

# Implementation of the Non-Punishment Principle for Victims of Human Trafficking in ASEAN Member States

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I consider this report to be hugely important in terms of the development of our legal analysis of the difficulties in implementing and ensuring implementation of the principle of non-punishment in international law.

I am particularly grateful that this report examines the challenges around implementation and application of the principle in the ASEAN region and is so comprehensive in pointing to the specific challenges that arise in practice and the recommendations which inform practitioners, policy makers and legislators; all of the actors that are critical in ensuring a more effective application of the principle.

”

United Nations Special Rapporteur on Trafficking in Persons,  
Especially Women and Children,

Professor Siobhán Mullally





# Foreword

## from Representative of Indonesia to AICHR

As an overarching body that is responsible to promote and protect human rights, the ASEAN Intergovernmental Commission on Human Rights (AICHR) is tasked to mainstream human rights across the ASEAN Communities, including on the measures to tackle trafficking in persons, especially women and children. It is in the interest of AICHR to sure that human rights are central in the efforts to prevent human trafficking, prosecute its perpetrators and protect its victims.

While the safety of the victims and their families is the paramount consideration, reducing the possibility of reprisal against them should always be the feature in protecting the rights of the victims. It is equally important to extend the protection to all victims who are also witnesses. Merging the measures of protecting witnesses and victim protection with appropriate supports, will not only increase the chance to obtain their cooperation but also assist countries in complying with their international human rights obligations.

In my capacity as the Representative of Indonesia to AICHR, I came across the situation where the status of being the victims of trafficking has often been downplayed or renounced in favour or treated as illegal immigrants or even criminals, which denies them from the promise of protection. I also received a number of reports that the traffickers exposed the victims to the risk of criminalisation and manipulate them for criminal activities in relation to the specific forms of exploitation. As a result, a number of trafficking victims end up detained, prosecuted, convicted and deported without being given due consideration to their victim status.

In all of these scenarios, critical assessment of human trafficking of the victim and carefully listening to their grievances are critical, and the victim is protected and not prosecuted or punished in violation of their right to respect for their human rights. The right to non-punishment can be considered as the heart of victims' human rights protection at the international, regional, and national legal framework in addressing trafficking in persons. In fact, it must be given high-level prominence since it relates to the undeniable legal right of the victim to be protected by law.

In ASEAN, the principle of non-punishment of victims of trafficking is guaranteed in the 2015 ASEAN Convention against Trafficking in Persons, Especially Women and

Children (ACTIP). Its Article 14(7) requires States Parties to “consider not holding victims of trafficking criminally or administratively liable”. Furthermore, Article 13 of the 2012 ASEAN Human Rights Declaration (AHRD) explicitly affirms that no one shall be subject to trafficking in persons, and Article 2 sets out the principle of non-discrimination on the basis of race, gender, age, language, religion, political or other opinion, national or social origin, economic status, birth disability or other status, which is very important in the application of the non-punishment principle for victims of trafficking.

In addition, Article 3 of the AHRD states the equality of every person before the law without discrimination, and to equal protection before the law, Article 5 states the rights of victims for ‘an effective and enforceable remedy’ for any violation of their rights’, and their right to a fair trial including the presumption of innocence, and the right to a defence (Article 20(1)). These provisions reinforce that the implementation of the non-punishment principle is essential to granting trafficking victims the protection they are legally entitled to, while at the same time preventing their re-trafficking and supporting our efforts to punishing traffickers.

At the national level, the principle of non-punishment of victims of trafficking is also found in the ASEAN Member States’ legal framework to combat trafficking in persons. Nevertheless, its application is essential to support victims to restore their dignity, reputation and exert and enjoy their rights.

Accordingly, I am delighted to welcome the ASEAN-Australia Counter Trafficking study on *implementation of the non-punishment principle for victims of human trafficking in ASEAN Member States*. I found the analysis, findings and recommendations that offered by this publication are not only timely and strategic but also speak the language of human rights, which are coherence with AICHR’s work in mainstreaming human rights in ASEAN and meet with the need of AICHR in dealing with paradigm shift in addressing trafficking in persons across the ASEAN.

I thank ASEAN-Australia Counter Trafficking program for their commitment in addressing trafficking in persons, especially women and children and look forward to strengthen our collaboration to give effect to the non-punishment principle, as we work together to design and implement victim-oriented initiatives, together with ASEAN sectoral bodies and ASEAN Member States.



**H.E. Yuyun Wahyuningrum**

**Representative of Indonesia to the ASEAN Intergovernmental Commission  
on Human Rights (2019-2021, 2022-2024)**

# Foreword

## from SOMTC Leader - Philippines

The ASEAN community is seized of the threats posed to its security by transnational crimes. Trafficking in persons – a particularly pervasive and insidious form of transnational crime – poses acute risks to ASEAN Member States and their citizens. Yet for its perpetrators, trafficking remains a high benefit, low-risk crime, yielding significant profits each year, with minimal risk of detection and prosecution. As traffickers enjoy impunity, it is very often that victims are the ones suffering from civil, administrative and even criminal consequences.

Across the region and beyond these countries where ASEAN citizens are trafficked, victims may even face punishment for fraudulent documentation, for illegally crossing borders, or for staying or working irregularly. They may be prosecuted for their involvement in the sex industry, the fishing industry, and others. They may even be prosecuted as traffickers if they are not identified and protected as victims. Where victims are exploited to commit crimes, serious penalties may result; their exploitation in drug production or drug smuggling, or even in armed conflict or terrorism may result in corporal or capital punishment. These grave concerns remind us of the urgency with which we must act to ensure that our responses to trafficking in persons do not violate the rights of the persons affected by them, who are often the most vulnerable among us.

We have tools in the ASEAN region to protect victims from punishment for the offences relating to trafficking. By virtue of the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP), Member States resolve to protect and assist victims with full respect to their human rights, including those set out in the ASEAN Human Rights Declaration. The ACTIP requires States to consider not holding victims criminally or administratively liable for unlawful acts that directly relate to trafficking. The ASEAN community is thus united in its resolve to ensure that counter-trafficking response is human-rights based and victim-centered. Implementation of the non-punishment principle is critical to that commitment.

The Senior Officials Meeting on Transnational Crime (SOMTC) Philippines as the Chair of the SOMTC Working Group on Trafficking in Persons, commends the ASEAN-Australia Counter Trafficking Program for this important and timely study on implementation of the non-punishment principle for victims of human trafficking in ASEAN Member States. The robust consultations that took place to inform all concerned assure us that its findings are anchored on expertise and experience within the ASEAN region. Its recommendations align with our vision to counter trafficking through mutual assistance, shared understanding and common commitment to human rights. We look forward to working with partners across the region to implement these recommendations as part of our collective effort to bring transnational criminals to justice, while protecting victims.



**H.E. Undersecretary Bernardo C. Florece, Jr.**

**SOMTC Leader – Philippines**

**Chair, SOMTC WG on TIP**

**Manila, 21 February 2022**

# Executive Summary





The non-punishment principle sets out that victims of trafficking should not be prosecuted or otherwise punished for unlawful acts they commit as a consequence of trafficking. It does not offer blanket immunity, but is a critical tool for victim protection and human rights-based criminal justice response to human trafficking.

This study explores laws, policies and practices to implement the non-punishment principle across ASEAN Member States, and canvasses practical challenges and barriers that have been encountered in criminal justice practice. Its findings and recommendations are offered to legislators, policy makers and criminal justice practitioners, to support their ongoing efforts to fulfill obligations to protect victims of trafficking in accordance with their human rights, prevent trafficking in persons, and to cooperate to these ends.

This study was informed by a desk review of material from the ASEAN region and elsewhere and 12 roundtable discussions held in 6 countries (Philippines, Cambodia, Viet Nam, Lao PDR, Thailand and Indonesia). A total of 196 persons participated in these discussions, comprising 122 government and 74 non-governmental representatives. Additionally, four individual experts provided inputs in writing or through in-depth discussions.<sup>1</sup>

## Sources of the non-punishment principle

**International law and policy:** The non-punishment principle is not explicitly contained in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Trafficking Protocol) nor the United Nations Convention against Transnational Organized Crime (UNTOC). However, it is increasingly understood as a core component of human rights-based victim protection and assistance, including in the *Recommended Principles and Guidelines on Human Rights and Human Trafficking* of the Office of the United Nations High Commissioner for Human Rights. That understanding has gained significant traction; it has guided the discussions of the Working Group on Trafficking in Persons under the Conference of the Parties to the United Nations Convention against Transnational Organized Crime,<sup>2</sup> been championed in reports of the Special Rapporteur on Trafficking in Persons,<sup>3</sup> and even Security Council Resolutions have called for States

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<sup>1</sup> The study also benefited from the author's participation in events related to the non-punishment principle. The author served as a participant and a facilitator at a consultation workshop convened on 4-5 February 2021 by the Special Rapporteur on Trafficking in Persons, especially Woman and Children, to inform the Special Rapporteur's report: *Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullaly*, UN Doc. A/HRC/47/34 (17 May 2021). The author also participated in a roundtable side event to the 47<sup>th</sup> Session of the Human Rights Council, on 30 June 2021, 13:00 – 14:30 CET, hosted by ICAT and OHCHR, titled *Non-punishment of victims of trafficking: A roundtable on the application of the principle of non-punishment for victims of trafficking* <https://aseanactpartnershiphub.com/resources/video-non-punishment-roundtable/>. The author is grateful for these opportunities to gather global insights.

<sup>2</sup> *Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking: Background paper prepared by the Secretariat*, Vienna 27 – 29 January 2010, UN Doc. CTOC/COP/WG.4/2010/4 (9 December 2010), para 10.

<sup>3</sup> *Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro*, 6 April 2020, UN Doc A/HRC/44/45, para. 36; *Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullaly*, UN Doc. A/HRC/47/34 (17 May 2021)

not to punish victims of trafficking.<sup>4</sup> Commitment to the non-punishment principle has also been reaffirmed in the *2021 Political Declaration on the Implementation of the United Nations Global Plan of Action to Combat Trafficking in Persons*.<sup>5</sup> The principle is also clearly captured in international law in specific relation to forced or compulsory labour; article 4(2) of the 2014 *Protocol to the Forced Labour Convention No. 29* entitles authorities not to prosecute victims for their involvement in unlawful activities they have been compelled to commit as a direct consequence of being subject to forced or compulsory labour. Article 31 of *1951 Convention Relating to the Status of Refugees*, also may be relevant for trafficked persons who seek asylum. That article prohibits the imposition of penalties on refugees on account of their illegal entry or presence in a country.

**Regional law and policy:** In Asia, the *ASEAN Convention against Trafficking in Persons, especially Women and Children* (2015), lays out that States parties (being all ten ASEAN Member States) shall consider not holding victims criminally or administratively liable for unlawful acts directly related to the acts of trafficking (Article 14(7)). The principle is given effect by the *ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children*; the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) *Gender Sensitive Guidelines for Handling Women Victims of Trafficking in Persons*, and the *ASEAN Practitioner Guidelines on Criminal Justice Response to Trafficking in Persons* (2007). Additionally, some bilateral MOUs between ASEAN Member States include non-punishment provisions, though may limit protection to only some victims (e.g. women and children) or only to specified offences (e.g. immigration related offences). At the sub-regional level, the Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT) *Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region and Guidelines on Victim Identification and Referral Mechanisms* (2016) upholds the non-punishment principle.

In Africa, the non-punishment principle finds explicit articulation in law and policy instruments including the *Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children* and the *10 Year SADC Strategic Plan of Action on Combating Trafficking in Persons, Especially Women and Children* (2009-2019).

In the Americas, Conclusions and Recommendations of meetings of Organisation of American States recognise the principle. In line with its Trafficking Victims Protection Act of 2000, the United States Department of States considers the extent to which victims are protected from punishment as a criterion for assessing other States in its Trafficking in Persons Report.

In Europe, the Organization for Security and Cooperation in Europe (OSCE) *Action Plan to Combat Trafficking in Human Beings* recommends 'ensuring that victims of trafficking

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<sup>4</sup> See Security Council Resolution 2331 (2016); Security Council Resolution 2388 (2017).

<sup>5</sup> 2021 Political Declaration on the Implementation of the United Nations Global Plan of Action to Combat Trafficking in Persons, UN Doc A/76/L.11, 9 November 2021 [13].

are not subjected to criminal proceedings solely as a direct result of them having been trafficked' (decision 557/Rev.1). The Council of Europe Convention against Trafficking in Human Beings provides for the possibility of not penalising victims for their involvement in activities to the extent they were compelled (Article 26). European Union *Directive 2011/36/EU of the European Parliament and of the Council* protects victims from prosecution or punishment for a non-exhaustive list of criminal activities (Recital 14), that they were compelled to commit as a direct consequence of their trafficking (Article 8). The Directive also recognises exploitation in criminal activities as a form of exploitation that victims may be trafficked into (Recital 11). In April 2021, a landmark judgment emerged from the European Court of Human Rights in the case of *V.C.L and A.N. v The United Kingdom*, finding the United Kingdom in violation of its European Convention of Human Rights obligations for prosecuting victims of human trafficking (Box 4).

**Domestic law and policy:** The enactment of clear statutory provisions on non-punishment, is a widely recognised good practice to give effect to the non-punishment principle.<sup>6</sup> Of the ten ASEAN Member States, seven have non-punishment provisions in their anti-trafficking legislation. In Europe, the Group of Expert on Action against Trafficking in Human Beings (GRETA) noted that by the end of 2019, of the 42 States who had completed a second evaluation round, only 17 had adopted specific non-punishment provisions.<sup>7</sup>

States take different approaches to establishing the relationship between a victim's unlawful conduct and his or her trafficking in their national legislation. Some require that the victim was compelled to participate in the activity and others require that acts were a direct consequence of the trafficking. Some experts consider the latter approach, known as the 'causation' model, to be preferable because it is broader and easier to prove than the 'compulsion' model, which requires that the means used by the trafficker to compel the victim be proven. This compulsion approach is also not considered practical in the case of child victims, for whom means are not required. Both models are further explained at p.33.

Five of the seven ASEAN countries that have captured the non-punishment principle in their legislation, adopt a causation model (Brunei Darussalam, Lao PDR, Malaysia, Myanmar and the Philippines). Only Indonesian legislation takes a compulsion approach, requiring that the trafficker coerce the victim. Thailand takes a different approach, requiring that written permission be sought from the Minister of Justice to prosecute the victim for a specified list of offences. Legislation in Cambodia, Singapore and Viet Nam do not contain explicit non-punishment provisions. In most countries in the region, the scope of protection from punishment only applies to a select list of offences, whether immigration

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<sup>6</sup> *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons*, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (15 June 2020), paragraph 46.

<sup>7</sup> Conference of the Parties to the UNTOC, Report on the meeting of the Working Group on Trafficking in Persons (10 - 11 September 2020), UN Doc. CTOC/COP/WG.4/2020/4, 28 September 2020, paragraph 34.

and document-related (Brunei Darussalam, Malaysia); illegal immigration and prostitution (Lao PDR); immigration, prostitution, document or work-related offences (Thailand); or trafficking in persons offences (Myanmar). In Indonesia and the Philippines, protection from punishment is not limited to specified offences. While the provisions in law were considered to contribute to a general understanding of non-punishment, few examples could be found of them being specifically evoked in practice.

## Interpretation of the non-punishment principle

**Establishing the link between the offence and the trafficking:** How the link is established between the victim's unlawful actions and his or her trafficking, is understood differently between countries and also within them. Questions were raised about when a victim should and should not be punished, and when a person ceases to be a victim for the purpose of benefiting from the non-punishment principle. Across the study countries, the point at which the link is severed is contentious. It was generally held that protection should cease where the person is no longer under influences that interfere with choice to commit offences or not. Even in jurisdictions that adopt a causation model, the prevailing view was that a person should not be prosecuted for offences they were compelled to commit, but should be prosecuted for those that they did willingly. On this, it was noted that 'force' and 'threat' may not capture the subtle psychological tactics traffickers use to manipulate victims, meaning compulsion should be broadly interpreted to capture the full range of 'means' used by traffickers.

**Divergent views on the scope of protection:** Some respondents expressed concern about provisions capturing only some offences (primarily immigration and prostitution-related offences) and argued for amendments to capture all offences that a victim of trafficking may commit in the course of being trafficked. Others expressed strong aversion to an expanded approach, being of the view that the gravity of an offence should be relevant to this assessment. Those respondents felt that victim-offenders should be prosecuted for serious crimes, particularly in relation to drug-related offences. Opinions varied on situations where victims graduate to become traffickers themselves and the point at which a victim-turned-trafficker should be prosecuted. A minority view was that the purpose of the protection, is to encourage victims to cooperate and those who do not should not be immune from prosecution.

**The need for guidance to interpret the non-punishment principle:** No evidence could be found that existing regional or domestic policy or guidance documents are used to support the interpretation and application of the non-punishment principle. However, there was widespread enthusiasm expressed for the need for guidance to be developed to harmonize understanding of the principle. Respondents stressed that such guidance should be made available to practitioners throughout the criminal justice process, including in remote and regional areas, to close gaps in awareness and capacity between central,

regional and provincial levels. Suggestions were made to provide guidance to reconcile inconsistencies between different legislative instruments and to instruct frontline officials (police, immigration officials and labour inspectors) to apply the non-punishment principle at the outset to protect offenders from the point they are identified as potential victims of trafficking.

## Application of the non-punishment principle

**Non-punishment provisions in law are rarely applied in practice:** The non-punishment principle is widely recognized as a component of victim-centred response to trafficking in persons, but is inconsistently applied in practice. Where victim-offenders are not prosecuted, it is rarely as a result of explicit reference being made to domestic non-punishment provisions, or its use as a defence against a charge laid. However, even in jurisdictions where the non-punishment provision applies to an exhaustive list of offences, examples were offered of victims *not* being punished for unlawful acts they commit in the course of being trafficked, including but not only those listed in legislation. Some respondents were resolute that (identified) victims of trafficking have never been prosecuted, citing examples of victim status trumping perpetrator status in determining how a person is treated, again though, not as a direct result of applying specific legislation. Others offered several examples of victims being prosecuted for activities related to their trafficking.

**Role of criminal justice practitioners:** Respondents explained that criminal justice practitioners have significant discretion in whether to lay or pursue charges, with some notable barriers vis-à-vis the implementation of the non-punishment principle. Criminal justice practitioners may be unfamiliar with or lack sufficient understanding of the non-punishment principle, its purpose and their role in applying it in practice. This is true not only in the ASEAN region, but has been pointed to elsewhere.<sup>8</sup> Capacity building efforts on counter-trafficking in general and non-punishment in particular were considered to be uneven. Not all stakeholders in the criminal justice system receive counter-trafficking training, and particularly those in provincial, rural or remote areas may not receive training they require. This is true in ASEAN and in other regions too.<sup>9</sup>

Respondents explained that practitioners are likely to be more comfortable to pursue charges in the *Criminal Code*, then to *not* pursue them on the basis of anti-trafficking law. Another challenge raised was the fact that not prosecuting offenders is contrary to the

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<sup>8</sup> For instance, GRETA has noted a lack of awareness as a persistent problem in EU Member States, owing to deficiencies in training on the non-punishment principle and victim identification more generally. See Ryszard Piotrowicz, "Article 26, Non-punishment provision" in Julia Planitzer and Helmut Sax (eds.) *A Commentary on the Council of Europe Convention on against Trafficking in Human Beings* (Edward Elgar, 2020) 318, referring to various GRETA reports.

<sup>9</sup> Michelle Koinange, Coalition Coordinator, Stop the Traffik, Kenya, speaking on the principle of non-punishment of victims of trafficking in persons, being a side event to the 47<sup>th</sup> Session of the Human Rights Council 30 June 2021, 13:00 – 14:30 CET. Author's notes on file.

function of criminal justice practitioners: the role of prosecutors is to prosecute. The same point was made with respect to immigration officers whose primary responsibility is to identify those who commit violations of immigration law, not victims of serious crime. Even when non-punishment provisions are in place, an attitudinal shift is therefore required for criminal justice practitioners to see individuals as victims rather than as offenders.<sup>10</sup> A related challenge arises from performance being measured by punishments secured rather than avoided. Thought therefore needs to be given to how practitioners can be incentivised to apply the non-punishment principle, and avoid accusations of negligence in their duties where they opt to not pursue prosecution.

**When the non-punishment principle applies in practice:** In theory, the non-punishment principle applies at all stages of the criminal justice process, but this theory is challenging to apply in practice. Questions emerge about the relationship between parallel processes of identifying potential victims and investigating potential traffickers. It was generally agreed that the principle should apply at the earliest point an offender is recognised as a potential victim of trafficking, and not be made conditional on a formal victim status determination process being completed, nor on a charge being laid or a prosecutorial outcome reached against a trafficker. Failing that initial protection, it is difficult to remove a person from the criminal justice system once they have entered it as an offender, though practitioners noted some opportunities to do so up to the mitigation of sentences as a last resort where an offender is identified as a victim but still convicted as a perpetrator.

**When the non-punishment principle should not apply in practice:** Some concerns were raised that the non-punishment principle could be misused to protect victims from prosecution for offences wholly unrelated to their trafficking, or be misapplied to protect people who are not victims of trafficking. Some respondents also expressed the view that the principle should be guarded against misuse to protect victims who repeatedly or habitually commit offences. These concerns speak to the critical importance of raising counter-trafficking capacity among criminal justice practitioners, and understanding of the interplay of its constituent elements.

## International cooperation challenges

**Uneven application of non-punishment in bilateral agreements:** Many bilateral agreements within the ASEAN region explicitly reference non-punishment, but no examples were found of these having been applied in practice. The importance of harmonized understanding between countries of origin and destination was flagged as key. Notably, states need to agree on who is a victim, and recognise those who are positively identified elsewhere. Concerns were raised about significant protection gaps in bilateral agreements, which often only apply to limited offences (immigration and prostitution) and only to a select category of victims (women and children), pointing to discriminatory

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**10** Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge, 2010) 502



application of the principle. Questions were also asked about the practicalities of applying non-punishment provisions contained in a bilateral agreement, in the absence of similar provisions in domestic legislation.

**Practical challenges in international cooperation:** Respondents raised examples of procedural challenges involved in allowing a convicted victim of trafficking in one country to testify against traffickers in another, resulting in prolonged punishment (see Box 5), and in returning victims from one country to another to avoid their prosecution in either. Jurisdictional challenges were flagged in complex transnational trafficking cases – including outside the ASEAN region. Exploitation in the maritime context was noted as posing particularly complex jurisdictional challenges. The importance of practitioner-to-practitioner level cooperation not just within ASEAN but also beyond it was stressed as a means of overcoming barriers, including with the support of actors such as ASEAN-Australia Counter Trafficking program and the United Nations Office on Drugs and Crime (UNODC) to support cooperation and communicate best practice.

## Victim identification challenges

**Victim identification is critical to non-punishment of victims of trafficking:** Early and effective identification of victims is critical to their protection from punishment for unlawful acts they have committed as a direct consequence of being trafficked. This study affirmed that non-identification of victims is a key reason many are prosecuted. It is widely accepted that victims who are identified as such, should not be prosecuted for unlawful acts they commit in the course of being trafficked. Context may determine whether charges are pursued or not; where a person is encountered as a victim and a perpetrator simultaneously, charges may not be pursued for minor offenses, but it may be unlikely that a person charged with an offence will be subsequently identified as a victim.<sup>11</sup> Recognition of a person's victim status may even be tied to his or her willingness to cooperate with police.<sup>12</sup>

**Some contexts, including 'raids' are detrimental to identification:** Misidentification happens in the course of law enforcement operations at places where trafficked persons may be living and working, or when potential victims of trafficking go to police for help and are instead criminalized.<sup>13</sup> Failure to identify victims during 'raids' carried out at establishments where sex work takes place, is widely noted. Victims are also unlikely to be identified in immigration management processes where authorities treat potential victims as irregular migrants, and charge them for immigration and document-related offences

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<sup>11</sup> Carolina Villacampa and Núria Torres, Human trafficking for criminal exploitation: Effects suffered by victims in their passage through the criminal justice system, *International Review of Victimology*, 2019, Vol. 25(1) 3–18, at 12.

<sup>12</sup> Carolina Villacampa and Núria Torres, Human trafficking for criminal exploitation: Effects suffered by victims in their passage through the criminal justice system, *International Review of Victimology*, 2019, Vol. 25(1) 3–18, at 8.

<sup>13</sup> See for instance, *Undeserving victims? A community report on migrant sex worker victims of crime in Europe* (ICRSE, 2020) 27–29

without recognising that they may be victims. The risk is exacerbated in contexts where there are hostile policies towards undocumented migrants that may influence approaches taken by frontline officers.<sup>14</sup> This conflation of counter-trafficking with migration regulation has been noted in the ASEAN region, resulting in trafficked persons being identified and deported as irregular migrants.<sup>15</sup>

**Victims unlikely to be unidentified once they enter the criminal justice system as offenders:** Once victims enter the criminal justice system as offenders, it is difficult to divert them into protection channels thereafter, and impossible to protect them from the punishment they have already endured within it. Concerns were raised across the study countries that law enforcement officers, prosecutors, defenders and trial judges may lack requisite skill to recognise that the offender before them may be a victim of trafficking. Under-identification outside the context of sexual exploitation was flagged for attention, as were the gender dimensions involved in the under-identification of male victims and the stigmatization of females involved in sex work.

