

# 'Scum of the earth'? People-smuggling, criminalisation and refugees

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Stephen Coupland, *Installation View*, 2009. Courtesy of the artist and Macquarie University Art Gallery.

On 24 September 2010, Hadi Ahmadi, a joint Iranian-Iraqi national was sentenced by the Western Australian District Court to seven and a half years in prison, with a non-parole period of four. In August 2010, he had been convicted for his role in helping organise two boats carrying 550 people that arrived at Christmas Island in 2001. In total, Ahmadi had been accused of helping to smuggle 911 people in four boats, of whom 866 were granted refugees status by the Australian authorities.<sup>1</sup> Some of these people gave evidence against Ahmadi during the hearing, as did an informant who was paid \$250,000 by the Australian Federal Police. Ahmadi was dubbed a people-smuggling 'kingpin' in much of the media but evidence given at the trial suggested his role consisted of 'finding accommodation for asylum seekers, collecting fees and taking them by bus to beaches where boats were waiting to take them to Australian waters'. Ahmadi had, himself, made two unsuccessful attempts to enter Australia by boat and was recognised as a refugee by the UNHCR in Indonesia. He told the court 'he helped [the passengers] for free out of a sense of duty and compassion for people who would face persecution or death if deported back to their countries.'<sup>2</sup> His lawyer commented outside the court: 'The case is a sad reminder of the status of Australia's obligations to refugees under international law. Mr Ahmadi hopes that history will judge him in a far kinder light and asks you to remember that there are members of our community who will forever be Hadi's Australians.'<sup>3</sup>

The Ahmadi case highlights the complex personal circumstances of those routinely attacked as 'evil' by politicians from both major parties and poses a number of related questions. Does people-smuggling really represent a serious form of criminality? Who are the people targeted by law enforcement agencies? What are the human rights implications for both the passengers and the smugglers? In discussing these themes, this article argues that the dominant law enforcement paradigm of people-smuggling is based on often false assumptions and contributes to systematic breaches of the rights of refugees.

### The legal and policy framework

In both international and domestic law, people-smuggling is conceptualised as a serious form of transnational organised crime. The 2000 *United Nations Convention on Transnational Organised Crime* and its associated *Protocol Against the Smuggling of Migrants by Land, Sea and Air* have contributed to the uniform criminalisation of activities related to organised breaches of border controls. The Convention requires signatory states to criminalise participation in an organised criminal group, which the Convention defines as 'a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences'.<sup>4</sup> One such offence is people-smuggling, which the Protocol defines as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State party of which the person is not a national or permanent resident'.<sup>5</sup> The Protocol also states that 'migrants shall not become liable to criminal prosecution'<sup>6</sup> for the act of being smuggled, a provision consistent with the prohibition on criminalisation in the 1951 *UN Refugee Convention*, but this does not prevent 'criminalisation' of refugees through administrative measures such as the mandatory detention of unlawful non-citizens.

Since 2001, both the Coalition and Labor governments have amended the *Migration Act 1958* and the *Commonwealth Criminal Code Act 1995*, to elevate people smuggling into the most serious category of criminal offences tantamount to breaches of national security. Following amendments rushed through Parliament in the final sitting before the 2010 federal election,<sup>7</sup> people smuggling is now defined as organising or facilitating the entry or proposed entry of a non-citizen with no lawful right to come to Australia.<sup>8</sup> Under this definition, unlike the 2000 Smuggling Protocol, even those who act for purely humanitarian purposes are criminalised. This is an absolute liability offence carrying a maximum penalty of 10 years. Moreover, it operates as an underlying offence for aggravated offences that are defined in order to cover all boat arrivals: a journey that gives rise to a danger of death or serious bodily harm or one that involves a group of at least five people.<sup>9</sup> The maximum penalty for the aggravated offences is 20 years. Mandatory minimum sentences of five years with a three year non-parole period apply; for repeat offences or offences that give rise to a danger of serious harm the mandatory penalty increases to eight years with a five year minimum.

