, countries require that all persons seeking to enter their territories present valid identity documents. In most countries it is necessary that immigrants present their passports to immigration authorities upon arrival in the country.<sup>32</sup> Some countries accept passport substitutes or other authorised identity documentation.<sup>33</sup> In Macau, exceptionally, travel and identity documentation issued under international treaties, including the *Refugee Convention*, are recognised as alternatives to passports.<sup>34</sup>

The most common and universal method to control and monitor prospective entrants is the establishment of a visa requirement. In order to obtain visas or entry permits,<sup>35</sup> most countries require that formalised applications be lodged at their diplomatic missions abroad. This application procedure enables immigration authorities to examine those who wish to enter well before they arrive, and deny visas to those who fall into categories of prohibited or otherwise undesired immigrants.

Most countries in the Asia Pacific region require that arriving immigrants hold a valid visa, issued by a diplomatic mission abroad. Under the immigration laws of Brunei, Cambodia, PR China, Hong Kong, Indonesia, Malaysia, Myanmar, Papua New Guinea, the Philippines, Singapore, Solomon Islands, Taiwan, Vanuatu and Vietnam, foreigners who arrive in the country must be in possession of an entry permit for that country.<sup>36</sup> In order to accelerate immigration procedures, some countries allow visas and entry permits to be

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<sup>32</sup> Article 8(2) *Law on Immigration 1994* (Cambodia); art 7 *Law on Control of the Entry and Exit of Aliens 1986* (PR China); art 5(1) *Entry and Residence Act 1999* (Macau); s 10 *Immigration Act 1940* (Philippines); art 17(1) *Immigration Act* (Taiwan); s 12(1) *Immigration Act 1979* (Thailand); art 3(1) *Ordinance on Entry, Exit, Residence, and Travel of Foreigners 1992* (Vietnam).

<sup>33</sup> Article 8(2) *Law on Immigration 1994* (Cambodia); art 5(2) *Entry and Residence Act 1999* (Macau); s 12(1) *Immigration Act 1979* (Thailand).

<sup>34</sup> Article 5(1) *Entry and Residence Act 1999* (Macau) with reference to art 28 *Refugee Convention*.

<sup>35</sup> The words visa and entry permit are used interchangeably, although some countries differentiate between visas and entry permits.

<sup>36</sup> Section 6, *Immigration Act 1958* (Brunei); art 8(1) *Law on Immigration 1994* (Cambodia); art 2 *Law on Control of the Entry and Exit of Aliens 1986* (PR China); ss 11, 61 *Immigration Ordinance 1972* (Hong Kong); ss 6(1), *Government Regulation on Visas, Admission Permits and Immigration Permits, No 32/1994* (Indonesia); s 10 *Immigration Act 1959/1963* (Malaysia); s 3(1) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 3(a) *Migration Act 1978* (PNG); s 10 *Immigration Act 1940* (Philippines); s 6(1) *Immigration Act 1959* (Singapore); s 6(1)(a) *Immigration Act 1978* (Solomon Islands); s 5(1) *Immigration Act 1971* (Vanuatu); art 3(1) *Ordinance on Entry, Exit, Residence, and Travel of Foreigners 1992* (Vietnam).

obtained at the port of arrival upon immigration inspection.<sup>37</sup> Undocumented entry is criminalised in most countries of the region, except in Thailand and the Philippines.<sup>38</sup>

Macau appears to be the only jurisdiction in the region that allows any foreign visitor to enter without a visa (for a period thirty days).<sup>39</sup> The Philippines also allow nationals from foreign countries to enter the country without a visa for up to 59 days, unless they are nationals of certain 'high risk' countries.<sup>40</sup>

Most countries in the region make exemptions from the visa requirement for individual immigrants or certain groups of foreigners. For example, personnel of foreign diplomatic missions and international organisations and their families are not required to hold a visa for entry into the country of their posting.<sup>41</sup> Some countries extend this privilege to other employees of foreign governments and to members of visiting military forces.<sup>42</sup> Exceptions are also made for transit passengers who are in the country for limited time only, as long as they stay within prescribed transit areas, such as airports.<sup>43</sup> Moreover, the heads of national immigration authorities have discretion to make exemptions for individual immigrants or designated groups of foreigners.<sup>44</sup>

Finally, some countries, such as the PR China,<sup>45</sup> Thailand<sup>46</sup> and Vanuatu<sup>47</sup> have put into place visa-waiver programs and other reciprocal agreements, which allow nationals of the Contracting Parties to enter without a visa. These programs have become particularly popular in recent years and have been introduced in many countries around the world. The advantage is that they offer facilitated entry to nationals of selected non-risk countries,

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<sup>37</sup> See, for example, art 6(1) *Law on Control of the Entry and Exit of Aliens 1986* (PR China); art 3(1) *Ordinance on Entry, Exit, Residence, and Travel of Foreigners 1992* (Vietnam).

<sup>38</sup> See *infra* Section 5.3.1.2.

<sup>39</sup> Article 9(1) *Entry and Residence Act 1999* (Macau).

<sup>40</sup> See the countries listed in Ledesma, *supra* note 14, at 55-56.

<sup>41</sup> Section 9 *Immigration (Emergency Provisions) Act 1947* (Myanmar); ss 6(1)(b), 7 *Immigration Act 1978* (Solomon Islands); art 25 *Immigration Law* (Taiwan); s 15 *Immigration Act 1979* (Thailand); ss 9, 12 *Immigration Act 1971* (Vanuatu).

<sup>42</sup> Cf s 7 *Immigration Act 1978* (Solomon Islands), ss 9, 12 *Immigration Act 1971* (Vanuatu).

<sup>43</sup> Article 6(4) *Law on Control of the Entry and Exit of Aliens 1986* (PR China); s 13 *Immigration Act 1979* (Thailand); s 9(d) *Immigration Act 1971* (Vanuatu).

<sup>44</sup> Article 9 *Law on Immigration 1994* (Cambodia); ss 6(1)(d), 55 *Immigration Act 1959/1963* (Malaysia); s 8 *Immigration (Emergency Provisions) Act 1947* (Myanmar); ss 3(b), 20 *Migration Act 1978* (PNG); ss 6(1)(d), 56 *Immigration Act 1959* (Singapore); s 7(g) *Immigration Act 1978* (Solomon Islands); s 12(2) *Immigration Act 1971* (Vanuatu).

<sup>45</sup> Article 6(2), (3) *Law on Control of the Entry and Exit of Aliens 1986* (PR China).

<sup>46</sup> Section 13 *Immigration Act 1979* (Thailand).

while imposing more stringent requirements on nationals from high-risk nations. These programs benefit tourist and business visitors from wealthy nations and discriminate against those countries that have a large outflow of migrants or that are war-torn, poverty stricken, or refugee-producing nations.

Though visa waiver programs are small measures to facilitate international travel, these measures have the potential to create discrepancies in the value and acceptance of certain passports and identity documentation. Since some nationalities obtain privileged treatment, forgery and theft of entry documents from these countries is encouraged.<sup>48</sup> The same can be said about documents used by other persons with privileged admission, such as diplomats.

The visa requirements imposed on immigrants, along with the measures to enforce these regulations, do not differentiate between persons seeking asylum, and those migrating permanently or visiting temporarily. The requirements of most countries do not provide exceptions for asylum seekers who cannot rely on national protection and cannot obtain authentic travel documents. In some cases, these restrictions can jeopardise the ability of asylum seekers to gain access to safe havens, which may cause them to resort to illegal ways of migration and the use of fraudulent documents.<sup>49</sup>

### 5.1.1.3. Exclusion clauses and prohibitions

Individual persons or certain groups of immigrants are regarded as undesirable foreigners if their presence in the country can potentially cause dangers, threats or expenses to economy, public health, morale or security of the receiving country. In order to prevent the entry of these immigrants, the immigration laws of the countries of the Asia Pacific region contain exclusion clauses that bar certain persons from being admitted to the country prior to arrival.

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<sup>47</sup> Section 5(1) *Immigration Act 1971* (Vanuatu).

<sup>48</sup> Cf Siron & van Baeveghem, *supra* note 1, at 106-107.

<sup>49</sup> Cf the concerns raised in UNHCR, Executive Committee, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, UNHCR Doc EC/50/SC/CRP.17 (9 June 2000) paras 17-19.

Economic considerations, for instance, lead receiving countries to bar those persons from immigration who have no or not enough means to support themselves and their dependants during their stay in the country.<sup>50</sup> Most countries in the region prohibit people from entering if they are likely “to become a public charge”, to place demands on public security systems, or if they are “vagrants, paupers and beggars”.<sup>51</sup> Thailand and the Philippines also bar those persons from coming who seek unskilled or other low-level employment.<sup>52</sup> Moreover, illiterate and “incompetent” persons are prohibited immigrants in the Philippines.<sup>53</sup> Brunei and Taiwan excludes those from immigration who show no willingness or no ability to leave the country again in the future.<sup>54</sup>

Secondly, countries exclude those persons who pose a danger to the receiving country for reasons of public health. Persons who suffer contagious, “loathsome”, infectious or otherwise dangerous diseases are barred from entering the country.<sup>55</sup> Also, mentally ill, “idiots” and other “insane persons” are not allowed to enter most countries in the region.<sup>56</sup> Those countries that require medical examinations prior to admission into the country prohibit the entry of persons who have failed to undergo the examination and of those who have not been vaccinated against certain diseases.<sup>57</sup>

Thirdly, some countries in the region perceive the presence of certain individuals or groups of persons as dangerous or otherwise undesirable for reasons of public morality. Malaysia,

<sup>50</sup> Section 8(2) *Immigration Act 1958* (Brunei); s 8(3)(a) *Immigration Act 1959/1963* (Malaysia); s 8(1)(a) *Migration Act 1978* (PNG); s 29(a)(5) *Immigration Act 1940* (Philippines); s 8(3)(c) *Immigration Act 1959* (Singapore); s 11(2)(c) *Immigration Act 1978* (Solomon Islands); art 17(9) *Immigration Law* (Taiwan); s 12(2), (9) *Immigration Act 1979* (Thailand); s 15(2)(b) *Immigration Act 1971* (Vanuatu).

<sup>51</sup> Section 8(3)(g) *Immigration Act 1959/1963* (Malaysia); s 29(a)(4) *Immigration Act 1940* (Philippines); s 8(3)(g) *Immigration Act 1959* (Singapore).

<sup>52</sup> Section 29(a)(14) *Immigration Act 1940* (Philippines); s 12(3) *Immigration Act 1979* (Thailand).

<sup>53</sup> Section 29(a)(9) *Immigration Act 1940* (Philippines).

<sup>54</sup> Section 8(2) *Immigration Act 1958* (Brunei); art 17(1) *Immigration Law* (Taiwan).

<sup>55</sup> Section 8(3)(b) *Immigration Act 1959/1963* (Malaysia); s 8(1)(b)(ii) *Migration Act 1978* (PNG); s 29(a)(2) *Immigration Act 1940* (Philippines); s 8(3)(b) *Immigration Act 1959* (Singapore); s 11(2)(d)(ii) *Immigration Act 1978* (Solomon Islands); art 17(8) *Immigration Law* (Taiwan); s 12(4) *Immigration Act 1979* (Thailand); s 15(2)(c)(ii) *Immigration Act 1971* (Vanuatu); art 6(3) *Ordinance on Entry, Exit, Residence and Travel of Foreigners 1992* (Vietnam).

<sup>56</sup> Section 8(3)(b) *Immigration Act 1959/1963* (Malaysia); s 8(7)(b)(i) *Migration Act 1978* (PNG); s 29(a)(1) *Immigration Act 1940* (Philippines); s 8(3)(b) *Immigration Act 1959* (Singapore); s 11(2)(d)(iii) *Immigration Act 1978* (Solomon Islands); art 17(8) *Immigration Law* (Taiwan); s 12(4) *Immigration Act 1979* (Thailand); s 15(2)(c)(iii) *Immigration Act 1971* (Vanuatu).

<sup>57</sup> Section 8(3)(c) *Immigration Act 1959/1963* (Malaysia); s 8(1)(c) *Migration Act 1978* (PNG); s 8(3)(c) *Immigration Act 1959* (Singapore); s 11(2)(d)(i) *Immigration Act 1978* (Solomon Islands); s 12(5) *Immigration Act 1979* (Thailand); s 15(2)(c)(i) *Immigration Act 1971* (Vanuatu).

the Philippines, Singapore and Thailand, for instance, prohibit prostitutes from entering,<sup>58</sup> as well as those who procure or live of the earnings of another person's prostitution.<sup>59</sup> Moreover, the Philippines explicitly bar "persons who practice polygamy" from admission into the country.<sup>60</sup>

Most importantly, countries prohibit the entry of persons whose presence in the country can potentially pose a threat to political stability and national security. For this reason, all countries in the region bar persons from entering who have been convicted of (and sentenced for) a crime. In most cases, the nature of the crime and the country of conviction are irrelevant.<sup>61</sup> Moreover, persons, such as terrorists, who are suspect of threatening or overthrowing the government or the political and administrative institutions of the receiving country are not allowed to enter.<sup>62</sup> This prohibition also extends to persons who are suspected of being affiliated with groups that promote these intentions.<sup>63</sup> Persons who are considered potential threats to public safety beyond these categories can be excluded under general clauses that allow prohibition for the protection of national security and sovereignty.<sup>64</sup>

Finally, countries bar a variety of other people from entering their territories. This includes, for example, people who have previously been removed from that country.<sup>65</sup> Malaysia, Singapore and Thailand also do not accept foreigners who have been removed on

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<sup>58</sup> Section 8(3)(e) *Immigration Act 1959/1963* (Malaysia); s 29(a)(4) *Immigration Act 1940* (Philippines); s 8(3)(e) *Immigration Act 1959* (Singapore); s 12(8) *Immigration Act 1979* (Thailand).

<sup>59</sup> Section 8(3)(f) *Immigration Act 1959/1963* (Malaysia); s 29(a)(4) *Immigration Act 1940* (Philippines); s 8(3)(f) *Immigration Act 1959* (Singapore); s 12(8) *Immigration Act 1979* (Thailand).

<sup>60</sup> Section 29(a)(7) *Immigration Act 1940* (Philippines).

<sup>61</sup> Section 8(3)(d) *Immigration Act 1959/1963* (Malaysia); s 29(a)(3) *Immigration Act 1940* (Philippines); s 8(3)(d) *Immigration Act 1959* (Singapore); s 11(2)(e) *Immigration Act 1978* (Solomon Islands); art 17(7) *Immigration Law* (Taiwan); s 12(6) *Immigration Act 1979* (Thailand); s 15(2)(d) *Immigration Act 1971* (Vanuatu).

<sup>62</sup> Section 8(3)(i) *Immigration Act 1959/1963* (Malaysia); s 29(8)(a) *Immigration Act 1940* (Philippines); s 8(3)(i) *Immigration Act 1959* (Singapore).

<sup>63</sup> Section 8(3)(j) *Immigration Act 1959/1963* (Malaysia); s 8(3)(j) *Immigration Act 1959* (Singapore).

<sup>64</sup> Article 9 *Law on Immigration 1994* (Cambodia); art 12 *Law on Control of the Entry and Exit of Aliens 1986* (PR China); s 9(1)(a) *Immigration Act 1959/1963* (Malaysia); s 12 *Immigration Act 1940* (Philippines); ss 8(3)(a), 9 *Immigration Act 1959* (Singapore); art 17(13) *Immigration Law* (Taiwan); s 12(7) *Immigration Act 1979* (Thailand); art 6(4) *Ordinance on Entry, Exit, Residence and Travel of Foreigners 1992* (Vietnam).

<sup>65</sup> Section 29(a)(15), (16) *Immigration Act 1940* (Philippines); s 11(2)(b) *Immigration Act 1978* (Solomon Islands); art 17(11) *Immigration Law* (Taiwan); s 12(11) *Immigration Act 1979* (Thailand).



previous occasions or who are repatriated from abroad.<sup>66</sup> In all countries, prohibitions also extend to the family and dependants of prohibited immigrants.<sup>67</sup> Moreover, unaccompanied and orphan children are barred from entering the Philippines.<sup>68</sup>

For persons who do not fall into any of these categories, but who are viewed as persona non grata, the law of all countries in the region provides special discretionary powers for the Minister or Director of Immigration to prohibit their entry.<sup>69</sup>

Prohibited immigrants are barred from entering the country and they are denied visas, unless the Minister or Director of Immigration makes special, individual exemptions. If persons classified as prohibited immigrants are found in the country, or if their status after arrival changes so that they become prohibited immigrants, the laws of all countries in the Asia Pacific region provide that they be detained and removed as soon as practicable. In some circumstances, they also face criminal charges.<sup>70</sup>

Prohibiting persons from entering is an expression of national sovereignty over immigration. There is no doubt that it is important to control the movements of people for reasons of national security, public health and economic stability. It is legitimate that the exclusion clauses discriminate against persons whose presence in the country poses threats to economic and political life, to certain individuals or to society as a whole. But the prohibition clauses can also bar people who may be in desperate need of protection and asylum. The bar against persons with criminal convictions, for example, can exclude those who have been convicted for political crimes and those who have been convicted wrongly. The receiving country cannot be expected, however, to verify the validity and correctness of convictions that have been made abroad.

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<sup>66</sup> Section 8(3)(k) *Immigration Act 1959/1963* (Malaysia); s 8(3)(l) *Immigration Act 1959* (Singapore); s 12(11) *Immigration Act 1979* (Thailand).

<sup>67</sup> Section 8(2) *Immigration Act 1958* (Brunei); s 8(3)(n) *Immigration Act 1959/1963* (Malaysia); s 29(a)(10) *Immigration Act 1940* (Philippines); s 8(3)(n) *Immigration Act 1959* (Singapore); s 11(2)(h) *Immigration Act 1978* (Solomon Islands); s 15(2)(g) *Immigration Act 1971* (Vanuatu).

<sup>68</sup> Section 29(a)(14) *Immigration Act 1940* (Philippines).

<sup>69</sup> Section 8(3)(k) *Immigration Act 1959/1963* (Malaysia); s 8(3)(k) *Immigration Act 1959* (Singapore); s 11(2)(f), (g) *Immigration Act 1978* (Solomon Islands); s 12(10) *Immigration Act 1979* (Thailand); s 15(2)(e), (f) *Immigration Act 1971* (Vanuatu).

<sup>70</sup> The entry of prohibited immigrants in an offence under s 20 *Immigration Act 1958* (Brunei); art 29 *Law on Control of the Entry and Exit of Aliens 1986* (PR China); s 8(5) *Immigration Act 1959/1963* (Malaysia); s 16(1)(a) *Migration Act 1978* (PNG); s 8(5) *Immigration Act 1959* (Singapore); s 18(1)(i) *Immigration Act 1978* (Solomon Islands); s 22(1)(i) *Immigration Act 1971* (Vanuatu).

Further problems emerge if stateless persons seek to enter, as they cannot be repatriated. But they may often be in great danger unless they are admitted. Finally, provisions that bar prostitutes from entering create problems if these persons are the victims of trafficking. If they are removed from the country they cannot serve as witnesses in the prosecution of traffickers.

Within the context of migrant trafficking, laws that bar certain persons and groups of migrants from entering are major factors that contribute to clandestine and otherwise illegal immigration. The exclusion and prohibition clauses may discourage some people from migrating to a particular country, but they do not take away the incentives for migration. This is the case where individual criminals seek illegal entry, but also, and in increasing numbers, in circumstances where people are desperate to flee unemployment, poverty or persecution and where traffickers offer ways to circumvent prohibitions and other entry restrictions.

### 5.1.2. Arrival Procedures and Border Control

The critical step of immigration clearance is the arrival of a person at a port of entry and the presentation of valid immigration and identity documentation to immigration and customs officials. Arriving persons are obliged to answer all questions at immigration points and in visa applications correctly. Failure to provide the required information and false and misleading statements can lead to prohibition of entry, criminal charges and to removal.<sup>71</sup>

#### 5.1.2.1. Authority in charge

Immigration matters have different priority in the countries of the Asia Pacific region. While some countries consider the movements of people in and out of the country as a rudimentary aspect of foreign affairs and trade, others dedicate more attention and more resources to the control of their borders and to the people who cross them. This is also

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<sup>71</sup> See *infra* Section 5.3.2.

reflected in the way in which the countries design and position their respective Immigration Departments.

Australia, a nation of immigrants which has traditionally placed strong emphasis on immigration control, appears to be the only country in the region that has a stand-alone Department of Immigration. In most countries of the region, immigration is a matter of interior affairs and public security. For that reason, the Immigration Departments of Brunei, Cambodia, PR China, Hong Kong, Macau, Malaysia, Singapore, Thailand and Taiwan are positioned within the Ministry of Interior (Ministry of Home Affairs).<sup>72</sup> In Papua New Guinea, and partly also in PR China, the Ministry of Foreign Affairs has power over immigration, while in the Solomon Islands responsibility is with the Ministry of Commerce.<sup>73</sup> Only in the Philippines is the Immigration Department part of the Ministry of Justice.<sup>74</sup>

#### 5.1.2.2. Immigration and border control

The majority of the Asia Pacific nations require that immigrants arrive at designated points of entry and prohibit the crossing of sea, land and air-borders beyond these points.<sup>75</sup> Clandestine entry outside designated immigration points can lead to detention and criminal charges.<sup>76</sup> All countries have specialised immigration and border control personnel who examine the incoming persons at seaports, airports and land-border control points. For persons arriving aboard sea vessels and aircraft, carriers have to submit lists with the names

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<sup>72</sup> Cf art 5 *Law on Immigration 1994* (Cambodia); art 25 *Law on Control of the Entry and Exit of Aliens 1986* (PR China). In PR China: Ministry of Public Security. In Hong Kong: Security Bureau. In Macau: Serviço de Migração de Polícia de Segurança.

<sup>73</sup> Section 3 *Immigration Act 1978* (Solomon Islands).

<sup>74</sup> Sections 2-4 *Immigration Act 1940* (Philippines), cf Ledesma, *supra* note 14, at 321-322.

<sup>75</sup> Article 13 *Law on Immigration 1994* (Cambodia); art 3 *Law on Control on the Entry and Exit of Aliens 1986* (PR China); s 60 *Immigration Ordinance 1972* (Hong Kong); art 4 *Entry and Residence Act 1999* (Macau); ss 17, 18 *Immigration Act 1959/1963* (Malaysia); art 6(1) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 24 *Immigration Act 1940* (Philippines); ss 17, 18, 18A *Immigration Act 1959* (Singapore); s 23 *Immigration Act 1979* (Thailand).

<sup>76</sup> Articles 1, 6 *Law on Immigration 1994* (Cambodia); art 29 *Law on Control of the Entry and Exit of Aliens* (PR China); s 17(4) *Immigration Law 1959/1963* (Malaysia); art 6(1) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 17(3) *Immigration Act 1959* (Singapore); s 13D *Immigration Act 1978* (Solomon Islands); ss 63, 65 *Immigration Act 1979* (Thailand).

and other details of all passengers and crew.<sup>77</sup> Failure to present these lists can amount to administrative fines and, in some cases, to criminal sanctions.<sup>78</sup> The details of the examination procedure at immigration points are outlined in the immigration legislation of each country.<sup>79</sup> Some countries, such as Cambodia and Taiwan, have no legislative guidelines or procedure and leave it to the Ministers or Directors of Immigration to specify the immigration control systems.<sup>80</sup>

If, at the time of arrival, immigration officials are in doubt about the identity and admissibility of a person, they are entitled to place that person in immigration detention until the immigration status of that person is finalised.<sup>81</sup> The legislation of some countries acknowledges that persons seeking to enter have some right to a hearing and appeal, albeit in a strictly limited way.<sup>82</sup>

In order to investigate the identity and admissibility of entrants, immigration officers are given a range of powers. These include powers to examine all immigration and identity documents, powers of interrogations, search and arrest.<sup>83</sup> Moreover, under the immigration laws of Hong Kong, Malaysia, Singapore and Solomon Islands immigration officials can seize, detain and forfeit any vessel, vehicle and aircraft suspect of being involved in

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<sup>77</sup> Article 11 *Law on Control of the Entry and Exit of Aliens 1986* (PR China); s 5 *Immigration Ordinance 1972* (Hong Kong); s 22 *Immigration Act 1959/1963* (Malaysia); s 5 *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 32 *Immigration Act 1940* (Philippines); ss 22, 23, 23A *Immigration Act 1959* (Singapore); s 5(1)(a) *Immigration Act 1978* (Solomon Islands); ss 26, 27(2) *Immigration Act 1979* (Thailand); s 10(1)(a) *Immigration Act 1971* (Vanuatu).

<sup>78</sup> Section 22(3) *Immigration Act 1959/1963* (Malaysia); art 13(3) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 44(a)(1), (2) *Immigration Act 1940* (Philippines); s 22(3) *Immigration Act 1959* (Singapore); s 5(3) *Immigration Act 1978* (Solomon Islands); s 66 *Immigration Act 1979* (Thailand); s 10(3) *Immigration Act 1971* (Vanuatu).

<sup>79</sup> Sections 4, 5 *Immigration Ordinance 1972* (Hong Kong); s 6 *Entry and Residence Act 1999* (Macau); ss 24, 25 *Immigration Act 1959/1963* (Malaysia); s 9 *Migration Act 1979* (PNG); ss 24-26 *Immigration Act 1959* (Singapore); s 5(2) *Immigration Act 1978* (Solomon Islands); s 18 *Immigration Act 1979* (Thailand); s 10(2) *Immigration Act 1971* (Vanuatu).

<sup>80</sup> Article 6 *Law on Immigration 1994* (Cambodia); art 4 *Immigration Law* (Taiwan).

<sup>81</sup> Sections 26, 27 *Immigration Ordinance 1972* (Hong Kong); s 27 *Immigration Act 1959/1963* (Malaysia); s 25 *Immigration Act 1940* (Philippines); s 27 *Immigration Act 1959* (Singapore); s 13E *Immigration Act 1978* (Solomon Islands); ss 18, 20 *Immigration Act 1979* (Thailand); s 4(2) *Immigration Act 1971* (Vanuatu).

<sup>82</sup> Cf s 27(c) *Immigration Act 1940* (Philippines); s 22 *Immigration Act 1979* (Thailand).

<sup>83</sup> Article 28 *Law on Control of the Entry and Exit of Aliens 1986* (PR China); ss 17E, 57A, 58, 58A, 59 *Immigration Ordinance 1972* (Hong Kong); ss 38-41, 50, 51 *Immigration Act 1959/1963* (Malaysia); art 10 *Immigration (Emergency Provisions) Act* (Myanmar); s 11 *Migration Act 1978* (PNG); ss 38-40, 50, 51 *Immigration Act 1959* (Singapore); s 4 *Immigration Act 1978* (Solomon Islands); art 61 *Immigration Law* (Taiwan); s 59 *Immigration Act 1979* (Thailand); s 4(i) *Immigration Act 1971* (Vanuatu).

immigration offences, and seize all property found in the possession of suspect unauthorised entrants.<sup>84</sup>

### 5.1.3. Post-Arrival Measures: Detention and Removal

Aside from the creation of immigration offences, detention and removal are the most commonly used tools in the fight against migrant trafficking and illegal immigration. Detention and expulsion regulations enable the removal of foreigners who have entered the country unlawfully or who are found residing in the country illegally. Government policy in most countries is constructed on the basis that detention of illegal immigrants, and their immediate return to the sending country, has a strong deterrent effect on other potential illegal migrants.<sup>85</sup>

For those who are detected upon entering the country illegally and for those who are found to be prohibited immigrants, the national law of most countries in the Asia Pacific region provides that they are to be detained and removed. Detention and deportation of illegal immigrants is practised in most countries in the region. Despite the existing regulations, however, some countries are more tolerant towards unauthorised arrivals than others, and permit illegal entrants to stay and legalise their status several years after their arrival.

Estimates about the numbers of persons held in immigration detention and removed from receiving countries are difficult to make given the discrepancy in detention policies and the way in which they are recorded and enforced. In 1999, for instance, Taiwan recorded approximately 200,000 illegal foreigners, including approximately 38,000 mainland Chinese.<sup>86</sup> That same year, Taiwan, however, only returned 1,166 illegal immigrants to the PR China and held 1,400 unauthorised Chinese in detention.<sup>87</sup> Hong Kong apprehended and repatriated 9,592 illegal immigrants in 2000, down from 13,262 in 1999.<sup>88</sup> In Thailand,

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<sup>84</sup> Article 29 *Law on Immigration* (Cambodia); ss 37E, 37G, 46, 46A, 46B, 47, 48 *Immigration Ordinance 1972* (Hong Kong); ss 49, 49A *Immigration Act 1959/1963* (Malaysia); ss 48, 49 *Immigration Act 1959* (Singapore); s 13B *Immigration Act 1978* (Solomon Islands).

<sup>85</sup> Cf Siron & van Baeveghem, *supra* note 1, at 145, and the discussion *supra* Sections 2.2 and 4.3.

<sup>86</sup> "Taiwan: Chinese Smuggling" (1999) 6(12) *Migration News*.

<sup>87</sup> "China, Hong Kong" (2000) 7(2) *Migration News*.

<sup>88</sup> Hong Kong Immigration Department, *Facts and Statistics: Investigation* (2 Apr 2001) [www.info.gov.hk/immnd/english/facts/4.htm](http://www.info.gov.hk/immnd/english/facts/4.htm).

on 3 November 1999 the Government started to deport illegal foreigners and within two months repatriated about one million illegal immigrants from neighbouring countries.<sup>89</sup>

### 5.1.3.1. Detention

All countries in the region have implemented legislation that allows the detention of illegal entrants and prohibited immigrants. Two types of detention have to be distinguished: (a) detention pending decision over the immigration status and admissibility of a person, and (b) detention pending removal.

#### *Detention pending immigration decision*

As mentioned before, the laws of some countries contain provisions that enable immigration officials to order the arrest and detention of persons suspect of illegal immigration.<sup>90</sup> In Australia and Taiwan the detention of unauthorised arrivals is mandatory.<sup>91</sup> Detaining illegal immigrants upon arrival serves two purposes: One is to determine the entrants' immigration status and, if applicable, their eligibility for entry or asylum. Secondly, detention prevents the immigrants from disappearing in the wider community. Immigration detention, as argued earlier, enables authorities to control and restrict the movements of people and, if necessary, facilitate and accelerate the removal process. In principle, detention is ancillary to the administration of entry requirements; it is not correctional and should not have punitive character. However, in particular the Australian detention practice raises serious concerns as it entails severe and illegitimate deprivations of human rights.<sup>92</sup>

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<sup>89</sup> "Thailand: Another Deadline" (1999) 6(12) *Migration News*; "Thailand and Myanmar" (2000) 7(1) *Migration News*.

<sup>90</sup> Article 27 *Law on Control of the Entry and Exit of Aliens 1986* (PR China); s 13D *Immigration Ordinance 1972* (Hong Kong) (detention of Vietnamese refugees); ss 26, 27 *Immigration Ordinance 1972* (Hong Kong); art 3(2) *Clandestine Immigration Act 1990* (Macau); ss 25, 26 *Immigration Act 1940* (Philippines); s 13E *Immigration Act 1978* (Solomon Islands); s 19 *Immigration Act 1979* (Thailand); s 4(2) *Immigration Act 1971* (Vanuatu).

<sup>91</sup> Article 36 *Immigration Law* (Taiwan), and see *supra* Section 4.3.4.2.

<sup>92</sup> See the discussion *supra* Section 4.3.4.2.

### *Detention pending removal*

When it has been established that a foreign citizen is barred by entry laws, it is likely that the person may attempt to evade arrest and removal by disappearing in the wider community. For that reason, all countries in the region detain unlawful foreigners pending removal from the country.<sup>93</sup> The detention seeks to ensure that a person who has been denied access to or stay in a country can be expelled as soon as practicable. After an arrest warrant has been issued, the laws of all countries provide that a person has to be detained until removal from the country to the home country, or until it has been arranged that another place accepts the removee.

#### **5.1.3.2. Removal**

Foreign nationals are removed if and when it has been determined that their entry is barred, and if it has been established that they are ineligible for asylum and protection programmes. The immigration laws of all countries in the region provide mechanisms that regulate the removal of illegal entrants, immigration offenders and those foreigners whose presence in the country pose a threat to national security.<sup>94</sup>

Few countries provide legislation that guides the decision as to where to deport persons who are expelled. Generally, most countries will seek to return the person to the country of nationality or the place of embarkation.<sup>95</sup> If unauthorised entrants have arrived aboard

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<sup>93</sup> Section 34 *Immigration Act 1958* (Brunei); art 27 *Law on Control of the Entry and Exit of Aliens 1986* (PR China); ss 13D, 29, 31, 32 *Immigration Ordinance 1972* (Hong Kong); art 3(2) *Clandestine Immigration Act 1990* (Macau); s 34(1) *Immigration Act 1959/1963* (Malaysia); s 7(1), (2), (4) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 13(1) *Migration Act 1978* (PNG); s 37(a) *Immigration Act 1940* (Philippines); s 34(1) *Immigration Act 1959* (Singapore); s 13F *Immigration Act 1978* (Solomon Islands); art 36 *Immigration Law* (Taiwan); s 17(3) *Immigration Act 1971* (Vanuatu); art 16 *Ordinance on the Entry, Exit, Residence and Travel of Foreigners 1992* (Vietnam).

<sup>94</sup> Sections 32, 33 *Immigration Act 1958* (Brunei); arts 35-39 *Law on Immigration 1994* (Cambodia); arts 27, 30 *Law on Control of the Entry and Exit of Aliens 1986* (PR China); ss 13E, 18, 24, 25 *Immigration Ordinance 1972* (Hong Kong); art 4 *Clandestine Immigration Act 1990* (Macau); ss 31, 33, 56(2) *Immigration Act 1959/1963* (Malaysia); s 7(1)(2) *Immigration (Emergency Provisions) Act 1947* (Myanmar); ss 12, 13(2), (3) *Migration Act 1978* (PNG); ss 37-39, 43 *Immigration Act 1940* (Philippines); ss 31-33 *Immigration Act 1959* (Singapore); ss 13G, 14 *Immigration Act 1978* (Solomon Islands); art 34 *Immigration Law* (Taiwan); ss 22, 54 *Immigration Act 1979* (Thailand); s 17(1) *Immigration Act 1971* (Vanuatu); art 14 *Ordinance in the Entry, Exit, Residence and Travel of Foreigners 1992* (Vietnam).

<sup>95</sup> Cf s 31(1) *Immigration Act 1959/1963* (Malaysia); s 38 *Immigration Act 1940* (Philippines); s 31(1) *Immigration Act 1959* (Singapore).

commercial vessels, they are returned to the custody of the carrier who has to return the person to the place of embarkation at his or her expense.<sup>96</sup> However, in many instances the sending country may be unable or unwilling to accept the return. In fact, especially those sending countries from which large numbers have emigrated for reasons of persecution, unemployment or famine are often very reluctant to accept the return of their own nationals. Secondly, the return of refugees to their home country can amount to contravention of the non-refoulement obligations if the person faces sanctions and persecution in that country.<sup>97</sup> Hence, some countries in the region have legislation that enables removal to places other than the country of nationality. Papua New Guinea also explicitly allows removal to countries to which the removee consents.<sup>98</sup>

#### 5.1.4. Refugee and Asylum Systems

Immigration law is an expression of a nation's sovereignty over its territory and over the decision concerning who may and who may not enter. Refugee law creates an exception to this; it derives primarily from international agreements. Once implemented into domestic law, it recognises that factors beyond the control of the receiving country determine whether or not individual immigrants are allowed to enter and remain in a country, and, most importantly, if they can be removed from it.

International refugee law creates obligations for the receiving countries. It also creates expenses, as those seeking asylum have to be accommodated and fed, and their claims have to be processed. Moreover, the application of refugee law brings with it political issues as the recognition of asylum seekers as genuine refugees — directly or indirectly — labels their home country as unsafe and persecutory. It is for these reasons that many countries chose not to commit themselves to the obligations of the international refugee protection system and not to implement asylum systems in their national laws.

Because refugee law represents an exception to the otherwise strict immigration regulations, the existence, operation and control of asylum systems have become a major

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<sup>96</sup> Cf s 31A *Immigration Act 1959* (Singapore); art 41 *Immigration Law* (Taiwan); s 29 *Immigration Act 1979* (Thailand).

<sup>97</sup> See the discussion *supra* Section 4.3.4.1. See also Ledesma, *supra* note 14, at 246.



determinant for migrant trafficking to Australia and in the Asia Pacific region. Generally speaking, countries that are more generous and humanitarian in the acceptance of asylum seekers have been described as “easy targets” for trafficking. But also, these nations offer the only refuge for those fleeing persecution, torture and armed conflict.

In the past 25 years, refugee law and policy in the region have, to the most part, been dominated by the concern about persons fleeing from Vietnam, Laos and Cambodia. Up until the early 1990s, Indochinese asylum seekers made up the biggest group of refugees in the region. The Asia Pacific nations have made two concerted attempts to control these flows: The first attempt was the Meeting on Refugees and Displaced Persons in South East Asia, which convened in Geneva in July 1979.<sup>99</sup> The second, and more successful of these attempts resulted in the conclusion of the *1989 Comprehensive Plan of Action*. Under the plan, the Contracting Nations agreed to honour the principles of first asylum, allow asylum seekers to land, and determine the status of the Indochinese who were living in refugee camps throughout the region. Consequently, most countries implemented formal procedures for the repatriation of the remaining Indochinese refugees in accordance with the principles of international refugee law.<sup>100</sup> The policies and practice promoted by the *Comprehensive Plan of Action* are, however, limited to persons who fled from Indochina. The regulations do not apply to other asylum seekers; they are generally dealt with on a case-by-case basis, subject to the discretion of the host nation.

In examining the refugee and asylum systems of the countries in the Asia Pacific region, the following paragraphs differentiate between (1) countries that are Signatories of the *Refugee Convention*, and (2) countries that have not signed the Convention.

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<sup>98</sup> Section 13(3) *Migration Act 1978* (PNG).

<sup>99</sup> *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). For further reading see Ann Barcher, “First Asylum in Southeast Asia: Customary Norm or Ephemeral Concept?” (1992) 3 *NYU J Int'l L&P* 1253 at 1254; W Courtland Robinson, *Terms of Refuge: The Indochinese Exodus and the International Response* (1998) 50-58.

<sup>100</sup> See *supra* Section 2.2.3.1.

#### 5.1.4.1. Signatories of the Refugee Convention

As on 31 December 2001, of the countries of the Asia Pacific region, only Australia, Cambodia, PR China, Fiji, Papua New Guinea, Philippines and Solomon Islands signed, acceded or succeeded to the *Convention relating to the Status of Refugees* and the *Refugee Protocol*.<sup>101</sup> By their signatures, these countries committed themselves to provide protection to refugees within the meaning of the Convention, and not to return them to places that pose a danger of persecution or that are otherwise unsafe. However, although these nations have signed the *Refugee Convention*, most of them have not introduced procedures and legislation that regulate the entry of refugees, their stay in the country and the protection provided to them.

Moreover, all these countries, except the Solomon Islands, are Signatories of the *Genocide Convention* and thereby agreed not to refole the persons protected hereunder. Cambodia, the PR China and the Philippines also signed the *ICCPR* and the *Convention against Torture* and have to comply with the non-refoulement obligations under these treaties.<sup>102</sup>

Cambodian immigration law does not explicitly regulate the entry conditions for refugees and asylum seekers. The *Law on Immigration 1994* prohibits un-visaed and otherwise illegal immigrants from entering “except only for the case where it is required to comply with the norms of international treaties of which the Kingdom of Cambodia is a signatory party”.<sup>103</sup> Hence, the provisions of the *Law on Immigration* do not apply to persons protected under Cambodia’s international obligations, such as the *Refugee Convention*,<sup>104</sup> thus enabling refugees to enter Cambodia legally without having to meet the usual entry requirements. There are no further regulations that determine the status and protection of refugee and asylum seekers in Cambodia. Persons who claim refugee status in Cambodia

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<sup>101</sup> 189 UNTS 150 [hereinafter *Refugee Convention*]; 606 UNTS 267 [hereinafter *Refugee Protocol*].

<sup>102</sup> See the list of signatories in Appendix C. The non-refoulement obligations are discussed *supra* Section 4.3.1.1.

<sup>103</sup> Article 3 *Law on Immigration 1994* (Cambodia).

<sup>104</sup> Cambodia acceded to the *Refugee Convention* and to the *Refugee Protocol* on 15 Oct 1992. Cambodia also acceded to the *Genocide Convention* (14 Oct 1950), the *ICCPR* (26 May 1992) and the *Convention against Torture* (15 Oct 1992).

are assessed on a case-by-case basis. In 2000, Cambodia recognised 17 refugees. Another five persons were resettled with the assistance of UNHCR.<sup>105</sup>

China acceded to the *Refugee Convention and Protocol* in 1982. Article 32 of the *Constitution of the People's Republic of China 1982* provides that the PR China may grant asylum to foreigners who request it for political reasons.<sup>106</sup> The obligation to protect political refugees is also reflected in article 15 of China's *Law on Control of the Entry and Exit of Aliens 1986*: "Aliens who seek asylum for political reasons shall be permitted to reside in China upon approval by the competent authorities of the Chinese Government." China has no regulations that outline how the admission of refugees is administered and on what grounds claims are granted or rejected. Moreover, since both the Constitution and the Act refer to "political reasons" it remains unclear on what basis people who flee for reasons recognised under the *ICCPR*, the *Genocide Convention* and the *Convention against Torture* are protected from removal.<sup>107</sup> Given earlier practice, it has, however, been suggested that China's signature of the international refugee instruments automatically brings them into force at the local level.<sup>108</sup> China has accepted some 280,000 Indochinese refugees and allowed their assimilation. Other asylum seekers, most recently primarily North Korean, have generally been rejected. Only few persons have been accepted on a case-by-case basis or resettled in third countries with the assistance of UNHCR.<sup>109</sup>

Although China signed the *Refugee Convention*, its signature does not apply in the newly acquired Special Administrative Regions (SARs) of Hong Kong and Macau. Article 13 of the *Basic Law (Hong Kong)*<sup>110</sup> and article 13 *Basic Law (Macau)*<sup>111</sup> stipulate that the Central People's Government of China is responsible for foreign affairs relating to Hong

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<sup>105</sup> UNHCR, *Provisional Statistics on Refugees and Others of Concern to UNHCR for the year 2000* (11 Apr 2001) [www.unhcr.ch/statist/2000provisional/main.htm](http://www.unhcr.ch/statist/2000provisional/main.htm).

<sup>106</sup> Reprinted in Fernand de Varennes, *Asia-Pacific Human Rights Documents and Resources, Vol 2* (2000) 36. China acceded to the *Refugee Convention* and to the *Refugee Protocol* on 24 Sep 1982.

<sup>107</sup> China ratified the *Genocide Convention* on 18 Apr 1953, and the *Convention against Torture* on 4 Oct 1988. China signed the *ICCPR* on 5 Oct 1998.

<sup>108</sup> Muntarhorn, *supra* note 3, at 61.

<sup>109</sup> Muntarhorn, *supra* note 3, at 58-60 and see the data provided in UNHCR, *Provisional Statistics on Refugees and Others of Concern to UNHCR for the year 2000*, *supra* note 105.

<sup>110</sup> *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, adopted by the Seventh National People's Congress of the People's Republic of China at its Third Session on 4 Apr 1990.

<sup>111</sup> *Basic Law of the Macau Special Administrative Region of the People's Republic of China*, adopted by the Eighth National People's Congress at its First Session on 31 Mar 1993.

Kong and Macau, but the *Basic Laws* authorise the SARs' Governments to conduct the relevant external affairs as specified in other *Basic Law* provisions.<sup>112</sup> Article 153 *Basic Law* (Hong Kong) and article 138 *Basic Law* (Macau) deal with the implementation and application of international agreements. Essentially, it is provided that the views of the Hong Kong and Macau Government have to be sought before international agreements to which China is or becomes a party are extended to the territories.<sup>113</sup> Secondly, article 153 and article 138 provide that international agreements to which China is not a party but which are implemented in Hong Kong or Macau may continue to be implemented in the SARs. Finally, article 151 *Basic Law* (Hong Kong) and article 136 *Basic Law* (Macau) provide that the Special Administrative Regions, using the names "Hong Kong, China" or "Macau, China", may maintain and develop international relations and conclude and implement agreements on their own with foreign states and regions and international organisations.

The *Refugee Convention* does not apply to Hong Kong. The United Kingdom never extended its signature to the Convention and the Protocol over Hong Kong. It has been assumed that the UK thus avoided political tension with China, as the extension would have created the obligation to assess and eventually protect the many illegal immigrants that arrived from China.<sup>114</sup> Given the large number of Vietnamese refugees living in Hong Kong, China has not signalled that it attempts to extend its signature to the Convention to Hong Kong, neither has the Hong Kong Government shown any sign that it may accede to the Convention independently.

This situation is different in Macau. At the time Portugal signed the Convention, it extended its signature to Macau. Before Macau returned to Chinese rule, Portugal declared that its responsibility over the application of the *Refugee Convention* and the *Protocol*

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<sup>112</sup> In particular Chapter VII — External Affairs.

<sup>113</sup> Article 153 *Basic Law* (Hong Kong) reads: "[1] The application to the Hong Kong Special Administrative Region of international agreements to which the People's Republic of China is or becomes a party shall be decided by the Central People's Government, in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region. [2] International agreements to which the People's Republic of China is not a party but which are implemented in Hong Kong may continue to be implemented in the Hong Kong Special Administrative Region. The Central People's Government shall, as necessary, authorise or assist the government of the Region to make appropriate arrangements for the application to the Region of other relevant international agreements." Art 138 *Basic Law* (Macau) is identical.

would cease with the handover. In a letter dated 3 December 1999, the Chinese Government then informed the United Nations that its signatures and China's reservations to the treaties apply to Macau with effect from 20 December 1999.<sup>115</sup> The Government of Macau later implemented the obligations in its new *Entry and Residence Act 1999*.

Fiji, Papua New Guinea and the Solomon Islands are the only Signatories of the *Refugee Convention* and *Protocol* in the South Pacific.<sup>116</sup> Although the countries' immigration laws are based on almost identical legislation, only Papua New Guinea has so far implemented the obligations arising under international refugee law into its *Migration Act 1978*. Section 14A of the Act provides that the Minister has discretion to grant refugee status to eligible persons. Moreover, ss 14B-14C allow the establishment of refugee detention centres to accommodate asylum seekers whilst their cases are assessed. The procedure of determining refugee status, however, is not regulated in the *Migration Act*.

The Philippines acceded to the *Refugee Convention* and to the *Protocol* on 22 July 1981. Section 47(b) *Immigration Act 1940* (Philippines) authorises the President "for humanitarian reasons ... to admit aliens who are refugees for religious, political or racial reasons". Following the accession to the Convention, the Philippine Ministry of Justice issued *Official Circular No 1* determining the groups of foreigners covered by the section 47(b) provision:<sup>117</sup>

1. aliens who are already in the Philippines, and known victims of social, political and religious, or social persecution in their country of origin;
2. persons whose entry under the [Immigration] Act is restricted by existing policies but should otherwise be allowed on humanitarian grounds;<sup>118</sup>
3. persons who are highly skilled and may make a positive contribution to the Philippine economy;
4. known political figures seeking political asylum in the Philippines whose lives may be endangered if forced to return to their homelands.

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<sup>114</sup> Jon Vagg, "Sometimes a Crime: Illegal Immigration and Hong Kong" (1993) 39 *Crim & Del* 355 at 367.

<sup>115</sup> The documentation is reprinted in UN, *Multilateral Treaties Deposited with the Secretary-General, Vol 1* (31 Dec 2000) 325-326, 340.

<sup>116</sup> Fiji succeeded to the *Refugee Convention* and the *Refugee Protocol* on 12 June 1972. Papua New Guinea acceded to the Convention and the Protocol on 17 July 1986. The Solomon Islands acceded to the Convention and the Protocol on 28 Feb 1995.

<sup>117</sup> Reprinted in Muntarhorn, *supra* note 3, at 86 and Ledesma, *supra* note 14, at 334-335.

<sup>118</sup> In 1992 the countries covered by this provision were Albania, PR China, Taiwan, Cuba, Lao PDR, Libya, Macau, North Korea, Russia, Vietnam, South Africa, Cambodia and Iran.

Apart from this Circular issued in 1981, the Philippines have not implemented the obligations arising from international refugee law locally.<sup>119</sup>

However, the Philippines have traditionally been very liberal towards the admission of asylum seekers. Prior to the implementation of the *1989 Comprehensive Plan of Action* the Philippines almost automatically considered asylum seekers as refugees. In 1990, the Philippines introduced a screening procedure for asylum seekers from Vietnam. If claims are successful, applicants are eligible for admission and resettlement. If claims are rejected, the applicant has a right to appeal. For non-Indochinese asylum seekers (mostly Iranians and Afghans) refugee status is determined with the assistance of UNHCR. If granted refugee status, foreigners are allowed to stay in the Philippines temporarily until resettlement can be arranged elsewhere.<sup>120</sup>

#### 5.1.4.2. Asylum systems in non-signatory countries

As mentioned earlier, the majority of countries in the Asia Pacific region are not Party to the *Refugee Convention* and the *Refugee Protocol*. The experience of World War II and the aftermath of the Vietnam War caused many countries to believe that formal adherence to international refugee instruments would result in more asylum seekers, additional burdens and increased legal obligations. Furthermore, most Asian countries traditionally regard human rights aspects as internal issues and do not accept accountability at the international level.

Many countries in the region have, however, accepted refugees, and some nations have put into place policies and legislation that regulate the entry, determination and stay of asylum seekers. But in most instances, these policies have been formed temporarily and only in response to specific refugee caseloads, and their legal basis is defined very narrowly. The decision whether or not to accept asylum seekers appears to be driven primarily by foreign

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<sup>119</sup> Muntarbhorn, *supra* note 3, at 83.

<sup>120</sup> Ledesma, *supra* note 14, at 333; Muntarbhorn, *supra* note 3, at 83-85, 87.

policy, ideological bias, ethnicity and demographic issues, rather than by humanitarian concerns.<sup>121</sup>

### *Lao PDR and Vietnam*

The Lao PDR and Vietnam, for instance, both offer asylum to political refugees under their constitutions. Article 38 of the *Constitution of the Lao People's Democratic Republic 1994* provides that "the Lao PDR grants asylum to foreigners who are persecuted for their struggle for freedom, justice, peace and scientific causes".<sup>122</sup> Article 82 of the *Constitution of the Socialist Republic of Vietnam 1992* provides that

[f]oreign nationals who are persecuted for taking part in the struggle for freedom and national independence, for socialism, democracy and peace, or for engaging in scientific pursuits may be considered for granting of asylum by the Socialist Republic of Vietnam.<sup>123</sup>

The provisions under the Laotian and Vietnamese constitutions are ideologically influenced as they primarily aim to provide asylum to persons who have fled their home country for political reasons. Lao and Vietnam, as well as China and North Korea, are the only socialist countries in the region and among the very few remaining socialist nations in the world. Although their constitutions have undergone amendments since the end of the Cold War, they still reflect the 'brotherhood' that tied the Socialist bloc together prior to its dissolution. Whilst most other former Socialist countries have commenced liberalising, democratising and 'capitalising' their administrative and government systems, Lao and Vietnam continue to pursue Socialist ideals. As part of this ideology they grant asylum to persons "struggling for freedom and national independence [and] for socialism". The constitutional provisions of Lao and Vietnam are, however, not accompanied by regulations that outline the determination of refugee status, and it is questionable whether the practice in these nations meets the standards of international refugee law.

### *Hong Kong SAR*

The *Refugee Convention*, as mentioned earlier, does not apply to Hong Kong although the PR China and the UK have signed it. Hong Kong, however, has witnessed some of the

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<sup>121</sup> Cf Fernando Chang-Muy, "International Refugee Law in Asia" (1992) 3 *NYU J Int'l L & P* 1171 at 1177; Muntarhorn, *supra* note 3, at 13, 33.

<sup>122</sup> Reprinted in de Varennes, *supra* note 106, at 212.

<sup>123</sup> Reprinted in de Varennes, *ibid*, at 552.

highest number of asylum seekers in the region, particularly from Vietnam — up until 1997 Hong Kong was the geographically closest outpost of the Western Bloc to Vietnam. Hong Kong hosted and accepted many refugees from Indochina and participated in the Geneva conferences on Indochinese refugees. Following the adoption of the 1989 *Comprehensive Plan of Action*, Hong Kong amended its *Immigration Ordinance 1972* and introduced a screening procedure for asylum seekers from Vietnam. Under this regime, Vietnamese residents are recognised as refugees either if they have previously resided in Vietnam, or if they were born after 31 December 1982 and their parents have previously been residents in Vietnam. The guidelines of the determination procedure recognise the terms of the *Convention* and the *Protocol relating to the Status of Refugees*. If the claims are successful, applicants are permitted to remain in Hong Kong as refugees pending resettlement elsewhere.<sup>124</sup> The application is, however, limited to persons arriving directly from Vietnam;<sup>125</sup> there are no equivalent regulations for people arriving from elsewhere. Persons who have been screened out are accommodated in detention centres,<sup>126</sup> and the permits that they have been granted can be cancelled at any time.<sup>127</sup> Applicants do, however, have a right to appeal against rejections of their claims, and against detention and removal from Hong Kong.<sup>128</sup> Following the completion of the *Comprehensive Plan of Action* and the handover of Hong Kong to the PR China, on 9 January 1998, the HKSAR Government started to abolish the ‘Port of First Asylum’ policy by treating new arrivals of Vietnamese as illegal immigrants and no longer considered their claims for asylum.<sup>129</sup>

### Malaysia

Malaysian law does not contain any provisions regarding asylum, and for the most part of its history the country has not accepted refugees. In 2002, the Malaysian Government adopted a “zero-entry” policy for unauthorised foreigners.<sup>130</sup> However, particularly after the end of the Vietnam War, Malaysia has witnessed the arrival of large numbers of

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<sup>124</sup> Section 13A(1) *Immigration Ordinance 1972* (Hong Kong).

<sup>125</sup> *Ibid*, s 13AA. See also Muntarbhorn, *supra* note 3, at 63.

<sup>126</sup> Sections 13C, 13D *Immigration Ordinance 1972* (Hong Kong).

<sup>127</sup> *Ibid*, s 13A(2)-(4).

<sup>128</sup> *Ibid*, ss 13DA, 13F.

<sup>129</sup> *Hong Kong: The Facts — Immigration* (1999) 1.

<sup>130</sup> “Southeast Asia” (2002) 9(2) *Migration News*.



Indochinese boatpeople who were temporarily accommodated in refugee camps pending resettlement in countries such as Australia, the United States and Canada.

Malaysia signed the *1989 Comprehensive Plan of Action* and, assisted by UNHCR, screened the Indochinese refugees living in the Malaysian camps. A Refugee Status Review Board (RSRB) has been established for applicants whose primary claim have been rejected.<sup>131</sup> But at the same time, Malaysia prohibited any further Vietnamese boatpeople from landing and actively redirected boats to the open sea, thus violating the *Comprehensive Plan of Action* and the non-refoulement principle. For example, between June 1989 and 1990, Malaysian government authorities redirected 218 boats carrying over 10,000 Vietnamese asylum seekers. Most of the boats went on to Indonesia, but some did not make it and many people drowned in the South China Sea.<sup>132</sup>

Malaysia's immigration and refugee policy has been highly discriminatory in that it has always been, and continues to be, in favour of migrants from Muslim countries. Malaysia has accepted Muslim asylum seekers from Cambodia, Sri Lanka and Vietnam as permanent settlers. In some cases, the government has assisted asylum seekers from Iran and Sri Lanka pending resettlement, but in other cases, persons have been deported as prohibited immigrants, especially if they had previously transited in countries that are regarded as safe.<sup>133</sup>

### *Brunei Darussalam*

Brunei has been portrayed as the most hostile country towards the admission of refugees. Since its independence in 1984, the Sultanate has pursued a rigid policy of no entry towards asylum seekers regardless of their country of origin. It has been argued that demography, ethnicity, and national security are among the reasons for which Brunei strictly enforces the prohibition of unauthorised entry. Brunei's Government fears that the

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<sup>131</sup> Cf Arthur Helton, "The Comprehensive Plan of Action for Indo-Chinese Refugees" (1990) 8 *NYLS J Hum Rts* 111 at 124-125.

<sup>132</sup> Arthur Helton, "The Malaysian Policy to Redirect Vietnamese Boat People" (1992) 24 *NYU J Int'l L&P* 1203 at 1204, 1210; id, "The Comprehensive Plan of Action for Indo-Chinese Refugees" *ibid*, at 139.

<sup>133</sup> Cf Muntarhorn, *supra* note 3, at 113-116; Yen Tran, "The Closing of the Saga of the Vietnamese Asylum Seekers" (1995) 17 *Hous J Int'l L* 463 at 475, 480-485.

country's wealthy economy, full-employment and ethnic uniformity would be threatened if asylum seekers were admitted to the Sultanate.<sup>134</sup>

### *Singapore*

Singapore's position is similar to that of Malaysia and Brunei. Geographically, Singapore is a very small country and its economy is much wealthier than most other countries in the region. Singapore admitted some 2,208 refugees from Indochina in the mid 1970s,<sup>135</sup> but radically changed its law with the *Immigration Amendment Act 1977* that established a rigid 'no entry' policy towards asylum seekers. Asylum seekers are considered prohibited immigrants, detained and removed as soon as practicable. Following the adoption of the *1989 Comprehensive Plan of Action* Singapore has not granted refugee status to asylum seekers and has placed harsh penalties, including imprisonment, caning and deportation on unauthorised arrival and illegal employment. Some asylum seekers from China, Afghanistan, Iraq and Iran have however been admitted if UNHCR agreed to assist them in finding resettlement in third countries.<sup>136</sup>

### *Thailand*

The large influx of Vietnamese and Cambodian refugees after the fall of Saigon is one of the reasons why Thailand does not adhere to international refugee law and has no provisions under domestic law dealing with asylum seekers. At the height of the influx from Vietnam, the Thai Supreme Court stated categorically that the *Refugee Convention* has no binding effect in Thailand.<sup>137</sup> It has been stated that Thailand's principal reasons for objecting accession to the *Refugee Convention* is its strong desire for national sovereignty and security, and the fact that Thailand mistrusts article 38 of the Convention, which confers the power to settle disputes relating to interpretation of the Convention upon the International Court of Justice.<sup>138</sup>

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<sup>134</sup> Cf Muntarbhorn, *supra* note 3, at 100-101.

<sup>135</sup> Figures from Australia, Senate Standing Committee on Foreign Affairs and Defence, *supra* note 133, at 29.

<sup>136</sup> See Muntarbhorn, *supra* note 3, at 121-124; OECD, *Migration and the Labour Market in Asia* (1996) 107-108.

<sup>137</sup> Decision Dika No 273/2523 (1980).

<sup>138</sup> Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (1993) 145-146; Muntarbhorn, *supra* note 3, at 132-133.

Although Thailand has not signed most of the international human rights and refugee treaties, in practice, the country has been very liberal and hosted millions of refugees from neighbouring countries and generally complies with the non-refoulement obligation. Prior to 1989, Thai asylum policy was primarily dependent on factors such as country of origin, ethnicity, time of entry and means of transport, and the Thai Government has been accused of pushing back asylum seekers from Laos, Cambodia, Vietnam and the then Burma. Thailand later adopted the *1989 Comprehensive Plan of Action* and introduced screening procedures of Vietnamese refugees on the basis of the Convention and Protocol. Non-Indochinese asylum seekers have been assessed on a case-by-case basis. Refugee status determination is usually assisted by UNHCR and successful applicants are granted temporary refuge.<sup>139</sup>

#### *Indonesia*

Indonesia, too, has no formalised refugee and asylum system and it has not signed the *Refugee Convention* and the *Protocol*. However, despite its many other human rights problems, Indonesia has a surprisingly good record in admitting asylum seekers in response to individual events. Throughout the 1980s, Indonesia permitted many boats that had been “pushed off” from Malaysia to land and allowed the asylum seekers to stay temporarily until resettlement or removal had been arranged. Indonesia, for the most part, respected the non-refoulement obligation. The country has no fixed policy for the growing number of Middle Eastern asylum seekers that have arrived in the second half of the 1990s. Many of them moved on to seek protection in Australia, while others have been protected by UNHCR under its mandate on a case-by-case basis.<sup>140</sup>

#### *Myanmar*

Myanmar is not a Signatory of the *Refugee Convention* and *Protocol* and not member to any regional refugee organisation and the *Comprehensive Plan of Action*. Other information about Myanmar’s asylum policy was unavailable.

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<sup>139</sup> Helton, “The Comprehensive Plan of Action for Indo-Chinese Refugees” *supra* note 131, at 113, 125; Muntarborn, *supra* note 3, at 125-131.

<sup>140</sup> Muntarborn, *supra* note 3, at 104-105, 111.

#### 5.1.4.3. Refugee protection as customary international law?

The obligations arising from the *Refugee Convention* and the *Protocol*, and the protection granted under these treaties, are limited to Signatory Parties. As seen earlier, the majority of Asia Pacific nations have not signed the major instruments of international refugee law and are reluctant to adhere to the principles of refugee protection.

There is a question, however, whether countries that are not bound by treaties could be bound to the principles of international refugee law by custom. It is arguable that some of the provisions under the *Refugee Convention*, especially the obligation not to remove refugees to unsafe places, amount to customary international refugee law, thus requiring adherence by non-Signatory nations.

Some writers in the field have stated that non-refoulement of refugees is a principle of customary international law and that it prohibits nations from removing refugees to places where their freedom and lives may be in jeopardy.<sup>141</sup> In fact, as seen in the previous sections, some countries in the region, including those that have not signed international refugee law treaties, apply the non-refoulement rule, even in the absence of judicial rulings.

