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***Don't Jail the Ferryman:  
the Sentencing of Indonesian  
People Movers***

***by***

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## **Don't Jail the Ferryman ... The Sentencing of Indonesian "People Movers".**

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### **1. People Movers?**

While working in the Darwin office of NT Legal Aid, representing Indonesian crewmembers charged with offences commonly known as "people smuggling" or "people trafficking", I was keen to try and find a term to describe my clients which lacked the pejorative ring and sinister drug importation overtones of those terms. People movers was the best I could do. In fairness, I figured that if the Department of Immigration and Multicultural Affairs could call the gulags for asylum seekers at Port Headland and Woomera "Immigration Reception and Processing Centres", it was open season for egregious euphemisms.

Pejorative tags have always had a special role in immigration discourse. Current favourites include Illegals, Queue-jumpers, Forum Shoppers and Economic Refugees - code words more palatable than old-fashioned racist slurs. Our political leaders have been enjoying the opportunity to talk tough, and have been doing plenty of huffing and puffing about the waves, floods and tides of these people threatening to swamp us. And as with many complex social problems, the blunt tool of the criminal law has again been wielded.

Clearly, illegal migration is a serious problem for governments the world over. As a business, it is a big and potentially nasty one that makes money out of exploiting people fleeing hardship, and often persecution.<sup>2</sup> It is, however, worth reflecting on exactly what offences involving boat arrivals from Indonesia entail, as distinct from other forms of illegal migration, and this paper seeks to dispel some of the myths surrounding these particular offences.

The role of the criminal justice system in tackling the problem of illegal migration is considered, and the sentencing process, in particular the role of general deterrence, is analysed. It is suggested that if sentences are able to deter others from participating in these particular enterprises, this is not likely to reduce unlawful arrivals to Australia. Rather it is more likely to result in a change in the way in which entry is achieved - through greater sophistication and subjecting passengers to greater danger.

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<sup>2</sup> For an analysis of the business of people trafficking, see Andreas Schloenhardt, "The Business of Migration: Organised Crime and Illegal Migration in Australia and the Asia-Pacific Region" (1999) 21 (2) *Adel LR*, and *Organised Crime and the Business of Migrant Trafficking: An Economic Analysis*, Paper presented at the Australian Institute of Criminology, Canberra, 2 November 1999, [www.aic.gov.au/conferences/occasional/schloenhardt.html](http://www.aic.gov.au/conferences/occasional/schloenhardt.html). For an analysis of national security issues, see Graycar and Tailby, "People Smuggling: National Security Implications", Paper presented at the Australian Defence College, Canberra, 14 August 2000, [www.aic.gov.au/conferences/other/smuggling.html](http://www.aic.gov.au/conferences/other/smuggling.html).

The relevance in sentencing of Australia's obligations under the Refugees Convention is also considered. It remains a contradiction that, pursuant to the terms of the Convention, it is not an offence for asylum-seekers to come to Australia without authority, but it is an offence to assist someone to do so.

## 2. The voyage

The vast majority of people entering Australia unlawfully by boat from Indonesia are from Iraq and Afghanistan. According to their statements to police, they pay on average between US\$5,000 and \$10,000 for their journey. They generally fly into Jakarta, sometimes on false passports. Organisers or their middlemen arrange for their transport to one of the eastern ports: typically a port in one of islands in the Nusa Tenggara. Rote is a favourite, but boats have also arrived from Java, Bali, Lombok, Flores, Alor and Bima.

At the chosen port of departure a crew is cobbled together, often at short notice. Most crewmembers will have some experience on a boat, or even better with some experience in getting to Ashmore Reef, but this is not essential. Some crews are given only simple directions: go to Rote and then head due south. Some crewmembers instruct that they have never been to sea as the crew of a vessel before. Younger members of the crew are often there simply to cook and bail water.

The boats used are generally old fishing vessels for the smaller enterprises, and old cargo ships for the bigger ones. Most of them are unseaworthy by Australian standards, and all are cramped and ill-equipped to take passengers. The smallest boats carry less than 10 passengers, but most recent arrivals are over 50 people. The largest arrival in Australia was a boat of 353 passengers. The vessels are loaded up with enough fuel and barely enough supplies for a one-way journey, and some do not make it.

