

Trafficking in Migrants: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region

ANDREAS SCHLOENHARDT

*Associate Lecturer, Queensland University of Technology Law School,
Brisbane, Australia*

The subject of this article is the phenomenon commonly known as trafficking in migrants or people smuggling—the criminal offence of transporting migrants across international borders. This article explores the phenomenon of migrant trafficking and analyses migrant trafficking in the light of recent developments at domestic, regional and international levels. This article examines national legislation dealing with migrant trafficking in criminal law and immigration law in Australia and fifteen countries of the Asia Pacific region: Brunei, Cambodia, People's Republic of China and its Special Administrative Regions Hong Kong and Macau, Fiji, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Papua New Guinea, Singapore, Solomon Islands, Taiwan, Thailand, Vanuatu and Vietnam. Moreover, international and regional efforts to combat illegal migration and organized crime are outlined and analysed.

Terminology and Scope

Definitions of trafficking in migrants vary widely. Terms such as 'human trafficking', 'people smuggling' or 'alien smuggling' often intend to describe the same thing, but in many cases definitions remain unclear, imprecise, overlap with other terms, or describe different phenomena [1].

The most widely accepted definition of migrant trafficking is that developed by the International Organisation for Migration (IOM). For IOM, trafficking in migrants can be said to exist if the following conditions are met: an international border is crossed; departure, transit, entry and/or stay are illegal; the migratory movement is voluntary; one or more traffickers are involved in the movement of migrants; and the traffickers profit from such activities (IOM 1994: 2–3; id 1997: 1–2).

Essentially, these five criteria fall within two categories that constitute the two major elements of migrant trafficking: (1) illegal migration (voluntary illegal border crossing), and (2) organized crime (involvement of criminal

traffickers/migrant smugglers who want to make profit). The first part of this article seeks to define more precisely the sub-components of migrant trafficking in order to provide a working basis for the following parts. Unless stated otherwise, the terms migrant trafficking and migrant smuggling are used interchangeably.

Illegal migration

The very nature of the phenomenon of trafficking in migrants is that people cross international borders illegally. Migrants move on a temporary, long-term or permanent basis from one country to another, sometimes through a third country. Migration is illegal if any segment of this movement is against the law of one or more of the countries involved. For example, the migrant may completely avoid contact with border and immigration authorities, may present fraudulent documents, or make false statements as to the circumstances and intentions of the border crossing. In other cases, migration may simply be illegal because the country of departure has placed obstacles on the free emigration of its citizens or restricted travel to certain specified countries.

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

The key factor that renders migrant trafficking different to other forms of trafficking in human beings, such as, for example, trafficking in women and trafficking in children, is the fact that the migratory movement involved must be voluntary. To fall within the definition of migrant trafficking, the initial decision to make use of and pay traffickers for the services they offer must be based on a free decision. Trafficking in migrants does not refer to situations where people migrate under coercion, by force, deception, or where they are sold or kidnapped (Morrison 2000: 66–67; Savona *et al.* 1998: 71; Siron & van Baeveghern 1999: 18).

Organized crime

The second element of trafficking in migrants is organized crime. Trafficking organizations operate as intermediaries in the illegal movement of people from sending to destination country offering one or more of the following services: facilitation of illegal exit, transit and/or entry; provision of fraudulent, stolen or altered travel and identity documentation; provision of information on border control and coastal surveillance, immigration control and asylum procedures; coaching of migrants as to how deceive immigration and law enforcement authorities; arrangement of accommodation in departure, transit

and destination points, and/or of (illegal) employment in the destination country.

Finally, the trafficking organization involved has to profit from the illegal transportation of migrants. This requirement excludes complimentary services provided by relatives or friends of the migrant from the definition of migrant trafficking [2].

Illegal Migration

The Asia Pacific region is home to more than one-third of the world population and is also source, transit point and destination for increasing numbers of migrants. Over the centuries, migratory movements have formed many nations in the region. Almost every country has witnessed unregulated migration flows, and viewed with varying degrees of alarm and anxiety the arrival of unauthorized migrants by land, air and sea.

In order to explain the emergence of migrant trafficking, and for the elaboration of appropriate measures against it, it is essential to look more closely at the causes and circumstances of illegal migration. The purpose of this second part of this article is to explore and analyse the principal concepts and causes of illegal migration and the characteristics of illegal migration in the Asia Pacific region.

Migration as a result of political, demographic, socioeconomic and environmental factors: the concept of push and pull

The decision to migrate can be explained as a rational choice by people who evaluate the costs and benefits of relocating. In the case of international migration, the factors that occur in the home country are called 'push factors' if they force migrants to leave or if they arouse the wish to emigrate. Factors in countries abroad that are perceived by migrants as beneficial are called 'pull factors'. This push and pull consideration of migration regards the initial decision to relocate as the result of a rational process: migrants choose to leave for a foreign country if existing or perceived benefits of migration outweigh financial (for example wages and expenses) and non-financial (such as personal freedom) costs, including the risks and—in the case of illegal migration and trafficking—sanctions and penalties that the movement may entail (Castles 1998: 20–21; Ghosh 1998: 34–70, 73; Loescher 1993: 16–17; Smith 1997: 13). These key factors that push and/or pull migrants can be differentiated between (1) political; (2) demographic; (3) socioeconomic and (4) environmental factors.

Political factors. In many countries of the world repressive governments and their policies have acted as push factors, causing large numbers of people to

emigrate. Where people feel politically suppressed, and where generalised political violence appears to be the rule rather than the exception, people often see 'the only way out' in illegal migration and in the services that migrant traffickers offer (Hathaway 1991: 105; Martin & Widgren 1996: 13).

The conditions that lead people to emigrate and seek protection in another country vary over time, and may include, for example, political and religious conflicts leading to the persecution of selected groups, generalized repression, warfare and other military conflicts. Race and ethnicity [3], religion [4], nationality [5], gender, sexual orientation [6], political opinion [7], institutional and administrative deficiencies [8], war and armed conflict [9] have been identified as the major political factors that have caused migratory flows in the Asia Pacific region.

Demographic push factors. Population growth is a reason for many people in developing countries to emigrate, especially if it combines with political factors, economic stagnation and/or environmental degradation. It has been estimated that 95 percent of the anticipated growth of the world population in the next thirty years will be occurring in developing countries where children are still considered a security for the survival of the elderly [10].

Especially in the least developed countries of the region, rapid population growth often comes together with decreasing national economies, creating large numbers of unemployed. This demographic development has to be seen in contrast with developing nations whose populations are decreasing. Once this demographic imbalance between countries is communicated to overpopulated communities, and once awareness of different levels of living standards in these countries has grown, people migrate in order to find better opportunities abroad (Martin & Widgren 1996: 10–12).

Rural–urban migration has emerged as another key aspect of migration in the region. The enormous growth of urban centers and industries has been a long-standing incentive for people from rural areas to move to the city in the hope to find employment and higher wages. In many countries, policies that are in favour of big cities or that reform landownership and agricultural systems have contributed to rural–urban migration, particularly in the developing countries of the region [11].

Socioeconomic factors. Socioeconomic circumstances act as push factors in countries with comparatively low wages, high unemployment and little welfare benefits; they work as pull factors in countries with relatively high living standards and labour demand. Economic stagnation has caused internal instability and conflict in many countries, particularly in economically less developed ones. Poverty and unemployment, famine, economic insecurity, and the perception of better opportunities abroad make people very vulnerable

to the promises of traffickers, who nowadays appear to offer the only avenue of migration for so-called 'economic migrants', who do not enjoy the same protection as political refugees.

Generally speaking, migration on socioeconomic grounds can be differentiated between survival migration, internal unequal distribution of wealth, opportunity seeking migration and relative deprivation.

Survival migrants emigrate under a compulsion rather than as a result of choice. Famine, widespread un- and underemployment often in combination with political instability and environmental disasters give people no choice but to move abroad to secure their lives and those of their friends and families. Survival migration has also emerged in response to national policies of land use, pricing of agricultural products and land reclamation that disfavoured small farmers which then caused large displacements. Under these circumstances economic migration cannot be viewed as a matter of personal convenience; it is the only way to survive. Survival migrants take any risk to flee starvation and unemployment and can usually not be deterred by restrictive immigration policies abroad (Ghosh 1998: 29, 35; Goldstone 1997: 53).

Economic disparities within one country are frequently a prelude to cross-border migration. The problem of unequal allocation of goods by governments is particularly apparent in economically poorer countries: Where "the cake to be divided by the State is too small, the temptation to exclude more groups from non-market resource allocation grows: people who only recently joined a political community are more likely to be excluded" (Schmid 1998: 52). If the distribution of wealth is unequal and favouring some while discriminating against others, internal conflicts are more likely to arise, often resulting in generalized violence and exodus.

For the category of opportunity seeking migrants the socioeconomic differential between two countries operates simultaneously as a pull and as a push factor. If foreign countries offer the prospect of higher wages and better opportunities for employment, these countries become attractive destinations for migrants who do not have the same opportunities to use their education and skills in their home countries. In addition to the prospect of higher earnings abroad, poverty and unemployment in the home country are push factors and facilitate the decision to relocate to another country (Beare 1997: 20; Goldstone 1998: 5; IOM 1994: 6). Closely connected to the concept of opportunity seeking migration is that of relative deprivation. With the increasing employment and income differential between developing and industrialised nations, many people in comparatively poorer economies feel disadvantaged. Whether based on perception or reality, this feeling of relative deprivation often combines with pessimism about the future development of the home economy. This imbalance induces increasing numbers of people who try to benefit from the enormous wealth that is achieved in industrialised nations. If legal avenues of migration to these countries are denied, people make use of the illegal services offered by trafficking organizations that in many cases add to

the feeling of relative deprivation by luring potential migrants with false promises of employment opportunities abroad, thereby stimulating further migration (Ghosh 1998: 42; Siron & van Baeveghem 1999: 72–73).

Environmental factors. With population growth and industrialization in many countries, environmental issues have emerged as a key factor of contemporary migration. Large-scale environmental destruction, natural disasters and fluctuations destroy settlements and arable land, pushing people to leave their homes and relocate (Beare 1999: 234–235; Dupont 1997: 15–17) [12].

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

Additional factors. Some factors have to be seen in addition to the push and pull factors listed above. Considered separately they may not be strong enough to make a person decide to relocate. But if they combine with other migration causes, they can add significantly to the migration decision.

The first of these contributory factors can be seen in technological progress and easier travel. Better modes of communication and transportation make migration easier. Infrastructure development and increasing international air traffic have lowered the costs of travel. Together with the rapid development in communication technology throughout the Asia Pacific region, potential migrants in sending countries have become more aware of political and economic disparities between countries, which strengthen the wish to relocate and take advantage of opportunities offered abroad (Martin & Widgren 1996: 14).

As a result of technological development the role of the media as a pull factor is becoming more important. Worldwide satellite television and telecommunication facilities broadcast images of the wealth and luxury of the industrialized world to developing countries. Regardless of whether or not these pictures are consistent with reality, they add to the desire to migrate to the countries of luxury and stability. The pictures produced by the media render the differences between poor and unsafe, and rich and safe countries more visible, which can contribute to the feeling of relative deprivation and to aspirations to move abroad (Beare 1999: 261).

The perception of better economic prospects abroad is often based on false or lacking information. The use of misleading information and false promises

about employment opportunities and immigration regulations in destination countries is another factor that contributes to the migration decision, particularly in the case of irregular movements. Both migration agents and criminal trafficking organizations have been found luring their customers with false promises about transit and entry regulations, labour markets and housing facilities, and little, if any, objective information on living conditions in the destination countries (Ghosh 1998: 67; Chin 1999: 10, 26–27; Salt & Stein 1997: 477, 479–480, 490; Zhang & Gaylord 1996: 6).

Migration and social networks: the migration systems approach

The push and pull theory of migration has been criticized by some writers as too simplistic as it does not sufficiently take into account factors which occur on collective and supranational levels beyond the perception of individual migrants. Historical and contemporary migration flows show that migratory movements are produced, provoked, shaped and regulated by national policies and international relations which cannot be categorized as push and pull factors (Castles 1998: 21–22; Stalker 1994: 21–23).

