

# **Migrant Smuggling and Organised Crime in Australia**

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# MIGRANT SMUGGLING AND ORGANIZED CRIME IN AUSTRALIA

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This article explores common perceptions about migrant smuggling and its nexus, if any, to organized crime in the Australian context. It argues that many myths about migrant smuggling cannot be validated by qualitative and quantitative research, which, in turn, questions the effectiveness of relevant policies and laws. The article explores the available evidence on organized crime involvement in migrant smuggling to Australia as manifested in reported cases. It examines offender typologies and the profits made by migrant smugglers and outlines relevant international and domestic legal frameworks.

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## I INTRODUCTION AND BACKGROUND

The topic of migrant smuggling – or people smuggling as it is referred to locally – remains a contentious issue in Australia, especially in political circles where both Government and Opposition are caught up in a decade-long competition about which party can be seen as most ‘tough on border protection’. Over this period, the rhetoric has somewhat shifted from demonising asylum-seekers to the new goal of ‘breaking the people smugglers’ business model’; a slogan that is presently repeated time and again on both sides of politics.<sup>1</sup>

In the Australian context, the topic of migrant smuggling is, by and large, synonymous with so-called unauthorised boat, or irregular maritime arrivals. The attention of policy makers, media, and the general public alike has been exclusively on the arrival of boats generally carrying asylum-seekers of mostly Middle Eastern or Sri Lankan backgrounds to Australia, especially to Christmas Island, Ashmore Reef, and, in lesser numbers, to the coasts of the Northern Territory and Western Australia.

Several hundred boats have arrived over the last ten years, spiking in the years 1999 and 2010.<sup>2</sup> These figures are the result of a great number of causes and circumstances. Contrary to the preferred view of many policy-makers and media outlets, it is not possible to attribute the relative increase and decline of boat arrivals to individual policy announcements and legislative changes. Migrant smuggling is more complex than that and defies single and simplistic generalizations,<sup>3</sup> convenient and politically palatable as they may be.

The smuggling of migrants is widely associated with organized crime. International and domestic law, policy papers and government sources, along with media reports and other public discourses generally construct migrant smuggling as a form of organized crime, a heinous activity of transnational criminal syndicates creating a world-wide economy worth billions of dollars.<sup>4</sup>

Contributing to misunderstandings and misperceptions about migrant smuggling in Australia are simplistic slogans about ‘stopping the boats’ and vast exaggerations about the scale of the problem and the profit it generates. Frequent statements by politicians, radio ‘shock jocks’, and other commentators, demonising migrant smugglers further distort the truth. Comments made by the then Prime Minister Kevin Rudd, describing migrant smugglers as ‘the absolute scum of the earth’ who ‘should all rot in hell’, are perhaps the best known example.<sup>5</sup>

The purpose of this article is to analyse common perceptions about migrant smuggling and its nexus, if any, to organized crime in the Australian context. It is argued that many myths about migrant smuggling cannot be validated by qualitative and quantitative research, which, in turn, questions the effectiveness of relevant policies and laws.

<sup>1</sup> See, for example, Minister for Immigration, Chris Bowen, ‘High Court decision’ (Press Release, 31 Aug 2011) <<http://www.minister.immi.gov.au/media/cb/2011/cb171159.htm>>.

<sup>2</sup> For further data relating to migrant smuggling and unauthorized boat arrivals in Australia, visit UQ Migrant Smuggling Working Group, *Statistics and other data* (15 Sep 2011) The University of Queensland TC Beirne School of Law <<http://www.law.uq.edu.au/migrantsmuggling-statistics>>.

<sup>3</sup> See generally, Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region* (Martinus Nijhoff, 2003) 27–50.

<sup>4</sup> See generally, G Vermeulen et al, *Organized crime involvement in trafficking in persons and smuggling of migrants* (Maklu, 2010); Alexis A Aronowitz, ‘Smuggling and Trafficking in Human Beings: The Phenomenon, The Markets That Drive It And The Organizations That Promote It’ (2001) 9 *European Journal on Criminal Policy and Research* 163–195.

<sup>5</sup> ‘Rudd wants people smugglers to “rot in hell”’ (17 Apr 2009) *ABC News* <<http://www.abc.net.au/news/2009-04-17/rudd-wants-people-smugglers-to-rot-in-hell/1653814>>.

The first part of this article explores the available evidence on organized crime involvement in migrant smuggling to Australia as manifested in reported cases. Secondly, in order to understand the so-called ‘people-smugglers’ business model’ the paper takes a brief look at offender typologies and the profits made by migrant smugglers. Thirdly, attention will turn to relevant international and domestic legal frameworks, before reflecting on the lessons learned and the way ahead.

## II CASE LAW

### A *Prosecutions of crew*

Australia’s courts are currently awash with migrant smuggling prosecutions. The Australian Federal Police (AFP) report a surge in migrant smuggling ventures since September 2008.<sup>6</sup> In 2010 alone, 126 so-called ‘Suspected Illegal Entry Vessels’ (SIEVs) were intercepted in Australian waters, carrying a total of 6,127 passengers and 313 crew.<sup>7</sup> As of January 25, 2011, the AFP had charged 302 individuals with people smuggling offences since September 2008.<sup>8</sup>

The increase in SIEV interceptions has led to growing numbers of prosecutions: there were 30 before the courts at June 30, 2009,<sup>9</sup> but 102 a year later.<sup>10</sup> By February 2011, 198 alleged people smugglers were awaiting trial, and another 161 were being held in detention while waiting to be charged.<sup>11</sup>

An image of the typical offender prosecuted under Australian people smuggling laws emerges from the case law: that of a poor, uneducated Indonesian fisherman, farmer, or labourer who, while seeking work, is approached by strangers offering a large amount of money to take a vessel to Australian territory.<sup>12</sup> This view of the typical offender is shared by other commentators, particularly those who made submissions to the Senate Inquiry into the Anti-People Smuggling and Other Measures Bill 2010 (Cth), lending support to the conclusion that

<sup>6</sup> Australian Federal Police, *People Smuggling*, <<http://www.afp.gov.au/policing/people-trafficking/people-smuggling.aspx>>.

<sup>7</sup> Lanai Vasek and Sean Parnell, ‘Pressure on Canberra to Pay for People smuggler Prosecutions’, *The Australian* (online), 10 December 2010 <<http://www.theaustralian.com.au/national-affairs/pressure-on-canberra-to-pay-for-people-smuggler-prosecutions/story-fn59niix-1225968555400>>.

<sup>8</sup> AFP, ‘Alleged Crew Members Charged’ (Media Release, 25 January 2011) <<http://www.afp.gov.au/media-centre/news/afp/2011/january/alleged-crew-members-charged.aspx>>. In the period from June 2009 to March 2011 alone, 353 individuals were charged: Lanai Vasek, ‘Legal Aid for Crews Tops \$4m’, *The Australian* (online), 19 April 2011 <<http://www.theaustralian.com.au/national-affairs/attorney-general/legal-aid-for-crews-tops-4m/story-fn59nju7-1226041212968>>.

<sup>9</sup> Commonwealth Director of Public Prosecutions, ‘Annual Report 2008-09’ (Annual Report, Commonwealth Director of Public Prosecutions, 22 October 2009) 72.

<sup>10</sup> Commonwealth Director of Public Prosecutions, ‘Annual Report 2009-10’ (Annual Report, Commonwealth Director of Public Prosecutions, 22 October 2010) 60.

<sup>11</sup> Ben Packham, ‘States Struggle to Pay for Legal Costs of People smuggling Cases’, *The Australian* (online), 18 April 2011 <<http://www.theaustralian.com.au/national-affairs/states-struggle-to-pay-for-legal-costs-of-people-smuggling-cases/story-fn59niix-1226041046996>>.

<sup>12</sup> See further, Charles Martin, *Scum of the Earth? People Smuggling Prosecutions in Australia 2008-11* (July 2011) The University of Queensland TC Beirne School of Law <<http://www.law.uq.edu.au/documents/humantrafficking/migrant-smuggling/Migrant-Smuggling-Prosecutions-2008-11.pdf>>.

the offenders in the cases studied are representative of people smuggling offenders generally.<sup>13</sup>

This typical profile describes exactly those individuals who are targeted by organizers of migrant smuggling ventures. Poor fishermen are particularly vulnerable while out of work, and are easily tempted by the money that the organizers promise. They are targeted because of their lack of sophistication, and are easily duped into undertaking the journey while the organizers remain out of the reach of Australian authorities. Because the organizers leave the boats before their arrival in Australian territory, few have been prosecuted.

The majority of persons who have been prosecuted are those with the most limited involvement in migrant smuggling organizations: They have not arranged the passengers for the journey and have no control over the number of passengers they transport to Australia. The typical offenders who are apprehended in Australian territory rarely understand that their conduct in transporting people to Australia is regarded as serious offending under Australian law. For example, the offenders in the case of *R v Pandu & Ors*

were deliberately targeted because of their lack of sophistication and naïveté as being people who might be relied upon to take the vessel further south beyond Rote Island towards Australia, compliant upon the instructions given to them and not sufficiently aware or sophisticated to appreciate the danger of apprehension by Australian authorities and the consequences of it. Those who were sophisticated and aware of those dangers made sure that they were not on board the vessel when it ventured south of Rote Island.<sup>14</sup>

## B Organizers

Prosecutions of organizers of migrant smuggling ventures and other facilitators and agents who are not on the vessels themselves are few and far between. In fact, some appeals aside, there has not been a prosecution of a high-profile migrant smuggler in several years,<sup>15</sup> though Australia is presently seeking extraditions of several individuals from abroad.