To determine whether or not state practice amounts to customary international law, it is necessary to look at the duration, uniformity or consistency, and the generality of the practice and the so-called "opinion juris et necessitas".<sup>142</sup>

As seen earlier, the state practices in the region have been marked by variation and inconsistency.<sup>143</sup> Not only is there a great discrepancy between countries, also individual nations have not been consistent in their practice of asylum, as seen in the cases of Malaysia and Thailand in particular. Generally, if asylum seekers have been admitted in the countries of the region, this has only been on ad hoc bases in response to individual exodi and only for limited periods of time. From the viewpoint of states, it needs to be asked whether there has been a subjective element, an opinio juris that led the nations to

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<sup>141</sup> Cf Colin Fieman, "A State's Duty to Protect Refugees under Customary International Law: A Case Study of Thailand and the Cambodian 'Displaced Persons'" (1989) 21(1) *Colum HRLR* 287 at 297-302; Guy Goodwin-Gill, *The Refugee in International Law* (2<sup>nd</sup> ed, 1996) 167; Nazaré Albuquerque Abell, "The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees" (1999) 11(1) *IJRL* 60 at 70 with further references.

<sup>142</sup> See generally Ian Brownlie, *Principles of Public International Law* (4<sup>th</sup> ed, 1990) 5-7; H W A Thirlway, *International Customary Law and Codification* (1972) 46-60.

accept asylum seekers — if and when they have done so — “out of a sense of legal obligation, humanitarian impulse, or some political calculus.” Again, official statements that have been made and motivations that have been expressed by Asia Pacific nations lead to think that there is no such sense of obligation. In many instances, the countries have denied asylum, or threatened to do so. Most of the countries do not adhere to the major human rights instruments and, up until very recently, did little to cooperate on matters of asylum and migration in regional or international basis.<sup>144</sup>

In summary, it can be noted that the way in which the countries of the Asia Pacific region, both isolated and cumulatively, have accepted (or not accepted) asylum seekers, demonstrates their reluctance to commit themselves to the obligations of international refugee law or undertake legal obligations to accept and protect asylum seekers. It is therefore suggested that the rules of international refugee law have yet to emerge as principles of customary international law in the Asia Pacific region.<sup>145</sup>

### 5.1.5. Summary

It is vital for the nation-state to encourage family reunion, tourism, business and skilled migration to enable its society to ‘mingle’ with other cultures and people, and create opportunities for transnational tourism, migration and trade. It is also the duty of each government to control and monitor the influx and outflows of foreigners, and protect its people from individuals or groups of foreigners who pose a potential threat to its citizens. Every nation has a sovereign right to determine who may and who may not enter its territory. Illegal immigration undermines this right.

All countries in the world have developed sophisticated immigration systems in order to ensure maximum freedom of transit and travel, while at the same time preventing unwanted foreigners from entering. These systems provide mechanisms that control and determine the quantity and quality of migration flows. They also create obstacles for those who do not meet immigration requirements. Some countries, however, make humanitarian

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<sup>143</sup> See Barcher, *supra* note 99, at 1262-1272.

<sup>144</sup> For recent initiatives see *infra* Section 6.5.

exceptions for those in need by offering facilitated entry to those desperate to leave their home country or a place of temporary asylum. If, however, these options do not exist or if the obstacles that have been placed on immigration and asylum become too great and do not adequately respond to the demand for immigration, some potential migrants will look for alternative ways of migration to circumvent these obstacles.

Moreover, if differences in immigration and asylum systems between neighbouring countries amount to major discrepancies, or if these systems inadequately regulate the entry and transit of foreigners, migrants as well as traffickers will use and abuse the more lenient countries as transit and immigration points. It is for that reason that countries with a more liberal and 'relaxed' attitude towards immigration, and those that do not have the personnel and resources to closely monitor cross-border movements have been described as "easy targets" for trafficking activities.

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<sup>145</sup> Cf Barcher, *supra* note 99, at 1286.

## 5.2. Trafficking Offences in the Asia Pacific Region

The primary focus of Section 5.2 is on criminal prohibitions targeting the operations and organisation of migrant traffickers.

Most immigration laws contain provisions that criminalise circumstances where entry requirements have not been met or where they have been actively violated.<sup>146</sup> This includes offences committed by the migrants themselves<sup>147</sup> and those committed by traffickers who, in one way or another, facilitate the illegal entry of migrants.

In the Asia Pacific region, only Macau has implemented a special code of offences to deal with “clandestine immigration”.<sup>148</sup> Though other countries may include immigration offences in their criminal codes. General criminal law provisions, such as forgery offences,<sup>149</sup> are also used to prosecute certain aspects of trafficking. Also, the passports acts of some countries provide special offences involving the use of fraudulent documents.<sup>150</sup>

The analysis in this section follows that of Chapter Four in that it distinguishes between offences that criminalise the operational side of trafficking, and those addressing organisational aspects.

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<sup>146</sup> *Law on Immigration 1994* (Cambodia); *Law on Control of the Entry and Exit of Aliens 1986* (PR China); *Immigration Ordinance 1972* (Hong Kong); *Immigration Act 1959/1963* (Malaysia), *Immigration Act 1940* (Philippines), *Immigration Act 1959* (Singapore), *Immigration Act 1978* (Solomon Islands); *Immigration Law* (Taiwan); *Immigration Act 1979* (Thailand); *Immigration Act 1971* (Vanuatu).

<sup>147</sup> See *infra* Section 5.3.

<sup>148</sup> *Clandestine Immigration Act 1990* (Macau).

<sup>149</sup> *Criminal Law 1997* (PR China); *Crimes Ordinance 1971* (Hong Kong); *Penal Code 1995* (Macau); *Penal Code 1932* (Philippines), *Penal Code 1963* (Solomon Islands); *Criminal Code 1935* (Taiwan); *Penal Code 1956* (Thailand), *Penal Code 1981* (Vanuatu); *Penal Code 2000* (Vietnam).

<sup>150</sup> *Passports Act 1966* (Malaysia), *Passports Act* (Philippines)

### 5.2.1. Operational Offences<sup>151</sup>

#### 5.2.1.1. Mobilising migrants

The activity that has earlier been described as “mobilising migrants” stands at the very beginning of the trafficking operations.<sup>152</sup> Recruiters who contact potential migrants in the sending country or lure them with false promises about opportunities abroad seek to obtain the migrants’ consent and thereby initiate the illegal journey and the offences that are associated with it. Hence, it is desirable to criminalise the mobilisation of migrants, thus preventing trafficking at its earliest possible stage. However, very few countries in the region have legislation that criminalises the recruitment of migrants or the false promises that are made to induce them to migrate.

Two types of offences can be identified: (1) The offence of mobilising migrants can be designed to penalise those who prey on the local population. In this case it is prohibited to recruit persons by making false promises, thereby inciting them to emigrate. (2) The offence can also seek to protect the local population from illegal immigration. This means that the object of the offence is the offering of an illicit service such as unauthorised entry to foreign immigrants.

#### *Mobilising migrants by false promises etc*

The Philippines, which has a long history in labour emigration, both legally and illegally, has special legislation to protect its citizens from illegal recruitment. Sections 6 and 7 *Migrant Workers and Overseas Filipinos Act 1995* make it an offence to

canvass, enlist, contract, transport, utilise, hire, or procure workers and ... refer, contract services, promise or advertise for employment abroad, whether for profit or not, when undertaken by a non-licensee or non-holder of authority contemplated under article 13(f) of ... the Labour Code of the Philippines ...<sup>153</sup>

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<sup>151</sup> See the overview of “operational offences” *infra* Appendix B.1.1.

<sup>152</sup> See *supra* Section 3.4.1.

<sup>153</sup> *An Act to institute the policies of overseas employment and establish a higher standard of protection and promotion of the welfare of migrant workers, their families and overseas Filipinos in distress and for other purposes*, Republic Act No 8042 of 7 June 1995 [hereinafter *Migrant Workers and Overseas Filipinos Act 1995* (Philippines)], reprinted in UNICRI & AIC, *Rapid Assessment: Human Smuggling and Trafficking from the Philippines* (1999) 60-63.



The Act also penalises circumstances where recruiters charge exorbitant fees for their services,<sup>154</sup> where they give out false information in relation to recruitment and employment,<sup>155</sup> where they withhold or deny travel documents from migrant applicants before departure,<sup>156</sup> and where they fail to reimburse migrants if the deployment does not take place.<sup>157</sup> Penalties for offences under ss 6 and 7 range between six and twelve years imprisonment and fines between 200,000 and 500,000 Pesos (c Aus\$8,300-20,600).

The provisions primarily focus on illegal labour migration rather than on migrant trafficking. They seek to protect the home population from falling victim to organisations that lure them with job opportunities abroad, and take upfront payments for services that are not supplied, or supplied contrary to the agreement with the migrant labourer. If more than three persons commit the offence, illegal recruitment is deemed committed by a syndicate; it is deemed committed in large scale if it is committed against three or more persons.<sup>158</sup> Under s 4(c)(ii) *Racketeer-Influenced and Corrupt Organisations (RICO) Act* (Philippines) “dealing with large-scale illegal recruitment and illegal placement of Filipino workers abroad” is considered a racketeering activity and any participation in such activity and acquisition of assets deriving from that activity can be penalised by imprisonment of up to twenty years.<sup>159</sup>

There are significant difficulties in criminalising the ‘recruiting’ of migrants by trafficking organisations. Clearly, creating incentives for international migration, awareness of different living standards in different countries, and expectations of a better lifestyle in a wealthier nation cannot be made the subject of criminal offences, even if these incentives and expectations are based on false perceptions and, in some cases, blunt lies. However, it must be possible to hold traffickers criminally liable in circumstances where migrants are lured with false promises so that they enter into agreements and contracts with criminal organisations and pay substantial amounts of money. In these cases, the criminal law can

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<sup>154</sup> Section 6(a) *Migrant Workers and Overseas Filipinos Act 1995* (Philippines).

<sup>155</sup> *Ibid*, s 6(b).

<sup>156</sup> *Ibid*, s 6(k).

<sup>157</sup> *Ibid*, s 6(m).

<sup>158</sup> *Ibid*, s 6.

<sup>159</sup> Sections 5, 6 *Racketeer-Influenced and Corrupt Organisations (RICO) Act* (Philippines). For details of the *Racketeer-Influenced and Corrupt Organisations (RICO) Act* (Philippines) see *infra* Section 5.2.2.1.

serve not only as a way to penalise traffickers, but also as a means to seize assets and prevent the illegal journey at the earliest possible stage.<sup>160</sup>

The Philippines' Act pursues that very goal, in that it seeks to prevent that people are lured with false promises for the sake of making profit. But the application of the Act is limited to the protection of Filipino migrant workers. Much of the legislation does not apply to migrants who emigrate for reasons that are not work related, and it does not protect non-Philippine nationals, including the many migrants who transit through the Philippines.<sup>161</sup>

### *Offering illegal migration*

As mentioned before, in countries that witness large influxes of illegal immigrants, the offence of 'mobilising illegal migrants' can be used as a tool to protect the local population from outsiders.

Section 37D(1)(b) and (c) *Immigration Ordinance 1972* (Hong Kong) makes it an offence to "offer to arrange or assist" in the passage of a person who is or will be an unauthorised entrant upon arrival in Hong Kong. For the perpetrator to be criminally liable, it is sufficient that he or she "offers" the illegal passage; it is not required that the journey has begun. In other words: Offering illegal immigration to Hong Kong, regardless of where this offer is made,<sup>162</sup> is a criminal offence and subject to penalties of up to HK\$5,000,000 (c Aus\$1,275,000) and fourteen years imprisonment. If committed by an organised crime group, the offence under s 32D(1) can be prosecuted with the special powers and measures of the *Organised and Serious Crime Ordinance 1994*.<sup>163</sup>

Similar to the provision under Hong Kong law, Macau's *Clandestine Immigration Act 1990* criminalises the enticing of another person to enter Macau illegally, punishable by imprisonment of two years.<sup>164</sup>

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<sup>160</sup> See also generally Graeme Hugo, "Undocumented International Migration in Southeast Asia" in Carunia Firdausy (ed), *International Migration in Southeast Asia: Trends, Consequences, Issues and Policy* (1998) 73 at 94.

<sup>161</sup> See *supra* Section 3.4.2.3.3.

<sup>162</sup> Section 37J *Immigration Ordinance 1972* (Hong Kong).

<sup>163</sup> Schedule 1 *Organised and Serious Crime Ordinance 1994* (Hong Kong), Chapter 455, No 82 of 1994, available at Hong Kong SAR, Department of Justice, *Bilingual Laws Information System*, [www.justice.gov.hk](http://www.justice.gov.hk) (19 July 2001). For details see *infra* Section 5.2.2.1.

<sup>164</sup> Article 6 *Clandestine Immigration Act 1990* (Macau).

The provisions under the laws of Hong Kong and Macau differ from that of the Philippines in that their key criterion is the promotion of a crime: illegal transport and entry into the territories. The emphasis in Hong Kong and Macau is on a purely criminal act: the offer of an illegal service, and not on the making of and luring with false promises. Macau, Hong Kong and Philippine laws adequately recognise the link between illegal migration and organised crime in that they contain special provisions and higher penalties for cases where the offers are made by criminal organisations.

#### 5.2.1.2. Organising illegal migration

The analysis in previous Chapters has demonstrated that the larger and more sophisticated trafficking organisations have multiple levels of staff and that the key-arrangers are rarely actively engaged in individual operations. This makes their prosecution particularly difficult. Some countries, however, have recently introduced special legislation under which organisers of migrant trafficking can be made criminally liable. China, together with its Special Administrative Region Hong Kong, are the two jurisdictions in the region that have criminal offences specifically designed to target the core members of criminal organisations. Chapter Four has shown that Australia, too, introduced an offence for organising and facilitating in 1999: s 232A *Migration Act* (Cth).<sup>165</sup>

In the PR China, article 318 *Criminal Law 1997* contains a very comprehensive offence that criminalises persons “who arrange for people to secretly cross the national border”. Penalties for the offence range between a minimum of two and a maximum of seven years imprisonment and additional fines.<sup>166</sup> A qualified offence with a penalty of not less than seven years imprisonment applies if the offender is involved in any of the following circumstances:

- (1) ringleader of organisations that arrange for people to secretly cross the national boundary [border];
- (2) repeatedly organising people to secretly cross the national boundary [border] or arranging for a large number of people to secretly cross the national boundary [border];
- (3) causing serious injuries and deaths to the people making an illegal crossing;

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<sup>165</sup> See *supra* Section 4.1.2.2.

<sup>166</sup> Formerly art 177 *Criminal Law 1979* (PR China).

- (4) depriving or restricting freedom of the people who are making an illegal crossing;
- (5) resisting investigation by violent or threatening methods;
- (6) obtaining huge amounts of illegal income;
- (7) other exceptionally serious circumstances.

The offence under article 318 *Criminal Law 1997* (PR China) seeks to target directly the arrangers and financiers of migrant trafficking operations who stand back and are not directly involved in the commission of immigration offences. The provision also draws attention to the fact that trafficking is often organised on very sophisticated and professional levels. It is for that reason that Chinese law places higher penalties on offenders who “repeatedly” commit trafficking offences and who “obtain huge amounts of illegal income”, though the meaning of “huge amount” is left undefined. Given the dangers involved in illegal methods of transporting people across borders, operations that cause injuries or deaths, or which involve the use of violence or the deprivation of freedom are subject to higher penalties, too. The Chinese provisions take care to distinguish between different kinds of trafficking, between different levels of organisation and operation, and between the dangers these activities entail. To date, article 318 *Criminal Law* (1997) is a unique example of how offences can be designed specifically to target the core characteristics of organised migrant trafficking. As such, it serves as a useful model for future law reform in the region.

Hong Kong's *Immigration Ordinance*, too, contains an offence for arranging the passage of unauthorised entrants to Hong Kong.<sup>167</sup> In comparison to the offence under Chinese law, the Hong Kong provision, however, neither defines the meaning of “arranging” nor does it distinguish between different types of offenders and different modes of transportation, thus creating a broad offence of organising illegal immigration. The offence can attract fines of up to HK\$5,000,000 (c Aus\$1,275,000) and fourteen years imprisonment. It is a defence if the person did not know, and had no reason to suspect, that the passenger would become an unauthorised entrant upon arrival in Hong Kong.<sup>168</sup>

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<sup>167</sup> Section 37D (1)(a) *Immigration Ordinance 1972* (Hong Kong).

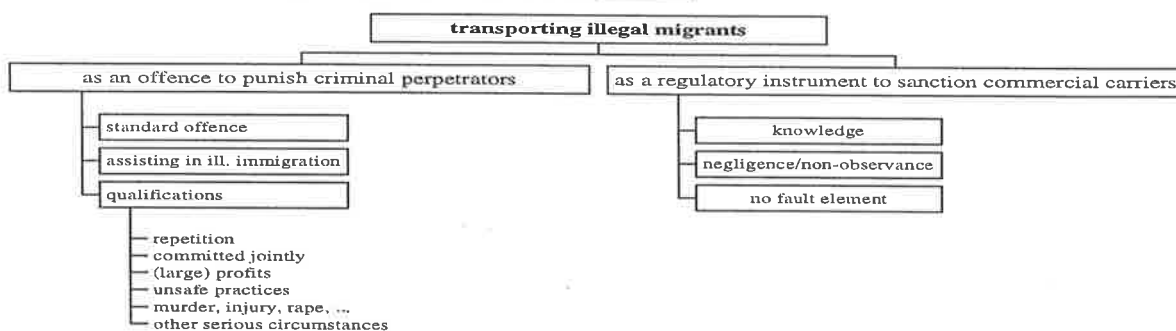
<sup>168</sup> *Ibid*, s 37D (2)(a).

The principal problem inherent in the Chinese and Hong Kong provisions is that they depend largely on international law enforcement cooperation and legal assistance in order to effectively combat trafficking organisations. As seen in earlier Chapters, most criminal organisations engaged in illegal migration operate transnationally, and often the arrangers and organisers of trafficking are located abroad. Therefore, the investigation of crimes and the prosecution and extradition of offenders depend largely on the assistance provided by agencies in foreign countries. It is for that reason that these provisions may prove to be unsuccessful as long as they are unique to China, Hong Kong and Australia and are not complemented by legislation in any other countries of the Asia Pacific region.

### 5.2.1.3. Transporting illegal migrants

The central and principal aspect of migrant trafficking is the transportation of migrants in violation of immigration laws. As seen in earlier Chapters, traffickers use multiple modes of transportation and show great variety in the ways in which they circumvent border and immigration control. The criminal element inherent in these operations, and the objective of the provisions that criminalise them can be differentiated as shown in Figure 24.

Figure 24: Offences: Transporting illegal migrants, Asia Pacific



Transporting illegal migrants can be established as a criminal offence to punish those who engage in the unlawful bringing of non-citizens into a country. In most, if not all instances, this transportation is carried out with the knowledge and for the profit of the perpetrator or the organisation he or she is part of. Secondly, the offence of transporting illegal migrants can be designed as a regulatory instrument to sanction commercial carriers. In these cases, the provisions make carriers liable for negligence towards the documentation of their passengers or for non-observance of other immigration regulations. Moreover, these

provisions seek to ensure that carriers verify the admissibility of their passengers in the destination country prior to arrival, thereby preventing unauthorised migrants from landing at the destination point.

#### 5.2.1.3.1. *Liability of criminal perpetrators*

All countries in the region have offences that criminalise persons who bring illegal migrants into the country. Common to all of these offences is the requirement that the offender is knowingly carrying migrants into a country in contravention of that nation's immigration laws.

The immigration laws of PR China, Macau, Malaysia, Philippines, Solomon Islands and Thailand contain provisions that criminalise the bringing of non-citizens who are not lawfully entitled to enter the country or who are otherwise inadmissible.<sup>169</sup> In the remaining countries, the offence is designed differently. The provisions under Cambodian, Hong Kong, Myanmar, Papua New Guinea, Singaporean and Taiwanese law focus on the "aiding and abetting" of another person's illegal immigration by providing transportation.<sup>170</sup> The application of these provisions goes beyond the transportation of unauthorised entrants; they criminalise any contribution and assistance to illegal immigration of which transportation is only one form.

Penalties for the commission of the offence vary widely and include fines, imprisonment, deportation,<sup>171</sup> and, in Malaysia and Singapore, physical punishment in the form of caning and whipping.<sup>172</sup> Fines range from as little as 5,000 Philippine Pesos (c Aus\$185)<sup>173</sup> to

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<sup>169</sup> Article 321(1) *Law on Control of the Entry and Exit of Foreigners 1986* (PR China); art 7(1) *Clandestine Immigration Act 1990* (Macau); s 55A(1) *Immigration Act 1959/1963* (Malaysia); s 46(1) *Immigration Act 1940* (Philippines); s 18(1)(s) *Immigration Act 1978* (Solomon Islands); s 63(1) *Immigration Act 1979* (Thailand).

<sup>170</sup> Article 29(2) *Law on Immigration 1994* (Cambodia); art 37D(1)(c) *Immigration Ordinance 1972* (Hong Kong); s 13(5) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 16(1)(b) *Migration Act 1978* (PNG); s 57(1)(b) *Immigration Act 1959* (Singapore); art 57(2) *Immigration Law* (Taiwan).

<sup>171</sup> For the removal and deportation of illegal immigrants, see *supra* Section 5.13.2. Also note that "[t]hese penal offences are prosecuted independently of the deportation proceeding arising from the same act or acts under these sections; hence, acquittal in the criminal action does not bar the deportation of the accused in the event that deportation are substantiated. Further, the deportation of the accused shall be abated until the service of sentence." Ledesma, *supra* note 14, at 317-318.

<sup>172</sup> Cf s 55A(1) *Immigration Act 1959/1963* (Malaysia); s 57(1) *Immigration Act 1959* (Singapore).

<sup>173</sup> Section 46(1) *Immigration Act 1940* (Philippines).

HK\$5,000,000 (c Aus\$1,275,000), while terms of imprisonment can reach up to fourteen years.<sup>174</sup>

The common failure of most offences is that they create a general offence of transporting undocumented or otherwise unauthorised immigrants without paying attention to the ways in which migrants are transported and to the different levels of sophistication in which the transportation is carried out. For example, in many countries, individual operators who sporadically transport small numbers of migrants across the border are liable in the same way as carriers who hide hundreds of migrants in freight containers or secluded compartments in ships and trucks. The legislation also does not sufficiently take into account the dangers inherent in some methods of clandestine transportation and it does not distinguish between different types of transporters and their position within the criminal organisation.

Earlier Chapters have demonstrated that the transportation of illegal migrants can be carried out in many different ways and can be arranged at different levels of sophistication depending on the trafficking organisation involved, the route chosen and the demand of the migrant customers. Only very few countries have special offences to punish the more serious crimes with higher penalties. Some of these offences are specifically designed to target professionally operating trafficking organisations, while others place higher penalties on offences that result in physical harm to the trafficked migrant. For example, repeatedly transporting illegal migrants,<sup>175</sup> the joint commission of offences,<sup>176</sup> and offences that generate particularly large profits<sup>177</sup> are aggravating factors in the PR China, Macau, Malaysia, the Philippines and Taiwan. Moreover, Chinese law provides higher penalties if the transportation is carried out by unsafe vessels, if it is accompanied by murder, rape or other physical assault of the migrant, if migrants are sold to other criminals, or if other circumstances qualify the crime as exceptionally serious.<sup>178</sup> These distinctions established

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<sup>174</sup> Section 37C(1)(i) *Immigration Ordinance 1972* (Hong Kong).

<sup>175</sup> Article 321 *Law on Control of the Entry and Exit of Aliens 1986* (PR China); art 57(1) *Immigration Law* (Taiwan).

<sup>176</sup> Section 55A(4) *Immigration Act 1959/1963* (Malaysia); s 46(1) *Immigration Act 1940* (Philippines); and see Ledesma, *supra* note 14, at 317-318.

<sup>177</sup> Article 321 *Law on Control of the Entry and Exit of Aliens 1986* (PR China); art 7(2) *Clandestine Immigration Act 1990* (Macau).

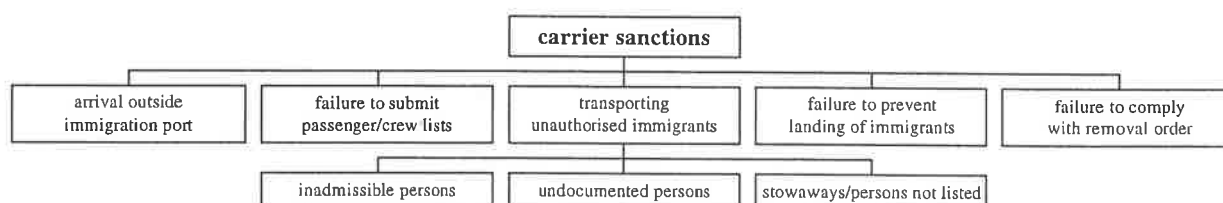
<sup>178</sup> Article 321 *Law on Control of the Exit and Entry of Citizens 1986* (PR China).

in the provisions under Chinese, Macau, Malaysian and Philippine laws respond more appropriately to the nuances that exist between different types of trafficking and between different types of traffickers.

### 5.2.1.3.2. Liability of commercial carriers

In addition to the offences outlined in the previous section, most countries in the region place administrative and/or criminal sanctions on carriers who transport unauthorised immigrants or who otherwise fail to comply with the immigration regulations of the destination country.

Figure 25: Carrier sanctions, Asia Pacific



The sanctions imposed on carriers who fail to comply with immigration regulations cover a wide spectrum and include all aspects of the arrival of immigrants, their immigration clearance, their departure, and their removal. For example, some countries penalise carriers who arrive outside designated points of entry.<sup>179</sup> Carriers are also liable if they fail to submit lists of all passengers and crew,<sup>180</sup> and if they fail to prevent the landing of their passengers prior to immigration clearance.<sup>181</sup> Furthermore, under the laws of the

<sup>179</sup> Section 18(2) *Immigration Act 1959/1963* (Malaysia); ss 18(2), 18A(2) *Immigration Act 1959* (Singapore); ss 23, 63(2) 65 *Immigration Act 1979* (Thailand).

<sup>180</sup> Section 22(3) *Immigration Act 1959/1963* (Malaysia); art 13(3) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 44(a)(1), (2) *Immigration Act 1940* (Philippines); s 22(3) *Immigration Act 1959* (Singapore); s 5(3) *Immigration Act 1978* (Solomon Islands); s 66 *Immigration Act 1979* (Thailand); s 10(3) *Immigration Act 1971* (Vanuatu).

<sup>181</sup> Sections 20(2) *Immigration Act 1959/1963* (Malaysia); s 39 *Immigration Ordinance 1972* (Hong Kong); ss 44(b)(1), 46A *Immigration Act 1940* (Philippines); s 20(2)(4) *Immigration Act 1959* (Singapore); s 5(3) *Immigration Act 1978* (Solomon Islands); ss 27(1), 67 *Immigration Act 1979* (Thailand); s 10(3) *Immigration Act 1971* (Vanuatu).



Philippines, Taiwan, Thailand and Vanuatu, carriers are criminally liable if they fail to remove inadmissible foreigners and cover the expenses for the removal.<sup>182</sup>

The key aspect of carrier sanctions is the liability for the transportation of unauthorised immigrants. In all countries of the region, carriers face penalties if they carry persons who are undocumented or otherwise inadmissible, or if persons who are not listed on passenger and crew lists are found on board the arriving vessel (so-called stowaways).<sup>183</sup> In all cases, liability is restricted to circumstances in which the carrier knew, or had reasons to believe or suspect, that the immigrant was not in possession of valid entry documents or that the person would otherwise become an unauthorised entrant upon arrival.<sup>184</sup> Carriers are not held responsible if their passengers hold fraudulently documented passengers.

In some jurisdictions, in addition to individual offenders, penalties can also be placed on large, commercial carriers. Malaysian law, for instance, provides a penalty of up to 100,000 Ringgits (c Aus\$48,000) if a body corporate conveys illegal immigrants into Malaysia.<sup>185</sup> Simultaneously “a member of the board of directors, a manager, a secretary or a person holding an office or a position similar to that of a manager or secretary of the body corporate” can be personally liable to a fine of up to 100,000 Ringgits, whipping and to imprisonment for a term of up to ten years.<sup>186</sup> Section 57(2) and (2A) *Immigration Act 1959* (Singapore) contains provisions identical to those under Malaysian law. In a similar way, under Thai immigration law a “juristic person, Board of Directors, manager or agent of such juristic person shall be fined according to the penalty prescribed for such

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<sup>182</sup> Section 44(b)(3) *Immigration Act 1940* (Philippines); arts 41, 58 *Immigration Law* (Taiwan); ss 29(1), (3), 71, 72 *Immigration Act 1979* (Thailand); s 17(6) *Immigration Act 1971* (Vanuatu).

<sup>183</sup> Sections 37C(1), (2)(b)-(d), 40 *Immigration Ordinance 1972* (Hong Kong); art 36 *Entry and Residence Act 1999* (Macau); ss 44(c), 46(2) *Immigration Act 1940* (Philippines); ss 22(4), 43 *Immigration Act 1959/1963* (Malaysia); ss 22(4), 23(4), 23A (4), 42 *Immigration Act 1959* (Singapore); art 38(2), 57 *Immigration Law* (Taiwan); s 70 *Immigration Act 1979* (Thailand); s 22(7) *Immigration Act 1971* (Vanuatu).

<sup>184</sup> Sections 37C, 40 *Immigration Ordinance 1972* (Hong Kong); art 36 *Entry and Residence Act 1999* (Macau); s 46A *Immigration Act 1940* (Philippines).

<sup>185</sup> Section 55A(2) *Immigration Act 1959/1963* (Malaysia).

<sup>186</sup> *Ibid*, s 55A(3).

offence”.<sup>187</sup> The Macau *Organised Crime Act 1997*<sup>188</sup> also contains provisions that make corporate bodies criminally liable for “enticing and assisting [in] clandestine migration”.<sup>189</sup>

It needs to be stressed that the key objective of provisions under the heading “carrier liability” is not the creation of criminal offences and the prosecution of offenders. The provisions, which are complemented by provisions under international law,<sup>190</sup> are intended to ensure that commercial carriers and corporate organisations comply with laws requiring scrutiny of travel documents. Additionally, all expenses attached to the processing of migrants and their detention and removal are laid on those who transport them into the respective country. The corporations targeted by this regulatory legislation are in most, if not all cases commercial operators and not criminal organisations.<sup>191</sup>

However, the situation is different in circumstances where carriers, including commercial transporters, knowingly or intentionally traffic persons clandestinely into another country. In these cases, the carriers are the targets of criminal offences and subject to much higher penalties. In Hong Kong, Myanmar, Singapore, Thailand and Vietnam, for instance, carriers who knowingly — or have reasonable grounds to believe — bring illegal immigrants into the country are liable to fines ranging between 100,000 Thai Baht (c Aus\$4,300) and HK\$5,000,000 (c Aus\$1,275,000), and imprisonment between two and fourteen years.<sup>192</sup> And, as mentioned previously, under Malaysian, Singaporean and Thai law, key managers within a corporate organisation that conveys illegal immigrants can be fined individually and imprisoned for such offences.

#### 5.2.1.4. Harboursing and concealing illegal migrants

To disguise their activities and prevent the detection of illegal migrants, trafficking organisations, as discussed earlier, often rely on local people who provide accommodation

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<sup>187</sup> Section 83 *Immigration Act 1979* (Thailand).

<sup>188</sup> *Lei da Criminalidade Organizada*, Act No 6/97M of 30 July 1997 [hereinafter *Organised Crime Act 1997* (Macau)].

<sup>189</sup> Articles 14, 1(1)(g) *Organised Crime Act 1997* (Macau).

<sup>190</sup> See *infra* Section 6.1.1.2.

<sup>191</sup> See also the discussion *supra* Section 4.1.2.3.1.

<sup>192</sup> Section 37C *Immigration Ordinance 1972* (Hong Kong); s 13(2) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 57(1)(c) *Immigration Act 1959* (Singapore); s 63 *Immigration Act 1979* (Thailand); art 20(1) *Ordinance on Entry, Exit, Residence, and Travel of Foreigners in Vietnam 1992*.

to the migrants until further arrangements for travel or employment are made. The concealment and harbouring of illegal migrants not only occurs in destination countries but also in embarkation and transit points, as the illegal journey is normally not made in a single venture.<sup>193</sup> The clandestine stay of illegal migrants is an integral part of migrant trafficking and is also closely connected to other offences such as illegal employment, prostitution and the sex industry. This explains why most jurisdictions in the region criminalise the harbouring and concealment of illegal migrants.

The immigration laws of Cambodia, Macau, Malaysia, the Philippines, Papua New Guinea, Singapore, Solomon Islands, Taiwan, Thailand and Vanuatu contain provisions that make it an offence to harbour and conceal any person not lawfully entitled to enter or reside in the country.<sup>194</sup> Penalties for the offences include fines between 5,000 Philippine Pesos (c Aus\$190)<sup>195</sup> and Sin\$6,000 (c Aus\$6,000),<sup>196</sup> and terms of imprisonment between three to six months<sup>197</sup> and ten years.<sup>198</sup>

The offence under Hong Kong's immigration law is different in that it criminalises "any person who assists an unauthorised entrant to remain in Hong Kong" if that person knows or has reasonable grounds to suspect that the entrant resides in Hong Kong unlawfully; it is not required that the person is hidden or otherwise concealed.<sup>199</sup> The provision in Myanmar is also more general in that it criminalises those who assist or attempt to assist persons illegally remaining in the country.<sup>200</sup>

Although the harbouring and concealing of illegal immigrants are characteristics of most trafficking operations, there are significant problems in criminalising them. First of all, most jurisdictions, except the Solomon Islands and Singapore,<sup>201</sup> fail to provide a definition

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<sup>193</sup> See *supra* Section 3.4.2.3.1.

<sup>194</sup> Article 29(2) *Law on Immigration 1994* (Cambodia); art 3 *Clandestine Immigration Act 1990* (Macau); s 56(1)(d) *Immigration Act 1959/1963* (Malaysia); s 16(c) *Migration Act 1978* (PNG); s 46(1) *Immigration Act 1940* (Philippines); s 57(1)(d) *Immigration Act 1959* (Singapore); art 164 *Criminal Code 1925* (Taiwan); s 64 *Immigration Act 1979* (Thailand); s 22(1)(l) *Immigration Act 1971* (Vanuatu).

<sup>195</sup> Section 46(1) *Immigration Act 1940* (Philippines).

<sup>196</sup> Section 57(1)(d) *Immigration Act 1959* (Singapore); Singapore Immigration & Registration, *News Release: Tough Enforcement Action against Immigration Offenders* (Feb 1999).

<sup>197</sup> Article 29(1), (2) *Law on Immigration 1994* (Cambodia); s 16(c) *Migration Act 1978* (PNG).

<sup>198</sup> Section 46(1) *Immigration Act 1940* (Philippines).

<sup>199</sup> Section 37DA *Immigration Ordinance 1972* (Hong Kong).

<sup>200</sup> Section 13(5) *Immigration (Emergency Provisions) Act 1947* (Myanmar).

<sup>201</sup> Section 2 *Immigration Act 1959* (Singapore); s 2 *Immigration Act 1978* (Solomon Islands).

or any other clarification of what harbouring and concealing is, and, more importantly, what it is not. Secondly, it is important that the offences require a fault element to limit their application to circumstances in which the perpetrator knows or at least negligently disregards the fact that she or he is hosting an unlawful non-citizen. If the meaning of the terms remains undefined and if there is no fault element, there is serious danger that the provisions can be abused to criminalise even the most insignificant forms of providing food and shelter to a person, not knowing that that person is an illegal immigrant.

#### *Commercial accommodation*

Similar to the sanctions imposed on carriers who transport illegal migrants, some countries have introduced legislation that imposes fines on providers of accommodation if they host illegal migrants. For example, in Malaysia, since June 2000 landlords are required to check that their tenants are legally in the country.<sup>202</sup> In a similar fashion, Cambodian, Hong Kong and Thai immigration laws require anyone who provides accommodation to foreigners to keep record and/or notify the competent authority about the stay of foreigners.<sup>203</sup> Failure to do so can result in administrative fines or criminal penalties. Singapore is now contemplating the introduction of similar legislation.<sup>204</sup> The nature of these offences is similar to those applying to commercial carriers of undocumented migrants, in that they create fines for persons who offer accommodation and fail to comply with registration requirements.

#### **5.2.1.5. False statements for another person's immigration**

Earlier Chapters have shown that in many instances traffickers are facilitating illegal migration by fraudulently obtaining the necessary documents or by making misrepresentations to immigration, customs and law enforcement officers on behalf of their

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<sup>202</sup> "Malaysia: More Migrants" (2000) 7(4) *Migration News*.

<sup>203</sup> Article 38 *Law on Immigration 1994* (Cambodia); s 17(3) *Immigration Ordinance 1972* (Hong Kong); s 38 *Immigration Act 1979* (Thailand).

<sup>204</sup> "Southeast Asia" (2000) 8(4) *Migration News*.

migrant customers.<sup>205</sup> It is for that reason that the laws of most countries criminalise the making of false statements for the person “himself or herself” and “for another person”.

The laws of Fiji, Hong Kong, Malaysia, Myanmar, Papua New Guinea, Singapore and Solomon Islands criminalise the making of false statements for the purpose of “obtaining or attempting to obtain” an entry permit, passport or other travel documents “for himself or another person”.<sup>206</sup> Philippine, Papua New Guinea, Hong Kong, Solomon Islands and Vanuatu immigration laws contain provisions that criminalise any false statement that is knowingly made for another person in an immigration matter, irrespective of the purpose of this statement.<sup>207</sup> In Macau, every false statement made towards immigration officials is a criminal offence, regardless of whether or not the statements is made for another person or the person herself or himself.<sup>208</sup> The *Immigration (Emergency Provisions) Act 1947* of Myanmar has a special provision to criminalise false statements made “to prevent the apprehension of any foreigner who has contravened any of the provisions of this Act”.<sup>209</sup>

Some countries only — or additionally — have general offences of making false statements in their criminal laws. Thailand, for instance, has an offence of “giving false information to public officials” in s 137 *Penal Code 1956*.<sup>210</sup> The Solomon Islands’ *Penal Code 1963* also criminalises the making of false statements with the intention to cause a public official to undertake or omit a particular act.<sup>211</sup> Similar offences can be found in the criminal laws of Hong Kong and Fiji.<sup>212</sup>

Persons found guilty of making false statements to obtain documents or otherwise enable another person to immigrate unlawfully are liable to fines between 1,000 Pesos (c Aus\$37)

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<sup>205</sup> See the discussion *supra* Section 3.4.2.2.

<sup>206</sup> Section 312 *Penal Code 1945* (Fiji); s 42 *Immigration Ordinance 1972* (Hong Kong); s 56(1)(k) *Immigration Act 1959/1963* (Malaysia); s 12A *Passports Act 1966* (Malaysia); s 13(7)(b) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 5(b) *Passports Act*; Chapter 17, No 83 of 1975 [hereinafter *Passports Act 1975* (PNG)]; s 57(1)(k) *Immigration Act 1959* (Singapore); s 18(1)(a) *Immigration Act 1978* (Solomon Islands).

<sup>207</sup> Section 42(1)(a) *Immigration Ordinance 1972* (Hong Kong); s 45(f) *Immigration Act 1940* (Philippines) (limited to statements made under oath; Ledesma, *supra* note 14, at 317); s 16(j) *Migration Act 1978* (PNG); s 18(1)(d) *Immigration Act 1978* (Solomon Islands); s 22(1)(a) *Immigration Act 1971* (Vanuatu).

<sup>208</sup> Article 12 *Clandestine Immigration Act 1990* (Macau).

<sup>209</sup> Section 13(6) *Immigration (Emergency Provisions) Act 1947* (Myanmar).

<sup>210</sup> See *infra* Section 5.3.2.

<sup>211</sup> Section 130 *Penal Code 1963* (Solomon Islands).

<sup>212</sup> Section 143 *Penal Code 1945* (Fiji); s 36 *Crimes Ordinance 1971* (Hong Kong).

in the Philippines<sup>213</sup> and HK\$150,000 (c Aus\$38,300) in Hong Kong, and can be sentenced with up to fourteen years imprisonment.<sup>214</sup>

The requirements of the respective offences are generally very limited in quantity and quality. Most provisions do not distinguish between professional traffickers, who may enable numerous migrants to immigrate illegally by making false statements, and, for example, family members and friends who make misrepresentations on behalf of individual relatives. As with the harbouring of illegal migrants, it is crucial to be very clear about the scope of the offences and the circumstances in which they shall apply. Criminalising false statements should not result in punishing everyone who provides false information to public officials. A fault element, such as knowledge that the statement is untrue, is one important tool to limit the offence; requiring a particular purpose of the statement (eg “to obtain entry”) is another one. Essentially, the provisions that can be found in the Asia Pacific countries meet these requirements, however, great caution must be exercised when prosecuting offenders.

Coaching and inciting migrants to make false claims to immigration, customs and law enforcement authorities is not criminalised in any country in the region.

#### **5.2.1.6. Production and provision of fraudulent documents**

The analysis in Chapter Three has shown that the use of fraudulent travel and identity documents is an integral part of migrant trafficking, particularly in the case of airborne trafficking.<sup>215</sup> The following paragraphs examine differences and similarities of criminal provisions in the region that deal with forged or otherwise fraudulent documentation. Following the distinction established in Chapter Four, the offences are differentiated between (1) producing such documents (forgery and falsification), and (2) transferring them. Offences involving the use and possession of fraudulent documents by migrants are examined in Section 5.3.3 below.

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<sup>213</sup> Section 45(f), (h) *Immigration Act 1940* (Philippines).

<sup>214</sup> Section 42(4) *Immigration Ordinance 1972* (Hong Kong).

### 5.2.1.6.1. Forgery and falsification of documents

The forgery and falsification of immigration and identity documentation are criminal offences in all countries of the Asia Pacific region. Three different kinds of forgery offences can be identified: The criminal codes of all countries in the region contain general offences that criminalise the forgery of government paper and documents. Secondly, all countries, except Papua New Guinea, the Philippines and Thailand have provisions that are specifically designed to prevent and combat document fraud in the context of immigration; hence, they are integrated in immigration legislation. Additionally, some countries have separate passports acts or other legislation that deal specifically with the production of travel and identity documents.<sup>216</sup>

The offences that can be found in immigration laws criminalise the production of false documents and falsification of genuine documents that are required for immigration purposes. Passports and visas are the most obvious and most commonly used immigration documents,<sup>217</sup> but in countries with more complex immigration and residence systems, the forgery offences also cover documents such as employment contracts, household registrations, residence and other identity cards.<sup>218</sup> Chinese law also prohibits the falsification of emigration documents that are issued to Chinese nationals seeking to travel abroad.<sup>219</sup> The forgery offence under Taiwan's *Criminal Code* extends to the forgery of tickets for international travel.<sup>220</sup> The criminalised methods of forgery include falsifying<sup>221</sup> or forging,<sup>222</sup> scratching, erasing, copying,<sup>223</sup> altering or defacing,<sup>224</sup> tampering<sup>225</sup> and making<sup>226</sup> travel documents or documents that can be used as travel documents.

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<sup>215</sup> See *supra* Sections 3.4.2.2.1 and 3.4.2.4.2.

<sup>216</sup> *Passports Act 1966* (Malaysia); *Passports Act* (Philippines).

<sup>217</sup> See *supra* Section 5.1.1.2.

<sup>218</sup> Cf art 32 *Law on Immigration 1994* (Cambodia); art 266 *Penal Code 2000* (Vietnam); art 42(2)(a) *Immigration Ordinance 1972* (Hong Kong).

<sup>219</sup> Article 14 *Law on Control of the Exit and Entry of Citizens 1986* (PR China).

<sup>220</sup> Articles 203, 212 *Criminal Code 1935* (Taiwan).

<sup>221</sup> Article 20(1) *Ordinance on Exit, Entry, Residence and Travel of Foreigners in Vietnam 1992*; "fakes" art 32 *Law on Immigration 1994* (Cambodia); art 11(1) *Clandestine Immigration Act 1990* (Macau).

<sup>222</sup> Article 29 *Law on Control of the Entry and Exit of Aliens 1986* (PR China); art 14 *Law on Control of the Exit and Entry of Citizens 1986* (PR China); s 42(2)(a)(i) *Immigration Ordinance 1972* (Hong Kong); s 55D *Immigration Act 1959/1963* (Malaysia); s 12(1)(a) *Passports Act 1966* (Malaysia); s 13(7)(c) *Immigration (Emergency Provisions) Act 1947* (Myanmar); art 212 *Criminal Code 1935* (Taiwan).

<sup>223</sup> Article 32 *Law on Immigration 1994* (Cambodia).

Major discrepancies exist between the penalties placed on forgery offences. In China, for instance, forgery of an entry permit is punishable by “a warning, a fine or detention for not more than ten days”<sup>227</sup> while in the Philippines and Cambodia falsification of travel, residence and identity documentation can attract a penalty of up to fifteen years imprisonment.<sup>228</sup> Penalties under Malaysian law also include physical punishment.<sup>229</sup> Fines range between \$1,000 in the Solomon Islands (c Aus\$380)<sup>230</sup> and HK\$150,000 (c Aus\$38,300) in Hong Kong.<sup>231</sup>

In addition to the immigration offences, most penal codes in the region contain general offences that criminalise the forgery of government paper and other documents. These offences are primarily designed to prevent and combat the unauthorised production and falsification of official documents. For example, the criminal laws of Hong Kong, Papua New Guinea, the Philippines, Taiwan and Thailand penalise the making of false documents generally.<sup>232</sup> As such, they cover a broad range of government documents, including official identity documentation. These offences usually do not distinguish between different kinds of documents and between the results caused by the use of fraudulent documents.

The criminal codes of some countries provide special offences with higher penalties for identity document forgery. Cambodia’s *Criminal Law Provisions 1992*, Fiji’s *Penal Code 1945*, Macau’s *Penal Code 1995* and Vietnam’s new *Penal Code 2000*, for instance, contain specific offences for the altering and falsification of the contents of passports, visas

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<sup>224</sup> Article 29 *Law on Control of the Entry and Exit of Aliens 1986* (PR China); art 14 *Law on Control of the Exit and Entry of Citizens 1986* (PR China); art 42(2)(a)(i) *Immigration Ordinance 1972* (Hong Kong); s 55D *Immigration Act 1959/1963* (Malaysia); s 12(1)(a) *Passports Act 1966* (Malaysia); s 13(7)(c) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 18(1)(b) *Immigration Act 1978* (Solomon Islands); art 212 *Criminal Code 1935* (Taiwan); s 22(1)(b) *Immigration Act 1971* (Vanuatu).

<sup>225</sup> Section 12(1)(a) *Passports Act 1966* (Malaysia); s 13(7)(c) *Immigration (Emergency Provisions) Act 1947* (Myanmar).

<sup>226</sup> Section 55D *Immigration Act 1959/1963* (Malaysia).

<sup>227</sup> Article 29 *Law on Control of the Entry and Exit of Aliens 1986* (PR China); art 14 *Law on Control of the Exit and Entry of Citizens 1986* (PR China).

<sup>228</sup> Article 32 *Law on Immigration 1994* (Cambodia); *Passports Act* (Philippines)

<sup>229</sup> Section 55D *Immigration Act 1959/1963* (Malaysia); whipping of not more than six strokes; s 12B *Passports Act 1960* (Malaysia): whipping of not more than six strokes.

<sup>230</sup> Section 18(3) *Immigration Act 1978* (Solomon Islands).

<sup>231</sup> Section 42(4) *Immigration Ordinance 1972* (Hong Kong).

<sup>232</sup> Sections 71, 72 *Crimes Ordinance 1971* (Hong Kong); s 462 *Criminal Code 1974* (PNG); art 172 *Penal Code 1932* (Philippines); art 210 *Criminal Code 1935* (Taiwan); ss 264, 265 *Penal Code 1956* (Thailand).



and other identity documents.<sup>233</sup> In the PR China, the forgery offence contained in article 280 *Criminal Law 1997* operates as a qualification to the offences under Chinese immigration and emigration law.<sup>234</sup>

As mentioned in earlier parts of this study, the production and provision of fraudulent identity and immigration documentation requires sophisticated techniques as well as networks that supply and distribute these documents.<sup>235</sup> It has been found that identity document fraud is, to the most part, a highly organised activity and closely associated with migrant trafficking and other forms of organised crime. It is for that reason that some individual countries have specifically legislated against highly organised and professional methods of document fraud.

Macau's *Organised Crime Act*, for instance, provides a special, qualified offence if members of criminal organisations are found "retaining or holding" fraudulent identity and travel documents in order to enable or facilitate trafficking and other organised crime activities.<sup>236</sup> Vietnam's *Penal Code* prescribes higher penalties if the forgery is committed "in an organised manner", more than once, or if it causes serious consequences.<sup>237</sup>

Trafficking organisations often depend on corrupt government officers in order to obtain fraudulent and genuine identity documents. For that reason, some countries provide special offences if public officials are involved in forgery offences. These are set out in Section 5.2.1.7 below.

The offences dealing with identity and immigration document fraud are usually highly technical provisions which extend to sophisticated methods of modifying genuine documents or producing false ones. From a legal perspective, it is important that the provisions adequately cover different kinds of immigration and identity documentation and the different ways in which they can be falsified. From a law enforcement perspective, it is

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<sup>233</sup> Article 47(2), (3) *Criminal Law Provisions 1992* (Cambodia); s 341(3) *Penal Code 1945* (Fiji); art 245 *Penal Code 1995* (Macau); arts 266, 284 *Penal Code 2000* (Vietnam).

<sup>234</sup> Article 29(2) *Law on Control of the Entry and Exit of Aliens 1986* (PR China); art 14 *Law on Control of the Exit and Entry of Citizens 1986* (PR China): "if the circumstances of the case are serious enough to constitute a crime, criminal responsibility shall be investigated in accordance with the [criminal] law."

<sup>235</sup> See *supra* Section 3.4.2.2.

<sup>236</sup> Article 6 *Organised Crime Act 1997* (Macau).

important that authorities keep pace with technical developments and use adequate methods and instruments to apprehend false documents. Within the context of migrant trafficking, it has been found that the production of fraudulent documents is in most, if not all cases, carried out by professional criminal organisations. Therefore, it is appropriate to provide higher penalties for forgery that is organised on a large scale, as seen in the examples of Macau and Vietnam. However, in order for these provisions to operate successfully, it is necessary that they be complemented by equivalent legislation in other countries.

#### 5.2.1.6.2. *Transfer of documents to another person including selling*

An additional feature of identity and immigration fraud in the Asia Pacific region is the transfer and provision of documents to other persons. This is in some cases accompanied by bribery of government officials and the illegal selling of passports and other travel documentation.

Most jurisdictions in the Asia Pacific region, except Macau, Myanmar and Thailand, criminalise the transfer of immigration and identity documents.<sup>238</sup> The Chinese *Law on Control of the Exit and Entry of Citizens 1986*, for example, makes Chinese nationals criminally liable for transferring their exit and entry certificates to another person,<sup>239</sup> and the *Law on the Control of the Entry and Exit of Aliens 1986* (PR China) contains an identical offence for foreigners who transfer their certificates.<sup>240</sup> In Hong Kong, it is an offence to transfer “any travel document, certificate of entitlement, entry permit, re-entry permit, certificate of identity, document of identity, APEC business travel card, travel pass or Vietnamese refugee card” to another person.<sup>241</sup> Malaysian immigration law, which is largely identical with that of Brunei and Singapore, provides that any person who “gives, sells or parts with possession of any Entry Pass, Internal Travel Document or Certificate in

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<sup>237</sup> Article 266(2) *Penal Code 2000* (Vietnam); cf art 6 *Organised Crime Act 1997* (Macau).

<sup>238</sup> See art 32 *Law on Immigration 1994* (Cambodia); s 45b *Immigration Act 1940* (Philippines).

<sup>239</sup> Article 14 *Law on Control of the Exit and Entry of Citizens 1986* (PR China).

<sup>240</sup> Article 29(1) *Law on Control of the Entry and Exit of Aliens 1986* (PR China).

<sup>241</sup> Section 42(2)(a)(ii) *Immigration Ordinance 1972* (Hong Kong).

order that it may be used” unlawfully by another person shall be guilty of an offence.<sup>242</sup> Moreover, the Malaysian *Passports Act 1960* makes it an offence to allow another person to have possession of one’s passport.<sup>243</sup> The Papua New Guinea *Migration Act 1978*, the Solomon Islands’ *Immigration Act 1978* and the *Immigration Act 1971* of Vanuatu contain similar offences.<sup>244</sup> Under Taiwan’s *Immigration Law*, the offence also includes the transfer of fraudulent tickets that are used to travel to another country.<sup>245</sup>

Some countries have special offences for the (unauthorised) selling of identity and immigration documents, which is particularly relevant in, but not exclusive to, cases where government officials are found issuing visas and passports in return for bribes. For example, the *Criminal Law* of the PR China makes it an offence to “provide [...], or sell exit and entry documents such as passports and visas”.<sup>246</sup> Similarly, the immigration acts of Malaysia, Singapore, Papua New Guinea, Solomon Islands, and Vanuatu criminalise the selling of entry and re-entry permits, passports, and internal travel documents.<sup>247</sup>

Once again, major discrepancies exist between the penalties placed on the illegal transfer of travel documentation. In Papua New Guinea and Singapore, for instance, the penalty is as low as a fine of 5,000 Kina (c Aus\$3,100), Sin\$2,000 (c Aus\$2,000) and imprisonment for six months maximum. The penalty under Hong Kong law is a fine of HK\$150,000 (c Aus\$38,000) or imprisonment for fourteen years. In Cambodia, offenders can be sentenced to imprisonment for up to fifteen years.<sup>248</sup>

The transfer of identity and immigration documents can occur in many different ways and at different levels of organisation. It is important that different types of offenders and different levels of crime are criminalised and punished differently. For that reason, public officials who abuse their positions to sell unissued or fraudulent documents need to be dealt with differently to persons who transfer their documents to relatives and friends, and

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<sup>242</sup> Section 56(i) *Immigration Act 1959/1963* (Malaysia); s 57(1)(i) *Immigration Act 1959* (Singapore).

<sup>243</sup> Sections 12(e), (g), (h) *Passports Act 1966* (Malaysia).

<sup>244</sup> Section 16(1)(h) *Migration Act 1978* (PNG); s 18(1)(p) *Immigration Act 1978* (Solomon Islands); s 22(1)(n) *Immigration Act 1971* (Vanuatu).

<sup>245</sup> Article 53 *Immigration Law* (Taiwan).

<sup>246</sup> Article 320 *Criminal Law 1997* (PR China).

<sup>247</sup> Section 56(i) *Immigration Act 1959* (Malaysia); s 57(1)(i) *Immigration Act 1959* (Singapore); s 16(1)(h) *Migration Act 1978* (PNG), s 18(1)(p) *Immigration Act 1978* (Solomon Islands); s 22(1)(n) *Immigration Act 1971* (Vanuatu).

<sup>248</sup> Article 32 *Law on Immigration 1994* (Cambodia).

differently again to trafficking organisations who transfer documents in great numbers. Some laws distinguish between offenders who are public officials and those who are not, as shown in the following section. But no country in the region makes a distinction between individual offenders and criminal organisations that trade in documents in large numbers.

#### 5.2.1.7. Participation of officials in immigration offences

The corruption of government officials is a major problem closely associated with organised crime in the Asia Pacific region. It is therefore essential that all countries in the region have adequate anti-corruption and bribery legislation. Most countries have introduced anti-corruption legislation to prevent and combat the bribery of public officials at all levels of government. However, a detailed study of this legislation in the region exceeds the limitations of this thesis and must be left for future research.

Corrupt public officials in immigration, customs, border control and law enforcement authorities often facilitate the activities of migrant trafficking organisations. Generally, they are criminally liable for trafficking offences in the same way as non-officials. But in the context of migrant trafficking, criminalising public officials is particularly important in cases where offences cannot be committed without office. For example, government employees who issue false documents or immigration officers who ignore undocumented incoming passengers are in positions that enable them to assist trafficking organisations by committing crimes that cannot be committed by non-officials.<sup>249</sup> In order to successfully combat migrant trafficking, it is necessary to identify the authorities and personnel in charge of immigration and crime control, and make those criminally liable who abuse their positions and who, directly or indirectly, assist criminal organisation and their operations.

Some countries in the region have introduced additional, specific legislation to criminalise public officials who assist and engage in migrant trafficking offences.<sup>250</sup> This includes persons who supply travel and identity documents, who ‘turn a blind eye’ to the illegal entry, transit, or exit of migrants, or who otherwise facilitate trafficking activities.

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<sup>249</sup> For examples from the Asia Pacific region see *supra* Sections 3.4.2.2.2 and 3.4.2.3.3.

<sup>250</sup> See also *infra* Appendix B.1.2 “operational offences”.

*Document fraud and forgery*

Cambodia, the Philippines, Solomon Islands, Thailand and Vietnam make special provisions for government officials who are involved in forgery offences. Under Thai criminal law, for example, public officers who wrongfully alter or falsify documents in the course of their duties are criminally liable under ss 159 and 162 *Penal Code 1956* (Thailand). Similarly, article 49 *Criminal Law Provisions 1992* (Cambodia), article 246 *Penal Code 1995* (Macau), article 171 *Penal Code 1932* (Philippines), s 97 *Penal Code 1963* (Solomon Islands) and article 284 *Penal Code 2000* (Vietnam) criminalise government officials who alter and counterfeit public documents in the course of employment.

*Facilitation of illegal immigration*

Some countries in the region provide offences that prohibit facilitation of illegal immigration and trafficking. The immigration law of Cambodia, for example, makes “any competent official or agent of the Royal Government” criminally liable if he or she conspires with or helps facilitate the illegal entry of foreigners. People found guilty are subject to imprisonment between six and twelve months; a penalty twice as high as that for non-officials who facilitate illegal immigration.<sup>251</sup> Administrative penalties apply to officials who are negligent or “non-observant” towards unauthorised immigration of foreigners.<sup>252</sup>

Similar provisions are contained in article 20(2) of the *Ordinance on Entry, Exit, Residence, and Travel of Foreigners in Vietnam 1992*. This provision makes immigration officers criminally liable for “abuse of their position and power for [their] own interest or other personal motive”.<sup>253</sup> Under Macau’s *Clandestine Immigration Act 1990*, the fact that a perpetrator is a public official or a member of the Forças de Segurança (National Security Forces) operates as a qualifying criterion. The commission of any of the immigration

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<sup>251</sup> Article 29(3) *Law on Immigration 1994* (Cambodia).

<sup>252</sup> *Ibid*, art 29(4).

<sup>253</sup> Similar provisions can be found in arts 281, 282 *Penal Code 2000* (Vietnam): abusing positions and/or powers while performing official duties.

offences under the Act by a public official attracts a significantly higher penalty than offences committed by non-officials.<sup>254</sup>

In the PR China it is an offence for public officials to take advantage of their position to enable and facilitate the violation of migration regulations in return for extortions and bribes.<sup>255</sup> Moreover, a penalty of not more than three years imprisonment (ten years in serious circumstances), criminal detention or deprivation of political rights applies to government officials “who harbour an organisation with characteristics of a criminal syndicate or who connive at the organisation’s lawless and criminal activities”.<sup>256</sup>

#### 5.2.1.8. Other offences

The principal focus of the existing trafficking offences is on the protection of the integrity of national immigration and administrative systems. The provisions examined so far criminalise those aspects of trafficking that violate the immigration regulations of a given country. But few, if any of the offences seek to protect the victims of trafficking, the physical integrity of migrants, and their human rights.

In most cases, physical assault of migrants, instances of murder, rape, theft and other offences are criminalised under domestic criminal codes. But these general offences often do not address circumstances that are unique to trafficking operations. However, some countries, though very few, have recently implemented offences that go beyond the traditional limitations of immigration and criminal laws.

For example, the offences introduced with the reform of China’s *Penal Code* in 1997 contain a variety of provisions that have been designed specifically to criminalise those aspects of migrant trafficking that cause particular harm to the persons involved. Article 318, as mentioned above, provides special offences for trafficking that “causes serious injuries and deaths to” migrants or that “deprives or restricts [the] freedom of the people who are making an illegal crossing”. Moreover, article 319 criminalises those who

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<sup>254</sup> Article 15 *Clandestine Immigration Act 1990* (Macau).

<sup>255</sup> Article 16 *Law on Control of the Exit and Entry of Citizens 1986* (PR China).

<sup>256</sup> Article 294[4] *Criminal Law 1997* (PR China).

defraud people, in the name of labour export and economic and trade exchanges or for other reasons, of their exit documents such as passports and visas through fraud and deception for use in organising people in the secret crossing of the national border ...<sup>257</sup>

Unlike the provisions contained in the laws of other countries, the offence under article 319 targets persons who obtain documents fraudulently by false statements from people in whose names these documents have been issued. The offence is further qualified by the requirement that such documents have been obtained “for use in organising” clandestine migration. The provision seeks to protect ownership of travel and identity documents. Individuals who are deprived of travel and identity documents are easy prey for trafficking organisations. The object of the legislation is to prevent the fraudulent use of genuine documents by persons other than the rightful holder. Penalties for the offence can be as high as five years imprisonment and up to ten years in “serious circumstances”. If (commercial) corporations commit the offence, the penalties apply to the principal personnel in charge, and the corporation can be fined separately.<sup>258</sup>

Provisions like those contained in articles 318 and 319 of the Chinese *Penal Code 1997* are still relatively new, and it is too early to predict whether or not they adequately combat and prevent the harm that is caused to many illegal migrants during their clandestine journey. However, it is important that offences similar to those under Chinese law be implemented throughout the region in order to enhance the protection of migrants. Provisions like those contained in articles 318 and 319 are important steps towards a broader recognition that migrant trafficking offences are not just about border protection but also about the protection of victims and witnesses.

### 5.2.2. Organisational Offences

The analysis of the phenomenon has shown that transnational criminal organisations carry out a large part of the illegal trafficking in migrants in the Asia Pacific region.<sup>259</sup> For that reason, combating migrant trafficking implies repressive action against the organisational

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<sup>257</sup> Article 319 *Criminal Law 1997* (PR China).

<sup>258</sup> Articles 319(2), 30 *Criminal Law 1997* (PR China).

<sup>259</sup> See *supra* Section 3.3.

and structural sides of trafficking. This section examines the provisions that address the organised crime aspect of migrant trafficking.<sup>260</sup>

### 5.2.2.1. Organised crime acts

Very few countries in the Asia Pacific region have laws that are specifically tailored to fight organised crime and the criminal activities associated with it. Of the nineteen jurisdictions examined in this Chapter only four have legislated directly against criminal organisations: Hong Kong, Macau, Taiwan and the Philippines.

