

SMUGGLERS AND SAMARITANS: DEFENCES TO PEOPLE SMUGGLING IN AUSTRALIA

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I INTRODUCTION AND BACKGROUND

The topic of migrant smuggling (or ‘people smuggling’ as the Australian Government refers to it)¹ has dominated Australian politics and criminal justice for more than a decade. With the growing number of migrant smuggling vessels arriving in Australia since 2008, Australian courts are currently awash with people smuggling prosecutions. In 2012 alone, 278 migrant smuggling vessels carrying 17 202 passengers and 392 crew members were apprehended in Australia.² As at 30 June 2012, there were 152 people smuggling prosecutions before the courts.³

The available information suggests that Australian authorities apprehend almost all migrant smuggling vessels before they arrive in Australia. The Australian Federal Police (‘AFP’) then interviews the people on board in order to identify crew and others involved in facilitating the illegal journey to Australia. Persons identified in this way are then arrested and incarcerated, pending prosecution by the Commonwealth Director of Public Prosecutions (‘CDPP’) for federal people smuggling offences set out in the *Migration Act 1958* (Cth) (‘*Migration Act*’) and the *Criminal Code Act 1995* (Cth) (‘*Criminal Code*’).

The vast number of prosecutions involves only the captain and crew who are found on the vessels when they arrive in Australian waters. In isolated cases,

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1 The terms ‘migrant smuggling’ and ‘people smuggling’ are used interchangeably throughout this article. The preferred term, ‘migrant smuggling’, is in keeping with international law and the definition of ‘smuggling of migrants’, while ‘people smuggling’ is a term used only in the context of relevant Australian offences.

2 Janet Phillips and Harriett Spinks, ‘Boat Arrivals in Australia since 1976’ (Research Paper, Parliamentary Library, Parliament of Australia, 2013) 22.

3 Commonwealth Director of Public Prosecutions (‘CDPP’), *Annual Report 2011–12* (2012) 76.

charges have also been laid against organisers of these ventures who were not themselves onboard when the vessels were detected. Between September 2008 and 12 December 2012, 317 people have been convicted of people smuggling offences for smuggling migrants to Australia by boat.⁴ Over a similar period (September 2008 to 2 October 2012), only 14 organisers and 12 facilitators, who were not themselves on the migrant smuggling vessels, have been convicted.⁵

Up until recently, court proceedings against persons accused of people smuggling followed a standard template, resulting in high conviction rates because the elements of relevant offences could be established by the mere entry of the vessel carrying 'unlawful non-citizens' into Australian waters and by proof of the role of the crew member in steering or navigating the vessel,⁶ supporting the captain, or assisting the smuggled migrants. As other research has shown, most of the people smuggling cases that reach Australian courts

are all remarkably similar: the offenders are Indonesian men who come from very poor families, they have only limited education, they were approached by strangers who offered them about 5 million Indonesian rupiah ... to undertake some work on a boat, and, in most cases, the mandatory minimum sentence was imposed.⁷

In many cases, the accused also quickly entered guilty pleas.

In 2012, the conviction rate for people smuggling offences dropped to below 40 per cent as the courts confronted a series of new challenges and questions about the criminal liability of people smugglers.⁸ Of particular importance in this context is the use of defences, which were rarely raised in previous people smuggling trials. For most accused, defences and other exculpatory matters provide the only avenue to escape a conviction, for example, by showing that they committed the offence under duress, out of necessity, for humanitarian reasons or other ulterior motives, because they were mistaken or ignorant about the conduct and circumstances of the crime they are charged with, or because their actions were excused or justified by some other reason.

The purpose of this article is to review relevant offences in light of the available case law and international legal requirements and to develop recommendations for law reform. Examining the available case law and existing legislation, this article identifies the specific grounds on which persons charged with people smuggling offences under Australia's *Migration Act* sought to excuse and justify their actions and analyses the wider issues of existing and conceivable defences to migrant smuggling. This article demonstrates that the documented case law is less homogenous than widely thought and that the causes

4 Cat Barker, 'The People Smugglers' Business Model' (Research Paper No 2, Parliamentary Library, Parliament of Australia, 2013) 28.

5 Ibid.

6 *Migration Act* s 14.

7 Andreas Schloenhardt and Charles Martin, 'Prosecution and Punishment of People Smugglers in Australia 2008–11' (2012) 40 *Federal Law Review* 111, 115.

8 Lauren Wilson, 'Law Fails to Catch Smuggler Kingpins', *The Australian* (online), 17 January 2013 <<http://www.theaustralian.com.au/national-affairs/policy/law-fails-to-catch-smuggler-kingpins/story-fn9hm1gu-12265540141>>.

and circumstances of migrant smugglers and smuggled migrants alike are complex and do not fit into a single ‘people smuggling business model’ – as frequently suggested by Australian politicians and mainstream media.⁹ What emerges from the analysis is that the situation and motivators of migrants and their smugglers are closely connected to wider concerns about refugee flows, the right to seek asylum, and other human rights issues that emerge prior to or during the migrant smuggling venture. This, in turn, raises doubts about the blameworthiness of individual offenders and places the scope and application of Australia’s people smuggling offences into question.

Part II of this article outlines the criminalisation of migrant smuggling in international and Australian law, focusing principally on the people smuggling offences in the *Migration Act* which are most commonly used in domestic prosecutions. Part III examines defences such as duress, mistake, and necessity that have been raised in reported cases in Australia. Part IV explores a range of other exculpatory matters that may exempt persons accused of migrant smuggling from criminal liability. The conclusion, Part V, summarises the main observations of the analysis and reflects on the wider implications of defences to migrant smuggling-related charges.

II CRIMINALISATION OF MIGRANT SMUGGLING

A Protocol against the Smuggling of Migrants by Land, Sea and Air

In international law, the United Nations (‘UN’) *Protocol against the Smuggling of Migrants by Land, Sea and Air* (‘*Smuggling of Migrants Protocol*’),¹⁰ which entered into force on 28 January 2004, has emerged as the principal instrument to combat migrant smuggling worldwide. With 138 States Parties, the *Smuggling of Migrants Protocol* has garnered considerable support.¹¹

Article 3(a) of the *Smuggling of Migrants Protocol* defines the term ‘smuggling of migrants’ to mean ‘the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.’

Article 6 of the *Smuggling of Migrants Protocol* mandates comprehensive criminalisation of migrant smuggling by States Parties. Article 6(1) identifies several offences that must be enacted in domestic law: (a) smuggling of migrants, (b) document fraud, and (c) the offence of enabling of illegal residence (or harbouring).

Article 6(1) limits the application of relevant offences to ‘intentional’ offences, though article 34(3) of the *Convention against Transnational*

9 For quotes from representatives of both sides of politics see, eg, Barker, above n 4, 1.

10 *Protocol against the Smuggling of Migrants by Land, Sea and Air*, opened for signature 15 December 2000, [2004] ATS 11 (entered into force 28 January 2004).

11 See United Nations Treaty Collection, *Protocol against the Smuggling of Migrants by Land, Sea and Air* (26 Sep 2013) <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-b&chapter=18&lang=en>.

Organized Crime,¹² with which the *Smuggling of Migrants Protocol* must be read, provides that ‘each State Party may adopt more strict or severe measures’. States Parties are thus free to create offences that require less onerous fault elements than ‘intention’, such as recklessness or, perhaps, negligence. Article 6(2) further requires States Parties to criminalise attempts to commit any of the offences under article 6(1), the participation as an accomplice in these offences, and the organising or directing of other persons to commit these crimes.

Article 6(3) of the *Smuggling of Migrants Protocol* creates obligations to incorporate ‘aggravating circumstances’ that ‘endanger, or are likely to endanger, the lives or safety of the migrants concerned; or ... [t]hat entail inhuman or degrading treatment, including for exploitation, of such migrants’ into the offences established by the *Smuggling of Migrants Protocol*. This can be achieved by creating aggravated migrant smuggling offences, or by inserting provisions that require courts to consider more severe penalties where there has been an aggravating circumstance.¹³

The *Smuggling of Migrants Protocol* contains no explicit reference to possible defences to the smuggling of migrants or to any matter that could excuse or justify the types of conduct criminalised under article 6. To this end, the Protocol relies on existing defences recognised under the domestic laws of States Parties.

B Australia’s People Smuggling Offences

Australia signed the *Smuggling of Migrants Protocol*, together with the *Convention against Transnational Organized Crime*, on 21 December 2000, and formally ratified the Protocol on 24 May 2004. Significant parts of the *Smuggling of Migrants Protocol* were implemented into domestic law with the *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002* (Cth), supplementing relevant provisions already existing at that time.

In Australia, offences relating to migrant smuggling are referred to as ‘offences of people smuggling’ and are set out in the *Migration Act* which, following Australia’s ratification of the *Smuggling of Migrants Protocol*, are duplicated in almost identical form in the *Criminal Code*. The people smuggling offences most commonly used in domestic prosecutions are those in division 12, subdivision A of the *Migration Act*. Relevant offences were first introduced with the *Migration Legislation Amendment Act (No 1) 1999* (Cth) which raised the penalties for existing immigration offences and created new, aggravated offences for ‘people smuggling’ – a term not used at that time. Further amendments followed with the enactment of the *Border Protection Legislation Amendment*

12 *Convention against Transnational Organized Crime*, opened for signature 15 December 2000, 2225 UNTS 209 (entered into force 29 September 2003).

13 United Nations Office on Drugs and Crime (‘UNODC’), *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 346.

Act 1999 (Cth). Section 232A created an offence for organising or facilitating the smuggling of five or more persons who do not hold a valid visa to enter Australia as required by section 42(1) of the *Migration Act*. The offence – and its equivalent today – attracts a penalty of 20 years imprisonment and a mandatory penalty of five years for first time offenders.¹⁴ Former section 233(1)(a) set out a similar offence for cases involving less than five persons.¹⁵ Minor amendments aside, these offences remained unchanged until the introduction of the *Anti-People Smuggling and Other Measures Act 2010* (Cth) which substituted the existing offences with the current sections 233A–233D.

