

Re:locations

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About

Re:locations is a student-run journal and academic forum that seeks to bridge disciplinary and geographical divides. In acknowledgement of shared histories of migration, cultural exchange, and trade—and a simultaneous recognition of the exciting but underdeveloped potential of comparative research— Re:locations disrupts traditional delineations of Asia to highlight a broadly Pacific-centric perspective. Geographically, the journal spans East, Southeast, and South Asia, Australasia, Polynesia and Oceania, the Americas, and other places that are connected to the Pacific world.

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Contents

Even so, Remember me:

Memorialization and Contestation in South Asia	6
Natalia A. Beghin, Australian National University	

“A survey of memorialization (a collective, rather than individualized remembrance) and its contestation provides the most accessible means with which to determine the effects of justice, or ostensible justice, on present day South Asia. Indeed, the ritualistic means by which humans collectively preserve memory, and the eons for which they have done so provide a solid basis for supposing that such practices can be beneficial: facilitating reconciliation, cooperation, and the non-violent restoration and preservation of identity. Nevertheless, it is also imperative to question, in the critical vein, who is in control of the narratives that are being memorialized at any given time, and what interests might determine proclivities toward commemorating persons or events in a particular fashion...”

Ships & Snakeheads:

The Brief Phenomenon of Fujianese-Chinese Boat Arrivals in Australia	23
Ryan Chan, University of Queensland, Australia	

“Beginning from the 1980s, many Fujianese-Chinese left their homes and families to pursue their fortunes abroad. Through the services of the Snakeheads, a transnational people smuggling organization, they were able to integrate within North America and Europe by the hundreds of thousands. This phenomenon also took place in Australia. However, little has been reported upon Australia’s experience with Fujianese-Chinese migration. This article will explore this gap in the literature by investigating Snakehead maritime operations within the Asia-Pacific region, and the Australian government’s efforts in limiting this trend of irregular migration...”

Even So, Remember Me:

Memorialization and Contestation in South Asia

Natalia A. Beghin

*So long as men can breathe, or eyes can see,
So long lives this, and this gives life to thee*

- William Shakespeare, Sonnet 18

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The history of political philosophy, from Plato's *Laws*, to Kautilya's *Arthashastra*, and John Rawls' *Justice as Fairness*, though infinitely varied, contains within it one continuous theoretical theme: namely, the notion that extant justice may only be guaranteed through efforts of deliberate administration.¹ Taken collectively, this philosophical sub-field implies that it is not enough to simply expect natural justice to take a principled course independently. Rather, institutions of state and civil society must actively create cultures that facilitate the equitable distribution of resources, rights, and thus, means to power.² This final component may initially strike as incoherent, until one recalls that the conveyance of just relations has always served as an arena for political and social struggle - and perhaps the most common object of such struggle is narrative in form.³ Put differently, any examination of just relations must take into account the identities, and therefore the memories, of the agents who engage in them; for such remembrances are determinant of the current means by which justice is (legitimately or otherwise) distributed.

Because individual memory formation is by nature both discrete and biological, however, any assessment of this aspect of justice in a contemporary setting must take a collective, and therefore somewhat mediated form. A survey of memorialization (a collective, rather than individualized remembrance) and its

¹ Plato & Thomas L. Pangle (trans.), *The Laws of Plato*, (Chicago: University of Chicago Press, 1988) pp.252; Kautilya & L. N. Rangarajan (trans.), *The Arthashastra*, (Delhi: Penguin Books, 1992) pp.351; John Rawls, *Justice as Fairness: A Restatement*, (Cambridge: Harvard University Press, 2001) pp.75 & 78.

² *Ibid.*

³ Michel Foucault, *Language, Counter-Memory, Practice: Selected Essays and Interviews*, (Oxford: Basil Blackwell, 1977) pp.204.

contestation thus provides the most accessible means with which to determine the effects of justice, or ostensible justice, on present day South Asia. Indeed, the ritualistic means by which humans collectively preserve memory, and the eons for which they have done so provide a solid basis for supposing that such practices can be beneficial: facilitating reconciliation, cooperation, and the non-violent restoration and preservation of identity.⁴ Nevertheless, it is also imperative to question, in the critical vein, who is in control of the narratives that are being memorialized at any given time, and what interests might determine proclivities toward commemorating persons or events in a particular fashion. Power dynamics, in other words, delimit what might be considered legitimate memory, and determine the repression or elevation of certain narratives on the basis of self-preservation and perceived import. The true and contemporary practice of memorialization, then, is less like an ideal and objective honoring of the past, and more akin to what Friedrich Nietzsche would have described as a process of ‘Egyptianism’ - a practice whereby events are de-historicized and perverted from their true contexts for the purpose of providing comfort to those who supposedly ‘commemorate’ them.⁵ Memorialization, thus, far from being a process of remembrance, is in fact nothing but a strategy to enable the profound illusion of an avoidance of verity.

This article pursues this thesis in the context of contemporary South Asia to demonstrate that memorialization is often more a process of manipulatory power struggles that mirror a Foucauldian ‘Power/Knowledge’ struggle than simple remembrance of things past. Notwithstanding its westernized approach, it is not a contradiction in terms to employ Foucauldian theory in an assessment of memorialization practice in South Asia. Indeed, Foucault represents a culturally and temporally transcendental stance, for his genealogy is not concerned with peoples

⁴ Barbra J. Mills, William H. Walker, *Memory Work: Archaeologies of Material Practices*, (Santa Fe: School for Advanced Research Press, 2008) pp.83; Nigel C. Hunt, *Memory, War, and Trauma*, (Cambridge: Cambridge University Press, 2010) pp.180.

⁵ Friedrich Nietzsche & Aaron Ridley (ed.), *The Anti-Christ, Ecce Homo, Twilight of the Idols: And Other Writings*, (Cambridge: Cambridge University Press, 2005) pp.167; Stuart Elden, “Reading Genealogy” in *Foucault and Heidegger: Critical Encounters*, Alan Milchman & Alan Rosenberg eds. (Minnesota: University of Minnesota Press, 2003) pp.199; Bruce Ellis Benson, *Pious Nietzsche: Decadence and Dionysian Faith*, (Bloomington: Indiana University Press, 2008) pp.90.

per se, but rather the spaces of contestation in *between* and *among* them: elements crucial to the act of memorialization, as we will see. As such, part one of the paper probes the notion of memorialization in more depth in order to locate the phenomenon, particularly as it relates to the concept of justice, contemporary, and Foucauldian discourse. Following this, I engage in two case studies to better examine memorialization's contemporary South Asian manifestations in countries which are well placed to exemplify the power of a Foucauldian approach. That is, countries whose histories and dynamics make evident the spaces *between*, and *among* rather than object person-driven 'similarities'. The first of these case studies presents an assessment of India's Bharatiya Janata Party and the ways in which the Hindu-nationalist discourse, to which the movement ascribes, is a process of memorialization for a false and constructed monolithic historical identity. The second case study, which concerns the memorialization efforts undertaken in Sri Lanka to commemorate the twenty-five-year civil war, reveals selectivity in remembrance initiatives, and once again highlights that power struggles of one kind or another are necessarily extant in the practice of memorialization.

Desires and Hopes Profound – Locating Memorialization

In order to properly understand the ways in which justice as memorialization is manifesting itself in the contemporary politics of South Asia, it is imperative to first examine the notion of memorialization in the abstract, and to consider some contemporary institutionalized and philosophical discourses of remembrance. In so doing, we are not only able to better locate the practice in the present, but also divorce the general and incomplete notion of memorialization from its true expression. To begin to understand the myopia with which the concept is generally approached, we need go no further than to consider that a typical definition of 'memorialization', retrieved via an internet search, will provide only a singular interpretation, and, will read much like that offered by Merriam-Webster, which states that the act of memorialization is: 'to do or create something that causes people to remember'.⁶ Examples tend to refer to 'ceremonies' or 'commemorations' – actions that require an element of physicality to pull the past into the present,

⁶ "Memorialization" *Merriam-Webster Online*, last modified 2015, <http://www.merriam-webster.com/dictionary/memorialize>

ostensibly so as to prevent it from repeating itself, or alternatively to perpetuate the perceived benefit of that which is being deliberately remembered.⁷ But the act of remembering, as we know intuitively from our own experiences, cannot be uniquely physical as these definitions imply, suggesting there is something incomplete about popular depictions of the phenomenon.

It is worthwhile then, to assess the perspectives of sources and agents better placed to actually determine the nature and extent of a given discourse, especially in the South Asian context. And an examination of recent resolutions undertaken by the United Nations (UN) concerning the question of memory suggests that this institution, too, is unsatisfied with a definition of remembrance that is purely monumental or ceremonial in both form and function. Indeed, the malaise with which the UN has appeared to grapple with this discourse in recent years not only bolsters my thesis concerning the necessarily contested nature of memorialization, but also shows that a true representation of the phenomenon is much more complex than orthodox definitions allow. In 2005, for instance, the *Updated Set of principles for the protection and promotion of human rights through action to combat impunity* was released by the Economic and Social Council's Commission on Human Rights. The principles, while never explicitly employing the term 'memorialization', nevertheless make strong statements about the 'right to truth' – or access to history grounded in the legitimate expression of remembrance and experience.⁸ The document states that 'every people [sic] has the inalienable right to know the truth about past events' and that such a right is 'imprescriptible', meaning that it exists and may be expressed regardless of whether legal proceedings concerning the event being remembered have taken place or not.⁹ This implies the UN recognizes the value and arguably the necessity of such undertakings, and thus tacitly suggests the denial of memorialization is in itself criminal. Indeed, the right to truth is considered by the UN to be 'fundamental to the inherent dignity of the human person' for

⁷ "Memorialization", *Merriam-Webster Online*

⁸ UN Commission on Human Rights, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1 (8 February 2005) pp.6-7; Dinah Shelton, *Remedies in International Human Rights Law*, (Oxford: Oxford University Press, 2005) pp.113.

⁹ *Ibid*, pp.7

knowledge of the ‘full and complete’ truth enables individuals to respond to tragedy or history in ways they feel to be personally appropriate.¹⁰ Such a conclusion corresponds well with the suppositions presented in Resolution 18/7, also of the Human Rights Council, which in establishing a three-year appointment of a Special Rapporteur on the promotion of truth, also formally entrenched the ‘four pillars’ of transitional justice in the UN lexicon, these being; the right to truth, the right to justice, the right to reparations, and the guarantee of non-recurrence.¹¹ Contemporaneous theoretical analyses, such as that by Thyagi Ruwanpathirana of the Centre for Policy Alternatives, laud this document for its implicit inclusion and affirmation of memorialization, noting that the practice ‘can play a role’ in supporting all four elements of justice.¹² Taken as a whole, therefore, what such UN resolutions confirm is that the practice of memorialization is actually an expression of justice in and of itself, inasmuch as it is a form of reparation (in the form of a public acknowledgement) for suffering.¹³

Although the above consideration of a UN-based discourse of memorialization provides us with greater insight than that offered by the mainstream lexicon, the institution has nevertheless failed to recognize the last element of memorialization which makes it fundamentally contested and contestable – namely its role as a tool of power. Michel Foucault’s 1977 masterwork, *Language, Counter-Memory, Practice*, which built on the philosopher’s polemic concerning what he called the ‘Power/Knowledge’ relationship, however, provides the key to completing this definition.¹⁴ Foucault’s main theory, extant in this work and others, was that all relations between agents are relations of power, and thus any ‘success of history’ or ‘ruler’, as it were, is simply an entity that has found a way to bend the

¹⁰ UN Commission on Human Rights, *Study on the Right to the Truth, Report of the Office of the United Nations High Commissioner for Human Rights*, E/CN.4/2006/91 (8 February 2006) pp.15 & 4.