Figure 26: Organised crime legislation in Hong Kong, Macau, Philippines, Taiwan

	Hong Kong <i>Organised and Serious Crime Ordinance 1994</i>	Macau <i>Organised Crime Act 1997</i>	Philippines <i>RICO Act 1999</i>	Taiwan <i>Organised Crime Control Act 1997</i>
Definition of organised crime/criminal organisation	s 2: organised crime, triad society	art 1: association, secret society	s 4(c): racketeering activity	art 2: criminal organisation
Membership offence; participation as a crime, penalty	—	art 2: 5-12 years arranger: 8-15 years recruiter: ≤ 18 years	s 5: 10-20 years	art 3
Migrant trafficking references	sch 1, no 6	art 6 (art 7)	s 4(c)(ii), (iv)	
Criminal penalty on organisation	—	art 14	—	—
Accessory penalties	—	arts 18, 21	—	arts 3(3), 13, 14
Forfeiture and seizure of assets	ss 8-24D, 25, 26	art 31	ss 7, 9, 13-15, 17	art 7
Special investigative powers	ss 2-7, 24E	—	—	
Procedural provisions	ss 27-30	arts 24-33	ss 8, 10-11, 12, 16, 18-24	

Hong Kong, which has been a hub for criminal organisations, particularly Chinese Triads, for centuries, enacted the *Organised and Serious Crime Ordinance* in 1994

to create new powers of investigation into organised crimes and certain other offences and into the proceeds of crime of certain offenders; provide for the confiscation of proceeds of crime; make provision in respect of the sentencing of certain offenders; create an offence of assisting a person to retain proceeds of crime; and for ancillary and connected matters.<sup>261</sup>

<sup>260</sup> See the overview of “organisational offences” *infra* Appendix B.1.2.

<sup>261</sup> Chapter 455, No 82 of 1994, reprinted in Hong Kong SAR, Department of Justice, *Bilingual Laws Information System*, www.justice.gov.hk (14 Mar 2001).



The principal purpose of the Ordinance is to enable law enforcement agencies to combat organised crime more effectively by using special powers of investigation.<sup>262</sup> Secondly, the Ordinance facilitates forfeiture and the seizure of illegitimate assets<sup>263</sup> and contains special provisions regarding criminal procedure and the prosecution of offenders.<sup>264</sup> The *Organised and Serious Crime Ordinance*, however, does not create new offences, it does not establish membership in a criminal organisation as a crime, and it does not place penalties on the organisation itself. Moreover, by definition, the application of the Ordinance is limited to activities of criminal organisations and triad societies “which use any ritual commonly used by triad societies ... or adopt or make use of any triad title of nomenclature”.<sup>265</sup>

The Philippines introduced special organised crime legislation in 1999 with the *Racketeer-Influenced and Corrupt Organisations (RICO) Act*. The Act is designed

to curb organised and sophisticated crimes and the laundering of the proceeds of these crimes into legitimate business and activities by depriving the criminals of the opportunity to enjoy the proceeds of their wrong doings.<sup>266</sup>

The Act, which has been drafted on the basis of the *RICO* legislation of the United States, contains extensive provisions directed at the activities of criminal organisations,<sup>267</sup> order the forfeiture and seizure of assets<sup>268</sup> and regulate the restitution of property and compensation of victims of organised crime.<sup>269</sup> Unlike the Hong Kong Ordinance, the Philippine Act establishes organised crime as a distinct criminal offence. The legislation is very comprehensive in that it covers most elements of organised crime and its structural, operational and financial aspects. It has low potential, however, for flexible responses to new forms of organised crime, as the Act is not based on any definition of organised crime. Instead it uses a concept of “racketeering activity” which is defined by enumerating nearly one hundred offences that are criminalised in other acts and the *Penal Code*.

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<sup>262</sup> Sections 2-7, 24E *Organised and Serious Crime Ordinance 1994* (Hong Kong).

<sup>263</sup> *Ibid*, ss 8-24D, 25-26.

<sup>264</sup> *Ibid*, ss 27-30.

<sup>265</sup> *Ibid*, s 2.

<sup>266</sup> Section 2 *Racketeer-Influenced and Corrupt Organisations Bill 1998* (Philippines), reprinted in UNICRI & AIC, *supra* note 153, at 82-88.

<sup>267</sup> Sections 5, 4(c) *Racketeer-Influenced and Corrupt Organisations Act 1999* (Philippines).

<sup>268</sup> *Ibid*, ss 7, 9, 13-14.

<sup>269</sup> *Ibid*, ss 15, 17.

Taiwan has introduced its *Organised Crime Control Act* in December 1996.<sup>270</sup> Article 2 of the Act defines the term criminal organisation as

[a]n organisation of three or more persons, with a hierarchical structure, whose aims or members are directed towards the commission of punishable acts, and characterised by unity, continuity, intimidation or violence.

Article 3 makes it an offence to participate in, “solicit for, preside, manipulate or command” in the criminal organisation. The Act also contains provisions on confiscation and forfeiture: It provides a number of accessory penalties such as prohibiting offenders from registering for public office,<sup>271</sup> and requires all offenders who have been convicted to perform compulsory labour for a term of three to five years after serving their prison sentence.<sup>272</sup>

The most comprehensive organised crime legislation in the region is probably that of Macau. Unlike the Philippine model, the Macau *Organised Crime Act* of 1997 is largely independent from the *Penal Code 1995* and, to the most part, contains offences that are not criminalised elsewhere. The Act provides higher penalties for offences commonly considered as organised crime activities, including migrant trafficking and the “retention” of fraudulent travel and identity documents.<sup>273</sup> It criminalises the participation in criminal organisations and contains provisions to make corporate bodies criminally liable if they engage in any of the offences under the Act.<sup>274</sup> In doing so, the Act distinguishes between different kinds and different levels of participation by providing higher penalties for persons who arrange organised crime and for those who are found recruiting members for criminal organisations.<sup>275</sup> Furthermore, the Act provides special forms of penalties for people found guilty of engaging in organised crime, for example, expulsion, or prohibition to exercise public and administrative duties.<sup>276</sup> Finally, the Act contains special procedural legislation.<sup>277</sup>

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<sup>270</sup> The analysis of the *Organised Crime Control Act 1996* (Taiwan) is based on Taiwan, “Introduction to the ‘Organized Crime Control Act’” (1997) 68 (3-4) *Rev Int’l Droit Penal* 1019-1030.

<sup>271</sup> Articles 13, 14 *Organised Crime Control Act 1996* (Taiwan).

<sup>272</sup> *Ibid*, art 3(3).

<sup>273</sup> Articles 3-13, 35 *Organised Crime Act 1997* (Macau).

<sup>274</sup> *Ibid*, arts 2, 14.

<sup>275</sup> *Ibid*, art 3(3), (4).

<sup>276</sup> *Ibid*, arts 18, 21.

<sup>277</sup> *Ibid*, arts 24-33.

In dealing with these issues, the Act avoids the implication of a particular concept of what organised crime is. Unlike the Hong Kong law, Macau's legislation is not designed to combat Chinese secret societies only; it is adaptable to different forms of criminal organisation. The Act also gains greater flexibility by the fact that it is largely independent from other laws.

In comparison, it has to be noted that the four organised crime acts place their emphases on different aspects of organised crime and organised crime prevention. In Hong Kong and the Philippines, for instance, the organised crime acts are primarily procedural legislation to facilitate confiscation and equip courts and prosecutors with special powers. Macau and Taiwan's acts focus particularly on the creation of the membership offence, and both acts provide special penalties for perpetrators. Finally, Macau's *Organised Crime Act* is the only one that enables courts to place criminal penalties on corporate organisations, recognising that organisations, both legitimate and illicit, often continue their operation after leaders have been gaoled.

#### 5.2.2.2. Conspiracy and participation in criminal organisations

Rather than establishing a conceptual legal framework for anti-organised crime mechanisms, most countries in the Asia Pacific region use their penal codes to criminalise participation in criminal organisations, in their activities, and conspiracy with others to intentionally commit a crime.<sup>278</sup>

Essentially, the provisions follow two different models: Model A establishes conspiracy or participation in a criminal organisation as a distinct offence. In Model B, committing an offence as part of organised crime activity operates as an aggravating factor.

##### *Model A: Crime of conspiracy and participation in criminal organisations*

The provisions based on this model penalise conspiracy and/or membership in a criminal organisation regardless of individual crimes committed by the group or by individual members.

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<sup>278</sup> Cf Boronia Halstead, "The Use of Models in the Analysis of Organized Crime and Development of Policy" (1998) 4(1) *Trans Org C* 1 at 1.

Participation in an organised criminal group is an offence under the criminal laws of Cambodia, PR China, Hong Kong, and Macau.<sup>279</sup> This membership offence provides a mechanism to prohibit undesirable associations of offenders in criminal organisations and their cooperation in crime.

Cambodia has a designated offence titled “organised crime”. Article 36 *Criminal Law Provisions 1992* prescribes that

any individual who has taken part in a formal or informal association set up for the purpose of planning one or more crimes or misdemeanours against persons or property, if specific acts of preparation of these offences have taken place, shall be liable to a term of imprisonment [...] from three to fifteen years.

This provision requires that the perpetrators have undertaken some preparatory acts towards the completion of the crime, but it is not required that the offence has taken place. The criminal association remains largely undefined; the key aspect is that it serves “the purpose of planning one or more crimes ... against persons or property”. The provision under Cambodian law is unique in that it lays severe criminal penalties on a comparatively broad and loose understanding of organised crime. But the *Criminal Law Provisions 1992* (Cambodia) are only transitional, and it is expected that they will soon be substituted by a more comprehensive criminal code.<sup>280</sup>

Article 288 *Penal Code 1995* (Macau) and, as mentioned before, article 2 *Organised Crime Act 1997* (Macau), contain offences titled “criminal organisation [association]”. Under these provisions it is an offence, punishable by up to twelve (and in qualified cases up to eighteen) years imprisonment, to found a criminal organisation or participate in its activities.

Chinese criminal law contains a very comprehensive organised crime offence in article 294(1)-(3) *Criminal Law 1997*:

[1] Whoever organises, leads, or actively participates in an organisation with characteristics of a criminal syndicate which carries out lawless and criminal activities in an organised manner through violence, threat, or other means, with the aim of playing the tyrant in a locality, committing all sorts of crimes, bullying and harming the masses, and doing what has seriously undermined economic and social order is to be sentenced to not less than three years but not

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<sup>279</sup> Article 36 *Criminal Law Provisions 1992* (Cambodia); art 264 *Criminal Law 1997* (PR China); ss 159A-159C *Crimes Ordinance 1971* (Hong Kong); art 288 *Penal Code 1995* (Macau).

<sup>280</sup> See *supra* note 4.

more than 10 years of fixed-term imprisonment. Other participants are to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, control, or deprivation of political rights.

[2] Personnel of overseas criminal syndicates who come to the PRC to recruit members are to be sentenced to not less than three years but not more than 10 years of fixed-term imprisonment.

[3] Whoever commits other crimes in addition to those in the preceding two paragraphs is to be punished according to the regulations for punishing multiple crimes.

Essentially, article 294 criminalises four types of members of criminal organisations: (a) those who “organise or lead” the organisation, (b) participants of criminal organisations, including those who “actively participate” and “other participants”, (c) recruiters of foreign criminal organisations, and, (d) in subsection (4),<sup>281</sup> government officials who assist or disguise the organisation’s activities. It is not required that the criminal organisation has committed any offence; membership and position in an organisation “which carries out lawless and criminal activities in an organised manner through violence, threat, or other means” is sufficient. Persons found guilty of being the organiser or participant et cetera of such a group are liable to a penalty of up to ten years imprisonment.

The concern of provisions based on this Model A is with the establishment and structure of criminal organisations rather than with their activities. In principle, and in contrast to Model B, this model does not require the commission of individual offences. Thereby it creates a possibility to make members of criminal organisations liable before the organisation actively commits any crime. In that respect, if implemented and enforced properly, the provisions can potentially serve as a tool to prevent the commission of crime.

Countries such as Brunei,<sup>282</sup> Fiji,<sup>283</sup> Papua New Guinea and Solomon Islands have a crime of conspiracy under their criminal laws. Although not directly designed to combat criminal organisations and the participation in organised crime, these provisions serve as a preliminary offence, similar to the concept of other inchoate offences that do not require the physical elements of a crime. For example, in Papua New Guinea, “a person who conspires with another to commit a crime ... is guilty of a crime” punishable with up to

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<sup>281</sup> See *infra* Section 5.2.2.2.

<sup>282</sup> See the information provided by UNCJIN, *Central Repository on Organised Crime*, [www.uncjin.org/Documents/Crtoc/cenrep.html](http://www.uncjin.org/Documents/Crtoc/cenrep.html) (12 Feb 2001).

<sup>283</sup> Sections 385-387 *Penal Code 1945* (Fiji).

seven years imprisonment, unless another penalty is provided for the principal crime.<sup>284</sup> Under the *Penal Code 1963* of the Solomon Islands “any person who conspires with another to commit any felony” is guilty of an offence, punishable by up to seven years imprisonment “if no other punishment is provided”.<sup>285</sup>

Malaysian and Philippine immigration laws provide special offences with higher penalties if a perpetrator “abets or is engaged in a criminal conspiracy to commit any [immigration] offence”.<sup>286</sup> In these cases, criminal conspiracy to commit immigration offences serves as a tool to prosecute offences that may not qualify as attempts or do not reach completion. Criminal conspiracy as defined under Malaysian criminal law is punishable in the same manner as the completed offence,<sup>287</sup> unless individual provisions provide specific penalties.<sup>288</sup>

*Model B: Conspiracy and participation in criminal organisations as qualifying features*

Under Model B the ‘organised commission of a crime’ or ‘conspiracy to commit a crime’ operates as an aggravating feature. Perpetrators are liable to higher penalties if criteria that qualify the commission of an offence as organised crime are fulfilled.

As mentioned earlier, the *Racketeer-Influenced and Corrupt Organisations (RICO) Act* of the Philippines provides higher penalties if a person

knowingly participates, either directly or indirectly with or in an enterprise conducting a pattern of racketeering activity [as defined s 4 of the Act];

receives any money or property derived directly or indirectly, from a pattern of racketeering activity, or act as dummy of any person in order to hide or conceal money or property acquired through racketeering activities as defined herein;

uses or invests directly or indirectly, any part of the money or property received or derived, directly or indirectly, from a pattern of racketeering activity in any interest in or the establishment or operation of any business;

acquires or maintains through a pattern of racketeering activity, directly or indirectly any interest in or control of any business enterprise;

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<sup>284</sup> Section 515 *Criminal Code 1974* (PNG).

<sup>285</sup> Sections 383-385 *Penal Code 1963* (Solomon Islands).

<sup>286</sup> Section 56(1A)(c) *Immigration Act 1959/1963* (Malaysia); and see s 45(h) *Immigration Act 1940* (Philippines).

<sup>287</sup> Sections 120A, 120B *Penal Code 1997* (Malaysia).

<sup>288</sup> Section 56(1A)(c) *Immigration Act 1959/1963* (Malaysia).

conspires in the conduct of any unlawful acts provided herein.<sup>289</sup>

The recently enacted *Penal Code 2000* (Vietnam) also uses the concept of “complicity” and “commission of crimes in an organised manner” as qualifying criteria. For example, if forgery is committed “in an organised manner”, perpetrators are subject to higher penalties.<sup>290</sup> The *Penal Code 1945* of Vanuatu is based on a similar model.<sup>291</sup>

### 5.2.3. General Observations

Many countries in the Asia Pacific region have witnessed political turmoil, the end of colonial rule and rapid economic developments which had significant impacts on legislation and legal systems. Some countries in the region do not have comprehensive immigration and organised crime legislation and the phenomenon of migrant trafficking is dealt with by a variety of very basic regulations. In other cases, law and law enforcement often could not keep pace with the rapid political, demographic and economic developments, or immigration issues did not have high priority on political agendas. In these circumstance the old law remained mostly unchanged.

Offences that criminalise the activities of transnational trafficking organisations are a comparatively new product. Prior to the early 1990s, very few countries in the region had special trafficking provisions, and up until today very few have enacted legislation that penalises the central aspects of migrant trafficking.

For example, organising illegal migration is a crime in only three of the nineteen jurisdictions surveyed in this Chapter. Countries such as Thailand, Malaysia, Singapore and the Philippines, which have been identified as some of the major hubs of migrant

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<sup>289</sup> Section 5 *Racketeer-Influenced and Corrupt Organisations (RICO) Act* (Philippines).

<sup>290</sup> Articles 266, 20 *Penal Code 2000*. Art 20(1) *Penal Code 2000* (Vietnam) defines complicity as two or more persons committing a crime intentionally. Subsection (2) extends criminal liability to “executors” (“who actually carry out the crimes”), “organisers” (“who mastermind, lead and direct the execution of crimes”), “instigators” (“who incite, induce and encourage other persons to commit crimes”), and “helpers” (“who create spiritual or material conditions for the commission of crime”). Subsection (3) prescribes that “the organised commission of a crime is a form of complicity with close collusion among persons who jointly commit the crime.”

<sup>291</sup> Section 29 *Penal Code 1945* (Vanuatu).

trafficking in the region,<sup>292</sup> do not have this offence. Although these countries have provisions that extend criminal liability to higher levels of management within commercial organisations, it often remains difficult, if not impossible, to prosecute the core arrangers and organisers of trafficking operations. Other countries do not have any provisions that make the transportation of illegal migrants an offence, thus making these places attractive transit points.

Secondly, the organisational side of migrant trafficking is not adequately criminalised in most countries of the region. Only the Philippines, Hong Kong, Macau, Taiwan and, to a lesser degree, China have enacted comprehensive legislation to combat organised crime and deprive criminal organisations of the profits they generate. Most countries continue to prosecute members of criminal organisations on the basis of provisions that are not originally designed to fight organised crime and which do not enable the prosecution of offenders who are not immediately engaged in the commission of crime.

But the countries with the more comprehensive and more sophisticated legislation are not necessarily those with the lowest levels of migrant trafficking. The PR China, for instance, has some of the most complex and up-to-date trafficking offences, most of which have been implemented with the criminal law reform in 1997. However, China continues to be the source of large numbers of trafficked migrants in the region and around the world. Comprehensive anti-trafficking laws are an important tool in the fight against illegal migration and organised crime, but there is little chance they will succeed if law enforcement efforts remain marginal and if government officials are bribable.

In comparison, the small territory of Macau has probably the most sophisticated, comprehensive and most adequate legislation to fight the activities of migrant trafficking organisations. As early as 1990, the Legislative Assembly of the then Portuguese outpost enacted the *Clandestine Immigration Act* which focuses specifically on the activities of trafficking organisations. The Act criminalises the core aspects of migrant trafficking, including the mobilisation, transportation, harbouring, employment and exploitation of migrants,<sup>293</sup> document fraud and the making of false statements. The Act provides higher

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<sup>292</sup> See *supra* Section 3.4.2.3.3.

<sup>293</sup> Illegal employment of migrants, extortion and blackmail are offences under arts 9, 10 *Clandestine Immigration Act 1990* (Macau).



penalties for public officials who assist traffickers regardless of the type and level of their collaboration. It does not criminalise the migrant customers, except, as seen in the next section, in circumstances where they intentionally and actively contribute to the violation of immigration laws. The Act is complemented by the comprehensive *Organised Crime Act 1997* that provides higher penalties for criminal organisations and their members, and contains additional powers for prosecutors and law enforcement agencies.

The comparison of the trafficking offences in the region also shows that major discrepancies exist between penalties. On the one hand, it could be argued that countries with comparatively low penalties are more likely to serve as transit points for trafficking operations. But on the other hand, there is no evidence that higher penalties are more successful in reducing the level of crime. Also, legislative specification of penalties is relevant only so far as it sets upper limits to actual punishment. For countries with high normal penalties, actual penalties may be low or rarely enforced. The comparison demonstrates that the countries and territories with some of the highest penalties, such as Hong Kong and Singapore, are simultaneously some of the major hubs for migrant trafficking. However, harmonising penalties is an equally important step in harmonising trafficking offences in the region.

Traditionally, most countries have placed strong emphasis on offences that occur immediately at or within their borders: making false statements, producing and transferring documents, and, as will be seen in Section 5.3, all offences involving the illegal migrants themselves. But the phenomenon of migrant trafficking is one that is not exclusive to one single nation; it is transnational in nature. In all cases, some of the preparatory, recruiting, organisational, transit, forgery, harbouring and clandestine immigration activities take place abroad. Provisions that solely focus on internal security and do not take into account the international dimension of trafficking are determined to fail.

But not only is it necessary that the offences address all aspects and all dimensions of trafficking, it is also important that they are complemented by similar, if not identical, legislation abroad. Hong Kong, the PR China, Macau, Malaysia and the Philippines, for instance, have comparatively comprehensive anti-trafficking laws, but their immediate neighbours do not. The problems of illegal migration and organised crime cannot be solved if one country criminalises trafficking and takes all possible steps to fight it, and its

neighbour does not. These discrepancies ultimately result in exporting problems to countries with less comprehensive legislation and less effective law enforcement mechanisms. Handballing crime elsewhere cannot be the answer to the growing concerns surrounding migrant trafficking. Once more it becomes clear that the key solution lies within multilateral, regional and international cooperation to combat illegal migration and organised crime, as will be shown in Chapters Six and Seven.

### 5.3. Offences Applying to Illegal Migrants

In most, if not all, countries of the region, the principal focus of immigration offences is on the individuals who violate domestic regulations by crossing the border clandestinely, by making false statements, or by using fraudulent documents. Section 5.3 analyses the provisions that apply to illegal migrants and that make them criminally liable for departing from and/or entering a country unlawfully.<sup>294</sup>

#### 5.3.1. Illegal Departure and Illegal Entry

##### 5.3.1.1. Illegal departure

Emigration restrictions have traditionally been an important tool to prevent and control migratory movements. Chapter Two already indicated that it is not uncommon for some countries in the region to restrict free travel of their citizens and criminalise those who emigrate in defiance of domestic exit regulations.<sup>295</sup> Particularly at the time of the Cold War, many governments of the then Socialist bloc placed harsh penalties on unauthorised emigration. Vietnam and the PR China still restrict emigration of their citizens.

Soon after the end of the Vietnam War, the new Vietnamese Government placed sanctions on emigration and Vietnam continues to criminalise illegal departure of its citizens. Article 274 of the *Penal Code 2000* prescribes that it is an offence to illegally leave the country and stay abroad without authorisation,<sup>296</sup> and to “violate the regulations on residence, movement or other regulations relating to border regions.”<sup>297</sup> Illegal emigration attracts fines between 5,000,000 and 50,000,000 Dong (c Aus\$660-6,600) or a prison term of three months to two years. Article 273(2) provides a penalty of up to seven years imprisonment for cases of recidivism.

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<sup>294</sup> See the overview *infra* Appendix B.2.

<sup>295</sup> See *supra* Section 2.2.4.1.

<sup>296</sup> Article 274 *Penal Code 2000* (Vietnam).

<sup>297</sup> Article 273 *Penal Code 2000* (Vietnam).

Chinese law also prevents people from freely leaving the country. Under the *Law on Control of Exit and Entry of Citizens 1986*, Chinese citizens are required to apply for a passport and a permit issued by the Public Security Bureau to exit the country;<sup>298</sup> emigration without such permit is a criminal offence. In 2001, it has been reported that only two percent of Chinese hold passports.<sup>299</sup> Later that year though, the Chinese Government announced that it will eliminate the regulations that prevented most citizens from obtaining passports.<sup>300</sup>

Article 14 of the *Law on Control of Exit and Entry of Citizens 1986* prescribes that “any person who, in violation of the provisions of this Law, leaves [...] the country illegally [...] may be given a warning or placed in detention for not more than ten days”. “If the circumstances of the case are serious enough” the perpetrator can be made criminally liable. In these cases, article 322 of the *Chinese Criminal Law 1997*<sup>301</sup> operates as a qualifying offence, punishing violations of “the laws and regulations that control leaving and entering the country, secretly crossing the national border” by up to one year imprisonment, “criminal detention, or control”. If Chinese nationals travel abroad in tourist groups, the tour operator can also be held responsible if individuals do not return to China.<sup>302</sup>

Additionally, some countries criminalise illegal emigration of non-citizens. The Philippines and the PR China have special regulations for the departure of non-nationals that are enforced by criminal sanctions if requirements remain unfulfilled. Section 45(g) *Immigration Act 1940* (Philippines) makes it an offence for “any person who — being an alien [to depart] from the Philippines without first securing an immigration clearance certificate required by section 22A”, punishable by imprisonment for up to two years and deportation. Article 29 *Law on Control of the Entry and Exit of Aliens 1986* (PR China) contains a similar offence, punishable by a warning or arrest for up to ten days.

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<sup>298</sup> Article 5 *Law on Control of Exit and Entry of Citizens 1986* (PR China). Cf Cleo Kung, “Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the US Statutory Definition of ‘Refugee’” (2000) 90 *J Crim L & Criminology* 1271 at 1278.

<sup>299</sup> “China: Rural, Tourism, Hong Kong” (2001) 8(8) *Migration News*.

<sup>300</sup> “China, Hong Kong, Taiwan” (2001) 8(12) *Migration News*.

<sup>301</sup> Formerly art 176 *Criminal Law 1979* (PR China).

<sup>302</sup> “China: Rural, Tourism, Hong Kong” (2001) 8(8) *Migration News*.

Hypothetically, criminalising the unauthorised departure of people can be seen as a measure to stop illegal migration at its earliest possible stage: If people are not allowed to leave their country, and if borders are controlled, those who attempt to migrate illegally can be stopped prior to entering another country. Fines and imprisonment placed on illegal emigration can be expected to deter some migrants from trying to leave illegally.

But the provisions criminalising unauthorised emigration operate largely at the expense of human rights and individual freedom. They violate the right of a person to freely leave a country, which is guaranteed in multiple human rights treaties, including the *Universal Declaration of Human Rights*.<sup>303</sup> Many countries in the region also recognise the right to leave in their constitutions.<sup>304</sup> The danger these emigration offences entail is that they potentially deprive people of their most basic human rights and may prohibit them from fleeing persecution, generalised violence, poverty or environmental disasters.

### 5.3.1.2. Illegal entry

Entry in defiance of domestic immigration regulations is an unlawful act in all countries of the region. Additionally, the majority of the Asia Pacific countries places criminal sanctions on migrants who arrive clandestinely or without genuine visas, entry permits or other identity documentation.

As seen earlier, the immigration laws of Brunei,<sup>305</sup> PR China,<sup>306</sup> Macau,<sup>307</sup> Malaysia,<sup>308</sup> Myanmar,<sup>309</sup> Papua New Guinea,<sup>310</sup> the Philippines,<sup>311</sup> Singapore,<sup>312</sup> Solomon Islands,<sup>313</sup>

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<sup>303</sup> See art 13 *Universal Declaration of Human Rights 1948*; art 12(2) *ICCPR* and many regional human rights instruments. See also Rainer Hofmann, *Die Ausreisefreiheit nach Völkerrecht und Staatlichem Recht* (1988) 309.

<sup>304</sup> See, for example, art 40(1) *Constitution of the Kingdom of Cambodia 1993*; s 34(3) *Constitution Amendment Act 1997* (Fiji); s 52 *Constitution of the Independent State of Papua New Guinea 1975*; reprinted in de Varennes (ed), *supra* note 106, at 28, 68, 317.

<sup>305</sup> See Muntarbhorn, *supra* note 3, at 100.

<sup>306</sup> Articles 2, 6 *Law on Control of the Entry and Exit of Aliens 1986* (PR China).

<sup>307</sup> Article 5 *Entry and Residence Act 1995* (Macau).

<sup>308</sup> Sections 6(1), 10(1) *Immigration Act 1959/1963* (Malaysia).

<sup>309</sup> Section 3 *Immigration (Emergency Provisions) Act 1947* (Myanmar).

<sup>310</sup> Section 3 *Migration Act 1978* (PNG).

<sup>311</sup> Section 15 *Immigration Act 1940* (Philippines) with exceptions listed there; cf Ledesma, *supra* note 14, at 134-135.

<sup>312</sup> Sections 6(1), 10(1) *Immigration Act 1959* (Singapore).

Taiwan,<sup>314</sup> Thailand,<sup>315</sup> Vietnam,<sup>316</sup> and Vanuatu<sup>317</sup> require immigrants to be in possession of valid travel documents and valid visas upon arrival, unless they are explicitly excluded from these requirements. Those who are found entering the given country without proper documentation and those who fall into categories of “prohibited immigrants” are usually excluded from entering and subject to detention and removal from the country.<sup>318</sup>

Under the immigration laws of most countries in the region unauthorised entrants are not only subject to removal and detention; they are also criminally liable for illegally entering the respective country. Out of the nineteen countries and territories surveyed in this Chapter, twelve make it a criminal offence to enter the country without proper authorisation.

The *Immigration Act 1958* of Brunei, for instance, prohibits immigrants from disembarking without entry permits; those who land unlawfully are liable to a fine of \$4,000 Brunei Dollars (c Aus\$4,350) and one year imprisonment.<sup>319</sup> Under the Cambodian, Hong Kong, Myanmar, Papua New Guinea and Solomon Islands immigration laws, foreigners who enter the country clandestinely or otherwise unlawfully can be imprisoned for up to three years.<sup>320</sup> Taiwan places a fine of up to \$10,000 New Taiwan Dollars (c Aus\$575) on illegal and undocumented entry.<sup>321</sup> In Malaysia and Singapore, any non-citizen who enters, or attempts to enter, the country without a valid entry permit is guilty of an offence, too.<sup>322</sup> Vietnamese and Chinese immigration laws place administrative sanctions on persons who enter China illegally or “who reside or travel in Vietnam without a permit, or breach any other provision of the law of Vietnam on entry, exit, transit”.<sup>323</sup> If persons continue the violation, or if the circumstances are serious, the criminal laws of both countries make

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<sup>313</sup> Sections 6, 7 *Immigration Act 1978* (Solomon Islands).

<sup>314</sup> Article 4(1) *Immigration Law* (Taiwan).

<sup>315</sup> Sections 12(1), 58 *Immigration Act 1979* (Thailand).

<sup>316</sup> Article 3(1) *Ordinance on Entry, Exit, Residence and Travel of Foreigners 1992* (Vietnam).

<sup>317</sup> Sections 5, 11 *Immigration Act 1971* (Vanuatu).

<sup>318</sup> See *supra* Section 5.1.3.

<sup>319</sup> Sections 20 *Immigration Act 1958* (Brunei); Muntarhorn, *supra* note 3, at 100.

<sup>320</sup> Article 29(1) *Law on Immigration 1994* (Cambodia); s 38(1)(b) *Immigration Ordinance 1972* (Hong Kong); s 13(1) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 16(1)(a) *Migration Act 1978* (PNG); s 18(1)(i) *Immigration Act 1978* (Solomon Islands); s 22(1)(i) *Immigration Act 1971* (Vanuatu).

<sup>321</sup> Article 59(1), (3) *Immigration Law* (Taiwan).

<sup>322</sup> Sections 6(3), 8(5) *Immigration Act 1959/1963* (Malaysia); ss 6(3), 8(5), 57(1) *Immigration Act 1959* (Singapore).

illegal immigrants liable to fines and imprisonment.<sup>324</sup> Macau also specifically criminalises migrants who repeatedly attempt to enter illegally.<sup>325</sup>

From the perspective of international law, illegal entry offences pose particular problems if refugees enter a country unlawfully. Criminalising refugees for illegally entering another country violates international refugee law. Article 31(1) of the *1951 Convention relating to the Status of Refugees* prescribes that

[t]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

Article 31(1) *Refugee Convention* is generally understood as an obligation not to subject refugees to any criminal penalties for entering a country unlawfully. However, administrative sanctions, such as detention and removal, do not fall within the meaning of article 31(1).<sup>326</sup> Also, the non-criminalisation obligation is limited to those refugees who are “coming directly from a territory where their life or freedom was threatened”; it does not cover refugees who transit through third countries.

It is for these reasons that the Signatories of the *Refugee Convention* usually prohibit illegal entry without imposing criminal sanctions on illegal immigrants. For example, in Australia,<sup>327</sup> Macau, and the Philippines<sup>328</sup>, immigrants who arrive without proper documentation and authorisation are “illegal” and can be detained and removed, but they are not liable for a criminal offence. In the case of Cambodia, another Party to the *Refugee Convention*, illegal entrants are criminally liable, but article 3 of the *Law on Immigration 1994* (Cambodia) states that this shall not apply “where it is required to comply with norms of international treaties”. Similarly, in Papua New Guinea the Minister may determine that a non-citizen is a refugee and exempted from criminal charges.<sup>329</sup> Chinese law can be interpreted in the same way, as it provides exceptions for the arrival and entry of asylum

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<sup>323</sup> Article 29 *Law on Control of the Entry or Exit of Aliens 1986* (PR China); art 20(1) *Ordinance on the Entry, Exit and Transit of Foreigners 1992* (Vietnam).

<sup>324</sup> Article 322 *Criminal Law 1997* (PR China); art 274 *Penal Code 2000* (Vietnam).

<sup>325</sup> Article 14 *Clandestine Immigration Act 1990* (Macau).

<sup>326</sup> Goodwin-Gill, *supra* note 141, at 305; Peter Weis (ed), *The Refugee Convention, 1951* (1995) 302-303.

<sup>327</sup> See *supra* Section 4.2.1.2.

<sup>328</sup> See Ledesma, *supra* note 14, at 6-7: “violation of immigration laws not a crime nor a felony”.

seekers in article 32 of the *Constitution of the People's Republic of China* and in article 15 *Law on Control of the Entry and Exit of Aliens 1986* (PR China).<sup>330</sup> The Solomon Islands, although Signatory of the *Refugee Convention*, provides no exception if refugees enter the country illegally, but the Director of Immigration has discretion under s 12 *Immigration Act 1978* to issue entry permits and thereby legalise the status of undocumented refugees.

### 5.3.2. False Statements

In many instances migrants cannot obtain genuine travel documents, do not have substantiated grounds for asylum claims, or fear their claims may be insufficient. In these circumstances, migrants have strong inducements to make false statements to immigration and border control authorities in order to obtain immigration clearance or to apply for visas, entry permits or asylum. Also, as mentioned earlier, traffickers sometimes coach migrants in how to lodge their claims and how to make false representations.<sup>331</sup>

Most jurisdictions in the region make immigrants criminally liable for making false statements in immigration matters. The provisions criminalising false statements can be differentiated as follows:

(1) In Brunei, Cambodia and the Philippines it is an offence to enter or attempt to enter the country unlawfully by false statement.<sup>332</sup> Penalties include fines of up to 1,000 Philippine Pesos (c Aus\$50), imprisonment for up to two years, and deportation.<sup>333</sup>

(2) Under the immigration laws of Hong Kong,<sup>334</sup> Macau,<sup>335</sup> Malaysia,<sup>336</sup> Myanmar,<sup>337</sup> Papua New Guinea,<sup>338</sup> Philippine,<sup>339</sup> Singapore,<sup>340</sup> and Solomon Islands<sup>341</sup> it is an offence to make

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<sup>329</sup> Sections 14A, 20 *Migration Act 1978* (PNG).

<sup>330</sup> See *supra* Section 5.1.4.1.

<sup>331</sup> See *supra* Section 3.4.2.1.

<sup>332</sup> Section 55 *Immigration Act 1958* (Brunei); art 29(1) *Law on Immigration 1994* (Cambodia); s 45(d), (e), (h) *Immigration Act 1940* (Philippines).

<sup>333</sup> Article 29(1) *Law on Immigration 1994* (Cambodia); s 45 *Immigration Act 1940* (Philippines).

<sup>334</sup> Section 42(1)(a) *Immigration Ordinance 1972* (Hong Kong).

<sup>335</sup> Article 12 *Clandestine Immigration Act 1990* (Macau).

<sup>336</sup> Section 56(1)(f) *Immigration Act 1959/1963* (Malaysia).

<sup>337</sup> Section 13(4), 7(a) *Immigration (Emergency Provisions) Act 1947* (Myanmar).

<sup>338</sup> Section 16(1)(e), (j) *Migration Act 1978* (PNG).

<sup>339</sup> Section 45(f) *Immigration Act 1940* (Philippines) only criminalises false statements and false representations "made under oath".



any false statement or false representation in immigration matters, regardless of the purpose for which that statement is made, punishable by fines of up to Sin\$4,000<sup>342</sup> (c Aus\$4,000) and up to five years imprisonment.<sup>343</sup>

(3) Fiji,<sup>344</sup> Hong Kong,<sup>345</sup> Malaysia,<sup>346</sup> Myanmar,<sup>347</sup> Papua New Guinea,<sup>348</sup> the Philippines,<sup>349</sup> Singapore,<sup>350</sup> Solomon Islands,<sup>351</sup> and Vanuatu<sup>352</sup> also have special offences if false statements or false representations are made in order to obtain passports or other travel and identity documentation. Penalties are identical with those prescribed for offences under the previous category.

(4) Finally, Hong Kong, Malaysia, Papua New Guinea and Solomon Islands also have general offences of making false statements in their criminal codes.<sup>353</sup> Thai criminal law has a general offence of giving false information to officials under s 137 *Penal Code 1956*.

Criminalising persons who make false statements to immigration officers or other authorities is difficult. On the one hand, it can be argued that in order for public agencies to function properly, it is important that their decisions are based on correct and not on false information. People who knowingly make misrepresentations to obtain certain benefits must be held responsible for their actions; if they are not, this has serious consequences for any administrative decision and for the public's faith in public services. But on the other hand, it is undeniable that 'desperate people do desperate things'. Hence, it can be questioned if it is just to criminalise desperate people who resort to false statements simply because they fear that their claims may not be sufficient otherwise. In

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<sup>340</sup> Section 57(1)(f) *Immigration Act 1959* (Singapore).

<sup>341</sup> Section 18(1)(d) *Immigration Act 1978* (Solomon Islands).

<sup>342</sup> Section 57(iv) *Immigration Act 1959* (Singapore).

<sup>343</sup> Section 57 *Immigration Act 1959/1963* (Malaysia).

<sup>344</sup> Section 312 *Penal Code 1945* (Fiji).

<sup>345</sup> Section 44(1)(c) *Immigration Ordinance 1972* (Hong Kong).

<sup>346</sup> Section 57(k) *Immigration Act 1959/1963* (Malaysia); s 12A *Passports Act 1960* (Malaysia).

<sup>347</sup> Section 13(7)(b) *Immigration (Emergency Provisions) Act 1947* (Myanmar).

<sup>348</sup> Section 5(a) *Passports Act 1975* (PNG).

<sup>349</sup> Section 45(a) *Immigration Act 1940* (Philippines).

<sup>350</sup> Section 57(1)(k) *Immigration Act 1959* (Singapore).

<sup>351</sup> Section 18(1)(a) *Immigration Act 1978* (Solomon Islands).

<sup>352</sup> Section 22(1)(a) *Immigration Act 1971* (Vanuatu).

<sup>353</sup> Section 36 *Crimes Ordinance 1971* (Hong Kong); s 182 *Penal Code 1997* (Malaysia); s 197 *Criminal Code 1974* (PNG); s 130 *Penal Code 1963* (Solomon Islands).

that case the false statements can be seen, for instance, as a direct result of greater hurdles to obtain asylum.<sup>354</sup>

The difficulties and controversies surrounding both viewpoints reach very far and cannot be solved within the boundaries set for this study. What can be said, however, is that the focus of migrant trafficking offences must always remain on the traffickers' side of illegal migration and organised crime, and not on those who are exploited by trafficking organisations and who are desperate to seek protection abroad. Criminalising false statements and false representation is necessary to protect the integrity of immigration and administrative systems. But the application of provisions should be limited to cases where the perpetrator intends to achieve a particular immigration outcome as a result of the false statement or misrepresentation. An example can be found in article 12 *Clandestine Immigration Act 1990* (Macau).

### 5.3.3. Obtaining, Possessing and Using Fraudulent Documents

Nowadays, migration, for the most part, depends on the possession of valid travel and identity documents. If such documents cannot be obtained legally, traffickers provide stolen, altered or otherwise fraudulent documents to facilitate illegal immigration. At the consumer side of immigration and identity fraud stands the person using the fraudulent document. The criminal laws of all countries in the region contain provisions that make it an offence to obtain, use and/or possess immigration and identity documents that have been falsified, altered, or which have been issued to another person.

Different jurisdictions criminalise different aspects of such conduct: In some countries it is an offence to use fraudulent documents. Other countries criminalise the possession of such documents. And finally, the law of some countries makes it an offence to obtain fraudulent documents.

Under the laws of Brunei, Cambodia, Hong Kong, Macau,<sup>355</sup> Malaysia, Myanmar, Papua New Guinea, Philippines, Singapore, Solomon Islands and Vanuatu it is an offence to use

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<sup>354</sup> Cf Helton, "The Comprehensive Plan of Action for Indo-Chinese Refugees" *supra* note 131, at 117.

unlawfully altered passports and identity documents.<sup>356</sup> Cambodia, PR China, Malaysia, Papua New Guinea, Singapore, Solomon Islands and Vanuatu also specifically criminalise the use of identity documents issued in a different name.<sup>357</sup>

Some countries in the region criminalise the possession of fraudulent immigration and identity documents without requiring that such documents be used. In Malaysia and Singapore, for instance, the immigration acts provide that persons in possession of forged or altered travel documents are prohibited immigrants subject to removal.<sup>358</sup> Simultaneously persons can be made criminally liable for possessing a forged, unlawfully altered or otherwise irregular entry permit, visa or passport.<sup>359</sup> The *Immigration Act 1971* (Vanuatu), the *Immigration Act 1978* (Solomon Islands), the *Migration Act 1978* (Papua New Guinea), the *Immigration (Emergency Provisions) Act 1947* (Myanmar) and the *Immigration Ordinance 1972* (Hong Kong) also contain offences for the possession of forged, altered and unlawfully issued entry permits or other immigration documents.<sup>360</sup> In Macau, possessing a fraudulent document is an offence only if it the holder intends to deceive immigration officials or to otherwise violate immigration laws.<sup>361</sup>

The Philippines criminalise immigrants who “obtain or accept” any immigration document knowing it to be false.<sup>362</sup>

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<sup>355</sup> Article 13 *Clandestine Immigration Act 1990* (Macau) makes it an offence to use a fraudulent document only if it is used with intention to deceive immigration officials or if it violates immigration laws otherwise.

<sup>356</sup> Section 55 *Immigration Act 1958* (Brunei); art 47(2), (3) *Criminal Law Provisions 1992* (Cambodia); s 42(2)(b) *Immigration Ordinance 1972* (Hong Kong); s 56(1)(l) *Immigration Act 1959/1963* (Malaysia); s 13(7)(d) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 16(1)(k) *Migration Act 1978* (PNG); s 45(c) *Immigration Act 1940* (Philippines); s 57(l) *Immigration Act 1959* (Singapore); s 18(1)(e), (f) *Immigration Act 1978* (Solomon Islands); s 22(1)(a), (e), (f) *Immigration Act 1971* (Vanuatu).

<sup>357</sup> Article 32 *Law on Immigration 1994* (Cambodia); art 29 *Law on Control of the Entry and Exit of Aliens 1986* (PR China); art 14 *Law on Control of the Exit and Entry of Citizens 1986* (PR China); s 56(1)(j) *Immigration Act 1959/1963* (Malaysia); s 16(1)(i) *Migration Act 1978* (PNG); s 57(j) *Immigration Act 1959* (Singapore); s 18(1)(o) *Immigration Act 1978* (Solomon Islands); s 22(1)(m) *Immigration Act 1971* (Vanuatu).

<sup>358</sup> Sections 8(3)(m), 32(1) *Immigration Act 1959/1963* (Malaysia); ss 8(3)(m) *Immigration Act 1959* (Singapore).

<sup>359</sup> Section 56(1)(l) *Immigration Act 1959/1963* (Malaysia); s 12(1)(a), (d), (f) *Passports Act 1960* (Malaysia); s 57(l) *Immigration Act 1959* (Singapore).

<sup>360</sup> Section 13(7)(d) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 42(2)(c) *Immigration Ordinance 1972* (Hong Kong); s 16(1)(k) *Migration Act 1978* (PNG); s 18(1)(e), (f) *Immigration Act 1978* (Solomon Islands); s 22(1)(e), (f) *Immigration Act 1971* (Vanuatu).

<sup>361</sup> Article 13 *Clandestine Immigration Act 1990* (Macau).

<sup>362</sup> Section 45(c) *Immigration Act 1940* (Philippines).

Again, there are significant discrepancies in the penalties that apply to the above-mentioned offences. In Vanuatu, for instance, offenders can be subject to a fine of not more than 50,000 Vatu (c Aus\$700) or a maximum of one year imprisonment,<sup>363</sup> while Cambodian law provides imprisonment of up to fifteen years.<sup>364</sup>

#### 5.3.4. General Remarks

Individuals who migrate across borders in violation of national immigration laws are the first and most immediate target of prosecutions and law enforcement activities. Illegal migrants are generally perceived as a threat to national sovereignty and security because they arrive without the proper consent of authorities and without immigration and security clearance.

Within the context of migrant trafficking, however, little can be achieved by making individual migrants the principal subject of criminal offences and law enforcement operations. There is no evidence that placing higher penalties on unauthorised arrivals and stepping up border controls have ever worked as deterrents for migrants who flee for political, environmental or socioeconomic reasons. Moreover, these offences do not contribute to the fight against trafficking organisations and against the exploitation of migrants. However, most countries in the region continue to focus their enforcement activities on the trafficked migrants.<sup>365</sup>

The right answer to the problem of criminalising illegal migrants can only be found in a compromise that takes into account reasonable security concerns on the one hand, and the freedom and motivations of migrants on the other. Suggestions that countries should “let them all in” or “send them all home” are equally inappropriate. An effective response has to address the issue of national security as well as the humanitarian aspects. Much can be achieved, for example, if the offences that apply to illegal migrants are limited to cases

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<sup>363</sup> Section 22(3) *Immigration Act 1971* (Vanuatu).

<sup>364</sup> Article 32 *Law on Immigration* (Cambodia); art 47 *Criminal Law Provisions 1992* (Cambodia).

<sup>365</sup> Cf Brunei, UN Council of Crime Prevention and Criminal Justice, *Review of Priority Themes: Additional information on measures to combat alien-smuggling*, UN Doc E/CN.15/1995/3 (26 April 1995) paras 19-20; Singapore Immigration & Registration, *News Release: Tough Enforcement Action against Immigration Offenders* (Feb 1999).

where persons deceive immigration officials to achieve a particular immigration outcome or where they otherwise actively and intentionally violate immigration laws.

## 5.4. Conclusion

In the past and present, most countries in the Asia Pacific region have viewed migrant trafficking primarily as an issue of national security, and have tried to combat the phenomenon by criminalising most aspects of irregular migration and organised crime on domestic levels. The success, however, has been very limited as the beginning of the new millennium is facing growing levels of migrant trafficking along with new and stronger migration pressures and a growth in organised crime activities.

Amending the criminal law is a comparatively inexpensive way to combat migrant trafficking and usually finds strong public support. To increase penalties appears to be the most immediate response to any media reports on illegal immigration. Also, creating new offences for traffickers and unlawful migrants has been a common tool for governments in response to the public's perception that their nations are 'invaded by floods of illegal immigrants'.

Controlling illegal immigration, especially migrant trafficking, is a major challenge for sending, transit and receiving countries. There is no doubt that criminal law has a role to play in the suppression and prevention of migrant trafficking, and in the prosecution of offenders. Criminal measures are particularly attractive because, in principle, they only affect the criminals, and because they may produce a positive short-term effect by gaoling offenders, and a long-term effect by preventing further criminal activities. However, there is great doubt that criminalising irregular migration has a deterrent effect on persons who are fleeing as a result of persecution, unemployment, poverty or severe environmental degradation. Moreover, it needs to be remembered that the criminal law is a remedy of last resort, and that criminal law and its enforcement cannot substitute the structural and political changes that are necessary to address the more fundamental causes of migrant trafficking.

Migrant trafficking is sometimes described as a victimless crime, also because it serves to transport refugees to more secure places. But there are many difficulties with this line of reasoning. Traffickers exploit and abuse people desperate to save their lives and those of their friends and families. Traffickers jeopardise these people's life-savings, maltreat them

physically and place their lives at risk. This is not a victimless crime and traffickers must be held criminally responsible for all their actions and intentions, and it must be ensured that they are dealt with fairly and adequately by national and international criminal justice systems.

In order to be successful, efficient law enforcement mechanisms and the actual prosecution and conviction of traffickers must accompany the criminal offences surrounding migrant trafficking. A principal problem for many, if not most countries in the Asia Pacific region is the discrepancy that exists between law and law enforcement systems. Many countries, especially the economically less flourishing ones, have great difficulties in enforcing their laws and in controlling their borders effectively, which is particularly difficult in countries with large, archipelagic coastlines. But even in countries with effective control mechanisms, law enforcement operations mostly concentrate on the individual migrant, leaving aside the involvement of criminal organisations in the trafficking of migrants.

Chapter Five has demonstrated that many countries in the region do not have up-to-date legislation to deal with large criminal organisations and their transnational activities. Although migrant trafficking, along with many other organised crime activities, is an offence that goes beyond national boundaries, the focus of law and law enforcement has remained local and national. Furthermore, criminal law, criminal procedure and law enforcement regulations vary greatly among jurisdictions, thus resulting in safe havens for traffickers.

The principal problem that is inherent in the existing regulations is that in order to combat trafficking organisations, their activities and structure effectively, the provisions largely depend on international law enforcement cooperation and mutual legal assistance. As seen in earlier Chapters, most criminal organisations engaged in illegal migration operate transnationally, and therefore the investigation of crimes and the prosecution and extradition of offenders depend heavily on the assistance provided by foreign countries. It is for that reason that provisions like, for instance, those under Chinese and Macau criminal law may prove to be unsuccessful as long as they remain unique and are not complemented by legislation in any other country of the Asia Pacific region.

A further problem in the fight against migrant trafficking and in controlling and regulating migration flows is that of refugees. The existence of asylum systems and the protection

provided thereunder is one of the key determinants for migration flows in the Asia Pacific region. It is not surprising, that the majority of people migrating in the region — those who are not labour-migrants — move to countries that are Signatories of the *Refugee Convention* and that put into place asylum systems. But to date, only very few countries in the region are committed to the obligations of international refugee law. Most countries fear about the potential political consequences, as to grant refugee status carries a negative imputation and can have a detrimental effect on the relationship between the receiving and the sending country. Consequently, the nations that have not signed the *Refugee Convention* may consider as illegal immigrants all foreigners not admitted as legal immigrants, and remove them as soon as practicable. In the absence of effective protection regimes in transit countries, asylum seekers are forced to move on to safe havens as they may otherwise be at risk of prolonged detention and refoulement.

At the same time it has been found that existing refugee protection schemes are seriously abused by migrants, and that traffickers advise their customers to apply for asylum as soon as they are apprehended by border control or police forces. It is not evident to answer the question how these abuses can be avoided in the future, without infringing the rights of migrants.

Although it is important that the criminal law demonstrates its full strength towards traffickers and immigration offenders, it must not deprive people of opportunities to access asylum systems and of the fair assessment of their claims. The requirements of immigration regimes and the offences that apply to unauthorised arrivals can interfere with international obligations, fundamental human rights and, in particular, the non-refoulement obligations established under various international human rights instruments. It is not reasonable to take action against migrant trafficking by eliminating legal avenues for migration and restricting the protection provided to asylum seekers. In this context it has been stated:

Simply building new barriers around Western countries will not make the refugee problem go away. Restrictive measures taken unilaterally by Western states do not solve the problem but merely pass it on to some other country to resolve, thus contributing to some interstate tensions, protectionism and, and a breakdown in the international refugee regime.<sup>366</sup>

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<sup>366</sup> Loescher, *supra* note 138, at 97, 99.



But the concern is not limited to refugees only; it also touches the much broader aspect of international migration. As long as people are convinced that life is better elsewhere, there is no way to avoid that some of them will 'try their luck' and move abroad, be it legally or illegally, with or without the consent of the countries involved.

Although many countries in the Asia Pacific region have received migrants from around the world, not one country today operates an active immigration policy; all seek to tightly control access to their territories. The isolated efforts of one country can make little or no difference; in fact, they can merely result in a displacement of the problem. Most countries in the region continue to ignore that the phenomenon of migrant trafficking is essentially situated on a structural level. As such, it is not simply a matter of national security and criminal law; it needs to be dealt with at all levels and all areas of government.

Moreover, the issues associated with migrant trafficking are not exclusive to one country; they are transnational in nature and concern all countries in the region. The underlying problems that cause migratory movements and refugee flows need to be addressed by regional development cooperation, and by information and education programmes to improve the sharing of responsibility. These are long-term processes that require strong commitment by all countries involved.

At the short and medium-term it is important that the countries of the region cooperate in elaborating, implementing and enforcing mechanisms to effectively combat the operations of traffickers and to protect the migrant victims. In order to reduce and eventually eliminate the discrepancies in law and legal systems, the countries of the region need to harmonise their immigration and asylum systems together with the equal criminalisation of violations of immigration laws. The growth of migrant trafficking in the Asia Pacific region urges nations to elaborate and implement adequate countermeasures, and cooperate in regional and international fora.

## CHAPTER SIX

### INTERNATIONAL INITIATIVES TO COMBAT MIGRANT TRAFFICKING

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Chapters Four and Five have demonstrated that the laws of Australia and most other countries in the Asia Pacific region have been largely unsuccessful in preventing and suppressing migrant trafficking. Illegal migration and organised crime are on the rise despite recent efforts to increase penalties, and step up border control and law enforcement measures. Moreover, in some nations, enforcement of laws in this area is lax, and the prosecution of offenders is the exception rather than the rule. Also, when law enforcement action is taken, it is usually directed against the illegal migrants, who face detention and removal for their illegal entry. Many countries still do not, or not adequately criminalise migrant trafficking organisations and their activities or participants in the trade. Furthermore, few countries have developed comprehensive strategies to tackle migrant trafficking and coordinate domestic efforts with regional and international strategies.

The lack of an international law enforcement authority, the absence of shared and consistently applied legal principles in criminal justice and immigration systems, combined with the non-existence of internationally accepted migration, asylum and resettlement regimes, have provided migrant trafficking organisations with an opportunity to exploit the discrepancies that exist between different legal systems. Also, the failure to achieve appropriate solutions for refugee and migratory flows has meant that many asylum seekers remain in refugee camps and detention centres. Initially designed as temporary arrangements, they have become permanent solutions.

The control, prevention and suppression of transnational migrant trafficking can only be successful if nations overcome national reservations and prepossessions, and solve intra-national problems of jurisdiction, legislation and sovereignty. With the enormous growth of migrant trafficking around the world, countries have now begun to recognise the necessity of international cooperation. Over the last five years, the international

community has engaged in multilateral consultations and negotiations. Multilateral agreements have been drafted with a view to eventual agreement on binding treaties. The concern over the rapid growth of asylum seekers in many nations along with the internationalisation of organised crime has led to an increasing number of initiatives at global and regional levels aimed at coordinating and intensifying the fight against illegal migration and organised crime.

This Chapter examines international initiatives to combat migrant trafficking as well as regional activities to prevent and suppress illegal migration and organised crime in the Asia Pacific. The Chapter provides an account of the institutional and the normative frameworks dealing with migrant trafficking at the supranational level.

First, Section 6.1 introduces the institutional framework by examining the role of international organisations in the field of migrant trafficking. Particular emphasis is placed on initiatives by international maritime and aviation organisations to enhance the safety of migrants and ensure that passengers are admissible in destination countries. These developments are compared to the activities of refugee and humanitarian organisations that focus on the human rights dimension of migrant trafficking.

The United Nations has been at the forefront of international cooperation against trafficking in migrants. Section 6.2 outlines the focus of the UN Crime Prevention and Criminal Justice Program and the role of UN agencies engaged in monitoring illegal migration and organised crime. Sections 6.3 and 6.4 focus on the principal international normative frameworks dealing with organised crime and migrant trafficking. The idea for an international treaty against organised crime first arose at the World Ministerial Conference on Organised Transnational Crime, held in Naples in 1994, which led to the elaboration of the United Nations *Convention against Transnational Organised Crime* and the *Protocol against the Smuggling of Migrants by Land, Air and Sea*. This Chapter outlines the developments resulted in the conclusion of these instruments in December 2000.

With the emergence of illegal migration and organised crime in the region, some mechanisms have been established in the Asia Pacific region to combat migrant trafficking. Section 6.5 analyses initiatives taken at the regional level, including the Manila Process, the Asia Pacific Consultations, ASEAN, APEC, the Pacific Islands Forum, and CSCAP.

The aim of this Chapter is to illustrate developments at international and regional levels and investigate the effectiveness of the existing multilateral agreements. This analysis serves as a basis for the elaboration of proposals for enhanced cooperation in Chapter Seven.

## 6.1. The Role of International Organisations

Migrant trafficking is a multi-faceted activity, raising concerns about criminal justice, human rights, immigration and asylum issues. A variety of international organisations have engaged in the fight against trafficking operations, in the regulation of the migration and transportation process, and in the protection of asylum seekers. Among these organisations are those concerned about the transportation of illegal migrants by sea and air, such as the International Maritime Organisation, the International Civil Aviation Organisation, and the non-governmental International Air Transport Association. Organisations dealing with the refugee and humanitarian aspects of migrant trafficking include the UN High Commissioner for Refugees, the Office of the UN High Commissioner for Human Rights, and the International Organisation for Migration. Finally, organisations such as Interpol and IGC have a focus on international law enforcement cooperation.<sup>1</sup>

### 6.1.1. Carrier and Transportation Organisations

Organisations that seek to regulate the international transportation industry were among the first to call for global cooperation to combat unauthorised arrivals and counteract unsafe ways of trafficking.

International maritime law and international aviation law have developed very differently with regards to migrant trafficking. International civil aviation law places a strong emphasis on the facilitation and acceleration of international air travel. In order to enable transnational flights to depart and arrive as quickly as possible, it is necessary that all passengers comply with immigration and emigration formalities. The principal concern of international civil aviation law is with immigration compliance and with preventing undocumented migrants from illegally entering the destination country. In contrast,

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<sup>1</sup> On the role of international organisations and migrant trafficking generally, see IOM, "Partnership Building: The Role of International Organizations in Dealing with Irregular/Undocumented Migration" paper submitted to the *International Symposium on Migration: Towards Regional Cooperation on Irregular/Undocumented Migration*, Bangkok, 21-23 Apr 1999.

international maritime law and the work of the International Maritime Organisation place a premium on the safety of migrants at sea. Through its work, IMO is seeking to improve the protection and safety of trafficked migrants, while the International Civil Aviation Organisation is seeking to single out trafficked migrants and prevent them from arriving in the destination country.

Distinct characteristics of the shipping and aviation industries and the ways in which they are regulated explain much of this difference. For example, in civil aviation, the legitimate passengers outnumber trafficked migrants by far, thus requiring speedy arrival and departure procedures. Trafficked migrants aboard commercial aircraft usually travel individually, while the experience of destination countries shows that trafficking by sea often takes place in large groups. Also, trafficking by sea often involves unseaworthy vessels or boats with hidden compartments, while trafficking by air, for the most part, is carried out by commercial airlines.<sup>2</sup>

#### 6.1.1.1. International Maritime Organisation (IMO)

The first international organisation to address the issue of migrant trafficking was the International Maritime Organisation, IMO. IMO is a specialised agency of the United Nations and is primarily concerned with maritime safety and the protection of the marine environment. Established in 1958 and based in London, IMO's principal concern is the adoption of legislation to ensure the highest level of maritime safety and environmental protection. The organisation seeks to provide mechanisms for international cooperation on shipping and maritime issues, and encourage the development and adoption of the highest practicable standards concerning maritime safety and efficiency of navigation.<sup>3</sup> In 2001, IMO counted 158 Member States featuring all countries of the Asia Pacific region with sea borders.

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<sup>2</sup> See *supra* Sections 3.4.2.3 and 3.4.2.4.

<sup>3</sup> Cf arts 1, 3 *IMO Convention*. IMO was established in 1958 (and renamed in 1982) by the *Convention on the Intergovernmental Maritime Consultative Organisation*, 6 Mar 1958, 1958 ATS 5 [hereinafter *IMO Convention*].

IMO first drew attention to migrant trafficking in November 1993, following the sinking of the vessel *Golden Venture* off the coast of New York, which resulted in casualties and the deaths of many trafficked migrants.<sup>4</sup> IMO was primarily concerned with the unsafe practices of sea trafficking that often place passengers' lives at risk. The IMO Assembly's first resolution on this matter sought to improve maritime safety standards and prevent illegal migrants from embarking in unsafe vessels or being abandoned at sea. Resolution 773(18) of 4 November 1993 calls upon Member States to cooperate in preventing unsafe practices associated with migrant trafficking, to examine and, if necessary, detain suspect vessels, and to ensure the safety and humane handling of the persons on board.<sup>5</sup>

In August 1997, the Government of Italy submitted a draft proposal for a Multilateral Convention to Combat Illegal Migration by Sea to the IMO Legal Committee. This initiative resulted from a considerable increase in unauthorised boat arrivals in Italy during previous years. The Italian proposal sought to establish a range of specific measures to prevent and combat migrant trafficking by sea, and open up the way for international cooperation on this matter. The draft convention proposed a codified international offence for the traffic of illegal migrants, measures to regulate reciprocal assistance and police cooperation, and a legal basis for the extradition of offenders. Moreover, it specifically recommended that illegal migrants must not be punished under criminal law for their illegal entry.<sup>6</sup>

In view of the importance of the problem most delegations supported the Italian proposal. However, questions arose over the competence of IMO as the proposed Italian draft primarily focussed on the creation of an international criminal offence along with other matters of international criminal law. Furthermore, it was stated that the Italian proposal might cause overlaps with initiatives taken up by other international organisations. In

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<sup>4</sup> The sinking of the ship *Golden Venture* attracted a lot of media attention in the US which was followed by significant changes in the ways in which the US handles illegal immigration. For background information, see Ko-lin Chin, *Smuggled Chinese — Clandestine Immigration to the United States* (1999) 62-66; Paul Smith, "Chinese Migrant Trafficking: A Global Challenge" in Paul Smith (ed), *Human Smuggling: Chinese Migrant Trafficking and the Challenge to America's Immigration Tradition* (1997) 1 at 1-6.