Ashmore Reef is a coral reef surrounding a number of lagoons and three small, sandy and uninhabited islands. It is approximately 80 nautical miles from Indonesia, and about 200 nautical miles from mainland Australia. It is a traditional fishing ground for fishermen mainly from Rote, Sulawesi and Madura, and still used as a stop-off for traditional fishermen operating in adjacent waters (this being allowed pursuant to a Memorandum of Understanding between Australia and Indonesia that gives certain limited rights to traditional Indonesian fishermen)<sup>3</sup>. The Ashmore Reef Nature Reserve was declared in 1983, and the Reef has been the home for many years to a boat stationed there to monitor and protect the area, generally under the banner of Environment Australia, but also with powers of the Australian Customs Service and the Department of Immigration and Multicultural Affairs.

It is a convenient place for boats to travel and be apprehended. While there are some cases of passengers being dropped off on Ashmore Reef with some limited food and

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<sup>3</sup> For a detailed treatment of Ashmore Reef and a history of Indonesian use of the area see Dan Dwyer, "Fishers of people: from reef fishing to refugees, the changing role of Indonesian sailors and their *perahu* at Ashmore Reef, north Australia", in *Altered States: Material Culture Transformations in the Arafura Region*, Frederickson and Walters (eds) NTU Press, Darwin, 2001.

water to last until the Australian authorities arrive, this is not the general course of events. If the boat is not apprehended before reaching its destination, the crew will generally approach whatever Australian authorities are present to hand themselves over, or simply wait in the lagoon at Ashmore Reef until someone arrives. I have heard indirectly that some crews receive a small down-payment, with the balance to be paid to their families when news comes back that they have all been detained – thus avoiding drop-offs. This would seem to be plausible.

Few boats from Indonesia make any attempt to reach the mainland directly. Of those that do wash up on the shores of Western Australia from time to time, most are lost, and have simply missed Ashmore Reef.

Needless to say, the organisers don't get their feet wet, and the crews get paid as little as they will accept. I frequently queried the low amounts that crewmembers claimed to have been paid, and was generally given the simple answer that they were not in any position to bargain – the offer was “take it or leave it”. On an average journey, crewmembers instructed me that they received about 1 million rupiah each (approximately A\$200).

### **3. Other forms of Illegal Migration**

While there is a tendency for “illegal migration” to be talked about as a general phenomenon, it takes many forms: from people trafficked against their will to those fleeing persecution. It is therefore important to distinguish these offences from others involving unlawful entry, and contrast the numbers arriving by boat from Indonesia with those in Australia by other illegal means.

#### **a. Entry by Air & Overstayers**

A significant proportion of illegal migration to Australia takes the form of air arrivals. Department of Immigration and Multicultural Affairs (DIMA) statistics<sup>4</sup> indicate that in financial year 1998-99, 3,027 people were identified as having arrived in Australia unlawfully. 2,106 (69%) were people refused entry at airports and 921 (31%) arrived on boats.

For 1999-2000 5869 people were recorded as having arrived in Australia unlawfully. This comprised 1695 (29%) unlawful air arrivals, and 4174 (71%) boat arrivals. In both periods, Iraq was the largest source country for both boat and air arrivals.

From a dramatic peak in 1999, the number of boat arrivals has fallen. 86 boats arrived in the 1999 calendar year, 51 in 2000, and 17 boats arrived before the end of April 2001. For the reasons developed below, this is unlikely to be the result of deterrent sentences putting an end to the movement of people into Australia from Indonesia.

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<sup>4</sup> All the figures in this section are taken from the DIMA website as of May 2001: <http://www.dima.gov.au>, and the DIMA publication *Protecting the Border: Immigration Compliance*, Commonwealth of Australia 2001, an electronic version of which is also available through the website.

