

Input for the Report on the implementation of the non-punishment principle to the United Nations Special Rapporteur on trafficking in persons, especially women and children.

Submitted by Professor Felicity Gerry QC

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To srtrafficking@ohchr.org

Purpose: To inform Ms. Siobhán Mullally's report to be presented to the 47th session of the Human Rights Council, June 2021.

Annexure: list of publications to inform Ms. Siobhán Mullally's report to be presented to the 47th session of the Human Rights Council, June 2021.

Summary: This submission makes 7 key points **supported by publications** as set out in the annexure for consideration by the Special Rapporteur, Ms. Siobhán Mullally. It is based on my current PhD candidature by publication, my role as Professor of Legal Practice at Deakin university and my experience as an International Queen's Counsel admitted in more than one jurisdiction.

- (i) States need to ensure that the visibility of women is not just as victims. This includes improving visibility of women as professionals in justice systems. **See book chapters and articles attached in annexure, particularly Felicity Gerry, 'Practitioner perspective: Feminism in court – practical solutions for tackling**

the wicked problem of women's invisibility in criminal justice' in Susan Harris Rimmer and Kate Ogg (eds), *Research Handbook on Feminist Engagement with International Law* (Edward Elgar Publishing, 2019) 399

- (ii) States have a reciprocal duty to protect citizens who retain allegiance to the state. This includes repatriation of women and children in Syrian camps which can be met by Habeas Corpus. See intervention in Shamima Begum – written case [here](#) and supplementary submissions [here](#)
- (iii) States need clear policy not to allow investigations to doubly victimise trafficked persons by the way in which an investigation is carried out, particularly by the use of technology. **See book chapters and articles attached in annexure, particularly Felicity Gerry, 'Module 14: Trafficking in Persons and Smuggling of Migrants / Cybercrime' (Speech, Educating for the rule of law, United Nations Office on Drugs and Crime, 8 October 2019) AND Felicity Gerry, Julia Muraszkievicz and Niovi Vavoula, 'The role of technology in the fight against human trafficking: reflections on privacy and data protection concerns' (2016) 32(2) *Computer Law & Security Review* 205.**
- (iv) States need to implement policy not to prosecute trafficked persons who commit crime. This is not complete. For example, Australia has a national action plan but no prosecutorial policy. **See See book chapters and articles attached in annexure and see below taken from my forthcoming publication.**
- (v) States need to implement a criminal defence for trafficked persons who commit crime. This is a structural necessity as most states do not have domestic laws which cover the field (as expressed by the UN Trafficking Protocol) AND without a formal criminal defence there is no protection for trafficked persons if a 'bad' or 'incorrect' decision is made to prosecute. **See book chapters and articles attached in annexure, particularly Felicity Gerry, Siva Vallabhaneni and Peter Shaw, 'Game Theory and the Human Trafficking Dilemma' (2019) *Journal of Human Trafficking* (online, 16 December 2019) <<https://www.tandfonline.com/doi/abs/10.1080/23322705.2019.1688086>>.**
- (vi) The current trend is to legislate domestically for a compulsion model which is contrary to the principle of protection. It inevitably means that a trafficked person

suffers harm before the defence is available. A causation model is preferred. My research has established a method for defining and judging autonomy by a 'free, informed and deliberate' which does not appear to have been addressed before. **See book chapters and articles attached in annexure and see below taken from my forthcoming publication.**

- (vii) Some jurisdictions, even when they have a 'Modern Slavery' defence (such as the UK) also exclude certain offences from protection. This reflects a policy not to apply a 'Modern Slavery' defence for serious offences such as murder. This does not provide sufficient protection for trafficked persons, particularly alleged accessories who are commonly prosecuted and convicted for being complicit when they do not in fact commit the principal offence. Again, such decisions to prosecute should not be left to policy but alleged accessories should be protected. **See book chapters and articles attached in annexure and see below taken from my forthcoming publications.**