<sup>5</sup> IMO Assembly, *Enhancement of Life at Sea by the Prevention and Suppression of Unsafe Practices Associated with Alien Smuggling by Ships*, IMO Doc Res A.773(18) (4 Nov 1993); and see Raul Pedrozo, "International Initiatives to Combat Trafficking of Migrants by Sea" in Myron Nordquist & John Moore, *Current Maritime Issues and the International Maritime Organization* (1999) 53 at 55-56.

November 1997, the IMO Legal Committee, followed in December 1997 by the IMO Maritime Safety Committee, supported the purpose of the Italian proposal, but agreed that it was necessary to wait for the outcome of work done by other organisations. The committees also noted that it would be more appropriate to elaborate a universal international law instrument that addresses all modes of transporting illegal migrants and that is not limited to trafficking by sea.<sup>7</sup> Notwithstanding significant support by other delegates, the IMO Assembly ultimately declared itself not competent, thus rejecting the Italian proposal.

But IMO's concern about the issue of migrant trafficking and the clandestine transportation of illegal migrants on unseaworthy vessels continued. In December 1998, the Maritime Safety Committee concluded a catalogue of interim non-binding measures to promote awareness and cooperation for the prevention and suppression of unsafe practices associated with the trafficking and transport of migrants by sea. These interim measures built on those recommended in Assembly Resolution 773(18) and on those contained in the Italian draft convention. The measures sought to establish mechanisms for bilateral and multilateral cooperation to ensure maritime safety standards, to report on, interdict and inspect suspect vessels, and to ensure the safety and the humane treatment of illegal migrants.<sup>8</sup> These interim measures have now been superseded by the conclusion of the *Convention against Transnational Crime* and the *Protocol against the Smuggling of Migrants* in December 2000. However, they represent an important milestone in the development of international measures against migrant trafficking. Most of these measures are now included in the special provisions on migrant trafficking by sea in articles 7-9 of the *Protocol against the Smuggling of Migrants by Land, Air and Sea*.

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<sup>6</sup> IMO Legal Committee, *Proposed Multilateral Convention to Combat Illegal Migration by Sea*, IMO Doc LEG 76/11/1 (1 Aug 1997). For details see *infra* Section 6.4.2.4.

<sup>7</sup> IMO Assembly, *Combating unsafe practices associated with the trafficking and transport of migrants by sea*, IMO Doc Res A.867(20) (27 Nov 1997); IMO Maritime Safety Committee, *Combating unsafe practices associated with the trafficking and transport of migrants by sea*, IMO Doc MSC 69/21/2 (29 Dec 1997); and see Andree Kirchner & Lorenzo Schiano di Pepe, "International Attempts to Conclude a Convention to Combat Illegal Migration" (1998) 10(4) *IJRL* 662 at 665-666; Pedrozo, *supra* note 5, at 56-57.

<sup>8</sup> IMO Maritime Safety Committee, *Interim measures for combating unsafe practices associated with the trafficking or transport of migrants by sea*, IMO Doc MSC/Circular 896 (16 Dec 1998); cf Pedrozo, *supra* note 5, at 60-62.



With the interim measures, the IMO Maritime Safety Committee also initiated the systematic collection of information on the trafficking of illegal migrants by sea. A reporting system has been established which requires Member Nations to provide information on any incident associated with unsafe trafficking by sea, including information on the port of embarkation, destination, nationality of the ship and owner, the number of persons transported, and a brief description of the incident. The information is then compiled and published biannually. A first report has been released in April 2001 and contains information on 43 incidents, involving 3,375 migrants.<sup>9</sup> All 43 incidents occurred in the Mediterranean and were reported by Greek and Italian authorities only. No information could be obtained as to why other countries, including those from Asia and the Pacific region, failed to report any incidents to IMO.

Simultaneously to the efforts to prevent and suppress unsafe trafficking by sea, IMO has also been concerned with the transportation of stowaways. As mentioned earlier, a significant number of people are transported secretly in concealed compartments of vessels or containers, often without the knowledge of captain and crew. Many, if not most of the stowaways are undocumented migrants seeking clandestine entry to another country.<sup>10</sup> In December 1997, the IMO Legal Committee concluded a resolution on *Guidelines on the Allocation of the Responsibilities to Seek the Successful Resolution of Stowaway Cases*.<sup>11</sup> The resolution calls for cooperation at bilateral and international levels to prevent the embarkation of stowaways, facilitate the identification and processing of clandestine passengers, and enable their return. The Guidelines recognise that stowaway asylum seekers must be treated in accordance with the obligations under international refugee law and that their safety must be ensured at all times. Furthermore, the Guidelines seek to prevent that stowaways become migrants in orbit by ensuring that they are accepted either at the port of embarkation, in destination or transit points, or in their country of citizenship. These Guidelines are in many ways similar to the obligations arising under international civil aviation law in that they seek to prevent the transportation and arrival of

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<sup>9</sup> IMO Maritime Safety Committee, *Trafficking of Illegal Migrants by Sea — First biannual report*, IMO Doc MSC.3/Circular 1 (30 Apr 2001).

<sup>10</sup> See *supra* Section 3.4.2.3.

<sup>11</sup> IMO Assembly, *Guidelines on the allocation of responsibilities to seek the successful resolution of stowaway cases*, IMO Doc Res A.871(20).

undocumented migrants.<sup>12</sup> However, the IMO Guidelines are not binding and they do not impose any liability on the masters or owners of vessels. Carriers are required to comply with the Guidelines and facilitate the identification and return of clandestine migrants, but they do not face sanctions if they fail to report stowaway cases, if they do not prevent them from landing, or if they refuse to assist in the return of stowaways.

In the context of migrant trafficking, IMO's principal concern is with the safety of life at sea, including crew, cargo, and passengers (legitimate and clandestine). The initiatives, resolutions and guidelines developed by IMO seek to ensure that the transportation by sea is carried out safely and that passengers, crew and cargo are not placed at risk. IMO recognises national security interests and respects compliance with national immigration regulations, but its initiatives focus on the protection of persons in danger, rather than on deterring unauthorised arrivals and criminalising migrants and carriers. IMO has generally taken a humanitarian approach to migrant trafficking and has repeatedly called for the protection of trafficked migrants.

#### 6.1.1.2. International aviation law and the International Civil Aviation Organisation (ICAO)

International civil aviation law is primarily concerned with the safety of commercial aircraft and international air traffic, issues of navigation, and the facilitation of international air travel. The key instrument of international civil aviation law, the *Convention on International Civil Aviation*, signed in Chicago on 7 December 1944, seeks to promote and implement measures for safe and orderly international civil air traffic.<sup>13</sup> It also established the International Civil Aviation Organisation (ICAO), based in Montreal,

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<sup>12</sup> See *infra* Section 6.1.1.2.

<sup>13</sup> 15 UNTS 275 [hereinafter *Chicago Convention*]. Of the countries of the Asia Pacific region only Australia (1 Mar 1947; 1957 ATS 5), PR China (31 Oct 1947), Philippines (1 Mar 1947), and Thailand (4 Apr 1947) signed the Convention. Brunei (4 Dec 1984), Fiji (5 Mar 1973), Indonesia (27 Apr 1950), Lao PDR (13 June 1955), Malaysia (7 Apr 1958), Myanmar (8 July 1948), Papua New Guinea (15 Dec 1975), Singapore (20 May 1966), Solomon Islands (11 Apr 1985), Vanuatu (17 Aug 1983), and Vietnam (13 Mar 1980) adhere to the Convention without signature; cf art 92 *Chicago Convention*.

as a specialised UN agency to monitor and assist in the development of principles and techniques by Member States.<sup>14</sup>

The *Chicago Convention* promotes uniformity and cooperation between State Parties to facilitate international air travel while recognising and enhancing safety requirements and standards. The Convention requires Signatories to implement the conditions and restrictions for safe and orderly international civil air traffic as developed on the basis of the Convention. Under article 28 State Parties “agree to provide and adopt, to the greatest extent possible, standard systems of procedures, codes, markings, signals and other operational practices and rules” as established under the Convention.

With regard to migrant trafficking and illegal migration, the Convention contains provisions on mutual cooperation between State Parties to standardise national procedures on immigration, emigration, customs and quarantine at embarkation, transit and destination points in order to improve and accelerate international air transportation.<sup>15</sup> The Convention recognises the sovereignty of Contracting States over immigration matters and refrains from formulating any recommendations or best practice principles for migration control at international airports. Under article 22, however, Contracting Nations agree to facilitate international air traffic by preventing “unnecessary delays” including those caused by lengthy emigration, immigration, customs and quarantine clearance. On this background, ICAO has recommended the development and universal use of machine-readable travel and identity documents to facilitate immigration control and prevent passport, visa and other document fraud.<sup>16</sup> Article 23 *Chicago Convention* provides that each Contracting State undertakes to establish customs and immigration procedures affecting international air navigation in accordance with the practices that have been established or recommended pursuant to the Convention.

Article 13 of the Convention requires, inter alia, compliance of crew and passengers with entry and departure formalities in embarkation and destination countries. Article 37(j) of

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<sup>14</sup> Arts 43-66 *Chicago Convention*.

<sup>15</sup> See in particular arts 22, 23 and 37(j) *Chicago Convention*. See generally, Ruwantissa Abeyratne, “Smuggling of Illegal Migrants by Air — Air Carrier Liability” (2000) 25(4-5) *Air & Space L* 148 at 154-157; Erika Feller, “Carrier Sanctions and International Law” (1989) 1(1) *IJRL* 48 at 53-54.

the *Chicago Convention* requires Contracting States to cooperate in the elaboration of uniform regulations and procedures for customs and immigration, which are then adopted and amended as necessary by ICAO. Annex 9 to the Convention contains the recommended standards adopted by ICAO pursuant to article 37(j). In order to facilitate international air travel, the Annex provides minimum standards for travel and identity documentation and for the inspection of these documents at embarkation and immigration points. The Annex calls upon Contracting States to limit entry and exit controls to the most necessary requirements and to abandon visa formalities for temporary visitors.

Carriers are required to ensure that their passengers are properly documented and meet the immigration requirements at the destination point. The standards provide that undocumented or otherwise inadmissible passengers, including those travelling with fraudulent documents, are to be returned to the custody of the air-carriers which should return the persons at their expense to the point of departure or another place where the returnees are admissible. Carriers who are found transporting undocumented passengers can be fined if they neglect to verify the documentation of their passengers. Carriers cannot be fined, however, if their passengers possess fraudulent documents. The emphasis of the Annex 9 standards is on the possession of documents, not on their authenticity. Commercial airlines are not burdened with the obligation to apprehend false and altered travel and identity documentation. If, however, fraudulent documents are found, carriers are required to seize them and return them to the authorised agencies of the issuing country.<sup>17</sup>

On the basis of the *Chicago Convention*, most countries in the region have introduced legislation that places administrative and/or criminal sanctions on carriers who transport undocumented immigrants.<sup>18</sup> Under these provisions carriers are liable if they fail to comply with immigration regulations, if they do not prevent undocumented passengers from disembarking and entering the country, or if they fail or refuse to return inadmissible

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<sup>16</sup> Cf Ruwantissa Abeyratne, "Air Carrier Liability and State Responsibility for the Carriage of Inadmissible Persons and Refugees" (1999) 24(1) *Air & Space L* 3 at 6; and id, "Smuggling of Illegal Migrants by Air" *supra* note 15 at 150-153.

<sup>17</sup> See Abeyratne, *ibid*, at 4-5; id, "Smuggling of Illegal Migrants by Air" *supra* note 15, at 155-156; James Fox, *The Regulation of International Commercial Aviation* (1995-) Booklet 8, 22-24; and Feller, *supra* note 15, at 54-55.

<sup>18</sup> See *supra* Section 5.2.1.3.2.

passengers. In all countries, these provisions apply simultaneously to air-carriers and to operators of vessels that arrive by sea or overland. International maritime law, however, does not contain any provisions similar to those under the *Chicago Convention* and the standards developed pursuant to the Convention.

Responsibility for ensuring the uniformity fostered by the *Chicago Convention* is vested in the International Civil Aviation Organisation. ICAO has, however, no power to enforce the provisions of the *Chicago Convention* and its standards and annexes. The ICAO Council can report any infractions of the Convention and any failure to carry out recommendations or determinations of the Council to Contracting States and to the ICAO Assembly.<sup>19</sup> But neither the Council nor the Assembly can force any nation to comply with the Convention and the recommendations. Moreover, article 38 *Chicago Convention* allows State Parties to depart from international standards and procedures if they find it impossible or impracticable to comply with them, or if the State wishes to adopt its own standards and procedures.

### 6.1.1.3. International Air Transport Association (IATA)

The International Air Transport Association (IATA) is a non-governmental trade association of the world's international airline industry. The goals of IATA are to promote safe and reliable air services, develop cost-effective standards and procedures to facilitate the operation of international air transport, identify and articulate common industry positions, and support the resolution of key industry issues. Founded in 1919 and based in Montreal, IATA now brings together 277 commercial airlines from around the world, including 34 domestic and international air carriers from the Asia Pacific region.<sup>20</sup>

In 1987, IATA established a Control Authorities Working Group (IATA/CAWG) in which air carriers cooperate with governments on the issue of inadmissible and inadequately documented passengers. Essentially, the group coordinates anti-migrant trafficking strategies and multinational interdiction exercises at selected airports. Today, the Working Group has seventeen member nations, featuring government and airline delegations from

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<sup>19</sup> Art 54(j), (k) *Chicago Convention*.

countries that witness particularly large numbers of unauthorised air arrivals. From the Asia Pacific region, the Working Group includes immigration officials and airline representatives from Australia and from the Association of Asia Pacific Airlines (AAPA).<sup>21</sup>

Recent initiatives of the Control Authorities Working Group include the development of *A Code of Conduct for Immigration Liaison Officers, Guidelines on Advance Passenger Information*, and the updating of a training programme for detection of inadequately documented passengers.<sup>22</sup>

The *Code of Conduct for Immigration Liaison Officers*, released in October 1998, compiles information and guidelines regarding overseas immigration officers. Canada and the United States were the first countries to place immigration and airline liaison officers at international airports overseas; a model that was later adopted by Australia and other countries. The officers assist commercial airlines in identifying undocumented passengers, apprehending fraudulent travel and identity documentation by checking travel documents, and by training local staff in the interception of fraudulent documents. The *Code of Conduct* developed by the IATA Working Group outlines the tasks and role of immigration liaison officers. Essentially, the officers can assist and advise airlines and local authorities in detecting cases of identity document fraud, but they have no power to prevent carriage of a passenger. Also, they cannot arrest or prosecute anyone engaged in the illegal movement of inadequately documented passengers.<sup>23</sup>

The *Guidelines on Advance Passenger Information*, published in October 1999, seek to establish a formal framework under which immigration intelligence and arrival procedures can be standardised in order to improve border security and at the same time facilitate international air travel. To prevent identity document fraud, the Guidelines recommend the universal use of machine-readable travel documents and mutual assistance in providing equipment that is required to put into practice the Advance Passenger Information program.

In conclusion, it needs to be borne in mind that IATA is an industry-based association and, unlike ICAO, not a sovereign international organisation. As such, the policies,

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<sup>20</sup> For further information see the IATA website at [www.iata.org](http://www.iata.org).

<sup>21</sup> On AAPA see *infra* Section 6.5.8.1.

<sup>22</sup> The documents are available at the IATA/CAWG website, [www.iata.org/oi/committees/icawg/main\\_public.asp](http://www.iata.org/oi/committees/icawg/main_public.asp) (21 Dec 2001).

recommendations and guidelines developed by IATA and the Control Authorities Working Group do not have the status of international law and they are not enforceable. With that in mind, the IATA initiatives can, however, serve as a set of best practice principles, particularly as they seek to develop working arrangements that are acceptable for both commercial air carriers and national immigration and law enforcement authorities.

#### 6.1.1.4. Carrier regulations and migrant trafficking

The key objective of the provisions under international civil aviation law, of the carrier sanctions under national immigration laws,<sup>24</sup> and of the principles developed by IMO, ICAO and IATA is not the creation of criminal offences and the prosecution of offenders. The provisions primarily serve as a basis to ensure certain safety standards, make commercial carriers responsible for transporting inadequately documented passengers, and lay all expenses attached to the processing, detention and removal of unlawful immigrants on those who transport them.

But placing sanctions on carriers for transporting inadmissible persons raises severe concerns in circumstances where the passengers are refugees or otherwise protected under international law. Sanctions, such as administrative or criminal penalties placed on carriers for transporting asylum seekers, discourage them from carrying refugees, thereby limiting the access to safe havens for people who may be in desperate need of protection.<sup>25</sup>

Furthermore, national authorities and airline personnel are frequently not aware of the distinction between refugees, who are entitled to international protection, and other migrants. If overseas authorities along with liaison officers, including staff from private companies, verify the possession and validity of travel and identity documentation of departing passengers and deny boarding to persons with no or with fraudulent documents,

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<sup>23</sup> IATA, CAWG, *A Code of Conduct for Immigration Liaison Officers* (1998) paras 2.1-2.4.

<sup>24</sup> See *supra* Sections 4.1.2.3.1 and 5.2.1.3.2.

<sup>25</sup> Feller, *supra* note 15, at 59, 61; UNHCR Executive Committee, *General Conclusions on International Protection*, No 46, 38<sup>th</sup> Sess (1987), UN Doc A/AC.96/702 (1987) 36.

they may also, directly or indirectly, refuse protection to a person who may have a genuine fear of persecution and may be in desperate need of asylum.<sup>26</sup>

Attention must also be drawn to the fact that the provisions established on the basis of the *Chicago Convention* and those recommended in the IMO Guidelines create the risk that passengers who are genuine refugees are returned involuntarily to a place where they are at risk or face persecution. Such return contravenes the non-refoulement obligation under article 33 of the *Convention relating to the Status of Refugees*<sup>27</sup> and under other international human rights treaties.<sup>28</sup>

### 6.1.2. Migration, Refugee and Humanitarian Organisations

A number of international organisations address the humanitarian, migration and refugee aspects of trafficking. Among these organisations are UNHCR, whose mandate is to protect and assist refugees, IOM, the international migration organisation, and the UNHCHR, who seeks to protect and promote human rights. Elsewhere, the International Committee for the Red Cross (ICRC) assists people caught in armed conflict, UNICEF, which aids children, and a large number of other international and non-governmental organisations that cannot be listed here.

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<sup>26</sup> Feller, *supra* note 15, at 57; UNHCR, Executive Committee, *Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach*, UNHCR Doc EC/50/SC/CRP.17 (9 June 2000) para 17.

<sup>27</sup> 189 UNTS 50. On the controversy between international aviation law and international refugee law generally see Abeyratne, "Air Carrier Liability and State Responsibility for the Carriage of Inadmissible Persons and Refugees" *supra* note 16, at 3-16.

<sup>28</sup> Art 7 ICCPR, 993 UNTS 3; art 45 1949 *Geneva Convention relative to the Protection of Civilians in Time of War*, 75 UNTS 287; art 3(1) 1984 *Convention against Torture and other Cruel or Degrading Treatment or Punishment*, 1465 UNTS 85; art 3(1) 1967 *Declaration on Territorial Asylum*, UN General Assembly Res 2312(XXII) (14 Dec 1967); and art 22 1989 *Convention of the Rights of the Child*, 1577 UNTS 3.



### 6.1.2.1. United Nations High Commissioner for Refugees (UNHCR)

UNHCR, the United Nations High Commissioner for Refugees, is the principal organisation for the protection of forcibly displaced persons. More than two-thirds of all the international assistance to refugees is channelled through UNHCR.

UNHCR was established in 1950, substituting its predecessors UNRRA and IRO. The United Nations Relief and Rehabilitation Administration (UNRRA) was originally set up in November 1943 to assist persons who had been displaced by the Second World War, not just refugees fleeing their country of origin. After the war, UNRRA focused largely on repatriating displaced persons. UNRRA did not consider or determine refugee status.<sup>29</sup>

IRO, the International Refugee Organisation, replaced UNRRA in 1947. Its mandate, too, was limited to three years, and only encompassed refugees in Europe.<sup>30</sup> But IRO also was the first truly international refugee organisation as it was supported by many non-European nations, including Australia, PR China and the Philippines,<sup>31</sup> and its functions addressed all aspects of refugee protection, including repatriation, identification, registration and classification, care and assistance, legal and political protection, transport, resettlement and re-establishment.<sup>32</sup> The IRO Constitution also opened the way for resettlement in third countries as an alternative to returning refugees to their country of origin.<sup>33</sup>

As it became clear that the problem of refugees and displaced persons was not just a short-term post-war phenomenon, the international community started to investigate long-term programmes for the protection of those fleeing persecution. This ultimately resulted in the

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<sup>29</sup> Cf Fernando Chang-Muy, "International Refugee Law in Asia" (1992) 3 *NYU J Int'l L & P* 1171 at 1171-1172; UNHCR, *The State of the World's Refugees 2000: Fifty Years of Humanitarian Action* (2001) 13-16.

<sup>30</sup> *Constitution of the International Refugee Organisation*, 15 Dec 1946 (18 UNTS 3; 1948 ATS 16) [hereinafter *IRO Constitution*] Annex I, pt I, s A defines refugees as persons "who have left, or who are outside of, their country of nationality or of former habitual residence, and who, whether or not they have retained their nationality," and who are victims of a Nazi or fascist regime, victims of Spanish fascist regime, and refugees as defined in pre-WWII treaties. Section B defines "displaced person" as a "person who, as a result of the actions of the authorities of the regimes mentioned in Part I, Section A, paragraph 1(a) of this Annex has been deported from, or has been obliged to leave his country of nationality or former habitual residence, such as persons who were compelled to undertake forced labour or who were deported for racial, religious or political reasons."

<sup>31</sup> Australia signed the *IRO Constitution* on 13 May 1947. China signed the Constitution on 29 Apr 1947. The Philippines signed on 18 Dec 1948.

<sup>32</sup> Art 2 *IRO Constitution*.

<sup>33</sup> See generally, UNHCR, *The State of the World's Refugees 2000*, *supra* note 29, at 16-18.

conclusion of the *1951 Convention relating to the Status of Refugees*<sup>34</sup> and the establishment of UNHCR as the United Nation's permanent refugee agency.<sup>35</sup>

UNHCR's functions are prescribed in the *UNHCR Statute*.<sup>36</sup> UNHCR has two main goals: One is to provide international protection for refugees. The second is to seek permanent solutions to the problem of refugees by assisting governments in facilitating the voluntary return of refugees, their admission to and integration in the community of the receiving country, or resettlement in a third country.<sup>37</sup>

The mandate of UNHCR is, however, not limited to refugees as defined in article 6 of the Statute; a definition that is identical to that of the *Refugee Convention*. Given the changing nature of migration flows and the limitation of the Convention definition, the UN General Assembly and the UN Economic and Social Council have in many resolutions expanded the High Commissioner's mandate.<sup>38</sup> UNHCR has often operated beyond its statutory mandate, and repeatedly argued for a re-definition of refugees. Following the conclusion of regional refugee conventions in Africa and Central America,<sup>39</sup> which use broader definitions of the term 'refugee', UNHCR has interpreted its mandate beyond article 6 *UNHCR Statute* to cover all persons who have been displaced forcibly from their country because of internal upheavals, armed conflict, gross discrimination or massive human rights violations.<sup>40</sup>

At the operational level, UNHCR is active in all countries of the Asia Pacific region, except Brunei and some of the smaller South Pacific island nations, and the organisation has assisted millions of refugees from around the region. As the majority of nations in the region have not signed the *Refugee Convention and Protocol*, UNHCR's primary task in

<sup>34</sup> See *supra* Section 2.2.2.1.

<sup>35</sup> UN General Assembly, A/Res/319 (IV) (3 Dec 1949).

<sup>36</sup> UN General Assembly, A/Res/428 (V) (14 Dec 1950) Annex [hereinafter *UNHCR Statute*].

<sup>37</sup> Arts 2, 8, 9 *UNHCR Statute*.

<sup>38</sup> Under art 3 *UNHCR Statute* "the High Commissioner shall follow policy directives given by the General Assembly or the Economic and Social Council."

<sup>39</sup> *1969 Convention Governing the Specific Aspects of Refugee Problems in Africa*, UN General Assembly A/RES/2594 (XXIV) [1969 *OAU Refugee Convention*]; *1984 Cartagena Declaration on Refugees*; UN General Assembly A/RES/42/110 [1984 *OAS Refugee Declaration*].

<sup>40</sup> On UNHCR's mandate see Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (1993) 141-142; Volker Türk, "The role of UNHCR in the development of international refugee law" in Frances Nicholson & Patrick Twomey (eds), *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 153 at 154-159.

the Asia Pacific is to protect asylum seekers, assist governments in determining their status, arrange the resettlement of refugees in third countries, and, in few cases, enable admission in the host nation.<sup>41</sup>

At the policy level, UNHCR promotes the principles of international refugee law, in particular the *Refugee Convention and Protocol*. The organisation can call attention to a country's legal obligations<sup>42</sup> but it cannot enforce the rules of international refugee law and monitor a country's compliance with the *Refugee Convention*. In fact, very few, if any safeguards are built into the Convention to prevent abuse by Member States or compel governments to administer international refugee law in a consistent and fair manner.<sup>43</sup>

With regards to migrant trafficking, UNHCR has assisted many trafficked migrants and has repeatedly called for the protection of victims of trafficking. The organisation has urged transit and destination countries to maintain fair and open asylum systems despite growing levels of organised trafficking and abuse of immigration programmes.<sup>44</sup> Most recently, UNHCR has played an active role in the elaboration of the *Protocol against the Smuggling of Migrants* and, in cooperation with UNHCHR, UNICEF and IOM, persuaded the UN Ad Hoc Committee to include safeguard clauses for the protection of migrants and refugees into the Protocol.<sup>45</sup>

#### 6.1.2.2. Office of the United Nations High Commissioner for Human Rights (UNHCHR)

The Office of UNHCHR seeks to promote and defend the universal application of human rights. The post of the High Commissioner was established in 1993 and the Office of

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<sup>41</sup> Cf Loescher, *ibid*, at 138.

<sup>42</sup> Art 8 *UNHCR Statute*.

<sup>43</sup> Loescher, *supra* note 40, at 139, 140; cf Türk, *supra* note 40, at 159-166.

<sup>44</sup> See, for example, UN General Assembly, Executive Committee of the High Commissioner's Programme, *Report of the Fifty-First Session of the Executive Committee of the High Commissioner's Programme*, UN Doc A/AC.96/944 (13 Oct 2000) 9; UNHCR, Executive Committee, *Interception of Asylum-Seekers and Refugees*, UNHCR Doc EC/50/SC/CRP.17 (9 June 2000) paras 28-32.

<sup>45</sup> See art 16 *Protocol against the Smuggling of Migrants*; and UN General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations High Commissioner for Refugees, the United Nations Children's Fund and the International Organisation for Migration on the*

UNHCHR consolidated into a single agency in 1997.<sup>46</sup> UNHCHR assists in the elaboration and implementation of human rights at national and international levels. The Office initiates and coordinates human rights action at the UN level, seeks to prevent human rights abuses, and respond to serious violations of human rights.

The UN High Commissioner for Human Rights has recently taken a more sustained interest in the subject of migrant trafficking. The Office has created the position of an Advisor on Trafficking with the principal focus on the particular problems associated with trafficking in women and children. Also, the Office has repeatedly called attention to the human rights violations inherent in migrant trafficking and other forms of clandestine migration. UNHCHR has pledged for the recognition of migrants' rights and the protection of victims of trafficking. In 1999, the High Commissioner addressed the UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Crime and submitted a proposal "to integrate human rights into [the] analysis of the trafficking problem and in the development of an effective international legislative response."<sup>47</sup> The proposal was later combined with efforts made by UNHCR, IOM and UNICEF,<sup>48</sup> and ultimately resulted in the safeguard clauses contained in article 16 *Protocol against the Smuggling of Migrants* and articles 6 and 7 *Protocol to Prevent, Suppress and Punish Trafficking in Persons*.<sup>49</sup>

### 6.1.2.3. International Organisation for Migration (IOM)

IOM, the International Organisation for Migration, is the single most important international organisation addressing the issue of migrant trafficking, assisting trafficked migrants, and combating exploitative and irregular forms of migration.

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*draft protocols concerning migrant smuggling and trafficking in persons*, UN Doc A/AC.254/27 (8 Feb 2000) and Corr.1 (22 Feb 2000).

<sup>46</sup> The mandate of the Office of UNHCHR derives from arts 1, 13 and 55 *Charter of the United Nations* (1945 ATS 1), and UN General Assembly Res A/48/141 (20 Dec 1993).

<sup>47</sup> UNHCHR, *Message from the High Commissioner for Human Rights, Mary Robinson to the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime* (Vienna, 7 July 1999).

<sup>48</sup> UN General Assembly, Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations High Commissioner for Refugees, the United Nations Children's Fund and the International Organisation for Migration on the draft protocols concerning migrant smuggling and trafficking in persons*, UN Doc A/AC.254/27 (8 Feb 2000) and Corr 1 (22 Feb 2000).

The organisation came into existence on 5 December 1951 as the Intergovernmental Committee for European Migration (ICEM). Similar to IRO and UNHCR, ICEM was originally established to assist displaced persons in Europe, but its focus was on technical and operational assistance rather than on the protection of refugees. Over the following decades, ICEM became engaged in activities outside Europe, particularly in Latin America, Africa and Oceania. Given the increasingly global role of ICEM, in 1980, Member States renamed the organisation Intergovernmental Committee for Migration (ICM). The status of the organisation was reinforced by a constitution, which in 1987 transformed ICM to the International Organisation for Migration.<sup>50</sup> Today, IOM has 86 Member States, including from the Asia Pacific region Australia, the Philippines, and Thailand. 46 other countries have observer status, including Cambodia, PR China, Indonesia, Papua New Guinea, and Vietnam.<sup>51</sup>

The principal objective of IOM is “to ensure, throughout the world, the orderly migration of persons who are in need of international migration assistance.”<sup>52</sup> IOM assists migrants, refugees, displaced persons and other individuals in need of international migration services.<sup>53</sup> Its mandate is not limited to persons who fall into categories that are defined by formal conventions or declarations; it covers all migrants (defined as persons who decided to migrate for reasons of personal convenience and free choice, without intervention of an external compelling factor) refugees and displaced persons (who are understood as all persons fleeing persecution, generalised violence and armed conflict) as well as other individuals who require migration assistance such as exiles and deportees.<sup>54</sup>

Unlike UNHCR, IOM has no protection mandate and its operations do not seek to promote or enforce any particular international convention. IOM’s tasks consist primarily of the provision of technical assistance to migrants. The organisation cooperates with national

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<sup>49</sup> See *infra* Section 6.4.2.4.

<sup>50</sup> *Constitution of the International Organisation for Migration* as entered into force on 14 Nov 1989, available at [www.iom.int/iom/mandate\\_and\\_structure/constitution\\_engl.ht](http://www.iom.int/iom/mandate_and_structure/constitution_engl.ht) (Dec 2001) [hereinafter *IOM Constitution*]. See generally Richard Perruchoud, “From the Intergovernmental Committee for European Migration to the International Organization for Migration” (1989) 1(4) *IJRL* 501 at 502-509.

<sup>51</sup> Membership and observer status as in June 2001.

<sup>52</sup> IOM, *IOM in Facts* (1993) 1.

<sup>53</sup> Art 1(a), (b) *IOM Constitution*.

<sup>54</sup> Richard Perruchoud, “Persons falling under the Mandate of the International Organization for Migration (IOM) and to Whom the Organization may Provide Migration Services” (1992) 4(2) *IJRL* 205 at 209-211.

governments and other international bodies to find solutions for groups of migrants to ensure an orderly migration flow and prevent clandestine and otherwise irregular movements of people. As such, IOM stands between governments and individual migrants and carries out a de facto protection for the human rights and physical safety of migrants and displaced persons.<sup>55</sup>

IOM's objective in counteracting trafficking is "to curtail migrant trafficking and to protect the rights of migrants caught up in the practice."<sup>56</sup> IOM is particularly concerned about those migrants who are, or have been, deceived or coerced into situations of economic exploitation, which unfold through forced labour, forced servitude, coercion, debt bondage, or other violations of their fundamental human rights. IOM is assisting many trafficked migrants in transit and destination countries throughout the Asia Pacific region. The assistance provided by IOM consists of medical support, counselling, education and vocational training, and in some cases provision of micro-credits and/or other income-generating activities. For persons whose asylum claims have been rejected, IOM facilitates their resettlement or voluntary return and reintegration. IOM also informs would-be migrants in sending countries about the potential dangers inherent in trafficking and other clandestine forms of migration.<sup>57</sup>

Furthermore, IOM is concerned about trafficking as it poses a migration management problem to governments of sending, transit and destination countries. Following the amendment of the *IOM Constitution* in 1989, the organisation has also been mandated to provide a forum for Member States to discuss migration issues, promote cooperation and coordinate efforts to ensure orderly migration. In this capacity, IOM has organised numerous seminars and fora at international and regional levels, including a conference on "International Response to Trafficking in Migrants and the Safeguarding of Migrant Rights", held in Geneva, 26-28 October 1994, which was the first global seminar in which countries of origin, transit and destination met to discuss the issue of migrant trafficking. One of the results of this meeting was the establishment of regional dialogues on

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<sup>55</sup> *Ibid* at 211-212.

<sup>56</sup> IOM Res 908 (LXIX) (30 Nov 1994).

<sup>57</sup> IOM, "Counter Trafficking Service" (2000) [www.iom.int/ct/entry.htm](http://www.iom.int/ct/entry.htm); id, "Partnership Building" *supra* note 1.

trafficking, including the Puebla Process in Central America and the Manila Process for the countries of East and South East Asia.<sup>58</sup>

Finally, IOM engages in technical cooperation, information gathering and dissemination, and in research on migrant trafficking to raise general awareness of the problems associated with it. Over the last decade, IOM has released numerous reports on migrant trafficking in different regions of the world and has assisted in academic research around the world, including in this study.<sup>59</sup>

#### 6.1.2.4. General observations

The principal obstacle for organisations such as IOM, UNHCR and UNHCHR is that their activities are unlikely to be effective in the long term, because the organisations cannot resolve the political, demographic and socioeconomic causes of refugee and migration flows. The mandate of these organisations is the protection of migrants and refugees and their human rights, irrespective of their nationality and origin. But in practical terms, the responsibility for protection at the national level is with sovereign governments that have the power to grant, control and refuse entry and asylum.

IOM and UNHCR can help migrants and refugees materially and can assist them in their claims for asylum. The organisations can cooperate with governments and condemn violations of human rights and breaches of international law. But they have no power to compel nations to the principles of international refugee law. The position of IOM and UNHCR is further weakened by the fact that they cannot impose any pressure on countries that deny protection or violate migrants' and refugees' rights, as the organisations depend on the collaboration with these countries in order to raise funding, obtain access to asylum seekers, set up refugee camps, and implement procedures for orderly repatriation and resettlement.<sup>60</sup>

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<sup>58</sup> See *infra* Section 6.5.1.

<sup>59</sup> The author acknowledges the support provided by Mr Jorgen Steen Olesen, former Chief of Mission, Regional Office for Australia, New Zealand, Papua New Guinea and the South Pacific, Canberra, and the staff at the IOM Headquarters in Geneva.

<sup>60</sup> Loescher, *supra* note 40, at 136-137, 139; Myron Weiner, "Introduction: Security, Stability and International Migration" in Myron Weiner (ed), *International Migration and Security* (1993) 1 at 23.

Further weaknesses of the position of these international organisations are caused by the fact that their operations depend on voluntary financial support of some very few countries. Like most international organisations they depend on donations and on the political support of the Western industrialised countries, particularly the United States, Canada, Japan and the countries of the European Union. The vast majority of the annual spending of organisations such as UNHCR and IOM is covered by donations from industrialised nations. For example, in 2000, the ten principal donor countries (USA, Japan, Netherlands, Sweden, European Commission, Norway, Denmark, UK, Canada, Germany) provided US\$616.1 million or 87.3 percent of the contributions to UNHCR.

Moreover, although the financial support offered to UNHCR and IOM is significant, it usually falls short of the real needs. Large parts of the organisations' expenditures are caused by sudden and urgent events that are unforeseeable at the time when annual budgets are planned. As humanitarian aid cannot be postponed to future budgets, UNHCR and IOM constantly have to request additional contributions in order to meet chronic shortfalls. The planning, managing, and funding of operations is a complex effort and in many instances the organisations cannot assist refugees and other migrants with the most basic aid and support.

### 6.1.3. Law Enforcement and Other Organisations

To date, there is no global law enforcement organisation. There is no police force with authority to investigate crimes beyond national boundaries. Although international criminal law is one of the most important issues of contemporary criminal justice, as yet there is no agency to investigate and prosecute offences that are criminalised in international treaties or that are transnational in nature. Even with the implementation of the *UN Convention against Transnational Organised Crime* law enforcement will remain primarily a national responsibility as the Convention is not enforced by an international organisation; its effectiveness depends on cooperation between national agencies.



### 6.1.3.1. Interpol

Interpol, the International Police Organisation based in Lyon, is the only law enforcement organisation that operates globally and assists in the fight against migrant trafficking and organised crime. Established in 1923 and renamed in 1956,<sup>61</sup> Interpol seeks to

ensure and promote the widest possible mutual assistance between all criminal police authorities, within the limits of the laws existing in the different countries and in the spirit of the Universal Declaration of Human Rights ... [and] ... to establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes.<sup>62</sup>

Interpol's concern is with "ordinary law" crime. This includes all types of crime from statutory and common law jurisdictions that have an international dimension and do not fall in the exclusion clause of article 3 *Interpol Constitution*.<sup>63</sup>

At the end of 2001, Interpol had 178 member countries.<sup>64</sup> The cooperation and information exchange between Member States, and between their police and criminal intelligence agencies in particular, is based on a global telecommunications network which is linked to a central Interpol database that stores information on transnational crime and its perpetrators. The information contained on the database is provided by participating agencies and circulated among them upon request.

Interpol first addressed the issue of organised crime and began to collect relevant information on criminal organisations in 1988. A specialised organised crime branch was established in 1989, which four years later created a database on transnational organised crime and the offenders engaged therein. Furthermore, Interpol is conducting a project under the name Eastwind that focuses on organised crime in Asia.<sup>65</sup>

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<sup>61</sup> In 1923, the 2<sup>nd</sup> *International Criminal Police Congress* established the International Criminal Police Commission (ICPC) as a primarily European police organisation with its headquarter in Vienna. The statutes of ICPC were revised in 1946 and the organisation was renamed Interpol in 1956.

<sup>62</sup> Article 2 *Interpol Constitution*, available at [www.interpol.com/Public/ICPO/LegalMaterials/constitution](http://www.interpol.com/Public/ICPO/LegalMaterials/constitution) (20 Mar 2002).

<sup>63</sup> Article 3 *Interpol Constitution* prohibits Interpol "to undertake any intervention or activities of a political, military, religious or racial character."

<sup>64</sup> From the Asia Pacific region Australia, Brunei, Cambodia, PR China with Hong Kong and Macau, Indonesia, Lao PDR, Malaysia, Myanmar, Papua New Guinea, Philippines, Singapore, Thailand and Vietnam are members of Interpol. Fiji, Solomon Islands and Vanuatu are not.

<sup>65</sup> Gwen McClure, "The Role of Interpol in Fighting Organized Crime" (2000) 481 *Int'l Crim Pol Rev*; John Morrison, *The Trafficking and Smuggling of Refugees — the end game in European asylum policy?* (2000) 18; Secretariat of the Budapest Group, *The Relationship between Organized Crime and Trafficking in Aliens* (1999) 8-10.

Recognising that migrant trafficking is closely associated with transnational organised crime, Interpol initiated its first project dealing with illegal immigration matters in 1996. The study under the name Marco Polo collected intelligence on the criminal organisations engaged in migrant trafficking to Western Europe and on the *modi operandi* and routes these organisations use. The Marco Polo project was completed in 1997.<sup>66</sup>

In 1999, Interpol started “Project Bridge” to collect information on trafficking organisations and individual offenders. The objective of this new project is to identify members of trafficking organisations, collect information on the organisations, their structure and activities. Project Bridge particularly focuses on information regarding individual offenders, common trafficking routes and methods of transportation, harbouring of illegal migrants in transit and destination countries, and on identity document fraud.<sup>67</sup> In 2001, 27 countries contributed information to Project Bridge. The collected data is analysed from various angles:

- ◆ *Case links* can be established when several offenders repeatedly act in various smuggling events in different countries, when illegal immigrants are in possession of contact addresses and telephone numbers which already appeared in other smuggling events. Repeatedly, the same smugglers/immigrants are registered and expelled at different border posts.
- ◆ The *comparative case analysis*, including the choice of the routes, the escorting procedures and the way of arranging for the travel documents (eg escorts meeting the groups in the transit area and changing flight tickets or travelling documents). The organisations might use a certain travel agency to book flight tickets, the visas and passports are obtained or falsified in a special way, or they might use blank documents originating from thefts.
- ◆ *Offender group analysis* on a certain organised crime association, its management, members and their duty, hierarchy and *modi operandi*, from illegal immigration/border crossing perspective, and post-smuggling activities (crime areas) where migrants are pushed when not [able] to pay their debts.<sup>68</sup> ...

By 29 December 2000, Project Bridge had collected information on 484 cases of migrant trafficking and on 1,628 offenders engaged in migrant trafficking.<sup>69</sup>

Interpol is the only international agency that facilitates the investigation of international crimes, including migrant trafficking, and the identification and persecution of offenders.

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<sup>66</sup> Morrisson, *ibid*, at 57; Mladen Vulinec, Manager Project Bridge, “Role of Interpol in Combating Transnational Organised Crime Involvement in Illegal Immigration” paper presented at the *South East Asia/Pacific Region Conference on People Smuggling*, Canberra, 14-19 Jan 2001, 2-3.

<sup>67</sup> McClure, *supra* note 55.

<sup>68</sup> Vulinec, *supra* note 66, at 7-8 [emphasis added].

<sup>69</sup> Vulinec, *supra* note 66, at 10.

Interpol, however, does not initiate and conduct investigations and the agency's officers have no power to urge Member Nations to arrest individual offenders or investigate particular crimes. Interpol is not a police force and does not have its own police officers. It serves primarily as an administrative body to collect and distribute criminal intelligence. Moreover, Interpol depends on cooperation by Member Nations on the basis of voluntary bilateral agreements; it has no power to seek criminal intelligence, extradition and cooperation from countries.<sup>70</sup>

Interpol plays a very rudimentary role in the Asia Pacific region. Although most countries of the region are members of the organisation, only a very small percentage of Interpol's operations are conducted in this region and even smaller portions of its resources are directed to the Asia Pacific. Member nations in the region have criticised Interpol for being Euro-centric, while Interpol has repeatedly complained about the lack of support and intelligence the organisation obtains from the countries in the Asia Pacific.<sup>71</sup> As the majority of nations in this part of the world continue to consider crime and criminal justice as matters of national rather than international concern, many countries are very reluctant to contribute to global databases. It is for that reason, that regional law enforcement cooperation, particularly that in the framework of ASEANAPOL deserves stronger attention and support.<sup>72</sup>

### **6.1.3.2. Inter-Governmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC)**

The Intergovernmental Consultations on Asylum, Refugee and Migration Policies in Europe, North America and Australia (IGC) is an international forum for information exchange and policy coordination on migration, particularly with respect to illegal migration and migrant trafficking. IGC was established in 1995 and has a small secretariat based in Geneva. Today, IGC has fourteen member governments that are financing the activities. In addition, IOM and UNHCR often participate in the consultations.

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<sup>70</sup> Cf Carrie Donigan Guymon, "International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention" (2000) 18 *Berk J Int'l L* 53 at 72-73.

The IGC Secretariat arranges meetings, prepares documents, statistics and analytical reports, and takes initiatives to facilitate multilateral cooperation. IGC systematically collects information on legislative, policy, technological and other measures against migrant trafficking. IGC also maintains a database on trafficking statistics, the *Trafficking Information Exchange System* (TIES). TIES collects non-personal data on the number of trafficking interceptions, on details of trafficking activities, and on the nationalities of the migrants. The information is only shared among Member Governments and not publicly available.<sup>73</sup>

IGC has been established as a forum for the principal destination countries of migrant trafficking in Western Europe, North America and Australia. IGC, similar to ICMPD and the Budapest Group,<sup>74</sup> is very Euro-centric. For Australia, which is the only country from the Asia Pacific region in this forum, IGC provides a basis to share information to combat migrant trafficking with other destination countries. Although IGC is an important forum for information exchange and for cooperation between those countries, the organisation has often taken a very restrictive and hostile approach towards irregular migration and the pledge of asylum seekers, which is reflected in the information that IGC has released publicly.<sup>75</sup> IGC's views are often dominated by security and law enforcement concerns and do not adequately consider the situation of transit and sending countries of irregular movements.

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<sup>71</sup> Personal communication with Mr Jeff Penrose, Director National Intelligence, Australian Federal Police, Honolulu, 20 Feb 2002.

<sup>72</sup> See *infra* Section 6.5.4.3

<sup>73</sup> Australia, External Reference Group on People Smuggling (1999) 23; Morrison, *supra* note 65, at 18.

<sup>74</sup> See *infra* Section 6.5.9.

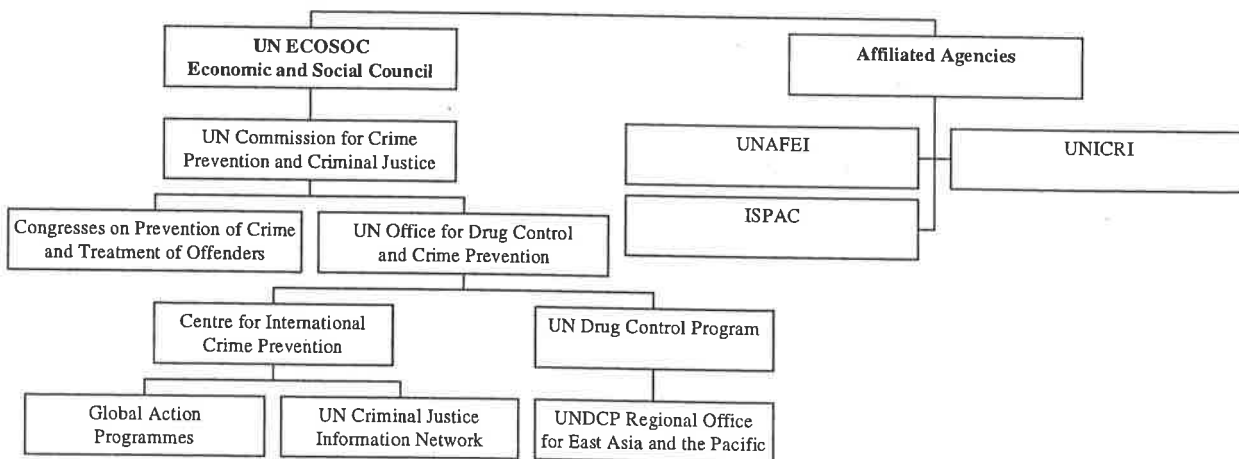
<sup>75</sup> See, for example, IGC, *Illegal Aliens: A Preliminary Study* (1995).

## 6.2. The United Nations and Organised Crime

With growing concern over organised crime and the globalisation of criminal activities, the UN has taken a genuine interest in preventing and combating transnational organised crime and in researching its causes and consequences. Over the last 25 years, organised crime has been addressed at all levels of the UN system, and, particularly in the 1990s, the UN has created specialised agencies and programmes for the organised crime prevention and coordination of anti-organised crime measures. These programmes are analysed in the following sections.

Crime prevention, the treatment of offenders, and criminal justice fall under the auspices of the UN Economic and Social Council (ECOSOC). As early as 1950, the UN General Assembly created an Ad Hoc Advisory Committee of Experts on crime prevention and control.<sup>76</sup> In 1955, ECOSOC organised a first *Congress on the Prevention of Crime and Treatment of Offenders* which was followed by regular congresses, held every five years. In 1971, the UN established a Committee on Crime Prevention and Control as a permanent subsidiary body of ECOSOC.<sup>77</sup>

**Figure 27: United Nations Crime Prevention and Criminal Justice System**



<sup>76</sup> UN General Assembly, A/Res/415(V) (1 Dec 1950).

<sup>77</sup> UN General Assembly, A/Res/1584(L) (1971).

### 6.2.1. UN Commission for Crime Prevention and Criminal Justice

The UN Commission on Crime Prevention and Criminal Justice was created in 1991/92, replacing the Committee on Crime Prevention and Control.<sup>78</sup> The Commission has 40 members, representing the UN Member Nations.<sup>79</sup> The key duty of the Commission is to formulate international policies on crime control, prevention and criminal justice, to recommend and coordinate activities to other entities of the UN system, and formulate draft resolutions for ECOSOC. The Commission, which meets annually in Vienna, offers Member Nations a forum for exchanging views and information, and to elaborate ways to fight crime on a global level under the UN crime programme. Moreover, the Commission organises the periodic UN Congresses on the Prevention of Crime and the Treatment of Offenders<sup>80</sup> and coordinates the crime prevention activities of the UN interregional and regional crime prevention and criminal justice institutes.<sup>81</sup>

When ECOSOC established the Commission in 1992, it was mandated with the following priority areas:

- ◆ international action to combat national and transnational crime, including organised crime, economic crime and money laundering;
- ◆ promoting the role of criminal law in protecting the environment;
- ◆ crime prevention in urban areas, including juvenile crime and violence; and
- ◆ improving the efficiency and fairness of criminal justice administration systems.<sup>82</sup>

Organised crime has been a major concern in the work of the Commission since 1992. Each annual session of the Commission has dealt with various aspects of organised crime and with the elaboration of comprehensive international instruments to combat transnational organised crime and associated offences. Following the *1994 World Ministerial Conference on Organised Transnational Crime* in Naples, the Commission

<sup>78</sup> UN General Assembly, *Creation of an Effective UN Crime Prevention and Criminal Justice Programme*, UN Doc A/Res/46/152 (18 Dec 1991); and UN ECOSOC, *Establishment of the Commission on Crime Prevention and Criminal Justice*, UN Doc E/Res/1/1992 (6 Feb 1992).

<sup>79</sup> The current Member Nations (2001) include from the Asia Pacific region Indonesia, the Philippines and Thailand. Membership changes with each annual session. For the list of Member Nations see [www.odccp.org/crime\\_cicp\\_commission\\_members.html](http://www.odccp.org/crime_cicp_commission_members.html).

<sup>80</sup> See *infra* Section 6.2.2.

<sup>81</sup> See *infra* Section 6.2.3-6.2.5.

<sup>82</sup> UN, *The United Nations and Crime Prevention* (1996) 15, and see also the website of the Commission on Crime Prevention and Criminal Justice [www.odccp.org/crime\\_cicp\\_commission.html](http://www.odccp.org/crime_cicp_commission.html).

endorsed the review and implementation of the *Naples Political Declaration and Global Action Plan against Organised Transnational Crime* and later created a committee for the elaboration of an international organised crime convention.<sup>83</sup>

Starting with the Fourth Session in 1995, the Commission began to deal with measures to combat migrant trafficking. It has compiled information on migrant trafficking from UN Member Nations and international organisations, and, on the basis of this information, has assisted in the development of measures to prevent and combat migrant trafficking at the global level.<sup>84</sup> The reports prepared by the Commission opened the way for the elaboration of the *Protocol against the Smuggling of Migrants by Land, Air and Sea* by the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime.<sup>85</sup>

### 6.2.2. UN Congresses on the Prevention of Crime and the Treatment of Offenders

Starting in 1955, the United Nations has held periodic Congresses on the Prevention of Crime and the Treatment of Offenders. These intergovernmental meetings are held every five years in different locations around the world.<sup>86</sup> The Congresses are designed to

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<sup>83</sup> See, for example, UN Commission on Crime and Criminal Justice, *Proposals related to the programmatic aspects of the Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc E/CN.15.1995/2 (22 May 1995); UN Commission on Crime and Criminal Justice, *Report of the Secretary-General on the implementation of the Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc E/CN.15/1996/2 (4 Apr 1996); UN Commission on Crime and Criminal Justice, *Report of the Secretary-General on the implementation of the Naples Political Declaration and Global Action Plan against Organized Transnational Crime and on the question of the elaboration of an international convention against organized transnational crime*, UN Doc E/CN.15/1997/7 (26 Feb 1997); UN Commission on Crime and Criminal Justice, *Report of the Secretary-General on the implementation of the Naples Political Declaration and Global Action Plan against Organized Transnational Crime and on the question of the elaboration of an international convention against organized transnational crime*, UN Doc E/CN.15/1998/6 (23 Mar 1998); and see *infra* Section 6.3.1.

<sup>84</sup> See, for example, UN Commission on Crime Prevention and Criminal Justice, *Additional information on measures to combat alien smuggling*, UN Doc E/CN.15/1995/3 (26 Apr 1995); UN Commission on Crime Prevention and Criminal Justice, *Measures to combat the smuggling of illegal migrants*, UN Doc E/CN.15/1996/4 (21 Mar 1996); UN Commission on Crime Prevention and Criminal Justice, *Measures to combat the smuggling of illegal migrants*, UN Doc E/CN.15/1997/8 (18 Feb 1997).

<sup>85</sup> See *infra* Section 6.4.

<sup>86</sup> The UN Congresses on the Prevention of Crime and the Treatment of Offenders have been held in Geneva 1955 (First Congress), London 1960 (Second Congress), Stockholm 1965 (Third Congress), Kyoto 1970 (Fourth Congress), Geneva 1975 (Fifth Congress), Caracas 1980 (Sixth Congress), Milan 1985 (Seventh

promote international cooperation on criminal justice matters, exchange information and experiences, and seek viable solutions to contemporary crime. The Congresses bring together government representatives from all UN Member Nations as well as specialists in the field, and interested international and non-governmental organisations. One of the primary functions of the Congresses has been the work on model treaties and the establishment of principles governing various aspects of crime prevention and the treatment of offenders, including international instruments against transnational organised crime and migrant trafficking. The recommendations adopted by the Congresses are forwarded to the UN Commission on Crime Prevention and Criminal Justice as well as other policy-making bodies of the UN.

### *Organised Crime*

Over the past 25 years, the UN Congresses have contributed substantially to the understanding of contemporary organised crime and have promoted cooperation against organised crime at the global level. The UN began to address the issue of organised crime at the *Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders* in 1975 which focussed specifically on the business dimension of organised crime, white-collar crime and corruption. Following the exploration of crime as business by researchers in America,<sup>87</sup> the Congress recognised that professional forms of crime pose a more serious threat to society, security and national economies of industrialised and developing nations than traditional forms of crime.<sup>88</sup> The *Sixth UN Congress on Crime Prevention and the Treatment of Offenders* broadened the understanding of organised crime, and particularly addressed the close relationship between organised crime, bribery and corruption.<sup>89</sup>

Throughout the 1980s, it was becoming more and more evident that the growing activities of organised crime are posing a serious threat worldwide. As the cross-border activities of international crime syndicates continued to grow, particularly in the form of drug

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Congress), Havana 27 Aug-7 Sep 1990 (Eighth Congress), Cairo 29 Apr-8 May 1995 (Ninth Congress), and Vienna 10-17 Apr 2000 (Tenth Congress).

<sup>87</sup> See *supra* Section 3.2.1.

<sup>88</sup> UN General Assembly, *Fifth UN Congress on the Prevention of Crime and the Treatment of Offenders, Crime as Business: Organized Crime, White-Collar Crime and Corruption*, UN Doc A/Conf.56/3 (1975); cf UN, *The United Nations and Crime Prevention*, *supra* note??, at 21-22; M Cherif Bassiouni & Eduardo Vetere (eds), *Organized Crime — A Compilation of U.N. Documents 1975-1998* (1999) xvii.

<sup>89</sup> Cf Bassiouni & Vetere (eds), *ibid*, at xvii-xviii.



trafficking and money laundering, the *Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders* adopted the so-called *Milan Plan of Action* to promote concerted international action to combat transnational crime in all its forms, including organised crime.<sup>90</sup> The Congress called upon Member States to introduce legislation to fight new and highly sophisticated forms of criminal activity, enable the forfeiture of criminal assets, and facilitate extradition and law enforcement cooperation.<sup>91</sup>

The issue of international law enforcement cooperation and information exchange was again addressed at the Eighth Congress, held in Havana in 1990. Great emphasis was placed on the emergence of world markets for illegal commodities and the laundering of money through the successor countries of the Soviet Union.<sup>92</sup> Moreover, the Congress developed a first set of *Guidelines for the prevention and control of organised crime* which recommend a series of strategies to prevent organised crime, enhance criminal legislation and investigations at national and international levels, and calls for cooperative action to combat organised crime, particularly in the form of money laundering and drug trafficking.<sup>93</sup>

The *Ninth UN Congress on the Prevention of Crime and the Treatment of Offenders*, held in Cairo in 1995, placed even greater emphasis on the globalisation of crime and the transnational activities of criminal organisations. On the issue of international cooperation, the Congress approved and endorsed the proposals made by the World Ministerial Conference on Organised Transnational Crime and the *Naples Political Declaration and Global Action Plan*, and asked that views of States be solicited on the possible elaboration of international instruments against transnational organised crime.<sup>94</sup>

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<sup>90</sup> UN General Assembly, *Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, Report prepared by the Secretariat*, UN Doc A/Conf.121/22 (1986) A. Adoption of the Milan Plan of Action.

<sup>91</sup> *Ibid.*, at E.1 Organised Crime. Cf Rodrigo Paris-Steffens, "The Role of the United Nations in Combating Organized Crime" in Jane Buckwalter (ed), *International Perspectives on Organized Crime* (1994) 13 at 14.

<sup>92</sup> UN General Assembly, *Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Effective National and International Action against: (A) Organized Crime (B) Terrorist Criminal Activities*, UN Doc A/Conf.144/15 (12 July 1990); UN, *The United Nations and Crime Prevention*, *supra* note 82, at 28-29.

<sup>93</sup> UN General Assembly, *Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Report of the Secretariat*, UN Doc A/Conf.144/28 (1991) Annex.

<sup>94</sup> UN General Assembly, *Ninth UN Congress on the Prevention of Crime and the Treatment of Offenders, Action against National and Transnational Crime, Economic and Organized Crime, and the Role of*

The most recent UN Congress was held in Vienna in April 2000. Again, particular emphasis of the Tenth Congress was laid upon international cooperation against transnational organised crime. The Congress discussed measures to fight organised crime globally and endorsed the work of the Ad Hoc Committee on the elaboration of a Convention against Transnational Organised Crime.<sup>95</sup>

### *Migrant Trafficking*

The UN Congresses did not address the issue of migrant trafficking until 1995. The Ninth Congress was the first to recognise that trafficking in migrants was among the most rapidly growing organised crime activities, noting that as many as one million people are transported illegally by criminal organisations around the globe.<sup>96</sup> The Congress called upon Member States, inter alia, “to promote further cooperation between their national crime prevention and criminal justice sectors in order to undertake international action against [...] alien smuggling.”<sup>97</sup>

Five years later, the *Tenth UN Congress on the Prevention of Crime and the Treatment of Offenders* discussed some common practices of trafficking and the criminal organisations engaged therein, and considered the implementation of technical assistance projects aimed at supporting States in their efforts to respond to the phenomenon.<sup>98</sup> The Congress adopted the *Vienna Declaration* expressing its commitment “to the development of more effective ways of collaborating with one another with a view to eradicating the scourge of trafficking

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*Criminal Law in the Protection of the Environment: National Experiences and International Cooperation*, UN Doc A/Conf.169/5 (30 Mar 1995) paras 70-79; UN General Assembly, Ninth UN Congress on the Prevention of Crime and the Treatment of Offenders, *Report of the Secretariat*, UN Doc A/Conf.169/16/Rev.1 (12 May 1995); cf UN General Assembly, *Ninth UN Congress on the Prevention of Crime and the Treatment of Offenders*, UN Doc A/Res/50/145 (21 Dec 1995). See *infra* Section 6.3.1.2-6.3.1.3.

<sup>95</sup> UN General Assembly, *Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-First Century*, UN Doc A/Conf.187/Rev.4 (15 Apr 2000) para 6-7; UN General Assembly, *International Cooperation in Combating Transnational Crime: New Challenges for the Twenty-First Century*, UN Doc A/Conf.187/6 (15 Dec 1999) paras 38-43.

<sup>96</sup> UN General Assembly, Ninth UN Congress on the Prevention of Crime and the Treatment of Offenders, *Action against National and Transnational Crime, Economic and Organized Crime, and the Role of Criminal Law in the Protection of the Environment: National Experiences and International Cooperation*, UN Doc A/Conf.169/5 (30 Mar 1995) paras 39-42.

<sup>97</sup> UN General Assembly, Ninth UN Congress on the Prevention of Crime and the Treatment of Offenders, *Report of the Secretariat*, UN Doc A/Conf.169/16/Rev.1 (12 May 1995) para 4.

<sup>98</sup> UN General Assembly, *International Cooperation in Combating Transnational Crime: New Challenges for the Twenty-First Century*, UN Doc A/Conf.187/6 (15 Dec 1999) paras 27-31.

in persons, especially of women and children, and the smuggling of migrants.”<sup>99</sup> The Congress however did not discuss the socioeconomic, political and economic causes of illegal migration, and did not recommend any specific measures to prevent and fight migrant trafficking and protect victims and witnesses.

### 6.2.3 UN Office for Drug Control and Crime Prevention (UNODCCP)

The UN Office for Drug Control and Crime Prevention (UNODCCP) was established in 1997 as a single UN Agency to administer the UN Drug Control Program (UNDCP) and the Centre for International Crime Prevention (CICP). The two entities UNDCP and CICP, however, operate largely separately. Although UNODCCP is primarily concerned with drug control, the work of the Office has in many instances touched upon issues relevant for the fight against migrant trafficking.

UNODCCP is based in Vienna and has approximately 350 staff and maintains 22 field offices and additional liaison offices around the world. The budget of the Office is primarily funded by voluntary contributions from national governments. In 2001, only seven percent of the UN Member Nations contributed financially to UNODCCP, providing approximately 90 percent of the office’s budget.<sup>100</sup>

#### 6.2.3.1. UN Drug Control Programme (UNDCP)

The United Nations Drug Control Programme (UNDCP) was founded in 1991 as a UN programme to promote and strengthen international cooperation against drug production, trafficking and drug-related crime. UNDCP also maintains global drug education and crop-monitoring programs, and it assists in implementing alternative development strategies in drug-producing countries. Moreover, UNDCP provides a forum for anti-money laundering cooperation and the training of judicial officials on drug related crime

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<sup>99</sup> UN General Assembly, *Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-First Century*, UN Doc A/Conf.187/Rev.4 (15 Apr 2000) para 14.