<sup>13</sup> See, eg, Nathalie Haymann, Submission No 4 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 2; Labor for Refugees Victoria, Submission No 5 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 1; Project Safecom Inc, Submission No 17 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 16 April 2010, 8; Sue Hoffman, Submission No 25 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 16 April 2010, 3, 6; Bassina Farbenblum et al, Migrant and Refugee Rights Project and International Refugee and Migration Law Project, University of NSW, Submission No 23 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 16 April 2010, 24; Pamela Curr, Asylum Seeker Resource Centre, Submission No 12 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 16 April 2010, 12-13. See also Michael Grewcock, “‘Scum of the Earth’? People smuggling, Criminalisation and Refugees” (2010) 19(3) *Human Rights Defender* 15; Lindsay Murdoch, ‘People smuggling Laws Harsh on Poor Fishermen’, *The Sydney Morning Herald* (online), 15 April 2010 <<http://www.smh.com.au/national/peoplesmuggling-laws-harsh-on-poor-fishermen-20100404-rls5.html>>; Christine Jackman, ‘Caught in the Net’, *The Weekend Australian Magazine* (Sydney), 16 April 2011, 14.

<sup>14</sup> Transcript of Proceedings, *R v Pandu & Ors* (Unreported, District Court of Western Australia, 95/2010, Eaton DCJ, 21 May 2010) 9.

<sup>15</sup> Earlier prosecutions of organizers include, inter alia, *Kadem v R* (2002) A Crim R 129; *Asfoor v R* [2005] WASCA 126; *R v Al Jenabi* [2004] NYSC 44; *Chaudry v R* [2007] WASCA 37; *R v Daoed* (2005) 158 A Crim R 138. These cases relate to vessels which arrived in Australia between 1998 and October 2001.

A careful analysis of the known organizers and their offending shows that no two cases are the same and that – unlike the crew on board the vessels – generalizations about organizers are almost impossible to make. The following three cases are illustrative, rather than representative, and highlight some of the unique features and circumstances of individual operations.

### 1 *Qambar Ali & Rahmatullah Bostan*

The case of Messrs Rahmatullah and Qambar Ali Bostan involves a group of 68 Afghan nationals who had been gathered for the purpose of taking them to Australia illegally. The group was apprehended in West Java, Indonesia on April 16, 2009.<sup>16</sup>

Qambar Ali Bostan and his family, themselves smuggled migrants, arrived from Afghanistan in Australia by boat in 1999, though it is not clear whether they all arrived on the same vessel. The family was granted protection visas in 2001 and became Australian citizens in 2002.<sup>17</sup>

The father and son duo became involved in migrant smuggling in 2009 when Qambar Ali Bostan travelled to Indonesia, Pakistan, and Malaysia.<sup>18</sup> In a media interview, one of his friends later quoted Mr Qambar Ali Bostan saying: ‘What a desire I had to fulfil. [...] I always dreamt of bringing our own people over so they could further sponsor their children. At least we could (build) a society here.’<sup>19</sup>

A Melbourne court later heard that some of Afghans had paid up to US\$ 10,000 for their (failed) journey, believing they would be able to work as fruit pickers in northern Victoria.<sup>20</sup> One of the smuggled migrants, when interviewed by police, said that she first met Qambar Ali Bostan in Pakistan in 2009. At that time she gave him \$6,000 and agreed to pay \$3,000 later. She then travelled on a forged Pakistani passport from Karachi to Kuala Lumpur and alleged that FIA officer at Karachi airport were complicit in her departure.<sup>21</sup> It is unclear whether all members of the group of Afghans who were apprehended in April 2009 travelled on the same route and around the same time, and there is no information available on how and when the group (or individuals) moved from Malaysia to Indonesia.

Reports later suggested that Mr Rahmatullah Bostan obtained AU\$ 40,000 or more from his father who transferred the money from Indonesia.<sup>22</sup> Under instructions from his father, he dispersed the money through transfers back to Indonesia,<sup>23</sup> though court proceedings later revealed that Mr Qambar Ali Bostan lost \$52,000 gambling in casinos between April and May 2009 and that his son made minimal profits.<sup>24</sup>

Following the apprehension of the group of Afghans in Indonesia, the AFP intercepted telephone calls between Mr Rahmatullah Bostan, who was in Australia at the time, and

<sup>16</sup> Peter Gregory & Darren Linton, ‘Man, 21, charged with people-smuggling plot’ (20 May 2009) *The Age* (Melbourne) 3.

<sup>17</sup> Paul Maley, ‘Almost all new-wave boatpeople genuine’ (21 May 2009) *The Australian* 2.

<sup>18</sup> ‘VIC: Man admits part in people smuggling’ (14 Sep 2010) *Australian Associated Press*.

<sup>19</sup> ‘Asylum seeker “dreamt” of bringing people to country’ (16 Sep 2010) *NewsMail*.

<sup>20</sup> Adrian Lowe, ‘People-smuggling scheme revealed to court’ (15 Sep 2010) *The Age* (Melbourne) 5.

<sup>21</sup> ‘Journey to freedom took 15 painful years’ (18 Sep 2010) *The Canberra Times*, 16.

<sup>22</sup> Melissa Iaria, ‘VIC: Charges withdrawn after accused people smuggler’s death’ (1 Dec 2009) *Australian Associated Press*.

<sup>23</sup> ‘VIC: Man admits part in people smuggling’ (14 Sep 2010) *Australian Associated Press*;

‘Asylum seeker “dreamt” of bringing people to country’ (16 Sep 2010) *NewsMail*.

<sup>24</sup> ‘VIC: Son helped people smuggling father’ (17 Dec 2010) *Australian Associated Press*.



members of the group.<sup>25</sup> Both father and son were arrested by the AFP in Shepparton, Victoria on May 19, 2009 and charged with people smuggling under ss 73.1 and 73.3 *Criminal Code* (Cth). Mr Rahmatullah Bostan was also charged with dealing in proceeds of crime totalling at least \$50,000 and with drug offences.<sup>26</sup>

Mr Qambar Ali Bostan was found dead in a lake on October 17, 2009.<sup>27</sup> His family later suggested that he had been blackmailed into organizing migrant smuggling operations and had ended his life because of the charges laid against him earlier that year.<sup>28</sup> The coroner investigated the death but without a public inquest.

On September 14, 2010 Mr Rahmatullah, Bostan, then aged 23, plead guilty in the Melbourne Magistrates Court to receiving \$52,000 from the proceeds of crime and to charges relating to the possession of cannabis, amphetamines, and ecstasy. Charges relating to people smuggling were dropped at this point as the Crown conceded that, unlike his father, Rahmatullah had no knowledge of the people en route to Australia and had never travelled to Indonesia.<sup>29</sup> At sentencing on December 17, 2010, the judge accepted that Rahmatullah acted out of fear of his abusive father. He was given a nine-month suspended jail term and two year good behaviour bond. He was fined \$400 for the drug possession charges.<sup>30</sup>

## 2 Mehmet Seriban

The 12-metre long Indonesian fishing vessel ‘Minas Bone’, later named SIEV 14, arrived at Snake Bay on the northern shore of Melville Island, 80kms north of Darwin on November 4, 2003. The vessel had left from a small island near Sulawesi a week earlier and was able to travel to Australia undetected. The boat carried 14 adult men of Kurdish background and four Indonesian crew.

Their arrival led the Australian Government to excise thousands of islands and nearly half of the Australian coastline from the *Migration Act 1958* (Cth) in order to deny the men, some of which had set foot on Australian soil, any opportunity to seek asylum.<sup>31</sup> Three days later, two naval vessels had towed the Minas Bone back to Indonesia. According to the Australian Government this action sent a strong message to migrant smugglers with then Foreign Minister Mr Alexander Downer saying that: ‘We’ve demonstrated a very clear point – that if you are strong in standing up to the people smugglers, people smugglers won’t be able to make money out of Australia and out of our goodwill.’<sup>32</sup>

The main person implicated in the arrival of SIEV 14 was Mehmet Seriban, an Australian citizen of Kurdish background. Together with five other nationals, Mr Seriban arrived from Indonesia at Ashmore Reef illegally on August 25, 1995 on SIEV Rosella. He was subsequently placed in immigration detention and granted a temporary protection visa on October 13, 1995. He acquired Australian citizenship on October 5, 1998 and was issued an

<sup>25</sup> Peter Gregory & Darren Linton, ‘Man, 21, charged with people-smuggling plot’ (20 May 2009) *The Age* (Melbourne) 3; ‘Court told of alleged smuggler’s \$40k deposit’ (20 May 2009) *ABC News*.

