

**Treating drug traffickers as human trafficked victims: The 20 days to try & save Mary Jane Veloso**

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Human trafficking is a highly lucrative industry that extends to all corners of the globe. The phrases ‘human trafficking’, ‘slavery’ and ‘forced labour’ are used interchangeably but essentially amount to exploitation for profit and power. Developed countries have become the destination for slaves plucked from source countries and people are trafficked within their own states. These are generally the impoverished, the un-empowered, the uneducated and the dispossessed and largely women and girls, particularly in the context of sexual exploitation. The transnational nature of human exploitation makes cooperation between nations imperative.

The potential profits from human exploitation are huge. In a 2012 survey by the International Labour Office it was estimated that 20.9 million men, women and children are in forced labour globally, trafficked for labour and sexual exploitation or held in slavery like conditions:

- Of the total, an estimated 9.1 million people (44%) moved either internally or internationally.
- The Asia-Pacific region has the largest number of forced labourers, at almost 12 million (56% of the global total and 89% of those in bonded labour and debt bondage.
- Women and girls make up about 55 per cent of all forced labour victims, they represent the vast majority of victims exploited for commercial sex work.

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<sup>1</sup> Taken from a blog for Civil Liberties Australia here <http://www.cla.asn.au/News/trafficked-women-suffer-doubly/> and a paper for Griffith Journal of Law and Human Dignity here <http://www.griffithlawjournal.org/#!/volume-3-issue-1/c1z2j> and an article in Origins Magazine here <http://www.felicitygerry.com/felicity-featured-origin-magazine-topic-lawyers-duties-trafficked-victims/> and a paper delivered at the NTBA conference in Dili in 2014 forthcoming in NTLJ.

- The estimated total profits made by forced labour each year worldwide was estimated in 2012 at US\$150.2 billion per year with profits highest in Asia (US\$51.8 billion)
- Sexual exploitation makes up two-thirds of these profits at an estimated \$105 billion a year.
- Annual profits made per victim range from \$4100 to \$37,100. This includes construction, manufacture, mining and utilities, agriculture, fishing and domestic work. Profits are highest in forced sexual exploitation.

The plight of Mary Jane Veloso who faced the death penalty in Indonesia exposes the need to accept that some alleged criminals are human trafficked victims. Ms Veloso is a 30-year-old Filipino migrant worker. She was arrested at Adisucipto International Airport in April 2010 for attempting to smuggle 2.6 kilograms of heroin into Indonesia from Malaysia. She was sentenced to death by Sleman District Court in October 2010.

She was in Malaysia having been recruited to work as a domestic helper, and was given two suitcases to carry to Indonesia. Concealed inside the suitcases were packs of heroin wrapped in aluminium foil. Ms Veloso maintains that she did not know the suitcases contained heroin and that she was the victim of deception and abuse of trust and abuse of vulnerability – a human trafficking victim. The classic exploited overseas worker.

On the 7<sup>th</sup> of April 2015, Ms Veloso's family appointed the National Union of Peoples' Lawyers (NUPL) in the Philippines as their new legal team led by Edre Olalia. The NUPL consulted me on the 9<sup>th</sup> and over the next few days I supplied material on how to invoke human trafficking referral mechanisms. Complaints were filed against the recruiters in the Philippines by the NUPL on the 16<sup>th</sup> of April. This triggered an investigation as to how she was recruited in the Philippines. An amicus curiae brief was prepared by myself taken from a partly prepared paper by myself and Neil Boister, Professor of Law, University of Waikato, New Zealand and Julia Muraszkievicz, a Ph.D Candidate, Faculty of Law, Vrije Universiteit Brussels Nathalina Naibaho, University of Indonesia, Jakarta with additional research and contributions by a Ph.D student in Australia. This was requested by Edre Olalia on the 24<sup>th</sup> of April 2015 as the 72 hour countdown to execution began and he was taking a plane to Indonesia. It was provided on the 27<sup>th</sup> of April and set out the law. Just a few hours before the executions on 29 April 2015, Ms Veloso was granted a temporary stay. After a sustained campaign by Migrant International, protests by the Philippine people and a conversation between the Philippine and

Indonesian presidents, the Indonesian President agreed to allow the reprieve in order that the trafficking claims be properly investigated. The reprieve was implemented 30 minutes before the proposed execution. It took 20 days to reprieve Mary Jane: Ms Veloso's legal teams in Indonesia and the Phillipines are still working to make the stay permanent I continue to assist remotely. The Indonesian Consul in Darwin sent a copy of the Amicus Curiae brief to Jakarta and we are hopeful that the law will be applied.

The Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings (2013) has made it plain that *'Trafficked Persons have been victims of one or more serious criminal offences. States have obligations to assist such persons, and not treat them as criminals.'* The practical issues are complex as referral mechanisms are different in every country. In transnational cases they need to be invoked in every country where investigation is required. There is a real need for uniformity here. The legal issues are relatively simple: It is vital that we identify victims of coercion, manipulation and deception and protect them. Efforts must be focussed on identifying suspects as victims and diverting them out of the criminal justice system. This includes non-prosecution and non-punishment of those victims in criminal justice systems.