<sup>100</sup> OAS (Organisation of American States), *Activities of the United Nations System Regarding the Prevention of and War on Crime* (2001); and see the UNODCCP website [www.odccp.org](http://www.odccp.org).

and the fight against it. UNDCP is a unique UN entity in that it provides a comprehensive programme to fight drug offences. It addresses the criminal aspects associated with illegal narcotics, including the production, trafficking, and distribution of drugs and the laundering of proceeds of such crime. At the same time, the programme seeks to offer solutions to consumer related problems, such as rehabilitation, and provide mechanisms for alternative economic developments in countries that produce illicit drugs.<sup>101</sup>

### 6.2.3.2. UNDCP Regional Centre for East Asia and the Pacific

In 1992/93 UNDCP in cooperation with the Governments of Thailand, PR China, Lao PDR and Myanmar signed a Memorandum of Understanding to upgrade the UNDCP office in Bangkok to a Regional Centre to eliminate drug cultivation, trafficking and consumption in the region through economic and social development and education programmes.<sup>102</sup> In 1995, Cambodia and Vietnam joined the Memorandum. The six countries later adopted a *Subregional Action Plan for Drug Control* which provides the framework for collaborative drug control projects in the areas of demand reduction, supply reduction, and law enforcement.<sup>103</sup> In 1998, the UNDCP Regional Centre was given responsibility for drug control cooperation in over 30 countries of the Asia Pacific region.<sup>104</sup> Further UNDCP Field Offices have been opened in Vientiane (Lao PDR), Yangon (Myanmar) and Hanoi (Vietnam). A project office is located in Kuala Lumpur (Malaysia).

Although UNDCP is primarily concerned with drug control and the prevention of drug trafficking and consumption, the work of the Regional Office has in many instances touched upon issues relevant for the fight against migrant trafficking. Also, the projects initiated by UNDCP can serve as models for future anti-trafficking mechanisms. For example, UNDCP has developed a regional *Law Enforcement Action Plan* to enhance

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<sup>101</sup> For further information see the UNDCP website [www.odccp.org/undcp.html](http://www.odccp.org/undcp.html).

<sup>102</sup> The full text of the Memorandum is available at [www.undcp.un.or.th/mou](http://www.undcp.un.or.th/mou) (24 Sep 2001).

<sup>103</sup> The full text of the *Subregional Action Plan for Drug Control* is available at [www.undcp.un.or.th/sap](http://www.undcp.un.or.th/sap) (24 Sep 2001).

<sup>104</sup> Australia, Brunei Darussalam, Cambodia, PR China, Cook Islands, Democratic People's Republic of Korea, East Timor, Fiji, French Polynesia, Indonesia, Japan, Kiribati, Lao PDR, Malaysia, Marshall Islands, Micronesia, Mongolia, Myanmar, Nauru, New Caledonia, New Zealand, Niue, Palau, Papua New Guinea, Philippines, Republic of Korea, Samoa, Singapore, Solomon Islands, Thailand, Tonga, Tuvalu, Vanuatu and Vietnam.

international law enforcement cooperation, train law enforcement officers, and advise to governments on legislative issues such as money-laundering legislation.<sup>105</sup> Moreover, UNDCP staff actively participate in many regional fora on illegal migration and organised crime.

#### 6.2.4. UN Centre for International Crime Prevention (CICP)

CICP, established in 1997 and also based in Vienna, is the UN office responsible for crime prevention, criminal justice and law reform. The Centre is responsible for putting the work program of the UN Commission on Crime Prevention and Criminal Justice into practice and providing expert advice and information to other UN agencies. In doing so, CICP assists national governments in implementing the UN rules and standards and in planning national crime prevention and control programs. The Centre is part of UNODCCP and employs about fifteen staff, plus support personnel. CICP coordinates the UN Crime and Justice Information Network (UNCJIN), and maintains close ties with UNICRI.<sup>106</sup>

In the five years of its existence, CICP has placed a premium on three areas of transnational crime: anti-corruption, trafficking in human beings, and organised crime control. Jointly with UNICRI, CICP has initiated so-called Global Programmes to address and research three topical issues of contemporary transnational crime and elaborate appropriate countermeasures to fight and prevent these crimes.

- ◆ The *Global Programme against Corruption* researches problems associated with corruption and bribery in selected developing and transitional nations. The Programme examines policies and legislation dealing with corruption and provides technical assistance including the introduction of mechanisms to monitor public sector tendering and commercial transactions for the promotion of anti-corruption measures.<sup>107</sup>
- ◆ The *Global Programme against Transnational Organised Crime* is a first attempt to assess organised crime activity around the world and compile information about the

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<sup>105</sup> Cf [www.undcp.un.or.th/law](http://www.undcp.un.or.th/law) (24 Sep 2001).

<sup>106</sup> OAS, *supra* note 100; and see the CICP website [www.uncjin.org/CICP/cicp.html](http://www.uncjin.org/CICP/cicp.html)

<sup>107</sup> CICP & UNICRI, *Global Programme against Corruption: An Outline for Action* (1999).

trends and dangerousness of criminal organisations. The Programme seeks to establish a comprehensive body of information and documentation on the political and socioeconomic aspects of organised crime, the illegal markets in which criminal organisations operate and the structural dimensions of these organisations. The information is made available to UN agencies and UN Member Nations and published in a biannual *World Organised Crime Report*. Moreover, based on this information, CICIP will in the future develop anti-organised crime strategies and provide assistance at the request of national governments.<sup>108</sup>

◆ *Global Action Programme against the Trafficking in Human Beings*

In February 1999, CICIP and UNICRI launched the *Global Programme against Trafficking in Human Beings* to “bring to the foreground the involvement of organised crime groups in smuggling and human trafficking and promote the development of effective criminal justice-related responses to it.” The emphasis of the Global Programme is on the trafficking of women and children. The Programme initiated a series of field-projects, focusing on flows emanating from South East Asia as a region of origin, flows directed towards Western Europe as a destination region, and flows directed towards North America. Studies are conducted in selected countries around the world, including a principal study of the trafficking of persons from the Philippines.<sup>109</sup>

At the primary stage, the studies collect information on trafficking organisations, on the ways in which migrants, particularly women and children, are recruited by trafficking organisations, the methods of transporting them to the destination countries, and the situation of migrants upon arrival. Secondly, the Programme reviews the legislation dealing with trafficking and associated crimes in the selected countries and elaborates a set of best practice principles to be implemented on an experimental basis. The implementation of the demonstration projects is accompanied by the training of law enforcement officials, drafting of model legislation, implementation of victim assistance, witness protection and repatriation schemes, creation of preventative

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<sup>108</sup> CICIP & UNICRI, *Global Studies on Organized Crime* (1999); and see *World Organised Crime Report*, UNICRI, [www.unicri.it/html/world\\_organised\\_crime\\_report.html](http://www.unicri.it/html/world_organised_crime_report.html) (21 Sept 2001).

<sup>109</sup> For preliminary results from the project focusing on the Philippines, see UNICRI & AIC, *Rapid Assessment: Human Smuggling and Trafficking from the Philippines* (1999); and see *supra* Section 3.4.2.3.3.

policies, such as public awareness campaigns, and the establishment of frameworks for cooperation of relevant agencies across countries. In the final stage of the Programme, the experience of the demonstration projects will be assessed in order to design a comprehensive international strategy against the trafficking in migrants and the trafficking in women and children.<sup>110</sup>

### 6.2.5. Other UN Initiatives and regional UN Agencies

#### 6.2.5.1. UN Interregional Crime and Justice Research Institute (UNICRI)

Originally established by ECOSOC in 1968,<sup>111</sup> the UN Social Defence Research Institute was converted to UNICRI, the UN Interregional Crime and Justice Research Institute, in 1989.<sup>112</sup> The Institute's activities include comparative international and regional research on crime and criminal justice, technical cooperation and training of staff, as well as publication, library and documentation services. Together with CICP, UNICRI maintains the UN Crime and Justice Information Network (UNCJIN) and compiles and provides information for other UN agencies and for the preparation of the UN Congresses on the Prevention of Crime and the Treatment of Offenders.<sup>113</sup>

#### 6.2.5.2. Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI)

Starting in 1961, the United Nations, in cooperation with national governments, established a number of regional study centres to research characteristics of contemporary crime and criminal justice and promote regional research, judicial and law enforcement cooperation. The network of regional institutes affiliated with the UN crime prevention and criminal justice system currently includes the Asia and Far East Institute for the Prevention of Crime

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<sup>110</sup> CICP & UNCJIN, *Global Programme against Trafficking in Human Beings — An Outline for Action* (1999).

<sup>111</sup> UN ECOSOC Res 1086B (XXXIX) (1968).

<sup>112</sup> UN ECOSOC E/RES/56 (1989).

<sup>113</sup> For further details see OAS, *supra* note 100; UN, *The United Nations and Crime Prevention*, *supra* note 82, at 43-45; and see the UNICRI website at [www.unicri.it](http://www.unicri.it).

and the Treatment of Offenders (UNAFEI), the UN Latin American Institute for Crime Prevention and Treatment of Offenders (ILANUD), the European Institute for Crime Prevention and Control (HEUNI), and the UN African Institute for Crime Prevention and the Treatment of Offenders (UNAFRI).<sup>114</sup>

UNAFEI, the first of these regional centres, was established by an agreement between the United Nations and the Government of Japan in 1961. The Institute is located in Tokyo and since 1970 solely funded by the Japanese Government. The principal purposes of UNAFEI include the training of personnel on principles and practices of criminology and criminal justice, conducting of research in the fields of crime prevention, juvenile delinquency and the treatment of offenders, collection of data and material, and the provision of information on these issues to regional governments and international organisations.<sup>115</sup>

Over the forty years of its existence, UNAFEI has organised numerous seminars, has researched and published on contemporary issues of crime and criminal justice, including aspects of organised crime activity in East and South East Asia. At the time this study was completed, UNAFEI had not addressed any aspect of migrant trafficking.<sup>116</sup>

### 6.2.5.3. UN Crime and Justice Information Network (UNCJIN)

In cooperation with the UN Interregional Crime and Justice Research Institute (UNICRI), CICC undertakes and coordinates research on contemporary issues of crime and criminal justice. On the recommendation of an ECOSOC resolution of May 1996, CICC established an internet-based database, the UN Crime and Justice Information Network (UNCJIN), to facilitate information exchange and dissemination among UN agencies and UN Member Nations. UNCJIN contains crime statistics from around the world, publications on crime and criminal justice issues, and links to other UN agencies and research institutions.

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<sup>114</sup> For further details see OAS, *supra* note 100; UN, *The United Nations and Crime Prevention*, *supra* note 82, at 45-49; and see the UNAFEI website [www.unafei.or.jp](http://www.unafei.or.jp).

<sup>115</sup> Art I(2), (3) *Agreement between the United Nations and the Government of Japan for the Establishment of the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders*, 15 Mar 1961.

<sup>116</sup> Correspondence between the author and Professor Akihiro Nosaka, UNAFEI (21 Apr 1999).



UNCJIN seeks to provide an additional mechanism for contact among government officials, practitioners and academics as well as national delegates to the UN and scientific organisations.<sup>117</sup>

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<sup>117</sup> OAS, *supra* note 100; and see the UNCJIN website [www.uncjin.org](http://www.uncjin.org).

### 6.3. United Nations Convention against Transnational Organised Crime

The last decade has witnessed a significant growth in transnational organised crime activities. It has also seen multiple efforts by the international community to come to terms with this growth and work towards an international instrument to combat organised crime, of which migrant trafficking is one form.

In December 2000, the United Nations opened for signature the *Convention against Transnational Organised Crime*, a treaty that is supplemented by three protocols, including the *Protocol against the Smuggling of Migrants by Land, Air and Sea*. The conclusion of the Convention marks the end of more than eight years of consultations on a universal instrument to criminalise and counteract transnational criminal organisations. The idea of an international convention against organised transnational crime dates back to 1994, when the Naples *World Ministerial Conference on Organised Crime* first explored concerted multilateral action in this field. Subsequently, the United Nations initiated international consultations on a transnational organised crime convention and, in 1998, created an intergovernmental Ad Hoc Committee to draft the provisions of a convention against transnational organised crime and three protocols on trafficking in migrants, manufacturing of and trafficking in firearms, and on trafficking in women and children.

Section 6.3 illustrates the developments that led to the *Convention against Transnational Organised Crime* and reflects on the amendments and concessions that have been made to earlier proposals during the elaboration process. This section highlights the strengths of the Convention in the areas of judicial cooperation and mutual legal assistance, and the shortcomings of the new convention, in particular in failing to establish a universal, unequivocal definition of transnational organised crime.

### 6.3.1. Early Developments

#### 6.3.1.1. International conventions on the prevention and suppression of crime

While international cooperation against migrant trafficking is relatively new, other aspects of organised crime and criminal justice have long been recognised in international law and are dealt with by a large body of multilateral and bilateral agreements. The recent instruments against organised crime developed under the auspices of the United Nations built on the treaties formulated over the last century and draw from the experience following their ratification and implementation.

For example, international cooperation to suppress and combat drug trafficking dates back to 1912 when the *International Opium Convention* was concluded in The Hague.<sup>118</sup> Multiple agreements and conventions to suppress the use, cultivation, manufacture and trade of narcotic substances followed over the next decades. International efforts to combat drug trafficking were ultimately combined in the *1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*.<sup>119</sup> This convention imposes numerous binding provisions on Signatories, including the criminalisation of the laundering of proceeds from drug crime, cooperation in extraditing offenders, mutual legal assistance, and transfer of criminal proceedings.

Similarly, international cooperation against trafficking in women and children began in the 19<sup>th</sup> century and resulted in the conclusion of the *1904 International Agreement for the Suppression of the 'White Slave Traffic'*.<sup>120</sup> Although not specifically designed to combat the activities of criminal organisations, the agreements and conventions against the trafficking of women and children of the early 20<sup>th</sup> century meant an important contribution to the protection of victims and witnesses of such crime. They also led the international community to recognise very early that trafficking can only be suppressed effectively if countries cooperate multilaterally.<sup>121</sup>

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<sup>118</sup> 8 LTS 187.

<sup>119</sup> UN Economic and Social Council, *UN Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, E/CONF.82/15 and Corr.2; 1993 ATS 4.

<sup>120</sup> 1 LTS 83.

<sup>121</sup> See also *International Convention for the Suppression of the Traffic in Women and Children*, 30 Sep 1921, 9 LTS 415, 1922 ATS 10; *International Convention for the Suppression of the Traffic in Women of*

Other areas of international crime that are closely associated with the activities of transnational criminal organisations and that have been addressed and criminalised in international conventions include theft of nuclear material,<sup>122</sup> piracy,<sup>123</sup> and traffic in pornography.<sup>124</sup>

Apart from combating specific crimes, the international community has also developed a series of multinational treaties to fight the organisational and financial aspects of organised crime and, particularly at the bilateral level, facilitate the extradition of offenders.

International cooperation against corruption and bribery, for instance, dates back to 1975, when first initiatives were taken following growing concern over the involvement of corrupt government officials in international criminal activities.<sup>125</sup> In December 1996, the United Nations adopted a *Declaration Against Corruption and Bribery in International Commercial Transactions*.<sup>126</sup> In May 1997, OECD recommended that Member Countries should legislate against the bribery of foreign public officials and drafted an international agreement which led to the conclusion of the *Convention on Combating Bribery of Foreign Public Officials in International Business*.<sup>127</sup>

The first formal international instrument against money laundering dates back from 1988 and is contained in the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* which criminalises the conversion of illicit cash deriving from drug trafficking.<sup>128</sup> International organisations such as the Basle Committee on

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*Full Age*, 11 Oct 1933, 150 LTS 431, 1937 ATS 14; *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 21 Mar 1950, 96 UNTS 271.

<sup>122</sup> *Convention on the Physical Protection of Nuclear Material*, 3 Mar 1980, 1456 UNTS 101, 1987 ATS 16.

<sup>123</sup> Piracy has been an offence under customary international law since the 1600s. The principal contemporary conventions to prohibit, prevent, prosecute or punish piracy include the *Convention on the High Seas*, 29 Apr 1958, 450 UNTS 82, 1963 ATS 12; and the *Convention on the Law of the Sea*, 10 Dec 1982, 516 UNTS 205, 1994 ATS 31.

<sup>124</sup> *Agreement for the Suppression of the Circulation of Obscene Publications*, 4 May 1910, 1912 ATS 10; *International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications*, 12 Sep 1923, 27 LTS 213, 1935 ATS 19.

<sup>125</sup> Cf UN General Assembly, Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Report prepared by the Secretariat*, UN Doc A/CONF.56/3 (1975) paras 51-59.

<sup>126</sup> UN General Assembly, *United Nations Declaration against Corruption and Bribery in International Commercial Transactions*, A/RES/51/191 (21 Feb 1997) Annex.

<sup>127</sup> 37 ILM 1. Cf Donigan Guymon, *supra* note 70, at 72.

<sup>128</sup> 1582 UNTS 1, 1993 ATS 4.

Banking Supervision,<sup>129</sup> the Offshore Group of Banking Supervisors (OGBS),<sup>130</sup> the Commonwealth of Nations,<sup>131</sup> and especially the Financial Action Task Force (FATF)<sup>132</sup> have also developed international agreements and best practice principles to prevent and punish the laundering of proceeds of organised crime. Whilst there is yet no single universal international convention against money laundering, the Council of Europe *Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* has now global standard as it has been ratified by non-European nations, including Australia.<sup>133</sup>

#### 6.3.1.2. UN World Ministerial Conference on Organised Transnational Crime and the Naples Declaration

Among the first advocates for an international treaty against organised crime was the Italian Judge Giovanni Falcone, who was involved in the prosecution and conviction of many leaders of the Italian Mafia. Following his assassination in May 1992, the Italian Government strengthened its commitment to fight organised crime and submitted proposals for international cooperation against organised crime to the United Nations. In 1993, the UN General Assembly endorsed the idea of a first international conference on organised

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<sup>129</sup> In June 1996, the International Conference of Banking Supervisors, attended by representatives from 140 countries, developed the 29 *Basle Committee Recommendations* designed to strengthen the effectiveness of supervision of banks operating outside their national boundaries. Guidelines were issued for determining the effectiveness of home country supervision, for monitoring supervisory standards in host countries, and for dealing with corporate structures that create potential supervisory gaps.

<sup>130</sup> Established in October 1980 at the instigation of the Basle Committee on Banking Supervision. The primary objective of OGBS is to promote the effective supervision of banks in their jurisdictions and to further international cooperation in the supervision between the Offshore Banking Supervisors and between them and Basle Committee Member Nations and other banking supervisors. Furthermore, OGBS, in cooperation with FATF, evaluates the effectiveness of the money laundering laws and policies of its members.

<sup>131</sup> In October 1993 the Commonwealth Heads of Governments Meeting “commended” the FATF Forty Recommendations, “urged steps for their early implementation”, agreed to initiate a process of self-evaluation, and mandated their Senior Officials to monitor with the assistance of the Commonwealth Secretariat the implementation of these measures and develop a model Commonwealth anti-money laundering law. Cf Mark Jennings, “International Cooperation to Combat Money Laundering: The Australian Perspective” in Adam Graycar & Peter Grabosky (eds), *Money Laundering in the 21<sup>st</sup> Century: Risks and Countermeasures* (1996) 44 at 48; William Gilmore, “International Initiatives” in Richard Parlour (ed), *Butterworths International Guide to Money Laundering Law and Practice* (1<sup>st</sup> ed, 1995) 15 at 26.

<sup>132</sup> See *infra* Section 6.3.2.3.

<sup>133</sup> 1997 ATS 21. Cf Donigan Guymon, *supra* note 70, at 70-71.

transnational crime, to be hosted by Italy in 1994.<sup>134</sup> While earlier initiatives at the UN level addressed and discussed the transnational threat inherent in organised crime, the specific objective of this international conference was “to consider whether it would be feasible to elaborate international instruments, including conventions, against organised transnational crime.”<sup>135</sup>

The *World Ministerial Conference on Organised Crime* was held from 21-23 November 1994 in Naples, Italy, and was attended by representatives from 142 nations. The principal features of the conference were the recognition of the global growth of organised transnational crime<sup>136</sup> and the elaboration of appropriate countermeasures.<sup>137</sup> The conference resulted in the conclusion of the *Naples Political Declaration and Global Action Plan against Organised Transnational Crime*, which was proposed by the Government of Colombia.<sup>138</sup>

In the *Naples Declaration* the conference expressed its “deep concern about the dramatic growth of organised crime over the past decade and about its global reach” and emphasised

the urgent need for more effective international mechanisms to assist States and to facilitate the implementation of joint strategies for the prevention of and to combat organised transnational crime, and the further need to strengthen the role of the UN as a focal point in that field.”<sup>139</sup>

The conference reviewed existing organised crime legislation around the world, including preventive and law enforcement strategies, and procedural legislation. It identified some of the differences between nations and the loopholes that exist in national laws. The conference acknowledged that crime prevention and control “must necessarily vary from State to State and region to region and be based upon improvements in national

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<sup>134</sup> UN General Assembly, *Crime prevention and criminal justice*, A/RES/48/103 (20 Dec 1993).

<sup>135</sup> UN Economic and Social Council, *World Ministerial Conference on Organized Transnational Crime*, UN Doc E/RES/1993/29 (27 July 1993) para 1(e).

<sup>136</sup> See UN ECOSOC, *World Ministerial Conference against Organized Transnational Crime, Problems and dangers posed by organized transnational crime in the various regions of the world*, UN Doc E/CONF.88/2 (18 Aug 1994).

<sup>137</sup> The background papers to the conference (UN Docs E/CONF.88/1-6) have also been reprinted in Bassiouni & Vetere (eds), *supra* note 88, at 450-585; and Phil Williams & Ernesto Savona (eds), *The United Nations and Transnational Organized Crime* (1996) 1-160.

<sup>138</sup> *Naples Political Declaration and Global Action Plan against Organised Transnational Crime* reprinted in UN General Assembly, *Crime Prevention and Criminal Justice: Report of the World Ministerial Conference on Organized Transnational Crime*, UN Doc A/RES/49/748 (2 Dec 1994) Annex [hereinafter *Naples Declaration*].

capabilities". But it also called for the universal criminalisation of participation in criminal organisation, measures for confiscation and forfeiture of assets, and enhanced efforts to combat money laundering and corruption.<sup>140</sup>

Most importantly, the conference discussed avenues for future international cooperation and considered a draft document that outlined a possible international instrument to standardise legislation and law enforcement measures against organised crime.<sup>141</sup> The document examined the feasibility of an international convention, particularly in comparison to bilateral and multilateral agreements. While it was acknowledged that existing arrangements have been successful in combating individual instances of transnational organised crime and in formalising common regional experiences, they remained restricted in their application. Moreover, it was found that mechanisms that are geographically limited contribute to the discrepancies in national and regional legislation, to the extent that crime may be handballed elsewhere.<sup>142</sup>

In contrast, it was found that a universal convention, supported and implemented by a majority of nations, could offer a set of standards that signatories around the world would have to adhere to, and it would also serve as an important symbolic mechanism against organised transnational crime. Moreover, an international treaty would harmonise anti-organised crime legislation and law enforcement activities, and enhance global judicial and law enforcement cooperation as well as information sharing and the collection of data. However, major difficulties were seen in the finding of a worldwide consensus on the contents of a convention based on a common understanding of organised crime and its seriousness, and in the elaboration of an agreement that is clear, unequivocal and strict in its application and enforcement rather than being a political declaration. Furthermore, it was found that an international instrument requiring sophisticated investigation techniques

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<sup>139</sup> *Ibid*, preamble.

<sup>140</sup> See *ibid*, para 5; and UN ECOSOC, World Ministerial Conference against Organized Transnational Crime, *National legislation and its adequacy to deal with the various forms of organized transnational crime*, UN Doc E/CONF.88/3 (25 Aug 1994), and UN Office at Vienna, "The World Ministerial Conference on Organized Transnational Crime" (1995) 26/27 *UN Crime Prevention and Criminal Justice Newsletter* 7-8.

<sup>141</sup> UN ECOSOC, World Ministerial Conference against Organized Transnational Crime, *The feasibility of elaborating international instruments, including conventions, against organized transnational crime*, UN Doc E/CONF.88/6 (29 Sep 1994).

<sup>142</sup> *Ibid*, paras 15, 18.

and law enforcement measures would pose particular difficulties to economically less developed nations.<sup>143</sup>

The *Naples Declaration* provided a set of elements for an international convention, limited to forms of organised transnational crime that are not already covered by other international conventions and initiatives, including

theft of cultural property, trafficking in arms, illegal gambling, smuggling of illegal migrants, trafficking in women and children for sexual slavery, extortion, violence against the judiciary and journalists, corruption of government and public officials, trafficking in radioactive material, trafficking in body parts, trafficking in endangered species, transnational auto theft, money laundering and computer related crime.<sup>144</sup>

The document suggested that a convention ought to express very clearly the concern about the growth of transnational organised crime and establish basic principles of international cooperation. The proposal recommended that a convention should incorporate a general concept of transnational organised crime and its structural and operational features, rather than an enumerative list of crimes that are typically committed by criminal organisations.<sup>145</sup>

The document, however, did not mention the establishment of specific offences under a convention; instead it emphasised the need for detailed provisions on procedural legislation, regulatory and administrative measures, concerted action against money-laundering, assistance in judicial matters, extradition and information exchange, and for uniform investigation and prosecution techniques.<sup>146</sup>

While the Naples conference recognised that organised crime benefits from the shortcomings of existing legislation, many countries were reluctant to support the idea of an international convention and preferred to increase and enhance bilateral and multilateral legal assistance agreements.<sup>147</sup>

The *Naples Declaration* however, stressed the need for enhanced international cooperation,

particularly in relation to:

- (a) Closer alignment of legislative texts concerning organised crime;

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<sup>143</sup> *Ibid*, paras 28-38.

<sup>144</sup> *Ibid*, para 41.

<sup>145</sup> *Ibid*, paras 39-42.

<sup>146</sup> *Ibid*, paras 43-49.

<sup>147</sup> Cf the comments made by the representatives of Canada and Japan, reprinted in UN Office at Vienna, *supra* note 140, at 10.



- (b) Strengthening international cooperation at the investigative, prosecutorial and judicial levels in operational matters;
- (c) Establishing modalities and basic principles for international cooperation at the regional and global levels;
- (d) Elaboration of international agreements on organised transnational crime;
- (e) Measures and strategies to prevent and combat money-laundering and to control the use of the proceeds of crime.<sup>148</sup>

Reflecting the debate at the conference, the *Naples Declaration* places great emphasis on practical aspects of international cooperation. At the same time, the Declaration recommends that “States should consider the further development of international instruments [...] such as a convention or conventions against organised transnational crime” and “requests the Commission on Crime Prevention and Criminal Justice to initiate the process of requesting the views of Governments on the impact of such a convention or conventions and on the issues that could be covered therein.”<sup>149</sup>

In December 1994, the UN General Assembly approved the *Naples Political Declaration and Global Action Plan against Organized Transnational Crime*.<sup>150</sup> This resolution opened the way for the elaboration of an international convention against transnational organised crime at the UN level.

### 6.3.1.3. Draft proposals for an organised crime convention

Following the approval of the Declaration by the UN General Assembly, the Commission for Crime Prevention and Criminal Justice was requested to undertake appropriate action to endorse and monitor the implementation of the *Naples Declaration*.<sup>151</sup> Simultaneously, the *Ninth UN Congress on the Prevention of Crime and Treatment of Offenders*, held in Cairo, 29 April-8 May 1995, considered the *Naples Declaration*, and recommended that the Commission on Crime Prevention and Criminal Justice request the views of Governments

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<sup>148</sup> *Naples Declaration*, para 9.

<sup>149</sup> *Naples Declaration*, paras 32-34.

<sup>150</sup> UN General Assembly, *Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc A/RES/49/159 (23 Dec 1994) para 3.

<sup>151</sup> *Ibid*, paras 4, 8.

on the possible elaboration of an international convention, particularly focusing on the following issues and elements:

- (a) Problems and dangers posed by organised crime;
- (b) National legislation dealing with organised crime and guidelines for legislative and other measures;
- (c) International cooperation at the investigative, prosecutorial and judicial levels;
- (d) Modalities and guidelines for international cooperation at the regional and international levels;
- (e) Feasibility of various types of international instruments, including conventions, against organised transnational crime;
- (f) Prevention and control of money-laundering and control of the proceeds of crime;
- (g) Follow-up and implementation mechanisms.<sup>152</sup>

Subsequent to the Congress, the Commission on Crime Prevention and Criminal Justice at its Fourth Session asked the UN Secretary-General to request views of Governments on the impact of an international convention against transnational organised crime and on possible issues to be covered therein.<sup>153</sup>

Twenty States responded to the Secretary-General's request. The majority of countries supported the idea of an international convention against transnational organised crime, while only one country opposed the elaboration of such a treaty. Australia and the Philippines, the only two respondents from the Asia Pacific region, expressed their concern about the difficulties of developing a convention that is universally acceptable but also effective.<sup>154</sup>

Around the same time, a series of regional ministerial workshops on organised transnational crime and corruption were held in Latin America, Africa and Asia to further discuss the *Naples Declaration* and comment on the proposal of a convention against transnational organised crime. The Latin-American Regional Workshop, held in Buenos Aires, 27-30 November 1995, supported the idea of an international convention and

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<sup>152</sup> UN General Assembly, *Report of the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, UN Doc A/CONF.169/16 (12 May 1995) 15.

<sup>153</sup> UN ECOSOC, *Implementation of the Naples Political Declaration and Global Plan of Action against Organized Transnational Crime*, UN Doc E/RES/1995/11 (24 July 1995).

<sup>154</sup> UN Commission on Crime Prevention and Criminal Justice, *Implementation of the Naples Political Declaration and Global Plan of Action against Organized Transnational Crime*, UN Doc E/CN.15/1996/2 (4 Apr 1996) paras 67-83, Australia: para 69, Philippines: para 80.

prepared a list of elements for inclusion in a convention.<sup>155</sup> The African Workshop, which met in Dakar, 21-23 July 1997, too, strongly supported the elaboration of a convention.<sup>156</sup> The Workshop for the countries of the Asia Pacific region did not meet until March 1998 when the elaboration of a convention had progressed much further and preliminary drafts had already been discussed at various levels within the UN system. The Workshop concluded the *Manila Declaration on the Prevention and Control of Transnational Crime* which expressed broad support of the efforts made to develop a comprehensive international instrument, but the participating countries also emphasised that “the principle of respecting national sovereignty [...] be maintained” and be subjected only “to limitations voluntarily agreed upon by States”.<sup>157</sup>

In July 1996, the UN Economic and Social Council considered the proposed elements for inclusion in a convention as contained in the *Buenos Aires Declaration on Prevention and Control of Organised Transnational Crime* and requested the Secretary-General to make further proposals based on the elements outlined in this declaration.<sup>158</sup>

On 12 December 1996, the Government of Poland proposed a first draft UN framework convention against transnational organised crime.<sup>159</sup> This document was further discussed at an *Informal Meeting on the Question of the Elaboration of an International Convention*, held in Palermo, 6-8 April 1997. Pursuant to the recommendations of this meeting, the Economic and Social Council, followed by the UN Secretary-General, decided to establish an inter-sessional open-ended intergovernmental group of experts to prepare a preliminary

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<sup>155</sup> UN Commission on Crime Prevention and Criminal Justice, *Implementation of the Naples Political Declaration and Global Plan of Action against Organized Transnational Crime*, UN Doc E/CN.15/1996/2/Add.1 (3 Apr 1996) and Annex.

<sup>156</sup> UN Commission on Crime Prevention and Criminal Justice, *Implementation of the Naples Political Declaration and Global Plan of Action against Organized Transnational Crime: Question of the elaboration of an international convention against organized transnational crime and other international instruments*, UN Doc E/CN.15/1998/6/Add.1 (29 Aug 1997) para 13.

<sup>157</sup> UN Commission on Crime Prevention and Criminal Justice, *Implementation of the Naples Political Declaration and Global Plan of Action against Organized Transnational Crime: Question of the elaboration of an international convention against organized transnational crime and other international instruments*, UN Doc E/CN.15/1998/6/Add.2 (1 Apr 1998) paras 10, 42, 43.

<sup>158</sup> UN ECOSOC, *Implementation of the Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc E/RES/1996/27 (24 July 1996) paras 8, 9(a).

<sup>159</sup> UN Doc A/C.3/51/7, reprinted in UN ECOSOC, *Follow-up to the Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc E/RES/1997/22 (21 July 1997) Annex III.

draft convention.<sup>160</sup> The expert group met in Warsaw, 2-6 February 1998 and presented its report together with an outline of options for contents of a convention to the UN Commission on Crime Prevention and Criminal Justice at its Seventh Session in April 1998.<sup>161</sup> The Commission then decided to establish an in-sessional working group to implement the *Naples Declaration* and further discuss the draft convention. The working group met in Buenos Aires from 31 August to 4 September 1998 and produced a new consolidated draft to serve as a basis for future formal consultations. The findings of the Buenos Aires meeting were put to the UN Commission and led to the creation of a special ad hoc committee to elaborate the text of a new convention.

#### 6.3.1.4. The work of the Ad Hoc Committee on the Elaboration of an International Convention against Transnational Organised Crime

On 9 December 1998, following recommendations of the Commission on Crime Prevention and Criminal Justice and the UN Economic and Social Council,<sup>162</sup> the UN General Assembly decided to establish an open-ended intergovernmental ad hoc committee open to all States, including non-UN members,<sup>163</sup> to elaborate and draft the main text of

- (a) a new comprehensive international convention against transnational organised crime; and
- (b) three additional international legal instruments on:
  - i. trafficking in women and children;
  - ii. illicit manufacturing of and trafficking in firearms, their parts and components and ammunitions; and

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<sup>160</sup> UN ECOSOC, *Follow-up to the Naples Political Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc E/RES/1997/22 (21 July 1997) para 14; UN General Assembly, *Follow-up to the Naples Political Declaration and Global action Plan against Organized Transnational Crime*, UN Doc A/RES/52/85 (30 Jan 1998) para 14.

<sup>161</sup> UN Commission on Crime Prevention and Criminal Justice, *Implementation of the Naples Political Declaration and Global Plan of Action against Organized Transnational Crime: Question of the elaboration of an International Convention against organized transnational crime and other international instruments*, UN Doc E/CN.15/1998/5 (18 Feb 1998).

<sup>162</sup> UN ECOSOC, *Transnational organized crime*, UN Doc E/RES/1998/14 (28 July 1998) para 10.

<sup>163</sup> UN General Assembly, *Transnational organized crime*, UN Doc A/RES/53/111 (20 Jan 1999) para 10; UN General Assembly, *Strengthening the United Nations Crime Prevention and Criminal Justice Programme, in particular its technical cooperation capacity*, UN Doc A/RES/53/114 (20 Jan 1999) para 13.

- iii. illegal trafficking in and transporting of migrants, including by sea.

Between January 1999 and October 2000, the Ad Hoc Committee held eleven sessions to discuss and finalise the text of the Convention and the three supplementing Protocols. The meetings were held at the UN office in Vienna. Representatives from 91 States attended the first meeting along with a range of international organisations, other UN entities, and non-governmental organisations. The number of participating nations grew constantly and the final two sessions of the Committee in July and October 2000 were attended by more than 120 nations.

At the first session, the United States and Argentina introduced the draft proposals for a *Protocol to Combat International Trafficking in Women and Children*.<sup>164</sup> The proposals were later combined and submitted in a second draft at the second session in March 1999.<sup>165</sup> The Canadian proposal for a *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition and other Related Material* was introduced for discussion at the third session in March 1999.<sup>166</sup> Discussions of the draft for an international instrument against illegal trafficking in and transport of migrants commenced at the fourth session of the Ad Hoc Committee in June/July 1999 on the basis of a proposal submitted by the Governments of Austria and Italy.<sup>167</sup> Consultations about the main Convention and the Protocols against trafficking in women and children and trafficking in

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<sup>164</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft Protocol to Combat International Trafficking in Women and Children Supplementary to the United Nations Convention on Transnational Crime*, UN Doc A/AC.254/4/Add.3 (25 Nov 1998); UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Consideration of the additional international legal instruments against trafficking in women and children*, UN Doc A/AC.254/8 (15 Jan 1999). Cf Anne Gallagher, "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis" (2001) 23(4) *HRQ* 975 at 982.

<sup>165</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc A/AC.254/4/Add.3/Rev.1 (22 Feb 1999).

<sup>166</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition and other Related Material*, UN Doc A/AC.254/4/Add.2 (15 Dec 1998).

<sup>167</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft elements for an international legal instrument against illegal trafficking and transport of migrants*, UN Doc A/AC.254/4/Add.1 (15 Dec 1998); and UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc A/AC.254/4/Add.1/Rev.1 (13 May 1999).

migrants finished at the eleventh session in October 2001. An additional twelfth session to conclude the *Firearms Protocol* was held in March 2001.<sup>168</sup>

The *Convention against Transnational Organised Crime* was approved by the UN General Assembly in November 2000,<sup>169</sup> and was made available for governments to sign at a conference in Palermo, Italy, 12-15 December 2000. 132 countries of the UN's 189 Member Nations and the European Community signed the *Convention against Transnational Crime* in Palermo in December 2000.<sup>170</sup> Of the countries of the Asia Pacific region Australia, PR China, Indonesia, Philippines, Singapore, Thailand and Vietnam have signed the Convention. Brunei, Cambodia, Fiji, Lao PDR, Malaysia, Myanmar, Papua New Guinea, Solomon Islands and Vanuatu have not (yet) signed it.<sup>171</sup>

### 6.3.2. The Provisions under the Convention

Article 1 of the *Convention against Transnational Organised Crime* states that

[t]he purpose of this Convention is to promote cooperation to prevent and combat transnational organised crime more effectively.

The Convention has two main goals: one is to eliminate differences among national legal systems. The second is to set standards for domestic laws so that they can effectively combat transnational organised crime. The Convention is intended to encourage the countries that do not have provisions against organised crime to adopt comprehensive countermeasures, and to provide these nations with some guidance as to how to approach the legislative and policy questions involved. It is also intended to eliminate safe havens for criminal organisations by providing greater standardisation and coordination of national legislative, administrative and enforcement approaches to the problem of organised crime, and to ensure a more efficient and effective global effort to combat and prevent it.

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<sup>168</sup> Cf UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, UN Doc A/55/383 (2 Nov 2000) paras 77, 102, 108, 120.

<sup>169</sup> UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, UN Doc A/55/383 (2 Nov 2000).

<sup>170</sup> See *ibid*, Annex I for the full text of the Convention in its final form. The text has also been reprinted in 40 ILM 335 (2001).

<sup>171</sup> Cf "Annex, United Nations Convention against Transnational Organized Crime, Signatures", available at UNODCCP, [www.odccp.org/adhoc/crime/crime\\_cicp\\_convention\\_signature.pdf](http://www.odccp.org/adhoc/crime/crime_cicp_convention_signature.pdf) (31 Oct 2001).

### 6.3.2.1. The concept of organised crime under the Convention

From the very beginning of the consultations over an international organised crime convention, disagreement arose about the appropriate concept of organised crime and the inclusion of a general definition of the term in a universal treaty.

The *Naples Declaration* and the 1995 Buenos Aires workshop recommended that definitions be included in a convention “as required for its purposes”, but they did not provide any guidance as to the nature and concepts of an organised crime definition.<sup>172</sup> The framework drafted by the Government of Poland in 1996, proposed a basic definition of organised crime, primarily focusing on the structural features of criminal organisations such as membership of three or more persons, hierarchical management, profit making and the use of violence, intimidation and corruption. It did not limit this definition to any type of organised criminal activity.<sup>173</sup>

The 1998 expert meeting in Warsaw discussed several options for a conceptualisation of organised crime, including the Polish draft.<sup>174</sup> Most countries, however, opted for provisions that would avoid a definition of the term and restrict the scope of the Convention to serious offences committed by criminal organisations. Canada, France, Germany and Russia proposed the introduction of a “seriousness of offence test”. This test would open the application of the Convention to offences that are committed by criminal organisations, that are considered as “serious” (usually in reference to sanctions and penalties), and that have transnational effect.<sup>175</sup> Other proposals combined the Polish

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<sup>172</sup> UN Commission on Crime Prevention and Criminal Justice, *Implementation of the Naples Political Declaration and Global Plan of Action against Organized Transnational Crime*, UN Doc E/CN.15/1996/2/Add.1 (3 Apr 1996) Appendix I (a).

<sup>173</sup> UN ECOSOC, *Follow-up to the Naples Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc E/RES/1997/22 (21 July 1997) Annex III, art 1.

<sup>174</sup> UN Commission on Crime Prevention and Criminal Justice, *Report of the meeting of the inter-sessional open-ended intergovernmental group of experts on the elaboration of a preliminary draft of a possible comprehensive international convention against organized transnational crime*, UN Doc E/CN.15/1998/5 (18 Feb 1995) para 72, art 1, option 3(2).

<sup>175</sup> *Ibid*, para 72, art 2, options 1-5.

definition with illustrative lists of criminal offences that are characteristic for organised crime such as drug trafficking, trafficking in women, smuggling, corruption et cetera.<sup>176</sup>

The Ad hoc Committee considered the various options, but did not come to any agreement over a definition of organised crime. Between March and October 1999, the Committee requested States to provide information on the meaning of “seriousness” under national criminal law provisions. It was found that of the 45 States that responded, sixteen recognised the concept of serious offence under their national laws, while most others used different mechanisms to distinguish more severe offences from others.<sup>177</sup> The Committee ultimately decided not to define organised crime as such, but instead use a model that combines the seriousness of organised criminal activity with a definition of criminal organisations.

Article 2(a) of the Convention now defines “organised criminal group” as

[a] structured group of three or more persons, existing for period of time and acting in concert with the aim of committing one or more serious crime or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

Based on the findings of the 1999 study, under article 2(b)

‘serious crime’ shall mean a conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years of imprisonment or a more serious penalty.

All provisions under the Convention make reference to the definitions contained in article 2. Moreover, all action taken on the basis of Convention provisions require that such action is directed against an organised criminal group within the meaning of article 2(s). The *travaux préparatoires* to the Convention further specify that pursuant to article 34(3) of the Convention, Signatory States are free to modify the number of members required for the definition.<sup>178</sup> Furthermore, it is established that “other material benefit” also includes non-material gratification such as sexual services.<sup>179</sup>

<sup>176</sup> *Ibid*, para 72, art 2, options 6-7.

<sup>177</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Analytical study on serious crime*, UN Doc A/AC.254/22 (30 Nov 1999).

<sup>178</sup> UN General Assembly, *Interpretative notes for the official records (travaux préparatoires) of the negotiations of the United Nations Convention against Transnational Organised Crime and the Protocols thereto*, UN Doc A/55/383/Add.1 [hereinafter *travaux préparatoires*] para 2.

<sup>179</sup> *Travaux préparatoires*, para 3.



The final Convention text reflects a very diplomatic solution of the ongoing debate of concepts of organised crime. The definition of organised crime groups clearly recognises the economic aspect of organised crime as well as its organisational features. But the Convention fails to provide an unequivocal conceptualisation of these aspects by omitting a definition of organised crime and avoiding the use of this term throughout the Convention. Instead, the understanding of transnational organised crime under the Convention is based on organisational features of criminal organisations, such as membership of three or more persons, continuity and profit orientation, and a degree of seriousness of organised criminal activity as manifested in penalties.<sup>180</sup> This also directly links the definitions with provisions under domestic criminal law, thereby facilitating the adoption and implementation of the Convention at the national level.

#### 6.3.2.2. Criminalisation and prevention of organised crime

Together with the definition of organised crime, the Ad Hoc Committee discussed multiple ways in which to criminalise and prevent organised crime.

##### *Organised crime offence*

The principal point of controversy during the elaboration process was the way in which the activities of criminal organisations can be criminalised most appropriately. The proposal of Poland suggested that Contracting States be required to “make punishable acts consisting of participation in or association with an organised group”,<sup>181</sup> while the American draft recommended the criminalisation of transnational organised crime per se.<sup>182</sup> Given the difficulties surrounding the definition of organised crime and the inability of the Committee to agree on a universal interpretation of the term, ultimately, the Ad Hoc Committee followed the Polish model.

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<sup>180</sup> Cf Donigan Guymon, *supra* note 70, at 95.

<sup>181</sup> UN ECOSOC, *Follow-up to the Naples Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc E/RES/1997/22 (21 July 1997) Annex III, art 2(2).

<sup>182</sup> *Ibid*, Appendix, after para 26, art 1(1).

Under article 5(1)(a) of the Convention

[e]ach State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- (a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:
  - (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organised criminal group;
  - (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organised criminal group or its intention to commit the crimes in question, takes an active part in:
    - a. Criminal activities of the organised criminal group;
    - b. Other activities of the organised criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim.

Essentially, the provisions under article 5(1)(a) reflect the different concepts of organised crime offences discussed in Chapter Five. Paragraph (i) combines elements of the conspiracy offence with the additional requirement that such conspiracy (“agreement”) is done for the purpose of obtaining a financial or other benefit.<sup>183</sup> Paragraph (ii) adopts the model that makes the participation and membership in a criminal organisation a separate offence.<sup>184</sup>

In summary, the Convention leaves responsibility for the adoption and design of measures against organised criminal groups with State Parties; it neither predetermines a particular design of the offence, nor does it establish an offence under international law. Moreover, Signatories are free to choose either or both of the models contained in paragraphs (i) and (ii).

In leaving these options open for States’ preference and modification, the Convention fails in one of its principal purposes:<sup>185</sup> it does not overcome the differences between national jurisdictions and the distinct concepts of organised crime contained in domestic criminal laws. As discussed earlier, these differences create significant obstacles in combating and

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<sup>183</sup> Cf the provisions under the laws of Brunei, Fiji, Malaysia, PNG, Philippines, Solomon Islands, *supra* Section 5.2.2.2 accompanying text. See also the provisions under Australian Federal and State criminal law, Section 4.1.3.1.

<sup>184</sup> Cf the provisions under the laws of Cambodia, PR China, Hong Kong, and Macau, *supra* Section 5.2.2.2.

<sup>185</sup> See also the comments by Donigan Guymon, *supra* note 70, at 93-94.

preventing transnational organised crime effectively. The absence of a universal organised crime offence — however it may be designed and worded — has proven to be the principal hurdle for international judicial and law enforcement cooperation. The inability of the international community to agree on a single concept of an organised crime offence will continue to provide criminal organisations with opportunities to expand globally, thus exploiting the differences between and shortcomings of national legal systems.

*Extended criminal liability: organisers, facilitators and legal persons*

The Convention extends criminal liability in a number of ways to hold persons criminally liable who may not be directly involved in the commission of the crime itself, thereby recognising the organisational structure of many criminal organisations.<sup>186</sup>

Article 5(1)(b) requires State Parties to criminalise the “organising, directing, aiding, abetting, facilitating or counselling [of] the commission of serious crime involving an organised criminal group” thus enabling the prosecution of organisers and arrangers as well as lower levels of participants who assist criminal organisations in their activities.

Secondly, under article 10 of the Convention, Signatory States shall make legal persons, such as corporate organisations, criminally, administratively or civilly liable if they are found participating in crimes involving criminal organisations. Provisions adopted pursuant to article 10 serve as a tool to hold commercial enterprises responsible for assisting the operations of criminal organisations and for laundering the assets of crime, for corruption, and the obstruction of justice.<sup>187</sup> Under the Convention, legal persons can, however, not be charged with offences typically committed by criminal organisations, including migrant trafficking, transportation of illegal migrants, harbouring illegal migrants et cetera.

*Sanctions against offences typically committed by criminal organisations*

During the elaboration of the *Convention against Transnational Organised Crime* it was discussed whether the Convention should require Signatories to criminalise certain activities that are usually committed by criminal organisations. The 1996 proposal by the

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<sup>186</sup> See *supra* Section 3.3.

<sup>187</sup> Cf arts 6, 8, 23 *Convention against Transnational Organised Crime*.

Government of Poland, for instance, suggested that Contracting States should criminalise nine offences, including drug trafficking, trafficking in persons, counterfeiting currency, trafficking of artefacts, stealing and misuse of nuclear material, terrorism, trafficking in arms, trafficking and stealing of motor vehicles, and corruption.<sup>188</sup>

The Ad Hoc Committee initially discussed similar options,<sup>189</sup> but ultimately decided against the inclusion of such provisions. This has several reasons. Primarily, it was argued that by including a list of offences, the Convention would become too cemented, as it would be difficult to incorporate new forms of organised crime in the future. Secondly, no agreement could be reached over the offences to be included in such a list. Some countries, for instance, demanded that terrorism be included. Given the political nature of terrorist acts, this would have enabled Governments to suppress freedom and separatist movements on the basis of the Convention. Not surprisingly, Turkey was the major advocate for the inclusion of terrorism,<sup>190</sup> as Turkey sought to obtain additional tools to fight the Kurdish rebels with provisions under international law. Thirdly, rather than enumerating specific offences in the Convention, the Ad Hoc Committee elaborated separate legal instruments for offences that required specific attention, such as migrant trafficking, trafficking in women and children, and manufacturing of and trafficking in firearms, while including offences that are common to most organised crime activities, such as money laundering and corruption, under individual provisions in the Convention.<sup>191</sup>

#### *Prevention of organised crime*

During the early sessions of the Ad Hoc Committee, it was discussed whether to include special provisions for the prevention of organised crime. In December 1998, the Netherlands proposed a draft for a provision that encouraged State Parties to

consider taking social, legal or administrative steps to reduce existing or future opportunities for criminal organisations to acquire illegal gains in markets such as illegal trafficking in cars,

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<sup>188</sup> UN ECOSOC, *Follow-up to the Naples Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc E/RES/1997/22 (21 July 1997) Annex III, arts 1(1), 2.

<sup>189</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft United Nations Convention against Transnational Organized Crime*, UN Doc A/AC.254/4 (15 Dec 1998) art 6(1).

<sup>190</sup> Cf UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Proposals and Contributions received from Governments*, UN Doc A/AC.245/5 (19 Dec 1998) 14-15.

<sup>191</sup> See arts 6, 8 *Convention against Transnational Organised Crime*.

firearms, women and minors and the smuggling of migrants, as well as to reduce opportunities to recruit new members among groups in the population that are at risk.<sup>192</sup>

Throughout the consultations, many delegations expressed their concern over the Dutch proposal, arguing that it reached too far and that its language was too mandatory.<sup>193</sup> Given the resistance from many countries, the Ad Hoc Committee ultimately adopted an amended provision, which is now contained in article 31.

The article includes provisions to prevent organised crime and reduce the opportunities for criminal organisations. The provisions are specifically designed to prevent the corruption of public officials and the infiltration of legitimate business enterprises. For example, the Convention promotes the disqualification of persons convicted of organised crime offences from acting as directors of business corporations, and promotes the establishment of public records for disqualified persons.<sup>194</sup> It also requires State Parties to endeavour to create mechanisms to monitor tendering procedures of public authorities.<sup>195</sup> Moreover, article 31 includes measures for the reintegration of offenders, the initiation of public awareness programmes and pilot projects for the prevention of transnational organised crime, and the developments of standards and codes of conduct to safeguard the integrity of public and private organisations.<sup>196</sup>

### 6.3.2.3. Money laundering

Closely associated with transnational organised crime is the issue of money laundering. Articles 6 and 7 of the Convention contain provisions that target the laundering of proceeds deriving from organised crime activities. The text of the articles has not been significantly

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<sup>192</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Proposals and contributions received from Governments*, UN Doc A/AC.254/5/Add.2 (18 Dec 1998) art 22(1).

<sup>193</sup> See, for example, the annotations in UN Ad Hoc Committee on the Elaboration of Convention against Transnational Organised Crime, *Revised draft United Nations Conventions against Transnational Organised Crime*, UN Doc A/AC.254/4/Rev.1 (10 Feb 1999) fns 152-163.

<sup>194</sup> Article 31(2)(d) *Convention against Transnational Organised Crime*.

<sup>195</sup> *Ibid*, art 31(2)(c).

<sup>196</sup> *Ibid*, art 31(1), (3), (5), (7).

altered since the first proposal in 1998.<sup>197</sup> Pre-1998 drafts for an international convention did not contain any provisions on money laundering.

Under article 6 of the Convention, State Parties are required to criminalise the key features of money laundering, including

(a)(i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

and

(b)(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

The provisions under article 6 seek to promote the universal criminalisation of money laundering. Although States have discretion to modify the offences “in accordance with fundamental principles of their domestic law”, once implemented into national legislation, the article will close many loopholes between different legal systems. The Convention requires States to criminalise the conversion, concealment and acquisition of any assets deriving from transnational criminal activities committed by organised criminal groups.<sup>198</sup> The offences established under article 6 are to be complemented in domestic law by the measures listed in article 7. These are specifically designed to enhance the regulation and monitoring of the financial and banking sectors in Signatory Nations and facilitate the apprehension and seizure of and intelligence on suspect assets and transactions. The

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<sup>197</sup> For earlier drafts see UN Commission on Crime Prevention and Criminal Justice, *Report of the meeting of the inter-sessional open-ended intergovernmental group of experts on the elaboration of a preliminary draft of a possible comprehensive international convention against organized transnational crime*, UN Doc E/CN.15/1998/5 (18 Feb 1998) art 4; UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft United Nations Convention against Transnational Organized Crime*, UN Doc A/AC.254/4 (15 Dec 1998) art 4bis.

<sup>198</sup> Read art 6(1) with art 2 *Convention against Transnational Organized Crime*. Cf *travaux préparatoires*, paras 10-13.

provisions on money laundering apply to banks as well as to other financial institutions such as stockbrokers, security dealers, bureaux de change and currency brokers.<sup>199</sup>

The money laundering provisions under the *Convention against Transnational Organised Crime* build on recommendations and best practice principles developed by other international, regional and non-governmental organisations active in this field.<sup>200</sup> Some of the measures introduced by the Convention reflect the *Forty Recommendations* of the Financial Action Task Force (FATF).<sup>201</sup> These recommendations were developed by FATF in 1990, and have been revised in 1996, to provide a basic, universal framework for anti-money laundering efforts. The recommendations include draft money laundering offences, criminal justice and law enforcement measures, regulations of banking and financial systems, and recommendations for international cooperation. Although these recommendations are universally accepted as best practice principles, and non-compliance is monitored by FATF,<sup>202</sup> they do not have binding legal effect and cannot be enforced. Once implemented into domestic law, the UN Convention overcomes the non-enforceability of these recommendations.<sup>203</sup>

#### 6.3.2.4. Corruption

As mentioned before, some of the earlier drafts of the Convention featured lists of offences that are typically committed by criminal organisations and offences that are closely associated with the phenomenon of organised crime. Amongst these offences is the corruption and bribery of public officials, which has also been identified as a characteristic of migrant trafficking.<sup>204</sup> During the elaboration of the Convention, a majority of nations voted against the inclusion of these illustrative lists and decided to include provisions against corruption as separate provisions, which can now be found in articles 8 and 9.

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<sup>199</sup> *Travaux préparatoires*, para 14.

<sup>200</sup> Cf *travaux préparatoires*, para 17; and see *supra* Section 6.3.1.

<sup>201</sup> The full text of the Forty Recommendations is available at the FATF website [www.oecd.org/fatf/40Recs\\_en.htm](http://www.oecd.org/fatf/40Recs_en.htm) (21 Nov 2001).

<sup>202</sup> Cf FATF, *Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* (2<sup>nd</sup> ed, 2001).

<sup>203</sup> Cf Donigan Guymon, *supra* note 70, at 71.

<sup>204</sup> See *supra* Sections 3.3.2.2 and 3.4.2.2.

Article 8(1)(a) contains a set of legislative measures to criminalise the corrupter for “promising, offering, or giving to a public official [...] an undue advantage [...] in order that the official act or refrain from acting in the exercise of his or her official duties”. The solicitation or acceptance of that advantage is an offence for the corrupted official under paragraph (1)(b) unless that person acted under duress.<sup>205</sup> Additionally, article 8(2) and (3) require State Parties to criminalise the corruption of foreign officials and representatives of international organisations, and criminalise any participation in corruption and bribery. The criminal offences established under article 8 are complemented by the legislative and law enforcement measures under article 9 which seek to enhance the prevention, detection and punishment of corruption.

#### 6.3.2.5. Legal and judicial cooperation and extradition

One of the Convention’s principal objectives is to promote and improve international cooperation to enable and facilitate the prevention and apprehension of transnational organised crime activities, the prosecution of offenders, and the exchange of information and intelligence.

Articles 16-18 and article 21 provide mechanisms for legal and judicial cooperation between Member States, including the extradition and transfer of offenders, mutual legal assistance, and the transfer of criminal proceedings.

##### *Extradition*

In order to close loopholes that enable offenders to escape criminal prosecution, it is important that countries have the ability to seek extradition of offenders from abroad. Article 16(1) of the Convention requires State Parties to allow foreign requests for extradition of persons engaged in organised crime provided the alleged offence is criminalised in the requesting and in the requested country (“dual criminality”).<sup>206</sup>

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<sup>205</sup> *Travaux préparatoires*, para 18.

<sup>206</sup> For proposals and contributions during the elaboration of art 16 see UN Ad Hoc Committee on the Elaboration of a Convention against Organised Crime, *Proposals and contributions received from Governments*, UN Doc A/AC.254/5/Add.20 (11 Feb 2000).



Article 16, which is based on the extradition provisions of the *1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, operates as an extradition treaty in the absence of other bilateral or multilateral agreements. The provision under article 16(1) is, however, conditional in a number of ways. For example, State Parties have discretion to refuse extradition if they have no extradition treaty with the requesting nation. Secondly, a State can refuse extradition if it suspects the person will be prosecuted for reasons of gender, ethnicity, nationality, race, religion or political opinion.<sup>207</sup> Thirdly, if the extradited person is a national of the requested State, that State can surrender the person under the condition that he or she will return to serve the sentence.<sup>208</sup> Moreover, the requested State can refuse extradition of its own nationals; in fact, some countries have constitutional provisions that prohibit the extradition of citizens to another country. In these circumstances, however, going back to a proposal by the United States,<sup>209</sup> the requested State must conduct criminal proceedings under its domestic law. This obligation to “extradite or prosecute (aut dedere aut judicare)” was the subject of long debate during the elaboration of the Convention. Many nations opposed the view that they should be obligated to initiate prosecution against their nationals if they refuse to extradite them. Ultimately, however, it became clear that in order to be effective, the provisions under the Convention ought to be complemented by this principle, which is now contained in article 16(10).<sup>210</sup>

#### *Transfer of proceedings and offenders*

To facilitate the prosecution of offenders, article 17 of the Convention promotes bilateral and multilateral arrangements that allow the transfer of sentenced and imprisoned persons. Additionally, article 21 promotes the transfer of criminal proceedings to a single jurisdiction in circumstances where several jurisdictions are involved.

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<sup>207</sup> Article 16(14) *Convention against Transnational Organised Crime*.

<sup>208</sup> *Ibid*, art 16(11).

<sup>209</sup> UN ECOSOC, *Follow-up to the Naples Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc E/RES/1997/22 (21 July 1997) Appendix, after para 26, art 3(1).

<sup>210</sup> Cf *travaux préparatoires*, para 31.

*Mutual legal assistance*

Amongst the principal reasons to draft and conclude an international convention against transnational organised crime were the difficulties arising from non-cooperation in legal matters and the lack of universal mutual legal assistance treaties to facilitate judicial collaboration in investigations and criminal proceedings. Article 18 of the Convention now provides a wide range of mechanisms to fill this gap and provide “the widest range of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention”.<sup>211</sup> The Convention seeks to encourage mutual cooperation in gaining evidence through witness statements and testimony, seizures, identifications, examinations and expert evaluations, and in information exchange.<sup>212</sup> To facilitate and accelerate mutual legal assistance, the Convention requires States to designate a central authority to deal with such requests and to formalise the requests and their execution.<sup>213</sup> The Convention allows State Parties to refuse legal assistance only on the grounds listed in paragraph 21<sup>214</sup> or in the absence of dual criminality.<sup>215</sup> Earlier drafts of the Convention did not allow the absence of dual criminality to operate as a ground for refusal, thereby facilitating the requesting State to obtain legal assistance from abroad. Too many countries, however, resisted legal assistance without the requirement of dual criminality.<sup>216</sup> Refusal on grounds of bank secrecy or fiscal matters, however, is not permissible.<sup>217</sup>

**6.3.2.6. Law enforcement and technical cooperation**

A large part of the *Convention against Transnational Organised Crime* deals with mechanisms to promote and enhance international law enforcement collaboration and

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<sup>211</sup> Article 18(1) *Convention against Transnational Organised Crime*.

<sup>212</sup> *Ibid*, art 18(3).

<sup>213</sup> Cf *ibid*, art 18(13)-(18), (24). See also *travaux préparatoires*, para 40.

<sup>214</sup> See further *travaux préparatoires*, para 42.

<sup>215</sup> Article 18(9) *Convention against Transnational Organised Crime*.

<sup>216</sup> Donigan Guymon, *supra* note 70, at 96.

<sup>217</sup> Article 18(8), (22) *Convention against Transnational Organised Crime*.

technical cooperation in investigations and prosecutions. Most of these provisions derive from the Draft Convention proposed by the US Government in 1996.<sup>218</sup>

At the investigative level, the Convention requires State Parties to establish legal frameworks under domestic law that allow the use of special investigative techniques such as electronic and other forms of surveillance and undercover operations, and it promotes bilateral and multilateral cooperation to enable joint investigations and the cross-border use of special investigative techniques.<sup>219</sup> Moreover, the Convention promotes law enforcement cooperation and information exchange at the international level, particularly in matters concerning the identity, whereabouts and activities of suspects, the proceeds of crime and the movements of property and equipment for the use in the commission of organised crime.<sup>220</sup> At the analytical level, the Convention encourages government, scientific and academic institutions to share information and intelligence on transnational organised crime activities, on the means and methods used by criminal organisations, and the policies to combat organised crime.<sup>221</sup>

In article 19, the Convention contains provisions that seek to improve investigations of organised crime offences at the domestic level, and enhance the knowledge and research on organised crime. Paragraph (1) requires State Parties to develop training programmes for prosecutors, law enforcement and customs personnel on the organisational and operational aspects of criminal organisations and on the measures to suppress and detect organised crime. The Convention also specifically promotes research and academic analysis of the causes and consequences of organised crime.<sup>222</sup>

To overcome the discrepancies in law enforcement and investigation techniques in different nations, the Convention includes a range of mechanisms that seek to provide special assistance to developing nations. For example, article 30 requires Signatories to provide technical assistance, and enhance financial and material assistance through voluntary donations and by donating some of the confiscated proceeds to developing

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<sup>218</sup> UN ECOSOC, *Follow-up to the Naples Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc E/RES/1997/22 (21 July 1997) Appendix, after para 26, arts 9, 10, 12.