Bio: Professor Felicity Gerry QC is admitted at the International Criminal Court and the Kosovo Specialist Chambers in The Hague, to the Bar of England & Wales and in Australia (Victoria and the High Court Roll). She has also had ad hoc admission in Hong Kong and Gibraltar. As an international QC she is regularly called upon to handle serious, complex and sensitive trials and appeals at every level of court. Her cases and advisory work often involve an international or human rights element. She is most well known for her experience in cases of complicity having led the appeal which corrected an error in the common law in *R v Jogee* [2016] UKSC 8 but her practice includes **defending trafficked persons who commit crime at trial and on appeal and vulnerable persons accused of terrorist acts. This has included [assisting in the reprieve from execution for Mary Jane Veloso](#) on death row in Indonesia when she raised her trafficked status and defending a [vulnerable man accused of conspiring to commit the Christmas Day bomb plot](#) in Australia. Felicity also [leads the intervention on behalf of JUSTICE in the UK Supreme Court in the Shamima Begum appeal](#), raising the duties of states to trafficked persons.**

Felicity holds a Bachelor of Laws, a Master of Laws in International Governance and a Graduate Certificate in University Teaching and Learning (GCUTL). She is Professor of Legal Practice at Deakin University, Melbourne where she is unit chair in the undergraduate and JD programs teaching Contemporary International Legal Challenges – including ‘**Modern Slavery (criminal and civil law issues)**’, **War Crimes and Terrorism (including terrorism and trafficking persons)**).

Felicity has a particular interest in the non punishment principle in relation to human trafficking, especially women and girls. She has contributed to the [UNODC E4J platform by authoring Module 13 on the intersection between human trafficking, smuggling of migrants and cybercrime](#). She also contributed as an expert to the 2020 UNODC Case analysis Report [Female Victims of Trafficking for Sexual Exploitation as Defendants](#)

Felicity has provided training to the Commonwealth Parliamentary Association *Modern Slavery Project* and the *Bangladesh Judiciary Management Project*. She has been involved in submissions to Governments leading to changes in the law on Modern Slavery. She recently led a death penalty study for the *Commission of Human Rights for the Philippines* on human trafficking and the death penalty and previously led a four -year project on *Women in Prison* for Halsbury’s Law Exchange (part of the Lexis Nexis group). She has also led a small *Indigenous Justice and Exoneration Project*. She has been involved in a number of projects and policy submissions and is widely published in the fields of human rights, women and law, technology and law and reforming justice systems. She contributes to the *Research Handbook on Feminist Engagement in International Law, Human Trafficking and Modern Slavery Law and Practice* and is widely published on the use of technology to tackle human trafficking and reform of justice systems in relation to non -prosecution of trafficked persons who commit crime.

Submission: This section **does not** cover the use of technology by states which doubly victimise trafficked persons which is set out in summary above and in the publications. This section does not cover the submissions in the Shamima Begum case which is summarised above where the links are provided.

This submission BELOW deals with only 2 issues provided in summary ABOVE (the others are summarised and supporting publications in the annexure):

- (i) The need for a causation model that provides a legal test for autonomy**
- (ii) An explanation of complicity to explain why defences should include at least accessories to serious crime.**

CAUSATION AS A SOLUTION TO PROTECTION BY A LEGAL TEST FOR AUTONOMY (FOCUS ON DEATH PENALTY).

This is a summary taken from a forthcoming publication and a preliminary paper presented to the ANZSIL Gender Sexuality and International Law Special Interest Group Series on 5 November 2020. As [Australia](#) and [New Zealand](#) develop policy for the protection of trafficked persons, this article calls for a legal defence for trafficked persons which recognises the loss of autonomy which comes with being trafficked. It also calls for an audit of prisons globally to identify and exonerate women trafficked to commit crime, particularly those on death row.