These deficiencies have been filled with what can be summarized as the migration systems approach. This theory considers migration factors in a complex network structure, emphasizing the relevance of historical and international relations between countries, collective action of people and institutional factors (Castles 1998: 21–26; Kritiz & Zlotnik 1992: 1–16).

The starting point of the migration systems approach is the assumption that besides individual motivations, migration is largely determined by links between origin and destination countries based on historical and political relations, trade, investment, personal or religious ties. A key factor of migration are social, particularly family networks which initiate, support and shape migratory movements. In many cases the decision to migrate is not made solely by the migrant but also by her/his family who may decide to send one or more family members abroad in order to find employment and higher wages and eventually support the family financially from overseas. Especially in the case of Asian migrants it has been found that ties of family and kinship play an important role in creating and sustaining migratory movements. With ethnic communities around the world these social networks actively assist in arranging emigration, transportation, transit, immigration and integration into the destination countries (Beare 1997: 11, 27; Chin 1999: 9–10, 21; Houd 1997: 76–92; Myers 1996: 185–189).

Secondly, it has been recognized that the existence of overseas communities has a strong impact on international migratory movements. Earlier emigration of relatives and friends to destinations around the world has created linkages between home countries and ethnic communities abroad. The presence of relatives in comparatively wealthier societies makes the decision to migrate to foreign shores easier, especially in circumstances where widespread

unemployment is the rule in the sending country while the success of overseas relatives becomes visible when they transfer money back to their places of origin.

A large extent of both legal and illegal migration occurs along the lines of previous movements between sending and receiving countries. This often combines with family reunification: As the duration of residence in the foreign country extends, the status of immigrants becomes more permanent, leading other relatives, spouses and children to follow the initial migrant. But if migration restrictions are placed on such movements or if family ties are too distant to benefit from immigration policies, potential migrants will look for other, possibly illegal avenues of migration (Ghosh 1998: 62; Houd 1997: 90).

In recent years, globalization has emerged as a key issue of international movements. Migration has become closely intertwined with the integration of national economies into the global market. Economic networks and interdependencies among countries bring lesser-developed countries in contact with the wealthy industrialized ones.

Labour migration of both skilled and unskilled workers is the most obvious and most immediate effect of globalisation. For a long time, the industrialized countries actively recruited workers from other nations, especially to fill lower levels of jobs that the native population was unwilling to take. But with increasing unemployment in industrialized nations, many countries started to place restrictions on labour migration, particularly reducing the intake of low or unskilled workers. However, these restrictions did not reduce the awareness of income disparities between countries and as long as goods, services, money and information are crossing borders easily people will attempt to do the same, be it in legal or illegal ways (Beare 1999: 237–238; 1997: 16; Ghosh 1998: 69–70).

Summary

Political instability and armed conflict, rapid population growth, environmental degradation and widening economic disparities between the countries of the Asia Pacific region have caused severe migration pressures which have led many people to leave their home countries and move abroad in order to find protection, employment, higher wages, or simply a better life. The factors that induce people to migrate are complex and may be perceived as pushing, thus encouraging emigration, or pulling, encouraging immigration, or they may exist in a complex network of social or economic ties. Voluntarily or involuntarily, people are migrating to other countries to save their lives, protect their families and friends, or secure their property.

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

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

Organized Crime

Growing migration pressures and increasing numbers of people willing or forced to move abroad have caused many destination countries to place restrictions on legal ways of immigration, and to criminalize those who attempt to arrive in irregular or clandestine ways. The lack and limitations of legal migration opportunities has led people to look for other, illegal ways to migrate. Often, and in growing numbers, these ways are found in the services offered by migrant trafficking organizations. Every year, thousands of migrants are being trafficked to Australia, throughout the Asia Pacific region and around the world by increasingly sophisticated criminal enterprises that earn billions of dollars by exploiting those fleeing poverty and to persecution.

The following sections present the traffickers as providers of illegal migration services between origin and destination countries. It is an attempt to demonstrate how trafficking organizations are structured and how they operate, and to identify more precisely the elements and mechanisms of trafficking.

Organizational features of migrant trafficking

Structure and management. The structure of criminal organizations depends on multiple factors such as the accessibility and barriers of illegal markets, the number of competitors, pricing and marketing strategies of different organizations and their attitude towards the use of threats and violence. Criminal organisations vary considerably in structure, size, geographical range and diversity of their operations. They range from highly structured corporations to dynamic networks which change constantly in order to adapt to the environment in which they operate (Fiorentini & Peltzman 1995: 6; Southerland & Potter 1993: 251).

The limited knowledge that is available on the structural patterns of criminal organizations engaged in the business of migrant trafficking is very controversial, too. Trafficking organizations operate in a very dynamic environment that is permanently changing due to altering demand for illegal migration, different law enforcement activities and unpredictable shifts in border surveillance (Ruggiero 2000: 193). The findings of recent studies cover a spectrum that ranges from individual operators to large, highly sophisticated enterprises (Schloenhardt 1999a: 90–91; 1999b: 215–216).

Diversification of trafficking organizations. The degree of integration and interdependence within and between organizations is a major issue for the structure and operations of legal and illegal enterprises. Criminal organizations generally show a diversified rather than a specialized pattern. In the case of migrant trafficking some connections have been found to drug trafficking activities. Not surprisingly, criminal organizations with well-tested trafficking routes and with personnel located in different countries along these routes will use their knowledge and experience to take new market opportunities and engage in new criminal activities.

It appears that especially Asian organized crime groups use routes, means and methods of transportation simultaneously for the trafficking of people and narcotics (Adamoli *et al.* 1998: 17; Skeldon 2000: 12). Furthermore, a number of recent studies have suggested that criminal organizations which engage in migrant trafficking often plan the systematic exploitation of migrants in the black labour market, especially in the prostitution business of the destination countries (Adamoli *et al.* 1998: 17). Finally, trafficking organizations are sometimes involved in a range of legitimate activities, such as the operation of travel agencies, language schools and freight companies to facilitate and disguise their operations, collect payments and launder profits (McInerney 2000: 7; Secretariat of the Budapest Group 1999: 27).

However, given the ad-hoc nature of many trafficking operations, great caution has to be taken when establishing links between migrant trafficking and other forms of organized crime. Without denying the existence of sophisticated and versatile criminal networks, there is no evidence to assume that individual traffickers are simultaneously engaged in other criminal activities.

Personnel management. To improve their operations and seek maximum profit, any organization, be it legitimate or criminal, differentiates vertically by implementing different levels of employees and horizontally by separating tasks.

Vertical differentiation. The illegal status of organizations engaged in criminal activities generates particular problems, which are also reflected in the management of staff. Employees present a major threat to the criminal organization, as they possess knowledge about the structure and operations of the enterprise and about the participation of other members that they could provide to law enforcement agencies or to competing organizations.

Secrecy, money and the creation of fear in the form of threat and intimidation are the major tools to ensure loyal performance of the employees and to prevent detection, arrest and seizure of assets. To protect the core arrangers and investors of organized crime it is essential to differentiate between different levels of staff and keep the information that is given to lower levels of employees at a minimum. Money is another important tool to

ensure loyal performance and stop participants from informing against the enterprise or individual members. To prevent treason, criminal organizations may also reward employees by paying higher wages or offering other benefits (Mastrofski & Potter 1987: 271, Reuter 1985: 9–10; Southerland & Potter 1993: 257).

Horizontal Differentiation: Division of Labour. The division of labour is essential for the existence of the criminal organization. Separating tasks and filling functional positions with qualified members protects the organization as a whole: should there be an investigation by law enforcement agencies, only small units of the organization are exposed. Participants within the migrant trafficking organization have been differentiated between arrangers/investors, recruiters, transporters, corrupt public officials, informers, guide and crew members, enforcers, debt-collectors, money launderers, and supporting personnel (Schloenhardt 1999a: 93–95). To adequately react to sophisticated law enforcement strategies and technologies, criminal organizations increasingly depend on employees who are able to perform very specialized tasks and who can find new opportunities for criminal activities and modify modes, means and routes of smuggling in response to changing law enforcement and legislative measures (Adamoli *et al.* 1998: 10; Southerland & Potter 1993: 255).

Globalization. In the case of migrant trafficking, globalization opened the doors for criminal organizations to easily access other countries and create transnational networks of trafficking routes with multiple modes of transporting illegal migrants. As a result of the increasing global trade, investment and communication, migrant trafficking involves criminal elements in many different countries: countries where the operations are planned, countries from which the migrants originate, countries of embarkation, transit countries and destination countries. Trafficking organizations systematically exploit the discrepancies between different jurisdictions and legal systems. Their information schemes quickly find loopholes in law enforcement, border control and legislation in different countries. This enables the traffickers to adapt the trafficking routes to changing permeability of borders and migration systems. Also, due to the increasing global trade, immigration and customs officers can only control a small proportion of the people and goods crossing international borders, which in return makes it easier for criminal organizations to hide illegal transactions.

Moreover, the increasing engagement of criminal organizations in global activities has brought with it a higher degree of sophistication, impunity and reduced vulnerability to investigations and prosecution by national law enforcement agencies. While criminal organizations have become increasingly transnational, law enforcement in Australia and the Asia Pacific region has remained mostly local and national.

Operational features of migrant trafficking

Mobilization of migrants. The promotion of their services is essential for traffickers. Trafficking organizations advertise their services in the same ways as legitimate business do. The ways in which the traffickers find and attract people willing to leave their home countries include newspaper advertising, the use of legitimate travel agencies and contacting people on an individual basis or through relatives and friends (Adamoli *et al.* 1998: 14, van Impe 2000: 119; Salt & Stein 1997: 477, 479–480, 490; Zhang & Gaylord 1996: 6).

For the people involved, by definition, there is no element of coercion when the first contact with the recruiters is established. The migrants voluntarily seek the services of the traffickers because that is their only available avenue to escape intolerable conditions in their home countries. To create further incentives, criminal groups often lure potential migrants with false promises of job opportunities abroad and false information about immigration procedures and about the dangers involved in the clandestine journeys. Also, the migrants are told they will easily be able to recover the fare once they have secured work in the destination country.

The illegal services. The illegal services that trafficking organizations provide can be differentiated into four elements: preparation of the migrants, provision of travel documents, transportation and routing, and arrival (immigration). The services change depending on the distance between the country of departure and the country of arrival and on the restrictions in force concerning immigration, emigration, asylum and transit.

Preparation of the migrants. The information that is available on how the migrants are prepared by the traffickers before they leave the country of departure is very limited. In some cases it has been found that migrants are given names and phone numbers of people in transit points and destination countries. Furthermore, prior to departure, traffickers sometimes provide coaching to the migrants in how to avoid border controls, how to answer immigration officers or law enforcement agencies if they get questioned or detained, and how to claim asylum in the receiving countries (Salt & Stein 1997: 483; Secretariat of the Budapest Group 1999: 15–16; Smith 1997: 16; Zhang & Gaylord 1996: 9).

The customers of the traffickers also represent the major risk of detection and arrest for the criminal organization. At the same time, the illegal migrants themselves must fear detection and arrest for illegally entering foreign countries. Threats and intimidation are the major tools to control the migrants and prevent them from inhibiting the organization's activities. Violence is used to control and maintain order among the migrants. It is also used to silence potential witnesses to crimes or as a punishment and warning to others.

Travel documents. Migrants, regardless of their country of origin and their legal status, need travel documentation to move from one country to another. Such documents are required, for example, for visa applications, for obtaining passports and exit authorizations, for transportation by air, border controls and immigration clearance. But the circumstances that cause people to flee their home countries often make it impossible for them to obtain genuine documents. Consequently, the services of transnational traffickers, particularly in the case of trafficking by air, frequently include the production and/or supply of fraudulent travel or identity documents. This has become a growing criminal activity, as the ability to migrate largely depends on the possession of the necessary documentation.

The use of fraudulent and stolen travel documentation is a major characteristic of migrant trafficking in the Asia Pacific region (Schloenhardt 2001/02). This phenomenon is also closely linked with the corruption of local government, law enforcement, border control and customs officials (AFP 1998: 3, 4; Beare 1997: 35; Chin 1999: 42–46; Houd 1997: 80; Peck 1998: 1054; Wang 1996: 54).

