

Is the Law an Ass When It Comes to Mules? How Indonesia Can Lead a New Global Approach to Treating Drug Traffickers as Human Trafficked Victims

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Abstract

Indonesia has enacted laws which provide mandatory protection for victims of human trafficking. It also has mandatory drug laws which, in some cases, lead to the death penalty. This legislative conflict together with investigative and prosecutorial failure risks the execution of human trafficked victims who are used as drug mules in organized crime. In countries where there is no statutory defence to criminal conduct, there is a need to approach criminal conduct in a way that protects victims. This includes mechanisms to ensure non-prosecution and non-punishment. The recent reprieve for Mary Jane Veloso, albeit temporary at the time of writing, is an opportunity for Indonesia to lead a new global approach to victim protection.

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Trafficking in human beings [THB] and drug trafficking are global issues. Both can arise in the context of transnational organized crime and are regulated by transnational criminal legal mechanisms. However, the links between these two offences have not been thoroughly explored in an academic context. Taking a focus on Indonesia, this paper will examine the intersections between international law and Indonesian domestic legislation. We answer the question: How can coerced drug mules be supported by international obligations with respect to protecting victims of human trafficking? In particular, we consider the emerging norm of non-prosecution of victims in international legal discourse and the mandatory nature of Indonesian protective law.¹

The premise of the paper is that in order to effectively tackle trafficking in persons, states need to expand the range of those that they identify as victims of THB to include those who are forced to engage in the trafficking of drugs. Consequently, where there is credible evidence that a person has been trafficked in order to commit criminal offences on behalf of those who make criminal profit, states should divert that person out of the criminal justice system. The general principle of criminal law underpinning this argument is that in committing a crime, victims of human trafficking do not act voluntarily and lack the requisite mental element for the offence, and thus the position of guilt cannot be reached. To put it another way, those who are coerced or tricked into an activity such as carrying drugs are not in a position to exercise their free will and so criminal liability cannot be attached to them.

In providing our arguments, we draw on current cases in Indonesia involving transnational drug trafficking, and refer to numerous best practice examples on non-punishment of trafficking victims, including those coming out of Europe. It is, however, acknowledged that in most counties, including Indonesia, the kind of protective mechanisms we are arguing for are not available. The consequence is that some victims of human trafficking who are coerced, manipulated, or deceived into carrying drugs end up prosecuted and punished.

I. CURRENT CASES IN INDONESIA

This section focuses on current cases in Indonesia involving transnational drug trafficking where courts can and should adopt a new comprehensive approach. Each presents an opportunity for Indonesian courts to lead the way in global law enforcement that recognizes in law the difference between drug traffickers and those whom they coerce, deceive, or force to commit crime. Although we focus on these cases, our method of analysis is selectively comparative; we illustrate how improvements can be made in Indonesia through reference to other jurisdictions where the issue has been partially recognized by judicial intervention to stay prosecutions even post-conviction. We analyze the four cases using material publicly available to form the backbone of this paper. In each case the issue is not merely the knowledge

1. The Warnath Group, "Law of the Republic of Indonesia No 21 of 2007 Human Trafficking Law" *Warnath Group* (2007), online: The Warnath Group <<http://www.warnathgroup.com/wp-content/uploads/2015/03/Indonesia-TIP-Law-2007.pdf>> at art. 18: "A victim who commits a crime under coercion by an offender of the criminal act of trafficking in persons shall not be liable to criminal charges."

(or lack thereof) of what the accused was carrying, but that they were acting under the control of others to varying degrees but always within the recognized definition of a trafficked victim. The four cases are those of:

- (1) Anthony De Malmanche, a New Zealand national, was convicted in Bali for drug trafficking offences. He raised evidence of his status as a trafficked victim on the basis that he was vulnerable, with cognitive difficulties, and was deceived by a woman who exploited his vulnerability by pretending to be in love with him. The drugs charges he faced were worded in terms of strict liability. The court rejected his defence. He was convicted and sentenced to fifteen years' imprisonment.²
- (2) Mary Jane Veloso, a Filipino maid, was convicted of drug trafficking in Indonesia and sentenced to the death penalty. She had always maintained that she was deceived by a cousin who recruited her for overseas employment. At the time of writing, she has a temporary reprieve pending a post-conviction investigation into her recruiters who are on trial in the Philippines.³
- (3) Lindsay Sandiford, a British national, was convicted of drug trafficking in Bali despite the prosecution accepting that she assisted the police to identify others involved. She is currently sentenced to execution but has an outstanding appeal before the Supreme Court of Indonesia in Jakarta. There appears to have been no inquiry into her status as a victim of human trafficking. She has maintained that her son's life was threatened.⁴

In each of these cases, the common element is that the individual sought to rely on the existence of human trafficking for forced criminal activity as part of their defence. An additional case is worthy of mention, although not specifically related to drug trafficking, namely:

- (4) Wilfrida Soik, an Indonesian maid, was trafficked to Malaysia and killed her employer. She was spared execution when prosecutors abandoned an appeal after the Indonesian government intervened on her behalf.⁵ It is notable that Article 39B of the 1952 Dangerous Drugs Act of Malaysia⁶ carries the death penalty and Malaysia is a destination for Filipino and Indonesian overseas workers.

2. Gabrielle DUNLEVY and Shane COWLISHAW, "New Zealand Man Antony de Malmanche Sentenced to 15 Years Prison on Bali Drug Charge" *Sydney Morning Herald* (30 June 2015), online: Sydney Morning Herald <<http://www.smh.com.au/world/new-zealand-man-antony-de-malmanche-sentenced-to-15-years-prison-on-drug-charge-20150630-gi1ubc.html>>.

3. Emma REYNOLDS, "Saving Mary Jane: Death-row Mother's Last-Minute Rescue was Thanks to Darwin Lawyer" *News.Com.Au* (7 July 2015), online: News.Com.Au <<http://www.news.com.au/life-style/real-life/true-stories/saving-mary-jane-death-row-mothers-last-minute-rescue-was-thanks-to-darwin-lawyer/news-story/77c48306a13c99b3412499fe7b8042ac>>.

4. Ian HUGHES, "Death Row Gran Lindsay Sandiford Wins Temporary Firing Squad Reprieve as Indonesia Halts Executions" *Mirror.Co.Uk* (20 November 2015), online: Mirror.Co.Uk <<http://www.mirror.co.uk/news/world-news/death-row-gran-lindsay-sandiford-6865839>>.

5. Samantha HAWLEY, "Wilfrida Soik: Indonesian Government Saves Maid from Death Row in Malaysia, After Sending Bali Nine Pair to Deaths" *ABC.Net.Au* (26 August 2015), online: ABC.Net.Au <<http://www.abc.net.au/news/2015-08-26/indonesian-maid-escapes-death-sentence-in-malaysia/6726012>>.

6. Rev. Ed. 1980.

Soik's status as a trafficked victim was apparently accepted on sentence and later during the appeal process, despite the charge of murder. The logical inference is that the matter was properly investigated and her status as a victim was credibly identified. In the context of drug trafficking, the other three have either been unsuccessful or are awaiting assessment. In the context of drug trafficking, we suspect that the efforts to investigate are more limited than in a murder trial and that there are others in prison in every jurisdiction in a similar position, but no empirical research is available to confirm this.