**Measures urgently required to address identified challenges:** Respondents stressed the need to sensitize practitioners at all levels of criminal justice response, including by strengthening understanding of the definition of trafficking in persons, and the interplay of its constituent elements for both adults and children. Notably, understanding of the use of subtle means and the irrelevance of consent where means have been used, were noted as key to effective identification. Robust screening processes need to be applied at the first stage that indicators of potential trafficking are identified. Proactive use of Standard Operating Procedures (SOP)s, qualified interpreters and multi-stakeholder approaches involving NGOs to strengthen screening processes were also stressed as necessary for identifying potential victims among irregular migrant workers. Practitioners emphasised the importance of applying the presumption that a person is a victim before a full determination can be made, as a safeguard against prosecution. Age can be the difference between a person being prosecuted as a perpetrator or protected as a victim. Accordingly, the presumption of minority until age can be determined was pointed to as a recognised good practice to protect children from punishment.

**Victim non-punishment and protection key to victim identification:** Not only is victim identification critical for non-punishment, but so too does non-punishment aid victim identification. Where victims are treated as perpetrators, they are deterred from seeking help from or communicating with police. Conversely, where victims are treated and protected as victims rather than perpetrators and are informed of their right not to be punished for unlawful acts committed in the course of being trafficked, they are more likely to engage with authorities, allowing for more effective identification. These realities

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<sup>14</sup> *Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro*, 6 April 2020, UN Doc A/HRC/44/45, 35.

<sup>15</sup> Marija Jovanović, *International Law and Regional Norm Smuggling: How the EU and ASEAN Redefined the Global Regime on Human Trafficking*, *The American Journal of International Law*, 2021, Vol. XX, 1, 19



highlight the importance of rights-based approaches to victim protection and assistance. Related to these realities, respondents noted that a key challenge to victim identification is that many victims may not want to be identified as victims, because they do not want to cooperate with authorities nor stay in shelters. Where victims' preference is to be treated as offenders rather than as victims, there is clearly urgent need to assess the protection and assistance models in place.

## Victim punishment in practice

**Victims punished for a range of offences in practice:** This study affirmed that immigration-related and prostitution-related offences are among the most prevalent offences victims are arrested, charged, prosecuted and convicted for in the ASEAN region, as elsewhere. Victims have also been prosecuted for criminal activities they are trafficked to commit, including drug-related offences. They have been prosecuted for offences they commit in the course of trying to escape their situation, including assault or even manslaughter. And where victims graduate to take on trafficking roles in a bid to escape their victimization, they have been prosecuted for trafficking offences.<sup>16</sup> The punishment of victims of trafficking in the fishing industry was raised as a key concern in many countries, including for immigration, document and labour offences, as well as for illegal, unreported or unregulated (IUU) fishing. Respondents also pointed to challenges raised in cases of victims trafficked to commit terrorism-related offences, including women and children forced into marriages with terrorists who then become terrorists themselves.<sup>17</sup>

**Misuse of anti-trafficking legislation to criminalize women in the sex industry:** Concerns were raised that anti-trafficking legislation has been misused to prosecute women in the sex industry – including but not only potential victims of trafficking among them – for trafficking offences, resulting in punishments from fines to detention or deportation, or even corporal punishment in some contexts. Suggestions were made to amend laws to reduce risks of victims of trafficking and other vulnerable people being prosecuted, towards diverting criminal justice resources and attention away from sex workers, to instead focus attention on prosecuting traffickers and other serious criminals.

**Punishment of citizens abroad, including in jurisdictions beyond ASEAN:** Citizens of ASEAN Member States – including children – have been prosecuted abroad after having been trafficked into forced marriage, forced criminality, fishing, entertainment, sex and other industries. This risk is exacerbated in jurisdictions where irregular migration is criminalized and irregular migrants are stigmatized, with unintended criminalization consequences for victims of trafficking who are in irregular situations. In these discussions, the importance

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<sup>16</sup> For a breakdown of typologies of offence as status offences, consequential offences, liberation offences, see Andreas Schloenhardt & Rebekkah Markey-Towler, "Non-Criminalisation of Victims of Trafficking in Persons – Principles, Promises, and Perspectives", *Groningen Journal of International Law*, vol 4(1) (2016), 10-38 at 13-15.

<sup>17</sup> For a comprehensive list of offences that victims have been criminalized for, see Annex 1.

of strengthening cooperation on the non-punishment principle both within the ASEAN region and also beyond was emphasised, alongside the need to harmonize understanding of who is a victim of trafficking and when the non-punishment principle applies.

**Punishment of children:** Examples of children prosecuted for offences committed in the course of being trafficked were raised, including for trafficking of other children. Such prosecutions may result from misidentification of children as adults, and their subsequent non-identification as victims of trafficking. Here the importance of applying the presumption of minority in screening and identification processes was stressed. Concern was also expressed that in some cases child-victim offenders may be classified as ‘children in conflict with the law’ rather than as victims of trafficking, contrary to their best interests. The age of criminal responsibility is also relevant to the treatment of child-offenders and the potential punishment of trafficked victims among them, and may need to be raised.

**Use of victim punishment by traffickers:** Traffickers may leverage participation of victims in crimes (such as narcotics-related offences), to displace the risk of punishment away from themselves and onto victims. They may also use threats of punishment for immigration or labour-related offences as a tactic to control victims. Where authorities treat victims like perpetrators, traffickers are proven correct. Exploiters may even use defamation or libel offences to silence criticism. In such cases, the power imbalance is blatant; traffickers and exploitative employers have significantly more resources to pursue legal action against victims who may be dependent on them financially and otherwise.

**Use of punishment by State officials for corruption or convenience:** In some cases, the use or threat of punishment was noted as a tool that state officials may use, for reasons of corruption or of convenience. As a tool of corruption, incidents were noted of officials threatening victims with punishments if they did not pay bribes (for instance, to irregularly cross borders or continue work in the sex industry) or even provide sexual services. As a tool of convenience, the threat or use of punishment was in one instance noted as being advantageous; detaining potential victims avoids the cost and effort required to return victims from their countries of origin to testify as witnesses against traffickers.

**Victims of trafficking at high risk of prosecution for drug-related offences:** Respondents discussed the risk of victims of trafficking being prosecuted for drug-related offences, ranging from petty offences to serious offences that attract severe penalties. Concern was raised about the strict liability approach taken to narcotics-related offences in the region, and the detrimental impact that ‘Wars on Drugs’ have on trafficked victims. Here it was noted that even if individual practitioners may be willing to apply the non-punishment principle, it may not be possible to convince all actors throughout the judicial process to do likewise. In reality then, victims trafficked into drug-related crime may be at grave risk.

**Corporal and capital punishment:** Victims may face severe penalties for criminal activities they have been trafficked to commit. These can range from corporal punishment for their involvement in the sex industry, to capital punishment where they have been exploited as drug mules. Half of ASEAN Member States apply the death penalty to drug-related offences. Victims of trafficking currently facing execution after having death penalties imposed, including Mary Jane Veloso, were discussed during roundtable meetings (see Box 5). Respondents explained that such cases point to the need for the non-punishment principle to be applied as a matter of urgency.

## **Recommendations on implementing the non-punishment principle**

The following 26 recommendations are offered towards strengthening implementation of the non-punishment principle in law, policy and practice, throughout the stages of criminal justice process. Guidance is offered for each recommendation in Part 3 of the study.

## Identification and investigation

1. Build capacity of frontline officials to identify potential victims of trafficking among people they encounter as offenders
2. Strengthen law enforcement understanding of control methods used by traffickers and their impacts on victims
3. Challenge misconceptions and assumptions about the 'ideal' or 'deserving' victim of trafficking
4. Ensure that offenders who are potential victims of trafficking are effectively and efficiently referred for screening
5. Proactively investigate links between the offence of potential victim-offenders and the conduct of potential traffickers



## Arrest and charge

6. Ensure that frontline officers understand the impact of arrest on victims of trafficking and on criminal justice response to trafficking
7. Ensure frontline officers understand their discretions and how to exercise them
8. Incentivise law enforcers to apply the non-punishment principle
9. Ensure that arresting officers understand their obligations to arrested persons

## Prosecution

10. Amend legislation to reduce risk of inappropriate prosecution of victims of trafficking
11. Ensure that any decision to prosecute a victim of trafficking is only taken after formal identification processes and is clearly explained
12. Clarify the relationship between victim status and non-prosecution
13. Ensure prosecutors understand their discretions and how to exercise them
14. Provide counter-trafficking training to prosecutors, particularly those who specialise in prosecuting offences victims of trafficking commonly commit
15. Strengthen understanding of the irrelevance of the victim's consent in trafficking in persons, in the application of the non-punishment principle

### Statutory defences

16. Draft or amend legislation to enact explicit statutory provisions to give effect to the non-punishment principle, capturing all victims for all types of offence
17. Provide training and guidance to practitioners on how to establish the link between the victim's offence and his or her trafficking
18. Provide training and guidance to criminal justice practitioners on applying general defences for victims who have committed offences as a direct consequence of being trafficked
19. Ensure that the burden of proof rests on the State and not on the victim
20. Guard against the misuse of the non-punishment principle



### Conviction and sentencing

21. Sensitize members of the judiciary to the non-punishment principle and their role in applying it
22. Avoid or mitigate sentences for convicted victims of trafficking
23. Consider restorative justice rather than retributive justice for victim-offenders
24. Protect victims of trafficking from being subject to corporal and capital punishment

### Post-conviction remedies

25. Explore opportunities in legislation to eliminate criminal records of victims of trafficking
26. Identify and address barriers victims of trafficking face in having convictions eliminated.

# Introduction



The non-punishment principle sets out that victims of trafficking should not be prosecuted or otherwise punished for unlawful acts they commit as a consequence of trafficking. This principle is explicitly captured in the 2015 *ASEAN Convention against Trafficking in Persons, especially Women and Children*, which has been ratified by all ten ASEAN Member States. Article 14(7) invites States to consider not holding victims of trafficking liable for unlawful acts committed by them that are directly related to their trafficking. The non-punishment principle does not provide blanket immunity from crimes they have been commit with the requisite criminal intention.<sup>18</sup> Rather, it is a tool to ensure that victims of trafficking are not subject to arrest, charge, detention, prosecution, penalty or otherwise punished for illegal conduct they may have engaged in as a consequence of being trafficked.<sup>19</sup>

The non-punishment principle is core component of a human rights-based approach to trafficking, ensuring that victims' rights are upheld throughout the criminal justice system, including by guaranteeing access to justice and protection from trauma and secondary victimization.<sup>20</sup> In this sense, the non-punishment principle is key to a trauma-informed and victim-centred approach. It is also critical for criminal justice actions against traffickers.<sup>21</sup> When victims are arrested and prosecuted for crimes they commit as a consequence of being trafficked, their trust in authorities is damaged, making them unlikely to cooperate.<sup>22</sup> However, this is a secondary reason to not punish victims, the primarily reason being because they are not criminally responsible.<sup>23</sup>

The non-punishment principle has gained increased attention in recent years. The Special Rapporteur on Trafficking in Persons, has given significant attention to the issue.<sup>24</sup> The Inter-Agency Coordination Group against Trafficking (ICAT) dedicated an Issue Brief to

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**18** *Commentary to the Recommended Principles and Guidelines on Human Trafficking and Human Rights* (OHCHR), p.133

**19** See inter alia, *Non-punishment of victims of trafficking: Issue Brief No. 8* (Inter-Agency Coordination Group against Trafficking in Persons, 2020); *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (OSCE Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings, Vienna, 2013), para. 10; Ryszard Piotrowicz, "Article 26, Non-punishment provision" in Julia Planitzer and Helmut Sax (eds.) *A Commentary on the Council of Europe Convention on against Trafficking in Human Beings* (Edward Elgar, 2020) p.310

**20** *Human Trafficking: Joint UN Commentary on the EU Directive – A Human Rights-Based Approach* (OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO, 2011) 35; United Nations Office on Drugs and Crime, *Legislative Guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime* (United Nations, Vienna, 2020) 48.

**21** UN Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons, *Non-Punishment and Non-Prosecution of Victims of Trafficking in Persons: Administrative and Judicial approaches to Offences Committed in the Process of Such Trafficking*, UN Doc CTOC/COP/WG.4/2010/4 (9 December 2009) 2–3, paras 5–6.

**22** *Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro*, 6 April 2020, UN Doc A/HRC/44/45, para. 29.

**23** Ryszard Piotrowicz, "Article 26, Non-punishment provision" in Julia Planitzer and Helmut Sax (eds.) *A Commentary on the Council of Europe Convention on against Trafficking in Human Beings* (Edward Elgar, 2020) p.317

**24** *Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullaly*, UN Doc. A/HRC/47/34 (17 May 2021); *The Importance of implementing the non-punishment provision: the obligation to protect victims*, Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children, United Nations, Geneva, 30 July 2020.

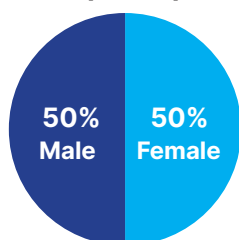
the topic.<sup>25</sup> A significant study on non-punishment was released by the Organization for Security and Cooperation in Europe (OSCE) in 2013.<sup>26</sup> The Council of Europe's Group of Experts against Trafficking in Human Beings (GRETA) considers non-punishment in its country reports, as does the United States' State Department in its annual Trafficking in Persons Reports. In a landmark 2021 decision, the European Court of Human Rights affirmed that governments should not prosecute victims of trafficking.<sup>27</sup>

The present study is the first to address the implementation of the non-punishment principle in ASEAN Member States. It is offered to legislators, policy makers and criminal justice practitioners, towards strengthening their knowledge-base and supporting their ongoing efforts to implement the principle in practice. It is comprised of three parts.

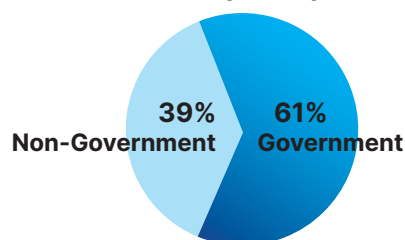
- Part 1 outlines the sources of the non-punishment principle in law and policy
- Part 2 examines how ASEAN Member States have implemented the principle in law, policy and practice
- Part 3 offers recommendations and guidance towards implementing the non-punishment principle throughout criminal justice processes.

**Study methodology:** This study was informed by a desk review of material from the ASEAN region and elsewhere and 12 roundtable discussions held in 6 countries (Philippines, Cambodia, Viet Nam, Lao PDR, Thailand and Indonesia), using a Facilitation Tool developed for this purpose and adapted to each country context (see Annex 2). A total of 196 persons participated in these discussions, comprising 122 government and 74 non-governmental representatives. Additionally, four individual experts provided inputs in writing or through in-depth discussions. This study has also benefited from the author's participation in events related to the principle non-punishment principle.<sup>28</sup>

**Sex of participants**



**Profile of participants**



<sup>25</sup> *Non-punishment of victims of trafficking: Issue Brief No. 8* (Inter-Agency Coordination Group against Trafficking in Persons, 2020)

<sup>26</sup> *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (OSCE Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings, Vienna, 2013)

<sup>27</sup> *V.C.L. and A.N. v The United Kingdom* [Application nos. 77587/12 and 74603/12], European Court of Human Rights, 16 February 2021 .

<sup>28</sup> The author served as a participant and a facilitator at a consultation workshop convened on 4-5 February 2021 by the Special Rapporteur on Trafficking in Persons, especially Woman and Children, to inform the Special Rapporteur's report: *Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullaly*, UN Doc. A/HRC/47/34 (17 May 2021). The author also participated in a roundtable side event to the 47<sup>th</sup> Session of the Human Rights Council, on 30 June 2021, 13:00 – 14:30 CET, hosted by ICAT and OHCHR, titled *Non-punishment of victims of trafficking: A roundtable on the application of the principle of non-punishment for victims of trafficking* <https://aseanactpartnershiphub.com/resources/video-non-punishment-roundtable/>. The author is grateful for these opportunities to gather global insights.



**Study limitations:** There is a severe dearth of research and jurisprudence on the interpretation and application of the non-punishment principle in ASEAN. Particularly limited information could be obtained for those countries where no roundtable discussion was held. A more practical study limitation relates to the inability of the researcher to conduct in-person consultations owing to pandemic-related travel restrictions, which may have had an impact on findings. Online discussions often lack the candour and ease of those held in-person, notwithstanding high enthusiasm and engagement of participants in online and hybrid discussions. A further limitation relates to the nature of the non-punishment principle and how its application manifests in practice. Data is not collected and records are not made when investigators exercise their discretion to *not* lay charges, or prosecutors exercise their discretion to *not* pursue them.<sup>29</sup> Perhaps the largest blind-spot of this study though relates to victims of trafficking who remain unidentified. The number of incarcerated victims of trafficking across the ASEAN region – and indeed elsewhere – remains unknown.

**A note on terminology:** ‘Non-punishment’ can be understood broadly or narrowly. Where it is understood broadly, it may apply to protection of victims from all manner of punishment, including detention and deportation and treatment in ways that may be tantamount to ‘punishment’, including the imposition of unwanted protection and assistance services.<sup>30</sup> For the purpose of this study, non-punishment is construed narrowly to refer to protection of victims of trafficking from punishment by the criminal justice system through their arrest, prosecution, conviction and sentencing.

**A note on scope:** Around the world, particularly where human, social and labour rights protection frameworks are insufficient, grave injustices are done in the name of ‘counter-trafficking’. The misapplication of the counter-trafficking criminal justice framework has made ‘perpetrators’ and ‘victims’ of people who are neither, resulting in stigmatization and criminalization of migrant workers and other marginalized groups. This is perhaps most notably borne out in raids of workplaces which can result in people being identified or misidentified as victims of trafficking against their will, while unidentified victims of trafficking are criminalized as ‘prostitutes’, ‘illegal workers’, ‘illegal migrants’, or even as traffickers (see Box 8).<sup>31</sup> These injustices need to be urgently confronted as part of victim-centred and human rights-based counter-trafficking response, but are largely

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<sup>29</sup> *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons*, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (15 June 2020), paragraph 38.

<sup>30</sup> Some of the forms of ‘punishment’ that victims of trafficking endure, where the subject of the study McAdam, M., *Freedom of movement of persons identified as victims of human trafficking: An analysis of law, policy and practice in the ASEAN region* (ASEAN-ACT, 2021)

<sup>31</sup> See *inter alia*, *Sex Workers organising for change: Self-representation, community mobilisation, and working conditions* (Global Alliance Against Trafficking Traffic in Women (GAATW, 2018); *A Brief Guide on Collateral Damages of Anti-Trafficking Laws and Measures on Sex Workers* (International Committee on the Rights of Sex Workers in Europe, 2019); *From vulnerability to resilience: sex workers organising to end exploitation* (International Committee on the Rights of Sex Workers in Europe, May 2021); *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (GAATW, 2007).

beyond the scope of this study which does not address the criminalization of people who are not victims of trafficking, but looks at criminalization of people who are victims of trafficked in persons as defined in Article 3 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (Trafficking Protocol), and Article 2 of the *ASEAN Convention Against Trafficking in Persons, Especially Women and Children* (ACTIP) (ACTIP).

### **Box 1: The definition of 'trafficking in persons'**

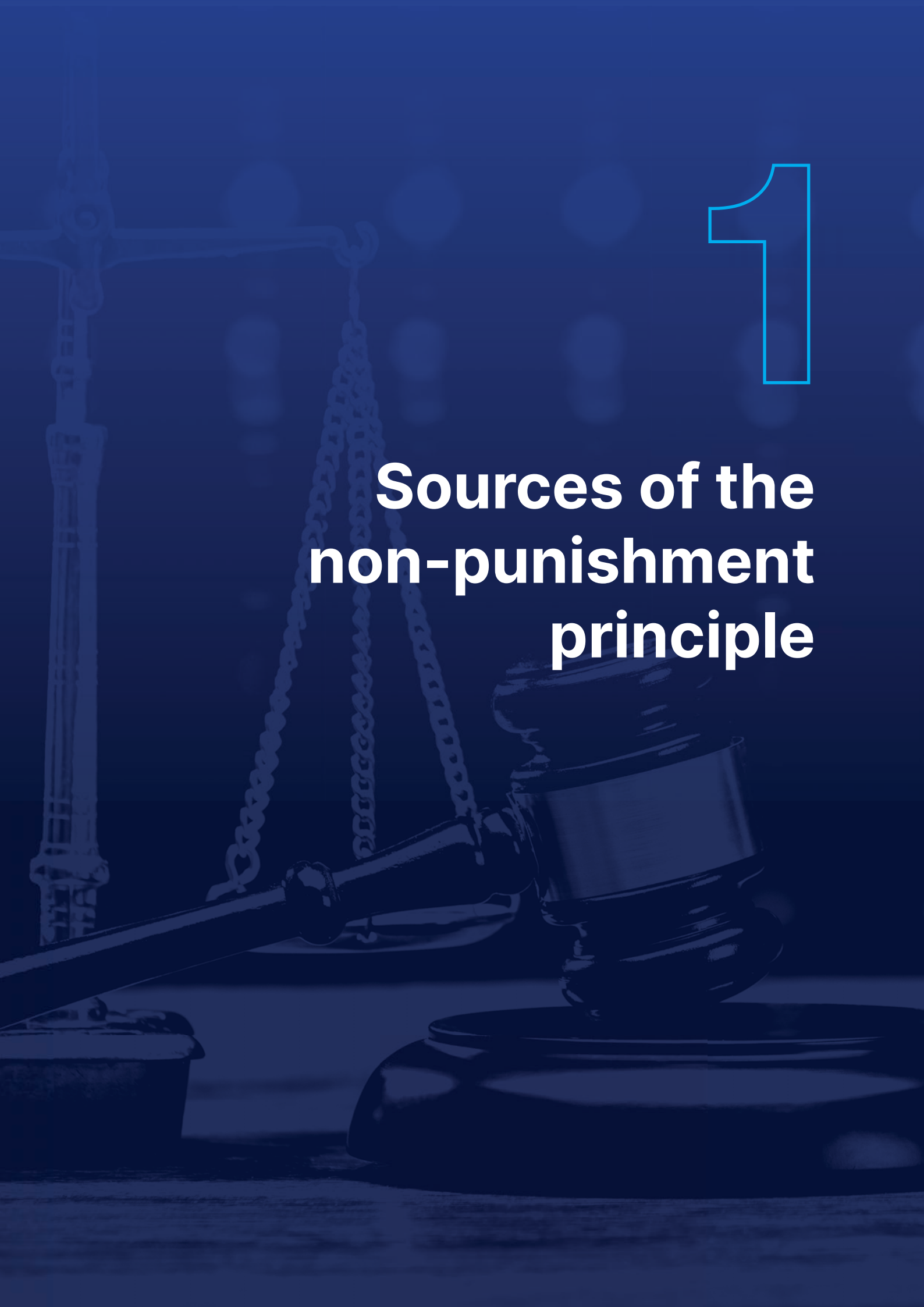
- a. "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. 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;
- b. The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- c. The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article;
- d. "Child" shall mean any person under eighteen years of age.

Article 3, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol); Article 2, ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP) (ACTIP).



# 1

## **Sources of the non-punishment principle**



## 1.1 International law and policy

The non-punishment principle is not explicitly captured in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Trafficking Protocol) nor the United Nations Convention against Transnational Organized Crime (UNTOC). However, the non-punishment of victims of trafficking has emerged as a core component of the protection obligations of State.<sup>32</sup>

The principle finds explicit expression in soft law instruments, including the *Recommended Principles and Guidelines on Human Rights and Human Trafficking* of the Office of the United Nations High Commissioner for Human Rights (UN Doc. E/2002/68/Add.1), Principle 7 of which states that:

*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.*

Significant discussions have occurred at the international level that also inform understanding and application of the non-punishment principle, including at the Working Group on Trafficking in Persons under the Conference of the Parties to the United Nations Convention against Transnational Organized Crime, established to support the implementation of the Trafficking Protocol. At its first session in 2009, the Working Group recommended that States parties should:

*(a) Establish appropriate procedures for identifying trafficking in persons and for giving such victims support; and (b) Consider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts.*<sup>33</sup>

At the 2010 Working Group ‘strongly differing viewpoints’ were expressed, such that it ‘was unable to reach agreement on an additional recommendation on non-prosecution to that agreed in its first meeting.’<sup>34</sup> A few delegations did not support the decision to restate that recommendation as an outcome of this second meeting, but it was nonetheless reaffirmed in the report, along with a statement that non-punishment provisions in

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**32** *Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking: Background paper prepared by the Secretariat*, Vienna 27 – 29 January 2010, UN Doc. CTOC/COP/WG.4/2010/4 (9 December 2010), para 10.

**33** Conference of the Parties to the UNTOC, Report on the meeting of the Working Group on Trafficking in Persons (14–15 April 2009), UN Doc. CTOC/COP/WG.4/2009/2, 21 April 2009, para 12.

**34** Conference of the Parties to the UNTOC, Report on the meeting of the Working Group on Trafficking in Persons (27–29 January 2010), UN Doc. CTOC/COP/WG.4/2010/6, 16 February 2010, para 109.

domestic legislation, guidelines, preambles or other instruments be clearly stated.<sup>35</sup> The issue was not discussed in subsequent Working Groups until the 8<sup>th</sup> session, which recommended that States parties should

*Consider, in line with domestic legislation and prosecutorial discretion, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or in cases where they were compelled to commit unlawful acts.*<sup>36</sup>

The recommendation introduces a new reference to ‘prosecutorial discretion’ which had not been mentioned in earlier reports. The recommendation also captures both causation and compulsion approaches to the link between the victim’s offending and his or her trafficking (for more on both models see p.33). The latter model was specifically raised in the 9<sup>th</sup> session, in which the Working Group recommended that the Conference of Parties consider as a priority issue, ‘guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked.’<sup>37</sup>

The topic of non-punishment was a specific agenda item at the 10<sup>th</sup> session of the Working Group in 2020. The Background Paper prepared by the Secretariat to support those discussions noted that notwithstanding considerable effort to implement the principle, implementation is uneven.<sup>38</sup> During discussions, several delegations pointed to the challenge of establishing that a victim has been compelled. Issues of inconsistency between country approaches were also raised, as was the importance of vacating criminal records of victims as a prerequisite for their rehabilitation and reintegration, and the need to apply the principle from an early state of investigation throughout criminal justice proceedings.<sup>39</sup>

Additionally, the 2020 resolution of the Conference of Parties to the UN Convention against Transnational Organized Crime, prescribes that States should:

*Consider providing, in accordance with their domestic law, that victims of trafficking in persons are not inappropriately punished or*

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**35** Conference of the Parties to the UNTOC, Report on the meeting of the Working Group on Trafficking in Persons (27-29 January 2010), UN Doc. CTOC/COP/WG.4/2010/6, 16 February 2010, paragraphs 50, 51.