Transportation and routing. Changing patterns of transporting people in response to legislative and law enforcement activities is essential for the survival of the trafficking organization and for the disguise of their activities. Trafficking organizations successfully exploit loopholes in legislation, coastal surveillance and border controls, or simply cross borders at times when control points are short-staffed. Borders and other gateways may be temporarily closed or heavily controlled, thus requiring a change of routes via other countries. Consequently, traffickers may sometimes use simple and direct routes and at other times complex and circuitous ones.

Migrant trafficking is carried out by land, air and sea. Often the means of transportation is changed several times en route.

Trafficking by land is the easiest way to move from one country to another. The spectrum ranges from simply walking migrants across borders to sophisticated methods of clandestine trafficking in trains and trucks. Trafficking by land offers the advantage that many people can be moved in a single venture if buses or trucks are used. If people cross borders clandestinely, for example, at night or beyond control points, land trafficking also removes the need for bribery and fraudulent documents.

Trafficking by air is the fastest-growing method of organized illegal migration in the Asia Pacific region due to increasing international air traffic as well as insufficient control of transit and immigration passengers in many countries. The number of migrants that can be trafficked at a time is limited and the passengers have to be prepared as to how to deceive officials at control points. Trafficking by air requires sophisticated travel documents or

alternatively the bribery of border and immigration officials or airline personnel. In many cases trafficking organizations facilitate the onward travel of their customers by switching documents, tickets and boarding passes in the transit lounges of international airports (Beare 1997: 31).

Trafficking by sea involves much lower risks of detection and arrest than land and air trafficking, especially regarding the geographical particularities of many countries in the Asia Pacific region. Also, it enables traffickers to transport many people in a single venture, which means higher profit. Beyond that, the logistics of trafficking by sea are much simpler as it removes the need for travel documents, and there is no need to bribe border officials, as the illegal migrants do not pass through immigration control points (Wang 1996: 49).

The experience of many destination countries has shown that especially the final part of the illegal voyage is largely determined by the question whether the persons trafficked seek to immigrate clandestinely and undetected and then disappear in the community, or whether they seek to reach the territory of the destination country and then claim asylum. In the former case, sophisticated means of trafficking such as high quality forged papers or hidden compartments in boats, trains and trucks are necessary to circumvent border controls and arrive undetected. In the latter case, migrants can simply be dropped off at the coast of the destination country or they are told to lodge their asylum claims immediately upon arrival at the destination airport.

Migrant trafficking is sometimes described as a way to circumvent migration regulations and, therefore, as a victimless crime. But in this context, it has to be noted that a major concern in the field of migrant trafficking is the victimization of migrants and the issue of human rights. During the journey the migrants are completely in the hands of the traffickers and often subject to deprivation and indignities. The transportation of illegal migrants often takes place under inhumane conditions, thus causing great numbers of accidents, casualties and sometimes fatalities during the dangerous passages. The common methods of seaborne trafficking in particular pose a serious danger for the migrants. In some cases they have been found crammed into vessels which were not seaworthy or locked in freight-containers without enough air, water or food. In other cases, traffickers have simply abandoned the migrants en route and put them at risk because they feared being caught by the authorities (IOM 1994: 4; Chin 1999: 72–77; Peck 1998: 1047; Smith 1997: 11).

Regional analysis. The Asia Pacific region is an area in which every form of criminal behaviour associated with trafficking in migrants can be observed. This is mainly due to the political and economic disparities between the countries in the region, which combines with the presence of well-established international criminal organizations that operate throughout the region. Many countries in the Asia Pacific region play more than one role for migrant

trafficking: they are simultaneously sending and transit or transit and receiving countries.

1. East Asia: PR China, Hong Kong, Macau, Taiwan

Many criminal groups engage in the systematic illegal transportation of Chinese nationals to destinations around the world, including Australia. Chinese migrant smuggling organizations, often referred to as 'Snakeheads', have created a global network to illegally transport people. Members of Chinese organizations who engage in migrant smuggling are located in mainland China, along the smuggling routes and in transit points such as Bangkok, Hong Kong, Manila and Singapore, as well as in Australia (AFP 1998: 3, 4; Chin 1999: 50–51, 56–57). The major smuggling route by land appears to go through the southern provinces of China into Myanmar where border control is almost non-existing (Chin 1999: 52, 56). The migrants then move onto Thailand, often disguised as tourist or business groups. Smuggling by sea to Australia and other destinations mostly commences in the ports of the southern Guangzhou and Fujian provinces where the migrants embark on boats that are registered in Hong Kong or Taiwan and which have easy access to Chinese ports (McFarlane 1999: 13; Wang 1996: 54–55).

Hong Kong's and Macau's infrastructure, their status as Special Administrative Regions of the PR China and their exposure to the sea make the cities ideal transit points for large numbers of illegal migrants from Asian countries (Smith 1997: 8). Hong Kong is one of the major ports of embarkation of people arriving in Australia illegally (DIMA 2001: 35).

As a result of increasing air and sea traffic passing through Taipei, Taiwan has become a major destination and transit point for illegal migrants, mostly from mainland China. It has been estimated that the number of people illegally residing in Taiwan exceeds 200,000, including circa 38,000 mainland Chinese (Ghosh 1998: 16; Peck 1998: 1046). Some studies have suggested that Taiwan play a major role in organized crime and is home to many Chinese migrant smuggling organizations (Chin 1999: 142).

2. Myanmar, Thailand, Cambodia [13]

For many years Myanmar has been a source for illicit drugs and there is increasing evidence that drug trafficking organizations use their experience and smuggling channels to transport illegal migrants in and out of the country (Adamoli *et al.* 1998: 87). Also, Chinese nationals have been found clandestinely crossing the mountains from the PR China into Myanmar and then travelling on to Thailand (McFarlane 1999: 13, Skeldon 1994: 188; Smith 1997: 1).

From both regional and global perspectives, Thailand appears to be one of the world's principal migrant smuggling centers. Bangkok is one of the major airports of embarkation for people travelling to Australia illegally [14]. Overseas research and the Royal Thai Police estimate that traffickers move

approximately 1000–2000 illegal migrants per month through Thailand and that circa 50,000 people reside in Bangkok waiting to leave for the destination country (Peck 1998: 1046; Smith 1997: 8).

Inadequate law enforcement, corruption and few immigration controls have made Cambodia an important and easy transit point for migrant smuggling. Despite recent attempts to combat illegal migration and illegal employment, international smuggling rings have been found using Cambodia as a transit zone for Chinese nationals and as a recruitment area for Cambodians who are smuggled to Hong Kong, Australia and Europe (Smith 1997: 8; IOM c1998: 6).

3. Philippines, Malaysia, Singapore

Organized crime and the smuggling of migrants into, through and out of the Philippines has been a long-standing problem. The Philippines' long archipelagic coastline makes border surveillance extremely difficult and makes the country attractive for illegal immigration and transit. The majority of trafficked migrants appear to be Chinese, but Algerians and Iraqis have also passed through the Philippines before they attempted to illegally enter Australia (Salvador 1999: 7–8).

Malaysia plays a significant role as a transit country and a base for different migrant smuggling organizations. With a booming economy and growing air traffic links, the country has become a major gateway to Australia [15], the United States and Europe, both for sea- and airborne methods of smuggling. For example, Chinese, Myanmar and Pakistan nationals have been found trying to enter Malaysia illegally for transit. Afghans, Sri Lankans and Iraqis have chartered Malaysian fishing vessels to reach Australia's coast. Additionally, Malaysia is also a destination for traffickers who bring in thousands of foreign workers, mostly from Indonesia and the Philippines (Ghosh 1998: 16; IOM 1996: 5; Smith 1997: 5; Spaan 1994: 98).

With one of Asia's major airports, many migrant trafficking organizations use Singapore as a transit point for gaining illegal entry to Australia [16]. Airline boarding pass swapping within the transit area of Changi Airport appears to be a common practice for many illegal migrants who board Australia-bound flights. The predominant nationalities found to transit through Singapore to reach Australia are Chinese, Sri Lankan, Afghan and Iraqi (AFP 1998: 3–5; Australia, External Reference Group on People Smuggling 1999: 12). Simultaneously, Singapore is an important destination for illegal migrants in the region (Adamoli *et al.* 1998: 86; Smith 1997: 8, Spaan 1994: 94, 98).

4. Indonesia Papua New Guinea and the South Pacific

Indonesia's archipelagic coastline poses particular difficulties for law enforcement and border surveillance and makes the country very attractive for

seaborne smuggling. The recent incidents of unauthorized boat arrivals in Australia have presented Indonesia as the major transit point for illegal entrants on their way to Australia. Investigations suggest that most of illegal migrants travel from Middle Eastern countries to Indonesia. From there they proceed to Australia by boat, usually departing from the south-eastern parts of Indonesia such as West Timor and Bali (AFP 1998: 3–5; Australia, External Reference Group on People Smuggling 1999: 12).

Papua New Guinea appears to be a new transit point for illegal migrants in the region. Recent investigations have found that asylum-seekers heading for Australia, New Zealand and also Canada transit through Papua New Guinea in response to increased surveillance of the Torres Strait and the Tasman Sea (Keelty 2000: 78, 83).

New Caledonia also reported the landing of two vessels with 110 undocumented Chinese migrants in 1997 [17]. In March 2001, Fijian authorities confirmed the existence of a trafficking ring that smuggles Asian migrants through South Pacific nations [18]. The Marshall Islands are affected by illegal immigration from China, and, to a lesser extent, from neighbouring countries such as Kiribati and Tuvalu (Jorban 2000: 2–3).

Illegal Immigration in Australia. Australia is among the major destination countries for migrant trafficking in the region. The country's wealth, a stable economy and its geographical proximity to South East Asia and the Pacific are the principal factors that make the country an important destination for migrants from various parts of the region.

The most current period of unauthorized arrivals began in 1989, following the end of the Cold War and the student revolt in China. The figures in Table 1 show the number of illegal arrivals by air and sea that have been detected by Australian authorities since 1989.

Boat arrivals. The landing of a boat carrying 26 asylum seekers in November 1989 marks the beginning of the latest period of unauthorized arrivals. In the last twelve years most boats appear to have departed from locations in the southern provinces of China (nine boats or 10.5 percent of all unauthorized boat arrivals in 1999) or from Indonesian ports (75 or 87.2 percent, 1999) with mostly Chinese, Iraqi, Afghan and other Middle Eastern nationals (DIMA, Unauthorized Arrivals Section 2000: 27).

The number of unauthorized arrivals remained at relatively low levels throughout the 1990s, with the highest number recorded in 1994 with 21 boats carrying 1071 persons. The 1999–2000 financial year witnessed the highest number of unauthorized boat arrivals in Australia's recent history. The number increased particularly towards the end of 1999 when 2406 people arrived between October and December that year. As mentioned earlier, most of these arrivals were Iraqi, Afghani and other Middle Eastern nationals, who

Table 1. Unauthorized arrivals to Australia by boat and air, 1989–2001 (Australia, Prime Minister’s Coastal Surveillance Task Force 1999: attachment B-1; DIMA 2001: 93)

	1989–90	1990–91	1991–92	1992–93	1993–94	1994–95	1995–96	1996–97	1997–98	1998–99	1999–2000	2000–01
Boat arrivals	243	172	81	198	200	1089	591	36	157	926	4175	4141
Air arrivals	na	na	529	452	409	485	669	1347	1550	2106	1695	1508
Total	na	na	610	650	606	1574	1260	1383	1707	3032	5870	5649

fled after countries such as Iran and Jordan withdrew from offering temporary protection and actively dissuaded Afghans and Iraqis from being within their borders.

Australia's less populated western and northern coasts, including Christmas Islands (13.3 percent of all boat arrivals in 1999–2000) and Ashmore Reef (65.3 percent, 1999–2000) have been the major detection points of illegal boat arrivals in the past (DIMA, Unauthorized Arrivals Section 2000: 28). These remote islands are the closest Australian territories to Indonesia and only a short boat-trip away from Indonesia's southern ports.

It has been found that the people arriving on the western sea route are mostly of Middle Eastern origin. This lends plausibility to the assumption that people arriving on this route seek to land anywhere on Australian territory in order to seek protection. They often use old, wooden Indonesian fishing vessels that are simply abandoned or destroyed after landing in Australia. Particularly Iraqi and Afghani nationals have migrated from the Middle East all the way to Australia, as Australia is the only country in the region that offers asylum and protection under the *Refugee Convention*. The major objective of this group of migrants is to reach a safe haven and then apply for asylum. They usually do not attempt to arrive clandestinely and circumvent border and immigration controls (McInerny 2000: 4).