¹¹ UN Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence, Pablo de Grieff*, A/HRC/30/42 (7 September 2015) pp. 4-6.

¹² Thyagi Ruwanpathirana, *Memorialization for Transitional Justice in Sri Lanka: A Discussion Paper*, (Colombo: Centre for Policy Alternatives, 2016) pp.9.

¹³ *Ibid.* pp.10

¹⁴ Foucault, op. cit. *Language, Counter-Memory, Practice*, pp.24-25.

constructed discourse that we call ‘knowledge’ to their advantage.¹⁵ In his own words, power ‘belongs to those who are capable of seizing the rules...to pervert them...and redirect them against those who had initially imposed them’.¹⁶ By this view, any narrative of event or phenomenon in which we engage in the present is not an invocation of an objective past happening, but rather an appropriation of a constructed knowledge or vocabulary, purposed towards the control and domination of others.¹⁷ History and its memory thus become what Foucault calls ‘a comprehensive view’, or a falsely monolithic abstraction that excludes details which conflict with the self-regard of those presently in power.¹⁸ While still a means towards obtaining a perceived justice then, the contemporary veneration of the past engaged with via practices of memorialization is nevertheless a false act or ‘parody’ in which individuals spurn any realization of a ‘real’ truth in favor of mollifying their distresses before the unknown, and satisfying what Nietzsche would likely have referred to as an ‘uncivilized’ human disposition, or our seeming need to routinely create a false friend/enemy dichotomy.¹⁹ To the extent that memorialization is nothing but an expression of power relations, then, Foucault reminds us that it is necessary to cast a critical eye not only on what is being ‘remembered’, but also on who is doing the remembering, why they chose to remember in the ways they do, and most importantly, what such activities imply about the essence of the political present.

Remembering Nothing – Contested History and the Bharatiya Janata Party

My elucidation of the nature of memorialization above, apart from anything else, demonstrates that memorial practices are not limited to the remembrance of events which could be called ‘historically accurate’ or, indeed, substantiated in any objective way. Currently, such a conclusion is perhaps no more applicable than in

¹⁵ Joseph Rouse, “Power/Knowledge” in *The Cambridge Companion to Foucault*, Gary Gutting ed. (Cambridge: Cambridge University Press, 2005) pp.95-96: Foucault, op. cit. *Language, Counter-Memory, Practice*, pp.151.

¹⁶ *Ibid.*

¹⁷ *Ibid.* pp.154.

¹⁸ *Ibid.* pp.157.

¹⁹ *Ibid.* pp.161 & 201: Irving M. Zeitlin, *Nietzsche: A Re-examination*, (Cambridge: Polity Press, 1994) pp.92.

India, where the center-right Bharatiya Janata Party (BJP) led by Narendra Modi and joined by an additional thirteen coalition partners, currently holds the balance of power in both houses of parliament.²⁰ In line with the repercussions of Foucault's relations of 'Power/Knowledge', I maintain the BJP has engaged in regular memorialization practices that siphon rhetoric from a falsely homogenized and constructed 'history' which pits a monolithic Hindu nation, or *rashtra*, against a vitriolic and uncivilized Muslim 'other'.²¹ This 'remembrance' creates a centralized flashpoint – redirecting contemporary feelings of economic and social disenfranchisement toward a communal-based dichotomy.²² This both distracts citizens from class inequalities, and - more importantly - provides an unmitigated legitimacy for the BJP, which is ostensibly securing 'justice' for the past wrongs committed against Hindus.²³ And clearly, the party is benefiting greatly: the BJP has not only recently been able to win the most decisive parliamentary victory in the history of modern India, but also better legitimate a nuclearized stance towards Pakistan, appeal popularly regarding their reactionary position on Jammu and Kashmir, and even rally overwhelming support for the destruction of Muslim places of worship, the most sensitive of which, the *Babri Masjid*, they publicly intend to replace with a Hindu Temple.²⁴

It is my contention that the BJP engages most clearly in memorialization practices with regard to its expressions of *Hindutva* ideology. This discourse can be traced to what were essentially the founding documents of the Rashtriy

²⁰ "Partywise Trends & Result" *Election Commission of India Online*, last modified 2016, <http://eciresults.ap.nic.in/>

²¹ Runa Das, "Encountering Hindutva, interrogating religious nationalism and (En)gendering a Hindu patriarchy in India's nuclear policies" *International Feminist Journal of Politics*, vol. 8, no. 3 (2007) pp.372.

²² Mary E. John, "Feminism, Poverty, and the Emergent Social Order" in *Social Movements in India: Poverty, Power, and Politics*, Raka Ray and Mary Fainsod Katzensten eds. (New York: Rowman & Littlefield Publishers Inc. 2005) pp.111.

²³ Runa Das, op. cit. "Encountering Hindutva" . pp.376.

²⁴ John Harriss, "Hindu Nationalism in Action: The Bharatiya Janata Party and Indian Politics" *South Asia: Journal of South Asian Studies*, vol.38, no.4, (2015) pp. 712; Runa Das, "Postcolonial (in)securities, the bjp and the politics of Hindutva: Broadening the security paradigm between the realist and anti-nuclear/peace groups in India" *Third World Quarterly*, vol. 24, no.1 (2010) pp.78; Deepa S. Reddy, "Hindutva: Formative Assertions" *Religion Compass*, vol.5, no.8 (2011) pp.444.

Swayamsevak Sangh (RSS), a paramilitary Hindu nationalist volunteer organization and ideological ‘parent’ of the BJP.²⁵ *‘Essentials of Hindutva’* and its subsidiary 1928 pamphlet *‘Hindutva: who is a Hindu?’* by Vinayak Damodar Savakar, laid the groundwork for the BJP’s contemporary memorialization of a false past constituted by a monolithic Hindu nation and a vicious Muslim enemy.²⁶ Savakar maintains that ‘Hinduness’ is comprised of identification with an Indian fatherland (*pitrībhu*) which is also congruent with a person’s holy land (*punyabhu*).²⁷ Moreover, Hindus are said to share a common culture (*sanskriti*) and race (*jati*).²⁸ Taken in tandem, Hindutva thus implies that there is not only an ethnic component to Indian identity but also a religious one.²⁹ By Savakar’s logic, one may be genetically Indian, but not legitimately someone who might partake in Hindutva, for practitioners of Judeo-Christian (read: Muslim) and other faiths have holy lands located outside of India, and thus any love for country they may harbor will necessarily be ‘divided’.³⁰ Official and public documents of the RSS also note that ‘the ideal of the Sangh is to carry the nation to the pinnacle of glory’ and to ‘consolidate the Hindu society’ at the expense of others who have, throughout history, not worked to ‘protect the Hindu Dharma’.³¹ Building on this, the election manifestos of the BJP engage in a polarized memorialization when, for instance, they state that ‘the present millennium begun with the subjugation of our ancient land’ recalling a constructed history of longstanding humiliation and subjugation to rally support in the present, and in so doing also ask that the people allow the BJP lead ‘a reinvigorated, proud, and prosperous India [sic] herald the next millennium’.³² Somewhat surprisingly,

²⁵ M. G. Chitkara, *Rashtirya Swayamsevak Sangh: National Upsurge*, (New Delhi: APH Publishing Corporation, 2004) pp.68: Harriss, op. cit. “Hindu Nationalism In Action” pp.713.

²⁶ Reddy, op. cit. “Hindutva: Formative Assertions” pp. 440.

²⁷ Vinayak Damodar Savarkar, *Hindutva; who is a Hindu? (fifth edition)*, (New Delhi: Veer Savarkar Prakashan, 1969) pp.115 & 118.

²⁸ *Ibid.* pp.101& 116.

²⁹ Reddy, op. cit. “Hindutva: Formative Assertions” pp. 440.

³⁰ Vinayak Damodar Savarkar, *Essentials of Hindutva*, (Seattle: Createspace Publishing, 2016) pp.40.

³¹ “Know RSS” *Rashtirya Swayamsevak Sangh Online*, last updated 2016, <http://www.rss.org/knowus/Static/shakha.aspx>

³² Bharatiya Janata Party, *For a Strong and Prosperous India: Election Manifesto* (New Delhi: Bharatiya Janata Party Office, 1996).

the memorialization practices of the BJP also extend to a falsely critical view of Hindus prior to the ‘awakening’ provided by Hindutva ideology; here BJP party members and publications regularly make reference to a supposedly historical ‘Hindu degeneracy’ that allowed for subjugation by foreign entities and also saw the unravelling of a distinctly Hindu consciousness at the hands of Nehruvian democracy, which ‘diluted’ Indians through a perverted secularism.³³ Similar critiques of such discourse have also been highlighted in the ongoing ‘NCERT controversy’ surrounding the writings of Romila Thapar, who’s historical textbooks for high-schoolers underwent censoring in 2002 to remove information which could be seen to cast Muslims such as the emperor Aurangzeb in a positive light.³⁴ Such ‘communal’ interpretation of history is, in the words of Thapar, not only ‘historically unjustified’, but also overtly partisan - fueling a constructed violence between contemporary Muslim and Hindu communities, which as a result of such discourse, generate large portions of their contemporary and past identities by contrasting themselves with that of the fundamentally contrived ‘other’.³⁵

For instance, and even more publicly, BJP commemoration of such constructed histories is not only ethno-nationalist but selective, regularly eulogizing the successes and virtues of Hindu Indians, and ignoring those of others. During the 2016 Independence Day speech delivered by Narendra Modi on the 70th anniversary of Independence, such rhetoric was evident within his language choices. Delivering the speech in English, he nevertheless reverted to Hindi only when speaking of India, which he referred to as ‘Hindustan’ even though other non-religious linguistic connotations of ‘nationhood’ or country would have been just as linguistically

³³ Reddy, op. cit. “Hindutva: Formative Assertions” pp. 443 & 447.