<sup>219</sup> Articles 19, 20 *Convention against Transnational Organised Crime*.

<sup>220</sup> *Ibid*, art 27(1)(a), (b).

<sup>221</sup> *Ibid*, arts 27(1)(e), (f), 28.

<sup>222</sup> *Ibid*, arts 28(1), 29(2).

nations.<sup>223</sup> Moreover, developed nations are encouraged to provide training programmes and modern equipment to developing nations and to explore options for bilateral and multilateral arrangements on material and logistical assistance.<sup>224</sup>

#### 6.3.2.7. Confiscation and seizure of assets

In articles 12-14 the Convention introduces a range of measures to enhance and facilitate the confiscation and seizure of assets deriving from or used for the commission of organised crime offences.

Article 12 requires State Parties to adopt appropriate countermeasures to enable the identification, tracing, freezing, confiscation and seizure of proceeds and property deriving from organised crime activities and any property, equipment and instrumentality used for the offences under the Convention. These measures shall also apply to income, proceeds and property that have been transformed, converted or intermingled with other property. Article 13 provides mechanisms for international cooperation for the purposes of confiscation by establishing a set of rules for confiscation requests similar to those guiding mutual legal assistance requests under article 18. Article 14 encourages State Parties to return and distribute confiscated proceeds and property to the requesting country for the purpose of compensation of victims and return to the legitimate owner.

#### 6.3.2.8. Protection of witnesses and victims

The investigation of organised crime activities and the prosecution of offenders is particularly difficult as members of criminal organisations, witnesses and victims of offences permanently fear threats and intimidations by other participants of the organised crime group.<sup>225</sup> In articles 24-26 the *Convention against Transnational Organised Crime*

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<sup>223</sup> *Ibid*, art 30(2).

<sup>224</sup> *Ibid*, art 30(2)(d), (4). Cf Gallagher, *supra* note 164, at 980.

<sup>225</sup> See *supra* Section 3.3.2.3.

contains provisions to assist and protect victims and witnesses of organised crime and to facilitate their cooperation with law enforcement agencies.<sup>226</sup>

To protect victims and witnesses from potential retaliation, threats and intimidations, articles 24 and 25 require State Parties to implement appropriate measures to protect the physical safety of victims and witnesses. The Convention promotes the implementation of special evidentiary rules to enable witness' testimony via video links and protect them from disclosure of their identity and whereabouts. Moreover, article 24(2) and (3) suggest the establishment of compensation and restitution schemes for victims of organised crime and the consideration of their claims and concerns in criminal proceedings.

Article 26 contains a range of measures that seek to facilitate the assistance of witnesses of organised crime, including members of criminal organisations, in investigations and prosecutions. The provisions under article 26 are specifically designed to create incentives for such persons to report crimes and provide information on the identity and location of offenders by offering protection to accused persons and to mitigate their penalty if they assist in criminal proceedings.

#### 6.3.2.9. Application and implementation provisions

Finally, the Convention contains a number of provisions that deal with the general application and implementation of the Convention,<sup>227</sup> the recognition of national sovereignty, and with territorial integrity and judicial rights of State Parties.<sup>228</sup>

During the elaboration process, the Ad Hoc Committee discussed various mechanisms to monitor and evaluate the implementation of the Convention. Several countries supported a

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<sup>226</sup> The Polish and the American drafts of 1996 only contained general references to witness protection programmes; UN ECOSOC, *Follow-up to the Naples Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc E/RES/1997/22 (21 July 1997) Annex III, art 13; and UN ECOSOC, *Follow-up to the Naples Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc E/RES/1997/22 (21 July 1997) Appendix, after para 26, art 9(g). A proposal by the Australian delegation to the Ad Hoc Committee at its second session provided much broader protection and guarantees than those contained in arts 24, 25; see UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Proposals received from Governments*, A/AC.254/5/Add.3 (8 Feb 1999) 3-5.

<sup>227</sup> Articles 3 and 34 *Convention against Transnational Organised Crime*.

<sup>228</sup> *Ibid*, art 4.

proposal for a reporting system which required State Parties to submit biannual reports about the implementation process to a designated UN Committee.<sup>229</sup> Under this model, the UN would obtain authority to request further information if it considered the reports insufficient.<sup>230</sup> Given the strong resistance from many nations, this reporting system has not been adopted. Instead, the Convention establishes a conference of Signatory Parties to review the implementation of the Convention and make further recommendations to enhance international cooperation to prevent, suppress and investigate transnational organised crime.<sup>231</sup>

The lack of strict compliance and monitoring mechanisms is another weakness of the Convention. State Parties have too great freedom to modify the requirements and not implement unwanted provisions of the Convention into domestic law. Too few mechanisms exist at the international level to ensure cooperation and compliance by State Parties, thus resulting in safe havens for criminal organisations.

As mentioned earlier, the *Convention against Transnational Crime* is supported by three protocols. Article 37 determines the relation between the legal instruments, prescribing that the Convention can be signed without signing the Protocols, but that the Protocols cannot be signed without signing the mother Convention.

The remaining provisions under the Convention deal with the jurisdiction over offences under the Convention,<sup>232</sup> record keeping of alleged offenders,<sup>233</sup> criminalisation of obstruction of justice,<sup>234</sup> and the settlement of disputes between State Parties.<sup>235</sup>

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<sup>229</sup> Cf UN ECOSOC, *Follow-up to the Naples Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc E/RES/1997/22 (21 July 1997) Annex I, art 15(1)-(3); cf UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft United Nations Convention against Transnational Organized Crime*, UN Doc A/AC.254/4 (15 Dec 1998) art 23.

<sup>230</sup> UN ECOSOC, *Follow-up to the Naples Declaration and Global Action Plan against Organized Transnational Crime*, UN Doc E/RES/1997/22 (21 July 1997) Annex I, art 15(5).

<sup>231</sup> Article 32 *Convention against Transnational Organized Crime*.

<sup>232</sup> *Ibid*, art 15.

<sup>233</sup> *Ibid*, art 22.

<sup>234</sup> *Ibid*, art 23.

<sup>235</sup> *Ibid*, art 35. The International Court of Justice is the final arbitrator in the settlement of disputes (art 35(2)).

### 6.3.3. Evaluation

The UN *Convention against Transnational Organised Crime* and the Protocols against migrant smuggling, trafficking in persons, and trafficking in firearms are the outcome of lengthy debate, are highly politically influenced, and represent the result of compromise rather than the best knowledge of contemporary transnational organised crime. The elaboration of the instruments was dominated by the more powerful industrial nations along with some regional leaders. Developing nations, particularly those from Asia and the South Pacific were underrepresented, primarily because of the expenses associated with the attendance of the lengthy meetings. The UN provided assistance to these countries under a rotating system, which meant that many nations only rudimentarily participated in the elaboration process.

However, the *Convention against Transnational Organised Crime* is presently the major, most universal and best available tool to combat transnational criminal activities beyond the limitations of national legislation. Although many concessions have been made to the original draft of the text, the Convention is a significant step forward in the international fight against organised crime. The Convention legitimises coherent law and law enforcement strategies at national and international levels and sets standards for domestic law reform as well as for regional cooperation. It facilitates bilateral and global collaboration and may create some 'peer pressure' on non-cooperative nations.

The provisions under the Convention are important tools to overcome many of the deficiencies of the past. When implemented by the Signatories, the Convention can serve as a universal basis for joint investigations, mutual legal assistance and extradition of offenders. It will facilitate and accelerate the prosecution of offenders and it will contribute to the universal criminalisation of organised crime, corruption and of money laundering.

Unfortunately, to date, only very few of the Asia Pacific nations have signed the Convention.

The implementation of the Convention, along with the Protocols, poses significant challenges to the United Nations and all Signatories. Many, if not most countries will have to amend their laws, including penal codes, organised crime acts and procedural legislation.

The criminal justice and law enforcement systems of some countries will also require adjustment to put in place the provisions under the new international instruments.

But in addition to the legislative amendments required to meet the obligations under the Convention and the Protocols, many of the measures require substantial financial, material and human resources. This creates particular difficulties for smaller and economically less developed nations. Many countries in the Asia Pacific simply do not have the resources to commit themselves to the Convention and the Protocols. Also, given the cultural diversity in the region and the strong commitment to maintain full national sovereignty over all aspects of governance, many nations are reluctant to support the internationalisation of criminal law and criminal justice systems. However, with growing levels of transnational crime in the Asia Pacific, the countries of the region are increasingly showing some willingness to participate in international law enforcement activities.

It is for that reason, that the larger regional powers, such as Australia, Japan, New Zealand and the United States need to assist the smaller nations at the earliest possible stage of the implementation process in order to improve law enforcement structures, criminal justice systems, and the development of human resources through training and the upgrading of skills, as well as assisting them in the acquisition and modernisation of equipment and facilities.



## 6.4. UN Protocol against the Smuggling of Migrants by Land, Air and Sea

The lack of a common, universally accepted tool to combat migrant trafficking has been identified as the principal obstacle in counteracting the phenomenon effectively. In December 2000, the United Nations opened for signature the *Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the Convention against Transnational Organised Crime* which aims to criminalise migrant trafficking and those who practise it and to offer a set of tools for enhanced international legal and judicial cooperation and for protection of victims and witnesses of trafficking.

The Protocol builds on two proposals for an international instrument against migrant trafficking prepared by Austria and Italy in 1997. These proposals were combined in 1998 and a new draft submitted to the Ad Hoc Committee on the Elaboration on a Convention against Transnational Organised Crime for further discussion. Consultations over the Protocol completed in October 2000. The UN General Assembly approved the final text of the Protocol in November 2000.<sup>236</sup>

The Ad Hoc Committee also altered the terminology of the Protocol. As mentioned in Chapter One, the early proposals along with international organisations refer to the phenomenon as ‘migrant trafficking’. If translated into other languages, this term, however, cannot be differentiated from ‘trafficking in persons’ or ‘trafficking in women and children’. It is for that reason that the Protocol now refers to the phenomenon as “migrant smuggling”. The following sections will use both expressions interchangeably, unless stated otherwise.

Section 6.4 recalls the developments that led to the Austrian and Italian proposals and explores the provisions under the *Migrant Smuggling Protocol* and its earlier drafts. Particular emphasis is placed on the offences contained in the Protocol and on the protection provisions under article 16.

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<sup>236</sup> UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, UN Doc A/55/383 (2 Nov 2000).

### 6.4.1. Initiatives for a Convention against Migrant Trafficking

Unlike many other transnational offences, the phenomenon of migrant trafficking has only very recently been addressed in international law. Although, following the Second World War, the international community developed mechanisms to protect refugees, up until now, measures to safeguard the rights of migrants have been very fragmentary and limited in scope and application.<sup>237</sup> Moreover, while Conventions dating back to 1904 have set standards for the protection of trafficked women and children, the safety and security of trafficked migrants was not recognised in international law until the year 2000.<sup>238</sup>

Calls for an international instrument emerged with the growth of migrant trafficking, particularly in the countries of Western Europe and North America when it became evident that the lack of international cooperation in the areas of illegal migration and organised crime was the main obstacle in the fight against migrant trafficking.

The United Nations General Assembly first addressed the issue of migrant trafficking in December 1993 in a resolution that condemned “the smuggling of aliens in violation of international and national law and without regard for the safety, well-being and human rights of the migrants”. The resolution urged Member Nations to frustrate the activities of trafficking organisations at the national level, to cooperate internationally, and contribute to the efforts of international organisations such as IOM, IMO, Interpol and ICAO.<sup>239</sup>

In 1994, the UN Secretary-General provided a first report on the background of migrant trafficking around the world and about legislative and law enforcement developments in Member Nations.<sup>240</sup> The report recognised that the discrepancies between legal systems and law enforcement efforts in different countries cause major obstacles in preventing and suppressing migrant trafficking, and it called for international cooperation to fight migrant trafficking more effectively. This call ultimately led to the development of the United Nations *Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the Convention against Transnational Organised Crime* which seeks to overcome the

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<sup>237</sup> Cf Morrison, *supra* note 65, at 64 and the Conventions cited there.

<sup>238</sup> See *supra* Section 6.3.1.1.

<sup>239</sup> UN General Assembly, *Prevention of the smuggling of aliens*, UN Doc A/48/102 (20 Dec 1993). Cf Pedrozo, *supra* note 5, at 62-63.

deficiencies of the past and set global standards for preventive, suppressive and investigative measures against migrant trafficking.<sup>241</sup>

#### 6.4.1.1. Italy's proposal to the International Maritime Organisation

The *Protocol against the Smuggling of Migrants* derives from two proposals made by the Governments of Italy and Austria. Along with many other Western European nations, Austria and Italy witnessed an enormous influx of illegal immigrants after the fall of the Soviet Union and the opening of many Eastern European nations. For hundreds of thousands of migrants, Austria and Italy became gateways to the security, wealth and luxury of the West. In return, the countries of the European Union called for tighter border controls and tougher penalties on illegal migration.

Following a dramatic increase in arrivals of trafficked migrants from the Balkans and the Middle East, Italy proposed a draft for a multilateral convention to combat illegal migration by sea to the International Maritime Organisation (IMO) in 1997.<sup>242</sup> A similar proposal had previously been tabled to the European Union and found strong support in various committees of the European Union.

The Italian draft convention was primarily concerned with international cooperation to apprehend, board and seize vessels suspected of transporting illegal migrants. The proposal contained a series of measures specifically designed to equip officials with a range of powers to prevent the arrival of suspect vessels and divert them to other ports.<sup>243</sup> Secondly, the draft contained provisions that defined illegal migration by sea as an offence under international law:

##### Article IX

- 1 Any person commits an offence if that person unlawfully uses a ship to transport illegal migrants:

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<sup>240</sup> UN General Assembly, *Measures to combat alien-smuggling*, UN Doc A/49/350 (30 Aug 1994) and Add.1 (1 Nov 1994).

<sup>241</sup> UN General Assembly A/55/383 (2 Nov 2000) Annex III; reprinted in 40 ILM 384 (2001) [hereinafter *Protocol against the Smuggling of Migrants*].

<sup>242</sup> IMO Legal Committee, *Proposed Multilateral Convention to Combat Illegal Migration by Sea*, IMO Doc LEG 76/11/1 (1 Aug 1997). See also *supra* Section 6.1.1.1; and Kirchner & di Pepe, *supra* note 7, at 664-667.

<sup>243</sup> *Ibid*, arts V-VIII.

2. Any person also commits an offence if that person:
  - (a) attempts to commit the offence set forth in paragraph 1; or
  - (b) instigates other persons to commit the offence set forth in paragraph 1; or
  - (c) abets the commission of the offence set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or
  - (d) threatens to commit the offence set forth in paragraph 1.

Further provisions under the Italian draft convention included measures of international cooperation for reciprocal judicial and police assistance,<sup>244</sup> the establishment of a legal basis for the extradition of people found guilty of transporting illegal migrants,<sup>245</sup> and the non-institution of criminal proceedings for all illegal migrants who, having landed in the territory of a State Party, return definitively to the territory of their country of origin.<sup>246</sup>

As mentioned earlier, the Italian proposal was supported by many delegations at the IMO Legal Committee. However, it was ultimately decided not to pursue the proposal any further at this level as IMO was regarded as an inappropriate body to deal with this matter.<sup>247</sup>

#### 6.4.1.2. Austria's proposal to the UN General Assembly

The end of the Cold War and the opening of its borders with Hungary, Slovakia, the Czech Republic and Slovenia caused an enormous influx of illegal immigrants into Austria in the early 1990s. It soon became evident that many of the illegal arrivals were supported by trafficking organisations, who benefited from the lack of law enforcement cooperation of Eastern European nations and the non-criminalisation of trafficking in these countries.<sup>248</sup>

In September 1997, Austria's Permanent Representative to the UN addressed a letter to the UN Secretary-General, presenting a draft *International Convention Against the Smuggling*

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<sup>244</sup> *Ibid.*, arts XII, XV, XVI.

<sup>245</sup> *Ibid.*, art XIV.

<sup>246</sup> *Ibid.*, art XIII.

<sup>247</sup> *Supra* Section 6.1.1.1.

<sup>248</sup> Personal communication with Mr Gregor Schusterschitz, Federal Ministry of Foreign Affairs, Austria, Vienna, 9 June 2000. The author acknowledges the support and assistance provided by the Office for International Law, Ministry of Foreign Affairs, Vienna.

of *Illegal Migrants*.<sup>249</sup> Soon after, the draft was formally presented to the 52<sup>nd</sup> Session of the UN General Assembly by Austria's then Minister for Foreign Affairs, Dr Wolfgang Schüssel.

Primarily, the Austrian proposal sought to establish migrant trafficking as an offence under international criminal law and provide a range of measures to facilitate the investigation of offences and the prosecution and extradition of offenders.

Under article 1

[a]ny person who intentionally procures, for his or her profit, repeatedly and in an organised manner, the illegal entry of a person into another State of which the latter person is not a national or not a permanent resident, commits the offence of 'smuggling illegal migrants' within the meaning of the Convention.

Article 2 criminalised all forms of attempts and participation and provided mechanisms to extend the application of the offences to instances in which migrants are trafficked through third countries and in which the offender is a national of the country but engaged in offences abroad (so-called third country trafficking).<sup>250</sup> The proposal further provided that State Parties must either extradite offenders or prosecute them<sup>251</sup> and included measures for judicial assistance in criminal proceedings.<sup>252</sup> Recognising that many trafficked migrants are seeking asylum, the Austrian draft included a safeguard clause for refugees<sup>253</sup> and stated that illegal immigrants must not be criminalised for their illegal entry.<sup>254</sup> For the most part, the initial proposal reflected Austrian statutory law as it was in 1997.

Following Italy's unsuccessful initiative, experts from Austria and Italy met in January 1998 to discuss the Austrian draft convention and the possible implementation of technical guidelines with regard to the smuggling of illegal migrants by sea. A combined proposal was put to the UN Commission on Crime Prevention and Criminal Justice on 30 April

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<sup>249</sup> UN General Assembly, *Letter dated 16 September from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General*, UN Doc A/52/357 (17 Sep 1997). Cf Kirchner & di Pepe, *supra* note 7, at 670-671.

<sup>250</sup> UN General Assembly, *Letter dated 16 September from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General*, UN Doc A/52/357 (17 Sep 1997) Annex art 5.

<sup>251</sup> *Ibid*, Annex arts 6-10.

<sup>252</sup> *Ibid*, Annex art 11.

<sup>253</sup> *Ibid*, Annex art 13.

<sup>254</sup> *Ibid*, Annex art 4(3).

1998.<sup>255</sup> The expert meeting on a possible convention against organised crime held in Warsaw, February 1998,<sup>256</sup> also addressed the issue of migrant trafficking, but concluded that priority be given to the elaboration of a framework convention and that migrant trafficking be dealt with as a protocol supplementing the main convention.<sup>257</sup>

In July 1998, the UN Economic and Social Council decided to amalgamate negotiations over an international instrument against migrant trafficking with the elaboration of the *Convention against Transnational Organised Crime*.<sup>258</sup> The draft proposal for an international instrument against illegal trafficking in and transport of migrants was introduced at the Fourth Session of the Ad Hoc Committee in June/July 1999.<sup>259</sup>

79 nations signed the *Protocol against the Smuggling of Migrants by Land Air and Sea, supplementing the United Nations Convention against Transnational Crime* in December 1999. Of the countries of the Asia Pacific region only Indonesia and the Philippines signed the Protocol. Australia has signed the Protocol, but it is not yet in force.<sup>260</sup> Brunei, Cambodia, PR China, Fiji, Lao PDR, Malaysia, Myanmar, Papua New Guinea, Singapore, Solomon Islands, Thailand, Vanuatu and Vietnam have not (yet) signed it.

#### 6.4.2. The Provisions under the Protocol

The *Protocol against the Smuggling of Migrants by Land, Air and Sea* aims to criminalise the smuggling of migrants and those who practise it, while recognising that migration itself is not a crime and that migrants are often victims needing protection:

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<sup>255</sup> Copy provided by the Austrian Ministry of Foreign Affairs [held with author].

<sup>256</sup> See *supra* Section 6.3.1.3.

<sup>257</sup> UN Commission on Crime Prevention and Criminal Justice, *Implementation of the Naples Political Declaration and Global Plan of Action against Organized Transnational Crime: Question of the elaboration of an International Convention against organized transnational crime and other international instruments*, UN Doc E/CN.15/1998/5 (18 Feb 1998) paras 13, 14.

<sup>258</sup> UN Economic and Social Council, *Action against illegal trafficking in migrants, including by sea*, UN Doc E/RES/1998/19 (28 July 1999).

<sup>259</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft elements for an international legal instrument against illegal trafficking and transport of migrants*, UN Doc A/AC.254/4/Add.1 (15 Dec 1998); and UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft Protocol against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc A/AC.254/4/Add.1/Rev.1 (13 May 1999).

#### Article 2 Statement of purpose

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

The structure of the Protocol is similar to that of the *Protocol against the Trafficking in Persons*. The Protocol includes provisions (1) that criminalise migrant trafficking and associated offences, (2) that seek to promote and enhance legal and judicial cooperation, (3) that address specific issues related to trafficking by sea, (4) that seek to protect trafficked migrants, and (5) provisions that deal with the application and implementation of the Protocol.

#### 6.4.2.1. Trafficking Offences

The principal concern of the Protocol is with the universal criminalisation of trafficking in migrants/migrant smuggling. Article 6 of the Protocol requires State Parties to criminalise a range of activities that are characteristic of and associated with the phenomenon, including the smuggling of migrants, harbouring and concealing illegal migrants, and the provision and production of fraudulent documents. The Protocol does not attempt to criminalise the mobilisation of migrants and it contains no provisions regarding false statements that are made in the context of migrant trafficking and illegal migration.

##### 6.4.2.1.1. Smuggling of Migrants

Under article 6(1)(a) Signatories are required to establish “the smuggling of migrants” as a criminal offence “when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit”. Smuggling of migrants is defined under article 3(a) as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into State Party of which the person is not a national or a permanent resident.”

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<sup>260</sup> [2002] ATNIF [Australian Treaties Not in Force] 5; see [www.austlii.edu.au/au/other/dfat/treaties/notinforce/2002/5.html](http://www.austlii.edu.au/au/other/dfat/treaties/notinforce/2002/5.html) (24 Mar 2002).

During the development of the Protocol, this definition was the subject of substantial debate. Of particular concern was the differentiation between the phenomenon of migrant smuggling and that of trafficking in persons, because victims and witnesses under the *Protocol against Trafficking in Persons, particularly Women and Children* are granted privileged rights and protection compared to smuggled migrants.<sup>261</sup> For example, the Committee contemplated including the “consent by the migrant” as a defining feature of migrant smuggling. But given the difficulties surrounding the voluntariness of migrant trafficking,<sup>262</sup> it was ultimately agreed not to include this requirement. Instead, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* renders this form of trafficking different by requiring “means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability”.<sup>263</sup>

The migrant smuggling offence under the Protocol is largely identical with the proposal prepared by Austria in 1997 and the drafts developed during the elaboration process.<sup>264</sup> Although the language and terminology has been subject to significant debate in the Ad Hoc Committee — and has been changed from trafficking to smuggling for translation purposes — the scope and objective of the provision remain unchanged.

The provision covers any procurement of another person’s illegal immigration and is not limited to acts of transportation. It recognises the organised crime and economic dimensions of migrant trafficking by requiring that the act be committed for financial or other material benefit. This requirement also excludes complimentary services provided by relatives and friends.<sup>265</sup> The smuggling offence under the Protocol is limited to illegal entry of migrants; it does not criminalise instances where traffickers assist migrants in illegal

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<sup>261</sup> See *infra* Section 6.4.2.4.

<sup>262</sup> See *supra* Section 1.1.2.4.

<sup>263</sup> Article 3(a) *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, UN General Assembly A/55/383 (2 Nov 2000) Annex II; reprinted in 40 ILM 377 (2001)[hereinafter *Protocol against Trafficking in Persons*]

<sup>264</sup> UN General Assembly, *Letter dated 16 September from the Permanent Representative of Austria to the United Nations addressed to the Secretary-General*, UN Doc A/52/357 (17 Sep 1997) Annex, art 1; UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Draft elements for an international legal instrument against illegal trafficking and transport of migrants*, UN Doc A/AC.254/4/Add.1 (15 Dec 1998) art A.

<sup>265</sup> *Travaux préparatoires*, paras 87, 92. Cf *supra* Section 1.1.3.



emigration. In most instances, however, the act of illegally emigrating from one country will coincide with illegal entry into another country.

#### **6.4.2.1.2. *Harbouring and concealing illegal migrants***

Article 6(c) requires Signatories to criminalise the harbouring and concealing of illegal migrants. The article, which was not included in the early drafts of the Protocol, covers any act that enables unauthorised foreigners to remain in the country illegally, including, for instance, providing accommodation to illegal migrants and the provision of false documents to illegal residents. Moreover, the application of article 6(c) is not limited to persons who have immigrated illegally; it includes any non-national and non-permanent resident without legal authority to be in the host country, such as overstayers and illegal workers. In this point, the Protocol exceeds the offences typically associated with migrant trafficking in that article 6(1)(c) can also be used as a tool to punish employers of illegal workers.

#### **6.4.2.1.3. *Producing and transferring fraudulent documents***

Articles 3, 6, 10, 12, 13 and 14 of the Protocol contain provisions to criminalise, combat and prevent the production, transfer and use of fraudulent documents. The initial drafts submitted by Austria and Italy did not contain any provisions relating specifically to document fraud.

“When committed for the purpose of enabling the smuggling of migrants”, State Parties are required under article 6(1)(b) to prohibit the production, procuring, provision and possession of fraudulent travel or identity documents. Article 3(c) defines “fraudulent travel or identity document” as any travel or identity document

- (i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorised to make or issue the travel or identity document on behalf of a State; or
- (ii) That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or

(iii) That is being used by a person other than the rightful holder.<sup>266</sup>

This definition seeks cover a broad range of travel and identity documents and ways in which these documents can be fraudulently obtained, altered and transferred. The term 'travel document' includes any type of document required for entering or leaving a country under its domestic law. The term 'identity document' includes any document commonly used to establish the identity of a person under the laws or procedures of that country.<sup>267</sup> The definition is not limited to international travel and identity documents.<sup>268</sup> The ways in which travel and identity documents can be "falsely made or altered" are also not restricted to the production of false documents; they also include the alteration of legitimate documents, the filling in of stolen blank documents, and genuine documents that have been validly issued but are being used by a person other than the lawful holder.<sup>269</sup>

Article 6(1)(b) does not propose the creation of general forgery offences. Nor does it propose that the use and possession of fraudulent travel and identity documents should be criminal offences unless this involves the trafficking of migrants. Earlier drafts of the Protocol contained broader provisions that applied regardless of whether or not the documents were used for the trafficking of migrants.<sup>270</sup> But the Ad Hoc Committee agreed to limit the application of the Protocol so that fraudulent documents used in the context of other offences, such as drug trafficking, trafficking in women and children, smuggling of arms and terrorism do not fall under article 6. Moreover, the *travaux préparatoires* make it clear that article 6(1)(b)

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<sup>266</sup> "For the purpose of this subparagraph 'fraudulent' shall mean documents that are misused, even if the document itself is genuine." UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organised Crime*, UN Doc A/AC.254/4/Add.1/Rev.5 (20 Mar 2000) note 19.

<sup>267</sup> *Travaux préparatoires*, para 89.

<sup>268</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organised Crime*, UN Doc A/AC.254/4/Add.1/Rev.5 (20 Mar 2000) note 17.

<sup>269</sup> *Travaux préparatoires*, para 90; UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organised Crime*, UN Doc A/AC.254/4/Add.1/Rev.6 (19 July 2000) note 18.

<sup>270</sup> See UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the*

was adopted on the understanding that subparagraph (ii) would only apply when the possession in question was for the purpose of smuggling migrants as set forth in subparagraph (a). Thus, a migrant who possessed a fraudulent document to enable his or her own smuggling would not be included.<sup>271</sup>

Articles 12 and 13 of the Protocol deal with the security, legitimacy, validity and control of travel and identity documents. These provisions are examined in Section 6.4.2.2.

#### 6.4.2.1.4. *Scope and application of offences*

The offences under article 6(2)(a)-(c) propose criminalisation of any form of attempt of and “participation as an accomplice” in any offence under the Protocol.<sup>272</sup> Moreover, the Protocol requires State Parties “to establish as criminal offences [the] organising or directing [of] other persons to commit” any of the offences under article 6(1).<sup>273</sup> Thus, the Protocol recognises that in many instances the transportation and harbouring of illegal migrants and the provision of fraudulent documents is carried out by lower levels of participants, while the core arrangers and organisers of the trafficking process are not physically engaged in the criminal act.

The Protocol is particularly concerned about the violation of human rights and the physical dangers inherent in the illegal journeys. Similar to the concept of the provisions under Chinese criminal law that have been discussed earlier,<sup>274</sup> article 6(3) of the Protocol contains a list of aggravating factors that cause particular dangers to the trafficked migrants. These aggravating factors include circumstances that put the lives or safety of migrants at risk, or that entail the exploitation or otherwise inhumane or degrading treatment of trafficking migrants. The Protocol obliges State Parties to provide higher penalties in these circumstances.

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*United Nations Convention against Transnational Organised Crime*, UN Doc A/AC.254/4/Add.1/Rev.4 (27 Dec 1999) 7, 8.

<sup>271</sup> *Travaux préparatoires*, para 93; cf UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organised Crime*, UN Doc A/AC.254/4/Add.1/Rev.6 (19 July 2000) note 27.

<sup>272</sup> Article 6(2)(a), (b) *Protocol against the Smuggling of Migrants*.

<sup>273</sup> *Ibid.*, art 6(2)(c).

<sup>274</sup> See *supra* Section 5.2.1.2.

Following the Austrian proposal, the Protocol also recognises that the migrants are often desperate to move abroad in order to save their lives and possessions, and those of their family and friends. Moreover, it is recognised that the principal concern of anti-trafficking provisions must be with the criminalisation of trafficking organisations and not with the punishment of illegal migrants. It is for these reasons that the offences proposed under article 6 do not apply to the trafficked migrants and that migrants should not be held criminally responsible for using the services of trafficking organisations.<sup>275</sup>

#### 6.4.2.2. Cooperative and preventive measures

In addition to the provisions under the *Convention against Transnational Organised Crime*, the Protocol contains a range of measures to promote and enhance international judicial and law enforcement cooperation as well as the prevention of migrant trafficking.

##### *Information exchange*

Article 10 contains provisions on information exchange that are designed for countries that share borders or that are located along common trafficking routes. The Protocol specifically requires State Parties to share intelligence and exchange information on the routes and means used for migrant trafficking, the criminal organisations engaged therein, the fraudulent documents used for illegal immigration, the means and methods of concealment as well as exchanging legislative and technical experiences.

##### *Border control and cooperation*

To enhance the prevention and detection of illegal movements, article 11 introduces a variety of border measures. The article requires State Parties to strengthen border control and cooperation but does not specify any techniques or strategies. To bring State practice in line with the obligations under international law, paragraph (2) also requires State Parties to enhance legislation and measures against the transportation of undocumented

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<sup>275</sup> Article 5 *Protocol against the Smuggling of Migrants*. Cf *infra* Section 6.4.2.4.

passengers by commercial carriers.<sup>276</sup> Moreover, paragraph (5) suggests that persons engaged in any trafficking offence be denied entry into the country.

Article 14 of the Protocol seeks to improve cooperation between countries and the training of immigration, customs and law enforcement officers. Subparagraph (1) promotes the provision and strengthening of specialised training, while subparagraph (s) seeks to enhance cooperation between countries, between countries and international organisations, non-governmental organisations, and other relevant organisations.

#### *Legitimacy and validity of travel and identity documentation*

Articles 12 and 13 of the Protocol deal with security, legitimacy, validity and control of travel and identity documents. These articles were not contained in the original draft of the Protocol; they result from the work of an informal drafting group that met during the sixth session of the Ad Hoc Committee.<sup>277</sup>

The objective of article 12 is to control the materials used for travel and identity documents<sup>278</sup> and their quality, and also to provide mechanisms for more general control of the issuance process.<sup>279</sup> The provision contained in subparagraph (a) seeks to ensure that identity and travel documents, and the material used for their production, are of a standard and quality which makes their unauthorised issuance and falsification more difficult, if not impossible. Once these standards are met, subparagraph (b) seeks to prevent “the more sophisticated documents [...] [from falling] into the hands of smugglers at any stage of the production or issuance process.”<sup>280</sup> To facilitate the measures established under article 12,

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<sup>276</sup> *Travaux préparatoires*, para 103, referring to the *Refugee Convention and Protocol*, but also recalling Annex 9 to art 37(j) *Chicago Convention*. See *supra* 6.1.1.2.

<sup>277</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organised Crime*, UN Doc A/AC.254/4/Add.1/Rev.6 (19 July 2000) note 100.

<sup>278</sup> “The term ‘travel documents’ includes any type of document required for entering or leaving a State under its domestic law” and “the term ‘identity documents’ includes any document commonly used to establish the identity of a person in a State under the laws or procedures of that State.” *Travaux préparatoires*, para 104: art 3 *Protocol against the Smuggling of Migrants*.

<sup>279</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organised Crime*, UN Doc A/AC.254/4/Add.1/Rev.4 (27 Dec 1999) note 114.

<sup>280</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, *Revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the*

article 13 requires State Parties to assist each other in verifying the legitimacy and validity of documents and their holders.

During the elaboration of article 12 it became clear that the costs associated with these standards can easily overburden State Parties. Developing countries, in particular, expressed this concern and proposed to make the application of article 12 discretionary or conditional. As a result, the words “within available means” have been added.<sup>281</sup>

#### *Preventive action*

Similar to the mother Convention, the *Protocol against the Smuggling of Migrants* also contains preventive measures. Article 15 requires State Parties to establish information and public awareness programmes explaining the reality of illegal migration, the dangers inherent in the clandestine journeys, and the criminal organisations engaged therein. The article also promotes government action to prevent potential migrants from falling victim to criminal organisations and specifically encourages Signatories to establish development programmes that address the socioeconomic reasons for international migration.<sup>282</sup>

#### **6.4.2.3. Special measures against trafficking by sea**

As mentioned earlier, the Italian proposal for an anti-trafficking convention was particularly concerned with the trafficking of migrants by sea and included a range of measures that were specifically designed to suppress seaborne trafficking and apprehend traffickers. Following the amalgamation of the two proposals, most of the Italian provisions are now contained in Part II, articles 7-9 of the Protocol.

Article 8 contains provisions to verify the registration and flag of vessels that are suspected of carrying illegal migrants, and provisions that allow the boarding, search and seizure of suspect vessels.<sup>283</sup> Paragraphs (3)-(5) promote cooperation and information exchange between countries about any measures they have taken against suspect vessels. Article 8(6)

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*United Nations Convention against Transnational Organised Crime*, UN Doc A/AC.254/4/Add.1/Rev.5 (20 Mar 2000) note 87.

<sup>281</sup> *Ibid*, notes 86, 87.

<sup>282</sup> Cf Gallagher, *supra* note 164, at 996-997.

<sup>283</sup> Article 8(1), (2), (7) *Protocol against the Smuggling of Migrants*.

requires State Parties to designate a central authority to deal with requests for assistance and information about the registration and flags of sea vessels.

Finally, article 9 contains a safeguard clause for any action taken under article 8. Under article 9, State Parties are required to ensure the safety and the humane treatment of passengers, not to endanger the cargo or the environment, and respect commercial interests when taking any action against suspect vessels. Moreover, any measures taken against suspect vessels must comply with the principles of the international law of the sea.<sup>284</sup>

#### 6.4.2.4. The position of illegal migrants under the Protocol

One of the principal concerns that led to the elaboration of an international instrument against migrant trafficking was the victimisation of migrants and their vulnerable situation upon arrival in the destination countries. As seen earlier, many countries in the region impose severe penalties on illegal entry. Moreover, people who arrive illegally are often subject to detention and removal.<sup>285</sup>

Both the Italian and the Austrian proposal called for the non-criminalisation of migrants, recognising that many persons transported by trafficking organisations are asylum seekers including genuine refugees. The Ad Hoc Committee agreed to adopt this principle of non-criminalisation, which can now be found in article 5 of the Protocol:

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

The vulnerability and victimisation of migrants has also been recognised in the Preamble of the Protocol, which, *inter alia*, expresses the State Parties' concern "that the smuggling of migrants can endanger the lives or security of the migrants involved".<sup>286</sup>

Many of the international and non-governmental organisations involved in the elaboration of the Protocol considered the draft proposals insufficient with regards to the protection of trafficked migrants. Concern arose that the Ad Hoc Committee would place too great

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<sup>284</sup> *Ibid*, art 7; cf *travaux préparatoires*, paras 98-99.

<sup>285</sup> See *supra* Sections 4.3.4 and 5.1.3.

<sup>286</sup> Cf Morrison, *supra* note 65, at 71.

emphasis on the criminalisation and suppression of migrant trafficking and not take due account of the causes and circumstances of international migration, refugee flows, illegal movements, and of the human rights and physical safety of individual migrants. In July 1999, the UN High Commissioner for Human Rights, Ms Mary Robinson, addressed the Ad Hoc Committee and emphasised that an international instrument against migrant trafficking must “explicitly commit itself to preserving and protecting the fundamental rights to which all persons, including illegal migrants, are entitled.” In her message, Ms Robinson specifically called for the recognition of refugees, the non-refoulement of asylum seekers and the protection and promotion of human rights. The High Commissioner strongly opposed policies of detention of unlawful immigrants, and called upon nations to house and assist trafficked migrants according to the principles of international human rights law. Moreover, she stressed the importance of tackling the underlying political, demographic and socioeconomic causes of illegal migration and migrant trafficking.<sup>287</sup>

Following this address, UNHCHR combined its efforts with those of UNICEF, UNHCR and IOM, which led to the submission of a formal note to the Ad Hoc Committee in February 2000.<sup>288</sup> The note made comments on the general purpose of the Convention as well as on individual provisions under the *Protocol against the Smuggling of Migrants* and the *Protocol against Trafficking in Persons*. The note emphasised many of the concerns expressed by UNHCHR and, most importantly, stressed the need to include a protection provision that is now contained in article 16 (“protection and assistance measures”).<sup>289</sup>

Article 16 *Protocol against the Smuggling of Migrants* urges State Parties to preserve and protect the rights of smuggled migrants when implementing the Protocol and to ensure that the right to life and the right not to be subjected to torture or other degrading treatment and

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<sup>287</sup> UNHCHR, *Message from the High Commissioner for Human Rights, Mary Robinson, to the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime* (June/July 1999). Cf Morrison, *supra* note 65, at 75-76.

<sup>288</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Note by the Office of the United Nations High Commissioner for Human Rights, [the United Nations High Commissioner for Refugees,] the United Nations Children's Fund and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons*, UN Doc A/AC.265/27 (8 Feb 2000) and Corr.1 (22 Feb 2000). Cf Gallagher, *supra* note 164, at 997-999.

<sup>289</sup> UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons*, UN Doc A/AC.265/27 (8 Feb 2000) paras 16-18.



punishment are respected at all times.<sup>290</sup> Moreover, the Protocol calls upon States to take due account of the special needs of women and children and to provide assistance to those whose lives or safety are put at risk by trafficking organisations.<sup>291</sup>

UNHCR, UNICEF and IOM were also particularly concerned about putting illegal immigrants, including child migrants, at risk of refoulement in instances where the host countries deny entry to asylum seekers, where they fail to protect them, or do not recognise them as refugees. Although the Protocol promotes the speedy return of illegal entrants to the home country,<sup>292</sup> article 19 now contains a saving clause, requiring that State Parties must respect the refoulement obligation under the *Refugee Convention* and other international human rights instruments. Furthermore, it calls upon Member States to respect the principle of non-discrimination.

The protection provisions contained in the final Protocol reflect the lowest common denominator, rather than the best available tools to protect and safeguard the rights, integrity and interests of trafficked migrants. During the elaboration process, participating nations repeatedly stressed that the Protocol along with the mother Convention is not a human rights document and that it must in all instances focus on the prevention and suppression of migrant trafficking and transnational organised crime. While a majority of countries acknowledged the human rights dimension of migrant trafficking, direct references to international human rights instruments, as proposed by international and non-governmental organisations, are not included in the final Protocol, leaving State Parties freedom to interpret the provisions at their own liking. For example, suggestions to quote or refer to provisions under the *Convention of the Rights of the Child*,<sup>293</sup> the *Convention on the Elimination of all Forms of Discrimination against Women*,<sup>294</sup> and the *Convention on the Rights of Migrants* did not realise.<sup>295</sup> The recognition of international human rights standards under the Protocol is limited to the saving clause under article 19. Moreover, in

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<sup>290</sup> Article 16(1), (2) *Protocol against the Smuggling of Migrants*.

<sup>291</sup> *Ibid*, art 16(3), (4).

<sup>292</sup> *Ibid*, art 18.

<sup>293</sup> 1577 UNTS 3; 1991 ATS 4.

<sup>294</sup> 1249 UNTS 13; 1983 ATS 9.

<sup>295</sup> Morrison, *supra* note 65, at 76; Gallagher, *supra* note 164, at 997.

contrast to the *Protocol against the Trafficking in Persons*, State Parties are not required to consider permitting victims of migrant trafficking to remain in their territories.<sup>296</sup>

#### 6.4.2.5. Application and implementation of the Protocol

The remaining provisions under the *Protocol against the Smuggling of Migrants by Land, Air and Sea* deal with the implementation of the Protocol and its application at domestic and international levels.

Article 1 of the Protocol mirrors the provision under article 37 of the *Convention against Transnational Organised Crime* by clarifying the relation between the mother Convention and the Protocol.<sup>297</sup> Moreover, it is stated that as a supplement to the Convention, the Protocol must be interpreted together with the Convention and that its provisions apply, *mutatis mutandis*, to the Protocol. Paragraph 3 puts the offences established under the Protocol at one level with those contained in the Convention, thus enabling State Parties to utilise the cooperative and law enforcement measures of the Convention to prevent and combat migrant trafficking, investigate offences and prosecute perpetrators.

Finally, articles 20-25 contain formalities regarding accession to the Protocol, the settlement of disputes, amendments and denunciations.

#### 6.4.3. General Comments

In many respects, the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime* is a surprisingly progressive and comprehensive instrument to fight the phenomenon of migrant trafficking at domestic and international levels. Unlike the Convention, deliberations during the elaboration of the Protocol were less controversial and — generally speaking — the countries represented in the Ad Hoc Committee showed greater willingness to consent and compromise. Many of the provisions under the Protocol directly reflect the proposals

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<sup>296</sup> Cf Gallagher, *supra* note 164, at 997.

<sup>297</sup> See *supra* Section 6.3.2.9.

by Austria and Italy and have been adopted unequivocally. Moreover, the Protocol takes due account of many characteristics of migrant trafficking that render the phenomenon distinct from other fields of organised crime activity.

In summary, the Protocol promotes the universal criminalisation of migrant trafficking and many of the associated activities, and facilitates the cooperation between State Parties in investigating such crime and prosecuting offenders. In combination with the Convention, great emphasis is placed on the suppression of organised trafficking in migrants. The Protocol also recognises the particular characteristics of trafficking by sea and offers a range of measures to combat it more appropriately, while protecting the safety and integrity of migrants, and the security of cargo. Furthermore, following the initiative by UNHCHR, UNHCR, UNICEF and IOM, the Protocol places a premium on the recognition of migrants' rights, particularly those who are found to be genuine refugees. While it is acknowledged that the Protocol serves primarily as an instrument of international criminal law, it simultaneously advances the status of trafficked migrants, who, up until now, have remained largely unprotected under domestic and international law.

The weaknesses of the Protocol are few. In some cases, the provisions under the Protocol offer too great discretion to State Parties, allowing them to implement and interpret the Protocol to their own liking and their best national interest. Particularly when seen in combination with the Convention, there is some degree of vagueness surrounding some of the provisions, which may result in further differences between different jurisdictions once these provisions have been implemented. Some concern has been expressed over the distinction between migrant smuggling and trafficking in persons and the different obligations arising under the two Protocols. Because the *Protocol against the Trafficking in Persons* provides a greater range of protection mechanisms for victims, some countries may consider persons who are trafficked for sexual purposes as smuggled migrants in order to facilitate their removal.<sup>298</sup> However, at present, these observations remain speculative, and the concern expressed here must be revisited after Signatories have fully implemented the provisions under the Protocol.

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<sup>298</sup> Gallagher, *supra* note 164, at 1000.

The elaboration of the *Protocol against the Smuggling of Migrants* is remarkable, given the fact that the issue of migrant trafficking and the linkage between organised crime and illegal migration has only emerged over the past decade. In an unprecedented move, countries from around the world, including sending, transit and destination countries, took less than four years to agree on a new international instrument in an area that has not been addressed by earlier conventions and agreements. The speed with which the Protocol came into existence can be interpreted as a strong commitment by State Parties to combat migrant trafficking, but it also reflects the enormous global growth of the phenomenon and the lack of international cooperation on this matter prior to the year 2000.

It is for that reason that the principal failure of the Protocol is the limited number of Signatories, particularly among the countries of the Asia Pacific. As long as countries such as Cambodia, PR China, Malaysia, Singapore, Thailand, and Vietnam,<sup>299</sup> that have earlier been identified as key sending, transit and destination points, do not ratify the Protocol, migrant trafficking will continue to grow in the region and will further move to those nations that do not have adequate legislation to prevent and combat illegal migration and organised crime.

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<sup>299</sup> See *supra* Section 3.4.2.3.3.

## 6.5. Regional Initiatives against Illegal Migration and Organised Crime

The Asia Pacific region is characterised by religious, political, cultural, economic and demographic differences. As seen in Chapter Five, this is also reflected in the different immigration and criminal justice systems of these nations. These differences, along with the prioritisation of national interests, have been the main obstacles for cohesive and comprehensive action against migrant trafficking in the Asia Pacific.

However, awareness about the phenomenon of migrant trafficking is increasing rapidly in the region. With growing levels of illegal migration and organised crime, the governments in the Asia Pacific have come to understand that trafficking in migrants can only be successfully suppressed through some form of regional cooperation. Initiatives specifically designed to prevent and combat migrant trafficking date from 1996, when the Manila Process and the Asia Pacific Consultations came into existence. Today, multiple organisations at various levels of government, law enforcement and research are engaged in the fight against illegal migration. These include the Asia African Legal Consultative Committee, the Association of South East Asian Nations, the Asia Pacific Economic Cooperation, the Pacific Islands Forum, the Council for Security Cooperation in the Asia Pacific, along with other regional organisations that are discussed in the following Sections.

### 6.5.1. Regional Seminar on Irregular Migration and Migrant Trafficking in East and South East Asia: the “Manila Process”

Widespread concern over the rapid growth of migrant trafficking in East and South East Asia led IOM to initiate a series of seminars, now known as the Manila Process. The first *Regional Seminar on Irregular Migration and Migrant Trafficking in East and South East Asia* was held in Manila on 5-6 December 1996 and brought together government representatives from eleven nations in the region. Participants discussed various aspects of migrant trafficking and decided to initiate regular exchange of views and information on

this matter. The first meeting concluded a loose list of ideas for future cooperation to be discussed at consecutive seminars, including

- ◆ Exchanging general information among participants on issues of common interest;
- ◆ Working together to harmonise legislation and penalties relating to irregular migration and migrant smuggling;
- ◆ Expanding the dialogue to other countries directly concerned with irregular movements in and through the region; and
- ◆ Seeking a link-up between regional discussions in East/South East Asia and those in other regions.<sup>300</sup>

A second meeting was held in Manila in December 1997, which drew particular attention to developments in Latin America and Europe, where IOM initiated similar cooperation and regional seminars.<sup>301</sup> However, consensus about future cooperation remained very limited at the second meeting. It was agreed to continue the seminars in a more issue-focused manner, preserve the atmosphere of frank and open discussion, but without expanding the seminars to the ministerial level.<sup>302</sup>

To date, five meetings have been held in what has come to be known as the Manila Process. Thirteen countries from East and South East Asia and Hong Kong now participate in the regional seminars to discuss trends in and measures against irregular migration and migrant trafficking. The most recent meeting held in Jakarta on 2-3 October 2000 agreed to pursue concrete action in capacity building and development of information and sharing practices.<sup>303</sup>

In addition to the Manila Process, IOM in collaboration with the Thai Government organised an international symposium at ministerial level "Towards Regional Cooperation on Irregular/Undocumented Migration" in Bangkok from 21 to 23 November 1999. The symposium discussed topics such as technical cooperation on migration, migration and

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<sup>300</sup> "Chairperson's Summary" *IOM Regional Seminar on Irregular Migration and Migrant Trafficking in East and Southeast Asia*, Manila, 5-6 Dec 1996.

<sup>301</sup> See also the comments *infra* Section 6.5.9.

<sup>302</sup> "Chairman's Summary" *Second IOM Regional Seminar on Irregular Migration and Migrant Trafficking in East and Southeast Asia*, Manila, 4-5 Dec 1997.

<sup>303</sup> "Chairman's Summary" *Fourth Regional Seminar of the Manila Process on Irregular Migration and Migrant Trafficking in East and South East Asia*, copy provided by IOM, Geneva, Jan 2001.

health, assisted returns, counter-trafficking measures, information analysis and dissemination, and post conflict intervention in East Timor and Cambodia. The meeting resulted in the adoption of the *Bangkok Declaration on Irregular Migration* as a framework for future regional cooperation in combating irregular migration and migrant trafficking.<sup>304</sup>

The Declaration, signed by nineteen nations and Hong Kong, takes note of the rapid growth of migrant trafficking in the region, condemns the practices of trafficking organisations and calls for enhanced regional cooperation to prevent and suppress illegal migration and organised crime. In relatively broad statements, the *Bangkok Declaration* calls upon Signatories to enhance bilateral and multilateral collaboration, facilitate research and information exchange on the causes and consequences of illegal migration, organised crime and the persons engaged therein, review and improve legislation criminalising migrant trafficking as well as trafficking in women and children, accelerate the return of migrants while ensuring the safety and humane treatment of victims of trafficking. Moreover, the *Bangkok Declaration* promotes closer cooperation with non-governmental organisations and international bodies such as the UN Institute for Training and Research (UNITAR), the UN Population Fund (UNFPA), and IOM.

Neither the Manila Process nor the *Bangkok Declaration* provide a legal framework to prevent, investigate and suppress migrant trafficking in the region more effectively. They do not establish criminal offences or law enforcement mechanisms to fight organised crime activities. They do not address the aspect of asylum and refugee flows and contain no references to other international human rights and refugee law instruments. The principles summarised in the Declaration and reflected in the Manila Process represent the lowest common denominator for regional cooperation against migrant trafficking. However, as such they are also the first steps towards closer cooperation, opening up opportunities for further information exchange and collaboration which may, in the future, become more harmonised and, ultimately, more effective.

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<sup>304</sup> IOM, *Migration Initiatives: The Bangkok Declaration and IOM Programmes in South-East Asia* (1999); cf Ronald Skeldon, "Trafficking: A Perspective from Asia" (2000) 32(3) *Int'l Migration* 7 at 21-22.

### 6.5.2. Asia Pacific Consultations (APC)

The Asia Pacific region has witnessed vast refugee flows in recent decades and is the source, transit point and destination for millions of migrants. Despite the dimension and significance of these movements, there is no cooperation between the countries of the region to address the causes and consequences of international migration. Also, as seen in Chapter Five, only very few of the Asia Pacific countries are committed to the principles of international refugee and human rights law.<sup>305</sup>

In 1994, Australia convened a first meeting for *Regional Consultations on Illegal Immigration* to discuss regional cooperation and information exchange concerning illegal migration, including migrant trafficking. The meeting was attended by participants from Australia, Brunei, Cambodia, Canada, PR China, Hong Kong, Indonesia, Japan, the Lao PDR, Malaysia, New Zealand, Papua New Guinea, the Philippines, Singapore, Thailand, the United Kingdom, the US, and Vietnam, as well as the United Nations Centre for Human Rights and IOM. The meeting acknowledged the growing levels of illegal migration and organised crime and concluded a list of measures to fight these phenomena more appropriately, including:

- (a) International cooperation to prevent illegal entry into countries;
- (b) Strong legislation to deter trafficking in persons;
- (c) The speedy return of persons with no legal basis for remaining in a country;
- (d) The provisions of opportunities for legal migration (temporary or permanent); and
- (e) Better information exchange and cooperation, at policy, intelligence and technical levels.<sup>306</sup>

Two years later, UNHCR in cooperation with IOM and the Government of Australia established another regional forum, now known as the Asia Pacific Consultations (APC). In November 1996, representatives from 24 nations and Hong Kong met in Canberra to discuss ways in which to enhance regional cooperation and information exchange concerning irregular migration. In a resolution adopted at the meeting, participants expressed their concern over the lack of protection available to asylum seekers and

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<sup>305</sup> See *supra* Section 5.1.4.

<sup>306</sup> UN, General Assembly, *Measures to combat alien-smuggling, Report of the Secretary General*, UN Doc A/49/350 Add.1 (1 Nov 1994) paras 6, 7.



refugees in the region, and agreed to work towards better protection mechanisms by continuing the Asia Pacific Consultations on a regular basis and consider the establishment of an APC Secretariat to liaise with governments in the region on migration issues.<sup>307</sup>

In comparison to the Manila Process, APC offers a much broader scope for discussion and is attended by a larger group of participants. While the Manila Process focuses on irregular migration and trafficking, APC serves as a forum to discuss a variety of issues relating to population movements in the Asia Pacific region. It is anticipated that APC and the Manila Process will develop a close working relationship in the future and there are expectations that APC could be used as a unifying forum for the various initiatives on population movements in the Asia Pacific region.<sup>308</sup>

### 6.5.3. Asian African Legal Consultative Committee (AALCC)

The Asian African Legal Consultative Committee (AALCC) was established in 1958 as an intergovernmental consultation group to discuss legal issues of concern to the countries of the region. AALCC has a small secretariat in New Delhi and the Committee brings together 45 Member Nations, including from the Asia Pacific region PR China, Indonesia, Malaysia, Myanmar, Philippines, Singapore and Thailand.

AALCC first addressed the issue of refugee protection in 1964 and over the next two years developed the *Bangkok Principles concerning Treatment of Refugees*.<sup>309</sup> In a region where the majority of nations have not implemented international refugee law instruments, the *Bangkok Principles* provide guidelines to protect refugees, safeguard their rights and ensure their humane treatment. The Principles largely reflect the provisions and

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<sup>307</sup> Pia Oberoi, "Regional Initiatives on Refugee Protection in South Asia" (1999) 11(1) *IJRL* 193 at 199; Skeldon, *supra* note 304, at 21.

<sup>308</sup> Chairman's Summary" *Fourth Regional Seminar of the Manila Process on Irregular Migration and Migrant Trafficking in East and South East Asia*, copy provided by IOM, Geneva, Jan 2001, para 7.

<sup>309</sup> *Principles Concerning Treatment of Refugees as adopted by the Asian African Legal Consultative Committee at its Eighth Session, Bangkok, August, 1966*, reprinted in Eberhard Jahn, "The Work of the Asian-African Legal Consultative Committee on the Legal Status of Refugees" (1967) 27 *ZaöRV* 122 at 133-136.

obligations under the *Refugee Convention*.<sup>310</sup> Article 1 of the *Bangkok Principles* defines a refugee as

[...] a person who, owing to persecution or well-founded fear of persecution for reason of race, colour, religion, political belief or membership of a particular social group:

- (a) leaves the State of which he is a national, or the Country of his nationality, or, if he has no nationality, the State or Country of which he is a habitual resident; or,
- (b) being outside such State or Country, is unable or unwilling to return to it or to avail himself of its protection.

The *Bangkok Principles* contain nine articles dealing with the legal status, rights and treatment of refugees and their return and expulsion. The Principles give Member Nations full sovereignty over the decision to grant and refuse asylum, however, any decision must adhere to the principle of non-refoulement. Also, the decision to grant asylum must be respected by other States and should not be regarded as a hostile act.<sup>311</sup> Article IV gives refugees the right to return to their country of nationality and obliges the country to accept returning nationals. Despite initial resistance from Asian nations, articles VII-IX establish basic standards for the treatment of refugees and promote the principle that that treatment of refugees should be treated “no way less favourable than that generally accorded to aliens in similar circumstances”. Finally, article VIII allows State Parties to expel refugees for reasons of national or public interest or in circumstances where they violate the conditions of asylum. Refugees, however, must not be expelled to places where they are in danger of persecution. The Principles were reviewed at a seminar held in Manila in 1996, and some minor amendments were made to update the provisions and adjust them to the characteristics of contemporary refugee flows.<sup>312</sup>

Primarily, the *Bangkok Principles* seek to establish a basic framework for the protection of refugees in Asia and Africa. While the Principles do not have the status of codified law, they do contain favourable mechanisms for refugees who are otherwise unprotected in nations that have not established national asylum systems and have not ratified the *Refugee Convention* and other human rights treaties. However, from the very beginning it was clear that the Principles must not duplicate the *Refugee Convention*; instead they should “fill the

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<sup>310</sup> Oberoi, *supra* note 307, at 195.

<sup>311</sup> Art III *Bangkok Principles*.

<sup>312</sup> Oberoi, *supra* note 307, at 196-197.

gaps left by the mother Convention and bring it up to date without supplanting it".<sup>313</sup> While the *Bangkok Principles* have been complemented in recent years — and in some instance superseded — by the work of regional fora such as APC, the Principles still represent the major and most commonly accepted guidelines for the protection of refugees in Asia. To further advance the status of refugees in the region it is important that regional committees such as AALCC and APC continue to promote the rights of refugees and encourage Member States to adhere to the principle of international refugee law and ultimately sign the *Refugee Convention* and *Protocol*.

#### 6.5.4. Association of South East Asian Nations (ASEAN)

ASEAN was established in 1967 as a regional forum for South East Asian nations to accelerate the economic growth, social progress and cultural development in the region, and to promote regional peace and stability.<sup>314</sup> To achieve these goals, based on the principles of self-confidence, self-reliance, mutual respect, cooperation, and solidarity,<sup>315</sup> ASEAN activities include a programme for political and security cooperation, and an economic and functional cooperation programme. The latter comprises six Plans of Action on Social Development, Culture and Information, Science and Technology, Environment, and on Drug Abuse Control. Most recently, the ASEAN Plan of Action in Combating Transnational Crime has been added.

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<sup>313</sup> Jahn, *supra* note 309, at 126.

<sup>314</sup> *Declaration of ASEAN Concord*, Jakarta, 24 Feb 1976, available at [www.aseansec.org/summit/concord.htm](http://www.aseansec.org/summit/concord.htm) (18 Dec 2001). At the end of 2001 Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam were members of ASEAN. Australia, Brunei, Cambodia, Canada, PR China, European Union, India, Indonesia, Japan, Democratic Peoples' Republic of Korea, Republic of Korea, Lao PDR, Malaysia, Myanmar, Mongolia, New Zealand, Papua New Guinea, Philippines, Russia, Singapore, Thailand, United States and Vietnam are members of the ASEAN Regional Forum (ARF).

<sup>315</sup> Cf art 2 *Treaty of Amity and Cooperation in Southeast Asia*, Jakarta, 24 Feb 1976, available at [www.aseansec.org/summit/amity76.htm](http://www.aseansec.org/summit/amity76.htm) (18 Dec 2001).

#### 6.5.4.1. ASEAN Plan of Action in Combating Transnational Crime

In 1996, ASEAN established a Plan of Action in Combating Transnational Crime in response to the growth of transnational criminal activities in South East Asia. From 18-20 December 1997, ASEAN Ministers of Interior/Home Affairs met in Manila to discuss the new Plan of Action and establish a framework for regional cooperation against transnational crime which led to the conclusion of the *ASEAN Declaration on Transnational Crime*.<sup>316</sup>

In summary, the Declaration expresses the concern of ASEAN Member States about the growth of transnational crime, including terrorism, illicit drug trafficking, arms smuggling, money laundering, trafficking in persons and piracy. The Declaration calls for cooperation at the regional level to fight transnational organised crime by encouraging networking of relevant national agencies and organisations in Member States, improving information exchange and dissemination, and by exchanging law enforcement liaison personnel. Also, the Declaration promotes the establishment of an ASEAN Centre on Transnational Crime.

ASEAN convened a second meeting on transnational crime in Yangon, Myanmar on 23 June 1999. The *Joint Communiqué of the Second ASEAN Ministerial Meeting on Transnational Crime* stresses the role of the Plan of Action to Combat Organised Crime as the principal tool in South East Asia

to prevent, control and neutralise transnational crime; foster regional cooperation at the investigative, prosecutorial, and judicial level as well as the rehabilitation of perpetrators; enhance coordination among ASEAN bodies dealing with transnational crime; strengthen regional capacities and capabilities to deal with sophisticated nature of transnational crime; and develop sub-regional and regional treaties on cooperation in criminal justice, including mutual legal assistance and extradition.<sup>317</sup>

Moreover, it was agreed to establish the ASEAN Centre for Combating Transnational Crime.<sup>318</sup> At the end of 2001, however, there was still no further progress on this matter other than some discussion about Manila as a possible location for the Centre.<sup>319</sup>

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<sup>316</sup> The full text of the Declaration is available at [www.aseansec.org/politics/adtc97.htm](http://www.aseansec.org/politics/adtc97.htm) (24 Dec 2001).