**36** Conference of the Parties to the UNTOC, Report on the meeting of the Working Group on Trafficking in Persons (18 July 2018), UN Doc. CTOC/COP/WG.4/2018/3, 16 February 2010, para 7(c).

**37** Conference of the Parties to the UNTOC, Report on the meeting of the Working Group on Trafficking in Persons (9 to 11 September 2019), UN Doc. CTOC/COP/WG.4/2018/3, 25 September 2019, para 4, recommendation 17(b).

**38** *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons*, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (15 June 2020), paragraph 2.

**39** Conference of the Parties to the UNTOC, Report on the meeting of the Working Group on Trafficking in Persons (10 - 11 September 2020), UN Doc. CTOC/COP/WG.4/2020/4, 28 September 2020, paragraphs 8, 9, 11, 12, 13, 15, 16.

*prosecuted for acts they commit as a direct consequence of being trafficked and, where appropriate, provide access to remedies if they are punished or prosecuted for such acts and, accordingly, establish as appropriate, domestic laws, guidelines or policies that espouse these principles.*<sup>40</sup>

The Security Council has also called for States not to punish victims of trafficking.<sup>41</sup> The Committee on the Elimination of Discrimination against Women and Children called for the application of the principle to all victims without discrimination.<sup>42</sup> Furthermore, pursuant to Human Rights Council Resolution 44/4, the Special Rapporteur on Trafficking in Persons, Siobhán Mullaly, submit her report on the implementation of the non-punishment to the 47<sup>th</sup> Session of the Human Rights Committee, describing non-punishment as a cornerstone of States' obligations to protect victims of trafficking.<sup>43</sup> The *2021 Political Declaration on the Implementation of the United Nations Global Plan of Action to Combat Trafficking in Persons* also reaffirmed commitment to implement the non-punishment principle of non-punishment of trafficking for criminal, civil, administrative and immigration offences they are compelled to be involved in as a direct consequence of their trafficking.<sup>44</sup>

In specific relation to forced and compulsory labour, article 4(2) of the 2014 *Protocol to the Forced Labour Convention No. 29* states that:

*Each Member shall, in accordance with the basic principles of its legal system, take the necessary measures to ensure that competent authorities are entitled not to prosecute or to 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.*

The language here specifically refers to 'unlawful activities' meaning that the protection may potentially capture activities that do not just violate criminal law but also administrative, immigration or other laws. The non-punishment principle also finds expression in Article 31 of the *1951 Convention Relating to the Status of Refugees*, prohibiting the imposition of penalties on refugees on account of their illegal entry or presence in a country. This provision may be relevant to victims of trafficking who exercise their right to seek asylum.

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**40** CTOC/COP/2020/L.6/Rev.1, para. 13, letter g

**41** See Security Council Resolution 2331 (2016); Security Council Resolution 2388 (2017).

**42** See: Committee on the Elimination of Discrimination against Women, General Recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration, para. 98.

**43** *Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullaly*, UN Doc. A/HRC/47/34 (17 May 2021). The author of the present study was an expert participant and facilitator at the consultation workshop held on 4 and 5 of February 2021 to gather input into this report.

**44** 2021 Political Declaration on the Implementation of the United Nations Global Plan of Action to Combat Trafficking in Persons, UN Doc A/76/L.11, 9 November 2021 [13].



## Non-punishment of children in international law and policy

The *Recommended Principles and Guidelines on Human Rights and Human Trafficking* of the Office of the United Nations High Commissioner for Human Rights offer an explicit protection against punishment for children, at Guideline 8.3, 'ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons.' Non-punishment of children is further protected by UNICEF Guidelines 2.1 stating that:

*The involvement of a child victim in criminal activities should not undermine their status as both a child and a victim and his/her related rights to special protection.*<sup>45</sup>

Also relevant to the non-punishment of child victims of trafficking, Article 37(b) of the Convention on the Rights of the Child (CRC) states that 'The arrest, detention or imprisonment of a child shall be in conformity with law and shall be used only as a measure of last resort and for the shortest appropriate period of time.'<sup>46</sup> Accordingly, the criminalization of children contrary to non-punishment provisions, constitutes a contravention of the CRC.<sup>47</sup>

The UN Committee on the Rights of the Child states that in developing policies on unaccompanied or separated children, including those who are victims of trafficking, '...States should ensure that such children are not criminalized solely for reasons of illegal entry or presence in the country.'<sup>48</sup> Concluding Observations of the Committee on both the Convention on the Rights of the Child and the Optional Protocol on the sale of children, child prostitution and child pornography, as well as in the recommendations issued by the Committee reiterate that children who have been trafficked should not be subject to sanctions.<sup>49</sup> UNICEF and the Inter-Parliamentary Union state that the law needs to include specific provisions guaranteeing that children will not face criminal penalty as a result of being trafficked into illegal industries and not be subject to incarceration, detention or other punishment.<sup>50</sup>

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<sup>45</sup> *Guidelines on the Protection of Child Victims of Trafficking* (Unicef, 2006) 10

<sup>46</sup> Article 37(b) Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49

<sup>47</sup> Where children do come into contact with the criminal justice system, Article 40 of the CRC comes into play, to ensure that children who are alleged, accused or recognised as having infringed penal law are treated in a manner consistent with their age and in accordance with their rights.

<sup>48</sup> CRC General Comment 6, paragraph 62.

<sup>49</sup> Benyam Dawit Mezmur, Member of the UN Committee on the Rights of the Child, and Professor of Law, Dullah Omar Institute, University of the Western Cape speaking on the principle of non-punishment of victims of trafficking in persons, being a side event to the 47th Session of the Human Rights Council 30 June 2021, 13:00 – 14:30 CET. Author's notes on file.

<sup>50</sup> *Combating Child Trafficking: Handbook for Parliamentarians No. 9* (Inter-Parliamentary Union and UNICEF, 2005) 34

## 1.2 Regional law and policy

The non-punishment principle is explicitly captured in law and policy instruments in Africa, the Americas, Europe and Asia, including in the ASEAN region.

### Asia

The 2015 *ASEAN Convention against Trafficking in Persons, especially Women and Children* which has been ratified by all ten ASEAN Member States, contains a strong statement upholding the non-punishment principle. Article 14(7) of that instrument reads:

*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.*

This provision has been commended for giving strong expression to the non-punishment principle. The former Special Rapporteur on Trafficking in Persons highlighted the wording of ‘not holding’ victims ‘liable’, stating that ‘[s]uch clear wording therefore excludes the possibility to interpret non-punishment as mere mitigation of the penalty applied.’<sup>51</sup> The term ‘in appropriate cases’ and the requirement that States ‘consider’, has been interpreted as not implying that States have discretion as to *whether* to apply the non-punishment principle, but rather that there is flexibility around *how* they achieve it, in accordance with their domestic frameworks.<sup>52</sup>

Supplementary material to give effect to the ASEAN Convention gives clarity to the principle. The *ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children* sets out at paragraph B(d) that States:

*Subject to 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 in persons.*

The ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) *Gender Sensitive Guidelines for Handling Women Victims of Trafficking in Persons* also set out (at Part III 3.6.1) that:

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**51** *The Importance of implementing the non-punishment provision: the obligation to protect victims*, Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children, United Nations, Geneva, 30 July 2020, 5 at [14]

**52** See, in the context of the non-punishment provision in the European Council Convention against Trafficking in Human Beings, Ryszard Piotrowicz, “Article 26, Non-punishment provision” in Julia Planitzer and Helmut Sax (eds.) *A Commentary on the Council of Europe Convention on against Trafficking in Human Beings* (Edward Elgar, 2020) p.317.



*Victims should not be detained, charged or prosecuted for any crime they may have committed as a direct and immediate result of their being trafficked.*

The ASEAN *Practitioner Guidelines on Criminal Justice Response to Trafficking in Persons* (2007) states at Part 1, C2 that:

*To the extent possible, victims of trafficking should not be charged or prosecuted in relation to crimes committed by them that are a direct consequence of their status as victims of trafficking.*

## Box 2: Bilateral MOUs between ASEAN Member States

There are several bilateral agreements including memoranda of understanding (MOUs) between ASEAN Member States that explicitly including provisions on non-punishment of victims of trafficking. Some apply only to a limited range of offences, or to some victims and not others, often to the exclusion of adult males.

Parties to bilateral agreement, Year	Limitations of non-punishment provision
Cambodia and Viet Nam (2005)	Applies to women and children only
Thailand and Viet Nam (2008)	Applies to women and children only
Myanmar and Thailand (2009)	
Myanmar and China (2009)	
Lao and Viet Nam (2010)	
Lao and China (2014)	Applies only to illegal entry or exit or other offences arising directly from trafficking
Cambodia and Thailand (2014)	Applies to women and children only
Lao and Thailand (2017)	Does not address non-punishment specifically but speaks to justice and protection from further victimization in legal proceedings
Lao and Viet Nam (2020)	Applies to illegal immigration and related offences only

At the sub-regional level, the Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT) is comprised of Cambodia, China, Lao PDR, Myanmar, Thailand and Viet

Nam. The COMMIT *Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region* commits signatories at paragraph 16 to '[e]nsuring that victims identified as victims of trafficking are not held in immigration detention by law enforcement authorities.'<sup>53</sup>

The COMMIT *Guidelines on Victim Identification and Referral Mechanisms: Common Guidelines for the Greater-Mekong Subregion* (2016), set out that:

*Trafficked persons are not, in any circumstances, prosecuted for violations of immigration laws or for activities they are involved in as a direct consequence of their situation as trafficked persons; or held in detention.*

The South Asian Association for Regional Cooperation (SAARC) *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution* (2002) is silent on non-punishment.

## Africa

The African Union Commission Initiative against Trafficking Campaign (AU.COMMIT) achieved the *Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children, as adopted by the Ministerial Conference on Migration and Development* (22-23 November 2006) calling on States to '[a]dopt specific measures to avoid criminalization of victims of trafficking.' At the sub-regional level, the Southern Africa Development Community (SADC) *10 Year Strategic Plan of Action on Combating Trafficking in Persons, Especially Women and Children* (2009-2019) states explicitly at point 3.1.6. that 'Victims should not be criminalized for the activities they are involved in as a direct consequence of their situation as trafficked persons.' There is no specific action item concerning non-punishment in the West African Sub-region in the ECOWAS Declaration (2001) and *Plan of Action on Trafficking in Persons especially Women and Children* (2002-2003), beyond protecting victims from further victimization.

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<sup>53</sup> COMMIT *Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region*, signed on October 29, 2004, by representatives of Governments of the Kingdom of Cambodia, the People's Republic of China, the Lao People's Democratic Republic, the Union of Myanmar, the Kingdom of Thailand, and the Socialist Republic of Vietnam.

## Americas

The Organization of American States (OAS) recognised the non-punishment principle in its First Meeting of National Authorities on Trafficking in Persons. In its Conclusions and Recommendations, National Authorities called for Member States to ensure that victims of trafficking are not prosecuted for participation in illegal activities that directly result from their trafficking.<sup>54</sup> Those Conclusions and Recommendations were affirmed at the Second Meeting on 25 to 27, 2009. Furthermore, the input of the Technical Working Group on Prosecution of the crime of trafficking in persons, administration of justice, and strategies for international cooperation and institutional strengthening, resulted in the inclusion of the recommendation to avoid detention, prosecution and punishment of victims “to the extent that such participation was the direct result of their being the victims of trafficking and to the extent that the victims were forced or compelled to participate in such activities.”<sup>55</sup> At the third meeting, the conclusion was reached that steps were necessary throughout judicial investigations, to ensure that victims “are neither criminalized nor victimized anew and bearing in mind at all times a human-rights based approach sensitive to differences in gender, generation, ethnicity, race, sexual preference, and skills.”<sup>56</sup> At the Fourth Meeting of National Authorities on Trafficking in Persons, OAS States adopted the *Inter-American Declaration against Trafficking in Persons* or ‘Declaration of Brasilia’ that declares the importance of ‘an unwavering approach of respect for and protection of [victims’] human rights.’<sup>57</sup>

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**54** First Meeting of National Authorities on Trafficking in Persons, Porlamar, Island Margarita, Bolivarian Republic of Venezuela – 14 to 17 March 2006, Conclusions and Recommendations RTP/doc.16/06 rev. 1 corr. 1, 26 April 2016, Topic IV Protection and Assistance for Victims of Trafficking in Persons, point 7.

**55** Second Meeting of National Authorities on Trafficking in Persons, Buenos Aires, Argentina – 25 – 27 March 2009, Conclusions and Recommendations RTP-II/doc.5/09 rev. 10, 18 September 2009, point 21.

**56** Third Meeting of National Authorities on Trafficking in Persons, Guatemala City, Guatemala – 15-16 October 2012, Conclusions, RTP-III/doc.7/12, 16 October 2012, point 4c.

**57** Inter-American Declaration against Trafficking in Persons, “Declaration of Brasilia”, Fourth Meeting of National Authorities on Trafficking in Persons, Brasilia, Brazil – 5 December 2014, RTP-IV/doc.5/14 rev. 1, paragraph 4.

### Box 3: Non-punishment in the United States Trafficking in Persons Report

The domestic law of the United States of America has significant implications how the non-principle is understood and applied globally. The 'minimum standards for the elimination of trafficking in persons' set out in the US Trafficking Victims Protection Act of 2000, determine the criteria by which all governments are assessed for the purpose of the Trafficking in Persons Report issued by the United States Department of State.<sup>58</sup> In specific relation to non-punishment of victims, the second specified Indicia of 'Serious and Sustained effort' used in that report, relates to non-punishment, being whether the government of the country 'ensures that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked, including by including by providing training to law enforcement and immigration officials regarding the identification and treatment of trafficking victims using approaches that focus on the needs of the victims.'<sup>59</sup>



## Europe

The Organization for Security and Cooperation in Europe (OSCE) *Action Plan to Combat Trafficking in Human Beings* recommends 'ensuring that victims of trafficking are not subjected to criminal proceedings solely as a direct result of them having been trafficked' (decision 557/Rev.1).

Article 26 of the 2005 *Council of Europe Convention on Action against Trafficking in Human Beings* states that:

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

The wording 'provide for the possibility', has been interpreted as not giving States discretion as to whether to apply the non-punishment principle, but discretion as to *how*

<sup>58</sup> Trafficking Victims Protection Act of 2000, Div. A of Pub. L. No. 106-386 § 108, as amended.

<sup>59</sup> Minimum Standards for the elimination of trafficking in persons set out in *Trafficking Victims Protection Act* of 2000, Div. A of Pub. L. No. 106-386 § 108, paragraph 2, as amended.

to fulfill this obligation.<sup>60</sup> It is not explicit from the wording what is entailed in the notion of 'compelled' and whether it may include deception or abuse of power or position of vulnerability. The limited scope of 'not imposing penalties' may in theory allow for States to still detain, deport or arrest and prosecute victims including for violations of labour and immigration laws.<sup>61</sup>

The European Union (EU) 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 (OJ L 101, 1 15.4.2011) (Article 8 and Recital 14) Recital 14 outlines that:

*Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators. This safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in.*

Article 8 concerns 'non-prosecution or non-application of penalties to the victim':

*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.*

Accordingly, the EU Directive 2011/36/EU goes further than the European Convention, in stating that authorities should be entitled 'not to prosecute or impose penalties' in contrast to the latter which only speaks of 'not imposing penalties.' Importantly, any distinction between administrative and criminal sanctions is considered irrelevant in the context of Article 8 of the Directive.<sup>62</sup> Recital 11 of EU Directive also recognises exploitation in criminal activities as a form of exploitation, including (but not limited to) the exploitation of a person to commit, *inter alia*, 'pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain.'

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**60** Ryszard Piotrowicz, "Article 26, Non-punishment provision" in Julia Planitzer and Helmut Sax (eds.) *A Commentary on the Council of Europe Convention on against Trafficking in Human Beings* (Edward Elgar, 2020) p.317; Ryszard Piotrowicz and Liliana Sorrentino, "What's on your mind? Towards growing recognition of the non-punishment principle with regard to victims of trafficking?" *La Strada Newsletter*, Issue 44, April 2017, 10.

**61** Anne T. Gallagher, *The International Law of Human Trafficking* (Cambridge, 2010) 117-118, 127.

**62** *Human Trafficking: Joint UN Commentary on the EU Directive – A Human Rights-Based Approach* (OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO, 2011) 37

#### **Box 4: European Court of Human Rights ruling on non-punishment of victims of trafficking:**

In the April 2021 European Court of Human Rights (ECtHR) judgment of *V.C.L and A.N. v The United Kingdom* [Application nos. 77587/12 and 74603/12] the Court offered clarity on the non-punishment principle.

The UK had prosecuted, convicted and punished two Vietnamese minors for involvement in drug production, notwithstanding that they were recognised by competent anti-trafficking authorities as victims of trafficking for the purpose of exploitation in criminal activities. This decision has been attributed to UK authorities discriminating against the victims of trafficking, on the basis of the offence being committed, in this case being cannabis-related offences as opposed to document-related offences for which trafficked persons had previously avoided conviction.<sup>63</sup> The ECtHR found the UK in violation of its obligations in Article 4 of the European Convention of Human Rights prohibiting slavery and forced labour (including trafficking in persons) and Article 6 concerning the right to a fair trial. In handing down this decision, the ECtHR made several points about non-punishment of victims of trafficking.

The Court noted that there is no general prohibition on the prosecution of trafficking in international or regional instruments, but that where a victim is compelled, a State is entitled though not obliged, not to prosecute.<sup>64</sup> However, the Court considered that prosecution of victims or potential victims of trafficking may be at odds with the State's duty to take operational measures to protect them, where they are aware or ought to be aware of circumstances giving rise to a credible suspicion that an individual has been trafficked. On this point, the Court expressed the view that States are obliged to protect

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**63** Parosha Chandran, Barrister and Professor of Practice in Modern Slavery Law in The Dickson Poon School of Law, King's College London, referring to the case of *R v O* [2008] EWCA Crim 2835, speaking on the principle of non-punishment of victims of trafficking in persons, at a side event to the 47<sup>th</sup> Session of the Human Rights Council 30 June 2021, 13:00 – 14:30 CET. Author's notes on file.

**64** *V.C.L and A.N. v The United Kingdom* [Application nos. 77587/12 and 74603/12], European Court of Human Rights, 16 February 2021, para 158.

victims and facilitate their recovery, and that prosecution would be injurious to their recovery and potentially leave them vulnerable to re-trafficking. In this respect, the criminal process was noted as being an ordeal, conviction an obstacle to their integration, and incarceration an impediment to their access to support and services.<sup>65</sup>

The Court also explained that victim identification is paramount to their protection from punishment. Accordingly, where circumstances give rise to a credible suspicion that a person suspected of having committed a criminal offence may have been trafficked, he or she should be promptly assessed by trained and qualified individuals to determine whether the person has been subject to trafficking in persons as defined in international and regional instruments.

Further, the Court noted that any decision on whether to prosecute a victim of trafficking should, insofar as possible, only be taken once a trafficked assessment has been made by a qualified person. Here, the particular vulnerability of children was noted. Once an assessment has been made by a qualified person, any subsequent prosecutorial decision has to take this assessment into account. The prosecutor may not be bound by the findings of that assessment, but would need to have clear reasons for departing from them which are consistent with the international and regional definition of trafficking.<sup>66</sup>

The ECtHR found the UK to be in violation of both its obligations of Article 4 of the European Convention of Human Rights in respect of forced labour, and Article 6 right to a fair trial, and criticised the UK for prosecuting victims of trafficking contrary to its commitments in the EU Anti-Trafficking Directive and the Trafficking in Persons Protocol.

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**65** *V.C.L and A.N. v The United Kingdom* [Application nos. 77587/12 and 74603/12], European Court of Human Rights, 16 February 2021, paras 158-159.

**66** *V.C.L and A.N. v The United Kingdom* [Application nos. 77587/12 and 74603/12], European Court of Human Rights, 16 February 2021, paras 160-162.





### 1.3 Domestic law and policy

A recognised good practice towards implementing the non-punishment principle in practice, is enactment of specific provisions in domestic legislation.<sup>67</sup> Countries have captured the non-punishment provisions in different ways, in line with their national legal system. Some have specific non-punishment principles in their human trafficking legislation or in their Criminal (or Penal) Code. Best practice is to not limit the protection to particular offences but to ensure it applies even to serious or grave offences, although the legislation of many States provides protection only for some specific offences.<sup>68</sup>

In order for the non-punishment principle to apply, a link between the victim's offending and trafficking must be established. States have taken different approaches to the relationship between a victim's criminal conduct and his or her trafficking in their national legislation.

Compulsion model	Causation model
The acts at issue were carried out under coercion / duress.	The acts at issue were a direct result of the trafficking.

**Compulsion model:** The compulsion model (also called the duress model) is grounded in the belief that a person should not be held criminally responsible for an offence he or she did not voluntarily commit. A trafficked person is therefore not criminalized for offences to the extent that he or she was compelled to commit them in the course of being trafficked. Unsurprisingly, the non-punishment principle is more likely to apply to victims for whom more overt means were used by traffickers (such as force), than in cases where subtle means were used (such as abuse of a position of vulnerability).<sup>69</sup> The compulsion model therefore has significant limitations in application, where coercion is understood narrowly to only capture threat or use of force.<sup>70</sup> Good practice then, is to understand compulsion more broadly to capture all the 'means' by which a trafficker can compel a victim, according to the international definition of trafficking in persons.

<sup>67</sup> *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons*, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (15 June 2020), paragraph 46.

<sup>68</sup> For instance, in many states in the United States, non-punishment provisions only relate to prostitution-related offence, providing limited protection to victims of sexual forms of exploitation and none to victims of trafficking for non-sexual forms of exploitation. Zornosa, Francisco, Protecting Victims from Punishment and Promoting their Rehabilitation: The Need for an Affirmative Defense, *Washington and Lee Journal of Civil Rights and Social Justice*, 2016, Vol 22, Issue 1, 177-203 at 195-196.

<sup>69</sup> United Nations Office on Drugs and Crime, Female Victims of Trafficking for Sexual Exploitation as Defendants: A Case Law Analysis (United Nations, Vienna, 2020) 66-88.

<sup>70</sup> United Nations Office on Drugs and Crime, Female Victims of Trafficking for Sexual Exploitation as Defendants: A Case Law Analysis (United Nations, Vienna, 2020) 65, 109.

**Table 1: Compulsion model**

	<b>Compulsion (duress)</b>
<b>Evidentiary threshold</b>	Victims should not be punished for offences they have been compelled to commit. Compulsion is not proven by the same high standard as traditional duress defence but by any of the 'means' set out in the Trafficking Protocol, such that a reasonable person in the same situation as the accused person would have no realistic alternative to performing the criminal act.
<b>Regional example (outside ASEAN)</b>	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.  (Article 26, Council of Europe Convention on Action against Trafficking in Persons)
<b>National examples (ASEAN)</b>	<b>Indonesia</b>  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.  (Article 18), Law Number 21 on The Eradication of the Criminal Act of Trafficking in Persons, 2007)
<b>National examples (non-ASEAN)</b>	<b>Haiti</b>  Victims of trafficking shall be exempted from all prosecution for illicit acts related to trafficking, committed while they were under the duress of the actual perpetrators of the offenses referred to in the present law.  (Article 22.2, The Anti-Trafficking Law)  Victims of trafficking in persons who allegedly committed a homicide under the same conditions as stipulated in the previous paragraph may be eligible for extenuating circumstances.  (Article 22.3, The Anti-Trafficking Law)  <b>Mozambique</b>  Victims of trafficking are not criminally liable for the commission of trafficking-related acts included in this law or any others they are coerced into, their consent being irrelevant.  (Article 20(3), Law No 6/2008)

	<b>Compulsion (duress)</b>
<b>National examples (non-ASEAN)</b>	<p><b>United Kingdom</b></p> <p>(1) A person is not guilty of an offence if—</p> <ul style="list-style-type: none"> <li>(a) the person is aged 18 or over when the person does the act which constitutes the offence,</li> <li>(b) the person does that act because the person is compelled to do it,</li> <li>(c) the compulsion is attributable to slavery or to relevant exploitation, and</li> <li>(d) a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.</li> </ul> <p>(2) A person may be compelled to do something by another person or by the person's circumstances.</p> <p>(3) Compulsion is attributable to slavery or to relevant exploitation only if—</p> <ul style="list-style-type: none"> <li>(a) it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or</li> <li>(b) it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.</li> </ul> <p>(4) A person is not guilty of an offence if—</p> <ul style="list-style-type: none"> <li>(a) the person is under the age of 18 when the person does the act which constitutes the offence,</li> <li>(b) the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, and</li> <li>(c) a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.</li> </ul> <p>(5) For the purposes of this section—</p> <ul style="list-style-type: none"> <li>"relevant characteristics" means age, sex and any physical or mental illness or disability;</li> <li>"relevant exploitation" is exploitation (within the meaning of section 3) that is attributable to the exploited person being, or having been, a victim of human trafficking.</li> </ul> <p>(6) In this section references to an act include an omission.</p> <p>(Section 45, Modern Slavery Act 2015).</p>

**Causation model:** According to the causation model, a trafficked person is not criminalized where the offending relates to the trafficking. The nexus between the offence and the trafficking does not require use of force, coercion or duress or compulsion, but requires that the offence is a direct consequence of the trafficking. The link between offence and the trafficking would be particularly clear where the crime itself is a manifestation of the exploitative purpose of trafficking, as when a person is trafficked into criminality. This causation model is preferred by counter-trafficking stakeholders over the coercion model, including the Special Rapporteur on Trafficking.<sup>71</sup> While neither approach is without its challenges in practice, the causation model is considered easier to prove and employ in practice than the compulsion/duress model.<sup>72</sup> Particularly in relation to minors, the compulsion model is noted as impractical given that means need not be proven to establish that they have been trafficked.<sup>73</sup> The causation-based model is in practice broader than the compulsion-based approach which requires specific evidence to show that the victim's offending was the result of compulsion on the part of the trafficker.<sup>74</sup>

**Table 2: Causation model**

	<b>Causation (nexus)</b>
<b>Evidentiary threshold</b>	Victims should not be punished for offences that relate to his or her trafficking.
<b>Regional example</b>	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. (Article 14(7), ACTIP)

<sup>71</sup> Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro, 6 April 2020, UN Doc A/HRC/44/45, para. 36; Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullaly, UN Doc. A/HRC/47/34 (17 May 2021) para. 52.