³⁴ Romila Thapar, ‘Section 2: What Historians Say’ in *Communalisation of Education, the History Textbooks Controversy*, Mukherji, Mridula; Mukherji, Aditya, eds., (Dehli: Dehli Historians Group, 2002) pp.63

³⁵ Romila Thapar, *Somanatha: The Many Voices of a History* (London: Verso, 2004) pp. xi,154 & 224

legitimate.^{36,37} Modi was also selective in his recognition of prominent Indians, recalling only the triumphs of Sri Ramanuja Acharya, Shrimand Rajchandra, Mahatma Gandhi, and Pandit Deen Dayal Upadhyaya – all Hindus.³⁸ Correspondingly, Modi's memorialization of the conflicts of the past in an exclusive television interview undertaken with India's Network18, also demonstrate his selectivity in commemoration. In response to a question concerning the history of conflict in India, Modi remarked that 'all those who believe in Vasudhaive Kutumbakam' (an expression derived from holy Hindu texts that translates roughly as 'the world is one family') will find peace; implicitly excluding those who do not consider such texts holy from being physically secure in India, and reaffirming the notion of a longstanding and monolithic Hindu nation.³⁹

We can conclude from this case study, therefore, that a contemporary Indian manifestation of justice as memorialization is more unorthodox than one might initially assume, but no less formidable. Hindutva, and the ethno-nationalist rhetoric it has inspired in the BJP, support my thesis concerning the fundamentally contestable nature of memorialization, and also demonstrate the theories of those such as Foucault and Nietzsche at work. Hindutva's artifice built upon false history, and peddled by the BJP, has patently and fearfully been a successful tool for the obtainment and perpetuation of power. Here, it seems, false memory is future.

³⁶ Narendra Modi "We have to now move from 'Swarajya' to 'Surajya' PM Modi" *narendramodi.in*, last updated August 15 2016, <http://www.narendramodi.in/preliminary-text-of-prime-minister-shri-narendra-modi-s-address-to-the-nation-from-the-ramparts-of-the-red-fort-on-the-70th-independence-day-511827>

³⁷ I thank the kind reviewer who noted that Modi's use of the word '*Hindustan*' presented a paradox, for its etymology is Persian derived, rather than rooted in Sanskrit. I note that the fact the term has been adopted as an endonym (e.g. via its employment in institutions such as the *Hindustan Times* - one of the most circulated newspapers in the country - or indeed, via Hindu-nationalistic movies such as *Sher-E-Hindustan* [1998], *Raja Hindustani* [1996], and *Hindustan* [2004]) means that its lay use via a language of adoption has arguably become a form of memorialization in itself.

³⁸ *Ibid.*

³⁹ "Tough Line on Black Money: Full text of PM Modi's Interview To Network18" *narendramodi.in*, last updated September 2 2016, <http://www.narendramodi.in/tough-line-on-black-money-full-text-of-pm-modi-s-interview-to-network18-522121>

Forgetting Everything – Sri Lanka’s Selective Truths

The ‘shock’ electoral defeat of Sri Lanka’s two-term president, Mahinda Rajapaksa to his former health minister, Maithripala Sirisena on the 9th of January 2015 was lauded as a step forward for reconciliation in the country that had recently seen the end of a twenty-five-year civil war.⁴⁰ With Sirisena carried to victory on the high voting turnout of Tamil and Muslim minorities, agencies such as the BBC reported that it would now be impossible for ‘the ethnic grievances that fueled the long war’ to be ignored.⁴¹ This may be strictly true, but the ways in which such grievances have been dealt with in the context of memorialization have been selective, and once again demonstrative of the Foucauldian ‘Power/Knowledge’ dynamic, where remembrance is used as a tool to delineate history for the benefit of those who hold the greatest authority in the present.

In order to properly evaluate the extent of the selectivity in memorialization of the Sri Lankan Civil War, it is necessary to first consider what initiatives the Sri Lankan state as a formal entity has undertaken for the purpose of memorialization (and thus justice, by way of implicit acknowledgement and reparation). This is important not only because Sri Lanka formally committed itself to such undertakings via the UN, but also more generally because state-based initiatives implicitly carry with them greater prestige and authority, coming as they do from an official institution.⁴² Perhaps the most polarizing of such remembrance initiatives has been the installation of a war memorial at Killinochchi, the town which had operated as the effective ‘capital’ of the Liberation Tigers of Tamil Eelam (LTTE)

⁴⁰ Jason Burke “Sri Lanka election: Shock as president Mahinda Rajapaksa concedes defeat” *The Guardian Online*, last updated January 9 2015, <https://www.theguardian.com/world/2015/jan/09/sri-lanka-election-shock-as-president-mahinda-rajapaksa-concedes-defeat>

⁴¹ “Sri Lanka’s Rajapaksa suffers shock election defeat” *BBC News Online*, last updated January 9 2015, <http://www.bbc.com/news/world-asia-30738671>

⁴² Ministry of Foreign Affairs Sri Lanka “Statement by Foreign Minister Samaraweera at the General Debate of the 30th Session of the UN Human Rights Council, 14 September 2015” [mfa.gov.lk](http://www.mfa.gov.lk/index.php/en/media/media-releases/6178-slfm-hrc30), last updated September 18 2016, <http://www.mfa.gov.lk/index.php/en/media/media-releases/6178-slfm-hrc30>: Ruwanpathirana, op. cit. *Memorialization for Transitional Justice in Sri Lanka*, pp.13.

during the civil conflict.⁴³ The monument memorializes the Sri Lankan government victory over the LTTE and depicts the insurgency forces as a fractured slate pierced by a bullet, which itself symbolizes the ‘sturdiness of the invincible Sri Lankan army’.⁴⁴ The memorial does not acknowledge any violence committed by the government during the war, even though over twenty-seven-thousand Tamils are thought to have lost their lives or been victim to forced disappearance at the hands of the army.⁴⁵ Similarly, various other memorials to the war erected or updated in the recent past commemorate only state military personnel killed as a result of direct combat or terrorism.⁴⁶ This is true of the National War Memorial in Colombo, the War Hero Monument in the Grounds of the Parliament, the Cenotaph War Memorial in Viharamahadevi Park, and the War Museum and Victory Monument in Puthukkudiyiruppu.⁴⁷ The result of such selectivity is that no monument has been erected by the state in the period since the end of the civil war which acknowledges the losses and the suffering of members of the LTTE at the hands of the government: a conscious decision calculated to avoid recrimination for acts that were not only criminal, but reprehensible, and thus incompatible with the identity the state has constructed for itself.⁴⁸

This selectivity on the part of the government can also be seen in the mirror image of the memorialization initiatives it has failed to undertake. That is, with reference to those established instead by individuals and civil society groups. The lack of openness and tension which surrounds the subject of government-perpetrated crimes has forced many such initiatives into underground, unofficial, and/or private spaces thus making them harder to track.⁴⁹ The most dynamic of these spaces is the internet, which has seen the proliferation of Tamil-administered websites such as

⁴³ Ruwanpathirana, op. cit. *Memorialization for Transitional Justice in Sri Lanka*, pp.14.

⁴⁴ Charles Haviland, “Hard times in Sri Lanka’s war-ravaged north” *BBC News Online*, last updated July 21 2011, <http://www.bbc.com/news/world-south-asia-14183579>

⁴⁵ *Ibid*: “Recorded fatalities in UCDP Organized violence 1989-2015, Sri Lanka” *Uppsala Conflict Data Program Online*, last updated 2016, <http://ucdp.uu.se/#/exploratory>

⁴⁶ Ruwanpathirana, op. cit. *Memorialization for Transitional Justice in Sri Lanka*, pp.14.

⁴⁷ *Ibid*. pp.14-16.

⁴⁸ *Ibid*: Foucault, op. cit. *Language, Counter-Memory, Practice*, pp.24.

⁴⁹ Impunity Watch, *Memorialization as Related to Transitional Justice Processes in Sri Lanka: an Exploration*, (Utrecht: Impunity Watch, 2015) pp.7.

30yearsago.asia which commemorates the anti-Tamil pogroms of 1983 and *llrcarchive.org*, which is intended to ‘complement’ the Government initiated Lessons Learnt and Reconciliation Commission to make sure no documents are left out of the public domain.⁵⁰ More concerning, however, is the intimidation and violence that communities have suffered during efforts to memorialize those lost to the war. There are multiple records of Tamil individuals and groups being forcibly stopped by Sri Lankan military personnel from commemorating events and deaths (though it is imperative to note, the LTTE was also known to have forbidden and actively prevented memorialization of Sri Lankan forces from taking place).⁵¹ There have even been a number of instances where gravesites of LTTE dead have been demolished – selectively denying even physical evidence of past injustices.⁵²

A victor’s peace is thus manifest in the memorialization efforts undertaken in Sri Lanka, both by the government and by the LTTE. Neither party could legitimately be said to be fully innocent or fully blameworthy for the atrocities which took place, but the discourse that characterizes the memory of the Civil War in the contemporary politics and actions of the Sri Lankan government can be shown to be nothing but an expression of contestation over history. My second case study thus demonstrates once again that the manifestation of justice as memorialization in contemporary South Asia is, at its core, a Foucauldian ‘Power/Knowledge’ struggle. The fact that the government continues to reframe historical events is not an indication that any injustices were fabricated, but rather that the Sinhalese population, for reasons of economic, social, and political favor has simply been more adroit at co-opting vocabularies, histories, and identities to support the prolongation of their authority.

The Light Behind the Shadow

This assessment of justice as memorialization manifested in contemporary South Asia has shown that the great contributors to political philosophy were not mistaken

⁵⁰ “30 Years Ago” *30yearsago.asia*, last updated 2013, <http://30yearsago.asia/>: “About the site”, *llrcarchive.org*, last updated 2011, <http://www.llrcarchive.org/>

⁵¹ Ruwanpathirana, op. cit. *Memorialization for Transitional Justice in Sri Lanka*, pp.22 & 25.

⁵² *Ibid.* pp.20.

in their cautions against assuming that justice could exist successfully without administration.⁵³ Indeed, it appears that justice needs not only recognition but active upholding – efforts by both the state and civil society to consistently question in the genealogical vein the narratives which abound, and search for alternatives that are more akin to an objective and verifiable truth – even if that truth is at times troubling.⁵⁴ Disturbingly, the two short case studies provided in this paper are illustrative of only a minotiae of the governments and entities around the world that regularly deny their complicity in crimes and injustices, frustrating Foucauldian ‘counter-memory’, and also any capacity for authentic reconciliation and healing between communities.⁵⁵ Although we may at times observe slippages in the artifice of remembrance narratives in moments in which power changes hands, but examples such as those above demonstrate there is no possibility of a veritable form of memorialization which accurately and dispassionately remembers the objective past; namely because a selective memorialization is in itself a necessary (and even possibly sufficient) means of expressing and retaining a dominant position vis a vis contemporaneous knowledge/power dynamics. One might even go so far as to suggest that this practice of protracted and arguably habitual marginalization of histories that challenge the powerful is the true and only genesis of the ongoing instability we see in the present; and the past, unfortunately, does not bode well for the future in this regard. We can only hope, therefore, that a more extensive and realistic account of justice and memorialization as viewed from a Foucauldian lens can make apparent a reality which will make headway towards, if not the ultimate interruption of falsehood, at least the appreciation of its inevitability.