The incidents that occurred at the coast of New South Wales and Queensland (boats with mostly Chinese nationals) indicate that traffickers use these routes to arrive directly from the east on routes which until 1999 were outside the usual area of coastal surveillance. Prior to 1997, most of these boats were comparatively small wooden vessels that only fitted limited numbers of passengers. The landing of a Chinese vessel on Thursday Island on 13 June 1997 was the first steel body ship that has been involved in an illegal passage to Australia. It has been found that in recent years, larger and heavier boats with sophisticated navigation technique and communication technology have been used. These boats are designed for repeated use and are sometimes specifically equipped with hidden compartments for the clandestine transportation of migrants (David 2000: 8; Tailby 2001: 4). The methods and sophistication used for unauthorized arrivals via the eastern route indicate that traffickers try to arrive in Australia clandestinely and unload the migrants without being detected (McInerny 2000: 4). The eastern route offers the additional advantage of fast and easy transport links to the big cities on Australia's east coast, which makes it easier for the immigrants to disembark clandestinely and disappear in the community of cities such as Sydney, Brisbane and Cairns. This explains why the majority of people arriving via this route are Chinese nationals. Since Chinese have little, if any chance, to be admitted as refugees in Australia, they need to remain undetected and avoid any contact with immigration and law enforcement agencies (Australia, Prime Minister's Coastal Surveillance Task Force 1999: 1; Heggen 1999).

Air arrivals. Up until 1998 the majority of unauthorized arrivals arrived by air; in 1998, ten times the number of boat arrivals arrived by air. Approximately 50 percent of the people arriving illegally by air travel with bogus or otherwise inadequate documents. Of those, most people arrive in Australian airports with no documentation (361 or 66.5 percent in 1999–2000) or with improper/fraudulent documents (182 or 33.5 percent in 1999–2000) (DIMA 2001: 99).

Post-immigration activities

At the end of the chain of services that trafficking organizations provide is the introduction of the migrant customers into the destination country and, if possible, their insertion into the local labour market.

To make return to their home countries impossible and also to protect the trafficking organization, all identity documents must be removed from the trafficked migrants prior to their arrival in the destination country. Passports, work permits, cash, contact addresses and return tickets which were initially given to the migrants to meet transit and immigration requirements or to make them appear as tourists are usually confiscated by the traffickers after check-in. In other cases the people being trafficked destroy these documents en route or upon landing (AFP 1998: 5; Beare 1999: 275; 1997: 32). If possible, both genuine and fraudulent documents are returned to the trafficking organization for further use or resale.

For the migrants, the contact with the trafficking organization does not necessarily end after entering Australia. Once again, two major groups of migrants can be distinguished: those who seek to claim refugee status upon arrival and those who attempt to immigrate clandestinely.

For the group of overt arrivals, contact with the traffickers ceases once the migrants reach their destination. Since their major objective is to go through official immigration channels to apply for asylum, traffickers can no longer control them while they are detained and their claims assessed. This leads to think that this group of migrant customers pay their debts to the traffickers in full prior to arrival. It may also explain why traffickers have abandoned boatloads of people before they reached their destination, as after payment is made these migrants are no longer of any interest for the trafficking organization.

For covert arrivals, contact to the trafficking organization continues. Upon arrival at the final destination most migrants owe large amounts of money to the traffickers for the illegal services which they provided. As a result of the accumulation of large debts and the powerless position resulting from their illegal status, many of those who have used the services of trafficking organizations find themselves in a 'debt-bondage' situation once they have reached the destination country. The findings of overseas research suggest that many

migrants remain in the hands of the traffickers who often respond to the inability to repay debts by charging exorbitant interest rates or with forced labour, threats and violence (Salt & Stein 1997: 483). It is questionable whether or not the same practices occur in Australia. To date, no in-depth studies have been undertaken about the situation of illegal immigrants in Australia and there is only little evidence to suggest that the evidence found overseas also applies to illegal immigrants in Australia (McFarlane 1999: 14).

The illegal status of the migrants prevents them from entering the legal labour market of the host country. Instead, they have no choice but to work illegally to survive. Hence, many of the migrants find themselves in the black labour market of the big cities or as illegal workers in the agricultural sector. But not only are illegal migrants unable to obtain legitimate employment, they are also ineligible for social welfare, health insurance and education benefits from the host country. Moreover, a different culture and language often set the illegal immigrants apart from the rest of society. The migrants find themselves in a position of 'social marginality', which in some cases may encourage illegal conduct. In the more extreme cases, they become engaged or are forced to engage in criminal activities such as prostitution, minor property offences or drug-related crime, often organized by the same criminal group that operated throughout the trafficking passage (Adamoli *et al.* 1998: 79; Graycar *et al.* 1999: 5; Savona *et al.* 1997: 9).

In this context it needs to be mentioned that as a consequence of their clandestine, illegal status and of the continuing exploitation by the traffickers, illegal immigrants, according to official crime statistics, commit more crimes in host countries than the rest of their population. In some countries this has led to xenophobia and the call for further immigration restrictions. However, it must be stated very clearly that although a disproportionate number of illegal immigrants can be found engaged in criminal activities in the host countries, there is no doubt that most undocumented migrants are law-abiding people. For clandestine immigrants the price of breaking the law in the host country—even for a minor offence—is much higher than for other parts of the population as they constantly have to fear detection, arrest and deportation. Often relatives and friends support migrants before, during and after their journey, and only a minority is engaged in illegal activities (Ghosh 1998: 93; Schmid 1998: 29–30).

Migrant Trafficking Offences in Australia and the Asia Pacific Region

The laws of the countries of the Asia Pacific region are, to the most part, concerned with the criminal aspect of migrant trafficking, using the criminal law as a tool to prevent and combat the activities that constitute and accompany migrant trafficking.

On the basis of the elements of migrant trafficking that have been identified in the second and third parts, this fourth part of this article analyses the way these elements are criminalized in the countries of the Asia Pacific region with special reference to the provisions under Australian law. The analysis commences with the operational side of trafficking, including (1) the mobilization and preparation of migrants; (2) organizing and facilitating illegal migration; (3) transporting illegal migrants; (4) harbouring and concealing illegal migrants; (5) immigration fraud by false statement, and (6) producing and providing fraudulent documents. This is followed by the analysis of organizational offences such as (7) organized crime and conspiracy.

Mobilization and preparation of migrants

The activity that has been described earlier as 'mobilizing migrants' stands at the very beginning of the trafficking operations. Recruiters who contact potential migrants in the sending country or lure them with false promises about opportunities abroad seek to obtain the migrants' consent and thereby initiate the illegal journey and the offences that are associated with it. Hence, it is desirable to criminalise the mobilization of migrants, thus preventing trafficking at its earliest possible state. However, very few countries in the region have legislation that criminalizes the recruitment of migrants and the false promises they are made.

The Philippines, which have a long history in labour emigration, both legal and illegal, have special legislation to protect its citizens from illegal recruitment. Sections 6 and 7 of the *Migrant Workers and Overseas Filipinos Act 1995* make it an offence to

canvass, enlist, contract, transport, utilize, hire, or procure workers and [...] refer, contract services, promise or advertise for employment abroad, whether for profit or not, when undertaken by a non-licensee or non-holder of authority contemplated under Article 13(f) of [...] the Labour Code of the Philippines [...].

Moreover, the Act penalizes situations in which recruiters charge exorbitant fees for their services, where they give out false information in relation to recruitment and employment, where they withhold or deny travel documents from migrant applicants before departure, and where they fail to reimburse migrants if the deployment does not take place (s 6(a), (b), (k), (m) *Migrant Workers and Overseas Filipinos Act 1995* (Philippines)).

The provision primarily focuses on illegal labour migration rather than on migrant trafficking. It seeks to protect persons from falling victim to organizations that lure them with job opportunities abroad and take upfront payments for services that are not supplied, or supplied contrary to the agreement with the migrant labourer. In many instances, these offences are committed by organizations that involve multiple offenders and that operate on a national

or international scale. Under section 4(c)(ii) *Racketeer-Influenced and Corrupt Organizations (RICO) Act* (Philippines) “dealing with large-scale illegal recruitment and illegal placement of Filipino workers abroad” is considered a racketeering activity and any participation in such activity and acquisition of assets deriving from that activity can be penalized by imprisonment of up to twenty years.

Section 37D(1)(b) and (c) *Immigration Ordinance 1972* of Hong Kong makes it an offence to ‘offer to arrange or assist’ in the passage of a person who is or will be an unauthorized entrant upon arrival in Hong Kong regardless of where this offer is made. If committed by an organized crime group, the offence under Section 32D(1) can be prosecuted with the special powers and measures of the *Organized and Serious Crime Ordinance 1994*.

Similar to the provision under Hong Kong law, in article 6 Macau’s *Clandestine Immigration Act 1990* criminalizes the enticing of another person to enter Macau illegally.

Australian law does not contain provisions that directly criminalize the mobilization and recruitment of illegal migrants. This is mostly due to the fact that in most cases these activities take place abroad. Luring people with false promises and taking up-front payments for the illegal services provided by trafficking organizations usually fall outside Australian jurisdiction, unless such activity classifies as organizing illegal immigration within the meaning of Section 232A *Migration Act 1958* (Cth).

There are significant difficulties in criminalizing the ‘recruiting’ of migrants by trafficking organizations. Clearly, creating incentives for international migration, raising awareness of the discrepancies between living standards in different countries, and adding to expectations of a better lifestyles in a wealthier nation cannot be made the subject of criminal offences, even if these incentives and expectations are based on false perceptions and, in some cases, blunt lies. However, it must be possible to hold traffickers criminally liable in circumstances where migrants are lured with false promises so that they enter into agreements and contracts with criminal organizations and pay substantial amounts of money. In these cases, the criminal law can serve not only as a tool to penalize traffickers, but also as a means to seize assets and prevent the illegal journey at the earliest possible stage.

Organizing and facilitating illegal migration

The analysis in previous parts of this article has demonstrated that the larger and more sophisticated trafficking organizations have multiple levels of staff and that the key-arrangers are rarely actively engaged in individual operations. This makes their prosecution particularly difficult. Some countries have recently introduced special legislation under which organizers of migrant trafficking can be made criminally liable. China, together with is

Special Administrative Region Hong Kong (s 37D (1)(a) *Immigration Ordinance 1972* (Hong Kong)), are the only jurisdictions in the region that have criminal offences specifically designed to target the core members of criminal organizations.

In the PR China, Article 318 *Criminal Law 1997* contains a very comprehensive offence that criminalizes persons “who arrange for people to secretly cross the national border”. A qualified offence with a higher penalty applies if the offender is involved in any of the following circumstances:

- (1) ringleader of organizations that arrange for people to secretly cross the national border;
- (2) repeatedly organizing people to secretly cross the national border or arranging for a large number of people to secretly cross the national border;
- (3) causing serious injuries and deaths to the people making an illegal crossing;
- (4) depriving or restricting freedom of the people who are making an illegal crossing;
- (5) resisting investigation by violent or threatening methods;
- (6) obtaining huge amounts of illegal income;
- (7) other exceptionally serious circumstances.

The offence under Article 318 *Criminal Law 1997* (PR China) seeks to target directly the arrangers and organizers of migrant trafficking operations who stand back and are not directly involved in the commission of immigration offences. The provision also recognizes the fact that trafficking is often organized on very sophisticated and professional levels. It is for that reason that Chinese law places higher penalties on offenders who ‘repeatedly’ commit trafficking offences and who ‘obtain huge amounts of illegal income’. Finally, given the dangers involved in illegal methods of transporting people across borders, operations that cause injuries or deaths, or which involve the use of violence or the deprivation of freedom are subject to higher penalties, too.

Up until 1999 the Australian *Migration Act 1958* did not contain any provisions that focused specifically on perpetrators who organize illegal immigration on a large scale. In response to the increasing numbers of boat-people arriving in Australia in the years 1998 and 1999, and the growing evidence of sophisticated trafficking operations, the Government introduced new Section 232A to target criminal organizations that engage in the bringing of groups of illegal migrants to Australia, particularly by sea (David 2000: 20).

