

HUMAN TRAFFICKING, DRUG TRAFFICKING, AND THE DEATH PENALTY

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Abstract

Both Australia and Indonesia have made commitments to combatting human trafficking. Through the experience of Mary Jane Veloso it can be seen that it is most often the vulnerable 'mule' that is apprehended by law enforcement and not the powerful leaders of crime syndicates. It is unacceptable that those vulnerable individuals may face execution for acts committed under threat of force, coercion, fraud, deception or abuse of power. For this reason it is vital that a system of victim identification is developed, including better training for law enforcement, legal representatives and members of the judiciary. This paper builds on submissions by authors for Australian Parliamentary Inquiry into Human Trafficking, and focusses on issues arising in the complex cross section of human trafficking, drug trafficking, and the death penalty with particular attention on identifying victims and effective reporting mechanisms in both Australia and Indonesia. It concludes that, in the context of human trafficking both countries could make three main improvements to law and policy, among others, 1) enactment of laws that create clear mandatory protection for human trafficking victims; 2) enactment of criminal laws that provides complete defence for victim of human trafficking; 3) enactment of corporate reporting mechanisms.

Keywords: human trafficking, drug trafficking, death penalty, victims protection

Abstrak

Australia dan Indonesia, keduanya telah membuat komitmen untuk memerangi perdagangan manusia. Melalui pengalaman Mary Jane Veloso, dapat dilihat bahwa seringkali penyelundup yang tertangkap oleh aparat penegak hukum adalah kaum rentan, dan bukannya pemimpin sindikat kriminal yang berkuasa. Sulit untuk diterima bahwa orang-orang yang rentan tersebut mungkin menghadapi eksekusi atas perbuatannya yang dilakukan di bawah ancaman, paksaan, penipuan, atau penyalahgunaan wewenang. Karena alasan itulah, penting agar sistem pengenalan korban dikembangkan, termasuk pelatihan lebih baik untuk aparat penegak hukum, pengacara, serta hakim dan jaksa. Tulisan ini disusun berdasarkan laporan para penulis kepada komisi penyelidikan Parlemen Australia terhadap isu perdagangan manusia, dan berfokus pada permasalahan yang timbul dari irisan kompleks antara perdagangan manusia, perdagangan obat-obatan terlarang, dan hukuman mati, dengan perhatian khusus kepada isu identifikasi korban dan mekanisme pelaporan yang efektif bagi Australia dan Indonesia. Tulisan ini menyimpulkan bahwa dalam konteks pemberantasan perdagangan manusia, kedua negara dapat membuat tiga perbaikan dalam hukum dan kebijakannya, ketiga solusi tersebut adalah, 1) penerapan hukum yang memberikan perlindungan wajib bagi korban perdagangan manusia yang jelas; 2) pembuatan hukum pidana yang memberikan perlindungan secara lengkap kepada korban; 3) pembuatan mekanisme pelaporan bagi perusahaan.

Kata kunci: perdagangan manusia, perdagangan narkotika, hukuman mati, perlindungan korban

I. INTRODUCTION

In March 2016, Australian Foreign Minister Julie Bishop announced a strategy on human trafficking and slavery to “counter this terrible trade in human beings” at a regional summit in Jakarta on people smuggling and transnational crime.¹ It follows the launch of an Australian national action plan to combat human trafficking and slavery in December 2014² and an Australian Parliamentary Inquiry into human trafficking in 2015/6.³ It also follows the failed Australian advocacy into the death penalty sentences for Australian citizens convicted of drug offences in Indonesia.⁴ In April 2015, as those Australian citizens were executed, Filipina Mary Jane Veloso was reprieved. She had also been convicted of drug trafficking offences. However, she always maintained that she was deceived into carrying the drugs in a suitcase provided to her as part of her recruitment to work abroad. Shortly before she was due to be executed, human trafficking mechanisms were invoked by her lawyers in the Philippines⁵. She was reprieved temporarily after a public campaign about her human trafficking status and when her recruiters were arrested⁶ in Manila which led to a high profile discussion between the Presidents of the two countries.⁷ Her recruiters were charged with both human trafficking and illegal recruitment⁸ and, at the time of writing, there is an ongoing trial involving Mary Jane Veloso and other complaints against the same recruiters in Manila. It has been reported that the Attorney General’s office in Indonesia has said they would allow Mary Jane Veloso to submit a judicial review of her case, based on the on-going trial of her alleged human trafficker in the Philippines⁹. In October 2015, we made a submission to the Joint Standing Committee on Foreign Affairs, Defence and Trade on Australia’s Advocacy for Abolition of the Death

¹ Sydney Morning Herald, “Migrant crisis: Australia to launch anti-human trafficking and slavery strategy,” <http://www.smh.com.au/world/migrant-crisis/migrant-crisis-australia-to-launch-antihuman-trafficking-and-slavery-strategy-20160321-gnnm3i#ixzz43bJcIGwv>, accessed on February 22, 2016.

² Australia Attorney-General Department, “National action plan to combat human trafficking and slavery,” <https://www.ag.gov.au/CrimeAndCorruption/HumanTrafficking/Documents/Trafficking-NationalActionPlanToCombatHumanTraffickingAndSlavery2015-19.pdf>, accessed on February 22, 2016

³ Parliament of Australia, “Australian Parliamentary Inquiry into human trafficking,” http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Law_Enforcement/Human_trafficking, accessed on February 22, 2016.