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⁵³ Plato, op. cit. *The Laws of Plato*, pp.252; Kautilya, op. cit. *The Arthashastra*, pp.351: Rawls, op. cit. *Justice as Fairness: A Restatement*, pp.75 & 78.

⁵⁴ Foucault, op. cit. *Language, Counter-Memory, Practice*, pp.163.

⁵⁵ *Ibid.* 160: Impunity Watch, op. cit. *Memorialization as Related to Transitional Justice Processes in Sri Lanka*, pp.9 & 12.

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Ships & Snakeheads:

The Brief Phenomenon of Fujianese-Chinese Boat Arrivals in Australia

Ryan Chan*

I Introduction

The cities and villages of Fujian Province owe their economic prosperity to the countless native men, women, and children smuggled out of the country to pursue their riches abroad.¹ Between the 1980s to mid-2000s, Western countries experienced an unprecedented amount of irregular Fujianese-Chinese migration.² There is currently a wealth of scholarly analysis and literature on the large-scale movement of Fujianese migrants to North America and Europe, but unfortunately very little on Australia.³ As such, the purpose of this paper aims to contribute to this glaring research gap by exploring Australia's experience with Fujianese-Chinese migrant operations at sea. The scope of analysis will not consider smuggling operations by air as this was not the predominant form of arrival into Australia, as reported by Australian authorities.⁴

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¹ Patrick Radden Keefe, "Snakeheads and Smuggling: The Dynamics of Illegal Chinese Immigration," *World Policy Journal* 26 (2009), 37.

² Ronald Skeldon, "Migration from China," *Journal of International Affairs* 49 (1996), 442; Frank Pieke, "Transnational Villages in Fujian: Local Reasons for Migration to Europe," *International Migration Review* 39 (2005), 486; Ko Lin Chin, *Smuggled Chinese: Clandestine Immigration to the United States* (Temple University Press, 1999), 28; Frank Pieke et al, *Transnational Chinese: Fujianese Migrants in Europe* (Stanford University Press, 2004).

³ *Ibid.*

⁴ Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), *Managing the Border: Immigration Compliance* (2004), 17-31.

II Causes of Immigration

A Push Factors

At the time when countless of Fujianese Chinese citizens were leaving their homes to pursue their fortunes abroad, it was observed that Fujian Province had been gripped by a culture of emigration.⁵ Almost all families sought to capitalise on the wage differential between China and Western countries, which effectually meant that any single family member working abroad could increase their annual income twentyfold.⁶ Due to this, there was immense pressure from society, and particularly from their families, for young men and women to migrate overseas in order to secure a steady income. People who remained behind were viewed as ‘lazy and stupid’, and families that did not have at least one-able bodied member sending remittances from abroad were considered to have no ‘face’ in their society.⁷ Soon, Fujianese citizens were emigrating at the expense of all employment opportunities offered domestically.⁸

A Chinese journalist who visited the area in the 1990s reported:

Everybody went crazy. The area was in a frenzy. Farmers put down their tools, students discarded their books, workers quit their jobs, and everybody was talking about nothing but going to America. If people found out someone had just successfully arrived in the United States,

⁵ Keefe, “Snakeheads and Smuggling: The Dynamics of Illegal Chinese Immigration,” 37; Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 9.

⁶ United Nations Office on Drugs and Crime, *Migrant Smuggling in Asia* (United Nations, 2015), 18.

⁷ Cindy Chu, “Human Trafficking and Smuggling in China,” *Journal of Contemporary China* 20 (2011): 44; Keefe, “Snakeheads and Smuggling: The Dynamics of Illegal Chinese Immigration,” 37; Julie Chu, *Cosmologies of Credit: Transnational Mobility and the Politics of Destination in China* (Duke University Press, 2010).

⁸ Frank Pieke, *Recent Trends in Chinese Migration to Europe: Fujianese Migration in Perspective* (International Organization for Migration, 2002), 38.

his or her home would be crowded with people to come to collect information about going to America.⁹

The dislocation of labour caused by China's economic reforms in the late 1970s was also a significant factor in the widespread emigration from Fujian Province.¹⁰ Large amounts of farmland in the Province begun to be converted into industrial areas or special economic zones, and millions of farmers and labourers found themselves displaced from their lands and unable to compete with the younger, better educated Chinese for factory jobs in rapidly expanding manufacturing industries.¹¹

Finally, O'Keefe notes the role of 'relative poverty' in driving the Fujianese-Chinese abroad. He describes this concept as the uneven distribution of material comforts, or simply put, the 'experience of watching your neighbours do better than you'.¹² Prior to the economic reforms, the people of Fujian Province had been fairly homogenous in terms of social class and spending capacity.¹³ The Province's economy was derived from agriculture, populated with low-skilled workers such as farmers and labourers.¹⁴ But as the region transformed into a centre for manufacturing and trade, certain material amenities began to distinguish those who had prospered in the new economic climate from those who had not.¹⁵ As a result, many felt they had no choice but to emigrate; if they failed to do so, they

⁹ "Chinese Human Smuggling," *Sing Tao Daily* (Hong Kong), 2 December 1996, 26; Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 9.

¹⁰ Sheldon Zhang and Mark Gaylord, "Bound for the Golden Mountain: The Social Organization of Chinese Alien Smuggling," *Crime, Law & Social Change* 25 (1996), 1-16; Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 17.

¹¹ Sheryl WuDunn, "With Focus on Profits, China Revives Bias Against Women," *New York Times* (New York), 28 July 1992, 1; Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 17.

¹² Keefe, "Snakeheads and Smuggling: The Dynamics of Illegal Chinese Immigration," 36. See also Jack Goldstone, "A Tsunami on the Horizon? The Potential for International Migration," *Human Smuggling: Chinese Migrant Trafficking and the Challenge to America's Immigration Tradition*, ed. Paul Smith (The Centre for Strategic and International Studies, 1997), 52.

¹³ Keefe, "Snakeheads and Smuggling: The Dynamics of Illegal Chinese Immigration," 36.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

would fall behind their neighbours in relative economic terms.¹⁶ Once several families in the area began to emigrate and improve their economic status, other families felt relatively deprived and thus felt spurred to emigrate themselves.¹⁷

B Pull Factors

It is widely acknowledged that the objective of the Fujianese migrant was to generate as much money as possible to send back to his or her family.¹⁸ In their migratory decisions, they assessed the likelihood of successful entry, strong employment opportunities, and high wages.¹⁹ Countries with an established Chinese diaspora were desirable as such a factor facilitated job-finding and eased settlement transitions.²⁰ By these premises, North American and European countries were the most attractive destinations as they all had sizeable and established Chinese diaspora communities. In particular, in the late 1990s, Australia enjoyed a prosperous economy, and the Snakeheads, the primary transnational people smuggling organization in China, also sought to exploit the large landmass and coastline that, at the time, were mostly unguarded.²¹ Moreover, it was reported that the Snakeheads had promised their smuggled 'clients' jobs at the Sydney Olympics in 2000, which would help to explain the influx of Chinese boat arrivals leading up to the Olympic games.²² This led to an influx of Fujian migrants migrating to Australia.

III China's Attempts in Stemming Fujianese Migration

¹⁶ Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 16.

¹⁷ Edward Taylor, "Remittances and Inequality Reconsidered: Direct, Indirect, and Inter-Temporal Effects," *Journal of Policy Modelling* 14 (1993), 208; Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 21.

¹⁸ Pieke, *Recent Trends in Chinese Migration to Europe: Fujianese Migration in Perspective*, 6. See also, Frank Pieke, "At the Margins of the Chinese World System: The Fuzhou Diaspora in Europe" (Research Paper, ESRC, 2005).

¹⁹ *Ibid.*

²⁰ Goldstone, "A Tsunami on the Horizon? The Potential for International Migration," 52.

²¹ Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region* (Brill Academic Publishers, 2003), 147.

²² Lynne O'Donnell and Sally Jackson, "From the Point of No Return, To Hell and Back, for \$20,000," *The Australian* (Sydney), 22 May 1999, 1.

The large influx of Fujianese immigrants in Western countries sparked major concern in Beijing, with many government authorities believing that the expansive Chinese smuggling network was causing considerable damage to China's reputation.²³ As a result, Beijing officials began to pressure authorities in Fujian Province to curb illegal migration,²⁴ employing two main strategies: education and harsher punitive measures.²⁵

The Fujian government attempted to educate the public about the dangers of clandestine immigration in a variety of ways. For instance, local law enforcement agencies and other government units were ordered to place large numbers of banners around Fujianese villages discouraging citizens from immigrating unlawfully.²⁶ The slogans on these banners included: "Be aware of the risks of clandestine immigration", and "Attack the Snakeheads, destroy the snake pits, punish the illegal immigrants."²⁷ However, such a measure failed to have any effect. According to Chin, many Fujianese simply viewed political slogans as routine propaganda.²⁸ Ying Chan, a journalist with the *New York Daily News*, reported that "residents privately laughed at requests by the government to turn in any Snakeheads."²⁹

The Chinese government also held numerous town meetings across Fujian Province, directing officers from China's Public Security Bureau to raise awareness about the perils of illegal immigration.³⁰ However, the audience was often comprised of government employees who had been forced by their superiors to attend. Ordinary citizens and people who had no affiliation with the government, ignored these meetings altogether.³¹ A police officer who had organized many of

²³ "Position of China on the Question of Illegal Migration" (People's Republic of China), 1994.

²⁴ Chin, above n 2, 133.

²⁵ *Ibid.*

²⁶ Pamela Burdman, 'China Cracks Down on Smuggling', *San Francisco Chronicle* (San Francisco), 29 April 1993, 1.

²⁷ Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 134.

²⁸ *Ibid.*

²⁹ Ying Chan, "Stop Smugglers, China Government Cries," *New York Daily News* (New York), 14 June 1995, 17.

³⁰ Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 135.

³¹ *Ibid.*

these events derided the effectiveness of this measure: “Special town meetings are really just a show we put on to convince our superiors in Beijing that we are doing something about illegal immigration. People attend these meetings because they have no choice. These meetings do nothing but to provide the participants with an opportunity to take a nap.”³²

The Chinese government also implemented harsher punitive measures to Snakeheads and illegal immigrants deported back to China. In March 1994, the Chinese Government promulgated a supplemental provision titled ‘Additional Provisions on Severely Punishing Criminals Illegally Organizing and Participating in Trafficking People across the International Border.’³³ Under these regulations, Snakeheads or any persons caught organising and transporting illegal imprisonments faced life imprisonment or, in certain circumstances, capital punishment.³⁴ Chinese migrants who were deported back to China were fined heavily, and reoffenders were sentenced to labour camps.³⁵

However, Chinese authorities failed to appreciate the profound level of corruption that affected law enforcement agencies, rendering many of their measures futile. Three years after the implementation of these measures, it was reported that immigration inspectors accepted more than RMB 1.6 million (approximately USD 200,000 at that time) in bribes from Snakeheads for their cooperation in the smuggling business.³⁶ Furthermore, given that the level of people smuggling persisted well after the implementation of this supplemental provision, it appears that punitive measures such as the death penalty, fines, and labour camp imprisonment did not bring about the deterrent effect intended.³⁷ On another note, the Fujianese community believed that the Snakeheads were conducting a fundamental societal good, and were considered amongst the community as philanthropists and respectable businessmen rather than criminals.³⁸ A forty-three

³² Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 135.