<sup>26</sup> Peter Gregory & Darren Linton, ‘Man, 21, charged with people-smuggling plot’ (20 May 2009) *The Age* (Melbourne) 3.

<sup>27</sup> ‘Suspect’s body found’ (20 Oct 2009) *Herald Sun* (Melbourne) 10.

<sup>28</sup> Drill, ‘Squad to curb influx’ (22 Nov 2009) *Herald Sun* (Melbourne).

<sup>29</sup> ‘VIC: Man admits part in people smuggling’ (14 Sep 2010) *Australian Associated Press*.

<sup>30</sup> ‘VIC: Son helped people smuggling father’ (17 Dec 2010) *Australian Associated Press*.

<sup>31</sup> *Migration Amendment Regulation 2003* (No 8) (Cth).

<sup>32</sup> Mark Forbes, ‘Boat People in Indonesian Hands’ (10 Nov 2003) *The Age* (Melbourne) 2.

Australian passport two days later. He left Australia for Turkey on October 10, 1998 and did not return until his deportation from Indonesia on March 25, 2004.<sup>33</sup>

Upon return to Turkey, he first became involved in organizing and/or facilitating migrant smuggling operations when he advised some of his relatives who sought his assistance to come to Australia. He suggested they travel to Indonesia and, like himself before, then move by boat to Ashmore Reef. Mr Seriban then flew to Indonesia himself where he spent most of the following years, learnt to speak Indonesian fluently, and became ‘a well-known figure in some Jakarta nightclubs’.<sup>34</sup>

Mr Seriban has been accused of – and was later convicted for – a number of migrant smuggling operations between Indonesia and Australia. On January 27, 2006 he was convicted for charges under ss 232A (1 count) and 233(1)(a) (9 counts) *Migration Act 1958 (Cth)* relating to the arrival five vessels that arrived at Ashmore Reef between October 30, 1998 and February 16, 2000, carrying a total of 191 passengers mostly of Turkish background (with smaller numbers of Afghani and Iraqi nationals).<sup>35</sup>

Mr Mehmet Seriban was first mentioned in the context of SIEV 14 when some of the passengers reported that they were met by a man named Mehmet at Jakarta airport in 2003 who drove them to a local hotel and took some money of them.<sup>36</sup> Mr Seriban was living in Indonesia at the time and, according to some media reports, had ‘been known to Australian authorities, including federal police, for several years as a suspected member of the smuggling operation’.<sup>37</sup> Ten of the men who arrived on SIEV 14 left Jakarta after just one night for Makassar on the island of Sulawesi where they waited for another two months before leaving for Australia. During that time, they were joined by four other men who had paid money to another man and were also brought to Makassar by Mr Seriban. Mr Seriban also organized the vessel and also provided the men with entertainment, including ‘girls’.<sup>38</sup>

Mr Seriban was arrested in Indonesia sometime in early 2004. He was deported to Sydney where he arrived on March 25, 2004 and, on the following day, extradited Darwin to face charges for a number of migrant smuggling offences.<sup>39</sup> In May 2005, prosecutors in Darwin intended to charge Mr Seriban for his involvement in the arrival of SIEV 14. At this time, Mr Seriban had pleaded guilty in relation to charges pertaining the five boat arrivals in 1998 and 1999 and the Crown sought to add charges for SIEV 14 to Mr Seriban’s trial before the Northern Territory Supreme Court.<sup>40</sup> However, charges relating to the arrival of SIEV 14 were dropped (and not included in the indictment dated December 5, 2005 for the other vessels – to which he plead guilty on January 18, 2006 and was sentenced to five and a half years imprisonment on January 27, 2006).<sup>41</sup>

<sup>33</sup> Transcript of Proceedings, *R v Mehmet Seriban* (Supreme Court of the Northern Territory, Angel CJ, 27 Jan 2006).

<sup>34</sup> Robert Wainwright & Matthew Moore, ‘Accused Smuggler Arrested at Airport’ (26 Mar 2004) *The Age* (Melbourne) 3; Transcript of Proceedings, *R v Mehmet Seriban* (Supreme Court of the Northern Territory, Angel CJ, 27 Jan 2006).

<sup>35</sup> DIMIA, Fact Sheet 74a. Boat Arrival Details (6 Oct 2004), formerly available at [www.immi.gov.au](http://www.immi.gov.au).

<sup>36</sup> Matthew Moore, ‘Kurds Name Australian “Smuggler”’ (27 Nov 2003) *The Age* (Melbourne) 1.

<sup>37</sup> Robert Wainwright et al, ‘Second “people smuggler” identified’ (28 Nov 2003) *The Age* (Melbourne).

<sup>38</sup> Matthew Moore & Robert Wainwright, ‘Lunch with the “People Smuggler” – Then Off to Australia’ (12 Jan 2004) *The Age* (Melbourne) 1.

<sup>39</sup> Lindsay Murdoch, ‘Man faces people-smuggling charges’ (21 Sep 2005) *The Age* (Melbourne).

<sup>40</sup> Lindsay Murdoch, ‘Man faces people-smuggling charges’ (21 Sep 2005) *The Age* (Melbourne).

<sup>41</sup> Transcript of Proceedings, *R v Mehmet Seriban* (Supreme Court of the Northern Territory, Angel CJ, 27 Jan 2006).



During his time in gaol, Mr Seriban befriended Mr Petr Petras who was kept in the same facility after his visa had been cancelled in 2004. Mehmet Seriban was released from custody on parole on December 22, 2006. Shortly thereafter he sought permission to travel to Turkey to visit his mother. The permission was granted, but after a short period in Turkey, Mr Seriban travelled to Malaysia and then Indonesia where, together with Mr Petras and at least two other men, he became involved in an operation that sought to import a commercial quantity of pseudoephedrine, a precursor chemical used in the production of amphetamine-type stimulants, from Indonesia to the Northern Territory.<sup>42</sup> His parole was revoked in October 2007 and Mr Seriban was extradited to Australia in January 2008.<sup>43</sup>

Mr Seriban pleaded not guilty for this offence, but a two-week jury trial in Darwin in February and March 2009 returned a guilty verdict. On March 16, 2009, he was sentenced to twelve years and three months, taking into account an additional two years and nine months he has to serve for the previous sentence. A non-parole period of seven years and ten months was set. He will be eligible for parole in January 2017.<sup>44</sup>

### 3 Pathmendra Pulendren

SIEV 46 was a 22 metre long wooden boat which left Indonesia on June 10, 2009 and arrived in Australia near Christmas Island on June 28, 2009.<sup>45</sup> One of the men accused of being involved in organizing the 193 passengers that arrived on SIEV 46 is Mr Pathmendra Pulendren, an Australian national of Sri Lankan background. Born in 1974, Mr Pulendren lived in Jaffna when he became caught up in the conflict between Sinhalese government troops and the separatist LTTE (or Tamil Tigers) that believed he was a government informer.<sup>46</sup> He ran an export and import business in Sri Lanka and felt it was too dangerous to stay in Sri Lanka after his boss was killed.<sup>47</sup>

In 2006, Mr Pulendren left for China on a three months visa but, in fear of his safety, decided not to return to Sri Lanka. Instead, he travelled to Malaysia where he stayed for ten months and met up with a friend who invited him to join a boat of Tamils to Australia.<sup>48</sup> Mr Pulendren arrived in Australia on February 20, 2007, along with 82 other Tamil asylum seekers.<sup>49</sup> His voyage cost \$US 15,000 and owed money to his wife's family, for a loan he received to pay for his time in China and Malaysia and to pay migrant smugglers for his journey to Australia.<sup>50</sup> After spending one month in immigration detention on Christmas

<sup>42</sup> *R v Woods* [2009] NTCCA 2 at paras [7], [8] per Riley J.

<sup>43</sup> Emily Watkins, 'Smuggler jailed over NT drug plot' (17 Mar 2009) *Northern Territory News* (Darwin).

<sup>44</sup> *R v Woods* [2009] NTCCA 2 at [14] per Riley J; see also, Emily Watkins, 'Smuggler jailed over NT drug plot' (17 Mar 2009) *Northern Territory News* (Darwin).

<sup>45</sup> Mark Dodd & Paige Taylor, 'Biggest Boatload to stretch detention centre' (29 June 2009) *The Australian* 1; Tom Arup, 'Boat crowded with 194 people intercepted off WA coast' (29 June 2009) *The Age* (Melbourne) 5.

<sup>46</sup> *R v Pulendren* [2010] NSWDC 335 at [10] per Tupman DCJ.

<sup>47</sup> ABC Central Coast NSW Radio, 'Refugee Week book launch on Central Coast', 26 June 2007 <<http://www.abc.net.au/local/stories/2007/06/26/1962707.htm>>.

<sup>48</sup> *R v Pulendren* [2010] NSWDC 335 at [11] per Tupman DCJ.

<sup>49</sup> Andra Jackson, 'Tamil asylum seekers taken to Christmas Island' (23 Feb 2007) *The Age* (Melbourne) 5; Susan Metcalfe, *Turning back the boats: it's a bridge too far* (26 Nov 2010) ABC News 24, *The Drum* <<http://www.abc.net.au/unleashed/41500.html>>.