The significant problems of both drug trafficking and THB are, of course, not solely an Indonesian problem. Soik's case suggests that being a human trafficked victim can be treated as a global mitigating factor for sentencing purposes and at diplomatic level. However, the cases as a group put Indonesia in the unique position of needing to argue for principles of protection for human trafficking victims in regard to those who are caught within the Indonesian system, and also in relation to its own citizens apprehended abroad. We argue that this exposes the need for a global commitment to harmonization of the approach of states to THB through a new reading of existing legislation in every state. In the longer term, we argue for fundamental and global legislative change that allows for a complete defence where it is demonstrated that the person is a human trafficked victim and the alleged criminal conduct was not voluntary and/or without material knowledge. There are already many statutory or treaty provisions which provide models.⁷ The approach we argue for is applicable in any jurisdiction.

The preambular paragraph to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime⁸ (hereinafter "Trafficking Protocol") calls for a "comprehensive approach" by states to protect the victims of trafficking. The harmonization of approaches to the issue of victims of trafficking being forced to commit crime nationally and transnationally, we suggest, is vital, otherwise states will fail to provide full protection for human trafficked victims, whether they commit offences within the relevant jurisdiction or where their own citizens are trafficked abroad.⁹ The failure to harmonize legal systems' approaches to this issue creates gaps in the global legal infrastructure through which the real traffickers operate and make illegal profit by exploiting others.

II. DEFINING HUMAN TRAFFICKING

For victims of trafficking to receive protection, including that of non-punishment, they need to be formally identified. This requires understanding the definition

7. See e.g. the above-mentioned duty in the UK to protect trafficked victims which arises from s. 45 of the Modern Slavery Act 2015 which creates a defence for slavery or trafficking victims who commit an offence; the EU's Directive 2012/29/EU establishing minimum standards on the rights, support, and protection of victims of crime; and the EU's Directive 2011/36/EU on preventing and combating trafficking in human beings.

8. 15 November 2000, 2237 U.N.T.S. 319 (entered into force 25 December 2003) [*Trafficking Protocol*].

9. *Ibid.*, at preambular para. 1, which calls for a "comprehensive approach" by states to protect the victims of trafficking.

of human trafficking. Article 3 of the Trafficking Protocol 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.¹⁰

The definition breaks down into three core elements: an “act”, a “means”, and a “purpose”. All three must be present for the offence of human trafficking to exist.

A. *The “Act”*

The “act” in the definition of human trafficking is part of the physical element of the offence. Although the actions may be of a neutral character in and of themselves, they take on a criminal meaning when combined with the intention to exploit (or indeed actually exploiting). The proscribed actions can occur on a national or international scale. In all of our three drug trafficking case examples, the argument is that each is a victim and not a criminal in the sense that even without consideration of their state of mind, there are “act” elements which can potentially apply: recruitment, transportation, transfer, harbouring, and receipt. None of the action terms are defined in the Trafficking Protocol or in the available interpretive guidance material. A Council of Europe/UN study focusing on organ trafficking tried to define these terms. However, in reality it merely highlights the fluidity of the terms.¹¹ In her leading text on the law of human trafficking, Anne Gallagher cites this Organ Trafficking Study with approval, noting that the definitions are fluid concepts which can be interpreted broadly.¹² This interpretation is consistent with the requirement that the prohibition be able to adapt to the myriad of circumstances in which people are exploited. The way THB is phrased in the Trafficking Protocol shows that the acts are not traditional physical elements, as they become criminally relevant only if they are committed with the intention to exploit a person.

B. *The “Means”*

The “means” element makes up the second part of the *actus reus*. In all of our case-studies, the proposed evidence raises a straightforward “means” element—coercion and/or deception. While “coercion” is one of the key ideas behind human trafficking, it

10. *Ibid.*, at art. 3.

11. *Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs*, Joint Council of Europe / UN Study (2009), at 78.

12. Anne GALLAGHER, *The International Law of Human Trafficking* (Cambridge: Cambridge University Press, 2010) at 29–30.

is also well recognized that “deception” can be applied as an indirect way of achieving the coercion of a trafficked person. The United Nations Office on Drugs and Crime [UNODC] notes that many trafficking cases begin with the deception of a victim.¹³ The UNODC gives examples of complete and partial deception, where the victim is either completely deceived about the nature of what they believe to be taking place, or deceived as to some aspects of what they believe to be happening.¹⁴

Interlinked with the means elements of coercion or deception is the element of “abuse of a position of vulnerability”.¹⁵ Again, this is not specifically defined within the Protocol. However, subsequent guidance suggests that it should be “understood as referring to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved”.¹⁶ The inclusion of this among the other “means” elements is to ensure that all the different, subtle, and nuanced ways by which a person can be exploited fall within the ambit of the Trafficking Protocol definition.¹⁷ In its report, the UNODC notes that vulnerability can consist of “factors which are pre-existing or intrinsic to the victim”.¹⁸ The UNODC suggests that proving this element consists of two separate requirements. First, proving the existence of a position of vulnerability on the part of the victim, and second, proving the abuse or intention to abuse those vulnerabilities as a means by which one of the specific trafficking “acts” was undertaken. It is here in our case examples that, if proper consideration is given to the THB issues, a critical analysis of the evidence of the “action” element would need to be undertaken by the court.

C. *The “Purpose”*

The Trafficking Protocol talks about exploitation having minimum standards in order for the element to count toward a case of trafficking. The relevant part of Article 3 is as follows:

[E]xploitation 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 the removal of organs.¹⁹

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13. United Nations Office on Drugs and Crime [UNODC], “Anti-Human Trafficking Manual for Criminal Justice Practitioners” (2009), online: UNODC <http://www.unodc.org/documents/human-trafficking/TIP_module4_Ebook.pdf> at 4.
 14. *Ibid.*, at 5.
 15. *Ibid.*, at 8.
 16. United Nations General Assembly [UNGA], “Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto” (3 November 2000), online: UNGA <https://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf> at 12.
 17. UNODC, “Issue Paper: Abuse of a Position of Vulnerability and other ‘Means’ Within the Definition of Trafficking in Persons” (2013), online: UNODC <https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf> at 2.
 18. *Ibid.*, at 3.
 19. *Trafficking Protocol*, *supra* note 8 at art. 3.

The UNODC calls trafficking a “crime of *dolus specialis* ... A crime of special intent”.²⁰ The special intent is “the purpose aimed at by the perpetrator when committing the material acts of the offence”. This means that trafficking can occur without exploitation taking place, so long as the intention is there, and that the intent to exploit was a motivating factor behind the conduct.

As shown by the words “at a minimum”, the list of examples that will constitute exploitation is open-ended.²¹ In the context of the law of human trafficking, exploitation was traditionally considered to take the form of prostitution.²² This is now accepted to be anachronistic: as well as exploitation for the purposes of sex, other forms of exploitation include domestic servitude, treatment of employees in remote locations, forced labour, organized gangs such as teams of “pick-pocketing” children, drug trafficking and cultivation, and immigration offences. The abusers, aiming to maximize profit, will exploit individuals, forcing a person to commit crime, including forcing them to be a drug mule.