In 2015, Mary Jane Veloso [was reprieved](#) from execution in Indonesia on the same death row as Australians Andrew Chan and Myuran Sukumaran. She was reprieved 30 minutes before she was due to be shot because she raised her status as a trafficked person who had been deceived into carrying drugs from the Philippines to Indonesia. Her trafficked status had not been considered at trial. Her lawyers in the Philippines used the human trafficking referral mechanisms to identify her recruiters who have [since been convicted](#) of trafficking others. The [Philippine Supreme Court](#) has recently decided that she can give evidence in her case against the recruiters from prison in Indonesia by deposition, as a form of dying declaration as she is on death row. She is likely one of many trafficked women in prison, including on death row, around the world for drugs offences. A [study](#) in the UK led to reduced penalties for drug mules. Australia and New Zealand are in a good position to go further and move the issue from mitigation of sentence to non-liability. Both Australia and New Zealand have also committed to the abolition of the death penalty so each should be looking to its trafficked

citizens at home and abroad - on death row and detained elsewhere, such as in [Syrian camps](#). Domestic commitments are ineffective if trafficked persons are prosecuted and executed abroad.

Our recent [study](#) of a proposal to restore the death penalty in the Philippines for human traffickers highlighted not only how this would be a breach the 2nd Optional protocol to the ICCPR but also how it failed to comprehend the complexities of human trafficking law, particularly the principle of non-punishment. In April 2020, a United Nations Inter-Agency Coordination Group against Trafficking in Persons briefing [paper](#) set out recommendations for a more consistent, human rights-based application of the non-punishment principle which has been defined as follows:

‘Trafficked persons should not be subject to arrest, charge, detention, prosecution, or be penalized or otherwise punished for illegal conduct that they committed as a direct consequence of being trafficked.’

Non-punishment requires law reform to move from prosecuting criminals to non-prosecution of trafficked persons who commit crime. Indonesia has committed to the non-punishment principle by Article 18 of Law 21 of 2007 on the Eradication of the Criminal Act of Trafficking in Persons issued by the Ministry of Women’s Empowerment and the Department of Justice which reads as follows:

Article 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.

The exoneration of Mary Jane Veloso is therefore both a question of international commitments to protect and assist trafficked persons but also of the application of domestic law. In Australia and New Zealand, in the absence of human trafficking as a legal defence, it is highly likely that trafficked women are currently facing trial without proper consideration of their trafficked status and have already been incarcerated in circumstances where they should not have been. This is not just a question of exercising a prosecutorial discretion not to charge but of having legal frameworks in place whenever there is an attempt to criminalise a trafficked person. It also requires a mechanism for appeals even where the time limit has passed.

Mary Jane Veloso's case also adds to the research by the Cornell Center on the Death Penalty Worldwide. Its report, [*Judged for More Than Her Crime, A Global Overview of Women Facing the Death Penalty*](#), found that women who are sentenced to death are subjected to multiple forms of gender bias, with women seen as violating entrenched norms of gender behaviour more likely to receive the death penalty. In criminal justice systems this is a [common tale](#) for women in conflict with the law.

In the context of women trafficking drugs abroad, the international commitment to protect trafficked persons, in the form of the U.N. Trafficking in Persons Protocol, challenges criminal justice systems which seek to act as both prosecutor and protector. Since there are now mechanisms and experts who can assess trafficked status, the practical approach to the implementation of international commitments to protect and not to prosecute trafficked persons is relatively simple:

- Use prosecutorial discretion not to prosecute trafficked persons who commit crime, because they have been exploited through the means and purposes of others ([see UK CPS here](#)).
- Make sure there is a complete defence for trafficked persons who commit crime if a decision is made incorrectly to prosecute (see below).
- Identify those persons already wrongly convicted and imprisoned and secure their release and exoneration. This requires an audit of prisons and, from the Cornell study, is particularly urgent on death row.
- Seek the return of trafficked citizens on death row as part of the duty to protect national subjects (as above).

This article considers the underlying approach to exoneration for trafficked women. I argue that this is an issue that calls for the recognition of women's autonomy.