It is worth noting that the figures for unlawful air arrivals are people who are refused entry at the airport - they are only the people who are *detected* entering Australia unlawfully. It is impossible to tell how many people are actually able to enter Australia unlawfully by air. By comparison, cases of unlawful entry by boat from Indonesia involve no element of deception, such as the use of false passports or visas to gain entry. Therefore Indonesian boat arrivals do not result in people passing unchecked into Australia. It is, however, a feature of the boat arrivals that many passengers come with no documentation, which, DIMA argues, makes difficult the task of assessing their bona fides and any security risk they may pose.

By far the largest group of people in Australia unlawfully is those who arrive lawfully and then overstay their visa. At 30 June 2000 the number of overstayers was 58,748. This can be compared with the total number of boat arrivals since 1989 - 11,435 at the time of writing. It is a great irony that the largest group of people in Australia unlawfully comprises overstayers who have come from the same place as those first people to arrive in Australia without passports or visas authorising their entry - they are from the UK.<sup>5</sup>

While many overstayers are people who simply extend their holiday by a short period before returning home voluntarily (28.6% of people had overstayed their visa by less than one year), 28% of people within this group overstayed their visa by over 9 years.

#### **b. Other arrivals by sea**

Vessels entering Australia via Ashmore Reef are also quite distinct from the sophisticated operations, generally involving boats from China, which gained great notoriety after some much-publicised arrivals on beaches in NSW and QLD. These types of enterprises were cited in parliamentary debate as exemplifying the offences that were being targeted by legislative changes in 1999 (outlined below). The Minister for Immigration and Multicultural Affairs, Philip Ruddock gave the following example in a second reading speech:

Earlier this year 'snakeheads'—as they are called in China—or people smugglers, from Fujian, conspired to bring a boatload of would-be illegal entrants to Australia. The Fujian group were attempting a totally clandestine entry, attempting to avoid detection and to disappear into the Australian community.

The vessels involved in the Fujian operation were steel-hulled and equipped with modern navigational and communications equipment. These ships travelled, by a circuitous route, through international waters, across the top of Papua New Guinea, before targeting Australia's eastern coast. They avoided contact with those neighbouring countries whose officials might alert Australia of their imminent arrival.

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<sup>5</sup>I can't claim this to be an original observation, or a new one. See, for example, Dennis Shanahan, "Most illegals profit from plane sailing", *The Australian* 25 November 1999. For the refugee side of this equation see Jonathon Hunyor, "Warra Warra: Refugees and Protection Obligations in Relaxed and Comfortable Australia", 2000, v.25 *Alternative Law Journal* 227.

The snakeheads coordinated the route taken by the vessel and arranged for accomplices onshore in Australia to receive and conceal the ships' human cargo. Their plans were to exploit the limitations of our current laws. The 'mother ship' was to wait in international waters. Accomplices in Australia were to travel out to the vessel in high-powered ocean-going speed boats that had been specifically purchased for this purpose.

Those accomplices were to ferry the passengers to Australia under cover of darkness. The mother ship, relieved of its human cargo, would then sail back to China without being detected or arrested.<sup>6</sup>

The sort of offences that come before the courts in Darwin and Broome are significantly different. These are simple boats with often no navigational equipment, or only a compass and sometimes a map. On only one occasion that I can recall did the boat have a GPS system. There is no attempt at achieving covert entry – the crews present themselves and their passengers for apprehension. They are therefore not "people smuggling" enterprises (although DIMA continues to use this terminology). There is no established contact with the mainland and no aim at attempting direct entry into the community. The inevitability of apprehension that characterises these offences significantly reduces "national security" implications that may attach to unlawful migration.

Despite concerns that these offences constitute a "serious violation of Australia's sovereignty"<sup>7</sup>, a significant measure of control is in fact maintained over the immigration process by the fact that the asylum seekers present themselves to Australian authorities. Despite the general absence of documentation held by the passengers, they do not possess bogus documentation, and their claims to refugee status can be properly assessed.

Arrivals at a point far from the mainland also pose far less a quarantine risk than do other boat arrivals. Thus, although nobody really wants to admit it, the Ashmore Reef drop-off point has distinct advantages, and if there is any place in Australia that might warrant the title of "Immigration Reception and Processing Centre" it could be the Customs/Environment Australia boat that sits at Ashmore Reef waiting for another arrival.