<sup>50</sup> Andrew Drummond, 'Govt bobby knew of people smuggling plan' (20 Sep 2010) *Sydney Morning Herald*.

Island, he was brought to Nauru on March 19, 2007 for processing.<sup>51</sup> He later received a protection visa to enter Australia and was granted permanent residence.<sup>52</sup> After a short time in Perth, together with his wife and son, he moved to Sydney in April 2008 where, after undertaking vocational training and working as a cleaner for some time, he bought a spice shop in Pendle Hill with money borrowed from his family. The purchase of the shop together with money he still owed for his voyage to Australia left Mr Pulendren in debt of about \$50,000.<sup>53</sup>

In about March 2009, Mr Pulendren was approached by another person to help with a migrant smuggling venture. He was promised US\$ 40,000 for his involvement, a 20 percent ‘cut’ of the payment received by the principal migrant smugglers (though he never received any of that money). His role was to act as the Australia-based ‘agent’ for twenty Sri Lankan asylum-seekers who were expected to arrive in June of that year. Mr Pulendren would then liaise with the families and friends of the asylum seekers and sometimes collect money for their voyage. He is also said to have introduced the person who first approached him to another person who wanted to smuggle the twenty Sri Lankans to Australia.<sup>54</sup> In court proceedings, Mr Pulendren later explained that ‘some (people) sought his assistance because he made it known throughout the Tamil community in Sydney that he was able to provide this service’.<sup>55</sup> The court found that:

For some of them he had to arrange for them to leave Sri Lanka and come by air to Malaysia and for some who were already in Malaysia, he had to arrange for them to meet the boat from there. He did so by using contacts in Sri Lanka, Malaysia and Thailand, all of whom he has named. One contact was in Colombo. For those of his twenty who needed to leave Sri Lanka he placed them in touch with this person in Colombo who would then quote the cost of travelling to Australia, assist with travel documentation where required and arrange for travel to Malaysia from Colombo where necessary. For those who travelled from Colombo this person used the services of a corrupt airport official in Kuala Lumpur because none of these people anticipated having the appropriate visa which would allow them entry to Malaysia from Sri Lanka.<sup>56</sup>

The AFP became aware of SIEV 46 when Mr Pulendren went to the police on June 14, 2009, four days after SIEV 46 had left Indonesia. A court later found that

he went to the police [...] because of a genuine fear for the safety of the people on the boat. He knew that he would be arrested and charged. He knew that as a result of going he would never recover any of the money he was to make for his involvement in this offence. His concern for the safety of the people, it is fair to say, was a little belated because he had become aware, at the latest a few days beforehand, of exactly the number of people on the ship overall.<sup>57</sup>

Mr Pathmendra Pulendren was arrested and charged on June 30, 2009 in Sydney for facilitating the entry of 193 unlawful non-citizens into Australia, contrary to (former) s 232A *Migration Act 1958* (Cth).<sup>58</sup> He appeared in Sydney’s Downing Centre Local Court on

<sup>51</sup> Jodie Minus, ‘Refugee admits smuggling role’ (26 Nov 2009) *The Australian* 9; Susan Metcalfe, *Turning back the boats: it’s a bridge too far* (26 Nov 2010) ABC News 24, The Drum <<http://www.abc.net.au/unleashed/41500.html>>.

<sup>52</sup> Jodie Minus, ‘Refugee admits smuggling role’ (26 Nov 2009) *The Australian* 9.

<sup>53</sup> *R v Pulendren* [2010] NSWDC 335 at [14] per Tupman DCJ.

<sup>54</sup> Jodie Minus, ‘Refugee admits smuggling role’ (26 Nov 2009) *The Australian* 9; Andrew Drummond, ‘Govt boby knew of people smuggling plan’ (20 Sep 2010) *Sydney Morning Herald*.

<sup>55</sup> *R v Pulendren* [2010] NSWDC 335 at [16], [17] per Tupman DCJ; Andrew Drummond, ‘Govt boby knew of people smuggling plan’ (20 Sep 2010) *Sydney Morning Herald*.

<sup>56</sup> *R v Pulendren* [2010] NSWDC 335 at [23] per Tupman DCJ.

<sup>57</sup> *R v Pulendren* [2010] NSWDC 335 at [26] per Tupman DCJ.

<sup>58</sup> Jodie Minus, ‘Refugee admits smuggling role’ (26 Nov 2009) *The Australian* 9.

November 24, 2009 and pleaded guilty to organizing the unauthorised entry of five or more non-citizens.<sup>59</sup> He was refused bail and taken into custody.

He was sentenced September 20, 2010. In her sentencing remarks, Judge Tupman said that Mr Pulendren ‘knew that what he was doing was against the law [...]’. He went ahead nonetheless, no doubt for financial gain.’<sup>60</sup> In determining the sentence for Mr Pulendren, Her Honour further remarked:

The discretion to consider all of the circumstances for this particular offence, unlike the vast bulk of equally serious Commonwealth offences, is curtailed by the mandatory sentencing provisions. The legislature has decreed that in all cases, full-time custody is appropriate and has set a minimum period. There is nothing in these mandatory sentencing provisions however, it seems to me, to suggest that these amounts or lengths are meant to operate as a starting point, applying only to the least serious factual cases, committed by an offender with the most impressive subjective case.<sup>61</sup>

Commenting on the purpose of s 232A *Migration Act 1958* (Cth) and its application to the case of Mr Pulendren, she noted:

It is clear that the sentence must carry a message of general deterrence. It is not however, it seems to me, helpful to allow the sentencing process to become involved in the political debate about these issues, and with respect it seems to me that from time to time this has occurred. It may be, and I accept is the case, that in some cases people smuggling raises issues of national security and the potential for that is certainly clear, thus the seriousness of the offence. However, in this case, that does not seem to be the situation, as is evidenced by the fact that just on ninety-three per cent of those on board this boat were granted protection visas as asylum seekers and thus, in effect, residency in Australia.

It may also be that sentences for offences under this section should send a message that those who wish to migrate to Australia should do so in an orderly fashion, although the evidence that this is in fact possible from certain parts of the world is far from clear.

This offence clearly does affect the issue of sovereignty but even that consideration would appear to ignore the very large number of asylum seekers who come through initially lawful means by air but who then later seek asylum status.<sup>62</sup>

Justice Tupman sentenced Mr Pulendren to five years and six months prison, with a non-parole period of three years, but remarked that:

Had it not been for the mandatory sentencing provisions, I would have set a non-parole period of two years and nine months, that is, fifty per cent of the overall term. Although the normal division for Commonwealth offences a non-parole period between sixty to sixty-six per cent of the overall term, it seems to me that for a variety of reasons a lower non-parole period would have been appropriate.<sup>63</sup>

### III FRAMEWORKS & TYPOLOGIES

#### A Offender Typology

Academic analyses of migrant smuggling – in Australia and abroad – have not produced conclusive findings about the size and structure of the networks and individuals involved in

<sup>59</sup> *R v Pulendren* [2010] NSWDC 335 at [1]; Jodie Minus, ‘Refugee admits smuggling role’ (26 Nov 2009) *The Australian* 9.

<sup>60</sup> Andrew Drummond, ‘Govt boby knew of people smuggling plan’ (20 Sep 2010) *Sydney Morning Herald*.

<sup>61</sup> *R v Pulendren* [2010] NSWDC 335 at [4] per Tupman DCJ.

<sup>62</sup> *R v Pulendren* [2010] NSWDC 335 at [46]–[48] per Tupman DCJ.

<sup>63</sup> *R v Pulendren* [2010] NSWDC 335 at [69] per Tupman DCJ.

this activity.<sup>64</sup> The debate has largely ‘focused on whether there is evidence that large international crime organizations are involved in smuggling of migrants, or whether this activity is largely run by networks with familial, friendship or ethnic commonalities.’<sup>65</sup>

There seems to be little to no evidence to suggest that transnational, cartel-like syndicates are involved in the smuggling of migrants to Australia. Instead, there is reason to believe that those smuggled to Australia encounter multiple actors and networks along their journey and that the various legs travelled between countries of origin, transit, and destination are rarely, if ever, organized by a single criminal organization. This observation is supported by the Australian Crime Commission (ACC), which recently noted that:

Increasing numbers of irregular maritime arrivals are dealing with multiple agents from different supply chains to stage their travel to Australia. This indicates that organizers may be reducing the scope of their operations to focus on moving irregular maritime arrivals between key staging points, rather than guaranteeing their delivery from source countries to Australia.<sup>66</sup>

Several studies have classified actors and their respective roles in the migrant smuggling process. Summarising these studies, UNODC has developed the following typology of perpetrators.