III. IDENTIFYING VICTIMS OF HUMAN TRAFFICKING

Turning to identification. A UNODC report highlights key issues and implications for response to transnational organized crime, including improving victim identification systems to enable the provision of protection and support, and investing in a victim-centred approach, with appropriate training for law enforcement to include the vital importance of ensuring the protection of victims.²³ All require standardized mechanisms, collaborative responses, and interagency co-ordination with data collection and properly trained specialists. It also requires a rethink of attitudes away from the traditional view of (for example) “illegal immigrants” or “drug traffickers” in order to differentiate between traffickers and victims.

Taking our case examples, if a referral mechanism is to be effective, credible evidence of the person’s status as a victim of human trafficking ought to be obtained at the investigation stage, when the drug trafficking charges are being considered. This is an opportunity to support rather than to prosecute. If the investigation has not been done, not done effectively, or if further evidence is adduced at trial, the responsibility continues to ensure that decisions are made to stop inappropriate prosecutions or, depending on the allegation, to impose a reduced sentence from that which might otherwise be available. It is here that, in our sample cases, the courts, and those who have the responsibility to reconsider a sentence politically, must take the opportunity to

20. UNODC, “Anti-Trafficking Practitioners’ Manual: Module 1” (2009), online: UNODC <https://www.unodc.org/documents/human-trafficking/TIP_module1_Ebook.pdf> at 4. UNODC further notes that domestic law could enable *mens rea* to be established on a lesser standard than direct “intent” (such as recklessness, wilful blindness, or criminal negligence).

21. Gallagher, *supra* note 12 at 34.

22. See e.g. *International Agreement for the Suppression of the White Slave Traffic*, 18 May 1904, 35 Stat. 1979, 1 L.N.T.S. 83 (entered into force 18 July 1905).

23. UNODC, “Transnational Organized Crime in East Asia and the Pacific: A Threat Assessment” (2013), online: UNODC <http://www.unodc.org/documents/data-and-analysis/Studies/TOCTA_EAP_web.pdf> at 139.

ensure that the protection intended for victims of human trafficking is actually effective.

Identification (as with any crime) is the most vital element of combating the crime, since progress will never be made unless efforts are undertaken to separately identify bosses from workers, victims from perpetrators, conspirators from pawns, terrorists from innocents. It is in this context of dealing with transnational organized crime that states must establish suitable mechanisms to seek out and identify victims of THB. From a criminal-law perspective, if the person accused of being a drug “mule” has acted voluntarily where the relevant mental element in relation to the drug trafficking has priority over the coercion or deception or other aspects of the trafficking definition, then the mule will proceed as normal through the criminal justice system. However, to reach a reliable assessment on whether the mule acted voluntarily, the proportionate response is to ensure that such assessments are made on a case-by-case basis. The question is not simply whether the person can be identified as a perpetrator or as a victim, but what influences were operative upon them and what factors caused the crime. This balanced approach allows for rational conclusions, based on evidence as to whether the person’s condition is as a victim, whether their status is a mitigating factor, or whether the assertion of victimhood can be rejected. Blanket laws and policies in relation to drug trafficking prevent such an assessment taking place, and commonly cause conflict between provisions designed for individual protection and those seen as protective of the general society. In the context of THB, the case-by-case approach recognizes the complex and societal issues that arise in individual coercion as part of global human exploitation.

IV. THE CASE FOR NON-PROSECUTION AND/OR NON-PUNISHMENT OF VICTIMS OF HUMAN TRAFFICKING

As stated at the outset, the inspiration for this paper are cases coming out of Indonesia. All involve issues of compulsion. Indonesia has referral processes for victims of human trafficking, and recently Indonesia’s Narcotics National Board [BNN] has said that those in possession of drugs should be channelled into rehabilitation rather than incarceration.²⁴ In doing so, they specifically excluded those involved in drug trafficking without giving due consideration to Indonesia’s own laws on the protection of trafficked victims. In our drug case-studies, all have been prosecuted and sentenced, two to the death penalty. In each case, the trafficking referral mechanisms do not appear to have been implemented pre-trial or considered at trial. The outstanding appeal of Ms Sandiford and the ongoing post-conviction investigation in Mary Jane Veloso’s case are opportunities for Indonesia to balance legislative requirements and international obligations surrounding the non-punishment of victims of human trafficking. If there is credible evidence to support their status as human trafficked victims, then Indonesia needs to ensure there is no significant miscarriage of justice.

24. Ina PARLINA, “Rehab Better than the Can for Drug Users” *Jakarta Post* (12 March 2014), online: Jakarta Post <<http://www.thejakartapost.com/news/2014/03/12/rehab-better-can-drug-users.html>>.

This is an issue that must be dealt with even before the infringement of their human rights by invoking the death penalty. In Mary Jane Veloso's case, these issues can be raised as part of a fresh appeal procedure.²⁵ Indonesia clearly took the opportunity to negotiate on this basis in relation to Soik, and went on to consider a travel ban for overseas workers.²⁶

Regrettably, an obligation of non-punishment and non-prosecution of victims of THB for status-related offences is absent from the Trafficking Protocol. Although it is beyond the scope of this paper to explain why such a clause is missing, it suffices to say that all in all the Trafficking Protocol has been criticized for lacking a victim focus, and instead primarily concentrating on the prosecution of those responsible for human trafficking.²⁷ Notwithstanding this, subsequent hard- and soft-law international instruments have addressed the protection of victims. Europe in particular has been instrumental in this. Five years after the Trafficking Protocol, the Council of Europe Convention on Action Against Trafficking in Human Beings (hereinafter "the 2005 Convention") came into force.²⁸ Article 26 of the 2005 Convention creates a soft obligation of non-punishment:²⁹

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.

This obligation was reinforced by the 2011 EU Directive, which creates an obligation of non-prosecution and non-punishment phrased in stronger terms:

Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.³⁰

Perhaps more importantly for Asian countries, the recently enacted (2015) Association of Southeast Asian Nations [ASEAN] Convention Against Trafficking in Persons, Especially Women and Children, joins these documents and calls on states to

25. SBS.Com.Au, "SBS Report 25th April 2015" *SBS.Com.Au* (25 April 2015), online: SBS.Com.Au <<http://www.sbs.com.au/news/storystream/bishop-fears-worst-chan-sukumaran-meeting-called>>.

26. Hawley, *supra* note 5.

27. Janie A. CHUANG, "Exploitation Creep and the Unmaking of Human Trafficking Law" (2014) 108 *American Journal of International Law* 609 at 616.

28. For a good analysis, see Anne GALLAGHER, "Recent Legal Developments in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments" (2006) 8 *European Journal of Migration and Law* 163.

29. *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, C.E.T.S. No. 197 (entered into force 1 February 2008), at art. 26.