<sup>72</sup> The Importance of implementing the non-punishment provision: the obligation to protect victims, Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children, United Nations, Geneva, 30 July 2020, 5 at [14]; Trafficking in persons, especially women and children, Report of the Special Rapporteur on trafficking in persons, especially women and children, UN Doc. A/HRC/44/45 (6 April 2020) [23]

<sup>73</sup> United Nations Office on Drugs and Crime, Female Victims of Trafficking for Sexual Exploitation as Defendants: A Case Law Analysis (United Nations, Vienna, 2020) 87.

<sup>74</sup> Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (15 June 2020), paragraph 61-62.

	Causation (nexus)
National examples (ASEAN)	<p><b>Brunei Darussalam</b></p> <p>A trafficked person shall not be liable to criminal prosecution in respect of –</p> <ul style="list-style-type: none"> <li>(a) his illegal entry into Brunei Darussalam;</li> <li>(b) his period of unlawful residence in Brunei Darussalam; or</li> <li>(c) his procurement or possession of any fraudulent travel or identity document which he obtained, or with which he was supplied, for the purpose of entering Brunei Darussalam, where such acts are the direct consequence of an offence of people trafficking that is alleged to have been committed or was committed.</li> </ul> <p>(Article 47, <i>Anti-Trafficking in Persons Order of Brunei Darussalam</i> (2019))</p>
	<p><b>Lao PDR</b></p> <p>Victims of the trafficking have the following rights:[...] 7. To be exempted from the criminal liability and shall not be detained for prostitution offence and illegal immigration</p> <p>(Article 39, Law Number 21 on The Eradication of the Criminal Act of Trafficking in Persons, 2007)</p>
	<p><b>Malaysia</b></p> <p>A trafficked person shall not be liable to criminal prosecution in respect of—</p> <ul style="list-style-type: none"> <li>(a) his illegal entry into the receiving country or transit country;</li> <li>(b) his period of unlawful residence in the receiving country or transit country; or</li> <li>(c) his procurement or possession of any fraudulent travel or identity document which he obtained, or with which he was supplied, for the purpose of entering the receiving country or transit country, where such acts are the direct consequence of an act of trafficking in persons that is alleged to have been committed or was committed.</li> </ul> <p>(Section 25, <i>Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act</i> 2007)</p>

	Causation (nexus)
National examples (ASEAN)	<p><b>Myanmar</b></p> <p>The Central Body: (a) shall not take action against the trafficked victims for any offence under this Law. (b) shall determine whether or not it is appropriate to take action against the trafficked victims for any other offence arising as a direct consequence of trafficking in persons.</p> <p>(Section 13, <i>Anti-Trafficking in Persons Law</i> 2005)</p>
	<p><b>Philippines</b></p> <p>Trafficked persons shall be recognized as victims of the act or acts of trafficking and as such shall not be penalized for crimes directly related to the acts of trafficking [...] or in obedience to the order made by the trafficker in relation thereto. In this regard, the consent of a trafficked person to the intended exploitation set forth in this Act shall be irrelevant.”</p> <p>(Section 17, <i>Anti-Trafficking in Persons Act</i> (RA No. 9208) of 2003)</p>
National examples (non-ASEAN)	<p><b>Argentina</b></p> <p>Victims of trafficking in persons are not punishable for the commission of any crime that is the direct result of having been trafficked.</p> <p>(Article 5, Law, 26.364, <i>Prevention and Criminalization of Trafficking in Persons and Assistance to Victims of Trafficking</i> of 2008)</p>
	<p><b>Egypt</b></p> <p>The victim shall not be criminally or civilly liable for any of the crimes of human trafficking as long as the crime occurred or was directly related to being a victim.</p> <p>(Article 21, Law No. (64) of 2010 regarding <i>Combating Human Trafficking</i>)</p>
	<p><b>Kenya</b></p> <p>Notwithstanding the provisions of any other law, a victim of trafficking in persons shall not be criminally liable for any offence related to being in Kenya illegally or for any criminal act that was a direct result of being trafficked.</p> <p>(Section 14, <i>Counter-Trafficking in Persons Act</i>)</p>

	Causation (nexus)
<b>National examples (non-ASEAN)</b>	<p><b>Malawi</b></p> <p>A person who has been certified as a trafficked person by an enforcement officer or a protection officer, in accordance with this Act, shall not be subjected to any criminal proceedings directly relating to, or as a direct consequence of, the person's situation as a trafficked person.</p> <p>(Section 42, Trafficking in Persons Act 2015)</p>
	<p><b>Qatar</b></p> <p>The victim shall not be subject to criminal or civil liability of any of trafficking in human beings crimes when such a crime is initiated or directly associated with such person as being a victim.</p> <p>(Article 4, Qatari Law No 15 of Year 2011 on Combating Trafficking in Human Beings)</p>
	<p><b>Romania</b></p> <p>a trafficked victim, who, as a result of his/her exploitation, has committed the offence of prostitution, begging, crossing the border illegally or giving organs, tissues or cells of human origin shall not be punished.</p> <p>(Article 20 of the Anti-Trafficking Law (amended in 2010))</p>
	<p><b>United States of America</b></p> <p>Penalties for the crime of unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labour do "not apply to the conduct of a person who is or has been a victim of a severe form of trafficking in persons, [...] if that conduct is caused by, or incident to, that trafficking."</p> <p>"[...] victims of severe forms of trafficking should not be inappropriately incarcerated, fined or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked."</p> <p>(Section 1592, Trafficking Victims Protection Act of 2000 (TVPA))</p>

Regardless of whether and how the non-punishment principle is captured in legislation, its fulfillment is essential for States as part of their obligation to protect victims of trafficking. States may violate this obligation by either failing to identify a victim of trafficking who is subsequently criminalized, or by failing to attach sufficient weight to the fact of a person's victimhood in decisions about whether to prosecute and convict him or her.<sup>75</sup>

<sup>75</sup> Ryszard Piotrowicz, "Article 26, Non-punishment provision" in Julia Planitzer and Helmut Sax (eds.) *A Commentary on the Council of Europe Convention on against Trafficking in Human Beings* (Edward Elgar, 2020) 319



# 2

## **Law, policy and practice in ASEAN Member States**



This section explores how the non-punishment principle has been captured in law and policy in ASEAN Member States and how it is applied in practice. The non-punishment principle is explicitly captured in the domestic law of seven of the 10 ASEAN Member States: Brunei Darussalam, Indonesia, Lao PDR, Malaysia, Myanmar the Philippines and Thailand.

**Table 3: Non-punishment provisions and scope of protection**

Country	Explicit provision in legislation	Limitations to scope of protection	Model	
			Causation	Compulsion
<b>Brunei Darussalam</b>	Article 47, Anti-Trafficking in Persons Order of Brunei Darussalam (2019)	Yes. Only applies to illegal entry, unlawful residence, and document-related offences.	✓	
<b>Cambodia</b>	None	N/A	N/A	N/A
<b>Indonesia</b>	Article 18, Law Number 21 on The Eradication of the Criminal Act of Trafficking in Persons, 2007	No.		✓
<b>Lao PDR</b>	Article 39, Law on Anti-Trafficking in Persons (2015)	Yes. Only applies to prostitution offence and illegal immigration	✓	
	Article 25, Law on Development and Protection of Women (2004)	Yes. Only applies to women and children and only applies to trafficking in women and children, prostitution and illegal immigration.	✓	

Country	Explicit provision in legislation	Limitations to scope of protection	Model	
			Causation	Compulsion
<b>Malaysia</b>	Article 25, Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (2007)	Yes. Only applies to illegal entry, unlawful residence and document-related offences.	✓	
<b>Myanmar</b>	Article 13, Anti-Trafficking in Persons Law (2005)	Yes. Only applies to offences specified in the Anti-Trafficking in Persons Law (2005)	✓	
<b>Philippines</b>	Article 17, Republic Act No. 9208 (2003) as amended by RA 10364 (2012) (Expanded Anti-Trafficking Act)	No.	✓	
<b>Singapore</b>	None	N/A	N/A	N/A
<b>Thailand</b>	Section 41 of Thailand's Anti-Trafficking in Persons Act B.E. 2551(2008)	Yes. Only applies to illegal entry or stay, providing false information, document-related offences, prostitution-related offences, work related offences. However, written permission of the Minister of Justice can be sought to take criminal proceedings against trafficked persons for these offences.		
<b>Viet Nam</b>	None	N/A	N/A	N/A

In applying the principle to real-life situations, practitioners are confronted with complex questions about its scope and effect. For instance, when does the principle apply, and when not? How is the link established between a victim's offending and his trafficking? Does protection from punishment apply to all types of crime or only some, and in what circumstances? Is a person's criminal culpability eliminated because he or she is a victim of trafficking, or only reduced? The complexity of answers to these questions partly explains why the principle is inconsistently applied in practice, although it is widely recognised in law.

## 2.1 Brunei Darussalam

Authorities of Brunei Darussalam opted not to participate in roundtable discussions for the purposes of this study, meaning information about implementation of the non-punishment principle could only be obtained through open-source information. Very limited information of relevance was identified.

**Explicit non-punishment provision in anti-trafficking legislation:** The non-punishment principle is captured in Article 47 of the *Anti-Trafficking in Persons Order of Brunei Darussalam* (2019), stating that a trafficked person shall not be liable to criminal prosecution in respect of illegal entry, unlawful residence and procurement or possession of fraudulent travel or identity documents as a direct consequence of a trafficking offence.

*Immunity from criminal prosecution*

*47. A trafficked person shall not be liable to criminal prosecution in respect of -*

*(a) his illegal entry into Brunei Darussalam;*

*(b) his period of unlawful residence in Brunei Darussalam; or*

*(c) his procurement or possession of any fraudulent travel or identity document which he obtained, or with which he was supplied, for the purpose of entering Brunei Darussalam, where such acts are the direct consequence of an offence of people trafficking that is alleged to have been committed or was committed.*

No information was obtained about whether and how Article 47 of the *Anti-Trafficking in Persons Order of Brunei Darussalam* (2019) has been interpreted and applied in practice.

**Irregular migrants at risk of punishment for trafficking-related offences:** There is a potential risk of victims of trafficking in Brunei being penalized for trafficking-related offences, under Article 48 of the *Anti-Trafficking in Persons Order of Brunei Darussalam* (2019).

*Offender deemed to be prohibited immigrant*

*48. A person, not being a citizen of Brunei Darussalam, convicted for any offence against this Order or any regulations made thereunder is deemed to be a prohibited immigrant under section 8 of the Immigration Act (Chapter 17).*

Where they are misidentified as traffickers, victims of trafficking who have graduated from victims to become involved in the recruitment or management of others for exploitation, may fall outside the scope of protection offered by Article 47, and be deemed ‘prohibited migrants’ under Article 48.

**Identification challenges resulting in punishment of victims of trafficking:** The United States 2021 Trafficking in Persons Report notes inadequate victim identification resulting in punishment of victims. It states that ‘[t]he government continued to detain, deport, and charge potential victims for crimes without employing a victim-centered approach to discern if traffickers compelled the victims to engage in the unlawful acts.’<sup>76</sup> Further, it reports that authorities used identification measures only after detaining victims following law enforcement operations, such as ‘raids’ in which foreign women were arrested for prostitution. Unidentified victims may also have been arrested for labour or immigration violations; there are reports of foreign workers being deported from Brunei without being appropriately screened, even in cases where employers withheld wages and retained passports, and reported them to immigration authorities as having run away.<sup>77</sup>

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<sup>76</sup> 2021 Trafficking in Persons Report: Brunei (US Department of State, 2021)

<sup>77</sup> 2021 Trafficking in Persons Report: Brunei (US Department of State, 2021)

## 2.2 Cambodia

Two roundtable discussions were held in Cambodia for the purposes of this study, with a total of 30 participants representing both State and non-state counter-trafficking entities. This section has drawn significantly on their insights, as well as relevant open-source material.

### Non-punishment principle in law and policy

**No explicit non-criminalization provisions in legislation:** There is no explicit non-criminalization provision in Cambodian legislation to prevent prosecution of victims of trafficking for offences related to their trafficking. Some respondents expressed the view that the principle should be clearly captured in the law so that police, prosecutors and judges can effectively and consistently apply it.

**Provisions relevant to non-punishment of child victims:** Article 44 of the *Law on Suppression of Human Trafficking and Sexual Exploitation* (2008) exempts children from punishment for offences including sexual intercourse with a minor under fifteen years (article 42) and indecent acts with a minor under fifteen years (article 43). Gaps in protection that may apply to protect victims/perpetrators over the age of 15 were noted here, though State respondents pointed to procedures in place to support age determinations and the application of the presumption of minority before official determinations are made. State respondents also noted special protection for children who violate the law in Cambodia through Article 96 of the *Code of Criminal Procedure* (concerning limitations to police custody of minors) and Article 7 of the *Juvenile Justice Law* (that determines 18 as the age of criminal liability).<sup>78</sup>

**Other relevant legislation to protect victims from punishment:** Notwithstanding the absence of an explicit non-punishment provision in domestic law, some respondents expressed the view that the law does protect the principle by generally protecting victims. Victim protection was underscored as a core component of human rights obligations and important to secure their cooperation. In this context, reference was made to the *Anti-Trafficking Law*, criminal law, Article 31 of the Cambodian Constitution (protecting human rights and equality before the law for Khmer citizens), as well as international and regional instruments. However, the point was also made that Cambodia is party to relevant international instruments, court decisions were noted as being guided solely by domestic law which does not always clearly articulate principles such as non-punishment in a way that it can be effectively applied.

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<sup>78</sup> This rule is subject to the exception that the court can make minors aged 14 and upwards criminally liable if circumstances or personality allow. See 'Juvenile Justice and Strategic Operational Plan 2018-2020', Ministry of Social Affairs Veterans and Youth Rehabilitation and Ministry of Justice, p.201.

**Policy documents of relevance to non-punishment:** Several policy documents, guidance, forms and procedures are relevant to the non-punishment principle, including those set out in Table 4 below. None of these policy documents were referred to by practitioners during roundtable discussions, suggesting they have limited or no utility in application of the non-punishment principle. The Five-Year National Strategic Plan for Counter Trafficking in Persons 2019-2023 does not refer to non-punishment, though it refers to its conceptualization in line with the ASEAN Action Plan to implement the ACTIP.<sup>79</sup> Other policy documents are also silent on the issue of non-punishment.<sup>80</sup>

## Interpretation of the non-punishment principle

**Establishing the link between the trafficking and the victim's offence:** Government stakeholders explained that a victim's culpability for an offence they have committed depends on his or her intention; if he lacks intention, for instance, because he was compelled to commit the crime, then he will be considered a victim. It was explained that Cambodian law clearly states that a person who commits a crime unintentionally shall be considered guilt-free, but if a person violates another person's rights and was not compelled to do so, then he or she would be held to account.

**Value of guidance on non-punishment:** Existing guidelines that address non-punishment were not referred to by practitioners in the discussions (see Table 4 below). However, suggestions were made for the government to put in place guidelines and criteria on victim identification, in relation to effective protection of victims and witnesses of trafficking who may be accused of trafficking offences. Such guidelines, it was suggested, could emphasise the value of NGOs in supporting identification processes. The suggestion was also made for such guidance to be provided on application of the non-punishment principle to allow cases against victims to be dropped, and to direct judicial authorities to international commitments and bilateral agreements.

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<sup>79</sup> Five-Year National Strategic Plan for Counter Trafficking in Persons 2019-2023, p.12.

<sup>80</sup> These include: *Prakas* 852 on Implementation of the Policy on Protection of the Rights of Human Trafficking dated August 31<sup>st</sup>, 2009; Policy on Protection of the Rights of Victims of Human Trafficking, dated August 31<sup>st</sup>, 2009 and *Prakas* No. 857S.V.Y on Minimum Standards for Protection of the Rights of Victims of Human Trafficking Dated September 3<sup>rd</sup>, 2009, Ministry of Social Affairs, Veterans and Youth Rehabilitation. The minimum standards do not explicitly protect victims from criminalization, but rather anticipate that victims may be facing criminal charges. A point contained in Article 6(11) on the right to freedom of movement states that "Adult victims facing no criminal charges shall have the right to leave law enforcement institutions or service providers after informing the competent authorities or institutions..." This provision implies that there are situations when adult victims will be facing criminal charges, in which case, they do not enjoy the same freedom of movement. In contrast, article 6(4) affirms their right to be "treated with respect throughout the victim assistance process and be recognized as individuals who have undergone a difficult series of circumstances" and states that "any act of discrimination and / or stereotyping against the victim on the basis of sex, age, race, ethnicity, religion, nationality, sexual preference, disability, or past experiences is strictly prohibited."



**Table 4: Cambodian policy and procedural documents relevant to non-punishment**

<p><i>Guidelines on Forms and Procedures for identification of victims of trafficking for appropriate service provisions</i> (National Committee for Counter Trafficking in Persons, NCCT, 2015)</p>	<p>2.C, 2: During the process [of preliminary identification] the foreigners who have been formally identified as victims shall not be detained or charged with illegal immigration and / or prostitution. They shall be provided with shelter and protection while awaiting the official repatriation process.</p>
<p><i>Decision on the Guideline for the Protection of the Rights of Trafficked Children of the Kingdom of Cambodia</i> (Cambodian National Council for Children, CNCC, 20 December 2007, No. 107)</p>	<p>Article 4, 2.3(a) Trafficked children are victims of human rights violations. They should not be treated as offenders or subjected to or threatened with criminal sanctions for any offense related to their situation as trafficked children.</p>
<p><i>Guidelines on the Implementation of the Law on Suppression of Human Trafficking and Sexual exploitation</i> (Unofficial UNIAP translation 2008) General Guidelines</p>	<p>(4) Prostitutes are to be regarded as victims of procurement for prostitution. Prostitution is not a crime; thus the individual prostitutes are not punished as offenders under the new legislation.</p>
<p><i>Policy and Minimum standards for Protection of the Rights of Victims of Human Trafficking</i> (Ministry of Social Affairs, Veterans and Youth Rehabilitation, 2009)</p>	<p>“We know that victims of human trafficking are victims of transnational crime, and not illegal immigrants although their stories may be similar to illegal immigrants. They are not criminals but they are individuals who have the right to respect, justice and self-determination to map their future without discrimination.” (p.1) This document also recognised (on p.8) that people may be trafficked to carry out criminal activities. However, the minimum standards do foresee the criminalization of trafficked persons, granting freedom of movement only to those victims not facing criminal charges (p.27).</p>

## Application of the non-punishment principle

**Application of non-punishment principle only to some offences:** Notwithstanding the absence of an explicit non-punishment provision in law, State respondents stated that there were no cases of presumed victims of trafficking being prosecuted. The example was offered of foreign victims of trafficking into prostitution who were accused of offences, but were not charged as they were identified as victims of trafficking. Examples were also offered of Indian, Bangladeshi and Pakistani people exploited in Cambodia who were not punished for violations of immigration and labour laws, but were protected as victims. The same point was made for offences relating to prostitution, for whom only those who commercially benefit are charged. However, it was explained that a person can be a victim of trafficking and a perpetrator of another offence for which they can be liable, for instance, a separate drug-related offence.

**Role of judicial discretion in not punishing victims of trafficking:** Government respondents explained that investigators, prosecutors and investigating judges have significant discretion to not punish victims of trafficking, with the latter able to modify or dismiss charges based on their own investigation. No examples were offered of Cambodian courts exercising discretion to dismiss a case against an accused person when their victimhood came to light, or to issue an order to give a person victim status. The comment was made that leaving the application of the principle to discretion rather than providing for it in law, results in inconsistent application. Again, the inclusion of a clear provision in legislation setting out the non-punishment principle was raised to make it easier for judges to exercise their discretion resulting in more consistent application of the principle.

## International cooperation challenges

**Importance of bilateral and regional agreements:** The importance of international cooperation with countries of destination for trafficked Cambodians was considered key to protecting them from punishment. Importantly, such cooperation would serve to achieve consensus on victim identification criteria. Cambodia has MOUs in place with Thailand and Viet Nam in which parties confirm that women and child victims are to be treated as victims not as offenders, and are not to be punished victims for illegal entry to or exit from its territory, or any other offences arising directly from human trafficking.<sup>81</sup> For some countries of key interest (including Malaysia) there is no MOU in place yet. However, an example was offered of a Malaysian court dismissing charges of illegal entry and stay, with a judge providing victim status to Cambodian victims.

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<sup>81</sup> See Article 6 of the *Memorandum of Understanding between the Government of the Kingdom of Cambodia and the Government of the Kingdom of Thailand on Bilateral Cooperation for Eliminating Trafficking in Persons and Protecting Victims of Trafficking* (30 April 2014) and Article 5 of the *Agreement between the Royal Government of Cambodia and the Government of Socialist Republic of Vietnam on Bilateral Cooperation in Elimination of Children and Women Trafficking and Protection of Victims of Trafficking* (signed October 10, 2005 and amended on September 28, 2012)

**Uneven application of bilateral and regional agreements:** Bilateral agreements as well as the *ASEAN Treaty on Mutual Legal Assistance in Criminal Matters* and Extradition agreements, are not considered to be fully or consistently implemented. Practical examples were offered of bilateral MOUs on criminal justice cooperation not being usefully applied, resulting in disagreements about whether a case is one of trafficking or labour violation. Examples were also offered of investigations not being carried out across borders, resulting in cases against traffickers not being pursued in other jurisdictions. Questions were raised about how the non-punishment principle captured in MOUs can be effectively implemented if it is not also captured in domestic law. The point was raised that a clear legislative provision would support consistent application of the principle between countries and potentially reduce reliance on MOUs and SOPs between them. Concern was also raised that SOPs and MOUs focus on women and children, leaving a protection gap for men trafficked into fishing, construction and other industries.

## Victim identification challenges

**Effective victim identification as key to non-punishment:** Stakeholders emphasized the importance of identification to non-punishment. Government actors were adamant that robust early and effective identification means that trafficked people – whether Cambodian or non-citizens – are not punished. Identification procedures were said to be in line with the *Trafficking Protocol* and the *Cambodian Law on Suppression of Human Trafficking and Sexual Exploitation*. They explained that the presumption of victimhood is reportedly applied at an early stage to remove room for error, but that even when victims were not identified at early stages, a person would be subsequently identified by the investigating or trial judge. These views stand in contrast to views expressed at the international level about the lack of effective identification of victims of trafficking in Cambodia.<sup>82</sup>

**Good practices in screening of Cambodians returning from abroad:** Examples were offered of police acting to ensure that people are comfortable to talk to them, including by wearing plain-clothes rather than uniforms to interview them. Here it was noted that the groups returning from Thailand, or Malaysia or Indonesia are screened by police for trafficking.

**Concerns about under-identification of male victims of trafficking:** Some respondents expressed concerns that assumptions that men are not trafficked result in low identification of male victims of trafficking relative to women and children.

**Challenges identifying foreign victims of trafficking in Cambodia:** Concerns were expressed that foreign people have been arrested and fined for violating immigration and labour laws without further investigation carried out into how they came to be in

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<sup>82</sup> See for instance, Concluding Observations on the sixth periodic report of Cambodia, *Committee on the Elimination of Discrimination against Women*, CEDAW/C/KHM/CO/6, 12 November 2019 [26].

Cambodia, who brought them to Cambodia, what promises were made and other aspects that would allow them to be screened for trafficking indicators. In such cases, a lack of coordination was noted between Immigration Police and Anti-Trafficking Police who have different roles meaning some migrants in irregular situations are not screened for potential trafficking, but are subject to deportation rather than repatriation. To remedy this, the value of a multi-stakeholder approach was emphasized, so that Immigration authorities carrying out operations at places where irregular migrant work or reside could be supported by Anti-Trafficking Police, social affairs and others to support identification victims of trafficking among migrant workers.

## Victim punishment in practice

**Misuse of anti-trafficking legislation to criminalize women in the sex industry:** The Committee on the Elimination of Discrimination against Women has expressed concern about the misuse of anti-trafficking legislation to criminalize individuals who are not responsible for trafficking, and called for Cambodia to revise national legislation to decriminalize women in prostitution.<sup>83</sup> At the same time, exploiters are rarely prosecuted. In response, the Committee has called for Cambodia to:

*Ensure that measures to combat trafficking, including anti-trafficking legislation, are used for the purposes of prosecuting traffickers and providing effective remedies to victims and that they are not misused against individuals who are not responsible for trafficking offences.*<sup>84</sup>

Among these people in the sex industry who are prosecuted for offences in counter-trafficking legislation, may be victims of trafficking who are charged, prosecuted and convicted as traffickers, often in lieu of their traffickers being investigated and brought to justice.