³³ “A Supplemental Regulation to Crimes Involving Organizing and Transporting People Across National and Regional Borders” (People’s Republic of China) Standing Committee of the People’s Congress, 5 March 1994.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 140.

³⁷ *Ibid.*

³⁸ *Ibid.*, 31.

year-old native from Tingjiang, Fujian, commented: “I look at human smuggling as benevolent work because a Snakehead can help people out of their predicament.”³⁹ Similarly, a nineteen year-old woman from Changle City, Fujian, described Snakeheads as “good people because, in a way, they helped China solve her overpopulation problem.”⁴⁰

IV Chinese Migrant Smuggling Operations

A The Snakeheads

The Snakehead, or the *shetou* in mandarin, is a colloquial term for migrant smugglers and any persons remotely involved in the migrant smuggling operation.⁴¹ Drawing from the current literature, the Chinese migrant smuggling trade is managed by ‘big Snakeheads’ who control transnational networks of ‘small Snakeheads.’⁴² The ‘big Snakehead’ is often the arranger or investor of the smuggling operation,⁴³ providing funds for the smuggling operation and overseeing it from afar.⁴⁴ In almost all instances, the Chinese citizens being smuggled will never meet the ‘big Snakehead,’ remaining as a faceless entity for the entirety of the migrant smuggling operation.⁴⁵ The ‘little Snakehead’ is considered the middleman and are responsible for finding and screening customers, collecting payments, and providing instructions and fraudulent documents necessary for leaving the country.⁴⁶ Other parties involved in maritime migrant smuggling operations include:

³⁹ Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 31.

⁴⁰ *Ibid.*

⁴¹ William Myers III, “Of Qingqing, Qinshu, Guanxi, and Shetou,” in *Human Smuggling: Chinese Migrant Trafficking and the Challenge to America’s Immigration Tradition*, ed. Paul Smith (The Centre for Strategic and International Studies, 1997), 128.

⁴² Cleo J Kung, “Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the US Statutory Definition of ‘Refugee,’” *Journal of Criminal Law & Criminology* 90 (2000): 1274.

⁴³ Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 29.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* 30.

⁴⁶ *Ibid.* See also Chu, *Cosmologies of Credit: Transnational Mobility and the Politics of Destination in China*.

transporters, document vendors, crew members, debt collectors, and enforcers. Transporters are based in China and abroad, and are responsible for moving the smuggled migrants to and from the vessel and the country's mainland.⁴⁷ Crew members and enforcers are responsible for the charter and maintenance of the vessel used for smuggling, and maintaining order amongst the smuggled migrants throughout the voyage.⁴⁸

There is a prevalent misconception that the Chinese migrant smuggling trade is governed by a strict criminal hierarchy, like in the manner of the Triads or Sicilian mafia.⁴⁹ However, most Chinese migrant smuggling is carried out by a diffuse international network of middlemen,⁵⁰ using different parties for every operation.⁵¹ Individuals come together on an ad-hoc basis, collaborate when it is convenient to do so, and go their separate ways once the smuggling operation comes to an end.⁵² A Hong Kong police officer stated that "Chinese human smuggling isn't organized, it's just a question of a couple of people with the wherewithal to put together a criminal scheme to smuggle illegal immigrants."⁵³ Another official concluded that "people who deal in this business are normally shop or business owners, not gang or mafia members."⁵⁴ The temporary nature of this business, however, also reflected the susceptibility of smuggling organizations to changes in market conditions or other external factors.⁵⁵ Indeed, it was reported that many Snakeheads realized the illicit nature of their activities and did not plan long-term involvement in the smuggling business despite its large profits; a balancing of risks

⁴⁷ Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 30.

⁴⁸ *Ibid.*

⁴⁹ Ko Lin Chin and Sheldon Zhang, "Enter the Dragon: Inside Chinese Human Smuggling Organizations," *Criminology* 40(4) (2002) 737, 740; Keefe, "Snakeheads and Smuggling: The Dynamics of Illegal Chinese Immigration," 37.

⁵⁰ *Ibid.*

⁵¹ Zhang and Gaylord, "Bound for the Golden Mountain: The Social Organization of Chinese Alien Smuggling," 12.

⁵² *Ibid.*

⁵³ Anthony DeStefano, "Feds Crack 'Snakehead' Alien Smuggling Ring," *New York Newsday* (New York), 10 November 1994, 8.

⁵⁴ "Former Smuggler Claims Immigration Graft," *The Nation* (Bangkok), 9 November 1994, 2.

⁵⁵ Chin and Zhang, "Enter the Dragon: Inside Chinese Human Smuggling Organizations," 758.

was always a consideration.⁵⁶ This is not to suggest that the Snakeheads were a harmless organisation. If suspected that a party of the smuggling operation had cooperated with government officials, reprisal from Snakeheads was usually death.⁵⁷ For example, the Australian media reported an incident where the Snakeheads had murdered the family of a convicted smuggler who had provided information to Australian and Hong Kong authorities.⁵⁸

Fujian Province, a southern coastal province, holds a deep emigration history, and for centuries has been widely acknowledged as a hotbed for trafficking and smuggling in China.⁵⁹ Following this vein, it is infamous for having a high concentration of Snakeheads.⁶⁰ By taking advantage of the globalisation of international commerce between the 1980s and 1990s, the Snakeheads were able to rapidly expand internationally, enabling them to cater for the high demand of Fujianese migrants to be smuggled out of the country.⁶¹ The increased interconnection facilitated a host of useful new innovations for consumers, corporations, and governments, and presented major opportunities for enterprising cross-border criminal networks. The Snakeheads utilized modern communications to establish networks around the globe, which allowed them to exploit various routes and transportation methods, remit their payments to subcontractors from one country to another, launder their profits, and keep them beyond the reach of authorities.⁶² Zhang and Gaylord have frequently criticized law enforcement

⁵⁶ *Ibid.*

⁵⁷ August Gribbin, "INS Has Trouble Keeping Up with Alien Smugglers," *Washington Times* (Washington), 18 January 2000, A1; Zhang and Gaylord, "Bound for the Golden Mountain: The Social Organization of Chinese Alien Smuggling," 13; Kung, "Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the US Statutory Definition of 'Refugee,'" 1290.

⁵⁸ Geesche Jacobsen, "Police Investigate People-Smuggling Link to Lin Murder," *Sydney Morning Herald* (online), 10 November 2009 <<http://www.smh.com.au/national/police-investigate-peoplesmuggling-link-to-lin-murder.html>>.

⁵⁹ *Ibid.*

⁶⁰ Chu, "Human Trafficking and Smuggling in China," 43.

⁶¹ Keefe, "Snakeheads and Smuggling: The Dynamics of Illegal Chinese Immigration," 41.

⁶² *Ibid.*

agencies for failing to recognize this transnational, flexible nature of the Snakeheads' organized crime.⁶³

B The Migrants

From the limited field work conducted by Chin, the demographic of these Fujianese smuggled migrants were middle class men and women who had given up their past professions to seek fortunes abroad.⁶⁴ They were neither poor nor fleeing from poverty-stricken environments.⁶⁵ This is consistent with Keefe's observations in that, 'out-migration is rarely driven by absolute poverty' and 'it is seldom the poorest provinces of China that generate migrants.'⁶⁶ Given the exorbitant smuggling fees charged by the Snakeheads, it is unlikely anyone but the middle to upper class citizens of Fujian would have been able to afford being smuggled out of China.⁶⁷

Australia's Department of Immigration and Multicultural Affairs observed that these Fujianese migrants were smuggled into Australia in modest numbers, often around thirty to one hundred at a time.⁶⁸ The large scale feature of these smuggling operations were characteristic of those organized by the Snakeheads, which were first developed in 1989.⁶⁹ Before then, the Snakeheads transported small numbers of Fujianese migrants via air.⁷⁰ However, they soon realized that the Fujianese demand for passage to Western countries was so insatiable that they could oblige their customers to forego the comforts of air travel for conditions resembling that of freight, shifting the migrant smuggling business from a retail model to a wholesale one.⁷¹

⁶³ Zhang and Gaylord, "Bound for the Golden Mountain: The Social Organization of Chinese Alien Smuggling," 14.

⁶⁴ Ko Lin Chin, "Safe House or Hell House? Experiences of Newly Arrived Undocumented Chinese," *Human Smuggling: Chinese Migrant Trafficking and the Challenge to America's Immigration Tradition*, ed. Paul Smith (The Centre for Strategic and International Studies, 1997), 172.

⁶⁵ Keefe, "Snakeheads and Smuggling: The Dynamics of Illegal Chinese Immigration," 36.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ DIMIA, *Managing the Border: Immigration Compliance*.

⁶⁹ Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 29.

⁷⁰ Keefe, "Snakeheads and Smuggling: The Dynamics of Illegal Chinese Immigration," 39.

⁷¹ *Ibid.*

As a consequence, these migrants endured abhorrent living conditions on these vessels. The inadequate supply of food and water, poor sanitary conditions, and physical or sexual abuse throughout the sea voyage were common features of the voyage.⁷² A Fujianese smuggled migrant recounts: “the whole trip was like a nightmare. The enforcers did not treat the passengers as human beings. They assaulted those they disliked and raped the women passengers at will.”⁷³ Many of these migrants were aware that their journey would be laden with hardships and risks of this nature;⁷⁴ only a small number migrants were misled by their Snakeheads into believing the journey would be completely safe.⁷⁵ To the Western world, the nature and extent of suffering on these ships are deemed inhumane; but to the Fujianese migrant, such tribulation was viewed as a rite of passage and a small price to pay for the unobtainable wealth to be gained by working abroad.⁷⁶

C The Costs

The cost of the average smuggling fee was determined by the amount of risk the Snakeheads faced, and the type and sophistication of services sought by the migrant to avoid detection by authorities. Australian journalists, Lynne O'Donnell and Sally Jackson, provides some insight into the pricing structure of these smuggling operations:

As little as \$960 buys a passage to northern Australia, a perilous 22-day trip by fishing boat across pirate infested waters of the South China Sea and through the teaming archipelago. For \$20,000, six weeks in a specially adapted bilge compartment of a cargo ship, surrounded by refuse and surviving largely on water, noodles and mushroom soup. For \$30,000 to \$50,000...an air ticket, a fake or real passport, and coaching

⁷² Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 69.

⁷³ *Ibid*; see also “Smuggling Ship Captain Raped a Female Passenger Before She Committed Suicide,” *Sing Tao Daily* (Hong Kong), 22 June 1993, 27.

⁷⁴ Keefe, “Snakeheads and Smuggling: The Dynamics of Illegal Chinese Immigration,” 39.

⁷⁵ *Ibid*; Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 26.