30. *European Union Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA*, 5 April 2011, EU Directive 2011/36/EU at art. 8.

not hold victims criminally liable.³¹ There are also a series of principles arising out of the UN. UN Trafficking Principles and Guidelines, at Principle 7, states:

Trafficked Persons shall not be detained, charged or prosecuted for their illegal entry into or residence in countries of transit or destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.³²

In addition there are a series of other communications coming out from the UN as to the importance of non-punishment.³³ The principle has also been expressed in the new International Labour Organization [ILO] protocol of June 2014, updating the existing ILO Convention 29 on Forced Labour. Article 4(2) of the ILO Protocol requires states to:

[T]ake the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.³⁴

Acknowledging the increasing number of hard-law and soft-law instruments, one conclusion is inescapable: there is a growing obligation at an international level for states not to punish or prosecute victims of human trafficking for crimes they were compelled to commit.

Given that victim protection and sensitivity is one of the key variables in addressing human trafficking, such an obligation is logical. Referring back to the Trafficking Protocol, compulsion is clearly more than being “forced”, but can take into account operative deception and abuse of vulnerability. Moreover, and as already mentioned at the outset of this paper, the principle of non-criminalization is deeply rooted in criminal-law traditions. Individuals who are in a trafficking situation—subjected to the means described above—do not act voluntarily, and as such there is a lacking of a *mens rea* that prevents the law enforcers from positioning guilt. This has been well argued by Gallagher, who noted that “the notion of protecting trafficked persons from criminalisation for status related offences is not particularly innovative or radical. Rather, it reflects basic principles recognised in most national legal systems relating to responsibility and accountability for criminal offenses.”³⁵

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31. ASEAN *Convention Against Trafficking in Persons, Especially Women and Children*, 21 November 2015, at art. 14(7), which states: “Each Party shall, subject to its domestic laws, rules, regulations and policies, and in appropriate cases, consider not holding victims of trafficking in persons criminally or administratively liable, for unlawful acts committed by them, if such acts are directly related to the acts of trafficking.”
 32. Principle 7, *UN Trafficking Principles and Guidelines*, online: <<http://www.ohchr.org/Documents/Publications/Traffickingen.pdf>>
 33. See e.g. *Trafficking in Women and Girls*, UN Doc A/RES/63/156 (2009), at [12]; *Trafficking in Persons, Especially Women and Children*, UN Doc. A/HRC/RES/11/3 (2009), at [3(e)].
 34. *ILO Forced Labour Protocol 2014*, online: <http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_246549/lang-en/index.htm>.
 35. Gallagher, *supra* note 12 at 288.

The rationale for non-criminalization has also been well advocated by scholars and stakeholders. For example, the Organization for Security and Co-operation in Europe [OSCE] has argued that, whilst on the face of it a victim may have committed an offence, the reality is that the trafficked person acts without real autonomy. They have no, or limited, free will because of the degree of control exercised over them and the methods used by traffickers, consequently they are not responsible for the commission of the offence and should not therefore be considered accountable for the unlawful act committed.³⁶ For Hoshi, the need to include principles of non-criminalization arise because of the exacerbated traumatization of a victim, when he/she is treated as a criminal.³⁷

V. THE ROLE OF THE DRUG MULE IN THE DRUG TRAFFICKING BUSINESS

In order to assist the reader in gaining a better understanding of why, how, and where drug mules fit into the global drug trafficking business, it is worthwhile describing, if only briefly, the nature of that business. In doing so, our analysis draws on a range of examples from around the world.

Drug trafficking, like human trafficking, is highly lucrative, with a global market worth about US\$20–25 billion per annum.³⁸ The international drug trafficking sector involves a measure of organization, usually in fluid or small flexible organizations and networks of individuals.³⁹ These organizations do not necessarily require high levels of skill from their members, do not necessarily last for long periods of time, and do not always use violence.⁴⁰ Trust is important, and may be based around ethnicity. Nigerian drug trafficking organizations, for example, operate globally.⁴¹ The structures and methods of drug trafficking organizations vary widely.⁴² For example, the Chinese trafficking groups operating in Australia and Southeast Asia are usually small-time flexible opportunists who rely on familial or social contacts and develop ingenious transportation schemes and exploit emerging opportunities.⁴³

The goal of the organizers is to increase efficiency and to reduce the financial and non-financial costs associated with drug dealing.⁴⁴ Overcoming state border controls is costly because of the use of means of detection at border posts such as X-ray machines

36. Organization for Security and Co-operation in Europe [OSCE], “Policy and Legislative Recommendations Towards the Effective Implementation of the Non-Punishment Provision with regard to Victims of Trafficking” (2013), online: OSCE <<http://www.osce.org/secretariat/101002?download=true>>.

37. Bijan HOSHI, “The Trafficking Defence: A Proposed Model for the Non-Criminalisation of Trafficked Persons in International Law” (2013) 1 Groningen Journal of International Law 54.

38. Laura WILSON and Alex STEVENS, “Understanding Drug Markets and How to Influence Them”, The Beckley Foundation Drug Policy Programme, Report Fourteen, at 1.

39. J.P. CAULKINS, H. BURNETT, and E. LESLIE, “How Illegal Drugs Enter an Island Country: Insights From Interviews with Incarcerated Traffickers” (2009) 10 Global Crime 66 at 69.

40. *Ibid.*, at 68.

41. See e.g. Phil WILLIAMS, “Nigerian Criminal Organisations” in Paolo LETIZIA (ed.), *The Oxford Handbook of Organized Crime* (Oxford: Oxford University Press, 2014), 254 at 255.

42. Caulkins *et al.*, *supra* note 39 at 69.

43. Sheldon X. ZHANG and Ko-lin CHIN, “Snakeheads, Mules, and Protective Umbrellas: A Review of Current Research on Chinese Organized Crime” (2008) 50 Crime Law and Social Change 177 at 191.

44. Wilson and Stevens, *supra* note 38 at 3.

and sniffer dogs, and because of the imposition of very serious penalties for trafficking. Enforcement and punishment serve as an incentive for the organizers of the traffic to find some way of avoiding interdiction while keeping their own personal involvement to a minimum.

Among the large number of different roles in drug trafficking operations,⁴⁵ the individuals who serve to transfer drugs between locations are critical but relatively uninfluential. Research reveals that most drug couriers serving markets around the globe are so-called drug “mules” who carry drugs, paid for by someone else, across international borders.⁴⁶ They present a cost to the organizers of the traffic, which in addition to the cost of the drugs, other operating costs, and the likely sale price, determines the quantity to be carried.⁴⁷ Organizers therefore take complete control of what illicit drug is carried, how it is carried, how much is carried, and where it is carried to; the mule has almost no involvement in these decisions.⁴⁸ The term “mule” is a pejorative term indicative of their relatively servile role.

What little research has been done into the role of these individuals suggests that they are almost entirely passive. Research by the UK Sentencing Council, for example, found that, in regard to all the mules interviewed, “all arrangements, (passports, flights and accommodation) were made for them”.⁴⁹ The relationship between the mule and their employer is extremely hierarchical; control is retained by the organizers at all times. Drug mules may or may not be paid for carrying out this task. The UK Sentencing Council research indicated that, for example, where they are paid, they profit far less than professional traffickers who purchased the drugs and reap all the profits for themselves.⁵⁰ The case-studies discussed in this paper tend to confirm this passivity, which is more readily accepted in traditional overseas work, such as the maid service undertaken by Soik.