Under the ‘offence of people smuggling’ in section 233A(1) of the *Migration Act*:

[a] person (the *first person*) commits an offence if:

- (a) the first person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of another person (the *second person*); and
- (b) the second person is a non-citizen; and
- (c) the second person had, or has, no lawful right to come to Australia.

The *Migration Act* also provides for several aggravated offences of people smuggling¹⁶ and separately criminalises supporting the offence of people smuggling.¹⁷ Penalties for people smuggling offences range from imprisonment for 10 years or a fine of AUD 110 000, or both, to imprisonment for 20 years and an AUD 220 000 fine, or both. A number of the offences contain mandatory minimum penalties and non-parole periods.¹⁸

The most commonly used people smuggling offence is that under section 233C of the *Migration Act*, which replaced former section 232A. Section 233C(1), entitled ‘Aggravated offence of people smuggling (at least 5 people)’ provides that:

A person (the *first person*) commits an offence if:

- (a) the first person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of at least 5 persons (the *other persons*); and
- (b) at least 5 of the other persons are non-citizens; and
- (c) the persons referred to in paragraph (b) who are non-citizens had, or have, no lawful right to come to Australia.

14 *Migration Act* former s 233C. The minimum penalty for repeat offenders was eight years. The minimum non-parole period for first time offenders was three years, and five years for repeat offenders.

15 See further, Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Asia Pacific Region* (Martinus Nijhoff, 2003) 169–70.

16 *Migration Act* ss 233B–C.

17 *Ibid* s 233D.

18 *Ibid* s 236B.

III RECOGNISED DEFENCES

The term ‘recognised defences’ is used in this article to refer to those general defences that are included in chapter 2 of the *Criminal Code*. Most of these defences have their roots in the common law. These defences, along with other general principles of criminal responsibility articulated in chapter 2 of the *Criminal Code*, apply to all federal offences, including those in the *Criminal Code* itself and, by virtue of section 2.1 of the *Criminal Code*, to all offences in other federal statutes, including those in the *Migration Act*.¹⁹

The defences that have been raised by defendants charged with people smuggling in Australia include mistake of fact,²⁰ duress,²¹ and sudden or extraordinary emergency.²² These defences may be raised if the accused argues that he or she was acting in response to an emergency (for example, a grave humanitarian crisis), whilst under duress (that is, being coerced to commit the offence), or due to a mistake of fact (for example, not knowing he or she was carrying undocumented/illegal migrants or where he/she was going). Each of these defences and their application to charges of people smuggling are explored in the following sections of this article. What these defences have in common is that, if raised successfully, they will excuse the accused’s actions and alleviate him or her from criminal responsibility. Not further discussed here are other general defences, such as self-defence and mental impairment, as these have no unique application in relation to people smuggling and there is no evidence that these defences have been raised in the context of people smuggling prosecutions. Also not further discussed here is the involvement of minors in migrant smuggling ventures to Australia.

A Mistake or Ignorance of Fact

The defence of mistake of fact serves to excuse the accused in situations in which he or she was mistaken about one of the elements constituting the offence the accused is charged with. In relation to the people smuggling offences in sections 233A and 233C of the *Migration Act*, this means a defendant may argue that he or she was mistaken about or unaware of the fact that his or her conduct facilitated in any way the bringing or coming to Australia or the entry or proposed entry into Australia of another person or of other people (that is, the smuggled migrant/s). A defendant may also argue that he or she was mistaken about or unaware of the fact that the smuggled migrant/s had no lawful right to come to Australia.

It would not be possible for the defendant to argue that he or she was unaware of or mistaken about the fact that the smuggled migrants are non-citizens or not authorised to come to Australia. The requirement in sections

19 See also *ibid* s 4A.

20 *Criminal Code* s 9.1.

21 *Ibid* s 10.2.

22 *Ibid* s 10.3.

233A(1)(b) and 233C(1)(b) that smuggled migrants are non-citizens is one of absolute liability to which the defence of mistake of fact is not available.²³

In federal criminal law, the defence entitled ‘mistake or ignorance of fact’ is set out in section 9 of the *Criminal Code*. Here, a distinction is drawn between mistakes in relation to physical elements that require proof of subjective fault (section 9.1) and physical elements that have no such requirement (so-called strict liability elements, section 9.2). The physical elements under sections 233A and 233C of the *Migration Act* in relation to which a mistake of fact may be raised require proof of fault on the basis of section 5.6 of the *Criminal Code*. Accordingly, a defendant would have to rely on the defence under section 9.1 of the *Criminal Code* which provides that:

- (1) A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if:
 - (a) at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts; and
 - (b) the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.
- (2) In determining whether a person was under a mistaken belief about, or was ignorant of, facts, the tribunal of fact may consider whether the mistaken belief or ignorance was reasonable in the circumstances.

The defence under section 9.1 of the *Criminal Code* will be successful – and the accused not criminally responsible – if it can be shown that he or she was actually under a mistaken belief or ignorant about the relevant fact, and that such a belief or ignorance was reasonable in the circumstances. The emphasis of the defence is on the subjective questions, ‘did the accused actually make the mistake? Was he or she really ignorant?’ The ‘reasonableness’ requirement goes to the question of whether the belief was actually held; there is no separate requirement that a reasonable person would have made the same mistake in the circumstances.²⁴

I Bahar v The Queen

The case of *Bahar v The Queen* involved the appeal of three men convicted at trial for offences of ‘organising bringing groups of non-citizens into Australia’ under former section 232A of the *Migration Act*.²⁵ Under this section:

A person who:

23 *Migration Act* ss 233A(2), C(2); *Criminal Code* s 6.2.

24 Cf *Proudman v Dayman* (1941) 67 CLR 536, 540 (Dixon J); *He Kaw Teh v The Queen* (1985) 157 CLR 523, 532 (Gibbs CJ); *CTM v The Queen* (2008) 236 CLR 440, 447 (Gleeson CJ, Gummow, Crennan and Kiefel JJ). See also Stephen Odgers, *Principle of Federal Criminal Law* (Thomson Reuters, 2nd ed, 2010) 95–7 [9.1.100]–[9.1.140].

25 (2011) 255 FLR 80.

- (a) organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people to whom subsection 42(1) applies; and
- (b) does so reckless as to whether the people had, or have, a lawful right to come to Australia;

is guilty of an offence punishable, on conviction, by imprisonment for 20 years or 2,000 penalty units, or both.

The three men, all Indonesian nationals, were involved in the arrival of the ‘suspected illegal entry vessel’ (‘SIEV’) 45 that was apprehended near Ashmore Reef on 23 June 2009.²⁶ In addition to four Indonesian crew, the vessel carried 50 smuggled migrants from Afghanistan and Iran. The four crew members were tried together in the District Court of Western Australia in 2010. One of the accused, Mr Lapikana, testified in his defence at trial and was acquitted. The three other accused, Messrs Samsul Bahar, Anto, and Anwar Abdullah, unsuccessfully argued that they had been acting under a mistake of fact when they engaged in the migrant smuggling venture, and were each sentenced to five years imprisonment with a non-parole period of three years, the statutory minimum.²⁷ In 2011, the three men appealed their convictions on the basis that the trial judge ‘failed to adequately or at all’ direct the jury on the defence of mistake of fact under section 9.1 of the *Criminal Code*.²⁸

The three men argued they had been mistaken or ignorant about relevant facts in slightly different contexts. Mr Bahar claimed that he had been unaware of the purpose and the destination of the venture, thus suggesting that he had been ignorant about the fact that his involvement facilitated the bringing of persons to Australia, as required by former section 232A(1)(a) of the *Migration Act*. He told the court that he had been deceived by the stranger who offered him work, stating that he was hired to work on a boat transporting crockery. Mr Bahar said he was never informed that he would be taking people to Australia and never contemplated that to be the position. When he first arrived at the vessel, the smuggled migrants were not on board; they only arrived the following day on another boat. By this time, his vessel was some distance away from the shore and it was not possible for him to leave. Mr Bahar put forward that the jury should accept that he had no intention of taking the migrants to Australia and was also not aware that this was the vessel’s destination. He argued that it was not possible for the jury to infer that it was his purpose to smuggle migrants and that they should keep in mind that he was a young man with very limited education and thus was the type of individual who could ‘easily be misled by more sophisticated people smugglers.’²⁹

26 Senate Standing Committee on Legal and Constitutional Affairs (Cth), *Australian Customs and Border Protection Service – Question No. 61* (Media Release, 26 May 2011) 2 (‘*Question No. 61 Report*’).

27 *Migration Act* former s 233C (now s 236B).

28 *Bahar v The Queen* (2011) 255 FLR 80, 82 [3]–[5] (McLure P).

29 *Ibid* 83 [11] (McLure P).