The principal problem inherent in the provisions under Australian, Chinese and Hong Kong law is that in order to be successful, the provisions largely depend on international law enforcement cooperation and legal assistance. As seen in earlier Parts, most criminal organizations engaged in illegal migration operate internationally, and often the arrangers and organizers of trafficking are located abroad. Therefore, the investigation of crimes and the prosecution and extradition of offenders depend largely on the assistance

provided by agencies of foreign countries. It is for that reason that these provisions may prove to be unsuccessful as long as they are unique to China, Hong Kong and Australia and are not complemented by legislation in any other country of the region.

Transporting illegal migrants

The central and principal aspect of migrant trafficking is the transportation of migrants in violation of immigration laws. As seen before, traffickers are using multiple modes of transportations and show great variety in the ways in which they attempt to circumvent border and immigration control. But also, the transportation can be carried out by commercial vessels, such as aircraft, trains and ships, which, knowingly or unknowingly, bring undocumented or fraudulently documented passengers to the destination countries.

Transporting illegal migrants can be established as a criminal offence to punish those who engage in the unlawful bringing of non-citizens into a country. In most, if not all instances, this transportation is carried out with the knowledge and for the profit of the perpetrator or the organization he/she is part of. All countries in the region have offences that criminalise persons who bring illegal migrants into the country. The common criterion of all provisions is that the offender is knowingly carrying migrants into a country in contravention of that nation's immigration laws. The immigration laws of PR China, Macau, Malaysia, Philippines, Solomon Islands and Thailand contain provisions that criminalise the bringing of non-citizens who are not lawfully entitled to enter the country or who are otherwise inadmissible [19]. The provisions under Cambodian, Hong Kong, Myanmar, Papua New Guinea, Singaporean and Taiwanese laws focus on the "aiding and abetting" of another person's illegal immigration by providing transportation [20].

Secondly, the offence of transporting illegal migrants can be designed as a regulatory instrument to sanction commercial carriers. In these cases, the provisions make carriers liable for negligence towards the documentation of their passengers or non-observance of other immigration regulations. Moreover, these provisions seek to ensure that carriers verify the admissibility of their passengers to the destination country prior to arrival, thereby preventing unauthorized migrants from landing at the destination point.

The sanctions imposed on carriers who fail to comply with immigration regulations cover a wide spectrum and include all aspects of the arrival of immigrants, their immigration clearance, their departure and removal. For example, some countries penalize carriers who arrive outside designated ports of entry [21]. Carriers are liable if they fail to submit lists of all passengers and crew [22], and if they fail to prevent the landing of passengers prior to immigration clearance [23]. In all countries of the region, carriers also face administrative fines or criminal penalties if they carry persons who are not

listed on passenger and crew lists and who are found on board the arriving vessel (so-called stowaways) [24]. Finally, under the law of the Philippines, Taiwan, Thailand and Vanuatu, carriers are criminally liable if they fail to remove inadmissible foreigners and do not cover the expenses the removal entails [25].

Transporting passengers who are not in possession of valid visas to enter Australia is an offence under Sections 229 and 232. Section 230 *Migration Act* contains a special provision that makes carriers criminally liable for the entry of stowaways ('concealed persons') into the migration zone. In contrast to Sections 229 and 232, the focus of Section 230 is on clandestine entry into Australia, while the former offences deal with cases of undocumented entry.

It needs to be stressed that the key objective of provisions under the heading 'carrier liability' is not the creation of criminal offences and the prosecution of offenders. The provisions primarily serve as a basis to make commercial carriers and corporate organizations responsible for transporting inadequately documented passengers, and to lay all expenses attached to the processing of migrants and their detention and removal on those who transport them into the respective country. The corporations targeted by the legislation are in most, if not all cases commercial operators and not criminal organizations.

Harbouring and concealing illegal migrants

To disguise their activities and prevent the detection of illegal migrants, trafficking organizations, as discussed earlier, often rely on local people who provide accommodation to the migrants until further arrangements for travel or employment are made. The concealing and harbouring of illegal migrants not only occur in destination countries but also in embarkation and transit points, as the illegal journey is normally not made in a single venture. The clandestine stay of illegal migrants is an integral part of migrant trafficking and is also closely connected to other offences such as illegal employment, prostitution and the sex industry.

The immigration laws of Cambodia, Macau, Malaysia, Myanmar, the Philippines, Papua New Guinea, Singapore, Solomon Islands, Taiwan, Thailand and Vanuatu contain provisions that make it an offence to harbour and conceal any person not lawfully entitled to enter or reside in the given country [26]. The offence under Hong Kong's immigration law is different in that it criminalizes "any person who assists an unauthorised entrant to remain in Hong Kong" if that person knows or has reasonable grounds to suspect that the entrant resides in Hong Kong unlawfully; it is not required that the person is hidden or otherwise concealed (s 37DA *Immigration Ordinance 1972* (Hong Kong)).

Australian law criminalizes the harbouring and concealing of illegal immigrants in Section 233. Under Paragraph 233(1)(b) it is an offence to conceal a

non-citizen who intends to enter Australia. Paragraph (c) makes it an offence to conceal persons who have been ordered to be deported from Australia. Subsection 233(2) criminalizes the harbouring of unlawful non-citizens, removees and deportees.

Commercial accommodation. Similar to the sanctions imposed on carriers who transport illegal migrants, some countries have introduced legislation that imposes fines on providers of accommodation if they host illegal migrants. For example, in Malaysia landlords are required to check that their tenants are legally in the country. In a similar fashion, Cambodian, Hong Kong and Thai immigration laws require anyone who provides accommodation to foreigners to keep record and/or notify the competent authority about the stay of foreigners (art 38 *Law on Immigration 1994* (Cambodia); s 17(3) *Immigration Ordinance 1972* (Hong Kong); s 38 *Immigration Act 1979* (Thailand)). Failure to do so can result in administrative fines or criminal penalties.

Immigration fraud by false statement

In many instances, traffickers are facilitating illegal migration by fraudulently obtaining the necessary documents or by making misrepresentations to immigration, customs and law enforcement officers on behalf to their migrant customers. It is for that reason that the laws of most countries criminalize the making of false statements for the person 'him/herself' and 'for another person'.

The laws of Fiji, Hong Kong, Malaysia, Myanmar, Papua New Guinea, Singapore and Solomon Islands criminalize the making of false statements for the purpose of "obtaining or attempting to obtain" an entry permit, passport or other travel documents "for himself or another person" [27]. Macau, Philippine, Papua New Guinea, Hong Kong, Solomon Islands' and Vanuatu immigration laws contain provisions that criminalize any false statement that is knowingly made for another person in an immigration matter, irrespective of the purpose of this statement [28].

Some countries only—or additionally—have general offences of making false statements in their criminal laws. Thailand, for instance, has an offence of "giving false information to public officials" in Section 137 *Penal Code 1956*. The Solomon Islands' *Penal Code 1963*, s 130 also criminalizes the making of false statements with the intention to cause a public official to undertake or omit a particular act [29]. Similar offences can be found in the criminal laws of Hong Kong and Fiji (s 143 *Penal Code 1945* (Fiji); s 36 *Crimes Ordinance 1971* (Hong Kong)).

Australian criminal law contains a comparatively large number of offences that criminalize the making of false statements. False statements

made in the context of immigration are criminalized in Sections 233A and 234 *Migration Act*. False statements in connection with applications for and renewal of passports are offences under Section 10 *Passports Act*. Section 22 *Migration Act* contains special provisions for false and misleading information about the identity and whereabouts of unlawful non-citizens. Section 137.1 *Criminal Code*, which replaces Section 22 *Migration Act*, introduces a general offence of making false statements to Commonwealth officers.

Producing and providing fraudulent documents

Forgery and falsification of documents. Forgery and falsification of immigration and identity documentation are criminal offences in all countries of the Asia Pacific region. Three different kinds of forgery offences can be identified: the criminal codes of all countries in the region contain general documentary offences that criminalize the forgery of government paper and documents [30]. Secondly, all countries, except Papua New Guinea, the Philippines and Thailand have provisions that are specifically designed to prevent and combat document fraud in the context of immigration; hence, they are integrated in immigration legislation [31]. Additionally, some countries have special passports acts or other legislation that deal specifically with the production of travel and identity documents [32].

It has been found that identity document fraud is, to the most part, a highly organized activity and closely associated with migrant trafficking and other forms of organized crime. It is for that reason that some countries have introduced provisions that criminalize forgery offences which are committed in an organized and more professional manner. Macau's *Organized Crime Act*, for instance, provides a special, qualified offence if members of criminal organization are found "retaining or holding" fraudulent identity and travel documents in order to enable or facilitate trafficking and other organized crime activities (art 6 *Organized Crime Act 1997* (Macau)). Vietnam's *Penal Code* prescribes higher penalties if forgery is committed "in an organized manner", more than once, or if it causes serious consequences (art 266(2) *Penal Code 2000* (Vietnam)).

Australian law criminalizes the production of fraudulent passports in the *Passports Act*. The unlawful production of Commonwealth documents generally (including passports and visas) is a crime under the *Crimes Act/Criminal Code*. The *Migration Act* does not criminalize the forgery of Australian visas.

Unlike most other offences examined here, those surrounding forgery and the production of fraudulent travel and identity documentation are largely very technical provisions, in that they deal with methods of modifying genuine documents or producing false ones. From a legal perspective, it is important that the provisions adequately cover different kinds of immigration and identity documentation and the different ways in which they can be

falsified. From a law enforcement perspective, it is important that authorities keep pace with technical developments and use adequate methods and instruments to apprehend false documents. Within the context of migrant trafficking, it has been found that the production of fraudulent documents is in most, if not all cases, carried out by professional criminal organizations. Therefore, it is appropriate to provide higher penalties for forgery that is organized on a large scale, as seen in the examples of Macau and Vietnam. However, in order for these provisions to operate successfully, it is necessary that they be complemented by equivalent legislation in other countries.

Transferring documents. An additional feature of identity and immigration fraud is the transfer and provision of documents to other persons. This is in some cases accompanied by bribery of government officials and the illegal selling of passports and other travel documentation.

Most jurisdictions in the Asia Pacific region criminalize the transfer of immigration and identity documents [33]. The Chinese *Law on Control of the Exit and Entry of Citizens 1986*, art 14, for example, makes Chinese nationals criminally liable for transferring their exit and entry certificates to another person, and the *Law on the Control of the Entry and Exit of Aliens 1986* (PR China), art 29(1) contains an identical offence for foreigners who transfer their certificates. In Hong Kong, it is an offence to transfer “any travel document, certificate of entitlement, entry permit, re-entry permit, certificate to identity, document of identity, APEC business travel card, travel pass or Vietnamese refugee card” to another person (s 42(2)(a)(ii) *Immigration Ordinance 1972* (Hong Kong)). Malaysian immigration law, which is largely identical with that of Brunei and Singapore, provides that any person who “gives, sells or parts with possession of any Entry Pass, Internal Travel Document or Certificate in order that it may be used” unlawfully by another person shall be guilty of an offence (s 56(i) *Immigration Act 1959/1963* (Malaysia); s 57(1)(i) *Immigration Act 1959* (Singapore)). The Papua New Guinea *Migration Act 1978*, the Solomon Islands’ *Immigration Act 1978* and the *Immigration Act 1971* of Vanuatu contain similar offences [34]. Under Taiwan’s *Immigration Law*, the offence also includes the transfer of fraudulent tickets that are used for travel to another country (art 53 *Immigration Law* (Taiwan)).

Some countries have special offences for the (unauthorized) selling of identity and immigration documents, which is particularly relevant in, but not exclusive to, cases where government officials are found issuing visas and passports in return for bribes. For example, in article 320 the *Criminal Law* of the PR China makes it an offence to “provide [...], or sell exit and entry documents such as passports and visas”. Similarly, the immigration acts of Malaysia, Singapore, Papua New Guinea, Solomon Islands, and Vanuatu criminalize the selling of entry and re-entry permits, passports, and internal travel documents [35].

In Australia, the transfer of identity documents to another person for the purpose of obtaining entry or immigration clearance is criminalized in Sections 234(2) and 233A(2) *Migration Act*.