<sup>317</sup> *Joint Communiqué of the Second ASEAN Ministerial Meeting on Transnational Crime*, Yangon, 23 June 1999, para 9. The full text of the Communiqué is available at [www.aseansec.org/politics/jc\\_cri02.htm](http://www.aseansec.org/politics/jc_cri02.htm) (24 Dec 2001).

<sup>318</sup> *Ibid*, paras 13-15.

The third and most recent ministerial meeting on transnational crime was held in Singapore in October 2001, which again stressed the importance of regional cooperation and emphasised the role of the Plan of Action and *Declaration on Organised Crime*.<sup>320</sup> A fourth meeting will be hosted by Thailand in 2003.

Although the ASEAN Plan of Action on Combating Transnational Crime is not designed to provide a binding legal document, its elaboration and recognition are important steps towards enhanced regional judicial and law enforcement cooperation. Since the majority of ASEAN members are not parties to the *Convention against Transnational Organised Crime*, the Plan of Action is currently the most accepted basis for regional cooperation against organised crime. Moreover, it needs to be stressed that the countries of the region show much greater support of ASEAN activities than of other initiatives at regional and global levels. This can be explained by the primarily economic nature of ASEAN, as Member Nations seek financial and trade advantages by engaging in ASEAN cooperation. It is for that reason that ASEAN has emerged as an important and powerful forum in the region. Also, ASEAN is largely independent from the major Western powers in the region such as the United States, Japan and Australia. Although these nations participate in the ASEAN Regional Forum, they have no impact on the decisions of the principal ASEAN summits and the action plans. Given the strong emphasis on maintaining national sovereignty and mutual respect, cooperation under the ASEAN umbrella has progressed in a genuinely South East Asian way, often much to the concern of other regional powers.

The establishment of the Plan of Action on Combating Transnational Crime and the *Declaration on Transnational Crime* are milestones on the way towards enhanced regional judicial and law enforcement cooperation. However, these mechanisms lack specific tools and enforceable mechanisms to fight organised crime in the region. The documents produced by the ASEAN meetings are broadly phrased declarations that promote regional cooperation but do not establish a basic set of rules that can be implemented by Member

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<sup>319</sup> Melitta Salvador, "Emerging Transnational Crime Threats and Government Responses — Country Report: Phillipines" paper presented at the *Fifth Meeting of the CSCAP Working Group on Transnational Crime*, Bangkok, 23-25 May 1999, 12-13.

<sup>320</sup> *Joint Communiqué, Third ASEAN Ministerial Meeting on Transnational Crime (AMMTC)*, Singapore, 11 Oct 2001, available at [www.aseansec.org/menu.asp?action=7&content=1](http://www.aseansec.org/menu.asp?action=7&content=1) (18 Dec 2001).

Nations to prevent, investigate and suppress the activities of criminal organisations in South East Asia more appropriately.

#### 6.5.4.2. ASEAN Cooperation on Immigration Matters

In addition to the Plan of Action on Combating Transnational Crime, ASEAN established a working group on immigration matters to complement regional “efforts towards closer economic integration, the move to facilitate enhanced intra-ASEAN tourism and the fight against transnational crime”.<sup>321</sup>

A basic framework for cooperation was developed at the third meeting of the ASEAN Directors-General of Immigration Departments and Heads of Consular Divisions of ASEAN Ministries of Foreign Affairs (DGICM) in Yangon, Myanmar, on 13-14 December 1999.<sup>322</sup> The meeting agreed to establish an ad hoc High-Level Experts Group on Immigration Matters

- a. To develop an institutional framework for ASEAN cooperation on immigration matters;
- b. To develop a plan of action on immigration matters encompassing the objectives, scope, strategies, mechanisms, modalities and funding arrangements; and
- c. To establish a directory of immigration focal points to establish a network among the immigration authorities in ASEAN, especially in the area of law enforcement.

Secondly, participants agreed to introduce facilitated travel among Member Nations including visa free entry offered by Member Countries to ASEAN nationals, the use of smart cards as uniform travel documents, harmonisation of immigration disembarkation cards, and special ASEAN lanes at international airports in Member Countries.

Regional cooperation on immigration matters, including migrant trafficking, were further discussed at the fourth meeting of the group in the Philippines in 2000<sup>323</sup> and again at the

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<sup>321</sup> *Joint Press Statement, Third Meeting of the ASEAN Directors-General of Immigration Departments and Heads of Consular Divisions of ASEAN Ministries of Foreign Affairs*, 13-14 Dec 1999, Yangon, Myanmar, available at [www.aseansec.org/news/jgs\\_dgi.htm](http://www.aseansec.org/news/jgs_dgi.htm) (24 Dec 2001).

<sup>322</sup> *Ibid.*

<sup>323</sup> *Joint Press Statement, Fourth Meeting of the ASEAN Directors-General of Immigration Departments and Heads of Consular Affairs Divisions of ASEAN Ministries of Foreign Affairs*, Davao City, 16-18 Oct 2000, available at [www.aseansec.org/politics/dg\\_img4.htm](http://www.aseansec.org/politics/dg_img4.htm) (24 Dec 2001).

most recent meeting in Singapore in 2001.<sup>324</sup> However, the meetings have yet to decide on comprehensive mechanisms and on a regional declaration to combat migrant trafficking more appropriately. It is expected that future meetings will address these issues in greater detail.

#### 6.5.4.3. ASEAN Chiefs of National Police (ASEANAPOL)

ASEANAPOL brings together the Chiefs of national police forces of the ten ASEAN Member Nations. This group meets annually to discuss preventive, enforcement and operational aspects of cooperation against transnational crime. ASEANAPOL actively fosters regional police cooperation, exchange of information and visits, establishing linkages in training and research, and holding regular conferences. ASEANAPOL has established its own database system to enable Member Countries to exchange information on transnational crime in a rapid, reliable and secure manner to provide further means of accessing the computerised systems at the INTERPOL secretariat. Further information about the forum was unavailable at the time this study was completed.

#### 6.5.5. Asia Pacific Economic Cooperation (APEC)

APEC, the Asia Pacific Economic Cooperation, was established in 1989 in response to the growing interdependence among the economies of the region.<sup>325</sup> As part of the APEC activities, the organisation, which has a secretariat based in Singapore, has established a variety of action plans to address issues that are of common concern to all economies in the Asia Pacific region.<sup>326</sup>

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<sup>324</sup> *Joint Press Statement, Fifth Meeting of the ASEAN Directors-General of Immigration Departments and Heads of Consular Affairs Divisions of ASEAN Ministries of Foreign Affairs (DGICM)*, Singapore, 3-5 Sep 2001, available at [www.aseansec.org/print.asp?file=/newdata/jps\\_imm01.htm](http://www.aseansec.org/print.asp?file=/newdata/jps_imm01.htm) (18 Dec 2001).

<sup>325</sup> Member economies of APEC include Australia, Brunei, Canada, Chile, PR China, Hong Kong SAR, Indonesia, Japan, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, Taiwan (Chinese Taipei), Thailand, United States and Vietnam.

<sup>326</sup> For general information on the organisational structure and activities of APEC see the website of the APEC Secretariat at [www.apecsec.org.sg](http://www.apecsec.org.sg) (24 Dec 2001).

One of the issues addressed by APEC include the facilitation of trade and travel in the region. In this context, starting in 1995, a number of workshops have been conducted to explore ways in which to facilitate business travel among Member Nations, and a working group on the “Mobility of Business People” was established in 1997. During the first meetings of this forum it became clear that the issue of free travel necessarily involves problems associated with document fraud and the detection of false travel and identity documentation. APEC continued the dialogue on these matters over the following meetings of the working group. The group recently arranged for the introduction of a universal APEC business travel card as a sophisticated, single travel document for business travel in the region. Card-holders are exempted from lengthy immigration controls and do not require visas to enter certain APEC nations.<sup>327</sup>

On another initiative, workshops under the title “Train the Trainer” have been established to bring together participants from around the region, exchange views on and experiences with document fraud, examination skills and techniques, as well as developing participant skills in relaying the contents of those workshops to their colleagues on return to their home country.<sup>328</sup>

#### 6.5.6. Pacific Islands Forum

The Pacific Islands Forum (formerly South Pacific Forum) is the principal regional organisation for the South Pacific island nations aiming to support Member Governments in “enhancing the economic and social well-being of the people of the South Pacific by fostering cooperation between governments and between international agencies, and by representing the interests of Forum Members.” The Pacific Islands Forum brings together sixteen nations from the region and has a secretariat in Suva, Fiji.<sup>329</sup>

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<sup>327</sup> The documentation of the meeting of the working group is available at [www.apecsec.org.sg](http://www.apecsec.org.sg) (18 Dec 2001).

<sup>328</sup> Information provided by DIMA, Belconnen (19 Apr 2001).

<sup>329</sup> The 16 Member Countries of the Forum are Australia, Cook Islands, Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.



Regional cooperation between the South Pacific island nations on issues of transnational crime and law enforcement commenced in 1992 when the Forum adopted the *Honiara Declaration* on law enforcement cooperation.<sup>330</sup> The Declaration addresses the need for a more comprehensive, integrated and collaborative approach to counter the threat posed by criminal organisations. The *Honiara Declaration* calls for enhanced law enforcement cooperation, extradition, mutual legal assistance in criminal matters, and the forfeiture of the proceeds of crime. Moreover, in relation to the specific issues associated with money laundering, the Declaration urges Member Nations to adopt the *Forty Recommendations* established by FATF<sup>331</sup> and afford priority to the ratification and implementation of the *UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*. In October 1998, the Forum initiated a five-year programme to assist Member Nations in preventing and combating cross-border crime, including money laundering, financial fraud, drug trafficking and the movement of contraband.<sup>332</sup>

The Pacific Islands Forum secretariat also has a training programme for law enforcement personnel and provides legal drafting assistance to the Forum Members to help them enact the legislative priorities identified. Moreover, chiefs of national police forces of the South Pacific nations meet annually to discuss current issues and developments in crime and law enforcement. The Forum serves primarily as an information gathering and exchange exercise and is not intended to develop regional solutions. However, recent meetings have strongly endorsed collaborative efforts at regional and global levels, including the *UN Convention against Transnational Organised Crime*.<sup>333</sup> In addition, the Government of Australia convened a *First Pacific Region Transnational Crime Seminar* in December 2000 as an additional forum to discuss regional developments in crime and criminal justice.<sup>334</sup>

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<sup>330</sup> The full text of the *Honiara Declaration* is available at the website of the Pacific Islands Forum Secretariat [www.forumsec.org.fj/division/piad.htm](http://www.forumsec.org.fj/division/piad.htm) (24 Dec 2001).

<sup>331</sup> See *supra* Section 6.3.2.3.

<sup>332</sup> *Project to Combat Cross Border Crimes*, Suva, 8 Oct 1998, available at [www.forumsec.org.fj/news/1998/oct04.htm](http://www.forumsec.org.fj/news/1998/oct04.htm) (30 Mar 2001).

<sup>333</sup> Cf *Resolutions, 30<sup>th</sup> South Pacific Chiefs of Police Conference*, Apia, 22-26 Oct 2001, available at [www.forumsec.org.fj/docs/docs.htm](http://www.forumsec.org.fj/docs/docs.htm) (18 Dec 2001).

<sup>334</sup> *Communiqué, First Pacific Region Transnational Crime Seminar*, Brisbane, 4-8 Dec 2000, available at [www.forumsec.org.fj/docs/Communique.htm](http://www.forumsec.org.fj/docs/Communique.htm) (30 Mar 2001).

The issue of trafficking in migrants was first identified by Forum Leaders as a new threat to the region at the 1999 Forum summit in Koror, Palau.<sup>335</sup> At the meeting of the Forum's Regional Security Committee in 2000, it was decided to request the Oceania Customs Organisations and the Pacific Immigration Directors Conference to develop a regional perspective on migrant trafficking.<sup>336</sup> The Third Pacific Immigration Directors Conference, held in Norfolk Island in December 1999, further discussed the issues of information exchange, and regional collaboration in developing migration and passport services.<sup>337</sup> At the time this study was completed, no information was available on the progress towards a regional policy on these matters.

#### 6.5.7. Council for Security Cooperation in the Asia Pacific (CSCAP)

At a meeting in Seoul in November 1992, representatives of strategic studies centres from ten countries in the Asia Pacific region (Australia, Canada, Indonesia, Japan, South Korea, Malaysia, the Philippines, Singapore, Thailand and the United States) agreed to explore options for "a more structural regional process of a non-governmental nature [...] to contribute to the efforts towards regional confidence building and enhancing regional security through dialogues, consultation and cooperation".<sup>338</sup> Over the following eight months, participants developed the concept of a Council for Security Cooperation in the Asia Pacific (CSCAP) to provide a new forum for government officials and regional security analysts, to work towards regional solutions for common security concerns in the Asia Pacific. A first CSCAP meeting was held in Kuala Lumpur in June 1993. The *CSCAP Charter* was finalised and adopted at a meeting in Indonesia in December 1993.<sup>339</sup>

CSCAP has a small secretariat located at the Institute for Strategic and International Affairs in Kuala Lumpur. The Steering Committee is the main organ of CSCAP and meets twice

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<sup>335</sup> 30<sup>th</sup> Pacific Islands Forum, 1999 Forum Communiqué, Koror, 3-5 Oct 1999, para 41, available at [www.forumsec.org.fj/docs/fc99.htm](http://www.forumsec.org.fj/docs/fc99.htm) (18 Dec 2001).

<sup>336</sup> Information provided by Mr Andie Fong Toy, Pacific Islands Forum Secretariat, Suva (21 Dec 2000).

<sup>337</sup> Third Pacific Immigration Directors Conference, Communiqué, Norfolk Island, 6-8 Dec 1999, available at [www.forumsec.org.fj/news/1999/dec02.htm](http://www.forumsec.org.fj/news/1999/dec02.htm) (30 Mar 2001).

<sup>338</sup> Desmond Ball, *The Council for Security Cooperation in the Asia Pacific — Its Record and Its Prospects* (2000) 1.

<sup>339</sup> Ball, *ibid.*, at 6.

each year to determine the general direction of the organisation. The principal work of CSCAP is done in a number of working groups. Four working groups on maritime cooperation, security cooperation in the North Pacific/North East Asia, confidence and security building measures, and on the concepts of cooperative and comprehensive security were established in 1993-94. A fifth working group, the CSCAP Working Group on Transnational Crime was established in June 1996.<sup>340</sup>

Since its creation, the Working Group on Transnational Crime has held ten meetings, the most recent in Jakarta, 7-9 November 2001. The principal goals of the group are to

- ◆ Gain a better understanding of and reach agreement on the major transnational crime trends affecting the region as a whole;
- ◆ Consider practical measures which might be adopted to combat transnational crime in the region; [and]
- ◆ Encourage and assist those countries which have recently become engaged in regional security cooperation, and which are concerned about the problem of transnational crime in the region, to endorse the United Nations and other protocols dealing with transnational crime, particularly in the narcotics area, and to develop laws to assist in regional and international cooperation to counter drug trafficking, money laundering, mutual assistance, extradition and the like.

The Working Group commenced work on the issue of migrant trafficking at its sixth meeting in November 1999.<sup>341</sup> The dialogue continued over the following three meetings, with a particular focus on immigration offences and the issue of document fraud.<sup>342</sup> This work resulted in a set of best practice principles for the countries in the Asia Pacific region on all aspects of identity and travel document fraud.<sup>343</sup>

The activities of CSCAP and its working groups follow the developments of ASEAN and the ASEAN Regional Forum. In some respect, CSCAP grew out of the concern of non-

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<sup>340</sup> Ball, *ibid*, 14-21.

<sup>341</sup> Cf Greg Talcott & Hamish McCardle, "Human Trafficking Routes through the Asia-Pacific Region: A Sub-Report of a Strategic Assessment on People Smuggling for the New Zealand Customs Service" paper presented at the *Sixth Meeting of the CSCAP Working Group on Transnational Crime*, Wollongong, 5-9 Nov 1999.

<sup>342</sup> Juan Ronderos, "Identity Fraud and Transnational Crime" paper presented at the *Seventh Meeting of the CSCAP Working Group on Transnational Crime*, Manila, 31 May-1 June 2000; Andreas Schloenhardt, "Legal Issues of Immigration and Identity Fraud in Australia and the Asia Pacific Region" paper presented at the *Eighth Meeting of the CSCAP Working Group on Transnational Crime*, Bangkok, 16-17 Oct 2000; id, "International and Regional Initiatives to Combat Identity Document Fraud" paper presented at the *Ninth Meeting of the CSCAP Working Group on Transnational Crime*, Sydney, 7-9 May 2001. The views expressed in this study are those of the author and do not represent the views of the Working Group.

ASEAN members such as the United States, Australia and Japan over regional developments that evolved independently from these nations. Unlike the other regional organisations discussed here, CSCAP is a 'second track' organisation featuring government officials and academics in their official and non-official capacities. The recommendations made by CSCAP do not have legal status and are not enforceable. However, governments from around the region closely follow the progress of the working groups, and the participating countries take the organisation very seriously. In a region where confidence-building and collaboration on issues of national security, law and law enforcement is relatively new, CSCAP has made a significant contribution to the regional dialogue in the field of law enforcement cooperation and information exchange on the issues of organised crime and illegal migration.

#### 6.5.8. Other Regional Organisations

##### 6.5.8.1. Association of Asia Pacific Airlines (AAPA)

The Association of Asia Pacific Airlines (AAPA) is a forum for seventeen commercial international airlines from thirteen countries of the Asia Pacific region and Taiwan.<sup>344</sup> AAPA has a small secretariat based in Kuala Lumpur. Similar to IATA, AAPA is an industry-based organisation, created to represent the interests of member airlines and provide a regional forum to exchange information and views on matters of common concern.<sup>345</sup>

The basic structure of AAPA is a range of committees and working groups made up of delegates from each member airline; governments from the region are not represented. Most relevant in the field of migrant trafficking is the AAPA Working Group on Fraud Prevention. The Working Group seeks

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<sup>343</sup> To be published in Andreas Schloenhardt, *Identity Document Fraud in the Asia Pacific Region* (2002).

<sup>344</sup> The present AAPA members include Air New Zealand, ANA, Asiana, Cathay Pacific, China Airlines, Dragonair, EVA Air, Garuda Indonesia, JAL, Korean Air, Malaysia Airlines, Philippine Airlines, Qantas, Royal Brunei Airlines, Singapore Airlines, Thai Airways, and Vietnam Airlines.

<sup>345</sup> For details see the AAPA website at [www.aapa.org.my](http://www.aapa.org.my).

- A. To coordinate and cooperate with other industry bodies [...] concerning fraud prevention issues and developments; and present AAPA common concerns and problems to the appropriate regional and international forums.
- B. To enhance the AAPA information exchange network regarding fraud prevention matters together with the Secretariat, in order to assist Members [to] prevent the commission of fraud against airlines and to create greater awareness of the modi operandi being used by criminal elements in committing fraud against airlines;
- C. To sponsor and/or initiate fraud prevention training activities in AAPA countries that respond to fraud prevention problems as they occur and to promote awareness and enhance skills of staff;
- D. To promote cooperation among Members during investigation and/or prosecution of fraud prevention cases; and in problem AAPA countries, support the national carriers' initiatives towards effective apprehension and prosecution of fraud perpetrators.<sup>346</sup>

No further information was available on the work of the Fraud Prevention Working Group at the time this study was taking shape.

Essentially, the work of AAPA complements the initiatives taken by IATA at the regional level. Since none of the South East Asian Nations and their air carriers is represented on the IATA Control Authorities Working Group, AAPA offers a forum for regional cooperation on civil aviation issues, including immigration and identity document fraud. The geographical boundaries of AAPA and the limited number of member airlines — especially in comparison to IATA — offer the advantage that airlines can cooperate more closely and that working groups can focus more precisely on regional characteristics of identity document fraud.

#### **6.5.8.2. Pacific Rim Immigration Intelligence Officers' Conference (PACRIM)**

Most recently, a number of countries from the Pacific region have established the Pacific Rim Immigration Intelligence Officers' Conference (PACRIM). The conference meets once a year and focuses primarily on illegal movements in the Pacific region. According to information provided by the Australian Department for Immigration and Multicultural

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<sup>346</sup> Information provide by Ms Winnifred Yoong, Assistant Manager – Commercial, AAPA, Kuala Lumpur, 20 Apr 2001.

Affairs, the conference has expressed plans to establish a regional database for lost and stolen passports. Further details were unavailable at the time this study was prepared.<sup>347</sup>

### 6.5.8.3. South Pacific Islands Criminal Intelligence Network (SPICIN)

At the initiative of the US Government, a number of South Pacific nations established the South Pacific Islands Criminal Intelligence Network (SPICIN) in the late 1980s, based at the police headquarters in Pago Pago, American Samoa. SPICIN has been created to operate as a regional centre with access to police data of the US Federal Bureau of Investigation and US state police services. It was intended that the Pacific islands obtain access to information on criminals in the United States, particularly those who were operating in the Pacific, and share their data on criminal movements with the US and other island countries.<sup>348</sup> No further information was available on the operations of SPICIN.

### 6.5.9. Summary

The number of organisations, conferences, recommendations and declarations addressing the issue of migrant trafficking in the Asia Pacific is growing. The last decade has seen a wide range of new initiatives that seek to provide a better understanding of illegal migration and organised crime, and promote cooperative counter-action.

The initiatives are diverse in their backgrounds, operations and objectives. While the Manila Process, AALCC and the Asia Pacific Consultations are primarily concerned with the migratory and humanitarian aspects of illegal migration and migrant trafficking, the principal focus of the ASEAN initiatives, the CSCAP process and the Pacific Islands Forum is on transnational crime issues. At this stage, there is no holistic regional approach to tackle the problem. But the cumulative effect of these diverse initiatives is a promising development.

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<sup>347</sup> Information provided by Mr Edward Brereton, DIMA, Belconnen, 20 Apr 2001.

<sup>348</sup> Information provided by Professor Ron Crocombe, Rarotonga, Cook Islands, July 2001.

Though the countries of the Asia Pacific region have been quick in harmonising their economies and financial markets, there is still great resistance to closer cooperation in matters of criminal justice, law enforcement and immigration, which are traditionally regarded as interior affairs and remain excluded from multilateral negotiations. Cultural, political and religious sensitivities, along with strict observance of the principles of national sovereignty and mutual respect, are the main reasons for the lack of regional cooperation in the Asia Pacific. This is also reflected in the fact that most countries of the region have not acceded to the major international refugee law and human rights documents.

Moreover, the countries of the region are reluctant to agree to and implement uniform, binding and enforceable mechanisms developed at regional and international levels; in fact none of the many declarations and recommendations dealing with migrant trafficking imposes any obligation on Signatory States. There remain great discrepancies between statements and declarations issued in regional fora, and their implementation and particularly their enforcement at the domestic level.

It is interesting to compare developments in the Asia Pacific region with those made in other parts of the world that have experienced comparable levels of organised crime and illegal migration. In Europe, for example, a cooperative forum, similar to the Manila Process known as the Budapest Group started work in 1991.<sup>349</sup> The Budapest Group has brought together countries from Western Europe and Eastern Europe, along with international organisations and representatives from the European Union. The early meetings of the Group have also been attended by observers from Australia, Canada and the United States. Over the ten years since its creation, the Budapest Group has created a framework for the countries of the European Union and Central and Eastern Europe to prevent, control, and suppress irregular migration more effectively.<sup>350</sup> This process resulted in the adoption of recommendations on immigration control, return and readmission, information exchange, and technical and financial assistance.<sup>351</sup>

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<sup>349</sup> *Final Communiqué of the Ministerial Conference on the movements of persons from Central and East European countries*, Vienna, 24-25 Jan 1991.

<sup>350</sup> Secretariat of the Budapest Group, *Overview of the Activities of the Budapest Group 1991-1998* (1998).

<sup>351</sup> See, for example, *Recommendations, Conference of Ministers on the Prevention on Illegal Migration, Held in the context of the Budapest Process*, Prague, 14-15 Oct 1997; *Final Document, Sixth Meeting of*

Most of the recommendations have been implemented at domestic and EU levels, primarily by the major destination countries for illegal movements in that region. But also, many of the transit and sending countries in Eastern Europe and the Balkans seek accession to the EU and its expanding markets. Accession to the EU, however, requires that new members must accept the so-called *aquis communitaires*, the laws and regulation of the EU, in its entirety, including those dealing with asylum and migration issues. It is for that reason that the Eastern European nations have strong economic incentives to implement the law and law enforcement measures established by the Budapest Group and other regional fora.<sup>352</sup>

Although the Asia Pacific countries maintain close economic ties, they have, at present, no financial incentive to cooperate in immigration and criminal justice matters. The political, demographic and economic environment in the Asia Pacific region is significantly different to those of Europe and Latin America. Moreover, particularly East and South East Asian nations show great resistance towards the influence of the Western superpowers that often dominate the dialogue in Europe and America.

Australia has a leading role to play in the fight against migrant trafficking in the Asia Pacific. As a modern, multicultural, politically and economically stable nation, Australia is in a position to initiate and stimulate regional cooperation. As a principal destination country for migrant trafficking in the region Australia must have a keen interest to cooperate with its neighbours at all levels and aspects of international relations. In the past, Australian Governments have often ignored the immediate neighbourhood. For most of its history, Australian foreign affairs focussed on relations with the United Kingdom, the United States and the countries of Western Europe. In the 1970s and 80s, Australian Governments came to acknowledge the geographical location of Australia and worked towards closer social and economic ties with our neighbours. More recent Governments, however, jeopardised many of the newly established relations by attempts to impose their views on the neighbours and 'handball' Australian problems abroad. The deterrence of unauthorised boat arrivals and the so-called Pacific solution are the most recent examples. It is important that Australia shows greatest cultural and political sensitivity towards the

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*the Budapest Group, Warsaw, 7-8 Dec 1998; Conclusions, Special Meeting on Illegal Migration through South-East Europe, held in the context of the Budapest Process, Budapest, 29-30 June 1998.*



partners in the region, but it also needs to be honest and frank about the problems associated with migrant trafficking.

Regional cooperation in the Asia Pacific in immigration, judicial, and criminal matters is crucial for the prevention and suppression of migrant trafficking. Regional initiatives should complement the efforts made at the global level, taking into account the more sensitive cultural, ethnic and political factors of the Asia Pacific nations. Complete uniformity and harmonisation of the criminal law and immigration systems of the countries in the region is an illusion and probably undesirable. At present, it is more important to encourage understanding of the immediate problems associated with migrant trafficking in the region, and bring the countries together to address the criminal and humanitarian issues along with the underlying political, demographic, environmental and socioeconomic factors.

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<sup>352</sup> Personal communication with Mr Jonas Widgren, Director, International Centre for Migration Policy Development (ICMPD), Vienna, 9 June 2000.

## CHAPTER SEVEN

### THE WAY AHEAD

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This thesis has outlined, discussed and analysed the trafficking of migrants in Australia and the Asia Pacific region and the legal framework guiding these movements. This study has demonstrated that the rise of migrant trafficking in Australia and the Asia Pacific region results from growing migration pressures and decreasing avenues for legal migration. The application of stringent measures for deterring, apprehending, punishing and removing irregular migrants in isolation from other mechanisms has been unsuccessful in reducing the demand for irregular migration and combating the criminal organisations engaged therein. The study has found that the absence of a comprehensive approach to control migrant trafficking has been the principal obstacle in investigating and suppressing this phenomenon.

The first part of this study, Chapters One, Two and Three, addressed the factual aspects of migrant trafficking. In Chapter Two, the study demonstrated that migration in the Asia Pacific region is the result of complex circumstances, including political, socioeconomic, demographic, environmental, structural, historical and cultural factors which cause people to leave their home countries and seek protection, employment, or simply a better life abroad. In response to increasing numbers of migrants, particularly those fleeing persecution and political violence, the receiving countries, such as Australia, began to place restrictive measures on immigration. Borders have been tightened and mandatory detention and fast removal of unsuccessful asylum applicants have become the answers to unwanted arrivals. The increasing criminalisation has not reduced the demand for migration to safe and wealthy nations. It meant rather that potential migrants started looking for illegal ways of migration. Chapter Three demonstrated how criminal organisations are exploiting the clandestine or otherwise illegal transportation of migrants, how criminal organisations adopt their structural features to the conditions and

requirements of illegal migration and how they conduct the trafficking of migrants between sending and destination countries.

The second part of this study dealt with the normative and institutional frameworks that seek to counteract migrant trafficking in the Asia Pacific. Special consideration was given to the criminal laws, immigration laws and asylum systems at national, regional and international levels. Chapters Four and Five illustrated that Australia and the countries of the Asia Pacific deal with the phenomenon of migrant trafficking as an issue of national security and try to curb trafficking with defensive strategies developed at the national level. Some countries, such as Australia, PR China, Hong Kong and Macau have implemented comprehensive legislation to address the diverse criminal aspects of migrant trafficking, but many countries, especially the developing nations in the Asia Pacific, do not have up-to-date legislation and do not have the capacity to fight the activities of sophisticated transnational criminal organisations. Moreover, there is little consistency between the immigration laws of the Asia Pacific countries and few nations have provisions to protect persons who are fleeing persecution and human rights violations. Criminal justice systems and immigration and refugee laws vary greatly in the region, thus resulting in safe havens for traffickers.

Chapter Six examined various regional and international mechanisms that have been created to overcome the shortcomings of national strategies to combat migrant trafficking. The efforts undertaken at these levels demonstrate the limitations of international cooperation, but also indicate that there is some willingness among the nations of the Asia Pacific to deal with the phenomenon of migrant trafficking collaboratively.

On the basis of these findings, the purpose of Chapter Seven is to show the way ahead for future action against migrant trafficking. Recognising the transnational nature of illegal migration and organised crime, the particular emphasis is on cooperative, harmonised action at regional and international levels. However, some of the recommendations made here, apply equally to the domestic and local levels.

## 7.1. Proposals for Change

Any strategy against migrant trafficking must balance the sovereignty and security interests of the nation state against the rights of individuals. A comprehensive response to migrant trafficking must combine achievable long-term goals, which offer real solutions to the political, demographic and socioeconomic dimensions of illegal migration and organised crime, with short-term measures that address the immediate needs of asylum seekers and the current threat posed by ruthless criminals.

Section 7.1 offers a range of proposals for mechanisms that, in combination, seek to provide a comprehensive approach to the control of migrant trafficking. These proposals must not be seen as purely normative and regulatory principles; they are intended to serve as a general framework for future law reform and policy change, providing a set of best practice guidelines.

The proposals made here fall into categories of (1) general objectives of law reform and policy change, and (2) specific proposals that address the current state of anti-trafficking laws. Secondly, the proposals are differentiated between (a) criminal law and law enforcement measures, (b) migration law and policy, (c) human rights and refugee law, and (d) proposals for cooperative, structural change.

### 7.1.1. General Objectives

An effective strategy against migrant trafficking must balance control and penal mechanisms with preventive measures, the protection of human rights, and economic and financial measures.

At the criminal justice level, a comprehensive approach needs to identify the role of criminal law and the criminal justice system in the fight against migrant trafficking. Law and law enforcement must be designed for flexible adaptation to the changing nature of organised crime. The approach must identify the criminal elements of migrant trafficking and develop an overarching concept for law and law reform.

Long-term solutions to migrant trafficking also include policies that address the realities of international migration. These policies must address current and future migration pressures and also allow immediate responses to humanitarian crises. Immigration and refugee policies must take due account of national security concerns as well as providing safeguards for human security.

Moreover, the criminal justice, immigration and refugee policies must be embedded in a national strategy that also addresses the underlying political, socioeconomic, demographic and environmental realities of migrant trafficking. These national mechanisms need to be coordinated at the regional and international level. Transnational problems require a multilateral response.

#### **7.1.1.1. Criminal law and criminal justice systems**

##### *The scope of criminal offences*

Chapters Four and Five have identified the loopholes in the legislation dealing with migrant trafficking. It has been shown that historically, the immigration offences have emphasised penalties for individual migrants who enter a country in defiance of immigration restrictions. Many of the regional and international initiatives provide only fragmentary rather than comprehensive offences to sanction the activities of criminal organisations.

At the criminal justice level, the trafficking of migrants must be made less attractive by increasing the costs for perpetrators and minimising the profit their activities generate. Illegal migration must be made less lucrative for criminal organisations by increasing the chances of being caught, closing the loopholes in criminal offences and depriving criminals of the proceeds their activities generate. It is important that the criminal offences are not limited to illegal immigration; they must also address preparatory and inchoate stages of trafficking, as well as targeting support structures and mechanisms that seek to disguise the activities of criminal organisations.

To criminalise migrant trafficking more appropriately, it is necessary to shift the focus from the individual migrant to those who organise and finance the illegal passage, those

who transport illegal migrants, those who harbour them, and, most importantly, those who place the safety of migrants at risk and their lives in jeopardy.<sup>1</sup> Trafficking offences must recognise the violation of migrants' rights more appropriately. The financial exploitation and inhumane treatment of people desperately seeking protection must be reflected in the severity with which the criminal law and criminal justice system respond to migrant trafficking.

At the same time, it has to be acknowledged that prison sentences are just one way in which persons engaged in migrant trafficking can be penalised. Recent developments have shown that higher sentences have not been a deterrent for people to engage in the trafficking of migrants. It is important that penal sanctions primarily focus on the financial aspect of organised crime and deprive perpetrators of any material profit or other benefit they have obtained through the offence. Sanctioning offenders with fines and imprisonment must be accompanied by the forfeiture of assets, freezing of funds, and, where applicable, administrative sanctions and the compensation of victims.

#### *Refugees and criminal law*

Until today, the focus of anti-trafficking measures has been on interception and investigation of offences and the prosecution of offenders. The dominance of the border control and law enforcement strategies in combating trafficking raises concerns and questions from many scholars in the field.<sup>2</sup> For example, none of the amendments made to the offences under Australian law have established mechanisms to enhance the protection of trafficked migrants and safeguard the rights of asylum seekers. When "refugee smugglers" brought emigrants from Socialist regimes to Western nations these traffickers were celebrated as heroes. But today, under the law of most nations in the region, including Australia, carriers cannot escape criminal responsibility if they assist refugees. For example, the sanctions placed on commercial carriers for transporting undocumented

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<sup>1</sup> See generally, Kristof van Impe, "People for Sale: The Need for a Multidisciplinary Approach towards Human Trafficking" (2000) 38(3) *Int'l Migration* 113 at 115; Ernesto Savona, "La Réglementation du Marché de la Criminalité" (1992) 4 *Rev int'l crim & pol tech* 455 at 455-456, 469; Nathalie Siron & Piet van Baeveghem, *Trafficking in Migrants through Poland* (1999) 84-85

<sup>2</sup> Cf Bimal Ghosh, *Huddled and Uncertain Shores — Insights into Irregular Migration* (1999), also cited in John Salt & Jennifer Hoghart, "Migrant Trafficking and Human Smuggling in Europe: A review of the evidence" in Frank Laczko (ed), *Migrant Trafficking and Human Smuggling in Europe: A review of the evidence with case studies from Hungary, Poland and Ukraine* (2000) 11 at 86.

passengers can potentially prevent persons with genuine claims from reaching safe havens if, for instance, airlines deny embarkation to passengers who travel without visas.<sup>3</sup>

The problems that refugees face when they seek entry into another country are also inherent in the criminalisation of false statements and the use and possession of fraudulent documents.<sup>4</sup> Desperate persons may resort to false documents and may make false representations because they fear they will otherwise not be admitted in the destination countries. Countries are in breach of international obligations towards refugees where the mechanisms to combat document fraud and false statements hinder access to asylum and refugee status determination procedures.

It is desirable to de-criminalise trafficking that involves refugees or otherwise protected persons. Most obviously, this can be achieved by facilitating access to safe countries through legitimate ways, thus eliminating the need for forged documents and false representations. However, recent developments have shown that countries are reluctant to open up their borders for asylum seekers.

To protect the integrity of immigration and asylum systems, it is important that authorities have access to full and genuine information about persons wishing to enter and seeking asylum. To prevent abuse of these systems and enhance the status of genuine refugees, it is necessary to discourage persons from making false claims and using fraudulent documents. At the same time, trafficking offences have to reflect obligations under international refugee and human rights law. Domestic criminal law along with regional and international instruments should recognise the status of 'protected person'. This can be done in two ways: For example, the application of an offence can be explicitly exempted if the accused has assisted refugees or persons protected under other international human rights instruments. Alternatively, it is possible to recognise the protected status of trafficked migrant as a defence (of necessity): (a) for the traffickers who knowingly assist refugees fleeing persecution, and/or (b) for the migrants who make false statements, use false documents, or enter a country illegally to obtain asylum. Other models can be found in the laws of Cambodia and PR China.<sup>5</sup> As seen earlier, in Cambodia, article 3 of the *Law*

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<sup>3</sup> See also the discussion *supra* Sections 4.1.2.3.1, 5.2.1.3.2 and 6.1.1.2.

<sup>4</sup> See *supra* Sections 4.2.2, 4.2.3, 5.3.2 and 5.3.3.

<sup>5</sup> See *supra* Section 5.3.1.2.

on *Immigration 1994* (Cambodia) also exempts unauthorised arrivals from criminal responsibility “where it is required to comply with norms of international treaties”. Chinese law provides exceptions for the arrival and entry of asylum seekers in article 32 of the *Constitution of the People’s Republic of China* and in article 15 of the *Law on Control of the Entry and Exit of Aliens 1986* (PR China).<sup>6</sup>

UNHCR has also recommended that criminal law and law enforcement measures recognise the difference between refugees and asylum seekers (who are entitled to international protection outside their home country) and other migrants (who have access to protection in their country of origin).<sup>7</sup> Those who deal with the victims of trafficking and the prosecution of immigration offenders must also be trained in treating asylum seekers.

#### *The limitations of criminal law*

Policies against migrant trafficking also need to recognise the limitations of criminal law. While creating and amending criminal offences are comparatively inexpensive and popular responses to illegal migration and organised crime, they may not always offer the most appropriate solution, or, in some instances, they may even be counter-productive. It has to be acknowledged, that criminalising irregular migration has little, if any deterrent effect on persons fleeing from persecution, generalised violence, war, famine or natural disasters. The criminal law can never substitute the need for humanitarian action and it must not prohibit compassionate responses to refugee exodi.

#### **7.1.1.2. Migration law and policy**

The primary emphasis of measures to counteract migrant trafficking at national, regional, and international levels has been on criminal prohibitions. The wider issues of international migration, refugee flows and national immigration and asylum systems have so far only been addressed very marginally in the Asia Pacific. Generally, the response to increasing numbers of trafficked and otherwise illegal migrants has been a further

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<sup>6</sup> See *supra* Section 5.1.4.1.

<sup>7</sup> UNHCR, Executive Committee, *Interception of asylum-seekers and refugees: The international framework and recommendations for a comprehensive approach*, UNHCR Doc EC/50/SC/CRP.17 (9 June 2000) para 34(a); cf Siron & van Baeveghem, *supra* note 1, at 306-307.



tightening of immigration restrictions, rather than attempts to open up legal ways for immigration, thus reducing the opportunities for trafficking organisations.

Every nation has a sovereign right over its immigration policies and the decision who may and who may not enter that country. In fact, national governments have a duty to maintain control over all aspects of national security, including the power to prohibit persons from entering if they pose potential dangers to the public.

However, collectively and individually countries must not lose sight of the reality of migration flows. Governments need to understand that “international migration is inevitable. It can be managed by states but not controlled by them.”<sup>8</sup> International migration results from factors that are beyond the control of the individual nation state and need to be addressed by international development, economic and political cooperation. At the national level, countries need to review their immigration policies in the light of contemporary labour migration and refugee flows, as well as national socioeconomic and demographic factors. Given population decline and ageing, many industrialised countries already need substantially more migrant workers at skilled and unskilled levels.<sup>9</sup>

Legalising the migration process is by far the most effective way of dealing with the problem of clandestine and illegal movements. Legal channels for entering asylum countries must be kept open, in order to reduce the risk that asylum seekers will resort to using migrant traffickers.<sup>10</sup> The suggestion here is not the acceptance of unlimited numbers of asylum seekers, but that countries that have not done so should recognise that a non-discriminatory immigration and asylum selection system can enhance national and regional security and can entail great economic advantages if new immigrants are quickly and successfully integrated into society. Furthermore, regulatory migration regimes in the region should be negotiated and harmonised between nations to prevent disproportionate flows.

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<sup>8</sup> John Salt, “The Business of International Migration” in Muhammed Siddique & Reginald Appleyard (eds), *International Migration into the 21<sup>st</sup> Century. Essays in Honour of Reginald Appleyard* (2001) 86 at 89.

<sup>9</sup> See also the discussion *supra* Section 2.1.3.

<sup>10</sup> Cf “Preface” in Alex Schmid (ed), *Migration and Crime. Proceedings of the International Conference on ‘Migration and Crime. Global and Regional Problems and Responses’* (1998) vii; UNHCR, Executive Committee, *Interception of asylum-seekers and refugees: The international framework and*

### 7.1.1.3. Human rights and refugee law

Particularly from an Australian perspective, the issue of refugees and asylum seekers has emerged as the key aspect associated with migrant trafficking. Despite differing Government statements, the great majority of people being trafficked to and arriving unlawfully in Australia are found to be refugees and are granted protection visas.<sup>11</sup> The exodi that have occurred following the Persian Gulf War, the rule of the Taliban regime, and the recent 'War on Terrorism' have led to the arrival of large numbers of Middle Eastern asylum seekers in Australia and in transit countries such as Indonesia and Malaysia.<sup>12</sup> However, the response to growing levels of asylum seekers in the region has been dominated by short-term measures of deterrence, rather than by sustainable long-term solutions for refugees and for the causes of these exodi.

The promotion of human rights and of the principles of international refugee law must stand at the forefront of any solution to the trafficking and exploitation of asylum seekers. At the human rights level, the journey to asylum and safe havens must become risk-free and the rights and needs of all migrants, including asylum seekers must be recognised and respected at all times.

While it is recognised that all nations have a sovereign interest in protecting their borders, the control and surveillance mechanisms in place must not interfere with international obligations and must not put the physical safety and human rights of asylum seekers at risk. The same must apply to deterrent strategies for unauthorised arrivals and the recent Australian initiative to turn around vessels suspected of carrying illegal immigrants.<sup>13</sup> Moreover, to prevent refoulement and the maltreatment of migrants, law enforcement and immigration officials need to be trained in dealing with asylum seekers and need to be made aware of the basic principles of refugee protection.

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*recommendations for a comprehensive approach*, UNHCR Doc EC/50/SC/CRP.17 (9 June 2000) para 34(c).

<sup>11</sup> See *supra* Sections 2.2.4-2.2.7 and 4.3.

<sup>12</sup> See *supra* Sections 2.2.6, 2.2.7 and 3.4.2.3.3.

<sup>13</sup> See *supra* Section 2.2.7.

In the light of recent refugee flows, many people have called for an overhaul of international refugee law. While government officials from Western nations, including Australia, have argued that the protection regime of the *Convention relating to the Status of Refugees*<sup>14</sup> is too generous,<sup>15</sup> many academics and human rights organisations have suggested that the scope of international refugee law is too narrow, leaving many persons in need of asylum unprotected. Action is necessary to improve the international refugee and asylum system. The inadequacies of the *Refugee Convention* are obvious: Under the current international system, persons fleeing famine, armed conflict or severe environmental disasters do not qualify as refugees although they are in desperate need of protection. The questions that arise are: What valid moral arguments do countries have to reject someone whose family will die from starvation if she or he cannot earn money abroad and send it back to the family? Why is this person rejected while admitting someone who is persecuted for voluntary political activity? From this standpoint the current distinction between refugees and other migrants becomes morally unsustainable.

Calls are growing for new international instruments, which protect different kinds of asylum seekers, establish separate systems for persons migrating primarily for socioeconomic reasons, and allow a more equitable sharing of the refugee burden.<sup>16</sup> However, in the current climate of anti-immigrant sentiments and heightened security alerts in most Western countries, particularly following the September 11<sup>th</sup> attacks, it is unlikely that the international community will agree on any framework that facilitates the free movement of people and shows greater compassion towards those fleeing repressive regimes, political turmoil, poverty and persecution.

At present, it appears more urgent to promote the principles of the existing protection regime more widely and recognise the *Refugee Convention* as the best available tool to protect the most needy. The Convention and the Protocol offer invaluable mechanisms to many people who would remain unprotected otherwise. Furthermore, particularly in an Australian context, it is desirable to incorporate the protection clauses under other human

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<sup>14</sup> 189 UNTS 150, 5 ATS 1954 [hereinafter *Refugee Convention*]; 606 UNTS 267, 37 ATS 1973 [hereinafter *Refugee Protocol*].

<sup>15</sup> For recent news headlines see, for example, Jack Straw, "The Convention: Britain's View" (2001) 123(2) *Refugees* 9; Megan Saunders, "Ruddock redefining refugees" (22 Mar 2000) *The Australian* 5.

rights instruments such as the *ICCPR*,<sup>17</sup> the *Convention against Torture*,<sup>18</sup> the *Convention relative to the Protection of Civilians in Time of War*,<sup>19</sup> and the *Convention of the Rights of the Child*<sup>20</sup> into the existing refugee determination process. This would reduce the delay and uncertainty of the current arrangements for those fleeing from torture and war.<sup>21</sup>

#### 7.1.1.4. Structural change

Many countries in the Asia Pacific are still hesitant to engage in frank and open multilateral dialogue on migrant trafficking. Suspicion and mistrust between nations, and their reluctance to cooperate on matters of urgency are still the principal hurdles in fighting illegal migration and organised crime and in saving and protecting the lives of trafficked migrants. The rapid growth of migrant trafficking around the world, however, does not allow suspicion and hesitance.

The issue of migrant trafficking and the phenomena associated with it touch upon domestic affairs, international relations, globalisation of trade and travel, environmental degradation and demographic developments around the world. The problems are not confined to one single part of the world; they are of concern to all countries individually and collectively. Strategies to counteract migrant trafficking can only be effective if they address the political, economic and demographic dimensions of the phenomenon.

The elaboration of solutions to the world's political, economic, environmental and demographic problems exceeds the boundaries of this study. What can be said, however, is that the issue of migrant trafficking illustrates the growing networks and interdependencies among nations which can only be addressed appropriately by international responses. The countries of the Asia Pacific region must learn to overcome the hostilities of the past and

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<sup>16</sup> Ruud Lubbers, UN High Commissioner for Refugees (2001-), "Don't kick refugees just to score points" *The Australian* (20 June 2001) 13.

<sup>17</sup> 993 UNTS 3.

<sup>18</sup> 1465 UNTS 85.

<sup>19</sup> 75 UNTS 287.

<sup>20</sup> 1577 UNTS 3, 1991 ATS 4. Cf Australia, Senate Legal and Constitutional References Committee: *A Sanctuary under Review: An Examination of Australia's Refugee and Humanitarian Determination Processes* (2000) 55-56.

work together to solve the immediate and long-term problems. Many of the initiatives made at global and regional level demonstrate that the nations in the region are genuinely interested in cooperative efforts to prevent and counteract migrant trafficking. More efforts should be made by regional powers such as Australia, Japan and the United States to convince other nations about the advantages of international cooperation by addressing the concerns of individual nations and assisting them in the financial burden such cooperation may entail.

### 7.1.2. Specific Proposals

At the short and medium-term it is important that the measures to counteract migrant trafficking reduce the opportunities for criminal organisations while recognising the humanitarian needs of the migrants involved.

The first set of specific proposals deals with the criminal aspect of migrant trafficking. On the basis of the analysis in Chapters Four, Five and Six, Sections 7.1.3.1-7.1.3.4 make specific proposals for criminal law reform and enhanced law enforcement cooperation.

The second set, Sections 7.1.3.5 and 7.1.3.6 make proposals for immigration and refugee law reform, particularly with regards to the treatment of unauthorised arrivals and the determination of refugee status.

#### 7.1.2.1. Trafficking offences

The analysis in earlier chapters has shown that the persons engaged in the trafficking of migrants cover a spectrum that ranges from high-profile organisers and financiers to low levels of local facilitators. Also, in some instances, friends and family member of the trafficked migrant actively assist in the illegal voyage. Moreover, while some trafficking operations are conducted by amateur operators, others are organised by transnational criminal networks.

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<sup>21</sup> See *supra* Section 4.3.3.1. Cf David Corlett, "Politics, Symbolism and the Asylum Seekers Issue" (2000)

Trafficking offences should differentiate between different kinds of trafficking, different kinds of traffickers, and different levels of organisation. The main focus and harshest penalties must always remain with the core organisers and financiers of transnational criminal operations. At the other extreme, the criminal law must make concessions for persons who assist trafficked migrants so that they can escape situations of suppression, deprivation and persecution. A clear distinction should be drawn between provisions which apply to criminal traffickers who exploit the vulnerabilities of illegal migrants, and regulatory measures for commercial carriers, such as airlines that fail to ensure that their passengers are admissible in the destination country.

In particular, the offences applying to persons engaged in migrant trafficking should include the following:

*Mobilising migrants and offering illegal migration*

It is desirable to prevent and criminalise migrant trafficking at the earliest possible stage.<sup>22</sup> The examples of Hong Kong, Macau and the Philippines have shown that persons can be held criminally responsible for offering illegal passage or for luring migrants with false promises.<sup>23</sup> In order to criminalise recruiters who operate in the sending countries, other nations should adopt similar mechanisms while avoiding the shortcomings of the existing provisions. Moreover, the offences of mobilisation of migrants must be restricted to circumstances where traffickers lure migrants so that they enter into agreements and contracts with criminal organisations and pay substantial amounts of money. The offences must not have the effect of criminalising statements about better job opportunities and living standards in the destination countries even if the statements are false.

*Organising and financing migrant trafficking*

A principal failure of the majority of offences existing to date, is that they do not hold responsible those who organise and finance the trafficking process and who oversee the structural and operational features of trafficking organisations. It is particularly important

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23(3) UNSW LJ 13 at 26-27. Australia, HREOC, *Submission to the Senate Legal and Constitutional References Committee inquiry into Australia's refugee and humanitarian program* (2000) 1

<sup>22</sup> Cf Kritaya Archavanitkul & Philip Guest, *Managing the Flow of Migration: Regional Approaches* (1999) 15.

<sup>23</sup> See *supra* Section 5.1.1.

that the organising and financing of migrant trafficking is criminalised universally, thus avoiding safe havens for criminal organisations. Similar to the geographical application of offences under Australian law, the provisions must allow the prosecution of offenders who are abroad, thus recognising that the organisers are rarely located in the destination or sending countries.

As mentioned earlier, article 318 of the Chinese *Criminal Law 1997* contains a specific offence for arranging illegal migration and provides higher penalties if the perpetrator is a “ringleader” of a trafficking organisation or if he or she repeatedly commits the offence.<sup>24</sup> This offence can serve as a model for other countries as it seeks to target directly the organisers of migrant trafficking operations who stand back and are not directly involved in the commission of immigration offences. The provision also draws attention to the fact that trafficking is often organised on very sophisticated and professional levels. The Chinese provisions take care to distinguish between different kinds of trafficking, between different levels of organisation and operation, and between the dangers these activities often entail.

### *Transporting illegal migrants*

At the heart of migrant trafficking is the transportation of persons who do not possess valid entry or travel documents or who are otherwise denied entry into the destination country. National immigration laws, as well as multiple international declarations and conventions include a wide range of offences that criminalise persons who carry undocumented passengers, stowaways and prohibited immigrants.

It is important that the offences recognise the variety of ways in which migrants can be brought into a country in violation or circumvention of entry restrictions. Most countries already differentiate between criminal traffickers and commercial carriers — a distinction that is also established in international law.<sup>25</sup> Generally, higher penalties, including longer prison terms, apply to those who intentionally conceal illegal migrants, while lesser monetary penalties apply to carriers of undocumented migrants. Particularly dangerous and scrupulous ways of trafficking should be designed as aggravated offences in all countries of

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<sup>24</sup> Art 318 *Criminal Law 1997* (PR China), cf *supra* Section 5.2.1.2.

<sup>25</sup> See *supra* Sections 4.1.2.3.1, 5.2.1.3.2 and 6.1.1.2.

the region. More countries should create special offences to adequately penalise persons who transport illegal migrants repeatedly, in great numbers and for financial profit only. The dangers for the migrants inherent in the clandestine transportation must be reflected in the penalty; carriers who place their passengers' safety and lives at risk must face the appropriate sanctions. The provisions contained in Australian, Chinese, Macau, Malaysian, Philippine and Taiwanese law establish as aggravated offences the repeated transporting of illegal migrants, the unsafe transportation of migrants, the joint commission of offences, and offences that generate particularly large profits.<sup>26</sup> The *Protocol against the Smuggling of Migrants* also recommends the application of higher penalties in these circumstances.<sup>27</sup> It is important that countries that have not yet established this differentiation follow these models, so that particularly serious and dangerous forms of trafficking are criminalised more adequately throughout the region.

#### *Harbouring and concealing illegal migrants*

To disguise their activities and conceal the presence of illegal migrants in transit and destination countries, trafficking organisations depend on local people who provide accommodation to the migrants. This conduct is criminalised in all countries of the region and, as seen earlier, some nations also hold commercial operators criminally liable for hosting unregistered foreigners.

As with all aspects of migrant trafficking, it is important that the offences adequately differentiate between different kinds of offenders and different levels of operation. Persons who accommodate relatives and friends must be dealt with differently from person who provide commercial and different again from operators of 'safe houses' who exploit and abuse migrants and use their illegal status to coerce and threaten them.

#### *Identity document fraud*

Closely associated with the transportation of illegal migrants is the issue of identity document fraud. The analysis in Chapters Four and Five has shown that all countries in the region have a great range of offences that criminalise the unauthorised production and

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<sup>26</sup> UN General Assembly A/55/383 (2 Nov 2000) Annex III; reprinted in 40 ILM 384 (2001) [hereinafter *Protocol against the Smuggling of Migrants*]. See *supra* Sections 4.21.2 and 5.2.1.2.

<sup>27</sup> See *supra* Section 6.4.2.1.1.



distribution of identity and travel documentation and the false statements that are made to obtain these documents.<sup>28</sup> These provisions are now complemented by the offences contained in the *Protocol against the Smuggling of Migrants*.<sup>29</sup> Moreover, some countries have specific offences to criminalise the activities of government officials who engage in the unlawful provision and selling of passports, visas and other identity documentation.<sup>30</sup>

To recognise the specific nature of migrant trafficking, it is important that all countries enact specific identity and immigration document fraud offences. In countries that do not have immigration-specific forgery and document fraud offences there is a danger that the general offences under criminal codes will not provide adequate sanctions against the professional circulation of forged identity documents, the false statements made to obtain them and the intention to use those documents for illegal immigration. Countries that have not done so should criminalise this aspect of migrant trafficking more precisely, adopt the document fraud offence under the *Protocol against the Smuggling of Migrants*,<sup>31</sup> and also, as seen in the examples of Macau and Vietnam,<sup>32</sup> create specific offences for instances where criminal organisations engage in large-scale identity document fraud.

#### **7.1.2.2. Offences applying to illegal migrants**

Up until today, the principal target of criminal law offences and law enforcement action is on the individual migrant who enters a country in defiance of national immigration restrictions. Around the region, illegal immigrants are detained, punished and removed if they fail to comply with immigration regulations.

##### *Illegal immigration*

Many countries in the region punish unauthorised arrivals and do not offer protection for those seeking asylum. But the rapid increase in illegal arrivals around the region has shown that these strategies have been unsuccessful and that they cannot prevent desperate people from trying to enter countries that promise a better and safer life.

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<sup>28</sup> See *supra* Sections 4.1.2.6 and 5.2.1.6.

<sup>29</sup> See *supra* Section 6.4.1.2.3.

<sup>30</sup> See *supra* Section 5.2.1.7.

International refugee law prohibits the punishment of refugees for illegally entering another country.<sup>33</sup> Also, the *Protocol against the Smuggling of Migrants*, along with other international and regional declarations requires State Parties not to punish trafficked migrants for illegal immigration.<sup>34</sup> To bring national legislation in line with international obligations, all countries should de-criminalise illegal immigration and abandon the punishment of unauthorised arrivals for their illegal status.<sup>35</sup>

#### *Document fraud and false statements*

Countries have a legitimate interest in controlling their borders and establishing and verifying the identity of persons seeking to immigrate. All countries in the region have put in place mechanisms to verify the identity and origin of incoming passengers, ensure the authenticity of identity documents, apprehend those travelling on forged, altered or stolen documentation,<sup>36</sup> and single out those persons who are regarded as potential threats to national security and public order.<sup>37</sup>

While it is acknowledged that it is necessary to protect the integrity of immigration systems, it is questionable whether criminal sanctions are appropriate for persons who resort to fraudulent documents in order to flee persecution. The same can be said for offences that criminalise false statements made to border control and immigration authorities. As mentioned earlier, the criminal law should make concessions for desperate persons who use fraudulent documents or who make false representations about their identity and the reasons that led them to flee simply because they fear their claims may not be recognised otherwise.<sup>38</sup>

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<sup>31</sup> See art 6(1)(b) *Protocol against the Smuggling of Migrants*. Cf *supra* Section 6.4.1.2.3.

<sup>32</sup> See *supra* Section 5.2.1.6.1

<sup>33</sup> Art 31 *Refugee Convention*.

<sup>34</sup> Art 5 *Protocol against the Smuggling of Migrants*.

<sup>35</sup> Cf Siron & van Baeveghem, *supra* note 1, at 306.

<sup>36</sup> See *supra* Section 5.1.1-5.1.2, 5.3.1.2.

<sup>37</sup> See *supra* Section 5.1.2.2-5.1.3.2.

<sup>38</sup> See *supra* Section 7.1.1.1.

### 7.1.2.3. Organised crime legislation

The concept of organised crime is contested and disagreement about what constitutes organised crime is widespread. Previous Chapters have explored and outlined the complexity of organised crime and the sophistication of the criminal organisations engaged therein.<sup>39</sup> The enormous growth of transnational organised crime activities has demonstrated that traditional criminal law, directed towards punishing isolated incidents of individual behaviour, is ineffective to decimate criminal organisations whose activities often continue after individual perpetrators have been arrested. Only few countries, however, have enacted legislation that enables comprehensive action against organised crime, including organised crime offences, anti-money laundering measures along with provisions to facilitate the forfeiture of assets, and the prosecution of offenders who are not directly engaged in the commission of crimes, and those who are located abroad.

Hong Kong, Macau, the Philippines and Taiwan are the only jurisdictions in the region that have established complex legal regimes to combat organised crime and enhance the investigation of crimes, prosecution of offenders, and seizure of assets.<sup>40</sup> While these laws may have been successful in fighting organised crime on a domestic level, their usefulness as tools in the fight against transnational criminal organisations is very restricted as they are bound to the geographical limitations of national jurisdictions.

The *Convention against Transnational Organised Crime* now provides a new framework for international cooperation against organised crime.<sup>41</sup> The Convention's principal concern, however, is with law enforcement, judicial and technical cooperation and Chapter Six has shown that the Convention fails to provide a universal strategy to tackle the problem of organised crime and limit the opportunities for criminal activities. Following the ratification of the Convention, many countries will implement a criminal offence for the participation in a criminal organisation as a criminal offence, but they will still lack a commonly accepted understanding of organised crime.

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<sup>39</sup> See *supra* Chapter 3.

<sup>40</sup> See *supra* Section 5.2.2.1.

<sup>41</sup> UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, UN Doc A/55/383 (2 Nov 2000) Annex I; reprinted in 40 ILM 335 (2001). See *supra* Section 6.3.

While accession to and ratification of the *Convention against Transnational Organised Crime* is highly desirable, it is essential that the international community, particularly under the chairmanship of the United Nations Crime and Criminal Justice Program, continues to explore the global phenomenon of organised crime and to work towards harmonised instruments to counteract it. In addition to the existing international agreements, multilateral collaboration should be enhanced to develop strategies for limiting the opportunities for organised crime by reducing the demand for illicit goods and services, or, in so far as possible, by trying to make these goods and services legally available.<sup>42</sup>

#### 7.1.2.4. Law enforcement and judicial cooperation

The principal concern with existing regional and international cooperation against migrant trafficking is with law enforcement cooperation and mutual legal, judicial and technical assistance. The discrepancy between existing laws and their enforcement, the lack of adequate resources for sophisticated investigation techniques in developing nations, insufficiently trained personnel, inadequate coordination of law enforcement agencies at national and supranational levels, along with the dangers of corruption and bribery are among the main obstacles for effective action against criminal organisations and their operations.

Furthermore, many countries are reluctant to take any action against criminal organisations if these syndicates bring money into the country or if they infiltrate local authorities with bribes. The developing nations in South East Asia and the Pacific still serve as safe havens for criminal organisations, their activities and for the money they generate.

Although accession to international instruments is crucial in the fight against migrant trafficking, the new mechanisms for enhanced law enforcement and intelligence cooperation will remain largely unsuccessful so long as government employees are underpaid or are otherwise vulnerable to corruption. Although many multilateral

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<sup>42</sup> Cf the recommendations made in UN ECOSOC, World Ministerial Conference against Organized Transnational Crime, *National legislation and its adequacy to deal with the various forms of organized transnational crime*, UN Doc E/CONF.88/3 (25 Aug 1994) para 5; and by Stephen Mastrofski & Gary Potter, "Controlling Organized Crime: A Critique of Law Enforcement Policy" (1987) 2(3) *CJPR* 269 at 285.

agreements and declarations condemn and criminalise corruption as well as money laundering, none of them promotes solutions to overcome the underlying political, administrative and economic discrepancies that cause and enable widespread corruption and money laundering.

Additional arrangements are needed to help developing nations with technical equipment, personnel exchange and better know-how to fight the causes and consequences of migrant trafficking and transnational organised crime more effectively.<sup>43</sup> Furthermore, the regional powers must assist the developing nations in the Asia Pacific with personnel and financial aid to allow these nations to escape the circle of crime and corruption.

#### 7.1.2.5. Immigration Law

The closed border policies of most countries have not been successful in reducing irregular movements and have not prevented migrants from trying to enter countries that are considered safer and wealthier.

But despite growing levels of illegal migration, all countries in the region should maintain transparent and realistic avenues for legal immigration. The countries of the Asia Pacific region, including sending, transit, and destination countries need to work together towards regional solutions for international migration and refugee flows and need to find ways to create and sustain legal avenues for migrants and fair assessment of immigration and asylum cases.