Figure 1: Typology of actors and roles in migrant smuggling networks<sup>67</sup>

Actor	Role
Organizer	Organizers have overall responsibility for the smuggling process, or particular stages. They typically arrange personnel, routes, modes of transport and accommodation. Organizers have many contacts. Traditionally, it has been extremely difficult to gather sufficient evidence against such individuals as they operate through employees. Organizers usually make significant profits.
Recruiter	Recruiters initiate contact between smugglers and smuggler migrants, sometimes by advertising smuggling services or by informing migrants how to contact particular smugglers.
Transporter/guide	Transporters or guides execute the operational part of smuggling operations by guiding and accompanying migrants en route in one or more countries and carrying out border crossings. These individuals often have local knowledge and play a crucial role with respect to individual migrants’ successful border crossing. They are in a position to mistreat or exploit the people they are guiding.
Spotters, drivers, messengers, enforcers	These individuals perform ad hoc roles during the smuggling process. They may provide intelligence about law enforcement, enable communication between other actors or use threatened or actual violence to control migrants.
Service providers and suppliers	Service providers provide work with smugglers to provide goods and services throughout the process. Examples include the provision of false documents, vessels, accommodation and cashier or money laundering services.
Others	Other actors involved in the process may include corrupt government officials, who take bribes to enable the smuggling of migrants. Individuals who contribute to the process by providing legal services (such as taxi drivers) for the normal fee can also be said to enable the smuggling process.

<sup>64</sup> See, for example, Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region* (Martinus Nijhoff, 2003) 113–115.

<sup>65</sup> UNODC, *Smuggling of Migrants: A Global Review and Annotated Bibliography* (2011); see also, Matthias Neske, ‘Human Smuggling to and through Germany’ (2006) 44(4) *International Migration* 121, 123.

<sup>66</sup> Australian Crime Commission, *Organized Crime in Australia* (2011) 65.

<sup>67</sup> UNODC, *Smuggling of Migrants: A Global Review and Annotated Bibliography* (2011) 69–71; see also, G Vermeulen et al, *Organized Crime Involvement in Trafficking in Persons and Smuggling of Migrants* (Maklu, 2010) 53.

While these examples of possible roles within migrant smuggling networks are illustrative, it is arguable that using such tools to describe migrant smuggling to Australia results in forcing the phenomenon into preconceived moulds. It is obvious that numerous actors are involved in smuggling migrants to Australia, however, the specific details of their actions and responsibilities within the process remain inherently unclear. As the earlier case examples illustrate, often actors will perform a number of roles, which overlap the categories listed above; this has the potential to render such typologies arbitrary and misleading.

The Australian experience defies strict categorisations. While persons involved in migrant smuggling may be distinguished between those who are in Australia and those who are not, simple distinctions begin to blur when persons on board the smuggling vessels are separated from those that do not join the journey. Matters become even more complex once attempts are made to distinguish passengers from crew, from organizers, agents, and others involved in the enterprise. In many, if not most cases individuals fall into more than one category and few instances follow a common template. The available case law also demonstrates that there is no ‘people smuggling business model’ that explains the organizational and operational patterns of migrant smuggling to Australia – and that would justify the type of countermeasures proposed by former and current Australian Governments.

### B Fees & Profits

The fees paid by smuggled migrants and the profits generated by migrant smugglers play a vital role in understanding the *modi operandi* of migrant smuggling and in assessing the organized crime nexus. UNODC, however, notes that it ‘is almost impossible to find accurate figures about the cost of smuggling of migrants and there is a general lack of rigour when collecting such figures.’<sup>68</sup> This is also true for migrant smuggling to Australia.

The amount paid by smuggled migrants will necessarily vary depending on a number of factors, such as: the distance and complexity of the voyage, mode(s) of transport, the presence of law enforcement and border controls in source, transit and destination countries, the number of people being moved and whether the process is intended to end in overt or covert arrival.<sup>69</sup>

The majority of sources suggest fees for migrant smuggling to Australia ‘range between US\$ 5,000 and US\$ 16,000.’<sup>70</sup> In October 2010, DIAC, the Department of Immigration and Citizenship, reported that:

Based on data obtained through the entry interviews of 5209 irregular maritime arrivals (IMAs) in the 2009-10 financial year, average amounts that IMAs paid to people smugglers were:

21% paid between \$0 and \$5000

30% paid between \$5001 and \$10,000

37% paid between \$10,001 and \$15,000

12% paid \$15,001 or more.<sup>71</sup>

<sup>68</sup> UNODC, *Smuggling of Migrants: A Global Review and Annotated Bibliography* (2011) 85.

<sup>69</sup> Petros, ‘The Costs of Human Smuggling and Trafficking’ (2005) 31 *Global Migration Perspectives* <[www.gcim.org/en/ir\\_gmp.html](http://www.gcim.org/en/ir_gmp.html)> 12; See also, UNODC, *Smuggling of Migrants: A Global Review and Annotated Bibliography* (2011) 85; and UNODC, *Toolkit to Combat Smuggling of Migrants*, Tool 2 Actors and Processes in the Smuggling of Migrants’ (UNODC, July 2010) 29.

<sup>70</sup> Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Immigration and Citizenship Portfolio (Additional Budget Estimates Hearing), Parliament of Australia, Canberra, 21 February 2011, Answer to Question on Notice No. 141.



References made to migrant smuggling fees during sentencing proceedings for offences under the *Migration Act* largely confirm these figures. Each case involved travel by sea via Indonesia and amounts of US\$ 10,000-12,000, AU\$ 6,000, US\$ 8,000-10,000, US\$ 2,000 and US\$ 10,000–20,000 per person were reportedly paid.<sup>72</sup>

The fees, and range of fees, identified above should be treated with caution. The usefulness of these figures, disconnected from the specific circumstances of the case, is questionable. However, it is evident that smugglers charge significant amounts of money for their services. There is a need for further, and more rigorous, empirical research into the fees paid by migrants smuggled to Australia by sea. The Australian Government is in a position to collect more detailed data on smuggling fees based on entry interviews. Future research should collate and categorise the amounts reportedly paid according to a number of determinative factors, including: source and transit countries, routes, modes of transport, nationality of migrants, date of travel and number of migrants per vessel.

## IV LAW

### A *International Law*

#### 1 *Evolution*

Negotiations for the elaboration of a treaty to target migrant smuggling were sparked amidst growing global concerns about irregular migration in aftermath of the collapse of the COMECON block of nations and the Soviet Union. Undoubtedly, migration as a social and historical phenomenon and migrant smuggling itself were not – and never have been – novel issues. But this movement of people from Eastern Europe, the Middle East, and parts of Africa into Western Europe, and from Mexico and other parts of Latin America into the United States coincided with fears about the rise transnational organized crime. In the post-Cold War era of the 1990s, perceived foreign threats such as ‘drug traffickers, illegal immigrants and the clandestine activities of organized crime syndicates’ came to be seen as presenting a legitimate and increasing global challenge, warranting a concerted international response.<sup>73</sup>

At that time, several commentators described ‘a worrying trend’ emerging in which a ‘growing reliance on smugglers, traffickers and other intermediaries’<sup>74</sup> was promoting a new scale of smuggling where the profits, sophistication and degree of transnational activity and

<sup>71</sup> Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Immigration and Citizenship Portfolio (Supplementary Budget Estimates Hearing), Parliament of Australia, Canberra, 19 October 2010, Answer to Question on Notice No. 61.

<sup>72</sup> Transcript of Proceedings, *R v Amos Ndolo* (Sentencing Remarks) (District Court of Western Australia, 221 of 2009, O'Brien DCJ, 3 April 2009); Transcript of Proceedings, *R v Edward Nafi* (Sentence) (Supreme Court of the Northern Territory, SCC21102367, Kelly J, 19 May 2011); Transcript of Proceedings, *R v Mohamed Tahir and Beny* (Sentence) (Supreme Court of the Northern Territory, SCC 20918263 and 20918261, Mildren J, 28 October 2009); Transcript of Proceedings, *R v Sarif Dopong, Ahmed Yusuf and Nuryadin Hasan* (Sentence) (Supreme Court of the Northern Territory, SCC 21041382, 21041385 and 21041380, Barr J, 25 January 2011); Transcript of Proceedings, *R v Yan Pandu, Daud Mau, Usman Kia and Titus Loban* (Sentencing Remarks) (District Court of Western Australia, 95 of 2010, Eaton DCJ, 21 May 2010).

<sup>73</sup> Peter Andreas, 'The Rise of the American Crimefare State' (1997) *World Policy Journal* 37, 37; Andree Kirchener and Lorenzo Schiano di Pepe, 'International Attempts to Conclude a Convention to Combat Illegal Migration' (1998) 10 *International Journal of Refugee Law* 662, 668.

<sup>74</sup> Susan F Martin, 'Global migration trends and asylum' (2001) (Working Paper 41) *The Journal of Humanitarian Assistance - New Issues in Refugee Research*



cooperation transnational were reaching unprecedented heights.<sup>75</sup> Rhetoric of the era deemed transnational organized crime a ‘monolithic threat’ that rivalled the scale and the threat of communism.<sup>76</sup>

Specifically, proposals for an international treaty which explicitly criminalised migrant smuggling were motivated by the paradigm shift in numbers of asylum claims.<sup>77</sup> ‘Migrant smuggling’ had entered into ‘mainstream political concern’, being identified as a ‘security threat by the preferred destination countries in Europe, North America, and Australia’.<sup>78</sup> The issue of globalisation was also a major motivation for developing international cooperation to combat transnational organized crime as it was seen to pose a direct threat to sovereignty of nation states.<sup>79</sup> Thus the elaboration of the United Nations *Convention against Transnational Organized Crime* and its *Protocol against the Smuggling of Migrants by Land, Air, and Sea*<sup>80</sup> inevitably reflects this novel sense of urgency to implement an adequate global framework to combat transnational organized crime – of which migrant smuggling is as one form.