The second appellant, Mr Anto, similarly argued that he mistakenly believed that the voyage involved the transportation of cargo, not persons, and that the purpose of this voyage was to travel to Makassar, Indonesia. Mr Anto gave conflicting accounts on whether the passengers were already on the vessel when he first arrived, initially suggesting they were, but later recounting that the passengers were transferred to the vessel at sea at a later time when he no longer had an opportunity to leave the boat. He also said that later in the journey he was told that the intended destination of the vessel would be Ashmore Reef, but that he was not aware that this was a part of Australia. It was put forward that even if he did facilitate the transportation of the smuggled migrants, there was no evidence from which the jury could conclude that he did so knowing that he was assisting non-citizens to enter Australia.³⁰

The third appellant, Mr Abdullah, also claimed that he was under the mistaken belief that he had been hired to work on a vessel that would carry cargo. He only became aware of the true purpose of the venture and ‘knew that there was something wrong’ when he boarded the vessel and saw the Afghani and Iranian passengers. Mr Abdullah further claimed that he was not aware of the practice of migrant smuggling and that he would not have boarded the vessel had he known the true purpose and circumstances of this venture. He also put forward that at no stage did he know or contemplate where the passengers were being taken.³¹

The Court rejected the appeal. It found that it was unnecessary to direct the jury on the issue of mistake because the fault elements of the charge against the appellants could clearly be established: the three men had positive knowledge of the purpose of their voyage and at that time had the intention to facilitate this voyage. Although prior to boarding the vessel the appellants may not have been aware of the fact that they would be transporting people rather than cargo, they quickly became aware of this fact once they boarded. The Court found that there was evidence that the smuggled migrants were either already on the vessel at that time, or boarded soon after, at which point the appellants became aware of this circumstance and their mistake or ignorance, if any, was negated. At all material times the three men had the intention to facilitate the journey.³²

While the defence of mistake of fact under section 9.1 of the *Criminal Code* was ultimately rejected in this case, the Court did entertain the idea that it was conceivable that a mistake of the kind raised by the defendants, if proven, could indeed negate liability for the offence under former section 232A of the *Migration Act*. Since the fault elements of the offence could easily be established, there was, however, no room left to raise the mistake defence.

30 Ibid 84 [12] (McLure P).

31 Ibid 84 [13] (McLure P).

32 Ibid 87 [28] (McLure P).

2 PJ v The Queen

Questions about mistake and ignorance about the intended destination of the migrant smuggling venture also formed the basis of the appeal in *PJ v The Queen*.³³ The appellant in this case, Mr Jeky Payara, was charged under section 233C of the *Migration Act* for his involvement in the arrival of 49 unlawful non-citizens after the vessel, referred to as SIEV 187 by Australian authorities, was intercepted near Christmas Island on 20 September 2010.³⁴

At a pre-trial hearing in May 2012, a question put to Maidment J of the County Court of Victoria was whether the offence under section 233C required proof that the accused ‘was aware that the destination of the journey which he was alleged to have facilitated was Australia.’ The defence submitted that this was a necessary element of the offence and that the accused was unaware of that fact, a proposition that the prosecution, and ultimately the trial judge, rejected. Relying on the decision in *Bahar v The Queen*,³⁵ counsel for Mr Payara appealed this decision to the Supreme Court of Victoria.³⁶

The Court allowed Mr Payara’s appeal, stating that for him ‘to be found guilty of the offence under section 233C, he must be shown to have intended that the relevant persons be brought to Australia. That is, he must have been aware that Australia was the intended destination.’³⁷ This, in turn, means that any ignorance or mistake about the intended destination would lead to an acquittal, thus opening the possibility of raising the defence of mistake of fact under section 9.1 of the *Criminal Code* in this context.

The Court came to this conclusion by analysing the statutory construction and interpretation of section 233C of the *Migration Act*, in particular the requirement in section 233C(1)(a) that the accused ‘organises or facilitates the bringing or coming to Australia.’ The Court took the view that this requirement has to be read as one physical element, describing the criminal conduct of this offence. Since no fault element is specified for this element in section 233C itself, the default fault element of intention applies by virtue of section 5.6(1) of the *Criminal Code*. The Court noted that ‘[i]t is the very essence of the people smuggling offences created by subdivision A of division 12 [of the *Migration Act*] that they are intended to prevent the entry *into* Australia of persons who have no lawful right’.³⁸ It was the legislator’s

33 *PJ v The Queen* (2012) 268 FLR 99.

34 *Question No. 61 Report*, above n 26, 5; Gareth Boreham, ‘Accused People-Smuggler Freed’, *Special Broadcasting Service* (online), 26 August 2013 <<http://www.sbs.com.au/news/article/2012/09/03/accused-people-smuggler-freed>>.

35 *Bahar v The Queen* (2011) 255 FLR 80.

36 *PJ v The Queen* (2012) 268 FLR 99, 100–1 [2]–[3].

37 *Ibid* 101 [5].

38 *Ibid* 111 [49].

manifest purpose [...] that this offence, with its very substantial maximum penalty of 20 years' imprisonment, was designed to deter persons from intentionally bringing non-citizens to Australia, being aware that they may well have no right to come to Australia.³⁹

The Court thus rejected the prosecution's argument that the requirement to prove intention only related to the words 'organising or facilitating' and that it was not necessary to show that Australia was the intended destination. The Court held that 'what must be established is an intention "to do the whole act that is prohibited"' .⁴⁰

3 Further Cases

The question before the Court in *PJ v The Queen* surfaced again in a number of cases that adopted a similar approach. Shortly after the Court of Appeal's judgment in *PJ v The Queen*, the case of two Indonesian men, Messrs Rustam and Sore, came before Maiment J in the County Court of Victoria. The two accused were charged under section 233C of the *Migration Act* for their role as crewmembers on SIEV 216, a vessel that was apprehended near Christmas Island on 30 November 2010 carrying 59 passengers. The pair was part of a larger crew, though after taking money from the smuggled migrants the other crewmembers left the vessel before it approached Australia, leaving Messrs Rustam and Sore alone. Counsel for the accused successfully argued that the two men did not know that they were helping to bring asylum seekers to Australia, which led the jury to unanimously return a not guilty verdict.⁴¹

In August 2012, prosecutors in Victoria dropped charges under section 233C against a further four men after defence lawyers argued that the accused could not be convicted because there was no evidence that they knew their destination was Australia. Two of the men, Messrs Teos Adu and Rajiun Chayudin had been charged for serving as crew on SIEV 173 that was intercepted on 28 July 2010 northwest of Christmas Island carrying 82 passengers.⁴² The other two accused were Messrs Udin and Arifin who were apprehended, along with 53 passengers, on board SIEV 222 north-north-west of Ashmore Reef on 16 December 2010.⁴³

39 Ibid 112 [51].

40 Ibid 116 [76], quoting *He Kaw Teh v The Queen* (1985) 157 CLR 523, 584 (Brennan J).

41 Victoria Legal Aid, 'First Trial in Victoria of Indonesian Boat Crew About to Start' (Legal Aid Brief, 11 July 2012) <<http://www.legalaid.vic.gov.au/about-us/news/first-trial-in-victoria-of-indonesian-boat-crew-about-to-start>>; Michael Gordon, 'Aborted People-Smuggler Trial to Re-Start', *The Age* (online), 20 July 2012 <<http://www.theage.com.au/victoria/aborted-peoplesmuggler-trial-to-restart-20120720-22e42.html>>; Victoria Legal Aid, 'Boat Crew Acquitted in Victoria's First People Smuggling Trial' (Media Release, 1 August 2012) <<http://www.legalaid.vic.gov.au/about-us/news/boat-crew-acquitted-in-victoria%E2%80%99s-first-people-smuggling-trial>>; Michael Gordon, "'Smuggle' Crews Score Win in Court", *The Sydney Morning Herald* (online), 5 July 2012, <<http://www.smh.com.au/federal-politics/political-news/smuggle-crews-score-win-in-court-20120704-21hll.html>>.

42 AAP, 'People Smuggling Charges Dropped for Four Indonesians', *The Herald Sun* (online), 13 August 2012 <<http://www.heraldsun.com.au/news/national/people-smuggling-charges-dropped-for-four-indonesians/story-fndo3ewo-1226449548650>>.

43 Ibid.

Courts outside Victoria have also adopted the interpretation in *PJ v The Queen* that a conviction for people smuggling offences is not possible if there is no proof that the accused knew that their intended destination was Australia.⁴⁴ In *Sunada v The Queen*, the Court of Criminal Appeal quashed the convictions of the two accused. The two men had been charged under former section 232A(1) of the *Migration Act* for their involvement in the arrival of 84 smuggled migrants on board SIEV 101, a boat that was apprehended near Ashmore Reef on 4 February 2010. In this case, counsel for the accused argued that the men might have known that the destination of the journey was Ashmore Reef, but that they had no knowledge that these islands were Australian territory. At the trial in September 2011, Madgwick DCJ directed the jury on two occasions that ‘it is enough if the Crown can prove that the accused knew they were coming to Ashmore Reef, however called. The Crown does not have to prove that they knew that it was part of Australia.’⁴⁵ Citing the decision in *PJ v The Queen*, the Court of Appeal accepted that this direction was wrong because former section 232A had to be interpreted in the same way as section 233C of the *Migration Act* which requires ‘proof that the accused intended that relevant persons be brought to a destination that was part of Australia and that the accused knew was a part of Australia.’⁴⁶

A similar question came before the South Australian Court of Criminal Appeal in December 2012 with the case of Mr Zainudin, who, together with another man, Mr Slamet, was charged under section 233C for facilitating the arrival of SIEV 246, a vessel that was intercepted near Christmas Island on 7 May 2011 carrying 83 smuggled migrants.⁴⁷ While Mr Slamet was acquitted, a jury in the District Court in Adelaide convicted Mr Zainudin. He appealed his conviction, *inter alia*, because he questioned whether it was open to the jury ‘to be satisfied beyond reasonable doubt that [he] had the requisite knowledge that the passengers were being brought to Australia’.⁴⁸ Mr Zainudin argued that he had no knowledge of the destination and did not know that Christmas Island was part of Australia. He further supported his claim by saying that ‘he had no geographical knowledge, had never used a map or a seafaring chart, and had never heard of Christmas Island.’⁴⁹ The Court allowed the appeal because it was ‘mere speculation’ that Mr Zainudin knew the destination was Australia. To that end, the prosecution failed to ‘prove that [the] defendant knew that the intended

44 Cf *R v Razak* [2012] QCA 244, [9] (Fraser JA), in which the appellant argued unsuccessfully that he believed the vessel (*Sumber Rejeki* SIEV 131, intercepted northwest of Ashmore Reef on 10 April 2010) was sailing to another place within the Indonesian archipelago.