In 2013, [Hoshi](#) considered 'two prisms through which the principle of non-criminalisation has been interpreted: (1) causation-based, which requires that the criminal act be a *direct result* of the trafficking situation; and, (2) compulsion-based, which requires that the criminal act is committed under a high degree of pressure from the trafficker(s).' Hoshi argued that the compulsion -based model provides insufficient protection for trafficked persons because it 'fails to grasp the subtle and nefarious methods by which traffickers can exert total dominance over trafficked persons' and

also ‘fails to recognise that a clear causal relationship between the criminal act and the trafficked status of the trafficked person may remain even after the trafficking situation has ended.’ There is an additional point which is that, in the context of human trafficking, any duress type model, whether policy (as Australia) or law (as the UK, Indonesia and Australia), effectively requires a trafficked person to suffer significant harm before any defence kicks in. The UK now has a complete defence in [s. 45 of the Modern Slavery Act 2015](#) for trafficked persons who commit certain offences based on the compulsion model. [Schedule 4 excludes a range of serious offences](#), including for accessories, even though they may well be significantly exploited. Pre-2015 convictions have been quashed on appeal, [not by extending duress](#) but on a policy-based compulsion model. Protection is therefore incomplete as the prosecution of crime takes precedence over the protection of trafficked persons. Australia can do things differently and set an example for other states.

In 2016, [research](#) into Mary Jane Veloso’s case suggested that the conceptual basis for her exoneration was that she was acting pursuant to the means and purposes of others and therefore was not acting voluntarily. The Indonesian law is a compulsion model as victim is defined in Article 1 as someone who has suffered harm or trauma caused by the trafficker. More recently, in [an appeal in England and Wales](#) which involved the manslaughter of a young woman by supply of a dangerous diet pill, the Court quashed the conviction following arguments that the actions of ingestion had the potential of being an intervening act, if they were ingested autonomously. The consideration of women’s autonomy in criminal law is rare but it complements and extends Hoshi’s research on causation, suggesting that the trafficked person does not cause the crime because they are not acting autonomously even if they consent to certain acts. They act pursuant to the means and purposes of others. In this sense a trafficked person is much more akin to an [innocent agent](#) but where it is accepted that the trafficked person remains trafficked when deceived and / or when they lack the freedom or capacity to act autonomously.

The point is that the cause of the crime is the trafficker, and the trafficked person does not break that chain of liability, providing the offence committed is reasonably foreseeable, not where a trafficked person commits a separate offence of their own. This return to traditional criminal law principle is useful: as long ago as 1959, [Hart and Honoré](#) emphasized the significance of free,

deliberate, and informed interventions for breaking the chain of causation. The criterion which they suggest should be applied in such circumstances is whether the intervention is voluntary, i.e. whether it is 'free, deliberate and informed.' But for women, it is more about autonomy than voluntariness because sometimes they make choices due to external factors of vulnerability, rather than being subject to duress as it is usually understood, and still fall within the definition of a trafficked person by, for example, abuse of vulnerability.

In Mary Jane Veloso's case, it is arguable that her acts were not free, informed or deliberate: the trafficked person may act deliberately but remain trafficked if they are deceived because they are not 'informed'. Compulsion to commit an offence is relevant because the person is not 'free'. This essentially negates the elements of the offence without the need for a defence, although a legal defence could spell this out clearly in order to ensure protection is complete. The impacts on autonomy are not limited to duress, compulsion or victimhood. They also extend to a woman deciding to commit a crime because of a situation of vulnerability relating to external economic of family or abusive factors. She may well be 'deliberate' and she may 'consent' to commit the crime but criminal responsibility lies firmly with the traffickers if she is not free, informed and deliberate.

Unless state laws, policies and procedures allow for safe confession by women to crimes with a non-liability outcome, the focus remains on criminal punishment of women who are not free (under duress/threats etc.), not informed (deceived) or not deliberate (involuntary). Here, abuse of vulnerability includes an acceptance that, even when a suspect knows she is committing a crime or consents to certain conduct, such as when she acts for the means and purposes of drug traffickers, she is not the cause of the crime and is not liable and not to be investigated as a suspect.

For women on death row, the research by the Cornell Center becomes instructive and demonstrate that trafficked women can be identified applying the criteria of 'free, informed and deliberate' as questions of fact, providing a foundation for non -prosecution and release. In the end the solution is for Australia to lead in the formulation of a complete defence for trafficked persons who commit crime based on causation as a voluntariness model, for Indonesia to release and exonerate Mary Jane Veloso and for all nations to review their laws and audit their prisons to release women whose autonomy has been compromised.