⁴ ABC News, “Bali Nine: Andrew Chan and Myuran Sukumaran executed by Indonesian firing squad,” <http://www.abc.net.au/news/2015-04-29/andrew-chan-and-myuran-sukumaran-executed/6426654>, accessed on February 22, 2016.

⁵ News.com, “Saving Mary Jane: Death-row mother’s last-minute rescue was thanks to Darwin lawyer,” <http://www.news.com.au/lifestyle/real-life/true-stories/saving-mary-jane-deathrow-mothers-lastminute-rescue-was-thanks-to-darwin-lawyer/news-story/77c48306a13c99b3412499fe7b8042ac>, accessed on February 22, 2016.

⁶ Inquirer.net, “Court orders arrest of Mary Jane Veloso’s recruiters,” <http://globalnation.inquirer.net/123100/court-orders-arrest-of-mary-jane-velosos-recruiters#ixzz43UVAgHVT>, accessed on February 22, 2016.

⁷ ABC News, “Mary Jane Veloso: Mother of Filipina spared from Indonesia firing squad hails ‘miracle’ reprieve,” <http://www.abc.net.au/news/2015-04-29/mary-jane-veloso-spared-from-indonesian-firing-squad/6429262>, accessed on February 22, 2016.

⁸ Rappler, “DOJ approves charges vs Mary Jane Veloso’s recruiters,” <http://www.minibalita.com/reader/4953/1/DOJ-approves-charges-vs-Mary-Jane-Veloso%2527s-recruiters>, accessed on February 22, 2016.

⁹ Sydney Morning Herald, “Economy ‘more important’ than executions: Indonesian Attorney General,” <http://www.smh.com.au/world/economy-more-important-than-executions-indonesian-attorney-general-20160113-gm51wm.html#ixzz43UU210J7>, accessed on February 22, 2016.

Penalty. In February 2016, we made submissions to the Australian Parliamentary Inquiry into Human Trafficking. This paper builds on those submissions and focusses on issues arising in the complex cross section of human trafficking, drug trafficking, and the death penalty with particular attention on identifying victims and effective reporting mechanisms in both Australia and Indonesia. It concludes that, in the context of human trafficking both countries could make three main improvements to law and policy:

1. Enact laws that create clear mandatory protection mechanisms for victims of human trafficking;
2. Enact criminal laws providing a complete defence to any criminal charge when committed by a victim of human trafficking and because they were victimised within the meaning of the Trafficking protocol; and
3. Enact corporate reporting mechanisms in relation to slavery, forced labour and human trafficking, with an annual report to parliament.

Mary Jane Veloso's case in particular publicly highlights how identification of victims needs to be achieved through both criminal and employment law referral and reporting mechanisms in order for there to be confidence in any justice system that victims are properly protected and not unduly punished after acting under coercion, manipulation or deceit. It also highlights the need to focus on the commercial aspects of and illegal recruitment and trafficking to ensure that the organisers and controllers are targeted rather than their victims.

II. THE DEATH PENALTY

There are currently 58 countries that retain the death penalty.¹⁰ Amnesty International conducted a report in 2014 on the use of the death penalty and found that 22 countries had recorded executions in 2014, and that *at least* 607 executions had been carried out worldwide.¹¹ This represented a 22% decrease in the 2013 figure. The trend is definitely towards universal abolition. In 1977 only 16 countries had abolished the death penalty; by 1995 that had increased to 59 and at the end of 2014 that number stood at 98. The trend follows the *Universal Declaration of Human Rights* which provides that 'everyone has the right to life, liberty and security of person.'¹² This post World War II statement on the sanctity of life was later given legal force under the *International Covenant on Civil and Political Rights* (ICCPR) which seeks to limit the death penalty where it is still applied.

The ICCPR states that 'no one shall be arbitrarily deprived of his life;' that 'sentence of death may be imposed only for the most serious of crimes pursuant to a final judgement of a competent court;' and that 'anyone sentenced to death shall have the right to seek pardon or commutation.' Further, that 'sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall

¹⁰ Death Penalty Information Center, "Abolitionist and Retentionist Countries," <http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries>, accessed on February 22, 2016/

¹¹ Amnesty International, "Death Sentences and Executions in 2014 (1 April 2015)," <https://www.amnesty.org/en/documents/act50/0001/2015/en/>, accessed on February 22, 2016.