**Foreign victims of trafficking in Cambodia:** Concerns have been raised about foreign victims of trafficking being subject to punishment in Cambodia. The 2020 US Trafficking in Persons Report refers to media reports of young Malaysians paying recruitment fees for high-paying jobs, only to be transferred to Cambodia where they are exploited by traffickers and arrested for immigration violations.<sup>85</sup> Some respondents pointed to situations of foreign victims of some forms of exploitation being discriminated against; one respondent noted that Vietnamese, Chinese and African victims sometimes fear discriminatory treatment. While there are many state and non-state services for Cambodians, there were noted to be fewer organisations providing support to foreigners. Risks of punishment were

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<sup>83</sup> See for instance, Concluding Observations on the sixth periodic report of Cambodia, *Committee on the Elimination of Discrimination against Women*, CEDAW/C/KHM/CO/6, 12 November 2019 [29](a).

<sup>84</sup> See for instance, Concluding Observations on the sixth periodic report of Cambodia, *Committee on the Elimination of Discrimination against Women*, CEDAW/C/KHM/CO/6, 12 November 2019 [26](c); [27](f).

<sup>85</sup> 2020 Trafficking in Persons Report: Malaysia (US Department of State, 2020)

particularly raised for foreigners in Cambodia exploited in prostitution and surrogacy, with complex questions emerging as to whether or not surrogacy falls within the understanding of trafficking. In this respect, it was noted that some women who have been used as surrogates have been prosecuted for unlawful acts not only in Cambodia but elsewhere in the ASEAN region, in the absence of legislation to enable their identification as potential victims of trafficking. In contrast, other respondents expressed the view that that foreign victims of trafficking in Cambodia are not punished for offences related to their trafficking, but are treated as victims by immigration authorities and police. Reference was also made to foreign victims of trafficking into sexual and forced labour exploitation (including from Bangladesh, China, Eastern Europe, India or Nepal, Sri Lanka or Viet Nam), who have not been prosecuted, even in cases where they had encouraged others to come with them to Cambodia knowing it was illegal to do so.

**Cambodian victims of trafficking abroad:** While authorities stated that victims of trafficking are protected within Cambodia, concern was expressed about the plight of Cambodian victims of trafficking abroad. Cambodian victims have reportedly faced punishment for violation of immigration or criminal provisions abroad, including in China, Malaysia, Thailand and Singapore, in some cases, where they have already been identified as victims. People potentially trafficked into forced labour have also been reportedly punished for illegal logging or working illegally in Chinese casinos, without being identified as victims of trafficking.

**Victims of trafficking in the fishing industry:** Particular concern was raised by both government and non-government respondents about protection challenges for persons exploited in the fishing industry, who have been threatened with or subject to lawsuits and penalties for falsified documentation and immigration-related crimes. Victims trafficked into fishing who manage to escape their situation have been punished for immigration-related offences in countries they manage to reach, without being identified as victims of trafficking. Potentially trafficked fishermen have reportedly been sent to detention and advised to plead guilty, and then been subjected to corporal punishment and given a criminal record, rather than being identified and protected as victims of trafficking.

**Cambodian victims returning from abroad:** There was consensus that those returning home from abroad are not punished for having left Cambodia irregularly. Efforts of police to alleviate concerns of returning victims – including repatriated fishermen – were commended. Ringleaders or brokers among them who have taken their neighbours or relatives abroad for fishing work, are not charged as perpetrators because they have been victimized too. In contrast to this, an incident was mentioned of a person who was being provided with services as a victim of trafficking, but upon discovering that she had also taken many victims to work illegally abroad, was reclassified as a perpetrator and services to her were suspended.

## 2.3 Indonesia

Two roundtable discussions were held in Indonesia for the purposes of this study, with a total of 29 participants representing both State and non-state counter-trafficking entities. This section has drawn significantly on their insights, as well as relevant open-source material.

### Non-punishment principle in law and policy

**Explicit non-punishment provision in Anti-Trafficking Law:** Article 18 of Law Number 21 on *The Eradication of the Criminal Act of Trafficking in Persons*, 2007 protects victims of trafficking from criminal charges where they were coerced to commit the crime. It does not limit the scope of the criminal charges to which it applies, simply stating that ‘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.’ Civil, administrative and immigration offences are not captured in this provision.

**Other laws relevant to non-punishment of victims:** Other laws mentioned as relevant to non-punishment included Article 55 of the *Penal Code*, which is narrower than the protection provided by Article 18 of the Anti-Trafficking Law, and concerns criminal liability for those who intentionally perpetrate or deliberately provoke others to commit a crime. Article 10 of Law No. 31 (2014), being the *Witness and Victim Protection Act* was noted to intersect with the non-punishment principle, by not allowing for the prosecution of witnesses, victims and informants in civil and criminal law who have given good faith information or testimony. There was some discussion too around the ACTIP, and the extent to which it is and should be considered legally binding where there are no provisions in domestic law to give explicit effect to it.

**Policies relevant to non-punishment:** The *National Action Plan for Eradication of Human Trafficking year 2015-2019* is silent on the principle of non-punishment. The National Action Plan for 2020-2024 was not available at the time research was being conducted in 2021 for this study. During the roundtable discussions, it was suggested that the non-punishment principle be included in both National and Regional Action Plans, supported by a roadmap for implementation of the non-principle as it is captured in the law.

### Interpretation of the non-punishment principle

**Understanding of the non-punishment principle:** Practitioners expressed different views as to whether the non-punishment principle is well understood in Indonesia. Some felt that frontline law enforcement officers and representatives of Witness and Victim Protection Agency (LPSK) recognise that victims commit crimes such as document forgery, for which they are not punishable because Article 18 of Law 21 comes into play. Some respondents were of the view that members of the judiciary understand the principle well, because it is captured in the legislation, where others felt that it needed more domestic



elaboration in order for judges to accept that it has been effectively incorporated into domestic law. Some respondents felt that the provision may be interpreted differently by different people. Those who considered understanding to be uneven raised concerns that particularly at the sub-national level, criminal justice practitioners may lack understanding of trafficking in persons and fail to understand why people who have committed crimes, should not be punished for them.

**Establishing the link between the offence and the trafficking:** The link between the offending and the trafficking was explained as established by coercion (compulsion); where victims commit an offence against their will, they are not punished. However, some respondents felt that the law lacks sufficient detail in the absence of criteria on how to prove the elements of trafficking at trial in order for article 18 to apply to protect persons who have been subject to trafficking.

Challenges were noted in proving that the crime conducted by the victim correlates with the actions of the perpetrator, with questions asked around the meaning of 'force' and 'coercion', and whether psychological manipulation comes into play in understanding how a victim came to commit an offence. The point was made that for some victims of trafficking, 'force' may be too high a standard to describe their participation in an offence. It was noted any consent victims may have given to committing crime is irrelevant where victims are acting under the control of traffickers.

**Guidance on implementing the principle in practice:** There are some guidelines of relevance to non-punishment in Indonesia. The *Guidelines for Law enforcement and the protection of victims of trafficking in persons in handling trafficking in persons cases* (2009) raise the challenge of victims who may also be considered perpetrators of crimes related to their trafficking (at p.36) and emphasise the need for officials to have specialized skills to understand that victims may have committed offences in relation to trafficking (at p.41). The *Integrated Service Centre for Witness and/or Victim of Trafficking in Persons (ISC) Guidelines* speak to non-criminalization at Schedule 4 stating that interviewers must inform the victim that he or she will not be prosecuted for unlawful conduct unwillingly done due to any pressure from the perpetrator.<sup>86</sup> None of these guidelines were raised by respondents as informing understanding of the non-punishment principle.

**The need for further guidance on non-punishment and implementation of existing guidance:** The fact that existing guidelines were not mentioned by practitioners suggests that they are not widely used. No other guidelines or other documents were mentioned as being of specific relevance to the non-punishment principle. Yet, in discussing ambiguity of the principle, the suggestion was made for government regulations or technical instructions to be developed particularly for law enforcers and immigration officials to ensure consistent understanding of the principle and to close knowledge gaps between national and provincial levels. Training was also called for to support police and prosecutors

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<sup>86</sup> ASEAN & ACTIP: Using a Regional Legal Framework to Fight a Global Crime (Liberty Asia, 2017) 39, 44.



to consider the non-punishment principle in case management meetings.

## **Application of the non-punishment principle**

**When the non-punishment principle applies in criminal justice process:** Respondents noted that Article 18 has not yet been applied in practice, meaning its application was only hypothetically discussed. There was a lack of consensus on whether it would apply at the initial point that the elements of trafficking are identified; or when an alleged trafficker is charged, prosecuted or convicted for trafficking; or when a person is charged with an offence and then subsequently discovered to be a victim of trafficking; or whether these things would occur contemporaneously, at the point it is discovered that traffickers have coerced a victim to commit an offence. On this, the point was made that victim identification is a separate informal process carried out for the purpose of victim protection, which may not occur simultaneously to the trafficking investigation. Another respondent ventured that where an offence is at issue, its elements must be fulfilled, which in the case of a victim committing an offence under coercion, they would not be. Questions were also raised about whether the answer to when and how the principle applies is answered in Criminal Procedure Law. On the basis of this discussion, respondents again emphasised the need for guidance to support the application of the principle in practice.

**Role of police applying the non-punishment principle:** In discussing the role of criminal justice practitioners, Article 18 was noted as operating, at least in theory, at all stages of criminal justice process from the point that police encounter potential victims of trafficking. Police are able to protect the victim where the victim's victimhood is known, by implementing Article 18 in the indictment with some proof that they are victims of trafficking, thereby categorising a person as a victim of trafficking rather than as an offender from the outset. However, concerns were raised about the capacity of law enforcers who may be more familiar with the offences contained in the Criminal Code than with the Anti-Trafficking Law, and who will more readily charge a person under law they are familiar with, than avoid charging a person under a law they are not, therefore passing such decisions on to courts.

**Role of prosecutors and defence lawyers in applying the non-punishment principle:** Unless they are protected from punishment at the outset, victims may face trial proceedings. During proceedings, defence lawyers can present evidence that a person is a victim and prosecutors may also uncover elements that show a person is a victim who was forced to commit the crime. A barrier noted here was the fact that the role of prosecutors is to prosecute. In practical terms then, Article 18 may only be applied once the victim has already been treated as a wrongdoer by police, and once a trafficker is identified and prosecuted.

**Role of members of the judiciary in applying the non-punishment principle:** Where a potential victim of trafficking is prosecuted for an offence, the judge is able to consider whether to absolve them from criminal responsibility or to mitigate their sentence. The

judge can act on the basis of their sense of justice that a person should not be punished. The Witness and Victim Protection Agency (LPSK) can also reportedly provide written legal opinions to the court, using Article 10 of Law No. 31 of 2014 and Article 18 of Law No. 21 of 2007. It was not clear from discussions whether these opportunities to assert the non-punishment principle had been pursued in practice.

**Restorative justice principles relevant to non-punishment principle:** Some practitioners pointed to restorative justice as a last option to protect victims from punishment. Restorative justice was flagged as particularly relevant for some categories of crime (those which do not attract sentences of more than 5 years), and some types of perpetrators (women and children). Restorative justice considerations can be entertained by judges in allowing for leniency in sentencing; examples were offered of courts reducing sentences because a perpetrator was a victim of trafficking, though they did not absolve them of criminal responsibility.

## International cooperation challenges

**Uneven cooperation across transnational trafficking routes:** Legal assistance may be provided by Indonesian authorities requesting police in other countries to screen and protect Indonesian citizens under the anti-trafficking laws of that country. Concerns were raised about some countries in the ASEAN region being less cooperative than others on counter-trafficking issues including non-punishment of victims. The importance of having mutual legal assistance and extradition treaties in place was flagged as key, alongside harmonizing domestic legislation in line with the ACTIP. Practitioners pointed to the importance of consistent understandings of trafficking in persons across jurisdictions, and harmonized criminal justice procedures. This same concern was raised in situations where Indonesians are trafficked outside the ASEAN region, for instance, to the Middle East. Challenges were pointed to in applying the non-punishment principle in such situations, where traffickers are being investigated or prosecuted in Indonesia, but their victims remain for instance, in Iraq, where they are charged or fined by police.

**International cooperation needed to address transnational trafficking in maritime context both within and beyond the ASEAN region:** Respondents offered examples of Indonesians exploited beyond the ASEAN region, including in forced labour on board fishing vessels, including in the Pacific. Their recruitment onto vessels in transit countries (such as Singapore) for subsequent exploitation elsewhere points to the need for transnational cooperation to counter trafficking in the maritime context. Good practices were raised in this context of ship crew being recognised as victims of trafficking by authorities in the Philippines and efficiently returned to Indonesia without being prosecuted for their involvement in any offences.

**International cooperation challenges in criminal procedure:** Complexities were pointed to in the case of Mary Jane Veloso (see Box 5 below) imprisoned in Indonesia for her involvement in narcotics-related offences, while being asked to testify against her alleged

traffickers on trial in the Philippines. The procedure by which this can happen is not clear, given that the Philippines requires witnesses to physically testify in the Philippines. In this case, Indonesia has not recognised Mary Jane Veloso to be a victim of trafficking, though the trial in the Philippines has confirmed that she is. Another case was mentioned in which an Indonesian migrant worker who served seven years in prison was subsequently released for reasons including the fact that she was a victim of trafficking.

## Victim identification challenges

**Victim identification as key to application of non-punishment principle:** Respondents confirmed that a key challenge to non-punishment of victims is their effective identification. Many remain unidentified and therefore liable to be treated as offenders rather than protected as victims. The 2020 US Trafficking in Persons Report also points to inadequate identification of victims of trafficking as a cause of their punishment, including in the context of raids in commercial sex and to combat illegal fishing.<sup>87</sup> This concern was reiterated the following year in the 2021 US Trafficking in Persons Report, which noted that police were sometimes unresponsive when victims attempted to report their trafficking circumstances.<sup>88</sup>

**Identification opportunities missed throughout the criminal justice proceedings:** Where a person is not formally identified as a victim and is treated as a perpetrator, it is reportedly difficult to remove them from the criminal justice process thereafter. Related concerns were raised about the language of illegality that applies to migrant workers who may feel blamed for illegal entry, regardless of how it took place. Investigators have reportedly classified victims as offenders (for instance, of document forgery), rather than as victims of trafficking, because the offence is apparent, while their victimisation is less so. In some cases, victims of trafficking will only be identified after legal processes against them have been completed, subjecting them to punishment in the course of proceedings and thereafter. Examples pointed to in this respect included Merry Utami and Mary Jane Veloso (see Box 5 below), both convicted for drug-related offences and seeking clemency on the basis that they are victims of trafficking.

**Gender dimensions of non-identification of victims of trafficking and their susceptibility to punishment:** Concerns were raised about criminal justice practitioners – from police through to members of the judiciary – having potentially negative responses to victims, potentially resulting in their non-identification and subsequent punishment. Social constructions were noted as potentially impacting how criminal justice practitioners perceive and treat LGBTIQ+ victims. Significant gender dimensions were evident too in negative assumptions made about females for how they dress, look or walk, potentially leading to victims not be identified. Some respondents noted negative attitudes towards women who willingly do sex work. Gender dimensions impacting on non-identification of

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**87** 2020 Trafficking in Persons Report: Indonesia (US Department of State, 2020)

**88** 2021 Trafficking in Persons Report: Indonesia (US Department of State, 2021)

males are also evident. Some practitioners noted that while foreign women encountered in the entertainment industry may be screened and protected, foreign males (for instance, in the maritime sector), may simply be sent to detention without been screened for potential trafficking. Others concurred, noting the lack of protection services available for male victims of trafficking relative to females.

**Challenges in identification of victims of transnational trafficking:** Victims of transnational trafficking are reportedly at particular risk of being punished. Authorities that intercept victims in transit may not identify them as victims, because they have not yet been exploited, and so merely apply their immigration law. At this stage too, victims may not recognise themselves as victims of trafficking and so not identify themselves to authorities. Low capacity of authorities in border regions was raised as a barrier to non-punishment, along with complexities of differentiating trafficked persons from smuggled migrants. Document-related offences for instance, may be involved in both crime types. Identification challenges are exacerbated in contexts and locations where there are high numbers of undocumented migrants. Respondents suggested that victims need to be made aware of their right to be protected and not to be punished, as a part of increasing the possibility of their early identification.

**Risks of punishment of third parties posing challenges for identification:** Trafficking of victims into forced marriages (notably, to China) raise significant complications. Where parents are paid significant amounts on the basis of promises that their daughter will enter a better life, they are at risk of being prosecuted. Victims may therefore be reluctant to take actions against traffickers in fear that their parents will also be punished. The same challenge may arise in other trafficking situations where victims are protective of persons who may be peripherally or even directly involved in what has happened to them.

## **Victim punishment in practice**

**Victims of trafficking punished for a range of offences:** Practitioners offered examples of victims being charged with offences including immigration offences, document-related offences, drug-related offences, selling illegal goods, and illegal work (prostitution). Children were noted as being at risk of punishment, including for their involvement in trafficking other children, or where they were recruited overseas potentially as victims, yet treated as offenders under immigration law. One case was offered of a person accused of murder escaping the death penalty because she was found to be a victim of trafficking. Examples were also offered of Indonesian trafficked victims being charged for crimes they commit in defending themselves in situations of exploitation abroad; Singapore, Malaysia and the Middle East, including Iraq, were mentioned in this respect.

**Punishment of victims of trafficking in the sex industry:** The 2021 US Trafficking in Persons Report noted that while there were no reports of specific instances in which

victims were punished for crimes traffickers compelled them to commit, adults in commercial sex work have been charged with crimes against morality and decency; crimes which attract corporal punishments of public caning under Sharia law in Aceh province.<sup>89</sup> During discussions, respondents offered examples of children in the sex industry who are identified by NGOs being protected from punishment, while identified adults in the same situations would not be. Examples of victims who recruit other victims were also offered as examples of where punishment for trafficking for sexual exploitation would apply.

**Punishment of victims for violations of immigration law:** Administrative and immigration-related offences were reportedly not implemented in the case of foreign victims of trafficking (and smuggled migrants), who are treated as special cases in immigration law, and so not placed in immigration detention but accommodated elsewhere. However, examples of victims being prosecuted were offered, with respondents noting that where there is a willingness on the part of victims to commit immigration or document-related offences and who choose to be illegal migrant workers, they are charged.

**Punishment of victims for terrorism-related offences:** Respondents discussed the complex intersection between trafficking and terrorism. Both use similar recruitment methods to abuse the vulnerability of people – including women and children – through ideological and religious manipulation to commit crimes. In the case of children, the *Child Protection Law* ensures that children in the criminal system are recognised as victims in how they are handled. Vulnerable women or girls who are forced into marriages with terrorists may be rehabilitated rather than sanctioned. However, challenges arise in the application of the non-punishment principle for people who willingly participate in terrorism-related offences even where there are aspects of indoctrination and abuse of vulnerability at play that may indicate that they have been trafficked. Some respondents expressed the view that where people assist terrorist networks and do not want to be rehabilitated, it may be more appropriate to prosecute them as terrorists rather than protect them as victims of trafficking.

**Punishment of victims trafficking in the fishing industry:** In the trafficking cases uncovered in 2015 in Benjina in Maluku province, victims were reportedly initially suspected of identity fraud for using falsified or forged passports and seaman books, or lacking papers altogether. Rather than being prosecuted for illegal fishing and illegal migration, they were instead considered victims and therefore exempted from punishment and returned to their countries of origin (Myanmar, Cambodia and Lao PDR). Article 18 of the Anti-Trafficking Law was not explicitly used in sparing them from punishment. However, other cases were mentioned of foreigners caught illegally fishing in Indonesian waters who were placed in immigration detention, sometimes for extended periods, without being screened for potential trafficking. The United States Department of State also notes that

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89 2021 Trafficking in Persons Report: Indonesia (US Department of State, 2021)

those exploited in the fishing industry (including trafficked fishermen from Cambodia, Thailand and Viet Nam) are highly vulnerable to criminalization for crimes committed in Indonesian waters and elsewhere, including illegal fishing, poaching, smuggling and illegal entry into territories of other States.<sup>90</sup>

**Punishment of victims for narcotics-related offences:** There was significant discussion on the risk of punishment faced by victims of trafficking exploited as drug mules. Respondents offered three key reasons why people may be punished under the *Narcotics Law 2009* rather than be protected under the *Anti-Trafficking Law*. Firstly, law enforcement officers are more familiar with the *Narcotics Law* than the *Anti-Trafficking Law*. Secondly, convictions are relatively easy to achieve under the former, with the element of intent not required. Accordingly, those who are first seen as perpetrators, may never be seen as victims of trafficking, being a crime requiring significant time, energy and skill to investigate, with uncertain chance of success. Thirdly, the impact of the ‘War on Drugs’ exacerbates risks of punishment for victims of trafficking and compromises their protection. Some respondents noted that those who advocate for the protection of victims of trafficking who are exploited as drug mules, may be stigmatized or criticised for acting contrary to national interests by not supporting the War on Drugs.

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90 2021 Trafficking in Persons Report: Indonesia (US Department of State, 2021)

### Box 5: Victim of trafficking facing death for drug smuggling - Mary Jane Veloso

In 2010, Mary Jane Veloso, a Filipina Overseas Foreign Worker (OFW), was arrested in Yogyakarta airport, convicted and sentenced to death for smuggling more than 2kg of heroin into Indonesia. Ms Veloso had always maintained that she had been duped into taking the suitcase after she had lost her job in Malaysia. Concerns have been raised about the trial procedure that resulted in Ms Veloso's conviction, with suggestions made that her right to a fair trial was not upheld.<sup>91</sup> Her execution by firing squad was reprieved on 29 April 2015, after Philippine authorities sought a stay of proceedings so that Ms Veloso could testify against Cristina Sergio and Julius Lacanilao, accused of human trafficking.

Ms. Veloso was not identified as a victim of trafficking when she was encountered by law enforcers.<sup>92</sup> Rather, her situation as a victim of trafficking emerged only after she was convicted and sentenced, owing to the advocacy of civil society groups and on the basis of facts that emerged in the Philippines trial against, Cristina Sergio and Julius Lacanilao, for illegal recruitment and qualified trafficking.

Notwithstanding the proceedings of the Court in the Philippines, at the time of writing, Ms. Veloso has still not been recognised in Indonesia as a victim of trafficking and Article 18 of the *Eradication of the Criminal Act of Trafficking in Persons* (2007) law has not been applied to protect her from punishment. Delays to bilateral cooperation between the Philippines and Indonesia have meant that Ms Veloso has not yet testified against her traffickers and as at December 2021, she remains in prison in Indonesia. The decision that is made in relation to her case will reflect on bilateral cooperation between the Philippines and Indonesia, as well as on Indonesia's capacity to understand and apply the non-punishment principle in practice, as it is captured in Article 14(2) of ACTIP and article 18 of its *Eradication of the Criminal Act of Trafficking in Persons* (2007) law.

<sup>91</sup> See for instance: Wahyu Susilo, Aspek-aspek Ketidakadilan Dalam Proses Peradilan Terhadap Mary Jane Fiesta Veloso (Perspektif Perbandingan) in Tim Penyusun, *Unfair Trial: Analisis Kasus Terpidana Mati di Indonesia* (Koalisi untuk Hapus Hukuman Mati, 2016) pp.107-114.

<sup>92</sup> Felicity Gerry and Narelle Sherwill, "Human Trafficking, Drug Trafficking and the Death Penalty" *Indonesia Law Review* (2016) 3: 265-282, 271.





**Punishment of Indonesian victims of trafficking in other jurisdictions:** Respondents pointed to challenges arising where Indonesians migrate abroad irregularly and subsequently fall victim to exploitation. Indonesian victims of trafficking, including children, have reportedly been treated as perpetrators by police in ASEAN countries and elsewhere for immigration offences, document forgery, drug offences and even murder. An example was offered of Indonesian victims seeking help of local police being instead charged for being undocumented. Such prosecutions reportedly occur where Indonesian embassies abroad are unfamiliar with the non-punishment principle and criminal justice authorities in those jurisdictions do not investigate whether a person has been trafficked.

**Use of punishment by traffickers:** Examples were offered of traffickers or exploitative employers reporting victims of trafficking for crimes, such as fraud, disloyalty and disobedience to the company's rules. This was noted as a strategy to deflect criminal justice attention onto vulnerable victims. The 2021 US Trafficking in Persons Report similarly notes that recruitment agencies have filed defamation lawsuits against victims attempting to report abuse, many of whom lacked the financial means to participate in trial proceedings.

**Use of punishment by state officials:** Respondents reported that particularly in border regions, corrupt officials can leverage the threat of punishment to extort bribes by demanding payment to facilitate crossings, threatening arrest if people refuse to pay.<sup>93</sup> Punishment may also be used to serve counter-trafficking ends. In practice, foreign victims of trafficking irregularly in Indonesia may be detained for the purpose of determining whether they are smuggled or trafficked, or asylum seekers or refugees. A government respondent also explained that bringing victims back to Indonesia to testify after they have been repatriated to their own countries is a costly process requiring significant effort, which can be avoided if they are initially arrested (for instance, for identity fraud / forgery-related offences) in Indonesia, so they can be engaged as witnesses in the judicial process.

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<sup>93</sup> Also see: *Corruption as a Facilitator of Smuggling of Migrants and Trafficking in Persons in the Bali Process Region with a focus on Southeast Asia* (UNODC and RSO, 2021) pp.26-27.

## 2.4 Lao PDR

Two roundtable discussions were held in Lao PDR for the purposes of this study, with a total of 27 participants representing State and non-state counter-trafficking entities. This section has drawn significantly on their insights, as well as relevant open-source material.