## 2 *Protocol against the Smuggling of Migrants by Land, Air, and Sea*

In codifying the criminality of migrant smuggling as a distinct offence, the *Migrant Smuggling Protocol* emerged as a ‘novel and unique’ framework<sup>81</sup> that achieved ‘rapid ratification’.<sup>82</sup>

The Protocol has its roots in two proposals by the Italian and Austrian Governments dating back to 1997. Concerned about the safety of smuggled migrants arriving by boat, the Government of Italy proposed to the International Maritime Organization that a framework be developed to sanction those who place the lives and safety of smuggled migrants at risk.<sup>83</sup> Austria, on the other hand, frustrated about the lack of cooperation from eastern European countries, addressed its proposal for an international treaty to combat migrant smuggling to the UN General Assembly.<sup>84</sup>

<sup>75</sup> Susan F Martin, ‘Global migration trends and asylum’ (2001) (Working Paper 41) *The Journal of Humanitarian Assistance – New Issues in Refugee Research*; Guymon, ‘International Legal Mechanisms for Combating Transnational Organized Crime: The Need for a Multilateral Convention’ (2000) (18) *Berkeley Journal of International Law* 52, 53.

<sup>76</sup> R.T Naylor citing Sen. John Kerry in « From Cold War to Crime War : The Search for a New National Security Threat » *Transnational Organized Crime (winter)* 1995; ‘The Rise of American Crimefare State’ 37.

<sup>77</sup> Anne Gallagher, ‘Human Rights and Human Trafficking: Quagmire or firm ground? A response to James Hathaway’ (2009) (49) *Virginia Journal of International Law* 789, 790.

<sup>78</sup> Anne Gallagher, ‘Human Rights and Human Trafficking: Quagmire or firm ground? A response to James Hathaway’ (2009) (49) *Virginia Journal of International Law* 789, 790.

<sup>79</sup> John and Sharone Backers Morrison, ‘Refugees - ‘The dark-side of globalisation’: the criminalisation of refugees’ (2001) 43(1) *Race & Class* 71.

<sup>80</sup> Hereinafter *Migrant Smuggling Protocol*.

<sup>81</sup> UNODC *Legislative Guide for the Implementation of the Protocol Against the Smuggling of Migrants by Land, Sea and Air* (2004) 340.

<sup>82</sup> UN, ‘Globalization and interdependence: International migration and development’ (United Nations General Assembly, 2010) 12.

<sup>83</sup> IMO Legal Committee, *Proposed Multilateral Convention to Combat Illegal Migration by Sea*, IMO Doc LEG 76/11/1 (1 Aug 1997); see further, Andreas Schloenhardt, *Migrant Smuggling: Illegal Immigration and Organized Crime in Australia and the Asia Pacific Region* (Martinus Nijhoff, 2003) 347–348.

<sup>84</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); see further, Andreas Schloenhardt, *Migrant Smuggling: Illegal Immigration and Organized Crime in Australia and the Asia Pacific Region* (Martinus Nijhoff, 2003) 349–350.

Upon signing the *Migrant Smuggling Protocol*, States agree to criminalise the smuggling of migrants, related offences, and participatory and/or preliminary conduct such as attempting and facilitating these offences.<sup>85</sup> The prevention and suppression of smuggling of migrants by sea is specifically addressed in Chapter II of the Protocol.<sup>86</sup> The Protocol also requires adoption of general prevention measures aimed at improving border control capabilities, information gathering, and law enforcement.<sup>87</sup> Signatories are also encouraged to adopt appropriate measures to preserve and protect the rights of smuggled migrants.<sup>88</sup> The Protocol further provides a basic framework for the return of smuggled migrants.<sup>89</sup>

The *Migrant Smuggling Protocol* is not an independent treaty. Rather, complimentary regimes of jurisdiction are established by the critical link between the Protocol and its ‘parent’, the *Convention against Transnational Organized Crime*.<sup>90</sup> Indeed, the final text of the *Migrant Smuggling Protocol* is silent on jurisdiction on the grounds that its Article 1(2) ensures that the provisions of the Convention apply, mutatis mutandis, to the Protocol.<sup>91</sup> To become party to the Protocol, a State must also be (or become) a party to the *Convention against Transnational Organized Crime*.<sup>92</sup>

Article 4 of the *Migrant Smuggling Protocol* provides the scope of the Protocol’s application:

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

The Convention and Protocol thus construct migrant smuggling one form of organized crime. The same system has been created for trafficking in persons<sup>93</sup> and to the trafficking in firearms and ammunition.<sup>94</sup> On a strict and narrow reading, the Protocol has no application to migrant smuggling that is not facilitated by an organized criminal group;<sup>95</sup> international law does not cover instances of migrant smuggling that fall outside the transnational organized crime paradigm.

The definition of migrant smuggling in the Protocol further consolidates the organized crime nexus. Under Article 3(a) of the *Migrant Smuggling Protocol*

<sup>85</sup> See Article 6(1), (2) (a) – (c) of the *Migrant Smuggling Protocol*.

<sup>86</sup> See Articles 7–9 of the *Migrant Smuggling Protocol*.

<sup>87</sup> See Articles 10–14 of the *Migrant Smuggling Protocol*.

<sup>88</sup> See Articles 5, 16 and 19 of the *Migrant Smuggling Protocol*.

<sup>89</sup> See Article 18 of the *Migrant Smuggling Protocol*.

<sup>90</sup> See Article 37 of the Convention and Article 1 of the *Migrant Smuggling Protocol*. Article 37 also applies to the other supplementary Protocols to the Convention.

<sup>91</sup> David McClean, *Transnational Organized Crime: A Commentary on the UN Convention and its Protocols* (Oxford University Press, 2007) 394.

<sup>92</sup> UNODC *Legislative Guide for the Implementation of the Protocol Against the Smuggling of Migrants by Land, Sea and Air* (2004) 329.

<sup>93</sup> Article 4 *Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children*.

<sup>94</sup> Article 4(1) *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition*.

<sup>95</sup> Under Article 2(a) of the *Convention against Transnational Organized Crime* “‘organized criminal group’ shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit’.

“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 the State Party of which the person is not a national or a permanent resident.

The crucial element here is the ‘financial or other material benefit’ which reflects the profit motive that is characteristic of organized crime generally. A *Model Law* developed to facilitate the domestic implementation of the *Migrant Smuggling Protocol* notes that:

The reference in this definition to “a financial or material benefit” was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provide support to migrants for humanitarian reasons or on the basis of close family ties.<sup>96</sup>

In summary, international law clearly constructs and defines migrant smuggling as a form of organized crime. Specifically, international law has no application in situations that appear to be migrant smuggling but that lack the constituent purpose of financial or other material benefit.

This conceptualisation of migrant smuggling is largely explained historically, as the *Migrant Smuggling Protocol* was predominantly motivated by a desire to universally criminalise this phenomenon. This was first expressed in the proposal by the Austrian Government to the UN General Assembly for an *International Convention against the Smuggling of Illegal Migrants*.<sup>97</sup> Critically, a letter introducing this proposal identified the ‘efforts of the international community to cope in an efficient manner with the phenomenon of smuggling of migrants for criminal purposes’ were significantly impeded by the current international regime or lack thereof.<sup>98</sup> To resolve this ‘lacuna’, the Austrian initiative of 1997 sought to ‘define the smuggling of illegal migrants as a transnational crime and [...] establish a treaty obligation for States to exercise their jurisdiction over persons committing and abetting such a crime’.<sup>99</sup> The risks to human life and the exploitation of vulnerable people created by migrant smuggling, on the other hand, do not feature prominently in international law. The protection of migrants is, at best, a secondary goal of the Protocol – and was originally only intended to focus on the protection of migrants smuggled by sea.<sup>100</sup>

## B Australian Law

Australian law reinforces the international concept of migrant smuggling in some respects, and significantly departs from it in others. In Australia, legislation on migrant smuggling is by and large limited to a series of so-called ‘people smuggling’ offences in the *Migration Act*

<sup>96</sup> UNODC, *Model Law against the Smuggling of Migrants* (UNODC, 2010) 13.

<sup>97</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). See also Andree Kirchner & Lorenzo Schiano di Pepe, “International Attempts to Conclude a Convention to Combat Illegal Migration” (1998) 10(4) *International Journal of Refugee Law* 662 at 670-671; Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region* (2003) 349–350.

<sup>98</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) para 3.

<sup>99</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) para 3.