### c. Organised Crime

The spectre of organised crime is often raised in connection with illegal migration, and "organised crime" of some description is almost certainly involved at some level in the facilitation of the majority of unlawful entries to Australia by boat from Indonesia. There is, however, no evidence that the crewmembers on boats arriving from Indonesia are any more than opportunistic participants in the enterprises – although the Crown has observed in submissions that they may have thereby "made themselves available to organised

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<sup>6</sup> Phillip Ruddock MP, Minister for Immigration and Multicultural Affairs, *Border Protection Legislation Amendment Bill 1999*, Second Reading Speech, Hansard, 22 September 1999.

<sup>7</sup> This is the wording of the standard submissions used by the Crown in these cases in Darwin. See also the second reading speech of the Minister for Immigration and Multicultural Affairs, above note 6.

crime". There is no suggestion that the crewmembers have any links to, or contact with, organised crime in Australia.

There is also no credible suggestion that the passengers involved are members of organised crime or that they will have any involvement with organised crime in Australia either voluntarily or involuntarily. Of course, this did not stop one Member of Parliament portraying all illegal migration in the following extraordinary terms:

[The passengers] face a life of servitude at the hands of organised crime gangs. Their servitude can also take other forms, such as loan sharking, protection rackets, money laundering operations, importation and distribution of narcotics, kidnapping, fraud, vice, extortion, contract killing, slave trading and the tragic practice of child prostitution.<sup>8</sup>

If there is evidence to support this nasty piece of xenophobia in relation to other forms of illegal migration, there is none available to support it in relation to the recent boat arrivals. We can note, for example DIMA's treatment of the issue of trafficking of women to work in the sex industry which states that "Women trafficked into Australia to work in the sex industry arrive by air ..."<sup>9</sup>

It remains a legitimate concern of the government to screen people arriving unlawfully to ensure that they do not pose any security risk to Australia. We may wonder, however, why members of organised crime would seek to arrive in Australia by such a precarious means as a boat from Indonesia, a mode of entry that ensures their apprehension and detention for many months while their bona fides are scrutinised.

In an interesting development two recently arrived Iraqi asylum seekers have also been charged with facilitating unlawful entry. These are the first cases of their kind. At the time of writing, their matters are still before the court in Western Australia and information about their case is limited. I am told that the Crown alleges that the men were involved in the organisation of another voyage, as well as the voyage that brought them to Australia. There is no evidence available as to the level and nature of their involvement.

#### 4. The Law

One obvious response to a problem such as illegal migration is to punish those involved in the facilitation of illegal entry, and in 1999 Commonwealth Parliament passed laws to increase penalties available to the courts in sentencing for such offences; *Migration Legislation Amendment Act (No.1) 1999 (Cth)*, commencing 22 July 1999 and *Border*

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<sup>8</sup> Chris Pyne MP, *Border Protection Amendment Legislation Bill 1999*, Second Reading Speech, Hansard, 21 October 1999. The member chose to make these claims after citing the increase in numbers in boat arrivals.

<sup>9</sup> *Protecting the Border*, above note 4, p.69. Note also the actual numbers of unlawful non-citizens located working in the sex industry in Australia – 190 people in 1999-00 (p.114). There are no figures in the publication of the number of people involved in any of the other pursuits in Mr Pyne's list.

*Protection Legislation Amendment Act (No.1) 1999*, commencing 16 December 1999. Other changes contained in the amending legislation were aimed at increasing the powers of law enforcement agencies to pursue, board and detain vessels, and detain, search and question persons suspected of involvement in breaches of the Migration Act.

While much of the attention at the time of these legislative changes was on the organisers of these enterprises<sup>10</sup>, the brunt of the laws has been felt by the Indonesian crews of the boats bringing unlawful non-citizens. There are presently two offences under the *Migration Act 1958 (Cth)* with which Indonesian crews are charged, in the alternative<sup>11</sup>:

Section 233(1)(a) makes it an offence for a person to take any part in the bringing or coming to Australia of a non-citizen under circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of the *Migration Act*. The maximum penalty was increased in the July 1999 amendments to imprisonment for 10 years, or a fine of \$110,000, or both.