45 *Sunada v The Queen; Jaru v The Queen* [2012] NSWCCA 187, [3].

46 *Ibid* [5], [10].

47 *Question No. 61 Report*, above n 26, 6.

48 *R v Zainudin* [2012] SASCFC 133, [4] (Blue J).

49 Sean Fewster, ‘Indonesian Fisherman “Paid \$250 to Smuggle People” to Christmas Island, Court Told’, *AdelaideNow* (online), 10 August 2012 <<http://www.news.com.au/national/indonesian-fisherman-paid-250-to-smuggle-people-to-christmas-island-court-told/story-fndo4dzn-1226447586472>>.

destination [...] was Australia, not merely that the defendant knew the destination and that destination happened to be Australia as a matter of law.⁵⁰

4 Observations

These cases demonstrate that the level of knowledge persons accused of people smuggling have about the nature and scope of these ventures is essential in determining the criminal liability for offences under sections 233A, 233C, and former section 232A of the *Migration Act*. Mistake and ignorance about the purpose of such enterprises and, in particular, their intended destination may serve to exculpate the accused. This may be achieved – as the case of *Bahar v The Queen* shows – by way of section 9.1 of the *Criminal Code*, which provides a defence for such circumstances. More recent cases, starting with the decision in *PJ v The Queen*, however, suggests that these matters raise more fundamental question about the fault elements of the people smuggling offences.

What crystallises from this analysis is a judicial interpretation which emphasises that the key objective of these offences is to criminalise migrant smuggling specifically to Australia and that it is not possible to establish criminal liability in situations in which it cannot be proved beyond reasonable doubt that Australia was the intended destination – and that this was known to the accused. This interpretation is also supported, and indeed warranted, by the high penalty (including minimum mandatory terms of imprisonment) attached to these offences.

B Duress

The defence of duress (or compulsion as it is termed in some jurisdictions) serves to excuse a person from criminal responsibility where he or she has committed a criminal offence as a result of fear induced by a threat of physical harm to himself or herself, or to some other person, should he or she refuse to comply with the threat. In federal criminal law, the defence can be found in section 10.2 of the *Criminal Code*:

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence under duress.
- (2) A person carries out conduct under duress if and only if he or she reasonably believes that:
 - (a) a threat has been made that will be carried out unless an offence is committed; and
 - (b) there is no reasonable way that the threat can be rendered ineffective; and
 - (c) the conduct is a reasonable response to the threat.

The defence usually arises in situations in which the accused must choose between two evils: to commit the acts constituting the offence or to suffer the

50 *R v Zainudin* [2012] SASFC 133, [57], [81] (Blue J).

harm threatened.⁵¹ In the context of migrant smuggling, the defence may arise, for example, where a person was forced to facilitate or engage in a migrant smuggling venture. This may involve, for example, threats against crew members or their families if they fail to join the vessel, or threats to throw them overboard if they do not comply with certain demands.

I R v Mahendra

The defence of duress was briefly entertained – but ultimately did not go to the jury – in the case of *R v Mahendra*.⁵² Mr Mahendra was charged with people smuggling under section 233C of the *Migration Act* for his involvement in the arrival of SIEV 157 that was apprehended near Scott Reef on 8 June 2010. The vessel was carrying 36 Afghan, Iranian, and Iraqi nationals who held no valid visa to enter Australia. Another man implicated in the arrival of SIEV 157, Mr Suwandi, pleaded guilty to charges under section 233C prior to the proceedings against Mr Mahendra in the Supreme Court of the Northern Territory.⁵³

Messrs Mahendra and Suwandi were both Indonesian fishermen who had been recruited to work as crew members on board SIEV 157. When they were recruited, they agreed to take people to Australia, but shortly before their vessel left Indonesia a third man who was to be the captain of the vessel disembarked, leaving the two men alone with the passengers. At trial, Mr Suwandi testified that following the captain's departure, the two men discussed whether or not to continue the journey and ultimately decided to do so for fear that the passengers on board may otherwise harm or possibly kill them. At that time, however, they had not been threatened, had not been forced to crew the vessel, and their primary motivation for involvement in the venture was to earn 'big money'.⁵⁴ Their fear materialised on the second day into the journey when one of the passengers made a threat by swiping a finger across Mr Suwandi's throat, indicating that he would be killed if he did not continue the journey. Mr Mahendra witnessed this, though on this occasion the two crew men did not take the threat seriously.⁵⁵

Mr Mahendra's attempt to raise the defence of duress under section 10.2 of the *Criminal Code* remained unsuccessful as the judge held that there was insufficient evidence to discharge the evidential burden. Justice Blokland further stated that if there had been evidence that Mr Mahendra believed that the threat against Mr Suwandi was real and would be carried out – either on himself or on Mr Suwandi – then the situation 'would have been different' and the defence would have gone to the jury.⁵⁶ This remark indicates that the type and

51 *R v Howe* [1987] AC 417, 435 (Hailsham LC).

52 (2011) 211 A Crim R 462.

53 Transcript of Proceedings, *R v Suwandi* (Unreported, Supreme Court of the Northern Territory, SCC 21037950, Riley CJ, 18 February 2011).

54 *R v Mahendra* (2011) 211 A Crim R 462, 469 [25]–[26] (Blowland J).

55 *Ibid* 469 [27].

56 *Ibid* 470 [30].

circumstances of the threats made in this case can conceivably give rise to the defence of duress to a charge of people smuggling.

2 *R v Pandu and Kia v The Queen*

In *R v Pandu*,⁵⁷ the defence of duress was raised in circumstances similar to those of *R v Mahendra* and was allowed to proceed to the jury. This case, and the related case of *Kia v The Queen*,⁵⁸ relates to four accused, Messrs Yan Pandu, Daud Mau, Usman Kia, and Titus Loban, who were charged under former section 232A of the *Migration Act* for their involvement in the arrival of SIEV 43. This vessel was apprehended on 25 May 2009 near Ashmore Reef carrying 74 passengers of Afghani, Iraqi, and other backgrounds.⁵⁹

Several of the accused later gave evidence that about two hours into the journey they agreed to turn the vessel around and travel back to Indonesia. By that time, several other crew members had already left the vessel, which left the four men worried.⁶⁰ Several attempts to turn the boat back to Indonesia were met by hostile actions and gestures by several of the passengers. These actions included pushing motions intimating that the crew would be pushed overboard if they turned the vessel around, swiping fingers across the throat, and other gestures indicating that they would be killed or seriously harmed. This created fear among the four men, who, as a result of these threats decided to abandon their plan and instead continue on the journey to Australia.⁶¹

On the basis of this information, the judge allowed the defence of duress to go to the jury, instructing the jurors that for the defence to operate there must have been a belief held by each accused that each would be either killed or thrown overboard if the boat deviated from the original path.⁶² Further, the accused must have believed that there was no reasonable way of rendering the threat ineffective, and that continuing to travel towards Australia was a reasonable response to the threat in all of the circumstances that they faced.⁶³ The jury, however, found all four accused guilty.

3 *Observations*

These two cases show that situations of threats and compulsion are not completely uncommon in migrant smuggling ventures and that the desire of smuggled migrants to be brought to Australia can often lead to hostilities against the crew involved in the smuggling enterprise if plans to bring the smuggled migrants to Australia are abandoned. This is a very understandable reaction, given that the majority of smuggled migrants arriving in Australia are asylum

57 (Unreported, District Court of Western Australia, Eaton DCJ, 21 May 2010).

58 *Kia v The Queen* [2011] WASCA 104.

59 *Kia v The Queen* [2011] WASCA 104, [2]–[3] (McLure P).

60 *Ibid* [11] (McLure P).

61 Transcript of Proceedings, *R v Pandu* (District Court of Western Australia, 95/2010, Eaton DCJ, 21 May 2010) 7.

62 *Ibid*.

63 *Kia v The Queen* [2011] WASCA 104 [4] (McLure P).

seekers fleeing from persecution and most of them would have spent considerable time and money by the time they make the final leg of their journey.⁶⁴ The two cases demonstrate that if the passengers' reactions and anger turn into threats against captain and crew, this can create a situation in which duress – and thus a defence to a charge of people smuggling – may emerge. Whether the defence under section 10.2 of the *Criminal Code* will indeed excuse a defendant will depend on the specific circumstances of the case, including the (perceived) seriousness of the threat and the actual or perceived ability to avoid the threat in ways other than continuing the criminal conduct.

The decision in *R v Mahendra* also suggests that the timing of the threat against the migrant smugglers appears to be relevant. Here, Blokland J stated that if there had been 'evidence of a threat made prior to or at the very commencement of the voyage pointing to a reasonable belief on the part of Mr Mahendra that it would be acted on', it was likely that the defence would have been put to the jury to consider.⁶⁵ It is possible that a jury may be more sympathetic to the defence of duress if the threats were made earlier rather than later in the journey and that the jury in *R v Pandu* rejected the defence merely because the accused had made greater progress on their route to Australia.

C Sudden or Extraordinary Emergency

The defence of sudden or extraordinary emergency – or 'necessity' as it is called at common law and in some jurisdictions – involves a claim by the accused that he or she was compelled to commit an offence by reason of some extraordinary emergency. The defence is generally seen (and in some jurisdictions explicitly construed) as a fall-back provision that may only arise if other defences such as self-defence or duress are not applicable. Australian federal criminal law recognises the defence entitled 'sudden or extraordinary emergency' in section 10.3 of the *Criminal Code*, which provides that:

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.
- (2) This section applies if and only if the person carrying out the conduct reasonably believes that:
 - (a) circumstances of sudden or extraordinary emergency exist; and
 - (b) committing the offence is the only reasonable way to deal with the emergency; and
 - (c) the conduct is a reasonable response to the emergency.