These cases also tend to confirm the general view that drug mules usually carry drugs in their luggage, rather than swallowing them or carrying them strapped to their bodies.⁵¹ This method of concealment makes it possible to move the greatest amounts of drugs when the organizers of the drug traffic are dependent upon commercial air transport. Luggage may be double lined or contain false bottoms, or mules may be given objects such as books or cartons of wine, shoes, or other souvenirs into which drugs have been compressed and inserted. Packaging, sealing, and concealment of the drugs in the luggage take place prior to handing them over to the mule. New luggage may be offered by their caring “friend”.⁵²

45. *Ibid.*, at 1, 5.

46. Jennifer FLEETWOOD, “Five Kilos: Penalties and Practice in the International Cocaine Trade” (2011) 51 *British Journal of Criminology* 375 at 376, 382; Genevieve HARRIS, “Law Reform Without Legislative Reform: Sentencing of Drug Offences in England and Wales”, *Transnational Institute/International Drug Policy Consortium, Series on Legislative Reform of Drug Policies*, No. 5 (June 2010), at 4.

47. Fleetwood, *ibid.*, at 382.

48. *Ibid.*, at 384.

49. UK Sentencing Council, *Drug “Mules”: Twelve Case Studies*, Office of the Sentencing Council (March 2011), at 4.

50. Fleetwood, *supra* note 46 at 382.

51. *Ibid.*, at 381 and the sources cited there; UK Sentencing Council, *supra* note 49 at 3.

52. UK Sentencing Council, *supra* note 49 at 5; Wilson and Stevens, *supra* note 38 at 5.

Concealment of the drugs in the hidden compartment also means that the mule may be either unaware of the fact that they are carrying illicit drugs, or unaware of the identity or weight of the drugs.⁵³ This facilitates control of the drug from a distance by drug traffickers, even though the drug is in the luggage being handled by the mule.⁵⁴ Again, the cases we deal with in this paper tend to confirm this fact, although it should be noted that full investigations into THB do not appear to have been undertaken.

The travel costs and the cost of the drugs carried by the mules must be recouped by the organizers, and may lead to the concealment of a significant quantity of drugs in the luggage of a mule in order to make the transaction worth the investor's investment. Research suggests that mules are frequently deliberately misled about what or how much they are carrying (both relevant to the penalty if caught) in order to increase their confidence and to increase the potential for successfully passing through customs.⁵⁵ Again, the cases we have studied tend to confirm this.

A great deal of effort is put into the recruitment of mules who are sufficiently trustworthy, dependable, and unlikely to be stopped by customs officials.⁵⁶ Mules may grow to trust their recruiters, but it is not deserved; research suggests that organizers are well aware of the ease with which mules may be arrested, are prepared to "sacrifice" them, and are constantly searching for new recruits.⁵⁷ Organizers are not usually located by law enforcement as the result of arrests of mules.⁵⁸ Research indicates that drug mules are usually first-time offenders with no previous criminal record.⁵⁹ Data also suggest that professional smugglers are usually more aware than mules of punishment thresholds, and thus less likely to carry quantities over thresholds that carry very heavy penalties.⁶⁰ Many are naive and vulnerable individuals who are exploited by the organizers of the drug supply chain.⁶¹ Their vulnerability to trafficking organizations has been implicitly recognized by the UN Commission on Narcotic Drugs.⁶² The cases that this paper focuses upon tend to confirm many of these findings drawn on research in other jurisdictions.

The facts of the following case-study from New York show a remarkably consistent pattern with some of the cases focused on in our study:

Delia, the divorced mother of four with a seventh-grade education, travelled outside of Greensboro, North Carolina, for the first time to meet her future husband in Nigeria, the brother of a businessman she knew. The businessman, who paid for her plane ticket, had

53. Fleetwood, *supra* note 46 at 384.

54. *Ibid.*

55. *Ibid.*, at 387.

56. Caulkins *et al.*, *supra* note 39 at 72.

57. Wilson and Stevens, *supra* note 38 at 7–8.

58. Tracy HULING, "Women Drug Couriers: Sentencing Reform Needed for Prisoners of War" (1995) 9 *Criminal Justice* 15 at 61, and sources cited there.

59. Fleetwood, *supra* note 46 at 377, and sources cited there; Huling, *ibid.*, at 17, and sources cited there.

60. Fleetwood, *supra* note 46 at 388.

61. *Advice to the Sentencing Guidelines Council: Sentencing Drug Offences*, UK Sentencing Advisory Panel (2010), at 21–2; Caulkins *et al.*, *supra* note 9 at 90.

62. *Promoting International Cooperation in Addressing the Involvement of Women and Girls in Drug Trafficking, Especially as Couriers*, UNODC Res. 52/1 (2009).

invited Delia to meet his brother, a doctor in Nigeria who was looking for an American wife. Delia's fiancé sent her home from Nigeria with a gift: a quilted suede coat, the lining of which she was told upon arrest contained fifteen ounces of heroin.⁶³

Reports have been made of offers of employment to people driving cars across the Mexican border when the cars were later found to be containing drugs;⁶⁴ a British woman duped by her Nigerian Internet lover, Emmanuel, to visit Guangzhou in China to meet him and then forced to smuggle drugs into Australia;⁶⁵ an elderly Australian couple who won an Internet competition for an all-expenses paid holiday to Canada only to discover the brand-new luggage they were given contained methamphetamine.⁶⁶

Trickery may be used to gain the accused's trust and then, when the mule grows suspicious, be supplemented by manipulation and threat at a later stage. The organizers use trickery because the imposition of higher penalties for trafficking makes the undertaking of these risks by the drug mule extremely risky and act as a strong disincentive. The UK Sentencing Council notes that, in regard to a small study of jailed mules that it carried out:

What was common amongst most of [them] is the involvement of a trusted person in making arrangements or paying for their trips – either a family member, a friend or a friend of a friend.⁶⁷

Whether a motivation is out of economic conditions, fear, or ignorance, the constant theme is one of exploitation. Harris notes: "It is widely accepted that the majority of drug mules are from poor backgrounds and are vulnerable or exploited."⁶⁸

In passing its law restricting the penalties that can be imposed upon drug mules, the Republic of Ecuador's Constitutional Assembly noted that the majority of mules "have no control over narco-trafficking, but are persons who rent their bodies",⁶⁹ while the UNODC and the Latin American and the Caribbean region of the World Bank have concluded that "this form of career appeals most to people who are reckless, desperate, or ignorant".⁷⁰

63. Huling, *supra* note 58 at 16.

64. Marty GRAHAM, "Mexican Cartels Trick Border Crossers into Being Drug Mules" *Reuters* (15 April 2012), online: Reuters <<http://www.reuters.com/article/us-usa-mexico-drugs-idUSBRE83EoIY20120415>>.

65. Richard SHEARS, "From Lonely Heart to Jailed Drug Mule: British Woman Forced to Smuggle Heroin for Internet Lover" *Daily Mail Online* (2 March 2009), online: Daily Mail Online <<http://www.dailymail.co.uk/news/article-1158292/From-lonely-heart-jailed-drug-mule-British-woman-forced-smuggle-heroin-internet-lover.html>>.