Section 232A (introduced in July 1999 and amended in December 1999) provides that a person who organises or facilitates the bringing or coming to Australia or the entry or proposed entry into Australia of a group of 5 or more people, reckless as to whether the people had or have a lawful right to come to Australia, is guilty of an offence. The maximum penalty is 20 years imprisonment, or a fine of \$220,000, or both.

## 5. Sentencing

### a. Number of Passengers & Role on the Vessel

The single most important factor in determining the length of the sentence imposed has been the number of passengers on board the vessel. Sentences have ranged between 16 months suspended after 10 months (for a vessel with 8 passengers crewed by youthful offenders) to 7 years with a non-parole period of 3 years 6 months (for the captain of a vessel of 228 passengers).<sup>12</sup>

Typically the captain of a vessel has received a longer sentence than the other crew. I have argued against this approach in cases where the captain and crew were all paid the same amount and were recruited at the same time by a third party. It is often the case that the designation of captain reflects little more than a person's seniority and the fact that they are put forward as the spokesperson for the group when they are apprehended. If

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<sup>10</sup> See, for example Peter Slipper MP, *Migration Legislation Amendment Bill (No.1) 1999*, Second Reading Speech, Hansard, 30 June 1999: "This penalty recognises that organised crime groups are involved in people trafficking, and the penalty reflects the seriousness of the offence. These new provisions are primarily aimed at those who profit from people trafficking—those who, for a fee, organise individuals or groups to enter Australia illegally".

<sup>11</sup> Only s.233(1)(a) applies where there are less than 5 passengers. It is the practice of the Crown to accept a plea to s.232A in satisfaction of the indictment.

<sup>12</sup> This was appealed unsuccessfully; see *Cita v The Queen* [2001] WASCA 5, unreported WA Supreme Court, 24 January 2001. The Captain of a vessel with 353 passengers, the largest to have arrived, was sentenced in Darwin to 7 years imprisonment, to be released after 3 years.



there is some distinction in the roles played on the vessel it is often minimal and it is unrealistic to suggest that a person designated the captain on such an unsophisticated voyage has necessarily taken "responsibility" for the vessel.

These boats are not ordinary commercial vessels, and the voyages are desperate affairs for all on board - it is all hands on deck. Ultimately the passengers can hardly expect that the Captain will do more than his very best to take care of himself, and the Captain is not holding himself out as holding any qualifications. The court has been prepared to accept this submission in some cases involving smaller vessels and young crews.

#### **b. Seaworthiness**

Another contentious issue is that of seaworthiness. The view has been taken by some Judges that the captain of an unseaworthy vessel should receive a heavier penalty for exposing the passengers to greater risk. While this increased penalty has generally been avoided on the basis that the prosecution are unable to prove beyond reasonable doubt that the captain was aware of the state of the vessel until it was too late, I maintain that this is a flawed and unrealistic approach for a number of reasons.

The captains generally have no role in preparation for the voyage and procurement of the vessel, and they are therefore not responsible for its condition in that sense. The general state of Indonesian vessels operating in the area is also relevant - Australians see a leaky boat where many Indonesian fishermen simply see a boat. More fundamentally, however, I argue that it is wrong to suggest that the captain and crew are exposing anybody to any risk. While the organisers may expose all on board to danger by caring little for the condition of the vessel, this is not something for which the crewmembers should properly be held criminally responsible. Rather, both the passengers and the crew accept the risks of the voyage when they set foot on the vessel. The crew makes no undertakings to the passengers as to the safety of the voyage, and the passengers are aware that the trip is an illegal and hazardous one.

#### **c. Juveniles**

From a very young age Indonesian boys work on boats, albeit in minor roles such as cooking and bailing water. Their presence on vessels bringing unlawful non-citizens to Australia is therefore no surprise, and juveniles are regularly apprehended - indeed a number have returned on subsequent voyages. The courts have largely taken the view that they are living the life of adults and should be treated accordingly, although afforded some leniency.