¹² Universal Declaration of Human Rights, GA Res 217A (III) UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948), art 3.

not be carried out on pregnant women.¹³ 168 states are party to the ICCPR, an almost universal adoption. The second optional protocol to the ICCPR abolishes the death penalty entirely (with provision made for states to reserve serious wartime crimes of a military nature); and envisions that state parties will undertake an international commitment to abolish the death penalty. 81 states are party to the second optional protocol, including Australia. In addition to the ICCPR's express prohibition against execution for a crime committed when a person was under 18 years of age, the *U.N. Convention on the Rights of the Child*¹⁴ and the *American Convention on Human Rights*¹⁵ also preclude the death penalty being imposed in such circumstances. The ban is so broadly accepted that it is considered a norm of customary international law.¹⁶ In 1997 the U.N. High Commission for Human Rights approved a resolution that the 'abolition of the death penalty contributes to the enhancement of human dignity and to the progressive development of human rights.' Subsequent resolutions called for restriction of death eligible offences and for a moratorium on all executions (leading to abolition).¹⁷

The European Union has made abolition of the death penalty a precondition for entry into the Union, a move which has undoubtedly contributed to Russia's commutation of the sentences of over 700 people on death row and consideration of abolition legislation.¹⁸ Poland, Yugoslavia, Serbia and Montenegro have all also voted to end the death penalty. Additionally, the member states of the Council of Europe have established Protocol 6 to the *European Convention of Human Rights* which calls for abolition, and the *American Convention on Human Rights* has added an optional protocol supporting an end to the use of the death penalty among its member states. As we move towards ASEAN integration, it is a move that can be considered given the differing approaches in the region.

The *Vienna Convention on Consular Relations* provides a framework for consular relations between independent countries. Article 36 provides for foreign nationals who are arrested or detained to be given notice 'without delay' of their right to have their embassy notified of that arrest so that they may receive consular advice and support. There are 177 state parties to this convention, however its use in practice is severely limited by the training of front line enforcement officers and their being made aware of the accused rights under it. Without this, many individuals on death row may make culturally inappropriate decisions regarding their case, with lethal consequences.¹⁹ Such dangers require a comprehensive framework in both death penalty reform and protection of human trafficking victims.

¹³ International Covenant on Civil and Political Rights (ICCPR), adopted by UN General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, United Nations, Treaty Series, vol. 999.

¹⁴ *Ibid.*, Article 37 (a).

¹⁵ *Ibid.*, Article 4 (5).

¹⁶ Richard C. Dieter, "The Death Penalty and Human Rights: U.S. Death Penalty and International Law," Death Penalty Information Centre, <http://www.deathpenaltyinfo.org/Oxfordpaper.pdf>, accessed on 20 February 2016.

¹⁷ United Nations, High Commission for Human Rights. Second report of the Special Rapporteur on the situation of human rights in Burundi, E/CN.4/1997/12 (April 3, 1997).

¹⁸ Dieter, "The Death Penalty."

¹⁹ *Breard v. Greene*, 140 L.Ed.2d 529.

III. DRUGS AND THE DEATH PENALTY

Approximately 1000 people are executed each year for drug offences, with 33 countries retaining the death penalty for drug trafficking and/or drug possession. Of these however, only six countries — China, Iran, Saudi Arabia, Vietnam, Malaysia and Singapore — routinely execute drug offenders.²⁰ Drug-related executions are on the rise in some regions, including Iran, Indonesia and China.²¹

International law requires that the death penalty, if applied, must be reserved for the ‘most serious crimes,’²² and it has been stressed by the UN Human Rights Committee and the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions that drug crimes do not meet this definition.²³ The increasing application of the death penalty for drug offences is of particular concern given the poor measures of police and judicial integrity and lack of fair trial norms particularly in parts of central and East Asia.

Currently, Australian citizens are detained for drug offences across Mainland China, Hong Kong and Malaysia.²⁴ Despite the Australian Crime Commission’s view that a significant number of these were duped or manipulated by crime syndicates,²⁵ Australia’s federal police continue to provide information to death penalty states to facilitate identification and apprehension of possible suspects. Information obtained under FOI reveals that between 2010 and 2014 the Australian Federal Police (AFP) exposed over 1700 Australians²⁶ to the risk of execution for drug offences by sharing intelligence with death penalty states. Where assistance was requested in relation to alleged drug offences, the AFP approved the provision of information in over 95 percent of cases, despite an identified risk of execution.

In addition to direct law enforcement cooperation, Australia provides funding for a range of counter-narcotics activities worldwide. The direct link between internationally funded counter narcotics programs and drug-related executions has been recognised by a number of European states, including the UK, Ireland and Denmark. These nations have recently withdrawn funding for supply control operations in Iran.²⁷

²⁰ Rick Lines, Damon Barrett, and Patrick Gallahue, *Complicity or Abolition? The death penalty and international support for drug enforcement* (London: International Harm Reduction Association, 2010).

²¹ The Economist, “Which countries have the death penalty for drug smuggling?,” <http://www.economist.com/blogs/economist-explains/2015/04/economist-explains-28>, accessed 25 August 2015.

²² ICCPR, art. 6 (2).

²³ Rick Lines, *The Death Penalty for Drug Offences: A Violation of International Human Rights Law* (London: International Harm Reduction Association, 2007).

²⁴ Sarah Gill, “AFP exposes Australians to the risk of execution in foreign countries more often than you think,” *The Age* (Online), September 8 2015, <http://www.theage.com.au/comment/the-afp-peddles-injustice-by-helping-asian-death-penalty-states-20150902-gjdvu3.html>, accessed February 22, 2016.

²⁵ Sean Rubinsztein-Dunlop and Jeanavive McGregor, “West African syndicates tricking Australians into risking death on drug-running missions,” *ABC News* (Online), 5 August 2015, <http://www.abc.net.au/news/2015-08-05/vulnerable-australians-face-death-after-lured-drug-smuggling/6675360>, accessed February 22, 2016.