Identification of a victim starts with Article 3 of the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Particularly Women and Children (Supplementing the UN Convention Against Transnational Organised Crime) ("the Trafficking Protocol") which defines trafficking 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.*

The definition is deliberately wide in order to try and cover the many and various ways people are exploited. In some cases there will be an overlap with forced labour and other abuse. The guiding Principles on non-prosecution and non-punishment are set out in Art 26 of the

Trafficking protocol. The current approach is to focus on the alleged criminal offence, such as attempted drug importation, and not the evidence of human trafficking. The consequence is that people, particularly women like Mary Jane Veloso, become victims of both the recruiter and the system. A person who is tricked or coerced into trafficking drugs fits the definition of a human trafficking victim perfectly. Drug-trafficking organisers who in terms of the definition in Article 3 'recruit' a person 'through the threat or use of force or other form of coercion' or of 'fraud' or of deception 'for the purpose of exploiting the person' are clearly traffickers and it is they who should be targeted, not those they exploit.

In England, the Modern Slavery Act 2015 creates a defence for slavery or trafficking victims who commit an offence. There is an 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. There is also now the Istanbul Convention dealing with violence against women and girls that any State can sign and ratify. Before the Modern Slavery Act, The English Court of Appeal quashed convictions of trafficked victims convicted in the criminal justice system. In *R v N; R v LE*, [2012] EWCA Crim 189, the UK Court of Appeal considered four unconnected appeals involving offenders who, at different stages after conviction, had been found to be victims of trafficking in human beings and to have been coerced into committing the offences which were integrally related to their exploitation. In giving judgement, the Court of Appeal gave guidance on how the interests of those who were or might be victims of human trafficking and who became enmeshed in criminal activities in consequence, in particular child victims, should be approached after proceedings had begun. The court had the advantage of European *Directive 2011/36* and previous decisions. The court noted that the reasoning for what is effectively immunity from prosecution is that "the culpability of the victims might be significantly diminished, and sometimes effectively extinguished, not merely because of age, but because no realistic alternative was available to them but to comply with those controlling them". The court went on to state that "where a court considered issues relevant to age, trafficking and exploitation, the prosecution would be stayed if the court disagreed with the decision to prosecute". The Court made clear that the international frameworks did not prohibit the prosecution or punishment of victims of trafficking *per se*, but did require the Prosecutor to give careful consideration as to whether public policy calls for a prosecution at all. The court quashed the convictions of more than one of the Appellants effectively on the basis that the whole process had been an abuse of process.

Abuse of process is not a novel concept in Australia but there is scope for it to be used in a novel way if trafficked victims in prison are to be properly assisted. More importantly, prosecutors should apply the public interest test so that exploited people are not prosecuted at all.

In Australia, there are currently no figures available for how many human trafficked victims are caught in the criminal justice system in Australia and no clear mechanisms available to allow victims to be diverted away from prosecution or for those who have been prosecuted for criminal offending to successfully appeal. Logically this must mean that some victims will be in prison as a result of their status as trafficked victims as they are not being picked up during the criminal justice process. Locking up victims including victims of abuse and exploitation is not what any criminal justice system is for.

Indonesia has led the way, together with other ASEAN nations on legislating to protect human trafficking victims. It has mandatory protection for human trafficked victims via its law 21 of 2007. The Philippines have had similar since 2003, updated 2012. It is in the context of mandatory drug laws that Mary Jane Veloso was apprehended and the human trafficking protection was not applied, at least, not before the 29<sup>th</sup> of April this year.

Resolving the conflict between mandatory protection and mandatory drug trafficking laws requires non-prosecution, non-punishment and clemency. The reprieve for Mary Jane is an opportunity for Indonesia to lead ASEAN in protecting victims of exploitation. The way for Indonesia to resolve this and to set an example to the rest of the world is to reprieve Mary Jane Veloso permanently. She has served 5 years in prison and can be sent home immediately without any humiliation to Indonesia's president as he would be applying Indonesia's own protective principles.

In order to effectively tackle trafficking in human beings (THB), all States need to identify all types of victims and divert them out of criminal justice systems. This includes in cases where there is credible evidence they have been trafficked in order to commit criminal offences on behalf of those who make criminal profit. Decisions need to be taken in every country not to prosecute those people and to release those who have been wrongly convicted. UK CPS Legal Guidance sets out some practical steps:

- Is there a reason to believe that the person has been trafficked? if so,

- If there is clear evidence of a credible defence of duress, the case should be discontinued on evidential grounds; but
- 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.
- Lawyers to bring the issues to the attention of prosecutors and judges and argue that continuation of prosecution is an abuse of process and / or not in the public interest

For prosecutors this involves decisions not to prosecute criminal offending as it is not in the public interest to further victimise exploited people. For judges this means staying indictments as an abuse of process. The recent decision in *English v R* [2014] NTSC 38 in the NT demonstrates the power of judges to stay cases which are manifestly foredoomed to fail. It is a small step to stopping cases against trafficked victims which should never be brought. These are not easy or popular decisions but they are the logical solutions for global exploitation, particularly when combined with protective measures and where countries empower their people to make alternative choices.

The complaints by NUPL in Mary Jane Veloso's case identified alleged recruiters who then said they were the subject of some sort of pressure and came forward for "protection" and were arrested. They are probably pretty low down a long chain of command and there are others in real control. The evidence will probably reveal an international network. The task is to identify those at the top and part of the protective measures for victims is it creates a potential bank of witnesses, providing they are not in danger or too traumatised. This is a concept where we accept people have committed crimes but do not prosecute or punish so in principle there may be evidence against a lot of people but the ones at the bottom are the most exploited and need protection - especially if they have been deceived or manipulated.

Ultimately what this is all about is international cooperation, women's empowerment, effective referral mechanisms, effective MLATs, social not militaristic policing, cooperation between authorities and NGO's and attitudinal change. Mary Jane Veloso's case has highlighted these issues and now it is for all countries to ensure their people are not exploited, whether by eradicating poverty, improving choices or tackling organised crime.