

Submissions for the Working Group on Arbitrary Detention's study on arbitrary detention relating to drug policies

March 2020

1. Introduction

Justice Centre Hong Kong ("Justice Centre") appreciates this opportunity to provide submissions to the Working Group on Arbitrary Detention ("WGAD")'s study on arbitrary detention relating to drug policies.

We wish to draw the WGAD's attention to the exploitation, criminalisation and consequent detention or imprisonment of potential or actual victims of human trafficking and other victims of exploitation in the drug trade as observed in Hong Kong. Our submission responds to the following issues within the WGAD's questionnaire:

- People belonging to disadvantaged groups who are convicted and imprisoned for drug-related offences; and
- Emerging trends in drug-related detention and policy that should be addressed by the study.

As detailed herein, these submissions are therefore being made with reference to the mandate of the WGAD¹; and, specifically it's remit to:

*"...investigate cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the relevant international legal instruments accepted by the States concerned"*²

2. Human trafficking for criminal exploitation

The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons ("Trafficking Protocol") defines human trafficking as:

"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 the 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."³

As such, the constituent elements of human trafficking are: an act (such as recruitment and transportation), via a means (such as deception or the abuse of power of a person in a vulnerable position), for the purpose of exploitation. The Trafficking Protocol

¹ UN Commission on Human Rights, "Question of arbitrary detention" (5 March 1991) E/CN.4/RES/1991/42; Human Rights Council, "42 / 22. Arbitrary detention" (8 October 2019) UN Doc. A/HRC/RES/42/22.

² UN Commission on Human Rights, "Question of arbitrary detention" (5 March 1991) E/CN.4/RES/1991/42, at [2].

³ Trafficking Protocol, Article 3.

includes a non-exhaustive list of examples of exploitation, but does not otherwise define exploitation⁴.

International anti-trafficking instruments, such as the 2011 European Union Directive on Trafficking in Human Beings, includes “exploitation of criminal activities” within its list of exploitation purpose. The term is understood as “the exploitation of a person to commit to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain”⁵. Under this definition, exploiting a person for the purpose of drug trafficking would amount to human trafficking⁶.

Nonetheless, the exploitation of vulnerable people for the purpose of criminal activities is rarely addressed within the framework of human trafficking. The lack of awareness about this type of exploitation means that victims are often misidentified as offenders and not offered protection⁷. Further, as discussed herein, victims may be subjected to criminal prosecution and excessive criminal sentencing.

Maria Grazia Gimmarino, the Special Representative and Co-ordinator for Combatting Trafficking in Human Beings, of the Organisation for Security and Co-ordination in Europe (“OSCE”), describes the prosecution and punishment of trafficking victims for crimes committed “as a direct consequence of their trafficking” as being “...a very stark violation of the human rights of victims and frankly speaking, one of the most appalling injustices”⁸.

3. Human trafficking for exploitation in the drug trade in Hong Kong

In Hong Kong, there is credible evidence that potential victims of human trafficking are exploited to commit drug-related offences. In Justice Centre’s exploratory study *Not Stopping Here: Hong Kong as a Transit Site for Human Trafficking*, one case involved a woman who was arrested and charged in Hong Kong for drug-related offences. In interview, she claimed she was asked by her boyfriend, whom she thought was a

⁴ See Trafficking Protocol Article 3(a): “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 the removal of organs”.

⁵ 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, Article 2(3) and explanatory note (11).

⁶ See also, United Nations Office on Drugs and Crime, “Issue Paper: *The Concept of ‘Exploitation’ in the Trafficking in Persons Protocol*” (2015). P 11, 38.

⁷ Human trafficking generally entails acts amounting to serious human rights violations, constituting persecution and requiring non-refoulement protection including within the scope of Article 33 of the Refugee Convention; see for example, *SB (PSG – Protection Regulations – Reg 6) Moldova CG* [2008] UKIT 00002; *SZBFQ v Minister of Immigration* [2005] FMCA 197; *Matter of M-J* CGRS Case No. 364 (China), BIA 30 March 2001. See also: United Nations High Commissioner for Refugees, “Guidelines on International Protection: the application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked”, UN Doc. HCR/GIP/06/07 (7 April 2006); and UNHCR, “Guideline on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees”, UN Doc. HCR/GIP/02/01 (7 May 2002).