⁷⁶ Kung, “Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the US Statutory Definition of ‘Refugee,’” 1293.

on what to tell suspicious customs officials in Sydney, Brisbane, or other Australian air or seaport.⁷⁷

Few had the resources to pay the fee outright and as such sought loans from the Snakeheads, often at extortionate interest rates of up to thirty percent a month.⁷⁸ It was also reported that Snakeheads would accept initial down payments of around ten percent.⁷⁹ Upon reaching their destination, the Snakeheads would ensure that the smuggled migrants were met by contacts who had already facilitated jobs and accommodation. Lawyers were made available should there be any encounters with Australian authorities.⁸⁰

Contrary to many reports, smuggled Chinese migrants were not forced to work as indentured slaves to pay off their debts. The Snakeheads had no interest in spending months or years keeping track of various debtors.⁸¹ Instead, they would allow a grace period of 48 to 72 hours for their sponsors, usually friends and family of the smuggled migrant, to produce the remaining balance of the fee.⁸² If the debt was not paid within the grace period, torture or death was the usual form of reprisal. For instance, debt-collectors may torture the smuggled migrant over the phone to coerce their sponsors into immediately sending the money.⁸³ Various officials from the United States' Immigration and Naturalization Services reported gruesome cases for those failing to pay the outstanding debt, such as incidents where parties were

⁷⁷ O'Donnell and Jackson, "From the Point of No Return, To Hell and Back, for \$20,000," 1.

⁷⁸ O'Donnell and Jackson, "From the Point of No Return, To Hell and Back, for \$20,000," 1.

⁷⁹ Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 37; Chin, "Safe House or Hell House? Experiences of Newly Arrived Undocumented Chinese," 174; Kung, "Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the US Statutory Definition of 'Refugee,'" 1275.

⁸⁰ *Ibid*; Kung, "Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the US Statutory Definition of 'Refugee,'" 1275.

⁸¹ Keefe, "Snakeheads and Smuggling: The Dynamics of Illegal Chinese Immigration," 40.

⁸² *Ibid*.

⁸³ Kung, "Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the US Statutory Definition of 'Refugee,'" 1276.

thrown off buildings, beaten to death, and “kidnapped, taped from head to foot with duct tape, and left in closets to die.”⁸⁴

V Arrivals in Australia

A An Overview of Unauthorised Chinese Boat Arrivals in Australia

During the 1998-99 financial year, Australia saw a relatively large increase in unauthorized Chinese boat arrivals, primarily hailing from Fujian Province.⁸⁵ The increase in these unauthorized arrivals captured significant attention by the Australian media, and by the following period, there was overwhelming pressure by the public to ‘tighten its borders,’ a sentiment often explicitly exacerbated by politicians and the media.⁸⁶ As a result, the Australian government responded by implementing a number of reforms to deter and prevent further illegal arrivals. In the ensuing months, the number of unauthorized Chinese boat arrivals declined significantly.⁸⁷ The exact figures of these trends are provided in table 1 below. In the 1998-99 financial year, 471 of the 926 unauthorized boat arrivals were from China. However, by the 2000-01 financial year, the number of unauthorized Chinese boat arrivals declined to less than 50 – equating to only 1.2 percent of the total unauthorized boat arrivals at the time.

⁸⁴ August Gribbin, “INS Has Trouble Keeping Up With Alien Smugglers,” *Washington Times* (Washington), 18 January 2000, A1; See also Kung, “Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the US Statutory Definition of ‘Refugee,’” 1276.

⁸⁵ DIMA, *Refused Immigration Clearance Report: Unauthorized Arrivals Section* (1999).

⁸⁶ Schloenhardt, *Migrant Smuggling: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region*, 82.

⁸⁷ *Ibid.*, 147; DIMA, *Unauthorized Arrivals Section: 1998-1999 Financial Year Report* (1999) 18; Department of Immigration and Multicultural and Indigenous Affairs (DIMIA), *Managing the Border: Immigration Compliance* (2004), 19-29; DIMA, *Managing the Border: Immigration Compliance*; DIMA, *Refused Immigration Clearance Report: Unauthorized Arrivals Section*, 85.

Cumulative arrivals	157	<u>926</u>	<u>4175</u>	<u>4141</u>	1212	0
Chinese arrivals	18	<u>471</u>	<u>135</u>	<u><50</u>	0	0

Table 1: Unauthorized boat arrivals, and unauthorized Chinese boat arrivals, 1997-2003

The vessels carrying these smuggled Chinese migrants sought to arrive clandestinely along the east coast of Australia, avoiding detection by Australian authorities and covertly unloading these migrants onto the mainland.⁸⁸ The primary reason why the Snakeheads employed a covert method is because of the low success in claiming refugee status upon arrival.⁸⁹ In 1994, Australia implemented the ‘Safe Third Country Policy’, with the aim of controlling the increasing number of asylum seeker claims and refugee status recognition.⁹⁰ There was a belief among the Australian political landscape that such ‘high’ numbers would ‘send the wrong message abroad’ and encourage further arrivals to Australia.⁹¹ As such, the Australian Parliament passed the *Migration Legislation Amendment Act (No 4) 1994* (Cth),⁹² which introduced SS 91B-91D into the *Migration Act 1958* (Cth) (*‘Migration Act’*). Applicants arriving in Australia from designated ‘safe third countries,’ or in other words, countries that were regarded as non-refugee producing countries or countries in which refugees can enjoy asylum without danger, became ineligible for refugee status and were barred from applying for protection visas, and

⁸⁸ Georgina Safe and Penelope Green, “People Smuggling Syndicate Smashed,” *The Australian* (Sydney), 18 May 1999, 1; Australia, Prime Minister’s Coastal Surveillance Task Force, *Report* (1999).

⁸⁹ Tony McInerny, *People Smuggling – An Inhuman Trade* (September 2000) Australian Federal Police <<http://www.afp.gov.au/media-centre/publications/platypus/previous-editions/2000/september-2000/1psmugl>>.

⁹⁰ Schloenhardt, *Migrant Smuggling: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region*, 151.

⁹¹ *Ibid* 77; Mary Crook, “The Peril of the Boat People: Assessing Australia’s Responses to the Phenomenon of Border Asylum-Seekers,” *Tomorrow’s Law*, ed. Hugh Shelby (1995) 44.

⁹² *Migration Legislation Amendment Act (No 4) 1994* (Cth) No 136 of 1994.

in some cases, any class of visa at all.⁹³ Relevantly, China was considered a safe third country from 1995 onwards due to the promulgation of a bilateral memorandum of understanding between Australia and China.⁹⁴ It was imperative that illegal Chinese arrivals remained undetected, and avoided any contact with immigration and law enforcement agencies as discovery would result in mandatory detention and swift deportation.⁹⁵

In respect to the typical sea-route taken by the Snakeheads in transporting their ‘clients,’ the smugglers primarily took advantage of the east coast of Australia. The eastern coast is long, and was difficult for Australian authorities to guard at the time, allowing smugglers and migrants the benefit of fast and direct transport links to the large communities in that area.⁹⁶ As such, many of the Snakeheads vessels sought to arrive along the coasts of New South Wales and Queensland, at which point the smuggled arrivals would disembark undetected and disappear into cities such as Sydney, Brisbane and Cairns.⁹⁷

The list of vessels holding unauthorized Chinese migrants from 1998-1999 observed by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) are listed below in table 2.⁹⁸ Notably, all of these vessels were detected along the east coast of Australia.

⁹³ *Migration Act 1958* (Cth), ss 91D-E; Schloenhardt, *Migrant Smuggling: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region*, 77.

⁹⁴ Schloenhardt, *Migrant Smuggling: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region*, 78.

⁹⁵ *Migration Act 1958* (Cth), s 91A.

⁹⁶ Schloenhardt, *Migrant Smuggling: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region*, 151

⁹⁷ *Ibid.*

⁹⁸ DIMA, *Managing the Border: Immigration Compliance*.

19/02/1998 – SIEV Clyde, 11 Chinese migrants	10/04/1999 – SIEV Dandenong, 60 Chinese migrants
21/02/1998 – SIEV Diamantina, 7 Chinese migrants	17/05/1999 – SIEV Kosciuszko, 69 Chinese migrants
24/12/1998 – SIEV Paroo, 52 Chinese migrants	27/05/1999 – SIEV Ossa, 78 Chinese migrants
12/01/1999 – SIEV Tumut, 4 Chinese migrants	4/06/1999 – SIEV Quin, 108 Chinese migrants
11/03/1999 – SIEV Ainslie, 57 Chinese migrants	21/12/1999 – SIEV Valentine, 73 Chinese migrants
12/03/1999 – SIEV Bogong, 26 Chinese migrants	

Table 2: Suspected Illegal Entry Vessels (SIEVs) carrying illegal Chinese migrants to Australia, 1998-99

B Brief Comparison with North America

The smuggling of Chinese migrants into North America began in 1984, and only started to decline from the mid 2000s onwards.⁹⁹ Between 1984 to 2007, it was estimated that around 50,000 to 100,000 Fujianese migrants were smuggled to the United States each year.¹⁰⁰ The main destinations for these migrants were New York

⁹⁹ Keefe, “Snakeheads and Smuggling: The Dynamics of Illegal Chinese Immigration,” 43.

¹⁰⁰ Sheldon Zhang, *Smuggling and Trafficking in Human Beings: All Roads Lead to America* (Praeger, 2007); United Nations Office on Drugs and Crime (UNODC), *Transnational Organized Crime in East Asia and the Pacific: A Threat Assessment* (United Nations, 2013) 32.

and San Francisco due to the established Chinese diasporas in those areas.¹⁰¹ Snakehead smuggling operations to North America were observed across land, sea, and air, as opposed to Australia, which was predominantly a maritime operation.¹⁰²

Due to the sheer immensity of arrivals into North America, the authorities did not have resources or facilities capable of processing them.¹⁰³ As such, even if these smuggled Fujianese migrants were detected and detained, they would often be released shortly afterwards due to limited space in detention centres.¹⁰⁴ Many Fujianese migrants arriving in America would seek asylum, claiming fear of persecution under the one child policy or political grounds.¹⁰⁵ This overt method of arrival was advantageous in that migrants applying for asylum were often safeguarded from indefinite detention and immediate deportation while their applications were processed.¹⁰⁶ Consequently, many Fujianese migrants would claim asylum, and then quickly disappear into the local Chinese community. This was not possible upon arrival in Australia, of course, due to the much more stringent immigration policies towards unauthorised arrivals.

Moreover, the United States and Canada experienced Fujianese migration in much larger numbers for a longer period of time in comparison to Australia. For Australia, these Fujianese arrivals only spanned for two to three years, with only a few hundred entering the borders by sea. These arrivals began to surge from around 1997, but quickly declined by the year 2000. North America, however, witnessed the arrival of hundreds of thousands of Fujianese migrants over a period of almost two decades. The fact that Australia's experience of the Fujianese-Chinese migratory phenomenon was delayed and short-lived is not surprising. At the time,

¹⁰¹ Linda Zhao, "Chinese Underground Banks and Their Connections with Crime: A Review and an Appraisal" *International Criminal Justice Review* 22 (2012): 13; Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 4; Keefe, "Snakeheads and Smuggling: The Dynamics of Illegal Chinese Immigration," 40; Chu, "Human Trafficking and Smuggling in China," 47.