Until relatively recently, juveniles involved in unlawful boat arrivals were dealt with by way of a good behaviour bond or a fully suspended period of detention<sup>13</sup>. This practice was not followed in Western Australian where courts commenced handing down

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<sup>13</sup> Crown appeals against the inadequacy of a suspended sentence of 6 months detention in 2 cases involving juveniles, and cross-appeals by the juveniles, were dismissed by the Supreme Court; Sidik and Najar, Unreported, 8 October 1999, Mildren J.

sentences of 12 – 18 months detention, to be released after 6-9 months for first offenders. Darwin courts have been convinced by the Crown to follow suit, although they have been less enthusiastic, settling on a tariff in the order of 8 months detention to be released after 2 months. Prosecutorial discretion has generally meant that boys 15 and younger are not prosecuted.

These offences cannot be said to fall within the category of serious offences that would ordinarily warrant a term of detention for a first offence by a juvenile – such penalty generally being reserved for offences such as murder and rape. However, general deterrence has been relied upon as the justification for not following ordinary principles for sentencing juveniles. In particular, the Crown has suggested that a perception of lenient treatment of juveniles may encourage their recruitment in the knowledge that they will receive no penalty. In fact, there is no evidence that this trend has materialised – most crews do not contain any juveniles.<sup>14</sup>

#### d. General Deterrence

General deterrence looms large in these matters, and the courts have consistently held that it needs to be given weight over other sentencing objectives, such as rehabilitation. What remains questionable, however, is how meaningful general deterrence really is in these sorts of cases.

##### (i) Supply

Indonesia is a country of over 200 million people. Its economic woes are well known, and the islands of the Nusa Tenggara region are some of the poorest in the Archipelago. It is unclear how well publicised the fate of the crewmembers is within Indonesia – they are not blessed with the *NT News*. While within the small fishing communities of Rote it is hard to believe that anyone is not well aware of the consequences of participation in these voyages, it is equally hard to believe that in the circumstances there will ever be a lack of willing volunteers. Trite as it may sound, there is no deterrence for poverty, and it may be that time in an Australian jail will become viewed as a rite of passage for young Indonesian fishermen, many of whom are accustomed to leaving their families and travelling the archipelago in search of opportunities.

The Crown has, however, argued that the courts must make the offences uneconomic - the penalties must be such that jail is not simply an occupational hazard, or even one of the occupational requirements, with the “salary” being commensurate with the anticipated sentence. From the defence perspective, this is hard to counter, and is probably the best the court can hope to achieve. Indeed, commentators such as Andreas

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<sup>14</sup> While there is no evidence that juveniles are recruited specifically because they will receive a lenient penalty, there is a regular practise amongst crewmembers of understating their age so as to be juveniles. This has presented another problem of determining age in the absence of identification. A procedure of using wrist x-rays to estimate age has been used, and despite many attempts to prevent the practise by defence counsel in the NT and WA on various grounds, the technique is still relied upon by the Crown and generally accepted by the courts as reliable evidence of age.

Schloenhardt suggest that tackling the economics of illegal migration is getting to the heart of the problem – illegal migration is a business and “legislation and law enforcement should be directed against the profitable market conditions of organised crime”.<sup>15</sup>

Ironically, however, it is arguable that Australian laws in relation to maritime and fishing boundaries have contributed to the circumstances that make fishermen vulnerable to exploitation by organisers of illegal migration and more likely to become involved in these enterprises. In 1979, Australia declared a 200 nautical mile Australian Fishing Zone, claiming exclusive rights over traditional Indonesian fishing grounds in waters closer to Indonesia than Australia. Prosecutions that have followed have inevitably resulted in the forfeiture of vessels, and it has been estimated that in 1996 approximately half of the fishing fleet from Papela, Rote, was apprehended and destroyed for illegal fishing<sup>16</sup>. Dan Dwyer has observed:

The historical developments of Australian expansion into the region and the resultant marginalisation of indigenous fishers had created a pool of highly skilled boatmen with intimate knowledge of the area but no way of legally utilising this skill...