²⁶ Australian Federal Police, “Routinely Requested Information,” <http://www.afp.gov.au/about-the-afp/information-publication-scheme/routinely-requested-information>, accessed February 22, 2016.

²⁷ Human Rights Watch, “UN: Freeze Funding of Iran Counter-Narcotics Efforts,” 17 December 2014, <https://www.hrw.org/news/2014/12/17/un-freeze-funding-iran-counter-narcotics-efforts>, accessed on February 22, 2016.

Australian-funded initiatives include PAKU83,²⁸ a 5-year program focusing on illicit trafficking and border management in Pakistan. Australia has contributed US\$4.5 million to enhance core capacities of Pakistani law enforcement with key indicators including increased arrests, prosecutions and convictions. Reprieve UK has identified a significant number of European nationals who have been arrested in Pakistan with death-eligible quantities of narcotics following implementation of PAKU83²⁹.

As a result of these twin activities, Australia is effectively complicit in drug executions - in violation of international human rights law and its own stance as an abolitionist nation - with little or no evidence of any broader community benefit. Despite substantial financial contributions and drug-related arrests, the United Nations Office on Drugs and Crime (UNODC) concedes that opiate flows from northern Afghanistan into Central Asia have not lessened in recent years.³⁰ A recent Australian study³¹ funded by the National Drug Law Enforcement Research Fund, revealed that drug seizures by Australian police had no effect on drug-related harm as measured by emergency department admissions or arrests. These conclusions are consistent with research by MacCoun and Reuter³² suggesting that supply reduction is an unrealistic objective in drug markets that are well established and diverse.

There are three important milestones for a nation to be considered truly abolitionist: abolition of the death penalty as a sentence of law; non-refoulement of people to face the death penalty in other countries; and a refusal to provide information or other assistance to facilitate application of the death penalty by others.³³

IV. HUMAN TRAFFICKING PROTECTION MECHANISMS

Human exploitation is highly lucrative.³⁴ In 2013, the UNODC Report, "Transnational Organised Crime in East Asia and the Pacific: A threat Assessment" (The UNODC Report), human trafficking was identified as a major issue and was found to be on the rise in a quarter of countries around the world.³⁵ One of the conclusions of the 2014 International Labour Office report was that 'there is an urgent need to address the socio-economic root causes of this hugely profitable illegal practice if it

²⁸ United Nations Office on Drugs and Crime, "Illicit Trafficking and Border Management," <https://www.unodc.org/pakistan/en/illicit-trafficking-and-border-management.html>, accessed February 22, 2016.

²⁹ Submission 37 to the Human Rights Sub-Committee on Australia's Advocacy for the Abolition of the Death Penalty

³⁰ United Nations Office on Drugs and Crime, "Opiate Flows Through Northern Afghanistan," https://www.unodc.org/documents/data-and-analysis/Studies/Afghanistan_northern_route_2012_web.pdf, accessed February 22, 2016.

³¹ Wai-Yin Wan DW, Grant Wardlaw, Vasilis Sarafidis and Grant Sara, *Supply-side reduction policy and drug related harm* (Canberra: National Drug Law Enforcement Research Fund, 2014).

³² R. J. MacCoun and P. Reuter, *Drug War Heresies: Learning from Other Vices, Times and Places* (Cambridge: Cambridge University Press, 2001).

³³ Eric Neumayer, "Death Penalty: the Political Foundations of the Global Trend Toward Abolition," *Human Rights Review* 9, iss. 2 (2008), p. 268.

³⁴ Polaris Project, "Human Trafficking An Overview," <http://www.polarisproject.org/human-trafficking/overview>, accessed February 22, 2016.

³⁵ United Nations Office on Drugs and Crime, "Transnational Organised Crime in East Asia and the Pacific: A threat Assessment" p139, http://www.unodc.org/documents/data-and-analysis/Studies/TOC-TA_EAP_web.pdf, accessed February 22, 2016.

is to be overcome.³⁶ The ultimate answer is to tackle poverty so that individuals have meaningful choices of employment but, in the meantime, States such as Indonesia and Australia need to improve victim identification systems to enable the provision of protection and support.³⁷ This requires effective protective mechanisms. These issues and opportunities for improved victim identification are particularly highlighted by the experience of Mary Jane Veloso who came from a background of abject poverty and was an easy target to be utilised as a drug 'mule' given her position of vulnerability relative to her recruiters and employers; in addition to her transportation between states under the promise of work. Had Ms. Veloso's possible status as a victim of human trafficking been credibly identified by trained law enforcement professionals at the outset, she may have been able to take advantage of Indonesia's existing protection mechanisms, potentially avoiding charge and been diverted into support programs but, at the very least receiving a short sentence that reflects both her mitigating circumstances and the assistance she has provided to the authorities to identify those further up the chain of command. At the time of writing Ms. Veloso has spent 5 years on death row. Although there is limited data, her story is likely to be reflected in women drug traffickers in Australian prisons and corrections facilities around the globe.