The Cornell Center hopes that its publication ‘will inspire the international community to pay greater attention to the troubling plight of women on death row worldwide’. The research set out in this article considers the necessity to identify the particular cohort of women on death row who are trafficked persons and to ensure they are exonerated and released without being re-trafficked. I argue that the issue is one of women’s autonomy, but criminal justice systems are still a long way behind. If Australia and New Zealand do not enact defences based on the causation / autonomy model suggested here, as signatories to UNTOC Human Trafficking Protocol, Australia and New Zealand are failing to comprehensively implement the commitments to protect and assist trafficked persons.

COMPLICITY AS A COMPLEX AREA OF LAW THAT CAN RISK CONVICTIONS OF THOSE WITH LITTLE CONNECTION TO A CRIME.

The scenario of an accessory not directly participating in a crime brings to light how the law of complicity works in practice and how we can approach the position of those commonly referred to as ‘on the periphery’ when they are trafficked persons. The decision by the UK Supreme Court in *R v Jogee* [2016] UKSC 8 put an end to parasitic accessorial liability (PAL) where a person who embarked on one crime could be convicted on subjective foresight of the possibility of a second crime. This had developed after the abolition of the felony murder rule which still exists in other jurisdictions where a person who embarks on a felony and the consequence of a death is an objectively foreseeable consequence. Both tests have led to expansive liability and to mass incarceration of those with little or no contribution to the crime but were vulnerable and their involvement was caused or directed by others, particularly in organized crime. The issue of complicity is particularly complex in cases involving drug trafficking where an individual may be deceived into carrying drugs or they know they are carrying drugs but they are exploited as trafficked persons.

The prosecution case

The phrase “joint enterprise” should generally now be avoided. Precision in the alleged mode of complicity ought to be key: *Jogee* was highly critical of the expression “joint enterprise liability”, with the UKSC emphasizing it was not a legal term of art and had a propensity to be misunderstood ‘to be a form of guilt by association or of guilt by simple presence without more’.¹ Yet it does still appear in a prosecutor’s lexicon. Putting a case on the basis that accused persons were ‘obviously in it together’ is also improper. It is a narrative not applicable since the abolition of constructive liability for murder in 1967. The modern law looks for subjectivity. In the context of liability as an accessory, their Lordships in *Jogee* were very clear that the prosecution must prove knowledge of the ‘essential facts’ and acts which demonstrate an intention to assist or encourage that crime. In murder this means the word intention may arise three times but not in exactly the same context – intentional (in the sense of deliberate) conduct, an intention to assist or encourage a known crime and, in murder, that is a crime where a principal intends to kill or cause really serious harm. Post *Jogee*, it remains possible to put a case on the basis that the accused acted as joint principal offenders although (with the exception of *Murder on the Orient Express*) that can be hard to prove. In *Regina v Dean Malcolm Lewis, James Marshall-Gunn* [2017] EWCA Crim 1734 this led to a successful submission of no case to answer and a failed appeal against that terminating ruling. Without doubt, it remains permissible post-*Jogee* to put cases on the basis of a shared intention, but such an approach requires precision: individuals who act pursuant to a shared intention (that the crime be committed) can still take on different roles, and the prosecution ought to make it clear, whenever possible, whether it is alleged that an individual acted with a shared intention to commit the crime or acted with a shared intention to assist or encourage others to commit the crime (*R v CN* [2020] EWCA Crim 1028). Post *Jogee* ‘shared intention’ appears to be the liability of choice for prosecutors who, instead of seeking a crime A / crime B scenario, seek to prove that everyone was ‘in it together’ and the purpose was violence. In drug deals, robberies and burglaries ‘gone wrong’ this is often unhelpful. An imprecise approach has repercussions for the prosecution. It means that CPS statistics will be skewed, as charges for murder that should not have been pursued for some accused persons are being recorded as ‘failures’. It is a worrying background to what will no doubt later be claimed to be a ‘problem’ with the criminal justice system. Meanwhile approaching every case as a ‘shared intention’ case risks the liberty of those wrongly accused of murder, particularly in cases where juries are invited to draw inferences from scant evidence. The