<sup>100</sup> See IMO Legal Committee, *Proposed Multilateral Convention to Combat Illegal Migration by Sea*, IMO Doc LEG 76/11/1 (1 Aug 1997); Andree Kirchner & Lorenzo Schiano di Pepe, “International Attempts to Conclude a Convention to Combat Illegal Migration” (1998) 10(4) *International Journal of Refugee Law* 662 at 664-667; Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region* (Martinus Nijhoff, 2003) 348, 350.

1958 (Cth) which, since 2002, are duplicated in almost identical form in the *Criminal Code* (Cth).

### 1 *Migration Act 1958 (Cth)*

Until 1999, offences pertaining to illegal immigration under Australia's *Migration Act 1958* (Cth) provided relatively minor penalties for the bringing of undocumented migrants and stowaways to Australia, and for the harbouring of prohibited immigrants and deportees.

The arrival of four vessels along Australia's east coast in 1999, which carried several dozen undocumented Chinese nationals, led to legislative changes aimed specifically at combatting the organized bringing of 'unlawful non-citizens' to Australia. The *Migration Legislation Amendment Act (No 1) 1999* (Cth)<sup>101</sup> raised the penalties for immigration offences under ss 229–234 *Migration Act 1958* (Cth) and created new, aggravated offences for people smuggling – a term not used at that time. Further amendments followed with the enactment of the *Border Protection Legislation Amendment Act 1999* (Cth).<sup>102</sup>

Section 232A was added to the *Migration Act* to specifically target persons who organize and facilitate the bringing of groups of undocumented migrants to Australia, particularly by sea.<sup>103</sup> The section created an offence for organizing or facilitating the smuggling of five or more persons who do not hold a valid visa to enter Australia as required by s 42(1) *Migration Act 1958* (Cth). The offence – and its equivalent today – attracts a penalty of 20 years imprisonment and a mandatory penalty of five years for first time offenders.<sup>104</sup> If less than five persons are brought into Australia, organizers and facilitators can be held responsible under s 233(1)(a).<sup>105</sup>

Minor amendments aside, these offences remained unchanged until the introduction of the *Anti-People Smuggling and Other Measures Act 2010* (Cth) which sought to 'strengthen the Commonwealth's anti-people smuggling legislative framework by ensuring an appropriate range of offences are available to target and deter people smuggling activity and by creating greater harmonisation across Commonwealth legislation.'<sup>106</sup> This Act repealed the offences relating to migrant smuggling, and substituted them with the current ss 233A to 233D. These sections now replicate the offences in the *Criminal Code* (Cth) discussed further below.

The basic offence of 'people smuggling' is now set out in s 233A *Migration Act 1958* (Cth). It provides:

- (1) A person (the *first person*) commits an offence if:
  - (a) the first person organizes or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of another person (the *second person*); and

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<sup>101</sup> No 89 of 1999.

<sup>102</sup> *Border Protection Legislation Amendment Act 1999* (Cth), No 160 of 1999. See further, Andreas Schloenhardt, *Migrant Smuggling* (2003) 165.

<sup>103</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>104</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>105</sup> See further, Andreas Schloenhardt, *Migrant Smuggling* (2003) 169–170.

<sup>106</sup> Explanatory Memorandum, Anti-People Smuggling and Other Measure Bill 2010 (Cth), 1.

- (b) the second person is a non-citizen; and
- (c) the second person had, or has, no lawful right to come to Australia.

...

- (2) Absolute liability applies to paragraph (1)(b).

...

- (3) For the purposes of this Act, an offence against subsection (1) is to be known as the offence of people smuggling.

In addition to this basic offence, the *Migration Act* also provides for several aggravated offences of people smuggling<sup>107</sup> and criminalises supporting the offence of people smuggling<sup>108</sup>. Penalties for people smuggling offences range from imprisonment for 10 years or a AU\$ 110,000 fine or both to imprisonment for 20 years and a AU\$ 220,000 fine or both. A number of the offences contain mandatory minimum sentences and non-parole periods.<sup>109</sup>

Section 233A is, effectively, the Australian definition of migrant smuggling. There are, however, two important points of difference: (1) Australian law, unlike the *Migrant Smuggling Protocol*, does not require a profit motive, and (2) that liability is extended to 'proposed entry into Australia'.<sup>110</sup> These points are discussed further in the next Section.

## 2 Criminal Code (Cth)

The *Migrant Smuggling Protocol*, which Australia signed in December 2001, led to the introduction of a parallel set of migrant smuggling offences into Division 73 the *Criminal Code* (Cth).<sup>111</sup>

Despite the structure of the offences in the *Criminal Code* (Cth) and the *Migration Act 1958* (Cth) being the same, there are some key differences. The *Migration Act* only applies if a person facilitates the bringing or coming of a non-citizen to Australia<sup>112</sup> while the *Criminal Code* also captures smuggling through or out of Australia.<sup>113</sup> Furthermore, the jurisdictional requirement stipulated by the *Criminal Code* also limits the offences to an 'Australian citizen or a resident of Australia'.<sup>114</sup> The legislation also differs where the *Migration Act* provides for mandatory minimum sentences,<sup>115</sup> if an accused is found guilty under sections 233B or 233C.

One of the results of the *Anti-People Smuggling and Other Measures Act 2010* (Cth) was the removal of the requirement that an accused has obtained (or is intending to obtain) a profit from the migrant smuggling operation. This requirement was a physical element of the *Criminal Code* offences since their introduction in 2002 and, as mentioned earlier, is a key characteristic of migrant smuggling in international law. The element of profit, financial or otherwise, has been identified as the central link between migrant smuggling and organized

<sup>107</sup> *Migration Act 1958* (Cth) ss 233B Aggravated offence of people smuggling (exploitation, or danger of death or serious harm etc.); 233C Aggravated offence of people smuggling (at least 5 people).

<sup>108</sup> *Migration Act 1958* (Cth) s 233D.

<sup>109</sup> *Migration Act 1958* (Cth) s236B.

<sup>110</sup> See, Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Sydney, 16 April 2010, L&C 2 (Associate Professor Ben Saul).

<sup>111</sup> Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Bill 2002 (Cth).

<sup>112</sup> *Migration Act 1958* (Cth) s 233A (1)(a). Emphasis added.

<sup>113</sup> Crimes Legislation Amendment (People Smuggling, Firearms Trafficking And Other Measures) Bill 2002 (Cth).

<sup>114</sup> *Criminal Code 1995* (Cth) s 73.4.

<sup>115</sup> *Migration Act 1958* (Cth) s 236B.



crime, and, perhaps, the most heinous part of migrant smuggling, characterising migrant smugglers as unscrupulous criminals seeking to financially exploit vulnerable persons who are in dire need of rescue and often face grave threats of persecution, violence, discrimination, or other forms of human rights violations.

The removal of the requirement of profit or other material benefit is seen by many as a critical flaw in Australia's migrant smuggling offences. The lack of any profit motive means that the legislation also targets those who act with the best humanitarian intentions. A paper prepared by Australian Lawyers for Human Rights, a network of legal practitioners, noted that the laws would enable the successful prosecution of Moses and Oskar Schindler for their legendary actions.<sup>116</sup> The Australian offences also create liability for persons coming to rescue smuggled migrants, especially on the high seas, as was the case of the MV Tampa, a Norwegian cargo vessel that rescued 438 asylum seekers from a sinking boat between Indonesia and Australia and then sought to enter Australian waters to bring the people to safety. Despite being widely lauded for his actions,<sup>117</sup> Mr Arne Rinnan, the captain of the Tampa could now have face up to 20 years imprisonment.<sup>118</sup>

Some Senators have recognised this flaw, noting that the law:

treats Good Samaritans the same as “for profit” people smugglers, which means that under the bill, the nuns from the Sound of Music could be thrown into jail. This is one of the unintended consequences of this bill that is plainly ridiculous.<sup>119</sup>

The legislative history of the *Anti-People Smuggling and Other Measures Act 2010* (Cth) sheds no further light into what motivated the removal of the profit element. Arguments that recent changes to Australia's migrant smuggling offences have ‘strengthened’ efforts to combat this crime focus exclusively on the fact that the offences now cast a much wider than before.

### 3 Observations and Interpretations

While international law places migrant smuggling squarely within the field of organized crime, Australian law has shifted into other directions. The basic offence of ‘people smuggling’ in Australia is concerned with an immigration, i.e. and administrative matter. People smuggling in Australia is, first and foremost, an offence designed to circumvent immigration controls. Criminalising those who assist others in entering Australia without a valid visa seeks to ensure compliance with Australia's universal visa requirement. The basic people smuggling offence in and by itself is not concerned with the exploitation of others, the plight of refugees and others seeking asylum and safety abroad, or with criminal organizations profiting from the provision of illegal services.

Australia's laws are capable of – and possibly designed to – create liability for those who may smuggle migrants for humanitarian reasons. But liability does not end there. The offences may also criminalise migrants who help each other to flee to Australia. The Immigration Advice and Rights Centre, a non-government organisation, cites a recent example where a wife and child came to Australia by boat, but the husband remained in Malaysia to re-pay the debt owed to smugglers. It was submitted that the husband could be liable for the offence of supporting people smuggling and, should he seek to join his family in Australia, that his entry

<sup>116</sup> Australian Lawyers for Human Rights (2010) *People Smugglers: saviours or criminals? A report on 16 convicted people smugglers in Australia between 2001 and 2006*, 15-16.