### Non-punishment principle in law and policy

**Explicit non-punishment provisions in Lao counter-trafficking legislation:** There are two explicit provisions in Lao law that speak to non-punishment. By virtue of Article 39(7) of the *Law on Anti Trafficking in Persons* (2015), victims of trafficking have the right ‘To be exempted from the criminal liability and shall not be detained for prostitution offence and illegal immigration.’ Additionally, Article 25(6) of the *Law on Development and Protection of Women* (2004) gives women and child victims the right ‘Not to be prosecuted and detained on any charge of trafficking in women and children, prostitution, [or] illegal immigration.’ These provisions limit the scope of protection to only some offences (prostitution, illegal migration, and trafficking in women and children), and only to some victims (women and children).<sup>94</sup> Respondents noted that the non-punishment principle was captured in Lao counter-trafficking legislation in 2016, prior to the accession of Lao to the ASEAN Convention against Trafficking in Persons in 2017. This was pointed to as a testament to Lao’s commitment to the principle.

**Penal Code provisions relevant to victim non-punishment:** The *Penal Code* (2017) specifies basic principles in Article 5: (1) When offences occurred there must be criminal liabilities; (2) Offenders’ liabilities for the offences; and (3) Offenders’ liabilities based on the nature and level of dangerousness of the offences, personality of the offender and attenuating and aggravating circumstances. Article 33 of the *Penal Code* also lists circumstances that may lead to exemption from criminal liability including force and threat, which may be applicable in the trafficking context. According to Article 35 of the *Penal Code*, where an individual commits an offence under force or threat in circumstances where such force or threat could not have been avoided, the individual shall not bear criminal responsibility. Where the offence is a crime, such force or threat constitutes an extenuating circumstance for criminal punishment. Participants also pointed to the relevance of article 12 of the *Penal Code*, setting out the components of criminal offences.

**Other relevant provisions in Lao law:** The *Constitution of the Lao People’s Democratic Republic* (2015) includes some provisions that may be relevant in the event that Lao victims are charged for related offences.<sup>95</sup> Article 41 and 42 of the Constitution protects Lao citizens from unlawful arrest or imprisonment. The *Promulgation of the Amended Law on Criminal Procedure* (2017), Article 14 (Modified) guarantees the right of an accused

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<sup>94</sup> Trafficked children are considered ‘children in need of special protection’ in article 2(2) of the *Law on Protection of the Rights and Interests of Children*, meaning that special protection measures apply under Chapter 2 of that law.

<sup>95</sup> See for instance Article 41 (amended), Article 42 (amended) and Article 46.

person to defend himself and guarantees the right of defence to protect the legitimate rights and interests of an accused person. It also States that an accused person ‘shall not be forced to bring evidence to prove his innocence.’ Respondents also pointed to Article 6 of the *Amended Law on Criminal Procedure* which offers 9 causes for criminal cases to be dropped.<sup>96</sup> Unlike the protection set out in the *Law on Development and Protection of Women* (2004) that protects only women and children for punishment for some offences, the protections set out in these instruments applies to all accused persons, including adult males.

**No policies specifically relevant to non-punishment:** At the policy level, the *Guidelines for the protection, assistance and referral of victims of trafficking* (Ministry of Public Security, Secretariat for the National Steering Committee on Anti-Human Trafficking, 2020), do not explicitly mention the non-punishment principle. However, they uphold principles of human rights, victims’ rights to protection, and protection, assistance and referral of victims in line with their best interests and on the basis of consent. The Lao National Action Plan and the National Protection Guideline were also considered relevant to the non-punishment principle, though it was not explained how.

## Interpretation of the non-punishment principle

### Divergent views on whether the non-punishment principle is effectively understood:

Respondents emphasised their strong support of the non-punishment principle. However, different views were expressed about whether the non-punishment principle is consistently understood in Lao PDR. State respondents consider it to be widely and deeply understood, with the law sufficient to support effective interpretation by criminal justice practitioners. They considered that the principle has been widely promoted at central, provincial and district levels, through the national committee structure, with guidelines in place to ensure that all related agencies have a common understanding of the principle. Non-State respondents expressed contrasting views, pointing to inconsistent understanding and the need for stronger dissemination efforts to strengthen awareness and understanding. In their view, police, prosecutors and judges do not fully understand nor consistently apply the non-punishment principle, particularly at local and district levels. Those participants stressed the need for more effort to change attitudes and shift paradigms to overcome simplistic understandings of who is a victim and who a perpetrator.

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<sup>96</sup> Law on Criminal Procedure, 15 May 2004, Article 4, Causes leading to the dismissal of criminal Cases. Causes which will not lead to the opening of an investigation or which will lead to the discontinuation of criminal proceedings are as follows: 1. Non-existence of the incident [which was alleged to constitute] the offence; 2. Lack of components of an offence; 3. Expiration of the limitation period for commencing criminal prosecution; 4. Pardon is granted; 5. A child who is under fifteen years old commits an act that endangers society. In this case, the child will be sent for re-education; 6. There is a mediation agreement between the injured party and the accused person, in a case where the wrongful act does not endanger society as provided in Article 22 of the Penal Law; 7. The injured party has not lodged a complaint or the injured party withdraws his complaint, in a case where the wrongful act is an offence as provided in Article 22 of the Penal Law; 8. Death of the offender; 9. There is an order to dismiss the case or there is a final decision of a people’s court regarding the same case.

**Establishing the link between the offence and the trafficking:** No insight was offered on how the link between the victim's offending and his trafficking is established or severed in applying the principle in practice. Although it was not explicitly discussed, reference was made to article 12 of the *Penal Code*, setting out the four components of criminal offences in Lao (material, objective, subjective and actor). Presumably, a victim of trafficking who had committed an offence would be absolved from prosecution where the subjective element is not fulfilled on account of the trafficker's use of 'means'. However, there was no discussion as to how the non-punishment provisions that apply to certain offences (causation) are reconciled with general provisions relating in the *Penal Code* relating to force or threat (compulsion).

**Limited scope of non-punishment protection in Lao legislation:** Noting that the anti-trafficking law only contains two offences that victims of trafficking cannot be punished for, some felt it should be expanded to capture other crimes that victims of trafficking may commit in the course of being trafficked, in line with trafficking trends. Examples offered included selling drugs, trafficking for organ removal, being forced to beg, or to be foreign fighters. One practitioner noted that protection should extend to capture the range of offences which a trafficked person may commit as a result of being subject to the 'means' set out in the definition of trafficking in persons in the Trafficking in Persons Law. Others were not supportive of an expanded approach, expressing concern that the principle could be taken advantage of to avoid criminal responsibility and should not protect habitual offenders from punishment.

**The need for guidance to be elaborated in applying the principle in practice:** Respondents noted the absence of any secondary instrument to support the practical implementation of the non-punishment principle as captured in Lao legislation. Some considered the elaboration of guidance to be integral to domesticate the non-punishment principle and shift it from the international and regional realms, into the Lao context. Both State and non-state respondents called for tools and guidance to be elaborated for criminal justice practitioners to understand what their role is in applying the principle as it exists in law. The need for guidance for prosecutors, defence lawyers, legal aid lawyers and the Lao Bar Association was raised as necessary to embed the non-punishment principle as part of a victim-centred approach to counter-trafficking. No insights were offered on the role of existing ASEAN and COMMIT guidance in implementing the non-punishment principle.

**Views on what guidance should be offered on the non-punishment principle:** One practitioner suggested that guidance should clarify that the non-punishment principle applies from the moment a person is identified as a potential victim of trafficking, and to a broader range of offences than that currently captured in the non-punishment provision. Another noted that guidance should reconcile the divergent approaches between the international law which frames the principle broadly and the Lao law which limits application of the principle only to specified crimes. The suggestion was also made for

guidance to support a shared understanding among police, prosecutors and courts on how to approach the challenge of repeat offences by victims. Situations in which victims continue to recruit others were noted as raising questions about whether the principle should continue to apply.

## Application of the non-punishment principle

**Application of non-punishment to serious offences:** State respondents repeatedly stressed that there have been no cases of victims of trafficking being punished in Lao. The example was raised of victims who recruit others becoming traffickers themselves, in which cases their victim status would be deemed to trump their perpetrator status. It was not clear whether a victim could be prosecuted for other offences committed in the course of being trafficked. Some felt that the notion of not laying charges for drug-related offences would be met with resistance, and that a victim who would be protected from punishment in the *Law on Anti-Trafficking in Persons*, would likely still be prosecuted for drug-related offences. This, it was noted, speaks to the need to reconcile the non-punishment provision in the trafficking law, with other laws.<sup>97</sup>

**Role of criminal justice practitioners in protecting victims from punishment:** It was explained that the non-punishment principle relies on the skill of investigators to gather evidence to show prosecutors, and prosecutors to show judges that a victim of trafficking should not be punished. If a victim of trafficking were to find him or herself before a court on charges, the court could refer the case file back to the prosecutor for further investigation. The prosecutor could carry out investigation, or instruct police to do this through a written communication. Judges would also have the opportunity to use Article 6 of the *Criminal Procedure Law*, setting out 9 causes for criminal cases to be dropped. Participants spoke to the need for training not only of law enforcement officers, but also other State officials, social workers, service providers, lawyers and others involved in victim protection, not only at the central level but also at provincial and district levels.

**The role of lawyers in upholding the non-punishment principle:** It was stressed that lawyers need to be engaged at the outset of criminal justice processes in order to uphold the non-punishment principle. An example of a drug trafficking case was offered, in which accused persons faced the death penalty. In that case, the application of the non-punishment principle was not explored, underscoring the need for lawyers to be appointed early in criminal justice proceedings and equipped with an understanding of how to apply the principle. State respondents emphasised the role of lawyers in assisting both defendants and victims, as integral to effective implementation of the non-punishment principle. They also pointed to the role of the Lao Women's Union in supporting victim-centred approaches throughout criminal justice proceedings. Non-state respondents also stressed the role of lawyers to advocate for victim-centred approaches, and advocate the

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<sup>97</sup> Some participants emphasised the value of their participation in the roundtable discussion, to enhance their understanding of the non-punishment principle, and integrate it into their counter-trafficking work.

principle without waiting for instructions from their superiors to do so. However, practical challenges were flagged; notwithstanding prescribed rights to access legal support there is notably insufficient funding allocated to legal aid to enable victim-defendants to access lawyers.<sup>98</sup>

## International cooperation challenges

### **The importance of bilateral cooperation to uphold the non-punishment principle:**

Respondents referred to bilateral cooperation as being necessary to ensure that a person trafficked from one country to another and forced to commit an offence (e.g. drug smuggling) is recognised as a victim of trafficking and protected from punishment in both jurisdictions. The importance of enshrining the principle in bilateral arrangements between – for instance – Lao PDR and Thailand, Viet Nam and China was emphasised. However, the bilateral agreements that are already in place were not discussed. Lao PDR has counter-trafficking MOUs in place with Viet Nam (2010), China (2014) and Thailand (2017) (see Box 3 above). The 2010 MOU with Viet Nam commits parties to not detain and/or punish victims of trafficking ‘for illegal immigration or any other related administrative offences’ (Article 4(1)(a)). The 2014 MOU with China states that parties ‘shall not punish the victims for illegal entry to or exit from its territory or any other offences arising directly from trafficking in persons’ (Article 4(1)).<sup>99</sup> The 2017 MOU with Thailand does not specifically address non-punishment but speaks to justice, legal protection (Article 6) and the need to not subject victims of trafficking in persons to further victimization in legal proceedings (Article 17).<sup>100</sup> There was no discussion about the application of these bilateral agreements, nor how the non-punishment provisions contained therein are reconciled with Lao legislation. It was more generally suggested that MOUs and Standard Operating Procedures should ensure that implementing agencies in both countries have a consistent understanding of how to identify and protect victims of trafficking from punishment.

**International criminal justice cooperation challenges:** Challenges in mutual legal assistance reportedly arise where domestic laws of countries involved in transnational trafficking cases do not align, and information about non-citizens in Lao is not shared. Cooperation to identify and return Lao victims to Lao is also reportedly hampered by disagreement about the person’s victim status. In some cases, victims may be returned to Lao (for instance, after being trafficked to China for forced marriage) without being punished, but with no further engagement to bring perpetrators to justice. The recommendation was made for Ministries of Foreign Affairs, entities that engage with

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<sup>98</sup> It was noted that articles 90 and 96 of the *Constitution*, and articles 19 and 21 on the *Law on Lawyers*, as well as article 71 of the *Criminal Procedure Code*, set out the right to have legal representation.

<sup>99</sup> *Agreement between the Government of the Lao People’s Democratic Republic and the Government of the People’s Republic of China on Cooperation in Preventing and Combating Trafficking in Persons* (2014) Trafficking in Persons (2014)

<sup>100</sup> *Memorandum of understanding Between the Government of the Kingdom of Thailand and the Government of the Lao People Democratic Republic on Cooperation to Combat Trafficking in Persons* (2017)



ASEAN, the United Nations Office on Drugs and Crime (UNODC) and individual experts to be engaged in efforts to strengthen international cooperation to implement the non-punishment principle.

## **Victim identification challenges**

### **Identification challenges impacting application of the non-punishment principle:**

Respondents stressed victim identification as the starting point for the application of the non-punishment principle, being determinative of whether a person will be viewed as a victim or as a perpetrator. Some respondents felt that the definition of trafficking in persons was sufficient to achieve accurate identification of victims and protect them from punishment, but others expressed contrary views. The role of victim consent in trafficking was noted as a barrier to their identification and protection from punishment. The suggestion was made that stakeholders beyond only the police and Lao Women's Union could be engaged, to adopt a multi-sectorial approach to victim identification.

**'Raids' detrimental to victim identification:** The 2021 US Trafficking in Persons Report noted inconsistent use of victim identification and screening procedures throughout Lao, resulting in police penalising some unidentified victims of trafficking for sexual exploitation for prostitution related violations that their traffickers forced them to commit. In this context it recommended proactive screening and identification of potential victims, including those encountered during 'raids' of establishments that facilitate commercial sex. It also noted that adult and child victims may have been arrested for prostitution-related charges, owing to officers' inability to determine age.<sup>101</sup> Respondents who expressed the view that victim identification could be improved, noted that victims are sometimes misidentified as 'illegal' migrants by police and immigration authorities. The role of corruption was also noted, with people 'fined' or threatened with fines for not travelling with correct documents, rather than being screened for trafficking.

**Non-punishment to strengthen victim identification:** State authorities noted that a key challenge in implementation of the non-punishment principle, is victims hiding information from police to protect their close friends and families from prosecution. Non-state actors reported that victims sometimes fear being arrested and so do not seek police assistance. The recommendation was made for victims to be given information about their rights, including not to be punished for offences they commit as a consequence of their trafficking, to empower them to communicate to authorities and enhance victim identification. The provision of appropriate assistance was also noted as necessary throughout the identification process, including through the use of inter-disciplinary teams comprised of social workers, service providers, lawyers, judges and where appropriate, child guardians, who need to be involved from the outset.

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**101** 2021 Trafficking in Persons Report: Lao (US Department of State, 2021)



## Victim punishment in practice

**Victims punished for immigration offences:** Some state respondents stated that there are no cases in Lao PDR of victims of trafficking being prosecuted, though divergent views were expressed on this point; some stating that even victims who have been formally identified as victims of trafficking may be subject to prosecution. Concern was raised that criminal justice practitioners may be unaware of the principle, resulting in victims being prosecuted even for immigration and prostitution-related offences explicitly captured in the legislation. Victims of trafficking intercepted during their migration may face illegal immigration charges, while those encountered at places of work may be arrested and prosecuted for working illegally.

**Victims punished for prostitution and surrogacy offences:** Victims of trafficking for sexual exploitation were noted as at particular risk of prosecution for prostitution-related offences. The subjective morality of stakeholders who encounter a person was noted as a factor in determinations as to whether a person is a victim or an offender. Discrimination on the grounds of sex or gender was not considered to be an issue in Lao PDR, but concern was raised that some law enforcement officers may be biased against people in the sex industry, owing to entrenched stereotypes and social norms. Such bias detracts from effective identification of victims who consequently may be at risk of being prosecuted for prostitution-related offences. Trafficking of women into surrogacy was noted to also raise questions relevant to the non-punishment principle.

**Victims punished for immigration-related offences:** Participants pointed to the challenges facing victims intercepted at borders before they reach the country of destination, who are not identified as victims but may be pushed back or deported from a country without being identified, therefore facing risks of punishment for immigration or other crimes. Some victims who have been returned to Lao have been screened through identification processes, but others reportedly have not been, in the absence of a concrete screening mechanism for returnees. The complexity of these situations prompted questions about how to apply the non-punishment principle where victims are turned back or deported, which jurisdiction applies in cross-border cases, and what the role of bilateral MOUs is in such cases.

**Prosecution of Lao victims abroad:** Some respondents noted that Lao victims of trafficking have been prosecuted as illegal migrants abroad. The specific case of Lao citizens trafficked into marriage was cited, where victims illegally enter or overstay in countries of destination facing risk of prosecution. In such cases, Lao reportedly considers these returnees to be victims of trafficking though they are considered illegal immigrants abroad. Examples of victims facing charges for more serious crimes were raised, including murder on board vessels, organ removal, prostitution and surrogacy. Offenders in these cases were reportedly not punished upon returning to Lao because they were identified as victims. Harmonized understanding of when a person is a victim of trafficking was therefore pointed to as being key to supporting victims of transnational trafficking.

**Risks of punishment of trafficked children:** Some practitioners pointed to the risks of punishment faced by children, including for their involvement in complicated cases of drug trafficking. In such cases, traffickers are powerful people who are challenging for authorities to investigate. The point was made that whether a person is determined to be over or under 18 years old, may impact on whether they are identified as victims of trafficking or not, and consequently whether they are subject to punishment. The importance of applying the presumption of minority was emphasised in cases where age cannot be confirmed.

## 2.5 Malaysia

Malaysian authorities opted not to participate in roundtable discussions for the purposes of this study, meaning that information about implementation of the non-punishment principle could only be obtained through open-source information and insights from individual experts.

**Explicit non-punishment provision in domestic anti-trafficking legislation:** Section 25 of the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act* (2007) lays out that trafficked persons shall not be liable to criminal prosecution in respect of illegal entry, unlawful residence and procurement or possession of fraudulent travel or identity documents for entering, where such acts are a direct consequence of his or her trafficking.

*Section 25. A trafficked person shall not be liable to criminal prosecution in respect of—*

- (a) his illegal entry into the receiving country or transit country;*
- (b) his period of unlawful residence in the receiving country or transit country; or*
- (c) his procurement or possession of any fraudulent travel or identity document which he obtained, or with which he was supplied, for the purpose of entering the receiving country or transit country,*

*where such acts are the direct consequence of an act of trafficking in persons that is alleged to have been committed or was committed.*

This provision does not provide immunity from criminalization for all offences committed by victims as a consequence of their trafficking.<sup>102</sup> It is not clear if, whether and how Malaysian authorities have applied their non-punishment provision or other relevant law to practically protect victims of trafficking from criminal prosecution.

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**102** Article 44(1) of *Malaysian Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* allows victims of trafficking to be placed in 'temporary custody' during investigation.

**Relevant provisions of the Penal Code:** The general exceptions provided in the *Penal Code* may offer recourse for liability for other offences, including through section 94 which provides a general exception where a person is compelled by threats:

*Act to which a person is compelled by threats*

*94. Except murder, offences included in Chapter VI punishable with death and offences included in Chapter VIA, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence:*

*Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.*<sup>103</sup>

**Non-punishment principle in policy documents:** There is no clear policy guidance to give effect to the non-punishment principle. At a general level, the *National Action Plan on Anti-Trafficking in Persons 2016-2020* affirms commitment to victim-centred and human rights-based approaches to treatment of trafficked persons. Malaysia's *National Action Plan on Anti-Trafficking in Persons 2021-2025* does not explicitly reference non-punishment, but does emphasise a human rights-based and gender-responsive approach, in line with international human rights standards towards promoting and protecting human rights, especially of the victim. In this context, it specifically mentions the principle of non-discrimination on any grounds including immigration or other status.<sup>104</sup> The NAP also emphasizes Malaysia's commitment to ACTIP which entered into force in 2017.

**Non-punishment principle recognised in training:** In 2021, ILO in partnership with the National Strategic Office for Anti-Trafficking in Persons and Anti-Smuggling of Migrants (NSO MAPO) published a training manual for Malaysia, which emphasises the need to not treat victims as offenders.

*When working with victims of forced labour and trafficking, one must always remember that these people are victims of a crime, they are not criminals themselves even though they may have committed offences such as irregular entry or may not have the necessary documentation to be in your country. This could be a challenging situation since the enforcement agencies officers might have different priority i.e. due to key performance indicators or raid operations, they need to take action against the victims for*

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**103** The Explanatory Notes provided to this provision are identical to those offered to the Section 94 of the Singapore Penal Code (see 2.8 below).

**104** National Action Plan on Anti-Trafficking in Persons (Malaysia, 2021) 4.2.3, p.18.

*irregular entry, etc. A victim-centred approach puts the victim first and focuses on the needs and rights of the victim of forced labour and TIP. [...] <sup>105</sup>*

**Role of law enforcement in upholding the non-punishment principle:** The 2020 US State Department Trafficking in Persons Report links the punishment of victims of trafficking to the lack of proactive investigation of trafficking in persons, noting victims may be referred for immigration violations rather than their traffickers being investigated, resulting in an increased unwillingness among civil society actors to report trafficking to law enforcement officials.<sup>106</sup>

**Identification challenges and ‘raids’ resulting in punishment of victims:** Standard Operating Procedures (SOPs) have been developed by the Council of Anti-Trafficking in Persons and Anti-Smuggling of Migrants (MAPO) to support victim identification. However, the 2021 US State Department Trafficking in Persons Report noted that the government continues to expect victims to self-identify and did not implement SOPs to proactively identify victims during law enforcement ‘raids’ among vulnerable populations, which are not conducive to victims speaking to law enforcement nor to their identification, resulting in continued penalization of victims for immigration and prostitution violations.<sup>107</sup> This same concern about the ineffectiveness of ‘raids’ in identification and the risk of victims being treated like criminals was also raised in the 2020 US Trafficking in Persons Report.<sup>108</sup> Concern has also been raised about insufficient attention given to identification of victims of trafficking for forced labour, despite this being a more prevalent trafficking issue than trafficking for sexual exploitation in Malaysia.<sup>109</sup> The failure to identify drug mules as victims of trafficking has also been noted in Malaysia, resulting in their prosecution for drug offences rather than their protection as victims of trafficking. For instance, there have been reports of women from mainland China being tricked into trafficking drugs to Malaysia. In all these cases, where people are not identified as potential victims of trafficking, they are instead prosecuted for drug trafficking.<sup>110</sup>

**Criminalization of irregular migration exacerbating risk of punishment:** Against the backdrop of insufficient identification of victims of trafficking, concerns have been expressed about the negative consequences that criminalization of irregular migration has on victim punishment in Malaysia. Inadequate screening of asylum seekers and refugees for trafficking indicators has been noted, alongside increased powers given to armed forces to arrest undocumented migrants, resulting in potential victims of trafficking

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<sup>105</sup> *Forced labour and trafficking in persons: Training manual for Malaysian law enforcers* (ILO, 2021) p.73

<sup>106</sup> 2020 Trafficking in Persons Report: Malaysia (US Department of State, 2020)

<sup>107</sup> 2021 Trafficking in Persons Report: Malaysia (US Department of State, 2021)

<sup>108</sup> 2020 Trafficking in Persons Report: Malaysia (US Department of State, 2020)

<sup>109</sup> 2021 Trafficking in Persons Report: Malaysia (US Department of State, 2021)

<sup>110</sup> Justice Centre Hong Kong, *Submission for the Working Group on Arbitrary Detention’s Study on arbitrary detention relating to drug policies* (March 2020)

being treated as ‘illegal’ immigrants.<sup>111</sup> The criminalization of victims of trafficking under the *Immigration Act* is reportedly fuelled by negative views towards migrants and victims of trafficking.<sup>112</sup> Following her 2015 mission to Malaysia, the then UN Special Rapporteur on Trafficking of Persons, Especially Women and Children, noted that

*...[t]he strong political inclination towards criminalizing and prosecuting irregular migrants may have unintended negative consequences for the victims of trafficking in spite of some protection against immigration related criminal prosecution in the Anti-Trafficking Act (2007).*

She went on to note that people who want to report abuse, including victims of trafficking, risk being criminalized, resulting in many avoiding contacting authorities and others inappropriately criminalized for crimes committed while being trafficked that they should not be held liable for.<sup>113</sup> There is little information to suggest that this situation has improved in the six years that have passed since that report was issued. On the contrary, in its most recent Trafficking in Persons Report, the US Department of State notes that:

*The government continued to rely on victims to “self-identify” and did not implement SOPs to proactively identify victims during law enforcement raids or among vulnerable populations with whom authorities came into contact; thus, authorities continued to inappropriately penalize victims for immigration and prostitution violations.*<sup>114</sup>

## 2.6 Myanmar

No roundtable discussions were held in Myanmar for the purposes of this study, owing to the military coup d’état that began on 1 February 2021. Accordingly, information about implementation of the non-punishment principle could only be obtained through open-source information and insights from individual experts. Very limited information of specific relevance to the implementation of the non-punishment principle was identified.

**Explicit non-punishment provision in domestic legislation:** Chapter V of the *Anti-Trafficking in Persons Law* (2005) safeguards the rights of trafficked victims, stating the Central Body shall not take action against trafficked victims for any offence under the *Anti-Trafficking in Persons Law*, and shall determine whether it is appropriate to take action against them for any offence arising as a direct consequence of being trafficked.