66. Irene OGRODNIK, "Elderly Australian Couple Used as Drug Mules in Canadian Holiday Ticket Scam" *Global News Canada* (25 October 2013), online: Global News Canada <<http://globalnews.ca/news/925185/canadian-arrested-after-elderly-australian-couple-used-as-drug-mules-in-holiday-ticket-scam/>>.

67. UK Sentencing Council, *supra* note 49 at 6.

68. Harris, *supra* note 46 at 4.

69. *Informe Sobre el Sistema de Rehabilitación Social*, Republic of Ecuador Montecristi (Constitutional Assembly) Report (3 April 2008).

70. *Crime, Violence and Development: Trends, Costs and Policy Options in the Caribbean*, UNODC Report No. 37820 (March 2007), at 97, para. 7.14.

Nonetheless, most national legal systems treat drug mules as responsible “for decisions, circumstances and issues, outside their knowledge, experience and control”.⁷¹ In pursuit of a policy of deterrence of drug trafficking,⁷² national laws tend to apply statutory minimum punishments dependent upon the weight and class of the drugs found on the mule.⁷³ They give sentencing courts no discretion to take into account as mitigating factors, factors that relate to how the offender was brought into the role by more senior figures in the drug trafficking organization, or factors relating to the offender’s background which made it relatively easy to exploit them, such as their gender, poverty, or emotional vulnerability.⁷⁴ Indonesia’s response is thus not unusual.

Drug mules are sent to jail for long periods of time, or in some instances executed, even though law enforcement officials recognized that they are in the vast majority of cases neither career criminals nor kingpins in the organization of the drugs market.⁷⁵ The inflexibility of sentencing laws mean that arguments relating to ignorance or duress can only be used in a challenge to the actual guilt of the accused person. When guilt is established by the presence of significant quantities of an illicit drug in the luggage of the accused, which leads to the presumption that they are engaged in trafficking, drug mules struggle to demonstrate in court that they were ignorant of the nature of what they were carrying or that they had been coerced in some way. Due to their low position in the hierarchy of the organization, they are also usually unable to implicate anyone else in the trafficking of the drugs, and often there are no other witnesses, particularly if the “recruitment” was done in a foreign country. Moreover, mounting a challenge in court, rather than taking “softer” options such as pleading guilty to a lesser charge, is likely to frustrate judicial and prosecutorial officials already submerged in large volumes of drug trafficking litigation, and may lead to more severe sentences being imposed. It is not surprising that most jurisdictions apply an undifferentiated approach to the prosecution and punishment of drug mules, tending to treat them all in the same way, with the minimum attention paid to their personal circumstances. As Huling puts it: “They are twice victimized, once by a drug dealer and again by the law.”⁷⁶ A drug mule who is tricked or coerced into trafficking drugs fits the definition of a human trafficking victim perfectly. Drug trafficking organizers, 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”—in this case exploitation of criminal activities—are clearly trafficking the drug mule.

71. Penny GREEN, *Drugs, Trafficking and Criminal Policy: The Scapegoat Strategy* (Winchester: Waterside Press, 1998) at 9.

72. *R v. Kouadio*, *The Times*, 21 February 1991, per Write J, cited in Genevieve HARRIS, *Law Reform Without Legislative Reform: Sentencing for Drug Offences in England and Wales*, Transnational Institute/IDPC, June 2010, Series on Legislative Reform of Drug Policies No. 5, at 4.

73. Huling, *supra* note 58 at 15.

74. See e.g. *Attorney General’s Reference No.14 of 2001 (Maria Das Dores Fietose)* [2003] 1 Cr. App. R (S) 17.

75. Huling, *supra* note 58 at 19.

76. *Ibid.*

VI. WHAT DOES THE PRINCIPLE OF NON-PUNISHMENT MEAN IN PRACTICE?

How should law enforcement treat cases involving drug mules? The first step is to investigate and uncover credible evidence of THB.⁷⁷ Like any criminal investigation, this must begin with trained investigators who can be alert to suspicions, not just on criminal offending but also in relation to victimhood. This can be by police officers, border officials, or others likely to be tasked with criminal enquiries. Such suspicions should be followed up in the same way as suspected criminal offending, although co-operation may be needed through defence teams to ensure that, if privilege needs to be waived, it is done in a fully informed way. This is a novel approach for many jurisdictions, particularly at common law, where there is less history of alternative dispute resolution. Only by ensuring that investigations into the circumstances of drug trafficking are thorough can we be satisfied that investigations into THB are thorough. So, in our case-studies, this requires investigation not just in the destination state but also in all places where the THB victim has travelled from and to. It is outside the scope of this paper to deal with how this also requires an improvement of mutual legal assistance treaties, but one can start to see how the obtaining of credible evidence requires an international effort: arguably, an international justice network to tackle an international trafficking network.

One solution is for each country to enact a specific defence of THB that would lead to acquittal at the very least for those forced or coerced. This transfers some of the investigative burden, so care in relation to referral mechanisms needs to be taken to ensure that state resources are additionally employed. In the absence of such a provision, proper investigations may uncover circumstances where administrative decisions can be taken not to prosecute out of a sense of mercy, or to engage the victim to give evidence against those further up the chain of the given operation.

A trafficked victim who has not been diverted out of the criminal justice system at the investigation stage, who has otherwise committed a drug trafficking offence, in any country, ought to be able to avail themselves of the following (whichever applies best in the context of the alleged offence or the type of criminal justice system):

- (1) Acquittal should follow where the drug offence is one of strict or absolute liability, committed under such coercion that s/he has no freedom or capacity to choose to act. The courts will need an evidential basis to find on the facts that the person was under the control/coercion, deception, etc. of another. This would be similar to existing law and policy in relation to mental impairment, where many jurisdictions already recognize that some accused do not act voluntarily. This gives a complete excuse on the basis that trafficked human beings do not act voluntarily; or
- (2) Acquittal should follow on charges with a fault element on the same basis as above. In essence, there is no need to go on to consider the mental element of the alleged offence (if there is one); or

77. *Rantsev v. Cyprus & Russia*, European Court of Human Rights [ECtHR] Application No. 25965/04 (Strasbourg, 7 January 2010); and *Case of M. & Others v. Italy And Bulgaria*, ECtHR Application No. 40020/03 (31 July 2012).

- (3) Acquittal may follow if the drug offence has a fault element (intention, recklessness, or any other fault liability) and it may be vitiated where the individual is identified as a human trafficked victim subject to the control/coercion, deception, etc. of another. This might also apply where the person admits knowing they were moving something illicit but didn't know it was drugs; or
- (4) Where the evidence is that the control was not sufficient to overwhelm the voluntary acts of the defendant, sentences should be reduced to reflect the evidence that the defendant was exploited.
- (5) Where there is fresh evidence post-conviction, an appeal should consider the same issues and overturn the conviction or reduce the penalty.