The transfer of identity and immigration documents can occur in many different ways and at different levels of organization. It is important that different types of offenders and different levels of crime are criminalized and punished differently. For that reason, public officials who abuse their positions to sell unissued or fraudulent documents need to be dealt with differently to people who transfer their documents to relatives and friends, and differently again to trafficking organizations who circulate documents in great numbers. Some laws distinguish between offenders who are public officials and those who are not. But to date, no country in the region makes a distinction between individual offenders and criminal organizations that trade in documents in large numbers.

Organized crime and conspiracy

Very few countries in the Asia Pacific region have laws that are specifically tailored to fight organized crime and the criminal activities associated with it. Out of the all the jurisdictions examined here only four have legislated directly against criminal organizations: Hong Kong, Macau, Taiwan and the Philippines [36].

In comparison, it can be noted that the different jurisdictions place their emphases on different aspects of organized crime and its prevention. In Hong Kong and the Philippines, for instance, the organized crime acts are primarily procedural legislation to facilitate confiscation and equip courts and prosecutors with special powers. Macau and Taiwan's acts focus particularly on the creation of the "membership in a criminal organization" offence, and both acts provide special penalties for perpetrators. Finally, Macau's *Organized Crime Act* is the only one that enables courts to place criminal penalties on corporate organizations, recognizing that organizations, both legitimate and illicit, often continue their operation after leaders have been gaoled.

Rather than establishing a conceptual legal framework of organized crime offences, most countries in the Asia Pacific region use their penal codes to criminalize participation in criminal organizations, engagement in their activities, and conspiracy with others to intentionally commit a crime. Essentially, these provisions can be differentiated between two different models.

One model establishes conspiracy or participation in a criminal organization as a distinct offence. The provisions based on this model penalize conspiracy and/or membership in a criminal organization regardless of individual crimes committed by the group or by individual members. Participation in an organized criminal group is criminalized under the criminal laws of Cambodia, PR China, Hong Kong, and Macau [37]. This membership offence

provides a mechanism to prohibit undesirable associations of offenders in criminal organizations and their cooperation in crime. Countries such as Brunei, Fiji, Papua New Guinea and Solomon Islands have a crime of conspiracy under their criminal laws [38]. Although not directly designed to combat criminal organizations and the participation in organized crime, these provisions serve as a preliminary offence, similar to the concept of attempt, in that they do not require the commission of a crime.

Under the second model the 'organized commission of a crime' or 'conspiracy to commit a crime' operates as an aggravating feature. Perpetrators are liable to higher penalties if criteria that qualify the commission of an offence as organized crime are fulfilled. In some instances, special regulations regarding methods of investigations, seizure of assets, and criminal procedure apply if the qualifying requirements are met. Examples can be found in the *Racketeer-Influenced and Corrupt Organizations (RICO) Act* (Philippines), and in article 266 *Penal Code 2000* (Vietnam).

Organized crime and participating in criminal organizations are not designated crimes under Australian law. Instead, the Government chose to legislate against key aspects and activities of organized crime rather than criminalizing organizations that are active in common fields of organized criminal activity. Section 4 of the *National Crime Authority Act 1984*, which established and regulates Australia's premier anti-organized crime law enforcement agency, outlines some of the features that characterise organized crime as "relevant criminal activity"/"relevant offence". These features, isolated or cumulative, are not necessarily criminal offences themselves. In Australia, it is, however, possible to make members of criminal organizations liable under the conspiracy provisions contained in Commonwealth and State criminal law [39].

General observations

Many countries in the Asia Pacific region have witnessed political turmoil, the end of colonial rule and rapid economic developments, which had strong impacts on legislation and legal systems. Some countries in the region do not have comprehensive immigration and organized crime legislation and the phenomenon of migrant trafficking is dealt with by a variety of regulations. In other cases, law and law enforcement often could not keep pace with the rapid political, demographic and economic developments, or immigration issues did not have high priority on political agendas. In these circumstance the old law remained mostly unchanged.

Offences that criminalize the activities of transnational trafficking organizations are a comparatively new product. Prior to the early 1990s, very few countries in the region had special provisions against trafficking, and up until today very few have enacted legislation that penalizes the central aspects of migrant trafficking.

For example, organizing illegal migration is a crime in only three jurisdictions surveyed here. Countries such as Thailand, Malaysia, Singapore and the Philippines, which have been identified as some of the major hubs of migrant trafficking and as bases for many criminal organizations, do not have this offence. Although these countries have provisions that extend criminal liability to higher levels of management within commercial organizations, it often remains difficult, if not impossible, to prosecute the core arrangers and organisers of trafficking operations. Other countries do not have provisions that make the transportation of illegal migrants an offence. In these circumstances there is great danger that these countries may be used as transit points for the illegal passage.

Secondly, the organizational side of migrant trafficking is not adequately criminalized in most countries of the region. Only the Philippines, Hong Kong, Macau, Taiwan and, to a lesser degree, China have enacted comprehensive legislation to combat organized crime and deprive criminal organizations of the profits they generate. Most countries continue to prosecute criminal organizations on the basis of conspiracy or other provisions that are not originally designed to fight organized crime and which do not enable the prosecution of offenders who are not immediately engaged in the commission of crime.

But the countries with the more comprehensive and more sophisticated legislation are not necessarily those with the lowest levels of migrant trafficking. The PR China, for instance, has some of the most complex and up-to-date trafficking offences, most of which have been implemented with the criminal law reform in 1997. However, China continues to be the source country of large numbers of trafficked migrants in the region and around the world. Comprehensive anti-trafficking laws are an important tool in the fight against illegal migration and organized crime, but there is little chance they will succeed if law enforcement efforts remain marginal and if government officials continue to be bribable.

In summary, Australian criminal law penalizes most of the activities of trafficking organizations in a comprehensive manner. The operational issues such as supply, service, distribution and finance that have been identified as integral aspects of migrant trafficking are largely covered by the provisions contained in the *Migration Act*, *Crimes Act*, *Criminal Code*, *Passports Act* and additional Commonwealth and State legislation.

A major deficiency of the present law is that it fails to make any exception for the transportation of refugees. For example, people who bring genuine refugees to Australia are criminally liable under Subdivision 12A *Migration Act* regardless of the fact that their passengers may all be granted protection visas in Australia. It seems cynical that the 'refugee smugglers' of the Cold War era are now designated criminals, and that refugees are expected to apply and be selected from abroad rather than being processed in safe countries such as Australia.

Traditionally, most countries have placed strong emphasis on offences that occur immediately at or within their borders: making false statements, producing and transferring documents, and, as will be the subject of future research, all offences involving the illegal migrants themselves. But the phenomenon of migrant trafficking is one that is not exclusive to one single nation; it is transnational in nature. In all cases, some of the preparatory, recruiting, organizational, transit, forgery, harbouring and clandestine immigration activities take place abroad. Provisions that solely focus on internal security and do not take into account the international dimension of trafficking are determined to fail.

But not only is it necessary that the offences address all aspects and all dimensions of trafficking, it is also important that they are complemented by similar, if not identical, legislation abroad. Hong Kong, the PR China, Macau, Malaysia and the Philippines, for instance, have comparatively comprehensive anti-trafficking laws, but their immediate neighbours don't. The problems of illegal migration and organized crime cannot be solved if one country criminalizes trafficking and takes all possible steps to fight it, and its neighbour doesn't. These discrepancies ultimately result in exporting problems to countries with greater loopholes in legislation and less law enforcement activities. Handballing crimes elsewhere cannot be the answer to the growing concerns surrounding migrant trafficking. It becomes evident that the key solution lies within multilateral, regional and international cooperation to combat illegal migration and organized crime as will be shown in the final parts of this article.

Regional and International Activities to Combat Illegal Migration and Organized Crime in the Asia Pacific Region

The growth of migrant trafficking in the Asia Pacific region and around the world urges nations to cooperate in regional and international fora and elaborate and implement adequate countermeasures. 'To fight crime and win' the countries of the region have no choice but to join forces and coordinate their efforts to prevent and combat illegal immigration and organized crime more effectively.

The following sections highlight some of the principal initiatives at global and regional levels.

United Nations Convention Against Transnational Organized Crime

The *UN Convention Against Transnational Organized Crime* was approved by the UN General Assembly in November 2000, and was made available for governments to sign at a conference on 12–15 December in Palermo. To date, 132 countries of the UN's 189 member nations and the European Community

signed the *Convention against Transnational Crime* [40]. Of the countries of the Asia Pacific region Australia, PR China, Indonesia, Philippines, Singapore, Thailand and Vietnam have signed the Convention. Brunei, Cambodia, Fiji, Lao PDR, Malaysia, Myanmar, Papua New Guinea, Solomon Islands and Vanuatu have not (yet) signed it [41].

The key objective of the Convention is stated in Article 1: "The purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively." The Convention has two main goals: one is to eliminate differences among national legal systems. The second is to set standards for domestic laws so that they can effectively combat organized crime. Various provisions of the Convention are designed to provide instruments for law enforcement agencies, to encourage and coordinate prevention efforts, and to support and protect victims. Key provisions of the Convention include the criminalization of participation in an organized criminal group (art 5), criminalization of money laundering (arts 6, 7), criminalization of corruption (arts 8, 9), provisions on confiscation and seizure (arts 12–14), extradition of offenders (arts 16, 17), mutual legal assistance (art 18), investigation and law enforcement cooperation (arts 20, 26–29), and provisions on the protection of witnesses (arts 24, 25).

The Convention is intended to encourage countries that do not have such provisions to adopt comprehensive measures and to provide them with some guidance as to how to approach the legislative and policy questions involved. It is also designed to provide greater standardization and coordination of national policy, legislative, administrative and enforcement approaches to the problem to ensure a more efficient and effective global effort to control transnational organized crime.

UN Protocol Against the Smuggling of Migrants by Land, Air and Sea

The *United Nations Protocol against the Smuggling of Migrants by Land Air and Sea, supplementing the Convention against Transnational Organized Crime* is the first attempt to criminalize migrant smuggling and associated offences universally, such as immigration and identity document fraud, and the harbouring and concealing of illegal migrants, including all forms of participation and attempts. The Protocol also seeks to enhance the protection of migrants and encourage judicial and law enforcement cooperation at the international level. 79 nations signed the protocol in December 2000 [42].

Essentially, the *Protocol against the Smuggling of Migrants by Land, Air and Sea* aims to criminalize the smuggling of migrants and those who practice it, while recognizing that migration itself is not a crime and that migrants are often victims needing protection:

Article 2 Statement of purpose

The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

The Protocol contains 25 Articles. Part I, Articles 1–6 makes general provisions regarding the criminalization of migrant smuggling, the application and terminology of the Protocol, its relation with the mother Convention, and the non-criminalization of migrants. Part II, Articles 7–9 is designed to establish special measures to combat the smuggling of migrants by sea, recognizing existing obligations under the international law of the sea. Article 9 contains a safeguard clause to ensure, inter alia, the safety of migrants and their humane treatment. Part III, titled “prevention, cooperation and other measures” contains the key provisions for international cooperation against migrant smuggling, including information exchange (art 11), border measures (art 12), apprehension of fraudulent documents (arts 12 and 13), training and technical cooperation (art 14) and provisions regarding the protection and return of smuggled migrants (arts 16 and 18). Final provisions are contained in Part IV, articles 19–25 of the Protocol.

The UN *Convention against Transnational Organized Crime* and the *Protocol against the Smuggling of Migrants* are the outcome of lengthy debate, are highly politically influenced, and represent the result of compromise rather than the best knowledge of contemporary transnational organized crime. However, they are also the major, most universal and best available tools to combat transnational criminal activities beyond the limitations of national legislation.

Unfortunately, only very few countries of the Asia Pacific region nations have yet signed the Convention and the Protocol. The implementation of the Convention and the Protocol pose significant challenges to the United Nations and all signatory States. Many, if not most countries will have to amend their laws, including penal codes, organized crime acts and immigration legislation. The criminal justice and law enforcement systems of some countries will require adjustment to put in place the provisions under the new international instruments.

But in addition to the legislative amendments, many of the measures require substantial financial and human resources as well as technical equipment and know-how, posing particular difficulties to smaller and economically less developed nations. Some countries in the region simply do not have the resources to commit themselves to the Convention and the Protocol. However, with growing levels of transnational organized crime in the Asia Pacific, the countries of the region are genuinely interested and willing to participate in international law enforcement cooperation. It is for that reason, that the larger regional powers, such as Australia, Canada, Japan and the United States need to assist the smaller nations at the earliest possible stage of the implementation process, in order to improve law enforcement structures,

criminal justice systems and the development of human resources, through training and the upgrading of skills, as well as assisting them in the acquisition and modernization of equipment and facilities.