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<sup>111</sup> Other forms of punishment noted, include victims being taken to court in handcuffs to testify against their trafficker. 2021 Trafficking in Persons Report: Malaysia (US Department of State, 2021).

<sup>112</sup> See: <http://www.tenaganita.net/news-and-press-releases/press-releases/tenaganita-press-statement-malaysia-needs-to-wake-up-to-its-human-trafficking-problem/> accessed on 6 April 2021.

<sup>113</sup> Source: *Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro, Addendum, Mission to Malaysia*, UN Doc A/HRC/29/38/Add.1, 1 June 2015 [25]

<sup>114</sup> 2021 Trafficking in Persons Report: Malaysia (US Department of State, 2021)

According to Section 13 of that law:

*13. The Central Body:*

*(a) shall not take action against the trafficked victims for any offence under this Law.*

*(b) shall determine whether or not it is appropriate to take action against the trafficked victims for any other offence arising as a direct consequence of trafficking in persons.*

While the Central Body is not to take action against a victim of trafficking for offences specified under the *Anti-Trafficking in Persons Law*, according to Section 13(a), a victim may still be prosecuted for any other offence they have committed, by virtue of Section 13(b).

**Protection of child victims from punishment:** Legislation does provide some protection for child victims against prosecution. The *Child Rights Law* sets the minimum age for voluntary military recruitment at 18 years of age and strengthens protections for children subjected to recruitment or use by state and non-state armed forces. The US Trafficking in Persons Report points to protections including automatic dismissal of criminal charges and referral to protective care for certain crimes victims were forced to commit as a result of said recruitment or use. However, while commending these protections, it has been noted that the age of criminal responsibility of 10 years old (increased from 7 years), remains too low to protect children from penalization for some crimes.<sup>115</sup>

**Non-punishment principle in policy:** At the policy level, Myanmar's *Third Five-Year National Action Plan to Combat Trafficking in Persons* (2017-2021) does not specifically mention the non-punishment principle but does emphasise a victim-centred approach to counter-trafficking. It has been reported that the government policy of not-charging returning Rohingya with immigration-related offences was overturned by the military junta following the February 2021 coup, with the military taking action against Rohingya for immigration-related offences.<sup>116</sup>

**Application of non-punishment of victims in practice:** The 2021 US State Department Trafficking in Persons Report noted that some victims were penalized for unlawful acts that traffickers compelled them to commit, partly owing to lack of awareness or implementation of screening procedures among police and judicial officials, including at least one instance of a victim charged with theft. However, in that case, the chair of the Central Body for the Suppression of Trafficking in Persons (CBTIP) suspended the criminal case once authorities officially recognized the individual as a victim of trafficking.<sup>117</sup> It is not clear whether this occurred as a direct result of applying Section 13 of the *Anti-Trafficking in Persons Law* 2005.

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**115** 2020 Trafficking in Persons Report: Burma (US Department of State, 2020)

**116** 2021 Trafficking in Persons Report: Burma (US Department of State, 2021)

**117** 2021 Trafficking in Persons Report: Burma (US Department of State, 2021)



**The role of victim identification in non-punishment:** Non-identification of victims is a significant barrier to their protection from punishment in Myanmar. The 2020 United States Trafficking in Persons Report notes deficiencies in identification of victims. It notes the proactive identification of potential victims from Myanmar ‘en route to China for marriages likely to result in sex or labor exploitation and Thailand for potential sex trafficking’, although it expresses concerns that authorities do not proactively identify victims across all sectors.<sup>118</sup>

**International cooperation to protect victims from trafficking:** Myanmar has MOUs in place in which parties confirm that victims are to be treated as victims not as offenders, and agree not to punish victims for illegal entry to or exit from its territory, or any other offences arising directly from human trafficking. Such agreements are in place with Thailand (2009, article 8(a)) and with China (2009, article 5(1)). It is not clear whether these bilateral agreements have been implemented in practice to protect victims from prosecution.

## 2.7 Philippines

Two roundtable discussions were held in the Philippines for the purposes of this study, with a total of 20 participants representing State and non-state counter-trafficking entities. This section has drawn significantly on their insights, as well as relevant open-source material.

### Non-punishment principle in law and policy

**Explicit non-punishment principle in anti-trafficking law:** Section 17 of *Republic Act No. 9208* (2003) as amended by *RA 10364* (2012) (*Expanded Anti-Trafficking Act*) prescribes that trafficked persons shall not be penalized for unlawful acts committed as a direct result of, or as an incident or in relation to, being trafficked, or in obedience to the order made by the trafficker. That section also protects victims of trafficking for purposes of prostitution from prosecution, fine or other penalty under the *Revised Penal Code*.

*Section 17. Legal Protection to Trafficked Persons.*

– *Trafficked persons shall be recognized as victims of the act or acts of trafficking and as such, shall not be penalized for unlawful acts committed as a direct result of, or as an incident or in relation to, being trafficked based on the acts of trafficking enumerated in this Act or in obedience to the order made by the trafficker in relation thereto. In this regard, the consent of a trafficked person to the intended exploitation set forth in this Act shall be irrelevant.*

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**118** 2020 Trafficking in Persons Report: Burma (US Department of State, 2020)



*Victims of trafficking for purposes of prostitution as defined under Section 4 of this Act are not covered by Article 202 of the Revised Penal Code and as such, shall not be prosecuted, fined, or otherwise penalized under the said law.*

**Additional provisions of relevance to non-punishment provision:** Further provisions are provided for in the *Revised Rules and Regulations Implementing Republic Act No. 9208, as amended by Republic Act No. 10364*. Section 88 'Protection against suits for unlawful acts committed in relation to trafficking or upon direct orders of the traffickers' states that 'The consent of trafficked person to the intended exploitation is irrelevant. Trafficked persons shall not be penalized for unlawful acts committed as a direct result of, or as an incident or in relation to, being trafficked, or in obedience to the order made by the trafficker in relation to said acts.' Further, Section 89 offers 'Protection against suits under Article 202 of the Revised Penal Code' stating that 'Persons trafficked for prostitution shall not be prosecuted, fined or penalized under the provisions of Article 202 of the Revised Penal Code.' Section 94 also makes the past sexual behaviour or sexual predisposition of a trafficked persons inadmissible for the purpose of providing consent of victim of a victim to engage in sexual activity or to prove the sexual or other predisposition of a trafficked person.

**Protection of child victims from punishment:** Child victims are protected from some offences, including through the *Juvenile Justice Act*, section 58 of which prohibits prosecution for vagrancy and prostitution. Further, section 5 of the *Anti-Child Abuse Act* states that children who engage in commercial sex acts 'are deemed to be children exploited in prostitution and other sexual abuse.'

**Other instruments relevant to non-punishment of victims of trafficking:** The exempting circumstances in the *Revised Penal Code* were mentioned as possible avenues of raising defences, acknowledging that merely evoking defences is not the same as upholding the principle of non-punishment to protect victims from being prosecuted in the first place. The *Cybercrime Act of 2012* was mentioned as of some relevance given it may be used in cases where the *Anti-Trafficking Act* should rather come into play. In such cases a person may be charged under the *Cybercrime Act* rather than be protected from punishment by the *Anti-Trafficking Act*, speaking to the importance of bringing the non-punishment provision into play when there is any element of exploitation.

**Policy relevant to non-punishment of victims of trafficking:** The *Guidelines on the Protection of the Rights of Trafficked Women* (Philippine Commission on Women in coordination with the Inter-Agency Council Against Trafficking (IACAT) 2013) emphasize that 'trafficked women should be treated as victims not offenders' (5.3.8.1.1.) Additionally, the *Guidelines on the Referral System involving Trafficking in Persons Cases adopted by the Inter-Agency Council Against Trafficking* (IACAT) on 02 March 2017 through Resolution

No.006 Series of 2017, state that trafficked persons have the right to: ‘not be criminalized (or charged, or punished) for their involvement in unlawful activities during their trafficking experience.’ None of these policies was mentioned during roundtable discussions.

## **Interpretation of the non-punishment principle**

**Evolution of the non-punishment provision in Republic Act 9208:** Participants noted that the legislation was broadened to protect victims from punishment not only for crimes, but also from labour law violations and administrative charges. One respondent noted that the non-punishment provision originally related only to acts ‘directly related’ to trafficking, but was later amended to refer to those that ‘directly result’ from trafficking. There was some discussion about whether this should be strictly interpreted to refer to ‘non-sentencing’, with the conclusion reached that the spirit of the non-punishment principle speaks in favour of a liberal interpretation to capture all stages of the criminal process, to mean non-arrest, non-detention and non-prosecution. It is not clear how the principle would be interpreted across these various stages of criminal justice process.

**Lack of clarity around non-punishment outside of prostitution-related offences:** Discussants considered the law to be widely understood and effectively applied in the context of prostitution-related offences. However, concern was raised in relation to other offences, for which victims may not so readily benefit from protection. Some examples were offered of possible victims of trafficking being charged with document-related offenses (whether fraudulently acquired or altered). Concern was expressed that trafficked persons would be indicted for drug-related offences, and left to point to their trafficking situation as a defence rather than being protected from prosecution at the outset. In the absence of clarity on the scope of protection from punishment, victims of trafficking may have to be charged if they trafficked others, for instance. A need for legislative guidance was noted in this respect.

**Establishing the link between the trafficking and the offence:** Beyond the practical challenges of obtaining information from victims about their trafficking experience and the need to dig into testimony over a period of time, there was little discussion on how the link between the offending and the trafficking is established. However, notwithstanding that Philippine law adopts a broadly-framed causation model, there was some indication that the commission of the crime is understood as being brought about by the compulsion of traffickers and the relative power dynamics between them.

**The need for policies around the meaning of non-punishment:** Practitioners emphasised the need for clear policies to supplement the law, to emphasise its application to offences beyond prostitution. Clarification was called for around the legal requirement that victims ‘should not be penalized’. Specifically, the question raised was whether this means that a person should not be sentenced, but can still be charged and prosecuted for unlawful

activities, or whether a broader protection is envisaged. Respondents pointed to the need for policy guidance and recommendations, based on international norms and standards, to inform practitioners of the 'correct' interpretation of Section 17 of the *Anti-Trafficking Law*, supported with dissemination, training and roundtable discussions to sensitize duty bearers to the practical application of the non-punishment principle, including through early identification of trafficked persons by those who encounter them.

**The need for guidance to resolve legislative inconsistencies:** The need for guidance on how to overcome contradictions between different legislative instruments was stressed. This was suggested with a view to minimising scope for discretion in application of the principle, and ensuring that it can be broadly applied including in cases where victims are prosecuted. Non-state actors stressed that guidelines must be addressed not only to law enforcement but also to labour authorities and others including at the level of Local Government Units (LGU), to raise broad awareness and ensure more cases are referred to anti-trafficking authorities. The importance of investing in the Department of Social Welfare and Development (DSWD) to enable their wider engagement on the principle was also emphasized.

## **Application of the non-punishment principle**

**Utility of legislation to protect from victims from punishment prostitution-related offices:** There was general consensus that Section 17 offers a strong legislative basis for protection from punishment, though there were divergent opinions as to how effectively it is applied in practice. Government respondents considered it effectively applied, with victims of trafficking only charged with offences in exception cases. They emphasised that the Law enables arresting officers, prosecutors and judges to not lay or pursue charges against victims of trafficking. This was attributed to familiarity with the provision, rather than the non-punishment principle on which it is anchored, *per se*.

**Application of non-punishment principle to victims of trafficking in the sex industry:** The law was noted as being of particular value in ensuring victims are not charged and cases are not filed in relation to prostitution-related offences. Some exceptions were pointed to, for instance in a case of a former victim of trafficking going on to recruit children into exploitation. In this case, there was considered to be no option but to file charges against the victim-perpetrator. One practitioner considered it was reasonable to set aside the principle at the point where a victim ceases to be a victim and becomes a trafficker him or herself, particularly where children are being recruited. Here the challenge of balancing the interests of former and current victims was raised. A gender dimension was raised here too of the susceptibility of females to be prosecuted for trafficking others into the sex industry, where they start as victims themselves, given that more females are impacted by this type of trafficking.

**The role of law enforcers and prosecutors in upholding the non-punishment principle:**

Criminal justice practitioners play key roles in applying the non-punishment principle. Investigators recommend what charges, if any, to lay and may include information about a person's status as a victim of trafficking toward reducing his or her liability. Prosecutors determine whether there is probable cause or no probable cause, or dismiss or request investigation to be conducted. Respondents noted that non-punishment is a right that should not depend on prosecutorial discretion. Concern was raised that many law enforcers, prosecutors and judges are unfamiliar with the non-punishment principle. One prosecutor gave the example of a law enforcer recommending prostitution charges against two people (one male, one female); the prosecutor in that case asked him to read Section 17 aloud and then change his recommendation.

**Role of judges in upholding the principle of non-punishment:** Judges have power to make decisions on the basis of facts, and be guided by principles and provisions of law, including Section 17 that determines that victims 'shall not be penalized'. In this respect, respondents explained that they have not seen cases of judges not imposing sentences, though in theory they would have discretion to not impose or to mitigate sentences. It was not clear whether courts could seal records in the cases of convicted adults as they can in the case of minors. The option of asking the court to discharge victims facing charges was also raised as an option, with one respondent having successfully requested that a victim of trafficking charged with transporting drugs be discharged by the court.

## **International cooperation challenges**

**Jurisdictional challenges related to transnational trafficking:** Practitioners noted that trafficked Overseas Filipino Worker (OFW) are often punished before their traffickers - including recruitment agencies - are brought to justice. Challenges related to jurisdiction were raised here, particularly in cases where victims are trafficked in the destination country (Syria, Saudi Arabia or the UAE for instance), even though they may have been recruited by people from the Philippines. The challenge of upholding the non-punishment principle across different jurisdictions was raised in the context of Filipino victims of trafficking in the fishing industry being prosecuted outside of the Philippines, posing challenges for local law enforcers and prosecutors. On the other hand, a good practice was raised in the processing of Filipino victims in Syria who return home with prepared affidavits, thereby reducing burden on them upon their return. The need for strengthened cooperation was emphasised - including at the police-to-police level between the Philippines and key countries such as Malaysia and Singapore - to uphold the non-punishment principle.

## Victim identification challenges

**Identification of victims of trafficking and non-punishment:** There was wide acceptance of the fact that identified victims should not be prosecuted for offences, with early victim identification being critical to this. Few examples were offered of identified victims being prosecuted for offences but concerns were raised (particularly by non-state actors) about victims not being effectively identified and so not being protected from punishment.

**The need to overcome victim identification challenges:** A challenge was raised in the fact that victims often do not identify themselves as victims, and may identify as offenders for the offences they have committed in the course of being trafficking. In this respect, practitioners need to have deep understanding of how traffickers abuse victims' position of vulnerability, so they are better able to identify victims who have been trafficked by subtle means that do not involve force or violence. The importance of guidelines to support effective and immediate identification was stressed as key to non-punishment, along with the need for duty bearers to effectively communicate to victims about their legal protections including non-punishment. A key challenge was noted here in screening foreigners who commit immigration violations; the primary role of the Immigration Bureau is to identify immigration violations, not victims of trafficking, making it unclear at what point a potential offender of immigration offences would be referred to law enforcement for screening as a potential victim of trafficking.

**Identification of victims during criminal justice processes and the application of the non-punishment principle:** Questions were raised about the point at which a victim is identified, and who has responsibility to formally identify them. For instance, when circumstances arise in the context of a trial that suggests there is some element of trafficking, are the persons on trial considered to be 'identified' at this point? An example was offered of minors charged with drug-related offences who had not been identified as trafficked, but during their trial it emerged that they had been. They were given suspended sentences, but were too afraid to file charges against traffickers. Questions were also raised about the challenge in balancing the presumption that a person is a victim from the point of view of receiving protections under the law, and the finding of probable cause of trafficking from a prosecutorial point of view, and who makes these decisions. The good practice consideration offered here, was for practitioners to err on the side of applying the presumption that a person is a victim, so as to not-punish them, without making their non-punishment dependent on punishment of traffickers.

## Victim punishment in practice

**Prosecution of victims for trafficking offences:** Some cases suggest that potential victims are prosecuted for trafficking-related offences. In *People vs. Ruth Dela Rosa y Likinon*, aka "Sally", Criminal Cases Nos 13-9820 and 13-9821, 2013, the prosecution presented evidence limited to victims' testimonies and forensic evidence that sexual intercourse had taken place, but did not bring evidence to show potential victimisation

of the defendants, including evidence of threat or use or force or other coercion to engage the victim-defendant.<sup>119</sup> In *People v. Janet Java Onida*, Crim Case No-Q-08-151971, 2013, involving trafficking from the Philippines to Singapore, the Court recognized the defendant's victimhood, but nonetheless prosecuted her. In that case, the victim-defendant had trafficked another girl while also being exploited herself. The Court sentenced the defendant to 20 years in jail, though it stated that "[w]hile the Court may feel that the accused is a victim of exploitation, the evidence presented clearly shows that with regard to the private complainant [name redacted], accused Janet Java was one of the exploiters and thus violated the law."<sup>120</sup>

**Prosecution of victims of trafficking and others in the sex industry:** There were divergent views about the utility of the law to protect victims of trafficking for prostitution-related crimes. Non-state actors commended Section 17, but pointed to deficient capacity of practitioners to apply it in practice, and criticised the prosecution of women involved in the sex industry. Lack of awareness of the non-punishment principle was considered by some non-state respondents to be widespread, with significant 'victim blaming' taking place. There was criticism of the mindset of some law enforcement officers who themselves commit crimes against women in the sex industry, including trafficked victims among them. The trafficking law was considered to have reduced incidents of women in the sex industry being charged with prostitution; some of the more severe crimes police would commit against women in the sex industry reportedly occurred prior to 2015, including threatening them with imprisonment unless they submit to sex. However, concern was raised that there is still a culture of charging women in the sex industry, if not for prostitution than for other offences.

**Punishment of returning Overseas Filipino Workers (OFWs):** Returning OFWs are reportedly not generally charged with immigration violations upon their return even if they had committed offences under the *Passport Act of 1996*, though exceptions were noted. The comment was also made that some impatient law enforcers may leverage the threat of laying passport-related offences against victims of trafficking to secure their cooperation, making the threat of punishment relevant rather than the actual punishment itself. But these exceptions aside, there was general consensus that returning victims of trafficking are not charged for immigration or document-related offences, though some have notably already been punished in foreign jurisdictions before returning home.

**Punishment of Philippine victims of trafficking abroad:** Participants mentioned cases of Philippine OFWs being prosecuted in the Middle East, including for offences relating to contract or privacy violations, absconding and immigration-related crimes, as well as human trafficking. An OFW in the Middle East was charged for qualified trafficking and

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**119** United Nations Office on Drugs and Crime, *Female Victims of Trafficking for Sexual Exploitation as Defendants: A Case Law Analysis* (United Nations, Vienna, 2020) 15.

**120** United Nations Office on Drugs and Crime, *Female Victims of Trafficking for Sexual Exploitation as Defendants: A Case Law Analysis* (United Nations, Vienna, 2020) 96.



detained in the Philippines, though her employer had used her online social media profile to recruit others from the Philippines. The risk of prosecution for immigration-related offences particularly arises where OFWs fall into irregular status (as happened during the covid crises) and are unable to go to authorities in fear of punishment. In some cases, employers use the threat of these charges, combined with the high debts many OFWs carry, to control them. Cases were also mentioned of people trafficked into fishing in Indonesia being prosecuted and deported to the Philippines; people exploited as drug mules facing drug-related offences, with the positive identification of one resulting only in a reduced sentence but not an acquittal. A landmark case in this respect is that of Mary Jane Veloso sentenced to death for smuggling heroin into Indonesia (see Box 5 above). OFWs were also noted to have faced libel charges abroad in some countries, and having had problems with religious police in the Middle East for violating religious norms, though it was not clear that the OFWs in these cases were victims of trafficking.

**Vulnerability of child victims to punishment:** A potential punishment risk was raised specifically in relation to Online Sexual Exploitation of Children (OSEC), being the involvement of children to recruit others to perform online sex acts, who are not known to be minors until after their entrapment.<sup>121</sup> Similarly, children between the ages of 15 and 18 involved in drug trafficking were noted as being at particular risk, given the law exempts minors under 15 from criminal responsibility, placing those between 15 and 18 at risk of punishment. This risk was noted as exacerbated by the government's 'War on drugs' that may harden authorities to the notion that offenders are in fact 'victims' entitled to not be punished. Here, respondents pointed to Republic Act 9344 on juveniles as potentially offering a basis for not filing cases against minors.

**Children treated as in conflict with the law rather than as victims of trafficking:** One respondent had encountered cases of children trafficked for labour exploitation who committed theft on account of their hunger, who were subsequently considered children in conflict with the law, rather than victims of trafficking. This distinction was attributed to local social welfare providers, law enforcers and prosecutors not knowing how to connect legislation on trafficking (Republic Act 9208) and laws concerning juveniles (Republic Act 9344) in order to effectively apply legal protections. Challenges were also noted in applying these instruments to protect children trafficked into armed conflict in the Southern regions, with some children jailed as perpetrators rather than protected as victims of trafficking.

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<sup>121</sup> A particular complexity in the OSEC context was noted in the situation of children who self-generate and self-distribute images. In such cases it is easier to consider those under 15 to be children, whereas those older fall into a grey area in respect of whether they should be exempt from prosecution or not.



### **Box 6: Risk of capital punishment for victims turned traffickers in the Philippines**

The death penalty is currently not applied in the Philippines for trafficking-related offences. However, the International Bar Association (IBA) has raised concerns about House Bill No. 1239 proposing to amend Republic Act No 9208 to reintroduce the death penalty for qualified human trafficking cases set out in section 6. The IBA points out that the proposal is contrary to the Philippine government's commitment under the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) to not reintroduce the death penalty. They also note that the Bill does not sufficiently reflect the complexities of human trafficking. Notably, the measures in place in the Philippines to protect victims from punishment are at risk through the introduction of this draft law where victims – particularly women – become perpetrators of trafficking. It also exposes those who were not committing serious acts themselves but played only minor roles, to risks of capital punishment. In short, the enactment of the draft law would be counter-productive to the extensive efforts undertaken in the Philippines to combat human trafficking and protect its victims.<sup>122</sup>

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**122** Gerry QC, Felicity., Karen Gomez Dumpit, Sara Kowal, Courtney Keefe, Human trafficking and the proposed reintroduction of the death penalty, 3 April 2020, International Bar Association, [www.ibanet.org](http://www.ibanet.org) accessed 30 September 2021



## 2.8 Singapore

Singaporean authorities opted not to participate in roundtable discussions for the purposes of this study, meaning that information about implementation of the non-punishment principle could only be obtained through open-source information and insights from individual experts.

### Non-punishment principle in law and policy

**No explicit non-punishment provision in legislation:** The *Prevention of Human Trafficking Act* 2014 (No. 45 of 2014) does not contain any specific provision to protect victims of trafficking from punishment or prosecution. The *Children and Young Persons Act* (which criminalizes trafficking in children at Article 12) does not contain any provisions of relevance. The 2020 US Department of State Trafficking in Persons Report recommends that Singapore strengthen its legal framework to enhance protection for victims from punishment for unlawful acts they were compelled to commit.<sup>123</sup>

**Potential statutory defences and understanding of compulsion:** The *Penal Code* 2008 provides general exceptions in Chapter IV, including some that may be of relevance to offences committed by trafficked persons, including where fear is involved (article 90) or where compulsion (article 94) is involved.

*Consent given under fear or misconception, by person of unsound mind, etc., and by child*

90. A consent is not such a consent as is intended by any section of this Code —

(a) if the consent is given by a person —

(i) under fear of injury or wrongful restraint to the person or to some other person; or

(ii) under a misconception of fact, and the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception;

(b) if the consent is given by a person who, from unsoundness of mind, mental incapacity, intoxication, or the influence of any drug or other substance, is unable to understand the nature and consequence of that to which he gives his consent; or

(c) unless the contrary appears from the context, if the consent is given by a person who is under 12 years of age.

*Act to which a person is compelled by threats*

94. Except murder and offences against the State punishable with death, nothing is an offence which is done by a person

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**123** 2020 Trafficking in Persons Report: Singapore (US Department of State, 2020)

*who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person or any other person will otherwise be the consequence: Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.*

*Right of private defence of the body and of property*

*97. Every person has a right, subject to the restrictions contained in section 99, to defend —*

*(a) his own body, and the body of any other person, against any offence affecting the human body;*

*(b) the property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.*

The *Penal Code* provides explanatory notes to this compulsion provision, drawn from the Indian Penal Code 1860, section 94.

*Explanation 1.—A person who, of his own accord, or by reason of a threat of being beaten, joins gang-robbers knowing their character, is not entitled to the benefit of this exception on the ground of his having been compelled by his associates to do anything that is an offence by law.*

*Explanation 2.—A person seized by gang-robbers, and forced by threat of instant death to do a thing which is an offence by law — for example, a smith compelled to take his tools and to force the door of a house for the gang-robbers to enter and plunder it — is entitled to the benefit of this exception.*

*[Indian PC 1860, s. 94]*

**Non-punishment captured in policy:** Notwithstanding the absence of an explicit non-punishment provision in legislation, the *National Approach against Trafficking in Persons 2016-2026* (Singapore Inter-Agency Task Force on Trafficking in Persons) states in its section on protection of victims: ‘They should not be prosecuted for violations of employment and / or immigration laws, or for any activity that they were involved in as a direct consequence of them being trafficked.’<sup>124</sup> This policy statement reflects a causation-based approach to the non-punishment of victims, while the legislation prefers a compulsion model.