¹ *Jogee* at [77].

real issue is knowledge, as an individual cannot intend to assist or encourage an offence they do not know about. To even form the intention to assist or encourage one needs to know about the principal offence. Knowledge is either an element of complicity which the prosecution must prove, or knowledge of the essential facts is essential to proof of intention. Either way it is key and must be left to the jury. In cases where the perpetrator remains unknown, this means s/he must have been one of the group. In this sense, subjective knowledge of the essential facts is not merely an evidential requirement, it requires proof. In *Bassett (Jordan)* [2020] EWCA Crim 1376 it was acknowledged that proof must be of sufficient strength to rebut other possibilities, such as panic, and, if not, there is no case to answer. In *Johnson* [2016] EWCA Crim 1613, despite the rather shocking interpretation of the substantial injustice test and the high hurdle it imposes on anyone who would wish to challenge their PAL conviction, the Court of Appeal at least re-emphasised the need for prosecutors to be precise. It is no longer acceptable to take a ‘wait and see’ approach.

Understanding Foresight

In *Jogee*, their Lordships restored foresight to its proper role as possible evidence of intention. It is the use of foresight or contemplation that may have caused more recent confusion, as Leveson LJ recently sought to explain in *Tas* [2018] EWCA Crim 2603. It is no longer acceptable to leave a case to a jury on the basis that there was a common purpose to assault or rob (crime A) and it was foreseen that a co-defendant would use a knife / cause really serious harm or death (crime B). This would be to restore parasitic accessory liability expunged by the UK Supreme Court in *Jogee*. For liability to follow, an alleged accessory must *know* the essential facts of the crime to come, it is not enough that he “must have known”.² Their Lordships in *Jogee* also specifically preserved the principle of overwhelming supervening act (OSA) as a break in the causative link and /or a question of remoteness. It is possible *for death to be caused* by some overwhelming supervening act by the perpetrator which nobody in the defendant’s shoes could have contemplated might happen and is of such a character as to relegate his acts to history; *in that case the defendant will bear no criminal responsibility for the death*.³ Causation is not normally needed to establish liability as an accessory (save in cases of procuring), and perhaps it is best to think about OSA as a remoteness principle. As a test for remoteness, it gives power to judges to stop cases at half time.

² See also *National Coal Board v Gamble* [1959] 1 QB 11 and *Johnson v Youden* [1950] 1 KB 544.

³ *Jogee* [2016] UKSC 8, [2017] AC 387 at [97-98].

In cases where someone is not a direct participant or somehow ‘on the periphery’, the likely issues are (a) knowledge or (b) that the further events were not a surprise or escalation. In those cases that get past half time OSA is a serious consideration to be left to the jury. The language of putting oneself in the shoes of the accused and considering whether his / her acts are made so insignificant by a subsequent act or event as to relegate these to history is the UK Supreme Court’s best effort at ordinary language as a test for trial judges and juries to follow. For example, it will be key to a stabbing where only one person uses a weapon, including for an alleged driver where the events take place outside a car. This is a practical example of how their Lordships in *Jogee* put a brake on expansive liability as a matter of law and how judges can make decisions about which cases to leave to a jury. After expunging parasitic accessorial liability, the UK Supreme Court gave trial judges the power to control which cases are left to the jury and how juries can safely consider evidence through the framework of conduct, knowledge, intention in relation to the alleged crime and when the actual events on the day may be an OSA. Sometimes there is sufficient proof and sometimes there is not, it behoves prosecutors not to overcharge and defence counsel to challenge routine use of ‘shared intention’ as a basis for liability.

Used properly the framework in *Jogee* should differentiate between those who are autonomous or not but the issue of trafficking has not been directly addressed so, it is submitted that a human trafficking defence should be extended at least to accessories to serious crime, including murder.

A handwritten signature in black ink, appearing to read 'Felicity Gerry QC', with a long, sweeping underline that extends to the left and then curves back under the signature.

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