In the context of migrant smuggling, the main issue appears to be the fact that most smuggled migrants come to Australia to seek asylum and that the vast majority of them are recognised as refugees – with recent figures showing as

⁶⁴ See also Schloenhardt and Martin, above n 7, 135.

⁶⁵ *R v Mahendra* (2011) 211 A Crim R 462, 470 [31].

many as 90.4 percent of unauthorised arrivals in Australia qualify for refugee protection visas.⁶⁶ This proves that most smuggled migrants arriving in Australia flee from situations of persecution or other gross violations of human rights. Several migrant smugglers have thus argued that they acted for humanitarian reasons by transporting the smuggled migrants away from situations of danger and uncertainty to a place where they are safe and where they can obtain meaningful, long-term protection.

In other words, it is arguable that the situations from which the smuggled migrants escape with the aid of migrant smugglers constitute emergencies which, through the defence in section 10.3 of the *Criminal Code*, would exculpate the smugglers from criminal liability for their smuggling activities. This argument can be supported by international law, where interpretative and supplementary material to the *Smuggling of Migrants Protocol* emphasise that ‘activities of those who provide support to migrants for humanitarian reasons’ are to be exempted from criminal liability.⁶⁷

I Nguyen v The Queen and Tran v Commonwealth

The first people smuggling prosecution to discuss the defence of sudden or extraordinary emergency is that of *Nguyen v The Queen*. This case involves the arrival of SIEV 13 that was apprehended on 1 July 2003 near Port Hedland, carrying 54 passengers of Vietnamese background. The principal accused in this case, Mr Van Hoa Nguyen, is an Australian citizen who travelled to Vietnam in early March 2003 where he became involved in disseminating pamphlets containing anti-government propaganda. On 15 May 2003, his sister alerted him that Vietnamese authorities had become aware of his activities, which are illegal in Vietnam. He became concerned that he would be arrested and tortured and also worried about his family members and other persons involved in his activities. At this point he decided to organise a vessel for him and others to sail via Indonesia to Australia.⁶⁸ Mr Tol Van Tran, a fisherman from southern Vietnam, was the owner and captain of the *Hao Kiet*, the vessel later referred to as SIEV 13, on which he arrived together with Mr Nguyen.⁶⁹ Also on this vessel were Mr Tran’s wife and their two teenage children.⁷⁰

66 Department of Immigration and Citizenship (Cth), *Asylum Trends 2011–12* Annual Publication, (2012) 31.

67 United Nations General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Work of its First to Eleventh Sessions* UN Doc A/55/383/Add.1 (3 November 2000) 16 [88]; UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organised Crime and the Protocols thereto* (2004) 469; UNODC, *Model Law against the Smuggling of Migrants* (UNDOC, 2010) 2.

68 *Nguyen v The Queen* [2005] WASCA 22, [14]–[15] (Templeman J); Simone Pitsis, ‘Soldiers “Ordered” Refugees to Island’, *The Australian*, 11 March 2004, 8.

69 *Tran v Commonwealth* (2010) 187 FCR 54, 61 [24] (Rares J).

70 *Tran v Commonwealth* [2008] FCA 901, [18] (Cowdroy J); Kaye Bernard, Submission No 169 to Senate Legal and Constitutional Committee, *Inquiry into the Administration and Operation of the Migration Act 1958*, 7 August 2005, 3–4.

Two days after the arrival of SIEV 13, Messrs Nguyen and Tran, together with a third man involved in this venture, were charged with offences relating to people smuggling under former section 232A of the *Migration Act*. Mr Nguyen initially pleaded not guilty to the charges against him.⁷¹ During his trial, he admitted to the facts that formed the basis for the charges against him but raised the defence of sudden or extraordinary emergency under section 10.3(1) of the *Criminal Code*. Counsel for Mr Nguyen argued that he had organised the vessel and brought the smuggled migrants to Australia out of necessity after Vietnamese authorities uncovered their anti-government activities.⁷² The prosecution also remarked that ‘[t]he venture was not for profit i.e. contrary to the spirit of the second reading speech which indicated that the section [232A] was enacted inter alia to stop those involved in people smuggling for profit.’⁷³ District Court Judge Yeats ruled that the defence under section 10.3(1) was open, but gave conflicting directions about the elements of the defence.⁷⁴ In particular, there was some confusion among jury members whether the situation of emergency under section 10.3(1) had to be both sudden and extraordinary, or whether it would suffice to establish one or the other. In March 2004, the jury returned a verdict of guilty.⁷⁵

In 2005, the two men appealed their conviction. The Court of Appeal found that there had been a miscarriage of justice in the directions given by the trial judge regarding the defence under section 10.3 of the *Criminal Code*. Justice Templeman allowed the appeal on the basis that

it is impossible to exclude a miscarriage of justice. Having regard to the way in which the Judge directed the jury, it would have been open to them to convict the appellant if they were satisfied that there was, in fact, no sudden or extraordinary emergency. On that basis alone, I concluded that the appeal must be allowed. Furthermore, I considered that the combination of errors made by the Judge were such that the appellant was denied his right to a fair trial.⁷⁶

His Honour also explained the application of section 10.3 in this context, noting that ‘[t]he circumstances in which the defence may be raised include a sudden emergency or an extraordinary emergency. It is not necessary for the emergency to be both sudden and extraordinary.’⁷⁷ He thus rejected the prosecution’s view that the emergency has to be both and that in Mr Nguyen’s case, to make the emergency sudden, too much time had passed between him becoming aware of the emergency and acting in response to it. Justice Templeman added that the direction given by Yeats DCJ ‘placed too much emphasis on the passage of time and did not take into account the fact that an

71 David King, ‘Bid “to Smuggle Family”’, *The Australian*, 3 March 2004, 6.

72 *Nguyen v The Queen* [2005] WASCA 22, [5] (Templeman J).

73 Quoted in Bernard, above n 70, 4; also quoted in Senate Standing Committee on Legal and Constitutional Affairs (Cth), *Migration Amendment (Visa Integrity) Bill 2006* (2006) 16.

74 *Nguyen v The Queen* [2005] WASCA 22, [18]–[26].

75 Australian Federal Police, *Annual Report 2003–2004* (2004) 36.

76 *Nguyen v The Queen* [2005] WASCA 22, [28].

77 *Ibid* [17].

emergency may be extraordinary even though the anticipated danger is not imminent.⁷⁸

Mr Nguyen's conviction was quashed and a retrial ordered. During the retrial the jury was unable to reach a verdict and the prosecution subsequently dropped the charge against Mr Nguyen.

On the basis of the decision in *Nguyen v The Queen*, the prosecution conceded to Mr Tran's appeal and his conviction was quashed.⁷⁹ Mr Tran was acquitted during his retrial. The jury accepted that he had helped to bring the passengers on board SIEV 13 – all of whom had been granted protection or other humanitarian visas – to Australia in circumstances of a sudden or extraordinary emergency pursuant to section 10.3(1) of the *Criminal Code*.⁸⁰ Further information about the reasoning and the application of the defence in this case is not available.

The outcome of the criminal proceedings against Messrs Nguyen and Tran recognises the close link between migrant smuggling activities and the dire circumstances from which most smuggled migrants flee. These cases establish that the persecution which motivated the accused and the smuggled migrants to flee their home country can indeed amount to a 'sudden or extraordinary emergency' thus giving rise to the defence under section 10.3(1) of the *Criminal Code*. This approach is also an important manifestation of the requirement in international law and best practice guidelines which mandates that persons accused of migrant smuggling ought not to be criminalised if their primary motivation is humanitarian.

2 Warnakulasuriya v The Queen

One further case exploring the application of section 10.3(1) of the *Criminal Code* in relation to charges of people smuggling is that of Mr Antony Warnakulasuriya. He is a Sri Lankan national who arrived in Australia near Barrow Island on 22 April 2009 on board SIEV 37, a vessel that carried 31 Sri Lankan nationals. Mr Warnakulasuriya was charged under former section 232A of the *Migration Act* and tried in the District Court of Western Australia on 17 November 2010. Counsel for the defendant argued that Mr Warnakulasuriya was 'not criminally responsible for the offence in that he carried out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency within section 10.3 of the *Criminal Code*'.⁸¹

The defence was raised because it was alleged that Mr Warnakulasuriya did little more than help persons fleeing from persecution in Sri Lanka to a place of safety. The Court heard that Mr Warnakulasuriya was affiliated with Sri Lanka's main opposition party. In the lead up to the national elections in 2004, he was involved in party campaigning. After the party was defeated in that election, men

78 Ibid [24].

79 Paige Taylor, 'Asylum Captain Wins a Retrial – People-Smuggling Conviction Quashed', *The Australian*, 23 March 2005, 2; *Tran v Commonwealth* [2008] FCA 901, [22]–[23] (Cowdroy J).

80 *Tran v Commonwealth* (2010) 187 FCR 54, 62 [29] (Rares J).