VII. INDONESIAN LAW: AN OVERVIEW

Indonesia is a member of the United Nations [UN], and has ratified international human rights instruments including the International Convention on Civil and Political Rights [ICCPR]⁷⁸ and the International Covenant on Economic, Social and Cultural Rights [ICESCR].⁷⁹ The Indonesian Constitution embodies human rights in the Second Amendment to the 1945 Constitution in 2000. Chapter XA (Articles 28A–28J on Human Rights) of the Constitution includes various categories of human rights that cover most of the rights guaranteed in the Universal Declaration of Human Rights, the ICCPR, and the ICESCR. The provisions of human rights in the Second Amendment to the 1945 Constitution can be used to test the provisions of a law through judicial review before the Constitutional Court.

With regard to the issues posed by drug trafficking, Indonesia has ratified all three UN conventions on drug control, and subsequently adopted a primarily punitive approach to managing the supply and demand of drugs controlled under those conventions. Most of Indonesia's current drug laws were enacted in 1997, and contain severe sanctions against the use and supply of controlled drugs. This includes imposing the death penalty for certain drug trafficking offences. Although Indonesia has been classed as a “low application state” in terms of its use of the death penalty for drug offences, there were seventy-one individuals on death row for drug offences as of 2012.⁸⁰ Recent drug trafficking offences are charged under the 2009 Law on Narcotics.

Indonesia has become an important destination and market for illicit drugs. Law enforcement operations for the reduction of illicit manufacture, trafficking of drugs, and drug-related crimes have been launched to dismantle clandestine laboratories, combat drug trafficking syndicates, and enhanced money laundering investigations. In the last five years, Indonesia has strengthened its legislative framework on

78. *International Convention on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 (entered into force 23 March 1976) [ICCPR].

79. *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976) [ICESCR].

80. Cornell Law School Death Penalty database, online: <<https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Indonesia>>.

drug-related crimes. In a statement by the Indonesian delegation to the 57th Session of the UN Commission on Narcotic Drugs, it was said that the 2009 Law on Narcotics was intended to address supply and demand reduction measures in a more balanced and integrated manner, ensuring and respecting the fundamental rights of drug abusers to access health services⁸¹. Despite this, there are still problems. For example, the law does not distinguish between people who use drugs and drug traffickers—a necessary distinction given that people who use drugs require a health rather than criminal response. Meanwhile, other problems arise in the law enforcement process, particularly when the drug trafficker is identified as a victim of human trafficking. In our case examples, as far as we can tell from the open-source material, there is no evidence that consideration has been given to the Indonesian human trafficking law and its impact at all. In Antony De Malmanche's case, the suggestion that he was a victim of THB was unsuccessful as a defence, but may account for the difference in his sentence in comparison with Lindsay Sandiford. It is important progress that the Indonesian court heard the issues. In his case, and that of Lindsay Sandiford, there was no indication that New Zealand or England investigated the THB issues at their end. Indeed, Lindsay Sandiford was denied legal assistance, and her judicial review of this decision failed. Reference was made to her co-operation with authorities but not to the coercion.⁸² It is more than unfortunate that the THB issues were not considered in her case by the executive or the judiciary.

The concern highlighted in these death penalty cases is that the failure to address the conflict between drug trafficking laws with human rights commitments creates a legal question which needs urgent resolution. A consequence of the failure to do so is that exploited individuals will continue to be treated as criminals, rather than recognized as victims.

A. Human Trafficking Under Indonesian Law

Having made assertions on the global approach, it is important to consider the efforts Indonesia has made to tackle human trafficking. Indonesia has ratified the Trafficking Protocol through the passing of the Trafficking in Persons law, Number 21 of 2007.⁸³ 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. As set out above, Article 18 provides mandatory protection for victims by stating: “A victim who commits a crime under coercion by an offender of the criminal act of trafficking in persons shall not be liable to criminal charges.”⁸⁴ Victims are defined in Article 1(3) as “a person suffering from

81. Statement by the Indonesian delegation to the 57th Session of the UN Commission on Narcotic Drugs, online: <https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_57/HLS/Statements/Thurs_13th_AM/20_Indonesia_130314_am.pdf>.

82. *R (on the application of Sandiford) v. The Secretary of State for Foreign and Commonwealth Affairs* [2014] U.K.S.C. 44.

83. *The Eradication of the Criminal Act of Trafficking in Persons, Law of the Republic of Indonesia No 21 of 2007*, online: <<http://www.warnathgroup.com/wp-content/uploads/2015/03/Indonesia-TIP-Law-2007.pdf>>.

84. *Ibid.*, art. 18.

psychological, mental, physical, sexual, economic, and/or social trauma caused by the criminal act of trafficking in persons”,⁸⁵ which somewhat limits the application of the protective provisions and is not consistent with the Trafficking Protocol. It is here that Indonesia can lead by defining its own law on “trauma” to include those coerced, manipulated, deceived, or otherwise the subject of abuse of vulnerability.

In 2008, the Indonesian government produced a Defence White Paper which defined the response to trafficking in terms of the eradication of trafficking-related crime, and of the protection of national sovereignty from transnational organized crime syndicates.⁸⁶ 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.⁸⁷

The Indonesian 2007 Trafficking in Persons Law defines human trafficking in a manner consistent with the Trafficking 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.⁸⁸

This open-ended list of types of exploitation is expanded on by subsequent Articles and reflects the non-punishment elements of the international law set out above. Article 18 states: “A victim forced to commit a crime by human traffickers, [shall] not be convicted.”⁸⁹ This Article makes it plain that one of the contemplated end-purposes of human trafficking is the commission of crime by a victim of trafficking. Consequently, this must be considered as being one of the forms of exploitation covered by Article 1(7). This therefore leads to the conclusion that human trafficking for forced criminal activity is a form of trafficking recognized under Indonesian law. “Force” ordinarily implies the threat or use of violence. However, it is arguable that when the provision is read in terms of being a form of exploitation, as per Article 1(7), then the term “force” should be understood in the sense of meaning “an unavoidable outcome” which results from the application of one or more of the acts done by way of one or more of the means set out in Article 1(1). It is here that we begin to see how Indonesia has made legislative effort to

85. *Ibid.*, art. 1.

86. *Buku Putih Pertahanan Negara 2008: Mempertahankan Tanah Air Memasuki Abad 21 [Indonesian Defense White Paper: Defending the Nation Entering the Twenty-first Century]*, White Paper published by the Indonesian Defense Department (2008), online: <<http://www.thejakartapost.com/news/2016/06/16/reviewing-indonesia-s-new-defense-white-paper.html>>.

87. *Pengarahan Presiden Republik Indonesia Pada Acara Menerima Para Peserta Rapim TNI dan Rakor POLRI Istana Negara*, Ministry of Communication and Information Indonesia (MENKOMINFO) (29 January 2009), at 116.

88. *Ibid.*, fn 88.

89. Authors' translation.

implement international treaties, going further than the judicial intervention of the UK as set out above.

Drug trafficking is a serious problem in Indonesia, as is human trafficking.⁹⁰ Both have resulted in mandatory legislation. Both laws are now in conflict, and exposed by the cases on death row. The need for Indonesia to address the legislation also highlights the need for effective referral mechanisms so that credible evidence can be obtained of the status of the person as a human trafficked victim without any inquiries being affected by poor systems or corruption.