Regional activities against migrant smuggling

Awareness among the governments in the Asia Pacific region that the issue of organized crime and illegal migration can be approached only through some form of regional cooperation led to the establishment of several mechanisms to allow dialogue and sharing of information.

The Manila Process. At the initiative of IOM, participants from eleven countries from East and South East Asia met in Manila on 5–6 December 1996 to discuss and exchange views on the topic of irregular migration and migrant trafficking in the region. There was widespread and shared concern over the growth in irregular migration, of which migrant smuggling is only one form, albeit a particularly abusive and dangerous one. The seminar concluded a loose list of ideas and decided to continue the dialogue that began at the Manila meeting, pursue the exchange of general information among participants on issues of common interest, work together to harmonise legislation and penalties relating to irregular migration and migrant smuggling, and expand the dialogue to other countries directly concerned with irregular movements in and through the region.

As a follow-up to the first seminar, IOM organized a second seminar with twelve participating nations that met in Manila in December 1997. The seminar considered various recommendations and suggestions that have been made in fora of other regions, for example in Europe and Latin America. However, consensus remained limited to preserving the atmosphere of frank and open discussion without expanding it to the ministerial level, and shifting the seminar to a more issue-focused approach. A third meeting was held in 1999 and most recently the Government of Indonesia hosted the fourth inter-governmental meeting in the framework of the 'Manila Process' in Jakarta on 2–3 October 2000.

Today, thirteen governments from East and South East Asia and Hong Kong participate in the Manila Process to discuss trends in irregular migration and trafficking in the region and how to combat those problems in regional cooperation. The last meeting agreed to pursue concrete action in capacity building and development of information sharing practices.

Asia-Pacific Consultations (APC). The Australian Government and UNHCR organized a regional meeting on refugees and displaced persons in 1996 that was attended by representatives of 24 countries (Skeldon 2000: 21). The scope of the agenda was expanded the following year to include migration, reflecting the migratory situation in the region and continued under the name of Asia Pacific Consultations (APC).

The APC offers a much broader scope of discussion than the Manila Process and is attended by a larger group of participants. While the Manila Process focuses on irregular migration and trafficking, APC serves as a forum to discuss a variety of issues relating to population movements in the Asia Pacific region. It is anticipated that APC and the Manila Process will develop a close working relationship and there are expectations that in the future APC could be used as a unifying forum for the various initiatives on population movements in the Asia Pacific region.

Bangkok Declaration on Irregular Migration. In April 1999, IOM in cooperation with the Thai Government organized a symposium on irregular and undocumented migration. Attended by ministers and representatives of more than fifteen countries, the meeting concluded with the signing of the *Bangkok Declaration on Irregular Migration* [43].

Key issues of the *Bangkok Declaration* are:

- analysis and management of migration in the Asia Pacific region (paras 1–4, 16);
- preventing and combating irregular migration (paras 6, 8) by passing legislation to criminalize smuggling of and trafficking in human beings in all its forms and purposes, and to cooperate as necessary in the prosecution and criminalization of all offenders, especially international organized criminal groups;
- assistance to developing countries (para 7);
- cooperation and information exchange (paras 3, 9, 10, 12);
- return of illegal migrants to countries of origin (para 13); and
- humanitarian treatment of migrants (para 14).

The Declaration is a landmark document addressing the question of international migration, with particular attention to regional cooperation on irregular and undocumented migration. The *Bangkok Declaration* can be considered as the most important tool in the Asia Pacific region to combat migrant smuggling at the supranational level. Since most of the countries of the region have not signed the *UN Protocol against Migrant Smuggling*, the *Bangkok Declaration* serves as a common basis for law enforcement cooperation and there is discussion that the provisions under the Declaration may one day become enforceable.

The activities of ASEAN (Association of South East Asian Nations). ASEAN aims to accelerate the economic growth, social progress and cultural development in the region, and to promote regional peace and stability. To achieve these goals, ASEAN activities include political cooperation and economic and functional cooperation under six Plans of Action.

Most recently, the ASEAN Plan of Action in Combating Transnational Crime has been added, which led to the *ASEAN Declaration on Transnational Crime*, concluded in Manila, 18–20 December 1997 [44]. The declaration calls for cooperation at the regional level to fight transnational organized crime and for the establishment of an ASEAN Centre on Transnational Crime. A second meeting was held in Yangon, Myanmar on 23 June 1999 [45].

Simultaneously, ASEAN established a working group for cooperation on immigration matters. At a meeting held in Yangon, 13–14 December 1999, the ASEAN Directors-General of Immigration Departments and Heads of Consular Divisions of ASEAN Ministers of Foreign Affairs formulated a framework for ASEAN Cooperation on Immigration Matters [46]. The meeting agreed to establish an Ad-hoc High-Level Experts Group on Immigration Matters to develop an institutional framework for ASEAN cooperation on immigration matters, to develop a plan of action encompassing the objectives, scope, strategies, mechanisms, modalities and funding arrangements, and to establish a directory of immigration focal points to establish a network among the immigration authorities in ASEAN, especially in the area of law enforcement.

Secondly, ASEAN countries agreed to introduce facilitated travel among ASEAN member states. Moreover, the ASEAN forum agreed to discuss on a regional approach to combat trafficking in persons at the Ad-hoc High-Level Experts Group Meeting in the Philippines.

Although the ASEAN initiatives are only fragmentary declarations, cooperation under the umbrella of ASEAN is particularly important, as the member countries show much stronger support for ASEAN activities than for initiatives by other regional organizations. ASEAN is primarily driven by economic incentives and all countries of the region, including non-members, show a keen interest in participating in ASEAN fora. Consequently, it is desirable to foster legislative and law enforcement cooperation at the ASEAN level and work towards harmonized and enforceable mechanisms to combat migrant trafficking in the Asia Pacific region.

The Way Ahead

In the past and present, most countries in the Asia Pacific region have viewed migrant trafficking primarily as an issue of national security, and have tried to combat the phenomenon by criminalizing most aspects of irregular migration and organized crime on domestic levels. The success, however, has been very limited, if not non-existent, as the beginning of the new millennium is facing growing levels of migrant trafficking along with new and stronger migration pressures and a growth in organized crime activities.

In Australia, the Government sought to combat migrant trafficking and deter illegal immigrants by criminalizing all aspects of the movements,

combined with policies of mandatory detention and, most recently, the off-shore processing of asylum seekers. Irregular immigration has been further criminalized and detention and deportation have become the simplistic answers to unwanted arrivals.

Controlling illegal immigration, especially migrant trafficking, is a major challenge for sending, transit and receiving countries. There is no doubt that the criminal law has a role to play in the suppression and prevention of migrant trafficking, and in the prosecution of offenders. Criminal measures are particularly attractive because, in principle, they only affect the criminals, and because they may produce a short-term effect by gaoling offenders, and a long-term effect by preventing further criminal activities. To increase penalties appears to be the most immediate response to any incidents of illegal immigration. Also, amending the criminal law is a comparatively inexpensive way to combat migrant trafficking and usually finds strong support in the public.

However, there is great doubt that criminalizing irregular migration has a deterrent effect on persons who are fleeing as a result of persecution, unemployment, poverty or severe environmental degradation. Moreover, it needs to be reminded that the criminal sanctions must only be the ultimate remedy, and that the criminal law and its enforcement cannot substitute the structural and political changes that are necessary to address the more fundamental causes of migrant trafficking. For instance, none of the amendments that have been made to the Australian *Migration Act 1958* in recent years has taken into account the migration pressures that exist in the Asia Pacific region, and none of the amendments have addressed the incentives for illegal migration (Schloenhardt 2000). Tightening up borders and 'unauthorizing' irregular arrivals has so far been unsuccessful in reducing the number of illegal immigrants to Australia.

Migrant trafficking is sometimes described as a victimless crime, also because it serves as a tool to transport refugees to more secure places. But there are many difficulties with this line of reasoning. Traffickers exploit and abuse people desperate to save their lives. Traffickers often maltreat migrants physically and place their lives at risk. Traffickers must be held criminally responsible for all their actions and intentions, and it must be ensured that they are dealt with fairly and adequately by national and international criminal justice systems.

In order to be successful, law enforcement mechanisms and the prosecution and conviction of traffickers must accompany the criminal offences surrounding migrant trafficking. A principal problem for many, if not most countries in the Asia Pacific region is the discrepancy that exists between law and law enforcement systems. Many countries, especially the economically less flourishing ones, have great difficulties in enforcing their laws and in controlling their borders effectively, which is particularly difficult in countries with large, archipelagic coastlines. But even in countries with effective control mechanisms,

law enforcement operations mostly concentrate on the individual migrant, leaving aside the involvement of criminal organizations in the trafficking of migrants.

Part Four of this article has demonstrated that many countries in the region do not have up-to-date legislation to deal with large criminal organizations and their transnational activities. Although migrant trafficking, along with many other organized crime activities, is an offence that goes beyond national boundaries, the focus of law and law enforcement has remained local and national. Furthermore, criminal law, criminal procedure and law enforcement regulations vary greatly among jurisdictions, thus resulting in safe havens for traffickers.

The principal problem that is inherent in the existing regulations is that in order to combat trafficking organizations, their activities and structure effectively, the provisions largely depend on international law enforcement cooperation and mutual legal assistance. As seen earlier, most criminal organizations engaged in illegal migration operate transnationally, and therefore the investigation of crimes and the prosecution and extradition of offenders depend heavily on the assistance provided by foreign countries. It is for that reason that provisions like, for instance, those under Chinese and Macau criminal law may prove to be unsuccessful as long as they remain isolated and are not complemented by legislation in other countries of the region.

A further problem in the fight against migrant trafficking and in controlling and regulating migration flows is that of refugees. The existence of asylum systems and the protection provided under these systems is one of the key determinants for migration flows in the Asia Pacific region. It is not surprising that the majority of people migrating in the region who are not labour-migrants move to countries that are signatories of the *Refugee Convention*. But to date, only very few countries in the region have committed themselves to the obligations of international refugee law. Most countries fear about the potential political consequences as the grant of refugee status carries a negative imputation and can have a detrimental effect on the relationship between the receiving and the sending country.

At the same time it has been found that migrants sometimes abuse existing refugee protection schemes and that traffickers advise their customers to apply for asylum as soon as they are apprehended by border control or police forces, in order to avoid removal. It is not evident to answer the question how these abuses can be avoided in the future without infringing the rights of migrants.

Although it is important that the criminal law demonstrates its full strength towards traffickers and immigration offenders, it must not deprive people of opportunities to access asylum systems and of the fair assessment of their claims. The requirements of immigration regimes and the offences that apply to unauthorized arrivals can interfere with international obligations, basic human rights and in particular with the non-refoulement obligations established under international refugee law and other human rights

documents. It is not reasonable to take action against migrant trafficking by eliminating legal avenues of migration and restricting the protection provided to asylum seekers.

But the concern is not limited to refugees only; it also touches the much broader aspect of international migration in all its forms. As long as people are convinced that life is better elsewhere, there is no way to avoid that some of them will 'try their luck' and move abroad, be it legally or illegally, with or without the consent of the countries and authorities involved.

The issues associated with migrant trafficking are not exclusive to one country; they are transnational in nature and are of concern to all countries in the Asia Pacific region. The underlying problems that cause migratory movements and refugee flows need to be addressed by regional development cooperation and information and education programmes to improve the sharing of responsibility. These are long-term processes that require strong commitment by all countries involved.

At the short and medium-term it is important that the countries of the region cooperate in elaborating, implementing and enforcing mechanisms to effectively combat the operations of traffickers and to protect the migrant victims. In order to reduce and eventually eliminate the discrepancies in law and legal systems, the countries of the region need to harmonize their immigration and asylum systems together with the equal criminalization of violations of immigration laws. The growth of migrant trafficking in the Asia Pacific region urges nations to elaborate and implement adequate counter-measures, and cooperate in regional and international fora. Ultimately, the countries of the region have no choice but to join forces and coordinate their efforts to prevent and combat migrant trafficking effectively.