Also, the role of regional fora such as the Manila Process, the Asia Pacific Consultations (APC) and the African Asian Legal Consultative Committee (AALCC) needs to be strengthened, and regional and international initiatives need to be authorised to elaborate more comprehensive and also more powerful, effective and enforceable mechanisms to control and safeguard international migration in the region.

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<sup>43</sup> See generally John McFarlane, *Transnational Crime and Illegal Immigration in the Asia-Pacific Region: Background, Prospects and Countermeasures* (1999) 16; Zhang Wang, "Ocean-Going Smuggling of Illegal Chinese: Operation, Causation and Policy Implications" (1996) 2(1) *Trans Org C* 49 at 63-64.

*The status of unauthorised arrivals*

Many countries in the region criminalise persons who arrive without proper travel and identity documentation. Some countries punish illegal entrants for unauthorised arrival, while in countries that do not criminalise illegal immigration, such as Australia, unauthorised arrivals are usually detained and, unless they obtain asylum or are granted other visas, are returned to the point of embarkation or to their country of origin.

Migrants who have been brought by traffickers to their destination have few legal rights, they usually do not have access to information about the local immigration system, to lawyers or human rights organisations and they are not allowed to contact friends and relatives in the host country or abroad.<sup>44</sup> National governments and large parts of the local population reject the notion that illegal immigrants should be granted any right, however qualified, to have access to basic food and accommodation, legal advice, health cover, and education.

In Australia, the Government has repeatedly been criticised for leaving unauthorised arrivals uninformed about their status, their rights and about details of the immigration selection and asylum procedure. The law does not require that DIMA officers provide unauthorised entrants in detention with information regarding their rights.<sup>45</sup> However, as mentioned earlier, there is no evidence to substantiate the Government's position that providing information to detainees will result in unfounded claims, and complicate and lengthen the immigration and refugee determination process.<sup>46</sup> Furthermore, in cases where asylum seekers are not informed about the ways in which they can apply for protection, this "incommunicado detention" can result in the refoulement of genuine refugees, thus violating obligations under international law.

All countries in the region need to ensure that the legal rights of unauthorised arrivals are respected at all times. In particular, immigration authorities must inform all entrants, including those who arrive unlawfully, about their status, their rights to apply for visas and the rights of appeal they have should their claims fail at primary stage. Moreover, humanitarian and compassionate considerations require that host countries provide basic

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<sup>44</sup> Cf *supra* Section 4.3.1-4.3.2.

<sup>45</sup> See *supra* Section 4.3.2.1.

<sup>46</sup> *Ibid.*

shelter, food and medical support to those who have fled the traumas of persecution, poverty and war.<sup>47</sup>

### *Detention*

The immigration laws of all countries in the region provide that prohibited immigrants can be arrested and detained until they are granted entry permits or are removed from the country. As seen earlier, some nations have provisions for the mandatory detention of unauthorised entrants.<sup>48</sup>

The most notorious mandatory detention policy is undoubtedly that of Australia where all unauthorised arrivals are detained upon arrival and placed in immigration detention centres or, more recently, in overseas processing centres. The Australian practice and the conditions in the detention centres in particular have been subject of severe criticism both domestically and internationally.

After twelve years of operation, Australia's policy of mandatory detention has failed in its principal objective: that is to reduce the number of unauthorised arrivals who seek asylum in Australia. The Government has repeatedly utilised its mandatory detention policy to deter asylum seekers from coming to Australia. In combination with very severe restrictions placed on the rights and facilities granted to detainees, as well as recent attempts to turn around asylum seekers prior to landing in Australia, the Government has placed its main effort on preventing the arrival of asylum seekers.

In contrast, most countries in the region that detain unauthorised entrants do so to facilitate their speedy return and prevent them from disappearing in the wider community. Other Western destination countries have tried to prevent abuse of their immigration asylum systems without denying access to those in need of protection. The experience of Western European and Scandinavian nations, for instance, which manage a far greater number of asylum seekers than Australia, has shown that releasing asylum seekers into the community subject to residency and reporting obligations or guarantor requirements is not only a more

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<sup>47</sup> Cf Ernesto Savona, *Globalisation of Crime: The Organisational Variable* (1997) 11.

<sup>48</sup> See *supra* Sections 4.3.4 and 5.1.3.1.

humane and sensitive way to deal with persons who have fled traumatic situations, it is also a far less expensive way to respond to growing numbers of asylum seekers.<sup>49</sup>

The concern over the living conditions, human rights issues, long-term effects and costs of mandatory detention outweigh any benefit that the policy may entail for national security and public order. Rather than detaining persons who arrive unlawfully, governments should further explore opportunities to release them in the community, provide them with basic food, accommodation, education and health care and introduce a reporting system to monitor the movements of these people and ensure that they do not disappear or relocate without authorisation.<sup>50</sup> Recent trials by the Australian Government to release women and children from the Woomera detention centre should be expanded and ultimately result in the abolishment of the mandatory detention regime. Detention of unauthorised arrivals should be limited to those non-citizens who are suspected criminals, who pose a threat to political stability and national security, or persons whose visa applications have been rejected and who are now expecting removal.

### *Removal*

The removal of illegal immigrants from the host country is one of the principal human rights concerns associated with migrant trafficking. Chapters Four and Five have demonstrated that all countries in the region remove those persons from their territory who are inadmissible or whose claims for asylum have been rejected.<sup>51</sup> In instances where asylum claims have not been appropriately assessed, there is great danger that genuine refugees are returned to a country where they may face persecution, discrimination or other forms of human rights violations, thus contravening the obligations under international refugee law and other international human rights instruments. In other cases, where persons are returned to transit or other third countries, these countries can easily be overburdened with the costs associated with housing and protecting the removees.

While the greater issue of repatriating and relocating asylum seekers goes beyond the limitations of this study, it has to be stressed that countries need to exercise great caution

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<sup>49</sup> Cf Australia, HREOC, *Those Who've Come Across the Seas: Detention of Unauthorised Arrivals* (1998) 236.

<sup>50</sup> Cf McFarlane, *supra* note 44, at 16.

<sup>51</sup> See *supra* Sections 4.3.4 and 5.1.3.2.



when removing persons who have arrived in search of safety and security. The removing country must ensure that the removal will not cause any hardship for the removee and for the receiving country. After a person has been denied entry or asylum, a decision about the removal should be made and executed as soon as practicable. However, a country must not remove anyone unless there is an assurance by the receiving nation that the person will be dealt with humanely and fairly. Insofar as possible, the removing country should take into account the personal situation of the migrant, and obtain the consent of the receiving country to host and process that person. Moreover, where applicable, countries of origin should facilitate the admission and return of their own nationals.<sup>52</sup>

### *Xenophobia and racism*

In many instances, the international community along with national governments have failed to understand and communicate the benefits of immigration and multiculturalism to the wider public. Where xenophobia and racism combine with growing levels of illegal immigration, hostility towards trafficked migrants is more likely to arise, thereby further marginalising those who seek protection in a foreign country.

It is the duty of every government to create awareness of the true nature, the causes and consequences of international migration and of the situation of those who have fled from war, persecution, starvation, environmental degradation, overpopulation, poverty and unemployment. At the very beginning of any anti-trafficking policy must be a clear analysis of the problem and the issues associated with it. The phenomenon needs to be explained to all levels of government and the wider public to ensure that trafficking is properly understood and that migrants are treated fairly.

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<sup>52</sup> Cf Nazaré Albuquerque Abell, "The Compatibility of Readmission Agreements with the 1951 Convention relating to the Status of Refugees" (1999) 11(1) *IJRL* 60 at 66, 70; UNHCR, Executive Committee, *Interception of asylum-seekers and refugees: The international framework and recommendations for a comprehensive approach*, UNHCR Doc EC/50/SC/CRP.17 (9 June 2000) para 34(h).

### 7.1.2.6. Refugee Law

#### *Refugee status in the Asia Pacific*

At the centre of a regional approach towards a common asylum policy must be a genuine commitment to protect all persons who present a claim for asylum until their status has been determined. Regional, national and local mechanisms to prevent further traumatisation and discrimination of asylum seekers need to be established. Rather than alienating unauthorised arrivals, local authorities along with immigration and law enforcement agencies, international and non-governmental organisations should cooperate closely with asylum seekers in a fair and open manner. In line with the provisions under the *Protocol against the Smuggling of Migrants*, special protection should be provided to those who are victims and witnesses of migrant trafficking and their collaboration with authorities should be facilitated as much as practicable.<sup>53</sup>

In particular, all asylum seekers need to be assured that they will not face refoulement to an unsafe country, regardless of the determination outcome. While their cases are being processed, the host countries need to safeguard the human rights of the asylum seekers and, as mentioned earlier, enable them to obtain access to basic food and shelter, as well as to legal advice and humanitarian organisations. Furthermore, rejected applicants should have access to judicial review of the primary decision.

All countries must exercise the greatest caution when denying entry to asylum seekers. Refusal of entry and return of unsuccessful applicants to places where their safety and admission cannot be guaranteed has to be avoided. Instead, regional and international mechanisms should be installed to enable resettlement and ensure the safety of these persons.

#### *Promotion of existing instruments*

The Asia Pacific — which as a result of war, human rights violations, economic deprivation and environmental degradation has witnessed the highest numbers of refugees

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<sup>53</sup> Cf Savona, *Globalisation of Crime*, *supra* note 48, at 11; UN ECOSOC, World Ministerial Conference against Organized Transnational Crime, *National Legislation and its adequacy to deal with the various forms of organized transnational crime*, UN Doc E/CONF.88/3 (25 Aug 1994) para 65; and see *supra* Section 6.4.2.4.

and displaced persons in the world — is the region with the lowest number of signatories to the principal international refugee and human rights instruments.

At present, it appears impossible to elaborate a comprehensive and unequivocal asylum system for all countries of the Asia Pacific. Regional and international responses to refugee exodi are particularly problematic as they entail statements about the political circumstances in the sending country. In many instances, receiving countries as well as the international community have been reluctant to protect refugees in order to prevent confrontation with the country of origin, especially if the sending country is a global political or economic player.<sup>54</sup> Moreover, individually or collectively, governments have very few rights and tools to intervene against nations that experience large outflows of people.

The countries of the region must work towards harmonised protection regimes to share the burden between nations and recognise the needs of asylum seekers as well as the security concerns of individual nations. Australia, along with the other Parties to the *Refugee Convention* and *Protocol* and UNHCR need to actively promote broader accession to the Convention and the Protocol and facilitate ratification for those nations that are concerned about the financial burden the ratification may entail.<sup>55</sup> Furthermore, international organisations such as IOM and UNHCR as well as regional fora including the Manila Process, APC and AALCC need to create better awareness and understanding of the causes and consequences of refugee flows in the region and work towards common and harmonised responses to them.

Despite frequent criticism, the conclusion of the *1989 Comprehensive Plan of Action*<sup>56</sup> demonstrates that the countries in a region as diverse as the Asia Pacific can cooperate in finding practical solutions on politically, culturally and economically sensitive issues. Based on the principles of international solidarity and burden sharing, the countries of the

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<sup>54</sup> Cf Myron Weiner, "Introduction: Security, Stability and International Migration" in Myron Weiner (ed), *International Migration and Security* (1993) 1 at 11.

<sup>55</sup> UNHCR, Executive Committee, *Interception of asylum-seekers and refugees: The international framework and recommendations for a comprehensive approach*, UNHCR Doc EC/50/SC/CRP.17 (9 June 2000) para 34(f).

<sup>56</sup> *Comprehensive Plan of Action approved by the International Conference on Indochinese Refugees*, Geneva, 13-14 June 1989, UN Doc A/44/523 (22 Sep 1989) [hereinafter *1989 Comprehensive Plan of Action*].

region must work together in a fair and open manner to reach agreements and overcome the limitations of their political, demographic, cultural, and economic settings. Countries that have access to greater economic resources, such as Australia, or that are less affected by refugee flows, should assist those nations that are disproportionately affected by large numbers of asylum seekers in order to alleviate their burden.

#### *The role of international organisations*

The role of international and regional organisations in that field needs to be strengthened and organisations such as IOM and UNHCR need to be given more financial security and autonomy.<sup>57</sup> The work of international organisations and multilateral initiatives needs to incorporate the views of all countries of the region. Given the strong emphasis on national sovereignty in the region, it has to be ensured that the discussion and decision making is not dominated by the politically, military or economically more influential countries. Mutual respect and the principle of non-interference with national sovereignty, however, do not discharge countries such as Australia, Japan and the United States from playing a major role in promoting the values and principles of international human rights and refugee law, and from providing financial assistance to those countries that create and maintain asylum systems.

### 7.1.3. Other Recommendations

#### *International and regional cooperation*

Ultimately, it is desirable that the specific instruments and organisations addressing illegal migration and organised crime in the Asia Pacific region obtain more recognition, further support and greater enforceability. It is crucial that more countries in the region ratify the *Convention against Transnational Organised Crime* and the *Protocol against the Smuggling of Migrants by Land, Air and Sea* and in the longer term attempt to eliminate the shortcomings of these instruments. The role of regional fora dealing with migrant trafficking, such as the Manila Process, needs to be strengthened in order to make their

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<sup>57</sup> See Gil Loescher, *Beyond Charity: International Cooperation and the Global Refugee Crisis* (1993) 138; and see *supra* Section 6.1.2.4.

work more effective and, insofar as possible, enforceable.<sup>58</sup> The harmonisation of criminal law and criminal justice systems in the region should go hand in hand with closer judicial and law enforcement cooperation as well as with greater appreciation of international refugee law and wider recognition of the rights of migrants.

#### *Preventive action and information campaigns*

To this day, the majority of initiatives taken at domestic, regional and international levels have been largely reactive, trying to suppress migrant trafficking and illegal immigration. Successful measures to combat trafficking in migrants, however, must also proactively address the forces driving international migration and must prevent potential migrants from using the services offered by trafficking organisations.

Sending countries should cooperate with transit and destination countries in informing migrants about the realities of migrant trafficking and the dangers it entails.<sup>59</sup> While it is desirable to discourage migrants from using illegal avenues of migration, countries also need to realise that regardless of the obstacles in place, they will not be able to stop international migration. It is for that reason that migrants need to be informed about legal avenues of migration and ways in which to obtain protection, employment and family reunification abroad.

#### *Financial aid and technical assistance*

Many countries of first asylum and transit countries are overburdened by the costs associated with hosting refugees. Some countries are reluctant to prevent the refugees from moving abroad, be it legally or illegally, and in some instances, local authorities have actively persuaded refugees to seek protection elsewhere. As mentioned before, the fact that the refugee problem of the world is not balanced makes it necessary that countries that are less affected and have more resources assist those that experience disproportionate influxes with food, personnel, equipment, money and also offer resettlement to those in need.

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<sup>58</sup> Cf Archavanitkul & Guest, *supra* note 22, at 26-27.

<sup>59</sup> Cf *ibid.*, at 19; IOM, "Information Campaigns against Trafficking" (1999/2000) 20 *Trafficking in Migrants* 1-2; id, "There are ways to curb the worldwide traffic in migrants" (2000) 21 *Trafficking in Migrants* 1 at 1-2; Ko-lin Chin, *Smuggled Chinese: Clandestine Immigration to the United States* (1999) 159; Wang, *supra* note 44, at 63.

Also, the lack of know-how, trained personnel and advanced equipment, and the lack of resources to obtain those, is another obstacle to effective action against migrant trafficking. Law enforcement and immigration agencies in developing nations need to obtain financial and technical assistance to keep pace with the growing sophistication of trafficking organisations. Additionally, the exchange and training of personnel is essential for effective counteraction and also contributes to confidence building in the region. Training for law enforcement, immigration, consular and other relevant partners to combat trafficking should be provided and strengthened in cooperation with appropriate national, regional, and international organisations and non-governmental bodies.<sup>60</sup>

Governments should also develop programs to enable those engaged in migrant trafficking to resort to legal ways of income. For example, in 2000, the Australian Government induced fishermen in West Timor not to rent out their boats to traffickers. Instead, they were offered assistance to help them set up fish farms and develop methods of increasing their catch.<sup>61</sup> These very practical programs should be made part of a much broader regional initiative to reduce the incentives for migrant trafficking.

Humanitarian and short-term technical assistance is, however, of very limited value and can only offer temporary relief. "The elimination of trafficking is unlikely to be realistically achieved through legislation and declarations of intent but by improvements in the socio-economic status of the population."<sup>62</sup> At the core of international cooperation, both politically and financially, must be a broader, strategic long-term plan to address and eliminate the root causes of displacement. Individually and collectively, all nations should demonstrate the political will to solve the global refugee crisis and commit themselves to solving the underlying problems, which cause the growth of illegal migration and organised crime worldwide.<sup>63</sup>

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<sup>60</sup> Cf IOM, "There are ways to curb the worldwide traffic in migrants" (2000) 21 *Trafficking in Migrants* 1 at 2.

<sup>61</sup> "Australia, New Zealand and Fiji" (2000) 7(9) *Migration News*.

<sup>62</sup> Richard Skeldon, "Trafficking: A Perspective from Asia" (2000) 32(3) *Int'l Migration* 7 at 7.

<sup>63</sup> Cf Archavanitkul & Guest, *supra* note 22, at 25; Savona, *Globalisation of Crime*, *supra* note 48, at 11.

*Research, analysis and data collection*

During the writing of this study it has become obvious that the lack of comprehensive and profound knowledge on migrant trafficking is another obstacle in combating illegal migration and organised crime more effectively.<sup>64</sup> One of the most immediate responses to growing levels of migrant trafficking around the world must be the collection of information and intelligence on migrant trafficking, the causes of illegal migration and the situation of trafficked migrants, the structure and operations of trafficking organisations, the role played by national governments, regional organisations and the international community, and the legal frameworks that exist at domestic and multilateral levels.<sup>65</sup>

This study attempts to bring some light into the key aspects of migrant trafficking in Australia and the Asia Pacific. Others have examined the phenomenon in the Americas and in Europe. However, more work needs to be done on the many aspects associated with migrant trafficking, the persons engaged therein and the people that fall victim thereto. Other global studies need to follow in other areas of law and in other fields of social science. Academic knowledge needs to be combined with the findings of law enforcement investigations. Further fieldwork should be undertaken, and more complete and comprehensive data should be collected to explore the motivation of individual migrants, trafficking patterns in countries of origin, transit and destination, and the results need to be woven into a more coherent strategy as part of future policy change and law reform.

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<sup>64</sup> Cf Ernesto Savona, *Illicit Trafficking in Arms, Nuclear Material, People and Motor Vehicles: The most important things we have learned and priorities for future study and research* (1998) 12.

<sup>65</sup> Cf McFarlane, *supra* note 44, at 16-17.

## 7.2 Conclusion

If crime crosses all borders, so must law enforcement. If the rule of law is undermined not only in one country but in many, then those who defend it cannot limit themselves to purely national means. If the enemies of progress and human rights seek to exploit the openness and opportunities of globalisation for their purposes, then we must exploit those very same factors to defend human rights, and defeat the forces of crime, corruption, and trafficking in human beings.<sup>66</sup>

The phenomenon of migrant trafficking is one of the most significant problems of contemporary crime. Migrant trafficking is a direct result of the combination of the globalisation of crime and the growing flows of asylum seekers around the world. The issues and solutions are, therefore, global ones.

In many nations, such as Australia, migrant trafficking has emerged as a key issue of national politics, international relations, defence, law enforcement, and immigration policies. Over the past two years, no other topic has received more media coverage and caused more public debate in Australia than illegal immigration. The issue has largely determined the outcome of the 2001 federal elections and has resulted in an unprecedented debate over Australia's immigration regime and the country's international obligations. Today, there can be no doubt that the topic is of significant relevance for Australia.

The lack of knowledge about migrant trafficking organisations and their operations, ignorance towards the causes of illegal migration and organised crime, and suspicions and reservations towards multilateral cooperation have hindered effective action against migrant trafficking over the past decade. For too long, many nations in the region, including Australia, have been preoccupied with domestic security issues, thus failing to recognise the transnational dimension of illegal migration and organised crime. The responses that have been formulated to date have been too few and have come too late, thus causing too many migrants to be exploited by traffickers, too many people to die during unsafe trafficking journeys, too many asylum seekers to be rejected and returned to places of persecution, and too many traffickers to escape prosecution and criminal justice.

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<sup>66</sup> UN Secretary-General Mr Kofi Annan at a ceremony marking the opening for signature of the United Nations Convention against Transnational Crime, Palermo, Italy, 12 Dec 2000.



It took devastating incidents to elevate the problem of migrant trafficking to an issue of national and international concern and bring about changes to the ways governments, individually and collectively, deal with asylum seekers and migrant traffickers. The Golden Venture incident in the United States,<sup>67</sup> the death of 58 asylum seekers in a freight container found in Dover in the United Kingdom<sup>68</sup> and the Tampa incident in Australia<sup>69</sup> have brought migrant trafficking on the front pages of newspapers around the world and have stimulated a broader debate about illegal migration and transnational organised crime.

Unfortunately, the most immediate response has been one of tightening borders and criminalising all aspects of irregular migration. Australia has done all it can to stop the flow of asylum seekers by blockading their boats, locking up all illegal immigrants and, most recently, denying full rights to those granted protection visas. But the solution to migrant trafficking cannot be one of tougher border control and law enforcement. Recent experiences have shown, that a repressive approach alone only increases the demand for the services of trafficking networks.

While the number of migrants in the Asia Pacific region is still small compared to the total population, it is likely to grow further for political, demographic, socioeconomic, and environmental reasons. If the current movements already cause a major problem for the countries of the region, what will happen if the numbers continue to grow, if more people seek to relocate, be it voluntarily or involuntarily? At the beginning of the new millennium, there is no end in sight to the waves of asylum seekers and other migrants. Uneven population and economic growth and environmental and political disparities between countries will produce international migrants and refugees for the foreseeable future.

The problem of illegal migration and organised crime is complex, multifaceted and defies single or simplistic solutions. It is important that the phenomenon is looked at from different angles. A criminal approach is just one of many possible ways to deal with migrant trafficking and suggestions that destination countries should “send all migrants

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<sup>67</sup> See, for example, Paul Smith, “Chinese Migrant Trafficking: A Global Challenge” in *Human Smuggling: Chinese Migrant Trafficking and the Challenge to America’s Immigration Tradition* (1997) 1 at 1-5; Chin, *supra* note 60, 62-66.

<sup>68</sup> Jamie Walker, “58 found dead in container tragedy” (20 June 2000) *The Australian* 1.

<sup>69</sup> See *supra* Section 2.2.7.

home” or “accept them all” are equally inappropriate. The emergence of new forms of illegal migration and transnational organised crime calls for effective responses that simultaneously address the criminal justice and humanitarian aspects of migrant trafficking.

Only very slowly, and primarily at the international level, have countries come to understand the true dimensions and causes of migrant trafficking and have commenced the elaboration of universal tools to combat its criminal aspects, while recognising the human rights dimension of international migration and refugee flows. The initiatives taken at regional and global levels, including the *Convention against Transnational Organised Crime*, the *Protocol against the Smuggling of Migrants*, the Manila Process, the *Bangkok Declaration*, the Asia Pacific Consultations along with many others are steps in the right direction and need strong support at all levels of government. These instruments have initiated a regional and international dialogue on matters that have traditionally been national concerns only. Now is the time to take these initiatives further and work towards cooperative, harmonised, enforceable, fair and humane solutions for illegal migration and organised crime.

Illegal migration and organised crime in the Asia Pacific region can only be effectively prevented and suppressed by promoting a better understanding of the immediate problem of migrant trafficking while also addressing the underlying political, demographic, environmental and socioeconomic causes. It is essential that the countries in a region as diverse as the Asia Pacific cooperate closely to find new ways to regulate international migration, taking into account the reality of illegal migration and organised crime, the needs and interests of asylum seekers and labour migrants, and the political and economic concerns of sending, transit and destination countries.

The countries of the Asia Pacific region have no choice but to work together to meet the challenges of migrant trafficking and improve regional security in the 21<sup>st</sup> century. Only together can they reduce illegal migration and organised crime, thereby working towards an environment for peace, democracy and development.



## Appendix A: Definitions of Trafficking in Migrants

(in chronological order)

IOM, "Trafficking in Migrants" Characteristics and Trends in Different Regions of the World" discussion paper for the *Eleventh Seminar on Migration 'International Response to Trafficking in Migrants and the Safeguarding of Migrant Rights'*, Geneva, 26-28 October 1994, 2-3:

International migratory movements will be considered 'trafficking' if the following conditions are met:

- ◆ Money (or another form of payment) changes hands.
- ◆ A facilitator — the trafficker — is involved. This intermediary can provide any or all of the following assistance: information, fraudulent or stolen travel/identity documents; formal (eg scheduled flights) or informal (eg hidden in a ship container) transportation; safe houses in transit points; guided border crossing; reception and employment in the country of destination.
- ◆ An international border is crossed.
- ◆ Entry is illegal. The border crossing is effected by completely avoiding authorities or by presenting either fraudulent documents or genuine documents which have been stolen or altered.
- ◆ The movement is voluntary. Determining true voluntariness is a complex task which requires understanding the interplay among available choices, motivations, likes and dislikes, resources, etc. Migrants are considered 'trafficked' so long as they have chosen to pay a trafficker for entry into another country, even if they would have preferred to stay at home [and if they are exploited following their arrival in a country of destination].<sup>1</sup>

Budapest Group, *Anti-Trafficking Model Legislation. Report of the Working Group of the Budapest Group*, June 1996, 2 (recommending that the Member States should adopt the following definition established by the *Europol Convention* of 26 July 1995):

Illegal immigrant smuggling means activities intended deliberately to facilitate, for financial gain, the entry into, residence or employment in the territory of the member states of the European Union, contrary to the rules and conditions, applicable in the member states.<sup>2</sup>

IOM, "Irregular Migration and Migrant Trafficking: An Overview" background paper submitted at the *Seminar on Irregular Migration and Migrant Trafficking in East and South East Asia*, Manila, 5-6 September 1996, 3:

'Trafficking in migrants' — the illicit transporting of migrants or trade in them — can be said to exist if the following conditions are met:

- ◆ an international border is crossed;

<sup>1</sup> This part was added in 1995, see IOM, "Migrant Trafficking: An Overview" paper submitted at the *Seminar on Irregular Migration and Migrant Trafficking in Central America*, Panama City, 19-20 Oct 1995, 3.

<sup>2</sup> Reprinted in Natalie Siron & Piet van Baeveghem, *Trafficking of Migrants through Poland* (1999) 13.

- ◆ an intermediary — the trafficker(s) — is involved in the movement of the migrant;
- ◆ entry and/or stay in the country of destination is illegal. The migrant may completely avoid contact with authorities during border crossing, present either fraudulent documents or genuine documents which have been altered, or misrepresent his or her intentions regarding, for example, intended length of stay or economic activity; and
- ◆ the trafficker profits from such activities in terms of economic or other personal gain.

DIMA, *Fact Sheet 83: People Trafficking: Australia's Response*, 9 September 1997:

People trafficking [is] the organised illegal movement of groups or individuals to another country.

Conference of Ministers on the Prevention of Illegal Migration held in the Context of the Budapest Process, Prague, 14-15 October 1997, *Recommendation (a)*, 3-4:

The need for a common understanding of the term 'trafficking in aliens'

... Noting that activities constituting trafficking in aliens i.a. include the following: abuse of legal migration facilities, facilitating illegal border crossing, illegal entry and/or stay, unauthorised transit, production, provision and use of fraudulent documents, abuse of genuine documents, providing advice and/or means to make fraudulent claims before authorities, arranging transportation, harbouring facilities and illegal employment.

1. Recommend that a common understanding of the term 'trafficking in aliens' should include activities intended deliberately to facilitate the border crossing or residence of an alien in the territory of the State, contrary to the rules and conditions applicable in such a State.

*International Convention against smuggling of illegal migrants (Draft)*, as proposed to the UN General Assembly by Dr. Wolfgang Schüssel, Minister for Foreign Affairs, Austria, 6 October 1997 (copy held with author), Article 1:

Any person who intentionally procures, for his or her profit, repeatedly and in an organised manner, the illegal entry of a person into another State of which the latter person is not a national or not a permanent resident, commits the offence of 'smuggling of illegal migrants' within the meaning of this Convention.

UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft elements for an international legal instrument against illegal trafficking and transport of migrants (Proposal submitted by Austria and Italy)*, UN Doc A/AC.254/4/Add.1, 15 December 1998, Article A:

Any person who intentionally procures, for his or her profit, repeatedly and in an organized manner, the illegal entry of a person into another State of which the latter person is not a national or not a permanent resident commits the offence of 'illegal trafficking and transport of migrant' within the meaning of this Protocol.

Ian Peck, "Removing the Venom from the Snakehead: Japan's Newest Attempt to Control Chinese Human Smuggling" (1998) 31(4) *Vand JTL* 1041, 1042:

All human smuggling involves (1) the exchange of money, (2) a voluntary journey and (3) a facilitator that arranges an illegal passage across an international border.

UN Center for International Crime Prevention, Office for Drug Control and Crime Prevention and UN Interregional Crime And Justice Research Institute, *Global Programme against Trafficking in Human Beings — An Outline for Action*, February 1999, 6:

The smuggling of migrants can be defined as the procurement of illegal entry of a person into a State of which the latter person is not a national with the objective of making profit. Trafficking can be defined as the recruitment, transportation or receipt of persons through deception or coercion for the purpose of prostitution, other sexual exploitation or forced labour.

Secretariat of the Budapest Group, *Draft Study on the Relationship between Organized Crime and Trafficking in Aliens*, Doc BG 1/99, March 1999, 24-25, paras 60-64:

Smuggling of persons comprises several features, which are partly common with the phenomenon of trafficking in persons. Firstly, it requires an intermediary, a smuggler, who facilitates the border crossing but does not provide his/her clients with such extensive other services like in trafficking business. ... Secondly, international borders are crossed unexceptionally illegally. ... Thirdly, the movement is fully voluntary. ... Finally, the profit from the smuggling business comes from the fee the smuggled person is paying for the smuggler.

UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft Protocol against the Smuggling of Migrants by Land Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc A/AC.254/4/Add.1/Rev.1, 13 May 1999, Art 2(1)(a):

'Smuggling of migrants' shall mean the intentional procurement for profit of the illegal entry of a person into and/or illegal residence of a person in a State of which the person is not a national or a permanent resident.

DIMA, *Protecting the Border: Immigration Compliance*, circa November 1999, 9, 14:

People Smuggling: Involves the illegal movement of people across international borders, usually for payment. This implies a voluntary agreement between the organiser and the person being smuggled.

DIMA, *Fact Sheet 83: People Smuggling*, 17 November 1999:

People Smuggling refers to the organised illegal movement of groups or individuals to another country. It occurs when there is a lack of economic opportunity, a reduced availability for legitimate migration and the lure of a better lifestyle.

UN Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Draft Protocol against the Smuggling of Migrants by Land Air and Sea, Supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc A/AC.254/4/Add.1/Rev.3, 22 November 1999, Art 2(1)(a) (with footnotes):

'Smuggling of migrants' shall mean the intentional procurement<sup>3</sup> for profit<sup>4</sup> of the illegal entry<sup>5</sup> of a person into and/or illegal residence<sup>6</sup> of a person in a State of which the person is not a national or a permanent resident.<sup>7,8</sup>

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<sup>3</sup> One delegation considered the concept of "procurement of illegal entry" to be problematic. In the view of that delegation, it would be better to make reference to complicity in and aiding and abetting the violation

Australia, External Reference Group on People Smuggling, [*untitled document*], December 1999, p7:

By 'people smuggling', we mean the illegal movement of people across international borders, usually for payment. This implies voluntary agreement between the organiser and the person being smuggled.

Fiona David, *Human Smuggling and Trafficking*, 2000, xiii:

Human smuggling refers to practices that involve a person gaining entry into a country without the necessary permission, whether or not this is undertaken for profit. This may include, for example, people who are hidden below deck on container ships and people who travel on fraudulent documentation.

*Protocol against the Smuggling of Migrant by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organised Crime*, 2000, Article 3(a):

'Smuggling of migrants' shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.

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of national migration laws. At the fourth session of the Ad Hoc Committee, one delegation suggested that the words "intentional procurement" should be replaced by the words "intentional and repeated procurement" or, alternatively, by "intentional and organized procurement"; however, other delegations opposed that suggestion.

<sup>4</sup> At the fourth session of the Ad Hoc Committee, one delegation suggested replacing the word "profit" by the words "proceeds of crime". Some delegations suggested deleting the word "profit", while other delegations were in favour of retaining it. At the informal consultations held during the fifth session of the Ad Hoc Committee, some delegations suggested that the element of profit should be transferred to article 4, paragraph 5, relating to aggravating circumstances. If the word "profit" would be subsequently deleted from the text, the definition of "profit" in subparagraph 1 (d) of this article would also be deleted.

<sup>5</sup> At the informal consultations held during the fifth session of the Ad Hoc Committee, suggestions were made regarding the replacement of the words "illegal entry" by the words "irregular or non-documented entry" or, alternatively, the replacement of the word "illegal" by the word "irregular". Several delegations expressed concern that "irregular" did not cover the same conduct as "illegal".

<sup>6</sup> At the fourth session of the Ad Hoc Committee and at the informal consultations held during the fifth session of the Ad Hoc Committee, some delegations suggested deleting the words "illegal residence"; however, others were in favour of retaining those words.

<sup>7</sup> At the fourth session of the Ad Hoc Committee, one delegation suggested deleting the words "of a person in a State of which the person is not a national or a permanent resident".

<sup>8</sup> At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation suggested adding the phrase "or any other procedure for an illegal stay in violation of the national law of a State Party" at the end of this subparagraph.

## Appendix B: Legislation — Country Profiles

### B.1. Migrant Trafficking Offences

#### B.1.1. Operational Offences

country	Australia	Brunei	Cambodia	PR China	Hong Kong SAR	Macau SAR	Fiji	Indonesia	Malaysia
offence									
Mobilising illegal Migrants	—		—	—	S 37D(1)(b), (c) <i>Immigration Ordinance</i>	Art 6 <i>Clandestine Immigration Act</i>			—
Organising illegal migration	Ss 232A, 233(1) <i>Migration Act</i>		—	Art 318 <i>Criminal Law</i>	S 37D(1)(a) <i>Immigration Ordinance</i>	—			—
Transporting illegal migrants			(Art 29(2) <i>Law on Immigr.</i> )	Art 321 <i>Criminal Law</i>	S 37C <i>Immigration Ordinance</i>	Art 7 <i>Clandestine Immigration Act</i>			S 55A(1) <i>Immigration Act</i>
Carrier liability for illegal immigration	Ss 229, 232 <i>Migration Act</i>				Ss 37C, 38(4), 39, 40 <i>Immigration Ordinance</i>	Art 36 <i>Entry and Residence Act</i>			S 22(3) <i>Immigration Act</i>
Harbouring and concealing illegal migrants	Ss 233, 230 <i>Migration Act</i>		Art 29(2) <i>Law on Immigration</i>	—	S 37DA <i>Immigration Ordinance</i>	Art 8 <i>Clandestine Immigration Act</i>			S 56(1)(d) <i>Immigration Act</i>
False statements for another person's immigration	Ss 233A, 234, 21, 22 <i>Migration Act</i> , S 10 <i>Passports Act</i>		—	(Art 319 <i>Criminal Law</i> )	S 42(1) <i>Immigration Ordinance</i>	Art 12 <i>Clandestine Immigration Act</i>	S 312 <i>Penal Code</i>		S 56(1)(k) <i>Immigration Act</i> S 12A <i>Passports Act</i>
General offence in criminal code	s 137.1 <i>Criminal Code Act</i>				S 36 <i>Crimes Ordinance</i>		S 143 <i>Penal Code</i>		
Producing fraudulent documents (forgery)	Ss 9B, 9C <i>Passports Act</i>		Art 32 <i>Law on Immigration</i>	Art 14 <i>Law on Exit and Entry of Citizens</i> , art 29 <i>Law on ... Aliens</i>	S 42(2)(a)(i) <i>Immigration Ordinance</i>	Art 11 <i>Clandestine Immigration Act</i> Art 6 <i>Org. Crime Act</i>			S 55D <i>Immigration Act</i> S 12(1)(a) <i>Passports Act</i>
General forgery offence in criminal code	Ss 67, 69 <i>Crimes Act</i> , S 144.1 <i>Criminal Code</i>		Art 47(2), (3) <i>Criminal Law Provisions</i>	Art 280(1), (3) <i>Criminal Law</i>	Ss 71-76 <i>Crimes Ordinance</i>	Art 245 <i>Penal Code</i>	S 341(3) <i>Penal Code</i>		
Transferring documents	Ss 234(2), 233A(2) <i>Migration Act</i>		Art 32 <i>Law on Immigration</i>	Art 14 <i>Law on Control of ... Citizens</i> , art 29 ... <i>Aliens</i> Art 320 <i>Criminal Law</i>	S 42(2)(a)(ii) <i>Immigration Ordinance</i>				S56(i) <i>Immigration Act</i> S 12(e, g, h) <i>Passports Act</i>
Participation of officials in immigration offences	S 335 <i>Migration Act</i> S 73(2) <i>Crimes Act</i>		Art 29(3,4) <i>Law on Immigration</i> Art 49 <i>Criminal Law Provisions</i>	Art 16 <i>Law on Exit and Entry of Citizens</i> Art 294[4] <i>Criminal Law</i>		Art 15 <i>Clandestine Immigration Act</i> Art 246 <i>Penal Code</i>			



## cont. B.1.1. Operational Offences

country offence	Myanmar	PNG	Philip- pines	Singapore	Solomon Islands	Thailand	Taiwan	Vanuatu	Vietnam
Mobilising illegal Migrants	—	—	Ss 6,7 <i>Migrant Workers &amp; Overseas Filip. Act</i>	—	—	—	—	—	—
Organising illegal migration	—	—	—	—	—	—	—	—	—
Transporting illegal migrants	(S 13(5) <i>Immigration (Emergency Provisions) Act</i> )	(S 16(b) <i>Migration Act</i> )	S 46(1) <i>Immigration Act</i>	S 57(1) <i>Immigration Act</i>	S 18(1)(s) <i>Immigration Act</i>	S 63 <i>Immigration Act</i>	Art 57 <i>Immigration Law</i>	—	—
Carrier liability for illegal immigration	S 13(3) <i>Immigration (Emergency Provisions) Act</i>	—	Ss 44(a)(1), (b)(1), (2), 46A <i>Immigration Act</i>	S 20(1), (3), (4), 22(3) <i>Immigration Act</i>	S 5(1)(b), (3) <i>Immigration Act</i>	Ss 27, 66, 67 <i>Immigration Act</i>	Arts 40(1), 58 <i>Immigration Law</i>	Ss 10(3), 22(7) <i>Immigration Act</i>	—
Harbouring and concealing illegal migrants	(S 13(5) <i>Immigration (Emergency Provisions) Act</i> )	S 16(c) <i>Migration Act</i>	S 46(1) <i>Immigration Act</i>	S 57(1)(d) <i>Immigration Act</i>	S 18(1)(n) <i>Immigration Act</i>	S 64 <i>Immigration Act</i>	cf Art 164 <i>Criminal Code</i>	S 22(1)(l) <i>Immigration Act</i>	—
False statements for another person's immigration	S 13(6), (7)(b) <i>Immigration (Emergency Provisions) Act</i>	S 16(j) <i>Migration Act</i> s 5(b) <i>Passports Act</i>	S 45(f) <i>Immigration Act</i>	S 57(1)(k) <i>Immigration Act</i>	S 18(1)(a), (d) <i>Immigration Act</i>	—	—	S 22(1)(a) <i>Immigration Act</i>	—
General offence in criminal code	—	—	—	—	S 130 <i>Penal Code</i>	S 137 <i>Penal Code</i>	—	—	—
Producing fraudulent documents (forgery)	S 13(7)(c) <i>Immigration (Emergency Provisions) Act</i>	—	S 45(b) <i>Immigration Act</i>	—	S 18(1)(b) <i>Immigration Act</i>	—	Arts 203, 212 <i>Criminal Code</i>	S 22(1)(b) <i>Immigration Act</i>	Art 20(1) <i>Ordinance on Entry ...</i>
General forgery offence in criminal code	—	S 462 <i>Criminal Code</i>	Art 172 <i>Penal Code</i>	—	—	Ss 264, 265 <i>Penal Code</i>	Art 210 <i>Criminal Code</i>	—	Arts 266, 284 <i>Penal Code</i>
Transferring documents	—	S 16(h) <i>Migration Act</i>	S 45(b) <i>Immigration Act</i>	S 57(1)(i) <i>Immigration Act</i>	S 18(1)(p) <i>Immigration Act</i>	—	Art 53(1) <i>Immigration Law</i>	S 22(1)(n) <i>Immigration Act</i>	—
Participation of officials in immigration offences	—	—	Art 171 <i>Penal Code</i>	—	S 97 <i>Penal Code</i>	—	Ss 156, 162 <i>Penal Code</i>	—	Art 20(2) <i>Ordinance on Entry ...</i> Arts 281, 282, 284 <i>Penal Code</i>

## B.1.2. Organisational Offences

country	Australia	Brunei	Cambodia	PR China	Hong Kong SAR	Macau SAR	Fiji	Indonesia	Malaysia
offence									
Organised crime legislation	—				<i>Organised and Serious Crime Ordinance</i>	<i>Organised Crime Act</i>			
Membership offence: participation as a crime/conspiracy	S 86 <i>Crimes Act</i> , s 11.5 <i>Criminal Code</i> (conspiracy)	+	Art 36 <i>Criminal Law Provisions</i>	Art 294(1)-(3) <i>Criminal Law 1997</i>	-, but: Ss 159A-159C <i>Crimes Ordinance</i>	Art 2 <i>Organised Crime Act</i> Art 288 <i>Penal Code</i>	Ss 385-387 <i>Criminal Code</i> (conspiracy)		
Participation as a qualifying feature									
Conspiracy to commit immigration offences									S 56(1A)(c) <i>Immigration Act</i>

country	Myanmar	Papua New Guinea	Philippines	Singapore	Solomon Islands	Taiwan	Thailand	Vanuatu	Vietnam
offence									
Organised crime legislation			<i>Racketeer-Influenced and Corrupt Organisat. (RICO) Act</i>			<i>Organised Crime Control Act</i>			
Membership offence: participation as a crime		S 515 <i>Criminal Code</i> (conspiracy)			Ss 383-385 <i>Penal Code</i> (conspiracy)	Art 3 <i>Organised Crime Control Act</i>			
Participation as a qualifying feature			S 5 <i>RICO Act</i>					S 29 <i>Penal Code</i>	Art 20 <i>Penal Code</i>
Conspiracy to commit immigration offences			S 45(h) <i>Immigration Act</i>						

## B.2. Offences Applying to Illegal Migrants

country	Australia	Brunei	Cambodia	PR China	Hong Kong SAR	Macau SAR	Fiji	Indonesia	Malaysia
offence									
Illegal departure				Art 322 <i>Criminal Law</i>					
◆ nationals				Art 14 <i>Law on Exit and Entry of Citizens</i>					
◆ non-nationals				Art 29 <i>Law on Entry and Exit of Aliens</i>					
Illegal entry, unauthorised arrival		S 20 <i>Immigration Act</i>	Art 29(1) <i>Law on Immigration</i>	Art 322 <i>Criminal Law</i>  Art 14 <i>Law on Exit and Entry of Citizens</i>  Art 29 <i>Law on Entry and Exit of Aliens</i>	S 38(1)(b) <i>Immigration Ordinance</i>			S 22(1)(i) <i>Immigration Act</i>	Ss 6(3), 8(5) <i>Immigration Act</i>
False statements									
◆ in immigration matters				—	S 42(1)(a) <i>Immigration Ordinance</i>	Art 12 <i>Clandestine Immigration Act</i>		S 22(1)(a), (d) <i>Immigration Act</i>	S 56(1)(f) <i>Immigration Act</i>
◆ for illegal entry	S 234(1)(b) <i>Migration Act</i>	S 55 <i>Immigration Act</i>	Art 29(1) <i>Law on Immigration</i>	—					
◆ to obtain travel documents	S 10(1)(a) <i>Passports Act</i>				S 42(1)(c) <i>Immigration Ordinance</i>		S 312 <i>Penal Code</i>		S 57(k) <i>Immigration Act</i>  S 12A <i>Passports Act</i>
◆ in criminal code	S 137.1 <i>Crimes Act</i>			—	S 36 <i>Crimes Ordinance</i>		S 143 <i>Penal Code</i>	—	S 182 <i>Penal Code</i>
Fraudulent documents									
◆ possession	S 236(b) <i>Migration Act</i>  S 9A(a), (b) <i>Passports Act</i>				S 42(2)(c) <i>Immigration Ordinance</i>	Art 13 <i>Clandestine Immigration Act</i>		S 22(1)(e),(f) <i>Immigration Act</i>	S 56(1)(l) <i>Immigration Act</i>  S 12(1)(a), (d), (f) <i>Passports Act</i>
◆ obtaining									
◆ use	S 234(1), 236(a) <i>Migration Act</i>  s 9A(d), (e), (f) <i>Passports Act</i>	S 55 <i>Immigration Act</i>	Art 32 <i>Law on Immigration</i>  Art 49 <i>Criminal Law Provisions</i>	Art 14 <i>Law on Exit and Entry of Citizens</i>  Art 29 <i>Law on Entry and Exit of Aliens</i>	S 42(2)(b) <i>Immigration Ordinance</i>	Art 13 <i>Clandestine Immigration Act</i>  Art 251 <i>Penal Code</i>		S 22(1)(c), (e), (f), (m) <i>Immigration Act</i>	S 56(1)(j), (l) <i>Immigration Act</i>  S 12(1)(a) <i>Passports Act</i>

## cont: B.2. Offences Applying to Illegal Migrants

country offence	Myanmar	Papua New Guinea	Philippines	Singapore	Solomon Islands	Taiwan	Thailand	Vanuatu	Vietnam
Illegal departure									
♦ nationals			-	-		Art 7 <i>Immigration Law</i>	-		Arts 273, 274 <i>Penal Code</i>
♦ non-nationals			S 45(g) <i>Immigration Act</i>	-			-		- see Art 7 <i>Ordinance on Entry ...</i>
Illegal entry, unauthorised arrival	S 13(1) <i>Immigration (Emergency Provisions) Act</i>	S 16(1)(a) <i>Migration Act</i>	-	sS 6(3), 8(5), 57(1) <i>Immigration Act</i>	S 18(1)(i) <i>Immigration Act</i>	Arts 59(1), (3) <i>Immigration Law</i>	-	S 22(1)(i) <i>Immigration Act</i>	Art 20(1) <i>Ordinance on Entry ...</i>  Art 274 <i>Penal Code</i>
False statements									
♦ in immigration matters	S 13(4) <i>Immigration (Emergency Provisions) Act</i>	S 16(1)(e), (j) <i>Migration Act</i>	S 45(f) <i>Immigration Act</i>	S 57(1)(f) <i>Immigration Act</i>	S 18(1)(d) <i>Immigration Act</i>				
♦ for illegal entry			S 45(d), (e), (h) <i>Immigration Act</i>						
♦ to obtain travel documents	S 13(7)(b) <i>Immigration (Emergency Provisions) Act</i>	S 5(a) <i>Passports Act</i>	S 45(a) <i>Immigration Act</i>	S 57(1)(k) <i>Immigration Act</i>	S 18(1)(a) <i>Immigration Act</i>				
♦ in criminal code		S 197 <i>Criminal Code</i>			S 130 <i>Penal Code</i>		S 137 <i>Penal Code</i>		
Fraudulent documents									
♦ possession	S 13(7)(d) <i>Immigration (Emergency Provisions) Act</i>	S 16(1)(k) <i>Migration Act</i>	—	S 57(1)(l) <i>Immigration Act</i>	S 18(1)(e), (f) <i>Immigration Act</i>				
♦ obtaining			S 45(c) <i>Immigration Act</i>						
♦ use	S 13(7)(d) <i>Immigration (Emergency Provisions) Act</i>	S 16(1)(i), (k) <i>Migration Act</i>	S 45(c) <i>Immigration Act</i>	S 56(1)(j),(l) <i>Immigration Act</i>	S 18(1)(e), (f), (o) <i>Immigration Act</i>		S 268 <i>Penal Code</i>		

## B.3. Immigration Regulations

	Australia	Brunei	Cambodia	PR China	Hong Kong SAR	Macau SAR	Fiji	Indonesia	Malaysia
Definition of alien, non-citizen, foreigner	non-citizen, s 5 <i>Migration Act</i>	S 2(d) <i>Immigration Act</i>	Arts 2, 7, 10 <i>Law on Immigration</i>	Art 31 <i>Law on Control on the Exit and Entry of Aliens</i>	S 2(1) <i>Immigration Ordinance</i>				
(Universal) visa requirements	S 13(1) <i>Migration Act</i>	S 6 <i>Immigration Act</i>	Art 8(1) <i>Law on Immigration</i>	Art 2 <i>Law on Control on the Exit and Entry of Aliens</i>	Ss 11, 61 <i>Immigration Ordinance</i>				Ss 6(1), 10 <i>Immigration Act</i>
excluded/prohibited immigrants	S 14 <i>Migration Act</i>	S 8(2) <i>Immigration Act</i>	Art 9 <i>Immigration Law</i>	Art 12 <i>Law on Control on the Exit and Entry of Aliens</i>	Ss 37A, 37B <i>Immigration Ordinance</i>				Ss 8, 9 <i>Immigration Act</i>
Detention pending immigration status decision	mandatory, S 189 <i>Migration Act</i>			Art 27 <i>Law on Control of the Entry and Exit of Aliens</i>	Ss 13D, 26, 27 <i>Immigration Ordinance</i>	Art 3(2) <i>Clandestine Immigration Act</i>			
Detention pending removal		S 34 <i>Immigration Act</i>	Art 27 <i>Law on Immigration</i>	Art 27 <i>Law on Control of the Entry and Exit of Aliens</i>	Ss 13D, 29, 31, 32 <i>Immigration Ordinance</i>	Art 3(2) <i>Clandestine Immigration Act</i>			S 34(1) <i>Immigration Act</i>
Removal, deportation of ill. immigrants	Ss 198, 199 <i>Migration Act</i>	Ss 32, 33 <i>Immigration Act</i>	Art 35-39 <i>Law on Immigration</i>	Arts 27, 30 <i>Law on Control of the Entry and Exit of Aliens</i>	Ss 13E, 18, 24, 25 <i>Immigration Ordinance</i>	Art 4 <i>Clandestine Immigration Act</i>			Ss 31, 33, 56(2) <i>Immigration Act</i>

## cont. B.3. Immigration Regulations

	Myanmar	PNG	Philippines	Singapore	Solomon Islands	Taiwan	Thailand	Vanuatu	Vietnam
Definition of alien, non-citizen, foreigner	S 2(1)(e) <i>Immigration (E.P.) Act</i>		S 50(b), (j) <i>Immigration Act</i>				S 4 <i>Immigration Act</i>	S 1 <i>Immigration Act</i>	Art 1(1) <i>Ordinance on the Entry...</i>
(Universal) visa requirements	S 3(1) <i>Immigration (E.P.) Act</i>	S 3(a) <i>Migration Act</i>	S 10 <i>Immigration Act</i>	S 6(1) <i>Immigration Act</i>	S 6(1)(a) <i>Immigration Act</i>	+		S 5(1) <i>Immigration Act</i>	Art 3(1) <i>Ordinance on the Entry</i> ...
excluded/prohibited immigrants		S 8 <i>Migration Act</i>	S 29 <i>Immigration Act</i>	Ss 8, 9 <i>Immigration Act</i>	S 11 <i>Immigration Act</i>	Art 17 <i>Immigration Law</i>	S 12 <i>Immigration Act</i>	S 15 <i>Immigration Act</i>	Art 6 <i>Ordinance on the Entry</i> ...
Detention pending immigration status decision			Ss 25, 26 <i>Immigration Act</i>		S 13E <i>Immigration Act</i>	Mandatory Art 36 <i>Immigration Law</i>	S 19 <i>Immigration Act</i>	S 4(2) <i>Immigration Act</i>	
Detention pending removal	S 7(1), (2), (4) <i>Immigration (E.P.) Act</i>	S 13(1) <i>Migration Act</i>	S 37(a) <i>Immigration Act</i>	S 34(1) <i>Immigration Act</i>	S 13F <i>Immigration Act</i>	Art 36 <i>Immigration Law</i>		S 17(3) <i>Immigration Act</i>	Art 16 <i>Ordinance on the Entry</i> ...
Removal, deportation of ill. Immigrants	S 7(1), (2) <i>Immigration (E.P.) Act</i>	Ss 12, 13(2), (3) <i>Migration Act</i>	Ss 37-39, 43 <i>Immigration Act</i>	Ss 31-33 <i>Immigration Act</i>	Ss 13E, 14 <i>Immigration Act</i>	Art 34 <i>Immigration Law</i>	Ss 22, 54 <i>Immigration Act</i>	S 17(1) <i>Immigration Act</i>	Art 14 <i>Ordinance on the Entry...</i>







### Appendix C: Signatures to International Conventions and Membership in International and Regional Organisations

Country	<i>Convention against Transnational Organised Crime</i>	<i>Protocol against the Smuggling of Migrants</i>	<i>Chicago Convention on International Civil Aviation</i>	<i>IMO Convention</i>
Australia	✓	—	✓	✓
Brunei	—	—	Adherence	✓
Cambodia	—	—	—	✓
PR China	✓	—	✓	✓
Fiji	—	—	Adherence	✓
Indonesia	✓	✓	Adherence	✓
Lao PDR	—	—	Adherence	—
Malaysia	—	—	Adherence	✓
Myanmar	—	—	Adherence	✓
Papua New Guinea	—	—	Adherence	✓
Philippines	✓	✓	✓	✓
Singapore	✓	—	Adherence	✓
Solomon Islands	—	—	—	✓
Taiwan (Chinese Taipei)	—	—	—	✓
Thailand	✓	—	✓	✓
Vanuatu	—	—	Adherence	✓
Vietnam	✓	—	Adherence	✓

Country	ASEAN Member States	APEC Member Economies	CSCAP	Manila Process (2000)	APC (1996)	AALC
Australia	—	✓	✓	✓	✓	—
Brunei	✓	✓	—	✓	—	—
Cambodia	✓	—	✓	✓	✓	—
PR China	—	✓	✓	✓	✓	✓
Fiji	—	—	—	—	—	—
Indonesia	✓	✓	✓	✓	✓	✓
Lao PDR	✓	—	—	✓	✓	—
Malaysia	✓	✓	✓	—	✓	✓
Myanmar	✓	—	—	—	✓	✓
Papua New Guinea	—	✓	✓	✓	—	—
Philippines	✓	✓	✓	✓	✓	✓
Singapore	✓	✓	✓	—	✓	✓
Solomon Islands	—	—	—	—	—	—
Taiwan (Chinese Taipei)	—	✓	✓	—	—	—
Thailand	✓	✓	✓	✓	✓	✓
Vanuatu	—	—	—	—	—	—
Vietnam	✓	✓	✓	✓	✓	—

## Appendix D: Additional Statistical Data

Figure 28: Refugees and asylum seekers in Australia, 1989-2000 (UNHCR)

year	asylum applications <sup>1</sup>	recognition under 1951 Convention <sup>2</sup>	rejection of asylum applications <sup>3</sup>	Total recognition rate <sup>4</sup>
1989	1,260	80	330	19.5%
1990	12,130	90	200	31.8%
1991	16,740	190	1,470	11.4%
1992	6,050	610	9,950	5.8%
1993	7,200	990	9,070	9.9%
1994	6,260	1,030	6,720	13.3%
1995	7,630	680	6,790	9.1%
1996	9,760	1,380	6,250	18.1%
1997	9,310	1,010	14,170	6.6%
1998	8,160	2,490	7,980	23.8%
1999	9,450	1,940	6,610	22.7%
2000	13,070 <sup>5</sup>	n a	n a	n a

Figure 29: Onshore Refugee Application Approval at Primary and Review Stage, Australia 1991-2000<sup>6</sup>

Year	applications	applications at primary stage								review stage	
		PR China	Indone sia	Sri Lanka	Philipp ines	Iraq	Afgha nistan	Form. Yugos.	Myan mar		Total
91-92	determined									5,306	229
	refugee status									[245]	[19]
	in %									4.6%	7.9%
92-93	determined	5,099	375	406	464					9,419	2,339
	refugee status	143	9	20	1					425	[161]
	in %	2.8%	2.4%	4.9%	0.2%					4.5%	6.9%
93-94	determined					78	11	535	71	10,490	[2,358]
	refugee status					33	6	232	48	1346	290
	in %					42.3%	54.6%	43.4%	67.6%	12.8%	12.3%

<sup>1</sup> UNHCR, "Table V.1./2. Asylum applications submitted in selected countries, 1980-1999", *Refugees and Others of Concern to UNHCR — 1999 Statistical Overview*, www.unhcr.ch (2000).

<sup>2</sup> UNHCR, "Table V.3./4. Recognition of asylum-seekers under the 1951 Convention in selected countries, 1980-1999", *ibid.*

<sup>3</sup> UNHCR, "Table V.7./8. Rejection of asylum applications in selected countries, 1989-1998", *ibid.* In case the asylum procedure includes an administrative review or appeal process, such decisions are generally included. As a result, negative decisions may have been double counted (in first instance and in appeal/review).

<sup>4</sup> Number of refugees granted Convention and humanitarian status divided by the total number of decisions taken. UNHCR, "Table V.17./18. Total recognition rates in selected countries, 1980-1999", *ibid.*

<sup>5</sup> Table 14 "Asylum applications submitted in selected countries, 1999 and 2000" in UNHCR, *2000 Global Refugee Trends* (2001) 20.

<sup>6</sup> DIEA/DIMA, *Population Flows: Immigration Aspects* [published annually] (1993) 12, (1994) 14, (1995) 14, (1996) 14, (1997) 14, (1998) 17, (1999) 19, (2000) 24, (2001) 27.

Year	applications	applications at primary stage								review stage	
		PR China	Indonesia	Sri Lanka	Philippines	Iraq	Afghanistan	Form. Yugos.	Myanmar		Total
94-95	determined			209		48		213	39	4,837	[4,217]
	refugee status			38		19		79	19	503	662
	in %			18.2%		39.6%		37.1%	48.7%	10.4%	15.7%
95-96	determined					177		197	47	10,111	[4,430]
	refugee status					133		84	31	1195	731
	in %					81.6%		49.4%	73.8%	11.8%	16.5%
96-97	determined	1,919	1,944	1,302	2,235					13,697	[5,216]
	refugee status	52	9	281	3					1,304	699
	in %	2.7%	0.5%	21.6%	0.1%					9.5%	13.4%
97-98	determined	2,033	1,505	1,237	873				302	11,341	[7,556]
	refugee status	27	3	95	0				23	844	680
	in %	1.3%	0.2%	7.7%	0%				7.6%	7.4%	9%
98-99	determined					357	102	125		7,145	[6,385]
	refugee status					274	72	56		979	664
	in %					76.8%	70.6%	44.8%		13.7%	10.4%
99-00	Applicants	866	638	453	815	2,394	1,765			12,713	7,828
	Protection visas granted					615	700			2,458	

Figure 30: Illegal immigration, Hong Kong, 1996-2001<sup>7</sup>

	1996	1997	1998	1999	2000	2001
No. of immigration related investigations	39,879	36,244				
♦ Illegal immigration	6,372	6,711				
Vietnamese illegal immigrants	na	1,161	577	474	293	170
No. of prosecution instituted	na	22,577	25,970	26,912	23,632	23,929
illegal immigrants apprehended and repatriated	na	19,584	15,925	13,262	9,592	8,896
Passengers refused permission to land	9,534	9,935				
♦ by land	1,558	2,225				
♦ by sea	1,778	2,578				
♦ by air	6,168	5,132				

Illegal immigrants from mainland China <sup>8</sup>	1996-97	1997-98	1998-99			
total number of persons	23,132	15,010	14,892	na	Na	na

<sup>7</sup> Hong Kong Immigration Department, *Facts and Statistics* (3 Apr 1998, 18 Aug 1999, 1 Dec 2000, 1 Feb 2002) [www.info.gov.hk/immd](http://www.info.gov.hk/immd).

<sup>8</sup> "Hong Kong: Right of Abode", (2000) 7(1) *Migration News*.

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*Note:* Bills Digests and Explanatory Memoranda to Australian Legislation are not listed in this bibliography.

## Errata

*Page 40, second paragraph:* Note that recently, several exceptions to the 'One Child Policy' have been introduced and the policy is no longer enforced uniformly. For example, the policy does not apply to certain ethnic minorities and to many rural areas.

*Page 58, third paragraph:* "The economic impact of illegal immigration on receiving countries is a debatable issue. In Australia, however, the extent to which illegal migrants use public social services is very small. Also, it has to be noted that in most cases their illegal status prevents illegal migrants from benefiting from any welfare program."

*Page 60, first paragraph:* "A number of writers have suggested that illegal immigration has a direct impact on the level of crime in the receiving country and have stated, 'illegal migration as such encourages many other illegal activities.' In Australia, however, there is to date little, if any evidence to support this hypothesis."

*Page 92, second paragraph:* "Starting in late 1994 the number of unauthorised arrivals in Australia increased further."

*Page 118, third paragraph:* "In contrast, organised crime, in most cases, tends to be more focused on achieving economic benefits instead of seeking political change."

*Page 164, fifth paragraph:* "Trafficking by sea in the Asia Pacific region involves much lower risks of detection and arrest than land and air trafficking, especially in countries that have long, archipelagic coastlines that are more difficult to patrol."

*Page 174, second paragraph:* "In the late 1990s, US authorities reported that Guam, along with other Micronesian islands, have served as transit points for Chinese migrants on their way to North America and Australasia."

*Page 176, third paragraph:* "As with all form of clandestine activity, the true number of illegal arrivals in Australia is difficult to assess. In response to speculations about undetected boat arrivals in Australia, in June 1999 Australian authorities stated, ..."

*Page 182, third paragraph:* "... accommodate them on so-called 'safe houses' and control and threaten the migrants for several years after the trip is made."

*Page 189, second paragraph:* "But in countries that do have such provisions, illegal money is processed through a legitimate financial institution at an amount slightly below the legal threshold that would trigger official oversight or reporting ('smurfing') ..."

*Page 248, second paragraph:* "Compared with the permanent protection visas, the temporary visa does not entitle the holder to obtain English language training, ..."