Identifying a victim starts with Article 3 of the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Particularly Women and Children ("the Trafficking Protocol") which defines trafficking in persons as follows:

*"Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs."*³⁸

Some of these forms of exploitation are defined elsewhere. For instance, the 1926 Slavery Convention defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."³⁹ The 1930 ILO Forced Labour Convention (C29) defines forced labour as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".⁴⁰ The plight of overseas workers, like Mary Jane Veloso, is that they are at risk of exploitation by otherwise legitimate transnational employers or by organised criminals, all seeking to maximise profit. Here we can see that the international definition which includes "threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of a position of vulnerability", is wide enough to cover overseas workers and those

³⁶ International Labour Organization, "Profits and Poverty: The economics of forced labour," http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_243391/lang--en/index.htm, accessed February 22, 2016.

³⁷ UNDOC, "Transnational Organised Crime."

³⁸ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, New York, 15 November 2000, *United Nations Treaty Series*, Vol. 2237, No. 39574.

³⁹ *Slavery Convention*, Geneva, 25 September 1926, *United Nations Treaty Series*, Vol. 212, No. 2861

⁴⁰ *Convention concerning Forced or Compulsory Labour*, Geneva, 28 June 1930, *International Labour Organization*

exploited in the drug trade.

In Indonesia, the United Nation's Trafficking Protocol has been ratified through the passing of the Trafficking in Persons law, Number 21 of 2007.⁴¹ The Indonesian government frames trafficking primarily as a law enforcement issue, and to a lesser extent a migration issue. The focus is strongly on preventing and punishing the crime of trafficking. In 2008, the Indonesian government produced a Defence White Paper which defines the response to trafficking in terms of eradication of trafficking-related crime, and protection of national sovereignty from transnational organised crime syndicates.⁴² According to some research, the perception of the Indonesian Government is that human trafficking is a national security issue, and a criminal law response to the problem can be used to protect the state from trafficking for the purpose of criminal activity.⁴³ Many victims of human trafficking are used to ferry drugs across international borders, sometimes at risk of the death penalty. *The Protocol to Prevent, Suppress and Punish Trafficking in Persons*, which supplements the United Nations Convention against Transnational Organized Crime, stresses that prosecution and punishment should not endanger the safety of the victim. Unfortunately the obligations imposed by the Convention are not always well understood even by signatory states, and protections which should be afforded to trafficked persons are not always guaranteed. The Trafficking protocol places responsibility on signatories to identify and not to punish trafficked victims:

“Article 26- Non-punishment provision

Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so”

The Indonesian 2007 Trafficking in Persons Law picks up on all these issues. It defines human trafficking in a manner consistent with the UN Protocol. Article 1(1) of the 2007 law states that:

“Trafficking is an act of recruitment, transport, shelter, sending, transfer, or receipt of persons by threat of violence, the use of violence, abduction, confinement, forgery, fraud, abuse of power or of a position of vulnerability, debt bondage or giving payments or benefits, to achieve the consent of a person having control over the other person, whether committed in the countries and between countries, for the purpose of exploitation or resulted in people being exploited.”

Chapter IV of that legislation sets out the duties of investigators and the requirements for victim protection. Article 55 specifically indicates that victims are entitled to other existing protective mechanisms. In simple terms this means that investigative authorities are bound by law in Indonesia to separate victims from

⁴¹ Indonesia, *Undang-Undang tentang Pemberantasan Tindak Pidana Orang [Law on the Eradication of Trafficking in Persons]*, UU No. 21 tahun 2007, LN. No. 58 tahun 2007, TLN No. 4720 (Law No. 21 of 2007, SG No. 58 of 2007).

⁴² Ministry of Defense Indonesia. *Buku Putih Pertahanan Negara 2008: Mempertahankan Tanah Air Memasuki Abad 21 [Indonesian Defense White Paper: Defending the Nation Entering the twenty-first Century]* (Jakarta: Indonesian Defense Department, 2008). Cited in N. Nuraniyah (2012) in ADM folder GDrive, n184.

⁴³ Ministry of Communication and Information Indonesia (Menkominfo), *Pengarahan Presiden Republik Indonesia Pada Acara Menerima Para Peserta Rapim TNI dan Rakor POLRI Istana Negara, 29 Januari 2009 [Presidential Briefing in the Event of Reception of the Participants of TNI Leaders' Meeting and National Police Coordination Meeting, National Palace, January 29, 2009]* (Jakarta: Kementerian Komunikasi dan Informatika RI, 2009), p. 116