<sup>117</sup> Arne Rinnan was awarded the Norwegian Medal of Honour, the AFRAS Gold Medal from the Association for Rescue at Sea and was named Captain of the Year in 2001 by the Nautical Institute and the shipping journal Lloyd's List.

<sup>118</sup> *Migration Act 1958* (Cth) s 233C.

<sup>119</sup> Commonwealth, *Parliamentary Debates*, Senate, 13 May 2010, (Senator Nick Xenophon).



could be denied on character grounds.<sup>120</sup> Holding smuggled migrants, and/or their relatives, liable in this way violates the principle of non-criminalisation in the *Migrant Smuggling Protocol* which reflects identical principles in international refugee law.

In this context, it should be noted that, in many, if not most, cases, far from feeling exploited by the smugglers who brought them to Australia, the passengers are grateful for the services they obtained. In the case of *R v Bumiamin*, for example, the passengers gave money to the offender and his son once they saw the Australian surveillance aircraft which detected them flying overhead, because they believed that he and his son deserved it for taking them to Australia.<sup>121</sup> In *R v Nafi*, Justice Kelly questioned the morally culpability of offenders in these cases: '[I]t cannot be said that, apart from the existence of that law, there is any moral culpability in helping to transport willing passengers to a place where they want to go.'<sup>122</sup>

On September 12, 2011 a review of the amendments passed in 2010 was successfully referred to the Victorian Court of Appeal. During a criminal trial involving charges of people smuggling, counsel for the accused argued that their clients gained no profit and acted purely for humanitarian reasons when they brought groups of asylum-seekers by boat from Indonesia to Australia where they were all later granted protection visas. A similar argument is currently under consideration by the Northern Territory Supreme Court.

After extensive and thorough assessment of their claims, the vast majority of persons smuggled to Australia by boat have been – and continue to be – recognised as genuine refugees. Yet, in order for a people smuggling prosecution to succeed, it must be shown that the person or persons brought to Australia had no lawful right to come. It is difficult to reconcile this element of the offences with Australia's international obligations though most juries seem to have been satisfied that persons seeking asylum in Australia are non-citizens with no lawful right to come here. Prosecutors have also consistently argued that refugees do not have a right to arrive in Australia. Many judges and scholars see this differently.

## V CONCLUSIONS

After over a decade of scare campaigns about 'floods of asylum seekers', of attacks on so-called queue-jumpers, of demonising migrant smugglers, and drastic measures that turned around boats and detained thousands of genuine refugees on remote islands for months and years, Australia is left with a lot of empty rhetoric, criticism by the international community and human rights organizations, and with no clue about how to prevent the smuggling of migrants to its shores. The nexus, if any, between migrant smuggling and organized crime also remains poorly understood.

Initiatives taken by the current and former Australian Governments to combat migrant smuggling have thus far only resulted in the gaoling of hundreds of poor Indonesian fishermen; those with little or no involvement in migrant smuggling organizations beyond being recruited to undertake the final journey to Australia. Their gaoling has come at

<sup>120</sup> Immigration and Advice Centre, Submission No 7 to Senate Legal and Constitutional Committee, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 16 April 2010, 3.

<sup>121</sup> *R v Bumiamin* (Unreported, Supreme Court of the Northern Territory, Southwood J, 21 January 2011) 3. See also Transcript of Proceedings, *R v Dokeng* (Unreported, Supreme Court of the Northern Territory, SCC 21032177, Kelly J, 2 December 2010) 3, where it appeared that the offenders were kind to the passengers and, in recognition of that kindness, the passengers gave the offenders money that they no longer needed after they left Indonesia.

<sup>122</sup> Transcript of Proceedings, *R v Nafi* (Unreported, Supreme Court of the Northern Territory, SCC 21102367, Kelly J, 19 May 2011) 5.

considerable financial and human cost but has had no measurable impact on preventing the often dangerous journeys.

As a result of budgetary measures announced in May 2011 – in particular, the decision to cut AU\$ 11 million in special-purpose funding for people smuggling cases – the Commonwealth Director of Public Prosecutions (CDPP) predicted that the number of prosecutions undertaken by his office next year would decline.<sup>123</sup> Given that ‘[t]he CDPP is unable to absorb the costs of people smuggling matters and to continue to prosecute all other matters’, the 282 people smuggling cases currently before the courts may well be among those prosecutions which will be dropped, especially given their cost and apparent lack of deterrent effect. But it seems the Australian Government, rather than the CDPP, will take responsibility for which matters are prosecuted within the new budgetary constraints.<sup>124</sup> If the Government intends to continue prosecuting people smugglers, it may need to shift its focus.

It is also prudent to ask whether the prosecutions are succeeding in deterring migrant smuggling ventures. Deterrence is based on the idea that if other individuals – like the offenders themselves – hear of their punishment, they will refuse to take people to Australia for money. Given the typical profile of those offenders who have been apprehended in Australian territory, it is easy to see why many judges have frequently questioned the potential of strong mandatory penalties to deter similar individuals from undertaking these ventures. While the offenders’ families and villages may become aware of the offenders’ gaoling in Australia the figures show that the current offences and tough penalties have had no deterrent impact whatsoever.<sup>125</sup>

A further emerging theme is the frustration sentencing judges have expressed with the minimum penalties they are forced by statute to impose on migrant smugglers. As the case of Mr Pulendren illustrates, many judges expressly stated that as a result of the mandatory minimum greater than appropriate sentences have been imposed in many – if not most – cases. Some judges even included calls for mercy to the Australian Government in their sentencing remarks.

### *The Way Forward*

If prosecutions are to have any impact on migrants smuggling ventures to Australia, the focus must shift from prosecuting those at the end of the chain to those higher up in the organizations who arrange for, and profit from, these ventures. The time, money and effort involved in prosecuting and gaoling hundreds of Indonesian fishermen would be better invested in investigating, extraditing, and prosecuting the organizers who put them to the task in the first place.

<sup>123</sup> Paul Maley, ‘Cuts to Curb Smuggler Prosecutions: DPP’ (17 May 2011) *The Australian*, <<http://www.theaustralian.com.au/business/legal-affairs/cuts-to-curb-smuggler-prosecutions-dpp/story-e6frg97x-1226057067055>>. The CDPP’s overall budget has been cut from \$96 million in 2010-11 to \$89 million in 2011-12, and is expected to fall further to \$79 million in 2014-15.

<sup>124</sup> Nicholas Perpitch, ‘Cuts to People smuggling Prosecutions’ (12 May 2011) *The Australian*, <<http://www.theaustralian.com.au/national-affairs/budgets/cuts-to-people-smuggling-prosecutions/story-fn8gflnz-1226054256174>>.

<sup>125</sup> Transcript of Proceedings, *R v Pandu & Ors* (Unreported, District Court of Western Australia, 95/2010, Eaton DCJ, 21 May 2010) 15; Transcript of Proceedings, *R v Dopong & Ors* (Unreported, Supreme Court of the Northern Territory, SCC 21041382/21041385/21041380, Barr J, 25 January 2011) 5; Transcript of Proceedings, *R v Hasanusi* (Unreported, District Court of Western Australia, 1365/2009, Fenbury DCJ, 21 April 2010) 3.

Some of the burden of prosecuting people smuggling offenders could be lifted from Australian authorities if greater diplomatic efforts were made to encourage other countries in the region to investigate and prosecute organizers under their own laws. Now that Indonesia has introduced laws against migrant smuggling, the task for Australia will be to emphasize the need for enforcement. Preventing the gaoling of hundreds of Indonesian citizens in Australia may provide an incentive.

The retention and extension of the mandatory minimum sentence to a broader range of circumstances for people smuggling offences by a government who is – rightly or wrongly – popularly blamed for the surge in migrant smuggling ventures since September 2008, seems to be motivated by the same purposes that led to the introduction of mandatory minimum sentences by the former Government in 2001: to appear ‘tough’ on migrant smugglers. That is wrong. Judges’ sentencing discretions should not be curtailed for political purposes. In the context of migrant smuggling, it has required courts to impose heavier sentences than would be proper according to the circumstances. The mandatory minimum provision should be removed so that offenders can be sentenced appropriately and according to basic principles of fairness and justice.

Finally, it has to be remembered that migrant smuggling involves human beings, vulnerable people who are often desperate to reach our shores in fear of persecution and in hope of a better future. Australia is a Signatory to the *Convention relating to the Status of Refugees* and, with that signature, agreed to assess the claims of those who land on our shores. Over the last decade, Australian Governments have tried a myriad of avenues to avoid our obligations by placing asylum-seekers in mandatory detention for months and years, by excising the place where most asylum-seekers arrive, limiting protection to temporary visas, turning boats back to Indonesia, and by handballing our obligations to other, less developed countries. Indeed, offshore processing would be no different to withdrawing our signature from the *Refugee Convention* – a point that neither side of politics has been honest about.

It is shameful that this country has made no progress whatsoever in developing meaningful, durable, and humane solutions to an issue that continues to make front-page news most days of the week.