¹⁰² UNODC, *Migrant Smuggling in Asia* (United Nations, 2015) 20; Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 180.

¹⁰³ Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 19, 61.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

America offered far better employment opportunities than that of Australia, and boasted significantly stronger currencies.¹⁰⁷ Australia's economic depression in the early 1990s, and the allure of employment in the lead up to the Sydney 2000 Olympics may also lend some explanation as to why unauthorised Chinese arrivals were not observed until the latter years of the 20th century.

VI The Ka Yuen Operation

A The Vessel and the Events

By way of example, the *Ka Yuen*, or the *SIEV Kosciuszko* as referred to by Australian authorities, demonstrated the sophistication of the Snakeheads' migrant smuggling operations in Australia.¹⁰⁸ It caught the attention of many media outlets, and its discovery may be viewed as the impetus for the Australian government's changes towards their migration policy outlined below.

The *Ka Yuen* was an 85 meter-long, steel-haul freighter registered in Panama.¹⁰⁹ The vessel had previously disappeared from the registry of international vessels for five years, before returning with special modifications to carry illegal immigrants.¹¹⁰ The vessel had false compartments equipped with toilets, sewerage systems, ventilation, supplies such as food and water, and also more sophisticated modifications including high-frequency radios, radar and global positioning systems.¹¹¹ According to Director-General Coast Watch, Russ Shalders, the vessel's false compartments were incredibly well concealed and capable of fitting large numbers of illegal immigrants at a time: "These false compartments would not have been found unless you were a naval architect or had access to the vessel's blueprints. The vessel could have carried about 1000 illegal immigrants in those false compartments and you would not have known unless you carried out a very thorough search."¹¹² The vessel had a crew of fourteen men. It carried no legitimate

¹⁰⁷ Reserve Bank of Australia, *Exchange Rates from 1983 to 2002* (Report, 2002).

¹⁰⁸ Steve Creedy, "Scourge of the Smuggler," *The Australian* (Sydney), 12 October 1999, 1.

¹⁰⁹ Safe and Green, "People Smuggling Syndicate Smashed," 1.

¹¹⁰ Creedy, "Scourge of the Smuggler," 1.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

cargo, only the sixty-nine Chinese migrants hidden within the false compartments between the steel hull of the ship and internal bulwarks.¹¹³

The *Ka Yuen* left China from a port in Fujian Province on 1 April 1999 and arrived in Hong Kong the same day.¹¹⁴ Two days later, on 3 April 1999, the vessel departed Hong Kong, reporting its destination for the Taiwanese port of Keelung. Sometime before 16 May 1999, Australian authorities were alerted to this operation when six Chinese nationals were apprehended at the Sydney airport.¹¹⁵ These nationals carried a large number of suspicious identity documents, as well as several maritime navigation maps which were later used by Australian authorities to track and intercept the *Ka Yuen*.¹¹⁶ Australian authorities launched naval operations to search for the vessel and soon detected it north of Jervis Bay, New South Wales.¹¹⁷ The vessel was intercepted on 17 May 1999, and escorted to and searched at Port Kembla, New South Wales.¹¹⁸ At the time, this was the furthest south that a vessel carrying smuggled migrants had reached before being detected.

The migrant smugglers planned to unload the 69 illegal immigrants along the East Coast of Australia onto a smaller boat called ‘*the Gruesome*,’ which would then ferry these smuggled migrants from the *Ka Yuen* to the Australian mainland.¹¹⁹ Mini busses and vans had also been organized to transport the smuggled migrants to pre-arranged accommodations.¹²⁰ It was reported that each migrant had paid AUD 20,000 to be smuggled in, and were promised jobs at the Sydney 2000 Olympics or

¹¹³ *R v Chen*. [2000]. NSWCCA. July 14, 267 [5] (Grove J); Safe and Green, “People Smuggling Syndicate Smashed,” 1.

¹¹⁴ O’Donnell and Jackson, “From the Point of No Return, To Hell and Back, for \$20,000,” 1; Safe and Green, “People Smuggling Syndicate Smashed,” 1; *R v Chen*. [2000]. NSWCCA. July 14, 267; *R v Lin*. [2000]. NSWCCA. August 11, 524.

¹¹⁵ *Ibid*.

¹¹⁶ *Ibid*.

¹¹⁷ *Ibid*.

¹¹⁸ *Ibid*.

¹¹⁹ *R v Lin*. [2000]. NSWCCA. August 11, 524.

¹²⁰ Stephen Gibbs, “Smuggler’s Tale Nonsense,” *Sydney Morning Herald* (Sydney), 21 January 2000, 1.

in Sydney's Chinese underground.¹²¹ All passengers on board the *Ka Yuen* were deported back to China.

B Prosecutions

Two men, Xin Chen and David Lin Min, were charged and convicted for their involvement in this migrant smuggling operation.¹²² In reconciling these prosecutions with the literature on the Snakeheads, it appears that Mr Chen and Mr Min were 'little Snakeheads,' or more importantly, parties which were not particularly senior in the overall network of Chinese people smuggling. This demonstrated the difficulty in tackling transnational organized crime, as it is unlikely that prosecuting such small players would have led to any measurable impact on the Chinese people smuggling trade. On a relevant but distinct note, the sentences handed down to Mr Chen and Mr Min, as observed below, were hardly significant, displaying the inadequacy of Australia's justice system in handling people smugglers at the time. Australia's border surveillance agencies and justice system were ill-prepared to handle crimes of this nature, and it was these inadequacies the Snakeheads sought to exploit.

1 Xin Chen

Mr Chen, aged 33, was a migrant to Australia who had arrived in January 1990, later becoming a citizen in 1992. He came from Fujian Province, the same origin of the sixty-nine men secreted within the vessel. Mr Chen worked as a chicken filleter in Lidcombe, New South Wales, when arrested on 17 May 1999. Mr Chen's involvement in the operation was the purchasing of 'the Gruesome' vessel, which was valued at around AUD 35,000 to 40,000.¹²³ The funds were provided by the Snakeheads. The intention was that Mr Chen and accomplices would use 'the Gruesome' vessel to ferry the *Ka Yuen*'s passengers onto the mainland at Dolans Bay, Port Hacking. It was concluded that Mr Chen, being a recipient of such a large

¹²¹ Creedy, "Scourge of the Smuggler," 1; Safe and Green, "People Smuggling Syndicate Smashed," 1.

¹²² *R v Chen*. [2000]. NSWCCA. July 14, 267; *R v Lin*. [2000]. NSWCCA. August 11, 524.

¹²³ *R v Chen*. [2000]. NSWCCA. July 14, 267 [2] (Grove J).

transfer of cash, was either sufficiently high within the Snakehead organisation or sufficiently trusted by it.¹²⁴

Mr Chen was charged under s 86(1A) of the *Crimes Act 1914* (Cth), where he plead not guilty for conspiring with others to take part in the bringing to Australia non-citizens contrary to the *Migration Act 1958* (Cth). Mr Chen claimed that whilst he purchased the vessel, he had no intention of bringing the smuggled migrants ashore. Following a two-week trial, he was found guilty by jury, and sentenced to fifteen months imprisonment.¹²⁵ His Honour also ordered the forfeiture of ‘*the Gruesome*’ vessel.

2 David Lin Min

Mr Lin, aged 28, was introduced to the operation by Mr Chen on 8 May 1999.¹²⁶ By that time, the smuggling venture was well advanced on the Australian end, but there were still major arrangements which needed to be made in Australia to bring the plot to fruition.¹²⁷

Mr Lin’s involvements were wide and varying. He had visited a number of jetties and wharves in the Sydney area, inspecting them for the purposes of launching ‘*the Gruesome*’ vessel for bringing the smuggled migrants ashore. He had attended to the rental of several vehicles, which would be used to transport the smuggled migrants to accommodation. Mr Lin had also assisted Mr Chen in identifying appropriate rental property and made arrangements for the rental of such property. He provided maintenance and repairs for ‘*the Gruesome*’ vessel as well. He expended in excess of \$2000 of his own money in various purchases associated with the conspiracy.¹²⁸ Mr Lin was charged under the same offence as Mr Chen and sentenced to twelve months imprisonment.¹²⁹

¹²⁴ *Ibid* [9] (Grove J).

¹²⁵ *R v Chen*. [2000]. NSWCCA. July 14, 267 [1] (Grove J).

¹²⁶ *R v Lin*. [2000]. NSWCCA. August 11, 524 [4] (Beazley JA).

¹²⁷ *Ibid*.

¹²⁸ *Ibid* [4] - [5] (Beazley JA).

¹²⁹ *Ibid*.

VII Australia's Governmental Responses

Australia's immigration policy has historically been informed by long standing xenophobic and insular traditions.¹³⁰ The fear of irregular migration has been prominent since 1989 when Australia saw a 'wave' of unauthorized boat arrivals from Cambodia. Since then, Australian politicians and media have engaged in a securitizing discourse, constructing the area of immigration as a threat to national security and territorial sovereignty.¹³¹ Such sentiments, particularly in relation to migrants of Asian descent, was encapsulated within Senator Pauline Hanson's famous speech in 1996: "I and most Australians want our immigration policy radically reviewed and that of multiculturalism abolished. I believe we are in danger of being swamped by Asians. They have their own culture and religion, form ghettos and do not assimilate."¹³²

The continued arrival of undetected, unauthorized Chinese boat arrivals between 1997 to 2000 furthered such public anxiety, providing a catalytic effect to the drastic responses and reforms implemented by the Australian government in 1999 and in 2001, known as the 'Pacific Solution.' These measures were a response to this 'threat' to national security, and sought to exclude, control, and deter irregular migrants from arriving on Australia's borders. To date, Australia is still the only country in the world which imposes mandatory offshore detention for unauthorised boat arrivals.

A Prime Minister's Coastal Surveillance Task Force

The prime minister's task force was created two days after an incident at Nambucca Heads, New South Wales, where 60 smuggled Fujianese migrants arrived on Australian shores undetected.¹³³ The Task Force was chaired by the Secretary of the Department of the Prime Minister and Cabinet, and was comprised of agency heads from the Attorney-General, Australian Customs Service, Australian Federal Police

¹³⁰ James Jupp, *From White Australia to Woomera* (Cambridge University Press, 2007), 7.

¹³¹ Anthea Vogl, "Over The Borderline: A Critical Inquiry Into The Geography Of Territorial Excision And The Securitisation Of The Australian Border" *UNSW Law Journal* 38(1) (2015): 116.

¹³² Commonwealth, *Parliamentary Debates*, House of Representatives, 10 September 1996 (Pauline Hanson).

¹³³ Australia, Prime Minister's Coastal Surveillance Task Force, *Report* (1999), 1.