traffickers and prosecutors must make sure that they pursue criminals not victims. The tension between mandatory drug trafficking laws and protection of human trafficking victims from exploitation as overseas workers or pawns in organised crime has not been generally resolved in Indonesia as a matter of law so, Mary Jane Veloso's case is an opportunity for Indonesia to provide a resolution to these issues through effective frameworks that could lead to victims, giving evidence against those further up the chain. Australia's approach to human trafficking is based on mixed law and policy that risks victims suffering doubly.⁴⁴ The Australian laws criminalising human trafficking are contained within the *Crimes Act 1914* (Crimes Act) and Divisions 270 and 271 of the *Criminal Code Act 1995* both as amended by the *Crimes Legislation Amendment (Slavery, Slavery-like Conditions and People Trafficking) Act 2013* (Slavery Act) and the *Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Act 2013*. The amendments focus on investigation and prosecution. There is support for alleged victims but largely in the context of them giving evidence, not to protect them from prosecution or punishment. The Australian Attorney General's office asserts that the provisions are designed to 'ensure Australia's law enforcement authorities are well equipped to investigate and prosecute human trafficking and slavery, and that trafficked people are afforded appropriate support and protection when engaging with the criminal justice system.' However, women in prison in Australia are vulnerable: In 2004 a study of women prisoners sentenced for drug/alcohol related crime across six jurisdictions found that 87% were victims of sexual, physical or emotional abuse in either childhood (63%) or adulthood (78%). Most were victims of multiple forms of abuse.⁴⁵ A significant majority of women in prison are mothers of dependent children.⁴⁶ Not much has changed: The Australian Institute of Family Studies reports that "the characteristics of the female inmate population have changed, with more mental ill-health, substance abuse and social disadvantage present, particularly among remandees. Female offenders demonstrate high levels of previous victimisation, poor mental health, substance misuse and social disadvantage compared to women in the community".⁴⁷

According to the Australian Federal Police (AFP) information about the number of trafficking-related investigations and assessments, by 30 June 2014, only 235 persons had been referred to the Australian Government's Support for Trafficked People Program since the program's inception in 2004.⁴⁸ It does not appear that Australia has tackled the tension between drug trafficking and human trafficking any more than Indonesia. Trusting in broad victim support and voluntary referral mechanisms (often to be instigated by a victim) is not enough. Protection mechanisms must be mandatory, placing the burden on investigators and prosecutors to ensure that full enquires are made nationally and transnationally into the status of a suspect. It is for the state to identify victims and divert them out of criminal justice systems, just as they would in any other type of crime.

⁴⁴ Taken from Felicity Gerry, "Trafficked Victims Suffer Doubly," <http://www.cla.asn.au/News/trafficked-women-suffer-doubly/>, accessed on February 22, 2016 and a forthcoming paper by Felicity Gerry QC

⁴⁵ Holly Johnson, "Drugs and Crime: A study of Female Incarcerated Offenders," Research and Public Policy Series, No 63, Canberra: Australian Institute of Criminology, 2004.

⁴⁶ Debbie Kilroy, Reanna Maloney, Kobie Mulligan, Suzi Quixley and Kate Warner, *Human Rights in Action: A Resource for Women in Prison (and their advocates)* (Brisbane: Sisters Inside, 2009), p. 8.

⁴⁷ AIFS, "Addressing women's victimisation histories in custodial settings," <http://www.aifs.gov.au/acssa/pubs/issue/i13/i13b.html>, accessed February 22, 2016.

⁴⁸ Interdepartmental Committee on Human Trafficking and Slavery, *Trafficking in Persons: The Australian Government's Response 1 July 2013–30 June 2014* (2014), p. 30.

European cases have dealt with the factual need to identify an individual's status as a victim on credible evidence.⁴⁹ On an evidential basis this can mean more than testimony but following up and tracking histories. For those victims apprehended committing crime (national or transnational) if such evidence is sensitively gathered at an early stage, prosecutors (or investigating judges) can give consideration to the question of whether to proceed with prosecuting a suspect who might be a victim of trafficking, particularly where the suspect has been compelled or coerced to commit a criminal offence as a direct consequence of being trafficked. Guidance in the UK is that prosecutors should adopt a three stage assessment:

- 1) Is there a reason to believe that the person has been trafficked? if so,
- 2) If there is clear evidence of a credible defence of duress, the case should be discontinued on evidential grounds; but
- 3) Even where there is no clear evidence of duress, but the offence may have been committed as a result of compulsion arising from trafficking, prosecutors should consider whether the public interest lies in proceeding to prosecute or not.⁵⁰

As a result of the raised awareness brought by Mary Jane Veloso's case, to these three suggestions can be added the following:

- 1) Was a legitimate and regulated recruiter used?
- 2) Are there other victims?
- 3) What is the criminal history of the alleged recruiter?

The rationale for non-punishment of victims of trafficking is that, whilst, on the face of it, they may have committed a criminal offence, they are acting under the control of traffickers. The vulnerable situation of the trafficked person becomes worse where the State fails to identify such a person as a victim of trafficking, as a consequence of which they may be denied their right to safety and assistance as a trafficked person and instead be treated as an ordinary criminal suspect.⁵¹ Qualified and trained officials are required to divert the victim away from prosecution or undue punishment along with suitable protective systems to ensure that those who have acted under coercion will be sympathetically treated wherever they are apprehended and, not subjected to the risk of the death penalty.⁵² Not every drug offender can be considered a trafficked person, however it is increasingly recognised that the vast majority of individuals apprehended with drugs in their possession – so-called 'drug mules' – are not the primary initiators, financiers, or profiteers behind drug trafficking operations. For example, in recognition of the low status that most drug traffickers occupy within drug syndicates, Singapore recently amended its

⁴⁹ *Rantsev v Cyprus and Russia* Application no. 25965/04 (Strasbourg 7 January 2010) and *CASE OF M. AND OTHERS v. ITALY AND BULGARIA* Application no. 40020/03 (31st July 2012)

⁵⁰ United Kingdom Crown Prosecution Office, "Legal Guidance," <http://www.cps.co.uk/legal>, accessed February 22, 2016.