It has already been noted that “Technically and juridically, the obligation to obtain sufficient preliminary evidence in handling criminal cases becomes obstacle to the police. Added with, witness who do not want to to give testimony in disclosing human trafficking. The reluctance of the witnesses to give testimony are caused by several matters, which are:

1. The hearing process are complicated and take a long time;
2. There is no safety guarantee for the witness from every kind of threat;
3. Less care from agencies to the witness so that witness becomes scared or reluctant to deal with law enforcement agencies;
4. Reason of time and cost are specific obstacles for the witness to deal with law enforcement agencies.

Moreover, prosecutors in making submissions as to sentence can have significant influence over judicial decision making which may well not reflect the perspective of the affected defendant. The difficulties in the process of investigation and enquiry have wide impact to further process of law. Therefore, trafficking becomes serious problem, which is hard to be disclosed.”⁹¹

The difficulties have been recognized in Indonesia as compounded because victims of human trafficking feel reluctant to report that s/he is a victim, particularly when s/he may have committed a criminal act.⁹² In this context, no assumptions should be made about drug mules, as it is the evidence that matters. It follows that Indonesia has created laws which are designed to protect victims but which are not being applied in the drug trafficking context.

B. *Drug Trafficking Under Indonesian Law*

Indonesian law sets out several offences related to drug trafficking. Indonesia’s Law on Production, Transit, Import and Possession of Narcotics, Law No. 22 of 1997 on Narcotics, and its Law on Production, Transit, Import and Possession of Psychotropic Drugs, Law No. 5 of 1997 on Psychotropic Drugs, domesticates the penal provisions in

90. Nathalina NAIBAHU, “Human Trafficking in Indonesia: Law Enforcement Problems” (2011) 11 *Indonesian Law Review* 83 at 91.

91. *Ibid.*, at 92–3.

92. *Ibid.*, at 94.

the UN Drug Trafficking Conventions.⁹³ They typically criminalize the actions of owning, keeping, controlling, proving, producing, importing, exporting, distributing, offering to be sold, purchasing, receiving, being an intermediary within a transaction, bringing, dispatching, transporting, and transiting.⁹⁴ Many are apparently committed by the mere act of importation or possession, etc. On the face of the legislation there is no mental element.

The importance for Indonesia is that the argument needs to be raised on behalf of their own citizens abroad, as well as in relation to foreign nationals and others apprehended within Indonesia. The consequence is that without such consideration, there is no apparent scope to divert victims of THB post-charge, or to not punish those already convicted. It is here that the courts (at trial or appeal stages) need to be able to resolve the conflict between the domestic legal provisions. How can this be achieved?

In each of our case examples, in the light of the international and national context set out above, the relevant courts can be invited to acquit for one or more of the following reasons:

- The defendant is not guilty of the charges relating to [set out the narcotics offence] because he was a victim of human trafficking for the purpose of forced criminal activity. Through the operation of the element of deception (or other means) applied against him by his/her traffickers, the defendant's ability to fulfil the physical requirements for the offence was negated as his/her physical act was not voluntary (s/he lacked the freedom and capacity to choose to act); and/or
- The defendant is not guilty of the charges relating to [set out the narcotics offence] because he was a victim of human trafficking for the purpose of forced criminal activity. Through the operation of the element of deception (or other means) applied against him by his/her traffickers, the defendant's ability to fulfil the fault requirements for the offence of drug trafficking was negated either:
 - o Because any mental element is vitiated by the control (etc.) of others;
 - o Because he/she did not know he/she was carrying narcotics.
- To resolve the conflict between the drug trafficking and human trafficking provisions (relevant to the case in hand) the defendant is afforded a complete defence and returned to the status of victim/witness;
- To mitigate sentence or allow an appeal for the same reasons.

The justification for the above approaches can be based on an involuntariness argument (physically and mentally). At no time was the defendant in control of the

93. *Single Convention on Narcotic Drugs*, 30 March 1961, 520 U.N.T.S. 151 (entered into force 13 December 1964), at art. 36(1); *Convention on Psychotropic Substances*, 21 February 1971, 1019 U.N.T.S. 175 (entered into force 16 August 1976), at art. 22; and *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 1582 U.N.T.S. 95 (entered into force 11 November 1990), at art. 3.

94. See e.g. art. 122-5 of Law No. 5 of 1997, with regard to Group III drugs.

process. Through the process of deception, the traffickers intended to exploit the labour of the defendant.

The procedural issue is that the investigators have either failed to investigate pre-charge, or the prosecution have failed to take into account information that would ordinarily result in a decision not to bring a prosecution, or credible evidence that the defendant is a trafficked victim emerges post-charge. This ought to be enough to lead to acquittal on the basis we have set out, or at the very least for a court to stop the proceedings or allow an appeal. Of course, legislating a defence of human trafficking would have a similar effect, but we recognize that this could take time, and issues of uniformity and harmonization of laws transnationally between source and destination countries are outside the scope of this paper. Having cases which focus on all of the potential issues puts Indonesia at the front of a global movement to combat human trafficking, and it is uniquely placed to initiate change for exploited people through law.

VIII. CONCLUSION

Although this is a relatively novel form of human trafficking, trafficking for forced criminal activity has been recognized by states both regionally and internationally, through research, statements by governments, specific legislative provisions providing for the non-prosecution of victims of trafficking for status-related offences, and cases brought before judicial bodies. It is not being consistently enforced in the context of criminal justice, which undermines any effort to combat transnational human trafficking.

The English Court of Appeal in *L., H.V.N., T.H.N., and T. v. R* noted that trafficking for forced criminal activity was a manifestation of the “vile trade in people”,⁹⁵ and held that the criminal activities committed by the victim were integrally related to the circumstances in which he was a victim. The Court overturned the convictions. In addition, human trafficking for forced criminal activity has been accepted by the United Nations High Commissioner for Refugees [UNHCR]⁹⁶ and the UNODC,⁹⁷ as well as the European Union, which has issued a Directive which deals specifically with human trafficking for criminal activity.

It is plain that Indonesia is committed to tackling the exploitation of people, but this is not merely a question of funding arrangements. There needs to be a legal approach and attitudinal change to the treatment of drug mules. The proper legal approach must prevent the exploited being treated as criminals, and ensure that, where there is credible evidence, they are approached as victims of organized crime. This stance is not particular innovative: “Rather, it reflects basic principles recognised in most national legal systems relating to responsibility and accountability for criminal offenses.”⁹⁸

95. [2013] EWCA Crim 991, at [1].

96. See United Nations High Commissioner for Refugees [UNHCR], “Conference Puts Focus on Human Trafficking, Fastest Growing Criminal Industry” *UNHCR Press Release* (11 October 2010), online: UNHCR <<http://www.unhcr.org/4cb315c96.html>>.

97. UNODC, “Drug Mules: Swallowed by the Illicit Trade” *UNODC*, online: UNODC <http://www.unodc.org/southasia/en/frontpage/2012/october/drug-mules_-swallowed-by-the-illicit-drug-trade.html>.

98. Gallagher, *supra* note 12 at 288.

In any event, if the courts in a particular country find that they cannot import such principles without legislative change, then there should be no sentence on conviction so that the defendant is returned to the status of victim/witness. It is only by taking such principled legal approaches that drug mules can truly be recognized and treated as human trafficked victims.