⁸ OCSE, “Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking” (June 2013). P 7.

businessperson in the trading business, to take clothing items from Guangzhou, China to Kuala Lumpur, Malaysia via Hong Kong. The clothing items were in fact drugs⁹.

Justice Centre also interviewed Father John Wotherspoon, a Hong Kong-based priest assisting people who have been tricked into trafficking drugs. Father Wotherspoon revealed that he had assisted a number of people arrested in Hong Kong who had been deceived or coerced into carrying drugs through Hong Kong on the way from South America or Africa to Mainland China¹⁰. The recruitment of potential victims appears to be gender-specific: men are usually deceived into drug trafficking through friendship, while women are usually deceived by intimate partners.

A similar pattern of exploitation is reported by the United States Department of State's 2019 Trafficking in Persons ("TIP") Report: "Reports indicated drug trafficking syndicates coerced South American women, who were subsequently arrested by Hong Kong authorities, to carry drugs into Hong Kong"¹¹. A specific case involving the exploitation of a Venezuelan woman is discussed below.

Further, there are media reports of Mainland Chinese women apprehended in Malaysia who were deceived into trafficking drugs by intimate partners. The Malaysian Chinese Association noted that between 2013-2015 over 20 Chinese women who claimed to be deceived into bringing drugs into Malaysia were arrested or convicted¹².

The exploitation of human trafficking victims for drug related offences has also been observed in Europe¹³, Central Asia¹⁴ and Africa¹⁵.

4. Legal framework in Hong Kong

4.1 Prosecution of trafficking victims

Hong Kong is not a signatory to the Trafficking Protocol, and there is no comprehensive law against human trafficking. The *Prosecution Code*, which is a set of instructions prepared by the Department of Justice to guide prosecutors, provides:

⁹ Justice Centre Hong Kong, "Not Stopping Here: Hong Kong as a Transit Site for Human Trafficking" (January 2019). P.10.

¹⁰ Not Stopping Here, p. 14. See also Simon Parry, "Hong Kong priest's mission to save drug mules from a system that favours kingpins" South China Morning Post (18 March 2018) <https://www.scmp.com/print/magazines/post-magazine/long-reads/article/2137465/hong-kong-priests-mission-save-drug-mules-system>

¹¹ "Hong Kong: Trafficking Profile" in United States Department of State, "Trafficking in Persons Report" (June 2019). P. 229.

¹² See Gao, M. and Nan, Z. [transliteration], "Many Chinese girls are suspected of committing drug crimes in Malaysia and may be sentenced to death" [article in Chinese] (25 April 2018). <https://bit.ly/32UJ1oN> and Louise Moon, "Chinese drug mule facing death penalty in Malaysia trial could be latest victim of trafficking ring" (27 April 2018) <https://www.thestar.com.my/news/regional/2018/04/27/chinese-drug-mule-facing-death-penalty-in-malaysia-trial-could-be-latest-victim-of-trafficking-ring>

¹³ See for example, RACE, "Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory Study and Good Practice Examples" (September 2014).

¹⁴ See for example, Louise Shelley, "The Relationship of Drug and Human Trafficking: A Global Perspective", *Eur J Crim Policy Res* (2012) 18:241–253 (May 2012).

¹⁵ Ibid.

“In appropriate cases, a prosecutor should consider a credible claim that a defendant or intended defendant is a victim of trafficking. If such a claim is found, a prosecutor should appropriately deal with the case bearing in mind that the person is a victim of trafficking. In this regard, reference can be made to applicable international standards and practices concerning victims of trafficking”.¹⁶

However, when asked to provide statistics on the application of the said provision in the Prosecution Code, such as the number of individuals who have been identified by prosecutors as having credible claims as victims of trafficking, the Department of Justice advised that they do not maintain such information¹⁷.

Justice Centre has observed that potential cases of human trafficking are not identified as such, with victims consequently prosecuted for drug-related offences committed as a result of their exploitation. Two recent judgements suggest that the authorities, including the Courts, fail to recognise the presence of significant human trafficking indicators¹⁸.

Case 1: HKSAR v Dang Hung Ngoc and Vu Dinh Nguyen¹⁹

Vu and Dang, two Vietnamese men, were convicted of cultivating cannabis plants in Hong Kong²⁰.