81 *Warnakulasuriya v The Queen* (2012) 261 FLR 260, 264 (Buss JA).

associated with the party that won the election kidnapped Mr Warnakulasuriya. The men told him not to work for the opposition party any longer and cut off one of his fingers.⁸² Too scared to continue his political activities, Mr Warnakulasuriya purchased a boat to take up work as a fisherman. He later witnessed an incident in which members of the Tamil Tigers ('LTTE') stabbed and shot people and also threatened him that he would be harmed unless he cooperated with the LTTE. For a short time he did assist the LTTE by carrying goods on his boat, but was later harmed and tortured when he refused to continue. Shortly after this experience, the Sri Lankan police summoned Mr Warnakulasuriya to question him over his association with the LTTE, which was seen as a terrorist organisation by Sri Lankan authorities at that time. In fear of further threats and harm from both the LTTE and Sri Lankan officials, he decided to organise a boat to flee from his home country.⁸³

Despite recounting his experience in Court, Mr Warnakulasuriya's attempt to raise the defence under section 10.3 of the *Criminal Code* was unsuccessful, and he was convicted after the jury returned a unanimous verdict of guilty. In 2011, he appealed his conviction on the sole ground that the trial judge misdirected the jury on the defence of sudden or extraordinary emergency under section 10.3.⁸⁴

Mr Warnakulasuriya's appeal was granted, with Buss JA recognising that the trial judge incorrectly explained the requirements of the defence to the jury. One of the principal particulars of the appeal was that the trial judge told the jury that the word 'emergency' describes 'a circumstance that requires there to be some immediate action'.⁸⁵ Justice of Appeal Buss stated that this was likely to convey to the jury that circumstances indicating an 'emergency' would not be 'extraordinary', 'unless those circumstances required that some immediate action be taken.' While the word 'emergency' does connote an element of urgency in its natural use, this case held that the emergency does not in fact need to be 'imminent' or require 'imminent action'. The Court of Appeal accepted that the trial judge had erred in directing the jury that the defence of sudden or extraordinary emergency required the emergency to be 'imminent'.⁸⁶ On that basis, Mr Warnakulasuriya's conviction was quashed and a retrial ordered. At the time of writing, the retrial had yet to take place.

The case of *Warnakulasuriya v The Queen* also expanded upon the decision in *Nguyen v The Queen*, in which it was noted that the prosecution cannot negative the defence simply by establishing that the emergency claimed by the accused did not exist.⁸⁷ Section 10.3(2) of the *Criminal Code* is based on the defendant's 'reasonable belief' that circumstances of sudden or extraordinary emergency exist. This introduces a subjective requirement that the accused

82 Ibid 265 (Buss JA).

83 Ibid 265-6 (Buss JA).

84 Ibid 264, 274 (Buss JA).

85 Ibid 275.

86 Ibid 276 (Buss JA).

87 *Nguyen v The Queen* [2005] WASCA 22, [17] (Templeman J).

positively held that belief, and an objective element requiring that the belief was reasonable in the circumstances.⁸⁸ Whether the belief in the emergency can be taken to be objectively reasonable will depend on the circumstances with which the migrant smuggler is faced at that time and whether an ordinary person would share such a belief. Whether the smuggled migrants in fact faced persecution or the migrant smuggler in fact faced personal harm (or whatever the claimed emergency entailed) does not determine whether the defence will be successful, though it will be relevant in deciding whether the belief was objectively reasonable.⁸⁹

3 Ahmadi v The Queen

The defence of necessity was also discussed in the case of Mr Hadi Ahmadi, one of the few prosecutions that involve an organiser of such migrant smuggling ventures who was not himself on the vessel when it arrived in Australia. Mr Ahmadi fled from Iraq to Iran with his mother and his siblings in the 1980s, and in 1999 moved on to Malaysia and Indonesia. Here, he became involved in migrant smuggling activities after two failed attempts to reach Australia with the assistance of another smuggler. Mr Ahmadi was implicated in the arrival of four vessels, carrying a total of 911 smuggled people to Australia between 25 March and 22 August 2001.⁹⁰ According to a newspaper report, Mr Ahmadi told the court he ‘helped them for free out of a sense of duty and compassion for people who could face persecution or death if deported back to their countries.’⁹¹ In August 2010, he was found guilty in relation to two of these vessels, SIEVs *Conara* and *Flinders*.⁹² In June 2011, he appealed his conviction to the Supreme Court of Western Australia.

One of the points Mr Ahmadi argued on appeal was that the trial judge erred in not leaving the defence of necessity open to the jury. At the time Mr Ahmadi was involved in his migrant smuggling activities, the *Criminal Code* was not yet in operation, so the common law defence of necessity applied. It was argued that Mr Ahmadi’s migrant smuggling activities served to save the passengers on his vessels from serious threats and dangers and that he genuinely believed his actions were necessary to bring his passengers to a place of safety where they would not face persecution or fear of being returned to a place of persecution.

In applying the elements of the defence, Buss JA drew particular attention to the requirement that the persons Mr Ahmadi was bound to protect were in a situation of imminent peril. Acting Justice Buss held that the imminent peril must

88 *Warnakulasuriya v The Queen* (2012) 261 FLR 260, 268 (Buss JA).

89 See also Odgers, above n 24, 130–1 [10.3.190]–[10.3.230].

90 See also Andreas Schloenhardt and Linley Ezzy, ‘Hadi Ahmadi – And the Myth of the “People Smugglers’ Business Model”’ (2012) 38(3) *Monash University Law Review* 120.

91 Lloyd Jones, ‘Trial Casts Light on People Smuggling’, *Sydney Morning Herald* (online), 12 August 2010 <<http://news.smh.com.au/breaking-news-national/trial-casts-light-on-people-smuggling-20100812-1210g.html>>.

92 Transcript of Proceedings, *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 3784.

be more than merely foreseeable or likely but must be ‘on the verge of transpiring and virtually certain to occur.’⁹³ In applying this standard to the circumstances of the case, his Honour found that there was a foreseeable risk that had the passengers on the *Flinders* and *Conara* stayed in Indonesia, they might have been arrested and held in detention centres, or deported to their countries of origin. However, his Honour found no evidence to suggest that Mr Ahmadi honestly believed that these circumstances were ‘on the verge of transpiring’ or were ‘virtually certain to occur’ when he committed the criminal acts.⁹⁴ It was further held that the possibility of detention in Indonesia was not an ‘irreparable evil’ required for the defence of necessity.⁹⁵ In this context, the Court also considered public policy implications and remarked ‘that the law cannot leave people free to choose for themselves which laws they will obey’ and that the law should not be disobeyed just because it is considered that the accused ‘serves some value higher than that implicit in the law which is disobeyed.’⁹⁶ In conclusion, Buss JA, with whom Mazza J and McLure P agreed, held that the trial judge was correct to exclude the defence of necessity from the jury.

4 Observations

The cases of *Nguyen v The Queen*, *Tran v The Queen*, *Warnakulasuriya v The Queen*, and *Ahmadi v The Queen* illustrate how persons accused of people smuggling in Australia have sought to raise the defence of necessity, or sudden or extraordinary emergency as it is now termed, to argue that their ventures were intended to save the smuggled migrants from persecution, serious human rights abuse, or other humanitarian crises. In the cases of Messrs Nguyen and Warnakulasuriya the accused themselves experienced the same fear as those who they sought to rescue and they also shared the nationality and background of the people they brought to Australia. The same may be said about Mr Ahmadi who, according to his own account, helped Iraqis and others who, like him, sought to reach Australia to escape the persecution experienced in their home countries and the uncertainty and dangers of the situation in the transit points.

The limited case law seems to acknowledge that migrant smuggling ventures may serve to rescue individuals or groups of persons from situations of ‘imminent peril’ or ‘sudden or extraordinary emergency.’ The cases discussed here seem to establish a connection between the persecution faced or feared by many smuggled migrants and the type of emergency required to raise the defence. Some observers may thus expect for the defence to be used more frequently in people smuggling trials. But the discussion also reveals that even if the defendants are able to discharge their evidential burden and the courts allow the defence to go to the jury, an acquittal is far from certain. The juries in the initial trials of Messrs Nguyen and Warnakulasuriya were unsympathetic to the

93 *Ahmadi v The Queen* (2011) 254 FLR 174, 183 [47], quoting *R v Latimer* [2001] 1 SCR 3, 19 [29].

94 *Ahmadi v The Queen* (2011) 254 FLR 174, 183 [49].

95 *Ibid* 183 [50].

96 *Ibid* 179 [37] (Buss JA), quoting *R v Rogers* (1996) 86 A Crim R 542, 546 (Gleeson CJ).

circumstances that led the defendant to instigate and carry out their migrant smuggling ventures. Concerns that the defence of sudden or extraordinary emergency could become the cloak to excuse large numbers of migrant smugglers are thus neither warranted nor justified.

VI OTHER EXCULPATORY MATTERS

Beyond the use of recognised statutory defences, which, if successful, would release the accused from criminal liability, a number of persons charged with people smuggling offences in Australia have raised other exculpatory matters to explain and justify their involvement in migrant smuggling ventures. Some of these matters question the elements that constitute relevant offences, while others raise more general, moral concerns about the criminalisation of migrant smugglers.

A Smuggling of Refugees

One of the more common arguments presented by migrant smugglers to justify their actions is the fact that the passengers they brought to Australia were, by and large, fleeing from situations of persecution and came to Australia to seek asylum and gain refugee status. As mentioned earlier, some defendants have raised this point in the context of the defence of sudden or extraordinary emergency, though few have been successful. The fact that most smuggled migrants who arrive in Australia are ultimately recognised as refugees and issued with protection visas also has implications for the proof of the physical elements of the people smuggling offences under the *Migration Act* and raise wider questions about the criminalisation of persons who assist refugees reaching a place of safety.

In the Australian context, the debate has focused on one of the principal physical elements of the domestic people smuggling offences: the fact that the non-citizens brought to Australia ‘had or have no lawful right to come to Australia’.⁹⁷ In short, the point raised in several people smuggling trials is that asylum seekers who are later granted a protection visa do have a lawful right to come here because the *Convention relating to the Status of Refugees* mandates that.⁹⁸

Article 1A(2) of the *Refugee Convention*, as amended by the 1967 *Protocol relating to the Status of Refugees*,⁹⁹ defines a refugee as any person who,

owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to

97 *Migration Act* ss 233A(1)(c), 233C(1)(c).