(AFP), Defence, Foreign Affairs and Trade (DFAT), Department of Immigration and Multicultural Affairs (DIMA), and Office of National Assessments.¹³⁴ Their purpose was to investigate the surge of unauthorized boat arrivals and air arrivals to Australia, and provide recommendations that would enable Australia to detect, deter and prevent illegal arrivals for the future.¹³⁵ On June 1999, the Task Force released their report, listing eighteen recommendations that called for stricter controls of Australia's coastline, for better cooperation with overseas and international agencies, and for a stronger, more punitive legal framework.¹³⁶ The Prime Minister at the time, John Howard (1996-2007), accepted all eighteen of these recommendations, pledging an AUD 124 million four-year package towards implementing these recommendations.¹³⁷

On the basis of this report, Coastwatch – Australia's principal coastal surveillance agency at that time – was significantly restructured, enabling greater funding and autonomy. Additional aircraft were purchased to extend the footprint and intensity of Coastwatch's aerial surveillance, particularly along the east coast.¹³⁸ Other changes included the posting of twelve immigration officers to major source and transit countries to expand Australia's capacity to detect and deter illegal immigration, the establishment of a national surveillance centre at Coastwatch's headquarters in Canberra,¹³⁹ and major legislative amendments to the *Migration Act* to better enable relevant authorities and the legal system to deal with people smuggling crimes.

B Legislative Amendments

The two major pieces of legislation passed by Australian parliament were the *Migration Legislation Amendment Act (No 1) 1999* (Cth),¹⁴⁰ and the *Border Protection Legislation Amendment Act 1999* (Cth).¹⁴¹ Until 1999, the *Migration Act*

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ Australia, Prime Minister's Coastal Surveillance Task Force, *Report* (1999), 1.

¹³⁷ Prime Minister John Howard, "\$124 Million Boost for the Fight Against Illegal Immigration" (Press Release, 27 June 1999).

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Migration Legislation Amendment Act (No 1) 1999* (Cth), No 89 of 1999.

¹⁴¹ *Border Protection Legislation Amendment Act 1999* (Cth), No 160 of 1999.

did not contain any provisions that specifically targeted the core organizers of illegal immigration.¹⁴² On the basis of the Task Force report, and the growing presence of sophisticated Chinese migrant smuggling operations, the Australian government implemented 's 232A' - a new 'organized people smuggling' offence which targeted persons who organized and facilitated the bringing of groups of illegal migrants to Australia by sea.¹⁴³ Offences under 's 232A' attracted a penalty of up to twenty years imprisonment, and a minimum mandatory penalty of five years for first time offenders. The *Border Protection Legislation Amendment Act 1999* (Cth) extended the jurisdiction of law enforcement and immigration agencies, allowing officials to pursue, board, move, detain, and destroy foreign vessels, both within and beyond Australia's territorial and contiguous maritime zones, if they were suspected of carrying illegal migrants to Australia.¹⁴⁴ The Act also conferred on officials increased powers to detain, search, and question people aboard vessels suspected of having committed offences against the *Migration Act*.¹⁴⁵

In further pursuit of the Government's deterrence policy, the Act also sought to prevent 'forum shopping,' a term coined by then Philip Ruddock, Minister for Immigration and Multicultural Affairs.¹⁴⁶ 'Forum shopping' was used to label migrants who had supposedly chosen Australia as their destination rather than attempting to seek asylum in geographically closer countries.¹⁴⁷ The amendments introduced sections 91M-91Q into the *Migration Act*: "A non-citizen who can avail himself or herself of protection from a third country should seek protection from the third country instead of applying in Australia for a protection visa, or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal."¹⁴⁸ In the eyes of the minister, this measure was "very important in sending an appropriate signal to people who were intent on travelling to Australia

¹⁴² *Ibid.*, 169.

¹⁴³ *Migration Act 1985* (Cth) s 232A; Schloenhardt, above n 21, 169.

¹⁴⁴ *Border Protection Legislation Amendment Act 1999* (Cth) div 12A.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ Schloenhardt, *Migrant Smuggling: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region*, 83.

¹⁴⁸ *Migration Act 1958* (Cth) s 91M.

unlawfully...leaving situations where they are otherwise safe – breaching our law and engaging with organized crime.”¹⁴⁹

However, a Senate inquiry at the time found no evidence of any substantial numbers of forum shoppers entering into Australia,¹⁵⁰ and this practice of essentially creating a ‘secondary’ class of refugee drew substantial criticism at the time.¹⁵¹ To imply that the refugee in question is a ‘calculating’ migrant who had the luxury in choosing their destination country completely disregards the equally likely alternative that he or she has legitimately suffered a loss of refuge in their country and is simply fleeing to the country most adequate in providing asylum and safety. The amendments were further criticized for failing to adequately establish the distinction between an economic migrant and a legitimate refugee, and that such expansive powers effectively enabled Australia to shift their protection obligation on to other countries and facilitate the immediate removal of all unauthorized arrivals.¹⁵²

C Subsequent Decline of Chinese Boat Arrivals in Australia

In many Western countries receiving large amounts of Fujianese migration, such as the United States and Canada, any form of government directives and policies were futile in stemming Chinese people smuggling into their countries. The demand to enter into North American and European countries, and the sheer number of arrivals, simply overwhelmed such efforts by authorities. This is, however, where the narrative in Australia diverges. As expressed above, the number of Fujianese-Chinese boat arrivals in Australia were minimal compared to those around the rest of the Western world, with only several hundred as opposed to tens of thousands reaching Australian shores. Even before Australia’s governmental responses were implemented, the detention centres were adequate in detaining, processing, and deporting the few unauthorised Chinese arrivals that had been detected. As soon as

¹⁴⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 22 November 1999, 9194 (Philip Ruddock, Minister for Immigration and Multicultural Affairs).

¹⁵⁰ Senate Legal and Constitutional References Committee, *Parliament of Australia, A Sanctuary under Review: An Examination of Australia’s Refugee and Humanitarian Determination Processes* (2000), 19.

¹⁵¹ Schloenhardt, *Migrant Smuggling: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region*, 84.

¹⁵² *Ibid*, 83.

Australia brought in these sweeping changes to their border protection operations and criminal justice system, it is contended that the already small numbers of Chinese migrant smuggling operations were wholly deterred. The inadequacies in Australia's coastal surveillance agencies and the justice system could no longer be readily exploited by the Snakeheads, and there was simply not enough desire nor foreseeable benefit on the part of the Fujianese migrant to justify further persistence, especially when the likelihood of successfully entering into more popular alternatives, such as North America, was considerably higher. Continual legislative changes in Australia, such as the 'Pacific Solution,' which saw the introduction of offshore mandatory detention and processing, and tow-back policies, further cemented Australia's position as having the one of the toughest border protection policies in the world, and surely served as an even greater deterrent for both the Snakeheads and potential smuggled migrants.

In addition to Australia's governmental responses, the decline of Fujianese-Chinese migration has also been attributed to the growth in Fujian Province's economy. While it is universally acknowledged that China's economy has boomed at unprecedented rates in the past few decades, what is often overlooked is the amount of remittances earned by the hundreds of thousands of local citizens who were smuggled out of the country to make their family's fortunes abroad. This sacrifice has not been lightly forgotten by their ancestral villages:¹⁵³

One of the major intersections in Changle City is dominated by a soaring steel sculpture of a sail flanked by a pair of angular wings. When I visited recently, my host, a local entrepreneur named Lin Li, explained that the monument was erected to acknowledge that the region owes it prosperity to those who left the country by boat and plane.

The primary motive of these economic migrants was not to make money for themselves, but for their families in China.¹⁵⁴ Most illegal Chinese immigrants were more concerned with their families' well-being than their own — a norm which is

¹⁵³ Schloenhardt, *Migrant Smuggling: Illegal Migration and Organized Crime in Australia and the Asia Pacific Region*, 83.

¹⁵⁴ Kung, "Supporting the Snakeheads: Human Smuggling from China and the 1996 Amendment to the US Statutory Definition of 'Refugee.'"

at odds with Western individualism.¹⁵⁵ A thirty-five-year-old man who was smuggled from Changle City, Fujian to New York stated: “I am sacrificing myself to bring happiness to my family.”¹⁵⁶ Almost all the savings earned abroad by this expatriate population are sent back to their families in Fujian Province, which has helped fuel the Fujian’s economy over the decades.¹⁵⁷ During the 1990s, remittances to Changle City amounted to hundreds of millions of dollars each year; these funds were then used to build schools, community centres, and underwrite new business ventures.¹⁵⁸ In testament to the working Chinese migrant, the remittances from the United States equated to around twelve billion dollars in 2013 alone.¹⁵⁹

Pieke theorizes that a culture of emigration can only be gradually reversed through local economic development, generating economic opportunities for employment and entrepreneurship that are on par with those in developed Western countries.¹⁶⁰ Due to Fujian’s recent economic prosperity, it appears that this theory now rings true. In the past, those who stayed behind were derided as unambitious and lazy. But today, it is now considered a last resort to migrate to the West: “Lin Li wrinkled her nose disdainfully at the mention of those who today would avail themselves to a Snakehead. ‘If you can do *anything* here, you stay,’ she remarked. ‘Residents of Fujian Province now prefer to find work locally, with the ‘truly enterprising citizens setting out to start a business or build a hotel.’”¹⁶¹ Over many years, Fujian’s economic prosperity, and increases in economic opportunities from employment and entrepreneurship, has facilitated a gradual reverse of the emigrating culture that once so permeated their society. Such a development would not have been possible without the sacrifices made by the countless Fujianese migrants smuggled abroad.

¹⁵⁵ Chin, *Smuggled Chinese: Clandestine Immigration to the United States*, 18.

¹⁵⁶ *Ibid.*

¹⁵⁷ Keefe, “Snakeheads and Smuggling: The Dynamics of Illegal Chinese Immigration,” 44.

¹⁵⁸ Keefe, “Snakeheads and Smuggling: The Dynamics of Illegal Chinese Immigration,” 44.

¹⁵⁹ UNODC, *Transnational Organized Crime in East Asia and the Pacific: A Threat Assessment* (United Nations, 2013), 28.

¹⁶⁰ Pieke, *Recent Trends in Chinese Migration to Europe: Fujianese Migration in Perspective*, 38.

¹⁶¹ Keefe, “Snakeheads and Smuggling: The Dynamics of Illegal Chinese Immigration,” 44.

VIII Conclusion

In contrast to North America and Europe, Australia's experience with Fujianese-Chinese migration was vastly different. The migratory trend was small and short lived, with only a few hundred migrants arriving at the beginning of 1997, and a complete cessation three years later. Upon investigation, this is not particularly surprising, given that other Western countries offered better economic opportunities and had more established Chinese diasporas. Indeed, Fujianese migration continued to exist well past the turn of the millennium in these countries, and anti-immigration and people smuggling directives by North American and Chinese authorities were futile in stemming irregular movement. However, it is contended that in the case of Australia, the demand on behalf of Fujianese migrants to enter Australia was so weak compared to other Western countries that it was simply inadequate to overcome Australia's tougher border protection policies when they were implemented in the late 1990s.

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