⁵¹ Organization for Security and Co-operation in Europe, "Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking" <http://www.osce.org/secretariat/101002?download=true>, accessed February 22, 2016.

⁵² Taken from Felicity Gerry, "Let's talk about slaves...Human Trafficking: Exposing hidden victims and criminal profit and how lawyers can help end a global epidemic," *Griffith Journal of Law and Human Dignity* 3 (2015), p. 1.

mandatory sentencing⁵³ to allow judicial discretion in cases where an offender could be considered a ‘courier’, rather than a supplier or organizer. Malaysia retains the mandatory death sentence for drug trafficking, but recent public opinion polls reveal that a large majority of Malaysians favour a restricted use of a ‘discretionary death sentence’, allowing the individual circumstances of the offence and the offender to be considered in sentencing.⁵⁴ Following a 2007 decision in the Constitutional Court, there are also signs Indonesia may move toward a more restricted application of the death penalty, with recommendations to amend the criminal code such that capital punishment is imposed with a 10-year probation period, and commuted to life in prison if the convict demonstrates ‘good behaviour.’⁵⁵ In view of these trends, Australia must address guaranteed protections for vulnerable and exploited people, proportionate sentencing and advocating for greater restrictions on the use of the death penalty given the risks for exploited citizens travelling abroad.

V. A HUMAN TRAFFICKING DEFENCE

The duties in England and Wales to protect trafficked victims arise from the recently enacted *Modern Slavery Act 2015* which creates a defence for slavery or trafficking victims who commit an offence and improved reporting mechanisms. This follows EU Directive 2012/29/EU which establishes minimum standards on the rights, support and protection of victims of crime and *Directive 2011/36/EU* of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings. Research by the UK Sentencing Council interviewed drug mules. The information collected related to their trafficked status for sentencing purposes.⁵⁶ However, as set out above, this is not just a sentencing issue. Trafficked victims need to be identified before they are charged, during any legal proceedings and for the purposes of appeal. For those convicted prior to the legislation coming into force or for offences not covered by the Act, case law has developed for courts to quash convictions, in particular in relation to child victims⁵⁷ largely due to the effect of European Directive 2011/36 and previous decisions.⁵⁸ The reasoning for what is effectively immunity from prosecution is that the culpability of the victims is significantly diminished, and sometimes effectively extinguished.⁵⁹ The Modern Slavery Act has brought with it the scope in relation to some offences, for victims to challenge a prosecution by raising a legal defence. There are shortcomings in the context of extra territorial and transnational effect which could be resolved through international harmonisation of such procedures. It is an approach that Australia and Indonesia should consider. Both need to improve approaches to combat human

⁵³ Mohamed Faizal Mohamed Abdul Kadir & Wong Woon Kwong, “Changes to the Mandatory Death Penalty Regime - An Overview of the Changes and Some Preliminary Reflections” <http://www.lawgazette.com.sg/2013-09/842.htm>, accessed August 30, 2015.

⁵⁴ Roger Hood, *The Death Penalty in Malaysia. Public opinion on the mandatory death penalty for drug trafficking, murder and firearm offences* (London: The Death Penalty Project, 2013).

⁵⁵ Natalie Zerial, “Decision No. 2-3/PUU-V/2007 [2007] (Indonesian Constitutional Court),” *Australian International Law Journal* 15 (2007), pp. 218-26.

⁵⁶ UK Sentencing Council, *Drug ‘Mules’: Twelve Case Studies*, Office of the Sentencing Council, March, 2011, p. 4.

⁵⁷ England and Wales Court of Appeal, *R v N; R v LE* [2012] EWCA Crim 189

⁵⁸ England and Wales Court of Appeal, *R. v LM* [2010] EWCA Crim 2327, [2011] 1 Cr. App. R. 12 and *R. v N* [2012] EWCA Crim 189, [2013] Q.B. 379 applied.

⁵⁹ See also, England and Wales Court of Appeal, *R v O* [2008] EWCA Crim 2835, *R v LM, MB, DG, Talbot and Tijani* [2010] EWCA Crim 2327 and *R v O* [2011] EWCA Crim 226. Emphasis added.

trafficking and to better support victims to be diverted from the criminal justice system where appropriate. This is not just important for those people trafficked within the Australian / ASEAN region but it should also be borne in mind that within the 10 ASEAN countries⁶⁰ Malaysia, Singapore, Thailand and Vietnam (as well as Indonesia) continue to retain the death penalty as an available punishment for drug offences. These are areas to which Australian and Indonesian people frequently travel and, given the scale of human exploitation and drug trafficking, are at risk of being trafficked and subsequently exposed to charges for death eligible offences. Non-fatal sentencing is a safer and humane alternative and categories of sentencing ensure issues such as coercion or rehabilitation can be recognised.