A new offence of providing material support for people-smuggling has also been introduced. This criminalises any support in the form of advice or material assistance that might assist someone (including a family member) obtain illicit passage. The only exception is if the person accused is also a member of the group. These provisions

clearly target refugee communities and their supporters in Australia and make them potentially subject to ASIO surveillance.

### Recent experience

The measures introduced to deter unauthorised entry have not succeeded in their own terms. The conflicts in states such as Iraq, Afghanistan and Sri Lanka have ensured that refugees justifiably continue to seek the protection of the Australian government. While providing potent political imagery for politicians, the use of terms such as 'queue jumper' to describe those who risk hazardous boat journeys denies their experiences of undocumented flight in circumstances where there are no formal means of entry into safe states (that is, there is no formal queue to join), and vastly exaggerates the role of people smuggling as a primary reason for refugees seeking protection in Australia.

There is a lack of systematic and transparent data about the scope of people smuggling and the nature and success of the various policing measures in place to disrupt and prevent it. Between September 2008 and March 2010, the Australian Federal Police (AFP) arrested 117 people in relation to people smuggling offences, which by April 2010 had resulted in 28 convictions and 89 people still before the courts.<sup>10</sup> However, there have been substantial disparities between the numbers of arrests reported and actual convictions,<sup>11</sup> and indications that those who are being arrested and detained tend to be boat crews or, as in the case of Hadi Ahmadi, people with protection needs of their own.

This issue was highlighted in August 2010, when approximately 120 Indonesian 'suspected people-smugglers' detained without charge for periods of up to nine months at the Darwin immigration detention centre, engaged in widely publicised protests regarding the delays in the investigation of their cases<sup>12</sup>. Many of these people are believed to be boat crew. Their fate had been raised in March 2010 by President Yudhoyono, who was reportedly concerned that the 173 alleged smugglers then detained in Australia were predominantly fishermen and undeserving of mandatory five year prison sentences. Imposing mandatory sentences on such people might be regarded by the major parties as a valuable 'get tough' strategy for domestic political purposes but it is difficult to see how it operates as a meaningful deterrent or a blow against 'organised crime'. Moreover, the sentencing regime comes at a significant financial cost, given that the courts will be required to sentence those detained currently to total of at least 648 years' jail.<sup>13</sup>

Some courts are also beginning to criticise the mandatory sentencing regime. In October 2009, two crew members from the SIEV 36, the boat that exploded off the north-west coast in April 2009, were sentenced in the Northern Territory Supreme Court. At the time of the explosion, Prime Minister Rudd described those involved as 'the absolute scum of the earth.'<sup>14</sup> However, in sentencing the pair, Judge Mildren made it clear, that had he the choice, he would have imposed a much lesser sentence than required given their backgrounds as poorly educated fishermen from coastal towns, confronting economic hardship and offered work to crew a boat.<sup>15</sup>

Recent prosecutions have also highlighted the protection needs of alleged 'key players'. In March 2004, Tol Van Tran and Van Hoa Nguyen were convicted of charges relating to the smuggling into Australia of

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53 Vietnamese refugees in a boat owned and skippered by Tran in July 2003. After successful appeals on the grounds that they were acting 'in response to circumstances of sudden or extraordinary emergency' Tran was acquitted on re-trial and the prosecution discontinued against Nguyen after the jury failed to reach a verdict. By 2005, all 53 passengers were granted protection or humanitarian visas and Tran has successfully appealed against the decision by Customs to destroy his boat in July 2003.<sup>16</sup>

In 2004, Iraqi national Ali Al Jenabi stood trial on charges related to smuggling 359 passengers on four boats and eventually pleaded guilty to charges relating to two boats carrying 258 passengers. In September 2004, he was sentenced to concurrent terms of six years and 3 months and eight years with a four year non-parole period. When sentencing Al Jenabi, Judge Mildren accepted that 'his principal motivation was to get his family to Australia, although he was clearly in need of money and whatever else may be said of his motives, this activity provided him with his means of living.'<sup>17</sup> Al Jenabi was released from prison in June 2006 but taken immediately into immigration detention. The Australian government has acknowledged that it has protection obligations to Al Jenabi, whose family has a history of persecution in Iraq. However, his convictions as a smuggler have been used to deny him a visa on character grounds and he remains in community detention.<sup>18</sup>

## Conclusion

The main effect of the criminalisation of people smuggling is that it legitimises policing operations designed to prevent refugees seeking protection on their own terms. While it is not suggested that people smugglers are characterised by the highest moral scruples, individuals such as Hadi Ahmadi and Ali Al Jenabi can claim to have provided a humanitarian service in circumstances where their passengers were denied formal routes of entry.