98 *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) (*‘Refugee Convention’*).

99 *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Australia's obligations under the *Refugee Convention* are enshrined in section 36(2)(a) of the *Migration Act*, which provides that non-citizens in respect of whom the Minister of Immigration is satisfied Australia has protection obligations under the *Refugee Convention* may be granted a protection visa which, at present, entitles the visa holder to permanent residence in Australia.

I R v Ambo

Mr Asse Ambo, an Indonesian national, and his nephew were the crew members of SIEV 229 that was apprehended near Christmas Island on 8 February 2011. The vessel carried 53 smuggled migrants of Iraqi and Iranian background; some of the passengers were stateless. Mr Ambo was charged with an aggravated offence of people smuggling under section 233C of the *Migration Act*.

When the case went to trial in September 2011, counsel for Mr Ambo sought an acquittal on the basis that '(a) those on the boat had a lawful right to come to Australia; or, in the alternative (b) the Crown has not proved that they did not have a lawful right to come to Australia.'¹⁰⁰ It was submitted that:

[O]n either of these bases, the passengers on the SIEV had a lawful right to come to Australia in that they could subsequently apply for asylum and/or refugee status. Accordingly, the jury cannot be satisfied that the people had no lawful right to come to Australia and consequently, there should be a verdict of acquittal ...

The entitlement to seek asylum from persecution founds a lawful right to come to Australia, at least for those people whose claim for asylum is ultimately accepted.

Section 233C of the *Migration Act* does not specifically equate the lack of a valid visa with the absence of a lawful right to come to Australia ...

The use of the alternatives 'had or have' in the wording of the section suggests that an entitlement to come to Australia can be determined after the fact through an assessment of refugee status ...

People seeking asylum from persecution have a right to come to Australia to seek such asylum; international law imposes positive obligations in relation to treatment of asylum seekers regardless of how those asylum seekers arrive. Australia has imported these international obligations into its domestic law through the *Migration Act*.¹⁰¹

The Court rejected these arguments. It held that Australian law is decisive in determining whether travel to Australia is lawful or unlawful. The relevant domestic law in this circumstance is found in section 42(1) of the *Migration Act*, which contains an 'unequivocal statement' that a person must not travel to Australia without a visa.¹⁰² Accordingly, the 'no lawful right to come to Australia' referred to in section 233C(1)(c) could not be interpreted to mean that the passengers had a lawful right to come to Australia merely because they were subsequently found to be refugees. Mr Ambo had satisfied this element of the

100 *R v Ambo* (2011) 13 DCLR (NSW) 229, 231 [10], 332-3 [18]-[21] (Know DCJ).

101 *Ibid* 232 [11], 232-3 [18]-[21] (Knox DCJ).

102 *Ibid* 236 [45], 237 [47] (Knox DCJ).

offence in spite of the fact that at least some of the smuggled migrants were subsequently found to be genuine refugees.¹⁰³ Accordingly, Mr Ambo was found guilty and sentenced to the mandatory minimum of five years imprisonment with a non-parole period of three years.¹⁰⁴

2 Director of Public Prosecutions (Cth) v Payara

The question of whether smuggled migrants who arrive in Australia and are later granted refugee status have a lawful right to come to Australia was also raised in the case against Mr Jeky Payara, who, as mentioned earlier, was charged under section 233C of the *Migration Act* for his involvement in the arrival of 49 smuggled migrants on board SIEV 187.

In November 2011, counsel for Mr Payara sought to challenge the charges against the defendant by arguing that the fact that the smuggled migrants brought to Australia on board SIEV 187 held no valid visas was not sufficient to prove that they ‘had or have no lawful right to come to Australia’ as required by section 233C(1)(c). The point made here was that asylum seekers, by virtue of Australia’s obligation under the *Refugee Convention*, had a lawful right to come here and that the prosecution was unable to prove otherwise.¹⁰⁵ Mr Saul Holt, Director of Victoria Legal Aid, representing Mr Payara stated that:

It comes down to this: Australia has an international law but also in its own law, in the *Migration Act*, accepted that people who are seeking asylum from persecution in other countries are entitled to come to the border of Australia and to have their claims for asylum properly tested and properly understood ... On the one hand, Australia says everyone has to have a visa to come in. On the other hand, Australia accepts ... when genuine refugees seek asylum in Australia for persecution in their own countries they have a right to do so and be assessed for that purpose. The reality is the refugees don’t get a visa before they leave their own country.¹⁰⁶

Two days before this matter was heard before the Court of Appeal, the Federal Government passed specific, retrospective legislation to ensure that the Court could not adopt the interpretation suggested by the defence. The Minister for Home Affairs introduced the Detering People Smuggling Bill 2011 (Cth) ‘to make it clear that ... a non-citizen has, at a particular time, no lawful right to come to Australia if at that time the person does not meet requirements for lawfully coming to Australia under domestic law.’¹⁰⁷ This was achieved by inserting a new section 228B, entitled ‘circumstances in which a non-citizen has no lawful right to come to Australia’ into the *Migration Act*. This section provides that:

103 Ibid 237 [50] (Knox DCJ).

104 *R v Ambo* [2011] NSWDC 182 [38] (Knox DCJ).

105 *R v Payara* [2012] VSCA 266 [13]; Gareth Bodem, ‘Accused People-Smuggler Freed’, *Special Broadcasting Service News* (online), 3 September 2012 <<http://www.sbs.com.au/news/article/1688697/Accused-people-smuggler-freed>>.

106 Shannon Deery, ‘Landmark Case May Force Review of Immigration Laws’, *The Herald Sun* (online), 31 August 2011 <<http://www.heraldsun.com.au/news/victoria/landmark-case-may-force-review-of-immigration-laws/story-fn7x8me2-1226126166284>>.

107 Explanatory Memorandum, Detering People Smuggling Bill 2011 (Cth) 4.

- (1) For the purposes of this Subdivision, a non-citizen has, at a particular time, no lawful right to come to Australia if, at that time:
 - (a) the non-citizen does not hold a visa that is in effect; and
 - (b) the non-citizen is not covered by an exception referred to in subsection 42(2) or (2A); and
 - (c) the non-citizen is not permitted by regulations under subsection 42(3) to travel to Australia without a visa that is in effect.
- (2) To avoid doubt, a reference in subsection (1) to a non-citizen includes a reference to a non-citizen seeking protection or asylum (however described), whether or not Australia has, or may have, protection obligations in respect of the non-citizen:
 - (a) under the Refugee Convention as amended by the Refugee Protocol; or
 - (b) for any other reason.

The Detering People Smuggling Bill 2011 (Cth) was referred to the Senate Legal and Constitutional Affairs Legislation Committee which considered the reasons for the legislative amendment, including the fact that it was introduced during relevant legal proceedings, the retrospective application of the amendment, and international obligations under the *Smuggling of Migrants Protocol*. The Committee endorsed the legislation because:

The increasing seriousness of people smuggling to Australia justifies the need for the Bill, its retrospective application and its application to current legal proceedings. The committee considers that it has always been the intention of the Parliament that the words ‘no lawful right to come to Australia’ mean that the people smuggling offences in the *Migration Act* also apply to those smuggling individuals who intend to seek asylum in Australia.¹⁰⁸

The *Detering People Smuggling Act 2011* (Cth) was passed on 30 November 2011. The introduction and retrospective application of section 228B made the question put to the Court of Appeal in the case against Mr Payara moot.

3 Observations

The courts and the Australian Government have made it perfectly clear that smuggled migrants, even if they are recognised as refugees in Australia, have no lawful right to come to Australia and that migrant smugglers do not escape criminal liability in these circumstances. The points on which the judiciary and the Government base their arguments are, however, unconvincing. Suggestions that the approach legislated with the *Detering People Smuggling Act 2011* (Cth) complies with the spirit of the *Refugee Convention* and international human rights law are wrong. The legal position articulated in *R v Ambo* and now legislated in section 228B of the *Migration Act* may satisfy a narrow

¹⁰⁸ Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Detering People Smuggling Bill 2011* (2011) 17 [2.42].

interpretation of the supremacy of domestic law over international law,¹⁰⁹ but runs squarely against the purpose of the *Refugee Convention*, which is to provide safety to those fleeing persecution. The protection obligations created by the *Refugee Convention* are not – and should not be – contingent upon the completion of lengthy bureaucratic domestic proceedings to confirm that asylum seekers arriving in Australia are indeed meeting the formal requirements of the refugee definition. The *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugee*, published by the UN High Commissioner for Refugees (‘UNHCR’), specifically provides that:

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. ... He does not become a refugee because of recognition, but is recognized because he is a refugee.¹¹⁰

Counsel for the accused in *R v Ambo* also referred to article 14(1) of the *Universal Declaration of Human Rights*, which provides that ‘everyone has the right to seek and to enjoy in other countries asylum from persecution.’¹¹¹ While this Declaration does not have binding effecting on domestic law, article 14 does create an obligation ‘not to obstruct a person’s lawful right to seek asylum.’¹¹²

Current Australian law fails to honour Australia’s core obligations under the *Refugee Convention* and thus effectively renders Australia’s ratification of the *Refugee Convention* meaningless. The intended consequence of the *Deterring People Smuggling Act 2011* (Cth) and of other measures to deter migrant smuggling is to ensure that no person, with or without the help of migrant smugglers, can flee to Australia to invoke protection as a refugee. Pointing to the requirement that all non-citizens require a valid visa to enter Australia, even if they flee persecution and serious human rights violations, fails to recognise the purpose of the *Refugee Convention* and the reality of refugee flows and irregular migration generally. Denying refugees this avenue to come to Australia to seek protection leaves little scope for the *Refugee Convention* to have any practical application in this country.