The deliberate actions of an Australian Government and bureaucracy, bent on claiming and exploiting the petrochemical and other resources of the Australian continental shelf, have ignored the plight of these indigenous fishers and the environment which once sustained them. The exclusion from the long held fishing grounds and the limiting of their area of operation to an economically unviable reservation... has... encouraged their desperate illegal activities. Failure to consider more inclusive solutions has created an expensive border management problem for Australian authorities.<sup>17</sup>

## (ii) Demand

Illegal migration will always exist, and there will always be a demand for the services of people movers. As DIMA concedes, “[p]eople smuggling will continue to occur while large numbers of people are living in poverty or economic uncertainty or where there is limited scope for legal migration”.<sup>18</sup> The huge numbers of people forced to flee persecution in their home country each year is also something that is unlikely to ever change, and such movements will never be met by the limited humanitarian migration policies of other countries, including Australia. And just as there is no deterrent for

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<sup>15</sup> Schloenhardt, above note 2.

<sup>16</sup> See Dan Dwyer, above note 3, at p.40.

<sup>17</sup> Dan Dwyer, above n.3, at pp. 50-51. See also Ruth Balint, “The Last Frontier. Australia’s maritime territories and the policing of Indonesian fishermen”, in *Journal of Australian Studies*, ‘New Talents’, 1999, and specifically in relation to the impact of the MOU see Dr Natasha Stacey, “Crossing borders: Implications of the Memorandum of Understanding on Bajo fishing activities in northern Australian waters”, paper presented to symposium *Understanding the Cultural and Natural Heritage Values and Management Challenges of the Ashmore Region*, 4-6 April 2001, Darwin.

<sup>18</sup> DIMA, *Protecting the Border*, above note 4, p.15.

poverty, the Jesuit Refugee Service has noted: "No deterrent will stop [people] from attempting to exercise their legally recognised right to seek asylum".<sup>19</sup>

Not only is Australia not alone in facing the problem of illegal migration, but indeed it currently bears little of the weight of the international movement of people. Numbers of people illegally in Australia and seeking asylum can be contrasted with those in the United Kingdom where, in the 12 months to 30 June 2000, 29,000 illegal entrants were identified.<sup>20</sup> This compares to 5,869 unauthorised arrivals to Australia in that period.<sup>21</sup> In the same period, the UK received 77,700 applications for asylum – 48,700 from people already there. There is an estimated backlog of 36,390 cases involving applications for refugee status.

As noted above, in recent years people from Iraq have made up the largest number of unlawful arrivals by both air and sea, suggesting that people will use whatever means is at their disposal to seek asylum. In all of these circumstances, it seems fair to assume that if the penalties meted out to the Indonesia crews involved in the latest unlawful arrivals have any impact, it will be to alter the modus operandi to avoid apprehension, rather than significantly diminishing the numbers of people coming to Australia unlawfully.

Avoiding apprehension might be achieved by increased sophistication, as has been demonstrated by the Chinese boat arrivals discussed above. It might also be achieved by simple means such as travelling with two boats, one of which accompanies the main vessel for the majority of the voyage and then takes the crew back to Indonesia, leaving the passengers to complete the journey. In one recent case, a crewmember left the vessel at night after its arrival at Ashmore Reef, returning home on a fishing vessel that had been in the area. There have been other similar cases. We might also expect an increase in the practise of abandoning the passengers on one of the small islands of Ashmore Reef. These various measures can be expected to increase the costs of detection and apprehension of persons involved.

A likely result of changes in the modus operandi is an increase in the dangers faced by passengers. The appalling treatment of people seeking unlawful entry into Europe, including claims of people being forced to jump off ships into the waters off the coast of Italy, are well publicised, and we can only hope that such trends will not be replicated off our shores.

The fact that the numbers of people arriving unlawfully has fallen significantly since 1999 may, of course, indicate that increased penalties have had their desired deterrent effect. However, Australia's experience with boat arrivals suggests otherwise. History shows that particular geopolitical events trigger the movement of a particular group people - most recently, people fleeing Iraq and Afghanistan have made up the

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<sup>19</sup> Jesuit Refugee Service submission to the Minister for Immigration and Multicultural Affairs, quoted in Richard McGregor, "Riding the Refugee Wave", *The Australian*, November 20-21 1999, p.21.