VI. CORPORATE REPORTING MECHANISMS

Tackling global slavery doesn't stop with Governments, NGO's or criminal justice, corporate and financial entities are also engaged: Corporate enterprises in legitimate global markets now widely seek good practical advice in the move toward corporate responsibility⁶¹. It is seen as good PR and large conglomerates are working to ensure that grand statements about corporate responsibility are reflected in observable actions. There is emerging human rights and international legal discourse focussing on the interplay between human rights law and other specific domains of international law. Business corporate responsibility is being seen as "more than just a bolt-on"⁶². On the 1st of October 2014, President Barack Obama announced that the United States will develop a national action plan to promote responsible and transparent business conduct, in line with the UN Guiding Principles on Business and Human Rights and the European Commission has invited Member States to develop a national plan for the implementation of the UN guiding principles⁶³. The Modern Slavery Act in England and Wales has also provided for an Independent Anti-Slavery Commissioner, legal advocates for trafficked children, rights for overseas domestic workers to leave or change employers when they have been subject to abuse or coercion (subject to a positive decision from the National Referral Mechanism confirming they have been trafficked) and the introduction of the requirement for large companies to annually report on efforts to identify and address modern slavery in their supply chains. Effective advocacy enables transnational cooperation. Mary Jane Veloso's case highlights the risk that exploited people are at risk of execution. It is important to note that had Ms. Veloso been Indonesian and intercepted in transit through Australia, it should be incumbent upon our authorities to recognise her status as a human trafficking victim, rather than mechanically process her through the criminal justice system or rely on diplomatic solutions. It follows that the issues relate not just to effective transnational engagement in investigations to uncover credible evidence that might mitigate criminal offending but there is a need to legislate in a harmonised

⁶⁰ Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

⁶¹ See the author's forthcoming paper on achieving the G20 gender equality target by uniformity, extra territoriality and corporate responsibility.

⁶² The Journal, "Corporate Responsibility is more than just a bolt on says construction boss," October 16th 2014, <http://www.thejournal.co.uk/business/smes/corporate-responsibility-more-just-bolt-on-7948059>, accessed February 22, 2016.

⁶³ The European Business Network for Corporate Social Responsibility, "US to Develop National Action Plan Consistent with UN Guiding Principles on Business Human Rights," 1st October 2014, <http://www.cs-reurope.org/us-develop-national-action-plan-consistent-un-guiding-principles-business-human-rights#.VEYtO4oayK0>, accessed February 22, 2016.

and mandatory way that will encourage victims to engage with authorities through the public protective commitment that flows from effective defence rather than a more informal referral mechanism.

Globalisation has created a complex network of markets, in which multi-national corporations are able to position parts of their supply chain in poorly regulated developing nations while yielding high profits in more restrictive legal regimes at home.⁶⁴ These corporations are often at the root of social issues such as global warming, corruption and human rights abuses;⁶⁵ yet unlike nation states, there is no international legal framework to temper their power or sanction transgressions. Domestic legislation is inadequate when it does not capture the activities of businesses outside their domicile country - and this is even more apparent when visibility of those activities is lost along complex international supply chains. Reliance is placed on business to self-regulate by implementing internal 'soft law' policies that uphold social responsibility norms, and many have seen the value in doing so - particularly due to increased consumer interest in the providence of goods and social media's ability to define a company's reputation. Despite the efforts that have been made, human trafficking, forced labour and slavery (interchangeably referred to here as *modern slavery*) continue to plague the supply chains through which multi-national corporations are deriving enormous profits.⁶⁶ Detailed legislative proposals are outside the scope of this paper but, the intersection between work and exploitation highlighted by Mary Jane Veloso's case and the increasing development in Australian and Indonesia means that reporting mechanisms are as important as referral mechanisms in relation to human trafficking.

VII. CONCLUSION

Both Australia and Indonesia have made commitments to combatting human trafficking. Through the experience of Mary Jane Veloso it can be seen that it is most often the vulnerable 'mule' that is apprehended by law enforcement and not the powerful leaders of crime syndicates. It is unacceptable that those vulnerable individuals may face execution for acts committed under threat of force, coercion, fraud, deception or abuse of power. For this reason it is vital that a system of victim identification is developed, including better training for law enforcement, legal representatives and members of the judiciary. Systemic protection and support is not sufficiently available without clear legislative protection as this paper suggests together with standardised referral mechanisms and effective financial reporting mechanisms. The implementation can be achieved through collaborative responses and inter-agency coordination with data collection and properly trained specialists. Crucially, cultural change is required to achieve a change in attitude away from the traditional view of criminal offenders so that they might be differentiated from human trafficking victims which ought to have a consequential effect of eliminating the death penalty permanently throughout the world.

⁶⁴ Sandeep Gopalan and Katrina Hogan, "Ethical Transnational Corporate Activity At Home And Abroad: A proposal for reforming continuous disclosure obligations in Australia and the United States," *Columbia Human Rights Law Review* 46, no. 2 (2015), pp. 1-2.

⁶⁵ Stephen New, "Modern slavery and the supply chain: the limits of corporate social responsibility?," *Supply Chain Management: An International Journal* 20, iss. 6 (2015), p. 697.

⁶⁶ International Labour Organisation, "Profits and Poverty: The Economics of Forced Labour," Report of the Special Action Programme to Combat Forced Labour, Fundamental Principles and Rights at Work Branch, 2014.

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