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- 109 See, eg, *R v Ambo* (2011) 13 District Court Law Reports (New South Wales) 229, 236 [44] (Knox DCJ); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 384 (Gummow and Hayne JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ); *Coleman v Power* (2004) 220 CLR 1, 27–8 (McHugh J); *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161; *Minister for Immigration v Ibrahim* (2000) 204 CLR 1.
- 110 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/IP/4/Eng/Rev.2 (January 1992) [28].
- 111 *R v Ambo* (2011) 13 District Court Law Reports (New South Wales) 229, 233 [23] (Knox DCJ), citing *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 14.
- 112 *R v Ambo* (2011) 13 District Court Law Reports (New South Wales) 229, 233 [23] (Knox DCJ), citing *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 14.

B No Financial or Other Material Benefit

A crucial element in the definition of smuggling of migrants in article 3(a) of the *Smuggling of Migrants Protocol* is the requirement that the activity be done ‘in order to obtain, directly or indirectly, a financial or other material benefit’. This element reflects the profit motive that characterises the heinousness of unscrupulous smugglers who organise or facilitate the smuggling of other persons purely for personal gain. The element also emphasises the nexus between migrant smuggling and organised crime – and thus the relationship between the *Smuggling of Migrants Protocol*, and its parent, the *Convention against Transnational Organized Crime*.

The *Interpretative notes for the official record (travaux préparatoires) of the negotiations for the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, along with other international best practice guidelines, state that the ‘financial or other material benefit’ requirement was

included in order to emphasise that the intention was to include the activities of organised criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the Protocol to criminalise the activities of family members or support groups such as religious or non-governmental organizations.¹¹³

The Australian people smuggling offences in the *Migration Act* and in the *Criminal Code* do not require that the accused acted for personal gain or in order to acquire any ‘financial or other material benefit’.¹¹⁴ In fact, this requirement was a physical element of the *Criminal Code* offences when they were first introduced in 2002, but this element was removed, without further explanation, by the *Anti-People Smuggling and Other Measures Act 2010* (Cth). Criticism has also been aimed at the offence of ‘supporting the offence of people smuggling’ under section 233D of the *Migration Act* which was added in 2010. Michael Grewcock, for instance, has argued that this offence

[c]riminalises any support in the form of advice or material assistance that might assist someone (including a family member) obtain illicit passage. The only exception is if the person accused is also a member of the group. These provisions clearly target refugee communities and their supporters in Australia and make them potentially subject to ASIO [Australian Security and Intelligence Community] surveillance.¹¹⁵

Australia’s offences are thus at odds with the *Smuggling of Migrants Protocol*. Persons acting for humanitarian reasons are criminalised in the same

113 United Nations General Assembly, *Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh sessions*, UN Doc A/55/383/Add.1 (3 November 2000) 16 [88]; see also UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2004) 364; UNODC, *Model Law against the Smuggling of Migrants* (2010) 13.

114 See *Migration Act* ss 233A–D; *Criminal Code* ss 73.1–73.3A.

115 Michael Grewcock, “‘Scum of the Earth?’ People Smuggling, Criminalisation and Refugees” (2010) 19(3) *Human Rights Defender* 14, 15.

manner as persons who have sought to profit by exploiting desperate migrants.¹¹⁶ Substantial criticism has been mounted against the removal of the ‘financial or other material benefit’ element from the *Criminal Code* offences.¹¹⁷ Nevertheless, the position on the relationship between domestic Australian law and international law is well established and the decision in *R v Ambo* confirmed that rights which exist under international law ‘may be overborne by clear domestic legislation to the contrary.’¹¹⁸

I Ahmadi v The Queen

The lack of any profit motive was raised in the case of Mr Hadi Ahmadi, who, as mentioned earlier in this article, was implicated in the arrival of four vessels, carrying a total of 911 smuggled to Australia between 25 March and 22 August 2001. Counsel for the defendant argued that Mr Ahmadi made very little (if any) profit from his migrant smuggling activities and that he acted for humanitarian purposes and not for commercial gain. When asked why he committed the offences he was charged with, Mr Ahmadi said he acted out of a religious duty and that he felt an obligation to look after the refugees; other smugglers just looked at them as money while he understood how they felt.¹¹⁹ Nevertheless, Mr Ahmadi was found guilty in relation to two of the vessels he had organised and sentenced to seven and a half years imprisonment, with a non-parole period of four years.¹²⁰

V CONCLUSION

This article has shown that while the use of defences in people smuggling trials in Australia may be statistically infrequent, there have been numerous

116 See also *ibid.*

117 See, eg, Immigration Advice and Rights Centre Inc, Submission No 7 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 14 April 2010, 4; Law Council of Australia, Submission No 9 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, April 2010; Sydney Centre for International Law, Submission No 11 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 15 April 2010; Asylum Seeker Resource Centre, Submission No 12 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 16 April 2010; The University of New South Wales, Submission No 23 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 16 April 2010; University of Adelaide, Submission No 20 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 16 April 2010; Project SafeCom, Submission No 17 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 16 April 2010; Erika Stahr, Submission No 2 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 1 April 2010.

118 *R v Ambo* (2011) 13 DCLR (NSW) 229, 235 [42].

119 *Ahmadi v The Queen* (2011) 254 FLR 174, 181 [43].

120 Transcript of Proceedings, *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 3784. See also Schloenhardt and Ezzy, above n 90.

attempts by defendants to excuse and justify their actions. The points raised in a range of people smuggling trials are central to fundamental questions about the criminalisation of migrant smuggling and the intricate nexus between migrant smuggling, the movements of asylum seekers, and the obligations under international refugee and anti-migrant smuggling law. The analysis has shown that the background, motivations, and experiences of migrant smugglers are more diverse than widely portrayed and do not fit into a single 'business model'. Indeed, other authors ask whether 'people smuggling really represents a serious form of criminality?' and call for decriminalising migrant smuggling.¹²¹

Two principal points crystallise from this analysis. First, international law requires States Parties not to criminalise and punish migrant smugglers who operate for humanitarian motives. Australia's people smuggling offences, however, make no such exceptions and the existing defences are inadequate to accommodate the reality and complexity of such situations. Secondly, international law and best practice guidelines limit the criminalisation of migrant smuggling to instances in which smugglers operate for financial or other material benefit. Australian law, however, contains no such limitations and, as a result, does not tie criminal liability to the principal characteristic of migrant smuggling.

The offences legislated in the *Migration Act* and equally in the *Criminal Code* thus depart fundamentally from the purpose of the *Smuggling of Migrants Protocol*. The elements of these offences and the defences available to persons accused of people smuggling are inadequate to address the complexities and realities of migrant smuggling. In short, Australian law has resulted in the criminalisation and punishment of individuals who, in the eyes of the international community and many experts, do not deserve punishment. These measures are seen by some as one piece of 'a range of interventions designed [by the Australian Government] to disrupt refugee movements and delegitimise attempts to seek protection from the Australian state outside officially mediated resettlement programmes.'¹²² Australia's people smuggling offences ignore the reality of international refugee flows and other forms of irregular migration. 'Smuggling operates as an integral part of the refugee experience', notes Grewcock, 'and that undercutting it requires that governments facilitate entry, rather than engage in increasing elaborate border controls, refugees will continue to take risks [and] some smugglers will continue to make money.'¹²³

There is a real possibility that the Australian Government may view the successful use of defences in people smuggling trials as a loophole in its efforts to deter and suppress migrant smuggling, resulting in further legislative amendments to ensure that persons accused of people smuggling will always be convicted and sentenced to the statutory mandatory minimum. The introduction of the *Deterring People Smuggling Act 2011* (Cth) demonstrates that the

121 Grewcock, above n 115, 15; Michael Grewcock, 'Australia's Ongoing Border Wars' (2013) 54(3) *Race & Class* 10, 26.

122 Grewcock, above n 121, 25.

123 Grewcock, above n 115, 16.

Government is prepared to adopt whatever means necessary to stop the arrival of smuggled migrants into Australia. Some may expect further amendments to lower the fault elements of the people smuggling offences so that accused migrant smugglers can no longer raise the defence of mistake or ignorance of fact and will be criminally liable even if they had no prior knowledge about who they were carrying and where they were going.

One positive development, on the other hand, is an announcement made by the then Attorney-General, Ms Nicola Roxon, on 27 August 2012, directing the CDPP not to 'institute, carry on, or continue to carry on a prosecution for an offence under section 233C of the *Migration Act* against a person who was a member of the crew on a vessel involved in the bringing or coming, or entry or proposed entry, of unlawful non-citizens to Australia' unless the persons is a repeat offender, has a role beyond that of a crew member, or if a death occurred in relation to the venture. This goes some way to ensure minor cases of migrant smuggling are not further pursued in criminal trials.¹²⁴

Further steps need to follow to achieve greater compliance with international instruments and to ensure that persons acting for humanitarian reasons and with no financial or other material gain in mind are not criminalised and punished. This will require (re)introducing the element relating to 'financial or other material benefit' to the people smuggling offences in the *Migration Act* and the *Criminal Code*. Furthermore, it would be desirable to legislate an additional clause that exempts persons from criminal liability if there is a family relationship between crew and smuggled migrants and if the person acts for humanitarian reasons by trying to smuggle persons who flee from persecution or other humanitarian crises.¹²⁵

124 Commonwealth, *Gazette*, No GN 35, 5 September 2012, [2318].

125 See, eg, *Penal Code* (Finland) ch 17 s 8(2): 'An act which, when taking into account in particular the motives of the person committing it and the circumstances pertaining to the safety of the foreigner in his or her home country or country of permanent residence, and when assessed as a whole, is to be deemed committed under vindicating circumstances, does not constitute arrangement of illegal immigration.' [unofficial translation].