Vu is a 23-year-old man who entered Hong Kong illegally via China. He was offered work by a man who took him to a villa to water cannabis plants and clean the premise. A key that could open the padlock of the main entrance to the villa was found in Dang’s room, indicating Vu may be kept in the villa by Dang. The starting point of his sentencing was *enhanced by 6 months* for his illegal immigrant status. He was sentenced to 7 years 8 months²¹.

Dang is a 66-year-old naturalised British citizen who entered Hong Kong with a visitor’s permit. He met a woman who offered him a cleaning job with food and accommodation at the said villa. Dang claimed he did not call the police upon detecting the smell of

¹⁶ Department of Justice, “Prosecution Code” (2013) at [18.2]. Available at: <https://www.doj.gov.hk/eng/public/pubsoppapcon.html>

¹⁷ Department of Justice, “Human Trafficking: Prosecutions” *Access to Information Request* (November 2019). Available at: https://accessinfo.hk/en/request/human_trafficking_prosecutions#incoming-1209

¹⁸ While the presence of human trafficking indicators does not prove or disprove human trafficking, their presence should lead to investigation: UNODC, “Human Trafficking Indicators”. Available at: https://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf

¹⁹ *HKSAR v Dang Hung Ngoc and Vu Dinh Nguyen* [2019] HKCFI 1954 (Court of First Instance).

²⁰ There is a well-established link between cannabis production and human trafficking; for example see note 13 above and Amelia Gentleman, “Trafficked and enslaved: the teenagers tending UK cannabis farms”, *The Guardian* (25 March 2017). Available at: <https://www.theguardian.com/society/2017/mar/25/trafficked-enslaved-teenagers-tending-uk-cannabis-farms-vietnamese>; “How a boy from Vietnam became a slave on a UK cannabis farm”, *BBC* (21 January 2020). Available at: <https://www.bbc.com/news/stories-51176958>

²¹ Note 19.

cannabis after a week of being employed at the villa as he was afraid and could not speak Chinese²². He was sentenced to 8 years and 6 months.

Case 2: *HKSAR v Gutierrez Alvarez Keishu Mercedes*²³

A Venezuelan woman was convicted of trafficking cocaine into Hong Kong and sentenced to 25 years' imprisonment.

She alleged she was tricked into leaving Venezuela for Brazil after applying online for an advertising job. When she arrived in Brazil, she was met by a man who detained her in the home of another man for a month and a half, where she was ill-treated, beaten and frequently raped. She was then coerced into taking substances, which she alleged she did not know were drugs, to Hong Kong via Abu Dhabi. The man threatened to kill her family members if she did not comply. She was also told she would be watched from her arrival at Hong Kong airport until her arrival at the hotel²⁴. The issue of human trafficking was raised in an unsuccessful application to permanently stay the proceedings.

In this regard, it is noteworthy that the 2019 TIP report specifically recommended Hong Kong cease penalising victims of trafficking for unlawful acts inherent within and/or resulting from their exploitation.²⁵

4.2 Sentencing regime

Furthermore, Hong Kong's sentencing regime for drug offences is draconian. It is one of the few jurisdictions to not make any distinction with regard to the accused's role and seniority within a drug operation in sentencing²⁶. This means "drug mules" or couriers, who may be victims of trafficking, receive harsh custodial sentences. For instance, the starting point for a person convicted in Hong Kong for trafficking in 5 kg of cocaine is 26 years 4 months, regardless of their role in the operation²⁷.

In comparison, other common law jurisdictions such as England and Wales and Australia, have adopted a proportionality basis in sentencing, taking into account the offenders' role in the operation, among other factors²⁸. For example, in England and Wales, the starting point for a person convicted for trafficking in 5 kg of cocaine, who committed the offence under coercion or exploitation and hence had a substantially lesser role in the operation, is 8 years²⁹.

While the exploitation of couriers may not always fall within the strict legal definition of human trafficking, the imposition of harsh custodial sentences on all offenders

²² Note 19 and *HKSAR v Dang Hung Ngoc* CACC 217 /2019, [2020] HKCA 167 (Court of Appeal), at [3] – [8]. Dang's case is on appeal.