<sup>20</sup> Figures from the British Home Office, <http://www.ind.homeoffice.gov.uk/rds/pdfs/hosb2200.pdf>

<sup>21</sup> DIMA, "Protecting the Border", above n.4, p.16.

overwhelming majority of the people arriving. As times change, so do the trends. DIMA observes:

Australia's experience of the "boat people" phenomenon commenced in the late 1970s with the arrival of Vietnamese asylum seekers who travelled in fishing boats from Vietnam. There was then a lull until 1989 when arrivals sailed from the Kompong Som region of Cambodia to Singapore and then to Indonesia and Australia, taking between 20 to 30 days, aboard boats of about 20 metres in length. Generally later arrivals came from locations in the southern provinces of the PRC, such as Beihai, Nanning and Qinzhou in Guanxi Province and from locations in the Guangdong Province. These boats took around 30 days to sail to Australia. Boats also came from Galang, a former refugee processing centre in Indonesia and in May 1995 a boat containing 18 East Timorese arrived.

While Australia's tough criminal laws, inhumane treatment of asylum seekers and much publicised diplomatic efforts abroad may all have played some role in reducing the numbers of boat arrivals, it is also possible, and in my view more likely, that the "tide" has simply gone out.

#### e. Asylum Seekers

Of recent arrivals, the majority of passengers have been granted temporary protection visas, recognising a legitimate claim to refugee status. Of those from Iraq and Afghanistan, the acceptance rate has been estimated at times to be 90%.<sup>22</sup>

It remains an apparent contradiction of Australia's migration laws that, pursuant to the Refugees Convention, it is not an offence for an asylum-seeker to come to Australia without authority, while it is an offence to assist someone else to do so.<sup>23</sup> The courts have, furthermore, rejected the submission that the fact that the passengers are asylum seekers, or have already been granted refugee visas prior to sentencing, is a factor in mitigation.<sup>24</sup> As a result, while many Indonesians remain in jail serving their sentences, their passengers are granted visas and released from detention.

It is generally observed by the Crown and accepted by the court that the crewmembers become involved in the enterprises for financial gain, not humanitarian motives – indeed, the crewmembers of the vessels are often unaware as to the purpose of the passengers for coming to Australia. However it is interesting to consider the case of a drug courier who doesn't know precisely what illegal substance is contained in a package secreted in their luggage – we can expect that the person will receive a different penalty if the contents are heroin, as opposed to cannabis, as opposed to kava.

<sup>22</sup> See Adele Horin, "Most Iraqis, Afghans win right to stay", *The Sydney Morning Herald*, 18 April 2001

<sup>23</sup> Article 31 of the 1951 United Nations Convention Relating to the Status of Refugees, to which Australia is a party, states that 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... enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence".

<sup>24</sup> See, for example *Cita v The Queen* [2001] WASCA 5, unreported WA Supreme Court, 24 January 2001.

The Crown has also observed that the Migration Act aims to regulate the entry of persons into Australia, including the entry of refugees under a structured refugee programme. These offences enable people to "jump immigration queues" and thereby prevent other refugees, who may be waiting in refugee camps outside their home country and may have equally, or more worthy claims, from being granted a visa to come to Australia. The courts have accepted this argument.

I have maintained that the fact that the passengers are asylum seekers is, at the very least, relevant in distinguishing these cases from others involving entry of persons for some nefarious purpose - of which, according to some politicians, there are many: child prostitution, contract killings etc., etc. My submission has not attracted much interest.

## **6. Conclusion**

From a global perspective, there is no "answer" to the problem of illegal migration - desperate people will always flee and end up somewhere. Australia obviously has the right to protect its borders, and punishment of people movers will always be an element in this. In doing so, however, we can avoid fanning the flames of xenophobia, and allowing impoverished opportunists to bear the brunt of political posturing.

The courts in Darwin have avoided, by and large, the hysteria displayed in some quarters and this restraint is perhaps a consequence of living on a frontier with a consciousness of our proximity to Asia - a fleet of Indonesian boats detained in Darwin harbour is no longer a novelty. Nevertheless, it remains important to recognise and remember the limited role that the criminal law can hope to play in what is a complex and inevitable problem. We can jail the ferryman as often as we like, but his passengers will still get to the other side.