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Notes

- 1 For an overview of definitions of 'trafficking in migrants'/'people smuggling', see Salt (2000: 33–34) and Siron & van Baeveghem (1999: 6–20).
- 2 Cf. UN General Assembly, *Interpretative notes for the official records of the negotiations of the United Nations Convention against Transnational Organized Crime and the protocols thereto*, UN Doc A/55/383/Add.1 (3 Nov 2000) para 88: "[T]he intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to

migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or non-governmental organizations.”

- 3 For example, the coups in Fiji in 1987; the persecution of ethnic minorities such as Mons, Shans and Karens in Myanmar. *cf.* Weiner (1993: 8, 15).
- 4 PR China, Indonesia, Lao PDR and Myanmar have been the scene of religious persecution. *cf.* Amnesty International (2001: 70, 153–154); Muntarbhorn (1992: 105–107).
- 5 For example, East Timor and the former states of the USSR. *cf.* Goodwin-Gill (1996: 45–46); Hathaway (1991: 144); Mikulka (1996: 42).
- 6 *cf.* Singapore (Amnesty International 2001: 213).
- 7 For example, China (Amnesty International 2001: 69–73), Myanmar (Amnesty International 2001: 175; Archavanitkul 1998: 30; Muntarbhorn 1992: 26), and Lao PDR (Amnesty International 2001: 153). Political opinion has also been a key migration factor in many countries on their way to independence. For example, the independence movements in New Caledonia, Bougainville, Solomon Islands and East Timor have caused internal conflicts, sometimes generalized violence and ultimately emigration. *Cf.* Henningham (1995: 52–70); Linnekin (1997: 407–419).
- 8 For example, PR China (Smith 1997: 14; Wang 1996: 59–60).
- 9 For example, Cambodia, Lao PDR, Myanmar, Vietnam and, more recently, Solomon Islands.
- 10 For example, PR China (*cf.* Goldstone 1997: 55; Kung 2000: 1296, 1320–1305; Peck 1998: 1051; Smith 1997: 13).
- 11 For example, Thailand (*cf.* Archavanitkul 1998: 3, 18, 24); PR China (Bolz 1995: 151; Wang 1996: 59).
- 12 In the Lao PDR, for instance, economic development was much at the expense of severe environmental degradation and caused large-scale resettlements. In Malaysia, government policies have been strongly in favour of urban centres while rural areas faced severe environmental degradation, particularly in the form of deforestation. Also, increasing urbanization and particularly environmental degradation have been common experiences in many South Pacific countries, thus contributing to migrant outflows.
- 13 No information could be obtained on migrant smuggling from and through Vietnam and Lao PDR.
- 14 Sixteen percent of all unauthorized air arrivals in the 1999–2000 financial year departed from Bangkok (DIMA 2001: 95).
- 15 Of all unauthorized air arrivals in the 1999–2000 financial year, 23.4 percent departed from Kuala Lumpur Kuching airport (DIMA 2001: 95).
- 16 Singapore is the major point of embarkation for passengers arriving in Australia illegally. Thirty percent of all unauthorized air arrivals in the 1999–2000 financial year departed from Singapore (DIMA 2001: 95).
- 17 Personal communication with Ms Christine Capron, Chef de la Division Ressources, Direction de la Police Au Frontières en Nouvelle Calédonie, Canberra, 14 Jan 2001; “New Caledonia still processing Chinese boat people” (19 Sep 2001) *Pacific Islands Report*, www.pipd.ewc.hawaii.edu/pireport.

- 18 “Authorities confirm existence of people smuggling ring” (2001) 5 *United Nations International Drug Control Programme: Eastern Horizons, News on the fight against drugs and crime in East Asia and the Pacific* 15.
- 19 Art 321(1) *Law on Control of the Entry and Exit of Foreigners 1986* (PR China); art 7(1) *Clandestine Immigration Act 1990* (Macau); s 55A(1) *Immigration Act 1959/1963* (Malaysia); s 46(1) *Immigration Act 1940* (Philippines); s 18(1)(s) *Immigration Act 1978* (Solomon Islands); s 63(1) *Immigration Act 1979* (Thailand).
- 20 Art 29(2) *Law on Immigration 1994* (Cambodia); art 37D(1)(c) *Immigration Ordinance 1972* (Hong Kong); s 13(5) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 16(1)(b) *Migration Act 1978* (PNG); s 57(1)(b) *Immigration Act 1959* (Singapore); art 57(2) *Immigration Law* (Taiwan).
- 21 s 18(2) *Immigration Act 1959/1963* (Malaysia); ss 18(2), 18A(2) *Immigration Act 1959* (Singapore); ss 23, 63(2) 65 *Immigration Act 1979* (Thailand).
- 22 Ss 230, 231 *Migration Act* (Cth); s 22(3) *Immigration Act 1959/1963* (Malaysia); art 13(3) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 44(a)(1), (2) *Immigration Act 1940* (Philippines); s 22(3) *Immigration Act 1959* (Singapore); s 5(3) *Immigration Act 1978* (Solomon Islands); s 66 *Immigration Act 1979* (Thailand); s 10(3) *Immigration Act 1971* (Vanuatu).
- 23 Ss 20(2) *Immigration Act 1959/1963* (Malaysia); s 39 *Immigration Ordinance 1972* (Hong Kong); ss 44(b)(1), 46A *Immigration Act 1940* (Philippines); s 20(2)(4) *Immigration Act 1959* (Singapore); s 5(3) *Immigration Act 1978* (Solomon Islands); ss 27(1), 67 *Immigration Act 1979* (Thailand); s 10(3) *Immigration Act 1971* (Vanuatu).
- 24 Ss 37C(1) (2)(b)–(d), 40 *Immigration Ordinance 1972* (Hong Kong); art 36 *Entry and Residence Act 1999* (Macau); ss 44(c), 46(2) *Immigration Act 1940* (Philippines); ss 22(4), 43 *Immigration Act 1959/1963* (Malaysia); ss 22(4), 23(4), 23A (4), 42 *Immigration Act 1959* (Singapore); art 38(2), 57 *Immigration Law* (Taiwan); s 70 *Immigration Act 1979* (Thailand); s 22(7) *Immigration Act 1971* (Vanuatu).
- 25 S 44(b)(3) *Immigration Act 1940* (Philippines); arts 41, 58 *Immigration Law* (Taiwan); ss 29(1), (3), 71, 72 *Immigration Act 1979* (Thailand); s 17(6) *Immigration Act 1971* (Vanuatu).
- 26 Art 29(2) *Law on Immigration 1994* (Cambodia); art 3 *Clandestine Immigration Act 1990* (Macau); s 56(1)(d) *Immigration Act 1959/1963* (Malaysia); s 13(5) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 16(c) *Migration Act 1978* (PNG); s 46(1) *Immigration Act 1940* (Philippines); s 57(1)(d) *Immigration Act 1959* (Singapore); art 164 *Criminal Code 1925* (Taiwan); s 64 *Immigration Act 1979* (Thailand); s 22(1)(1) *Immigration Act 1971* (Vanuata).
- 27 S 312 *Penal Code 1945* (Fiji); s 42 *Immigration Ordinance 1972* (Hong Kong); s 56(1)(k) *Immigration Act 1959/1963* (Malaysia); s 12A *Passports Act 1966* (Malaysia); s 13(7)(b) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 5(b) *Passports Act 1975* (PNG); s 57(1)(k) *Immigration Act 1959* (Singapore); s 18(1)(a) *Immigration Act 1978* (Solomon Islands).
- 28 Art 12 *Clandestine Immigration Act 1990* (Macau); s 42(1)(a) *Immigration Ordinance 1972* (Hong Kong); s 45(f) *Immigration Act 1940* (Philippines); s 16(j) *Migration Act 1978* (PNG); s 18(1)(d) *Immigration Act 1978* (Solomon Islands); s 22(1)(a) *Immigration Act 1971* (Vanuatu).
- 29 S 130 *Penal Code 1963* (Solomon Islands).

- 30 See, for example, ss 71, 72 *Crimes Ordinance 1971* (Hong Kong); s 462 *Criminal Code 1974* (PNG); art 172 *Penal Code 1932* (Philippines); art 210 *Criminal Code 1935* (Taiwan); ss 264, 265 *Penal Code 1956* (Thailand).
- 31 Cf. art 32 *Law on Immigration 1994* (Cambodia); art 29 *Law on Control of the Entry and Exit of Aliens 1986* (PR China); art 14 *Law on Control of the Exit and Entry of Citizens 1986* (PR China); s 42(2)(a)(i) *Immigration Ordinance 1972* (Hong Kong); art 11(1) *Clandestine Immigration Act 1990* (Macau); s 55D *Immigration Act 1959/1963* (Malaysia); s 13(7)(c) *Immigration (Emergency Provisions) Act 1947* (Myanmar); s 18(1)(b) *Immigration Act 1978* (Solomon Islands); s 22(1)(b) *Immigration Act 1971* (Vanuatu); art 20(1) *Ordinance on Exit, Entry, Residence and Travel of Foreigners in Vietnam 1992*.
- 32 *Passports Act 1966* (Malaysia); *Passports Act* (Philippines).
- 33 See art 32 *Law on Immigration 1994* (Cambodia); s 45b *Immigration Act 1940* (Philippines).
- 34 S 16(1)(h) *Migration Act 1978* (PNG); s 18(1)(p) *Immigration Act 1978* (Solomon Islands); s 22(1)(n) *Immigration Act 1971* (Vanuatu).
- 35 S 56(i) *Immigration Act 1959* (Malaysia); s 57(1)(i) *Immigration Act 1959* (Singapore); s 16(1)(h) *Migration Act 1978* (PNG); s 18(1)(p) *Immigration Act 1978* (Solomon Islands); s 22(1)(n) *Immigration Act 1971* (Vanuatu).
- 36 *Organized and Serious Crime Ordinance 1994* (Hong Kong); *Organized Crime Act 1997* (Macau); *RICO Act 1999* (Philippines); *Organized Crime Control Act 1999* (Taiwan).
- 37 Art 36 *Criminal Law Provisions 1992* (Cambodia); art 264 *Criminal Law 1997* (PR China); ss 159A-159C *Crimes Ordinance 1971* (Hong Kong); art 288 *Penal Code 1995* (Macau).
- 38 Ss 385-387 *Penal Code 1945* (Fiji); s 515 *Criminal Code 1974* (PNG); ss 383-385 *Penal Code 1963* (Solomon Islands), and see the information provided by UNCJIN, *Central Repository on Organized Crime*, www.uncjin.org/Documents/Crtoc/cenrep.html (12 Feb 2001).
- 39 See S 86 *Crimes Act 1914* (Cth), s 11.5 *Criminal Code* (Cth); *Crimes Act 1900* (NSW) (common law offence); ss 282-294 *Criminal Code* (NT); Chapter 56 *Criminal Code 1899* (Qld); common law offence, SA; s 297 *Crimes Act* (Tas); Div 10 *Crimes Act 1958* (Vic); Chapter LVIII *Criminal Code* (WA).
- 40 See UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, UN doc A/55/383 (2 Nov. 2000) Annex I for the full text of the Convention in its final form. The text has also been reprinted in 40 ILM 335 (2001).
- 41 Cf. "Annex, United Nations Convention against Transnational Organized Crime, Signatures", available at UNODCCP, www.odccp.org/adhoc/crime/crime_cicp_conventions/signature.pdf (31 Oct. 2001).
- 42 See UN General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, UN Doc A/55/383 (2 Nov. 2000) Annex III, and 40 ILM 335, 384 (2001) for the full text of the Protocol in its final form.
- 43 The full text of the *Bangkok Declaration* is available at www.iom.int/migration-web/meetings/Bangkok/BangkokDeclarationIrr-Migration.htm
- 44 The full text of the *ASEAN Declaration* is available at www.aseansec.org/politics/adtc77.htm.

- 45 The full text of the Communiqué is available at www.aseansec.org/politics/jc_cri02.htm.
- 46 *Joint Press Statement, Third Meeting of the ASEAN Directors-General of Immigration Departments and heads of Consular Divisions of ASEAN Ministeries of Foreign Affairs*, 13–14 Dec. 1999, Yangon, Myanmar, available at www.aseansec.org/news/jgs_dgi.htm.

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