²³ *HKSAR v Gutierrez Alvarez Keishu Mercedes* CACC 320/2016; [2020] HKCA 184 (Court of Appeal).

²⁴ Note 23 at [11]- [19]

²⁵ Note 11 at p. 227.

²⁶ *HKSAR v Kilima Abubakar Abbas* CACC 143/2016; [2018] HKCA 602 (Court of Appeal).

²⁷ Sentencing tariffs in *R v Rojas Pedro* [1994] 2 HKCLR 69 and *HKSAR v Abdallah Anwar Abbas*

²⁸ Sentencing Council for England and Wales, "Drug Offences Definitive Guideline" (2012); State of Victoria, Sentencing Advisory Council, "Major Drug Offences: Current Sentencing Practices" (17 March 2015).

²⁹ See note 28, "Drug Offences Definitive Guideline", p 3 – 8.

regardless of their role nonetheless may amount to arbitrary detention in violation of relevant international human rights standards, including the prohibition on arbitrariness in legal procedures (under the International Covenant on Civil and Political Rights (“ICCPR”) Article 9, for example), and the prohibition on cruel inhuman or degrading punishment or treatment (under ICCPR Article 7 and Convention against Torture, for example)³⁰.

5. Principle of non-criminalisation of trafficking victims

Although the Trafficking Protocol does not explicitly grant immunity from criminal prosecution to trafficked persons, the principle of non-criminalisation of victims is enshrined in other instruments and accepted as integral to protecting victim’s rights³¹. For instance, the United Nations High Commissioner for Human Rights (“OHCHR”)’s *Recommended Principles and Guidelines on Human Rights and Human Trafficking* provides as follows:

“Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and 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

As such, prosecution and prolonged detention of human trafficking victims for drug-related offences, committed as a result of their trafficking may be in contravention of international human rights standards, including but not limited to the prohibition on arbitrariness and the prohibition against cruel, inhuman and degrading treatment or punishment discussed above.

6. Conclusion

In light of the issues discussed above, Justice Centre asks the WGAD to look into the detention and imprisonment of human trafficking victims, and the draconian sentencing of those who are otherwise victims of exploitation for drug-related offences in Hong Kong for its study. Justice Centre invites the WGAD to provide recommendations where necessary, in particular on the following areas:

- Discuss the need for States to fulfil their obligations under international human rights law to combat human trafficking and offer protection to trafficking victims in their laws and policies relating to drug crimes.

³⁰ See for example discussion in Dirk van Zyl Smit and Andrew Ashworth, “Disproportionate Sentences as Human Rights Violations”, *The Modern Law Review*, Vol. 67, No. 4 (Jul., 2004), pp. 541-560. Hong Kong courts considered the issue of arbitrariness in *HKSAR v Godson Ugochukwu Okoro* CACC 222/2015; [2019] HKCA 158 (Court of Appeal) but decided the existing sentencing guidelines were not arbitrary.

³¹ See for example UNODC, “A Human Rights-Based Approach to Trafficking in Persons: the principle of non-criminalisation of victims” (May 2019). Available at: <https://www.unodc.org/e4j/en/tip-and-som/module-8/key-issues/principle-of-non-criminalization-of-victims.html>

³² OHCHR, “Recommended Principles and Guidelines on Human Rights and Human Trafficking” (2003), at [7].

- Discuss the need for States to prohibit the prosecution of trafficking victims who were involved in drug crimes as a result of their situation as trafficked persons.
- Discuss the need for States to bring periods of imprisonment and/or sentencing guidelines for drug crimes in line with international standards, in particular international human rights standards

About Justice Centre Hong Kong

Justice Centre Hong Kong is a non-profit organisation focused on the promotion of human rights through our legal, psychosocial, research, policy and advocacy work. We are committed to driving change for a just and fair society. Founded in 2007 as The Hong Kong Refugee Advice Centre, over seven years we helped over 2,000 men, women and children on the road to a new life. Building on our expertise in refugee issues, in 2014 we identified a clear need for an increased response to tackling forced labour and human trafficking in Hong Kong, and expanded our remit to fill this gap and rebranded as Justice Centre Hong Kong. We now help around 300 people each year through our direct services and aim to benefit many more through our research, policy and advocacy work.