There is limited published research on the attitudes of refugees towards smugglers<sup>19</sup> but one of the refugees who Al Jenabi assisted recently commented, 'I think he is the best smuggler. He had a good heart. He was not hard, not a greedy person.'<sup>20</sup> Such comments reflect the complex overlap between forced migration, illicit travel and border controls that is denied by the increasingly punitive response to people smuggling. However, unless we acknowledge that smuggling operates as an integral part of the refugee experience, and that undercutting it requires that governments facilitate entry, rather than engage in increasing elaborate border controls, refugees will continue to take risks, some smugglers will continue to make money and a lot of fishermen will serve mandatory prison sentences for no good purpose in Australian gaols.

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## Endnotes

- 1 Project Safecom, *The case of Mr. Hadi Ahmadi*, at <http://www.safecom.org.au/ahmadi-case.htm> accessed 18 September 2010.
- 2 'Trial casts light on people smuggling', *Sydney Morning Herald*, accessed 12 August 2010.
- 3 'Hadi Ahmadi gets minimum four years for people smuggling', *PM*, Radio National, 24 September 2010
- 4 Article 2.
- 5 Article 3(a).
- 6 Article 5.
- 7 See *Anti-People Smuggling and Other Measures Act 2010*.
- 8 S233A(1) *Migration Act 1958*; s73.1 *Commonwealth Criminal Code Act 1995*.
- 9 SS233B and 233C *Migration Act 1958*; SS72.2 and 72.3 *Commonwealth Criminal Code Act 1995*.
- 10 Senate Legal and Constitutional Affairs Legislation Committee (2010) *Report on Anti-People Smuggling and Other Measures Bill*, p.4.
- 11 Out of approximately 1,000 allegations, there were 19 prosecutions and 17 convictions between June 2000 and June 2005, Department of Immigration, Multiculturalism and Indigenous Affairs, *Annual Report 2004-2005*, p.95.
- 12 'Detainees rioting at Darwin immigration centre', *Sydney Morning Herald*, 29 August 2010; 'AFP won't explain why Indonesians left to languish', *ABC News*, 3 September 2010, online at <http://www.abc.net.au/news/stories/2010/09/03/3002251.htm>, accessed 6 September 2010.
- 13 '648 years jail for smugglers', *The Age*, 7 September 2010.
- 14 'People smugglers should rot in hell: Rudd' *PM*, ABC Radio National, 17 April 2009, transcript at <http://www.abc.net.au/pm/content/2009/s2546098.htm>, accessed 20 April 2009.
- 15 *The Queen and Mohamid Tahir and Beny*, NTSC, SCC 20918263 and 20918261, transcript of proceedings, 28 October 2009.
- 16 *Nguyen v The Queen* [2005] WASC 22; *Tran v The Commonwealth* [2010] FCAFC 80.
- 17 *The Queen and Al Hassan Abdolamir Al Jenabi*, NTSC SCC 20302840 and 20302843, transcript of proceedings, 21 September 2004.
- 18 Chris Bowen MP, Media release, 7 February 2008.
- 19 See, for example, Sue Hoffman, 'Reaching Australia: Iraqi asylum seekers in transit in south-east Asia', Paper presented at the Second Multi-disciplinary Conference of the International Association of Contemporary Iraqi Studies, Philadelphia University, Amman, Jordan, June 2007, online at: <http://www.safecom.org.au/hoffman2007.htm>, accessed 18 September 2010.
- 20 Quoted, 'People Smuggler defended as fair, decent man', *Sydney Morning Herald*, 4 February 2008.