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<sup>124</sup> *National Approach against Trafficking in Persons 2016-2026* (Singapore Inter-Agency Task Force on Trafficking in Persons) 14. Available for download at: <https://www.mha.gov.sg/what-we-do/combating-trafficking-in-persons>

## Interpretation of the non-punishment principle

**Understanding of non-punishment principle:** Although there is no explicit protection against prosecution in the *Prevention of Human Trafficking Act 2014*, there is some understanding of the fact that a person cannot be held liable for an offence in the absence of the requisite mental element where they are compelled to commit an offence. In a 2017 study, Liberty Asia referred to Parliamentary debates leading up to the passing of the Act, the comments of Mr. Christopher de Souza (who tabled the Act as a Bill), in response to suggestions that immunity from prosecution should be provided therein:

*As a matter of practice, I understand our authorities usually do not prosecute a victim for offences which they are compelled to commit as a direct consequence of being a trafficking in persons victim, quite simply because they have not acquiesced or consented to, and they may not even have the requisite mental element or the mens rea to commit these under compulsion. So I think some comfort can be derived from those legal principles. The Public Prosecutor makes a detailed assessment based on the full facts of each case, not least the degree of culpability involved. This process applies uniformly to all categories of crime and the Bill should not fetter the exercise of the Public Prosecutor's discretion.<sup>125</sup>*

**Establishing the link between the victim's offending and his or her trafficking:** As mentioned, the legislative provisions that may apply in defence of a victim for having committed offences, apply a compulsion-based model, as opposed to the broader causation-based approach taken in the *National Approach against Trafficking in Persons 2016-2026*. It is not clear whether the traffickers' use of more subtle means would be sufficient to prove that a victim has been 'compelled' for the purposes of these defences.

**Defences available to a victim of trafficking compelled to commit an offence:** Consideration can be given to whether Section 94 of the *Penal Code* would be broadly construed to capture the use of more subtle means used by traffickers against victims of trafficking, including in situations where the victim has consented to his or her exploitation. Victims of trafficking may have recourse to defences where acts are compelled by threats that may cause reasonable apprehension of death to themselves or to others. This defence does not apply to offences subject to the death penalty which for instance, include murder, perjury and piracy in the *Penal Code* as well as several drug-related offences specified in the *Misuse of Drugs Act*. In the latter case, the court has discretion not to impose the death penalty in certain circumstances, by virtue of Section 33B. Section 97 also provides the right of private defence for acts done to defend one's body or property. However, there is no right of private defence against acts that do not reasonably cause

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<sup>125</sup> ASEAN & ACTIP: Using a Regional Legal Framework to Fight a Global Crime (Liberty Asia, 2017) 113. Also see <https://www.todayonline.com/singapore/anti-human-trafficking-laws-passed-parliament>

apprehension of death or grievous harm, or if the perpetrator had time to have recourse to protection from public authorities. Accordingly, the application of such defences would be very specific to an individual's case, and would likely apply only to offences committed by victims of the most extreme manifestations of trafficking.

## Application of the non-punishment principle

**Criminal procedure to apply the non-punishment principle:** Prosecutorial policy in Singapore is not predicated on the status of an individual, who would not be prosecuted for acts that he or she was compelled to commit. Rather all the facts and circumstances of a case are considered in prosecutorial decisions, with investigators verifying the circumstances in which an offence was committed, providing the background for consideration of whether to prosecute or not. The Attorney-General's Chambers has discretion to institute, conduct or discontinue any criminal proceedings. In making that determination, a detailed assessment would be made on the basis of the facts of the case including the culpability of the parties involved. Accordingly, an individual who is determined through this process as having been compelled to commit acts as a direct consequence of being trafficked would not be prosecuted.

## International cooperation challenges

**International cooperation and jurisdictional challenges:** Concerns were identified among experts, that victims of transnational trafficking in Singapore may be identified as victims of trafficking by their countries of origin (whether by embassies or upon their repatriation), but not recognised as such by authorities in Singapore, potentially resulting in their punishment in Singapore.

## Victim identification challenges

**The need to strengthen identification to protect victims from punishment:** The need to raise awareness of trafficking to strengthen identification processes, and to address impediments to victims approaching authorities for assistance were noted. These same concerns about identification shortcomings were also noted by the US Department of State Trafficking in Persons Report 2020, which points to concern expressed by NGOs that authorities do not sufficiently understand the impact of debt and psychological coercion on a victim of trafficking, potentially resulting in punishment of unidentified victims.<sup>126</sup> This finding was expressed again in the 2021 Trafficking in Persons Report, noting the concern expressed by NGOs that police do not consistently screen for trafficking indicators during 'raids' of unlicensed brothels, potentially resulting in punishment of unidentified victims of trafficking for immigration violations or public solicitation.<sup>127</sup>

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**126** 2020 Trafficking in Persons Report: Singapore (US Department of State, 2020)

**127** 2021 Trafficking in Persons Report: Singapore (US Department of State, 2021)

## Victim punishment in practice

**The non-identification of victims of trafficking resulting in victim punishment in practice:** There are reportedly incidents of trafficked persons who are not formally identified, being criminalized for working illegally or working without appropriate documentation. Such situations were noted among women in the sex industry, particularly foreign women, who have sought assistance from police following assault, abuse or exploitation, subsequently criminalized for working without a visa. Examples were also offered of men unidentified as having being trafficked into construction and shipping, being charged for working irregularly.

**Counter-trafficking legislation misused to punish victims and others:** The heavily punitive nature of some legislative instruments may have an impact on punishment of victims of trafficking. For instance, enforcement powers set out in section 8 of the *Prevention of Human Trafficking Act* allow police officers to enter any premise without warrant where there is reasonable cause to believe that an offence under the Act is taking place, and to detain and examine any persons. Section 8 grants powers of arrest without warrant, where the officer reasonably suspects a person of committing or who has committed any offence specified in Part 2 of the Act. Any person at the premise who obstructs police or enforcement officers in this respect is deemed to have wilfully obstruct them for the purpose of Section 17. Section 20 also prohibits providing of false statements or information. Both offences attract a fine not exceeding \$10,000, or imprisonment not exceeding 12 months, or both. The risk that these provisions could be applied to victims rather than traffickers, points to the importance of specialized training delivered to any officer engaged in enforcement of these provisions.

**Risk of punishment for women and girls trafficked for sexual exploitation:** Good practices have been noted in Singapore, including in an instance of a victim of trafficking in the sex industry who was formally identified as a victim of trafficking and so not charged for working outside the bounds of her working visa conditions. Instead of being charged, she was protected and given the opportunity to work outside the shelter she was accommodated in. However, risks of punishing victims for prostitution-related offences have also been noted by experts; who have reported incidents of women from the Philippines, Thailand and Indonesia being criminalized after approaching police for help. Singapore's *Women's Charter 1997 concerning Offences against Women and Girls* includes several provisions related to prostitution and powers to detain women and girls in a place of safety pending judicial proceedings (Article 155); remove and detain in a place of safety women or girls under the age of 21 who have been 'trained or used for immoral purposes' (article 159) and other cases (article 160); remove them to Malaysia, Brunei Darussalam or Hong Kong (article 165) or received from those places and detained in Singapore (article 167), and be arrested for leaving the place of detention (article 169).

**Risks of punishment for victims of trafficking for forced labour:** In addition to the exploitation of women and girls in the sex industry, example were offered of male victims of trafficking at construction sites and shipyards being detained for working illegally or without a proper visa, or in some cases, for giving false testimony. Singapore has also been recognised as a place of transit for men from ASEAN countries trafficked into the fishing industry.

**Risks of punishment for non-citizen victims:** The *Immigration Act* refers to ‘prohibited immigrants’ being ‘persons who are members of prohibited classes’ including ‘any person who is unable to show that he has the means of supporting himself’, and ‘any prostitute or any person who is living on or receiving or who, prior to entering Singapore, lived on or received the proceeds of prostitution’ or ‘any person who... is not in possession of [valid travel] documents or is in possession of forged or altered travel documents.’<sup>128</sup> The burden of proof in this case lies on the person to prove that he or she is not a prohibited immigrant. There is a potential risk that this provision could capture most if not all victims of trafficking, highlighting again the importance of effective identification processes.<sup>129</sup>

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<sup>128</sup> Immigration Act c. 133 (M. Ordinance 12 of 1959, rev’d ed. Jan 1, 2008) pt. II

<sup>129</sup> Marija Jovanović, International Law and Regional Norm Smuggling: How the EU and ASEAN Redefined the Global Regime on Human Trafficking, *The American Journal of International Law*, 2021, Vol. XX, 1, 20



## 2.9 Thailand

Two roundtable discussions were held in Thailand for the purposes of this study, with a total of 38 participants representing State and non-state counter-trafficking entities. This section has drawn significantly on their insights, as well as relevant open-source material.

### Non-punishment principle in law and policy

**Explicit non-punishment provision in anti-trafficking legislation:** According to Section 41 of the *Anti-Trafficking in Persons Act* B.E. 2551 (2008), subsequently amended in 2015 (BE 2558) and 2017 (BE 2560), victims cannot be prosecuted for illegal entry or stay, providing false information, document-related offences, prostitution-related offences or work-related offences, unless the Minister of Justice grants permission in writing:

*Unless the Minister of Justice grants a permission in writing, the inquiry official is barred from taking criminal proceeding against any trafficked person on the offence of entering, leaving, or residing in the Kingdom without permission under the law on immigration, giving a false information to the official, forging or using a forged travel document under the Penal Code, offence under the law on prevention and suppression of prostitution, particularly on contacting, persuading, introducing and soliciting a person for the purpose of prostitution and assembling together in the place of prostitution for the purpose of prostitution, or offence of being an alien working without permission under the law on working of the alien.*

### Limitations of non-punishment provision and practitioner suggestions for amendment:

According to Section 41 law, criminal justice proceedings can be taken against a trafficked person with the written permission of the Minister of Justice. Some concerns noted about this provision are that it only applies to victims who are formally identified by a competent official who is under no obligation to make this determination, and the absence of options to challenge this decision, allowing for significant discretion in protection.<sup>130</sup> It also only applies to a limited range of offences. These limitations were noted by roundtable discussants, some of whom suggested that the provision should be broadened to capture additional offences such as identity fraud. Some felt the law should be drafted to make clear to investigators the extent to which a victim is protected from punishment. It was also suggested that the legislation could explicitly ensure that the Ministry of Interior can protect victims from being blacklisted or subject to notations in passports for offences.

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**130** Marija Jovanović, International Law and Regional Norm Smuggling: How the EU and ASEAN Redefined the Global Regime on Human Trafficking, *The American Journal of International Law*, 2021, Vol. XX, 1, 20

**Commitment to non-punishment of victim-offenders who have been subject to forced or compulsory labour:** Thailand is a signatory to the ILO Protocol of 2014 to the Forced Labour Convention, committing states parties to “take 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.” The implementation of this provision in domestic law was not discussed.

**Other relevant provisions in legislation:** In addition to Section 41 of the *Anti-Trafficking in persons Act B.E. 2551 (2008)*, section 31 of that same instrument was pointed to as of relevance; by allowing prosecutors to bring anyone, including trafficked persons to court to testify, it was felt that the risk of victims being punished was reduced, presumably by allowing the full circumstances of any criminality that victims may have been involved in, to be brought to light.

**Expungement of criminal records not legislatively possible:** Outside of the limited context of *Royal Pardons and the Rehabilitation of Offenders Act* that can operate to clear records of offenders, there is no opportunity in legislation for criminal records to be expunged. However, a case was cited in which the Office of the Attorney General worked in conjunction with the Ministry of Foreign Affairs and UNHCR to expunge the criminal record of a victim of trafficking being sent to a third country.

**No non-punishment statement in policy:** In relation to policy, the *Second National Policies, Strategies and Measures to Prevent and Suppress Trafficking in Persons* (2017-2021) of the Ministry of Social Welfare and Development (MSDHS) is silent on the non-punishment principle, but does set out to strengthen victim identification.

## Interpretation of the non-punishment principle

**Understanding of the purpose of the non-punishment principle:** Practitioners offered two reasons to uphold the non-punishment principle. Firstly, not charging victims for offences is to incentivise victims to cooperate with authorities and participate in criminal justice proceedings as witnesses. Secondly, the non-punishment principle is part of a victim-centred approach to counter-trafficking. These two different understandings of the purpose of the principle have bearing on how it is interpreted.

**Different views on whether non-cooperating victims should be protected from punishment:** Respondents raised the question of whether victims who do *not* participate in prosecutions of traffickers should be protected under Section 41. Opinions on this point varied. Some noted that a victim-centred approach affirms that a victim should not be punished even if he or she victim opted not to participate in criminal justice proceedings.

Those who took this approach felt that retroactively punishing a victim for crimes if they retract their cooperation would not be in keeping with the intention of the provision, and that victims should be able to refuse cooperation without being punished for that choice. Others expressed a contrary view, that the intention of Section 41 is to encourage victims to cooperate in criminal justice processes, and to support practitioners to approach victims as witnesses rather than perpetrators. On this rationale, a victim who does not cooperate as a witness should not be given the same protection and investment of resources as one who does. Concern was raised that making protection from punishment accessible to all victims, irrespective of whether they cooperate or not, may indirectly benefit traffickers by giving them an opportunity to pay or otherwise incentivise victims to not cooperate.

**Establishing the link between the offence and the trafficking:** According to Thai law, criminal liability attaches only where a person commits an act intentionally (Section 59). A person is also not to be punished where they commit acts on account of necessity, including ‘when a person is under compulsion or under the influence of a force such that such person cannot avoid or resist’ (Section 67(1)) or ‘[w]hen such person acts in order to make himself or another person to escape from an imminent danger which could not be avoided by any other means, and which such person did not cause to exist through his own fault. Provided that no more is done than is reasonably necessary under the circumstances’ (Section 67(2)).

Some practitioners explained that if it cannot be established that a victim committed an offence, for instance, in self-defence, then Section 41 cannot be used. Others took a different view, suggesting that the exemption relates more broadly to the extent to which the offence relates to the actions of the traffickers. It was explained that where a person voluntarily enters Thailand illegally to participate in prostitution, falsifying documents herself to do so, Section 41 does *not* apply because the trafficker had nothing to do with her commission of the offence. Here it was noted that investigators face acute challenges where a person voluntarily enters Thailand illegally, and later fall victim of trafficking, raising questions about whether Section 41 protects against prosecution in such cases.

**Non-punishment tied to victim status:** Some practitioners took a broader view of the scope of the non-punishment principle, attaching it to a person’s status as a victim rather than requiring that the offence in question be directly related to their trafficking. The example offered was of victims (including children) in immigration detention or shelters against their will, who vandalise property, commit theft or assault staff. Reportedly, law enforcers charge victims for these offences in some cases but not in others. In short, the scope of the non-punishment principle is not consistently understood by practitioners.

## Application of the non-punishment principle

**Value of the non-punishment provision in Thai legislation:** Thus far there have reportedly been no cases of permission being sought under Section 41 by either the Royal Thai Police or the Immigration Bureau to prosecute a victim of trafficking. Practitioners pointed to provision as key to Thailand's improved implementation of the non-punishment principle in practice, with instances of victim prosecution reported prior to its enactment. An example was offered of victims in the fishing industry being prosecuted for falsifying documents, including Thai seaman books. They were spared conviction through the cooperative efforts of both State and non-state stakeholders, and subsequently, SOPs were introduced on rescuing and repatriating Lao, Myanmar or Cambodian nationals and channelling them away from prosecution and into protection.

### Box 7: Case study: Inconsistent application of the non-punishment principle in practice

Notwithstanding that the non-punishment principle may be provided for in law, it may be inconsistently applied in practice. This can be true between States across a trafficking route, or even within a single State. In one situation, two young women were trafficked from Uzbekistan under false promises of work as waitresses in Thailand. Upon arrival they were forced into prostitution for six months, before being sold to a Chinese gang that promised to free them if they carried 'goods' into Thailand. Both agreed to the proposal and were transported from Pakistan to Thailand smuggling drugs in their suitcases. Both were arrested in Bangkok, prosecuted, convicted and sentenced to 32 and 25 years imprisonment respectively. One was subsequently given amnesty and repatriated with the support of an NGO, while the other remains in prison. This example reveals that the non-punishment principle may be inconsistently applied and result in different outcomes for trafficked victims.

Source: *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (OSCE, Vienna 2013) 25



**Implementation of the non-punishment provision in criminal procedure:** Respondents generally held the view that Thai officials stringently apply Section 41 of the *Anti-Trafficking in Persons Act B.E. 2551* (2008). Some felt that the requirement to seek permission from the Ministry to prosecute trafficked persons for illegal migration or prostitution, offers a higher standard of protection than the ASEAN Convention. According to this view, it is procedurally impossible for identified victims to be prosecuted, as investigators, prosecutors and courts have no discretion to prosecute victims; only the Minister has authority to allow their prosecution.

**When the non-punishment principle should be applied:** One practitioner explained that application of the non-punishment principle should not depend on the long process that is required for formal victim status determinations to be made. The suggestion to make either victim status determinations, or the outcomes of prosecutions of traffickers prerequisites for applying the principle, were considered contrary to its purpose, being to protect victims of trafficking. In that person's view it should be sufficient that a charge is pursued against a trafficker.

**Role of investigating officers in upholding the non-punishment principle:** Section 41 was explained as being for the enquiry/investigating officer to enforce; not prosecutors or officers of the court. Implementation challenges were noted where law enforcers have insufficient understanding and capacity to understand why victims may lie or not provide truthful information about their victimisation, leaving them culpable for offences they have committed.<sup>131</sup> Yet respondents expressed confidence that police have improved their application of the principle, not only by refraining from charging prescribed offences, but also by not charging victims for other offences in the *Criminal Code*, even including offences that are not explicitly exempt by Section 41. Examples were offered of law enforcers exercising discretion not to charge victims for document-related or fraudulent offences, identity fraud, overstay visas, or are involved in trafficking others. However, challenges were noted here too. The fact that police are measured by the charges and arrests they lay and may be liable to neglecting their duties if they do not pursue charges, were noted as potential disincentives to apply the non-punishment principle (see below under Victim Identification).

**Role of prosecutors and defence lawyers in upholding the non-punishment principle:** If investigators charge a victim so that he or she appears before the court as an accused person, it was explained that prosecutors should only then prosecute cases when they are certain that the suspects are not victims of trafficking. It was also noted here that prosecutors also have the opportunity to only prosecute them to a minimal level. An example was offered of a surrogacy case in which the surrogate mother, fearing incrimination for crimes relating to reproductive technology, provided insufficient information with which to classify her as a victim. However, no charges were filed against her, with prosecutors

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<sup>131</sup> *Legal Analysis of Human Trafficking in Thailand* (Liberty Asia, 2017) 30

opting instead to protect her as a witness against those who exploited her. Here it was noted in such cases that where the mothers are not the owners of the eggs, there may be violations of crimes relating to reproductive technology, but that prosecuting surrogates would jeopardize cooperation from them. Defence lawyers also have a role to play in this respect by giving persons on trial a full defence, including by evoking Section 41 where it is relevant to the offences a victim has been charged with.

**The role of courts in upholding the non-punishment principle:** Respondents explained that the court technically has no power to dismiss cases against trafficked victims if investigators and prosecutors choose to prosecute them. An exception emerges from the *Criminal Code* being *force majeure*, where victims are compelled by extraordinary circumstances to protect themselves, for instance, from imminent physical harm. Failing that, the court could work with prosecutors to have charges dropped. There have reportedly been cases dismissed where an offender has been found to be a victim of trafficking. Members of the judiciary have discretion to talk directly with parties at trial, but it was noted that they often do not do so, or do not ask questions that could reveal that an alleged offender is a victim of trafficking.

## International cooperation challenges

**Non-punishment principle in bilateral agreements:** Thailand has MOUs in place confirming that victims are to be treated as victims not as offenders, and agree not to punish victims for illegal entry into or exit from its territory, or any other offences arising directly from human trafficking, including with Myanmar (2009) (article 8(a)); China (2018) (article 5); and for women and children only, with Cambodia (2014) (article 6) and Viet Nam (2008) (article 6). The 2017 MOU between Lao and Thailand does not specifically address non-punishment but speaks to legal protection (article 6) and the need to not subject victims to further victimization in legal proceedings (article 17). There was no discussion about the practical application of these agreements beyond State respondents noting that Thai authorities adhere to the non-punishment principle in collaborating with authorities in other jurisdictions, irrespective of whether or not it is explicitly captured in cooperation agreements.

**Inconsistent approaches to non-punishment principle in different jurisdictions:** Respondents emphasised the importance of consistent approaches to counter-trafficking so that victims of transnational trafficking are protected from punishment across jurisdictions. This point was emphasised not only for ASEAN countries but also beyond in jurisdictions where Thai citizens are trafficked, that also need to adopt the non-punishment principle in their context. State respondents stated that Thai authorities work with countries of origin to share information to implement the non-punishment principle and pointed to the importance of the work of ASEAN-ACT and other non-governmental organisations to communicate best practice.



## Victim identification challenges

**Victim identification critical to non-punishment of victims of trafficking:** Roundtable discussants emphasised that for the non-punishment principle to be applied, victims first must be identified. Failing that, even if new facts come to light to identify them as victims once they have entered criminal justice system, they cannot be protected from the punishment they have already endured within it. The call was made for victim identification processes to be transparent so that the reasons that they have been identified as victims or not, can be better understood and any errors remedied. The 2020 US State Department Trafficking in Persons report notes flaws in identification procedures that are detrimental to implementation of Thai non-punishment legislation, and increase the risk that victims will be penalised including for immigration and prostitution violations.<sup>132</sup>

**Victim preference to be criminalized rather than identified and protected:** In some cases, victims reportedly prefer to confess to committing an offence and pay fines for immigration or prostitution-related offences, rather than be identified and protected as victims of trafficking.<sup>133</sup> An example was offered of a woman arrested for soliciting for prostitution who paid a 500 THB fine and admitted her guilt for reasons of expediency, and was later detained for deportation though she would have been protected by the law had she been initially identified as a victim of trafficking. This type of 'low level' prosecution was noted as common, with some victims only identified once they have spent an extended period of time in detention awaiting deportation.

**Role of interpreters in identification and criminalization of victims of trafficking:** Access to appropriately trained interpreters was noted as a key challenge in victim identification. NGO's have reported that interpreters who have participated in victim identification interviews and court proceedings have not always been appropriately trained, and sometimes have even attempted to convince victims to confess to unlawful acts that traffickers compelled them to commit.<sup>134</sup>

**Role and capacity of police to identify victims and exercise discretion not to punish them:** Respondents noted that frontline officers may readily identify trafficking in cases where children are involved or violence is used, but that lack capacity to identify trafficking where subtle means have been used. Respondents noted that performance of law enforcers may be measured by the number of arrests they make and charges they file. This was suggested as a disincentive for law enforcers to identify victims among the people they encounter as offenders, meaning victims may fall into a 'grey area' and not be identified at all, nor have the non-punishment principle applied to them. Changing the

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<sup>132</sup> 2020 Trafficking in Persons Report: Thailand (US Department of State, 2020).

<sup>133</sup> For more on challenges that victims in being 'protected' as victims of trafficking, see: McAdam, Marika., *Freedom of movement of persons identified as victims of human trafficking: An analysis of law, policy and practice in the ASEAN region* (ASEAN-ACT, 2021)

<sup>134</sup> 2021 Trafficking in Persons Report: Thailand (US Department of State, 2021). The State Department reports that Thailand's criminal defamation laws have been used strategically by companies to pursue charges against potential victims and advocates.



way that police performance is measured, and carrying out training to conduct screenings were stressed as key measures towards ensuring that officers are empowered to identify victims and incentivised to exercise their discretion not to charge them with offences.

**Role of NGOs in supporting victim identification and protection from punishment:** The involvement by police of NGOs in identification processes was noted as a good practice in identification. NGO involvement in screening processes has reportedly resulted in more effective victim identification, by supporting trust-building with victims who do not see themselves as victims and do not trust police. NGO respondents also cited instances where they have managed to have people in the criminal justice system recognised as victims and assisted accordingly.

**Importance of identifying and protecting child victims as children:** Participants noted that a person's age is often the difference between them being identified and protected as a victim or being classified and prosecuted as a perpetrator. In one example, a person apprehended for production and sale of child sex abuse images was subsequently identified as a minor under the age of 15. Because she was identified as a child she was not charged, including for offences not explicitly included in Section 41. Another case involved a group of 14 people identified as potential victims of trafficking; the adults among them were prosecuted for prostitution and deported on the basis of their refusal to cooperate. For children, the *Child Protection Act* applies notwithstanding that they do not want to cooperate with authorities or be identified and assisted as victims. Migrant children trafficked into sexual exploitation were noted as being particularly at risk of punishment where officers do not realise that documents have falsified age. In such cases, they may be misidentified as perpetrators of prostitution-related offences rather than as victims of trafficking. Good practices noted in this regard were reliance on scientific and victim-centred social approaches to determine age.

**Misidentification of non-victims as victims:** In addition to victims not being effectively identified, concerns were raised about non-victims being misidentified as victims. An example was offered of a person who had been identified as a victim of trafficking, being later determined by the court not to be. In this case, the prosecutor asked the court whether she will instead be punished for illegal entry and be required to reimburse the costs incurred by the Ministry of Social Development and Human Security (MSDHS) for supporting her as a victim of trafficking. At the time of writing, this case is yet to be resolved. Some respondents made the point here, that victims of trafficking are protected in ways that victims of other crimes and of other statuses (such as refugees and smuggled migrants) are not, and that misuse of the non-punishment principle must be guarded against.

## Victim punishment in practice

**Particular vulnerability of foreign victims to punishment:** Foreign victims of trafficking – including children among them – were identified as particularly vulnerable to being prosecuted, fined, detained and deported. Those exploited in non-sexual forms of labour

have been charged with irregular migration offences, document-related offences (relating to passports, permits or seaman books) and working without permits. Meanwhile, those exploited in the sex industry face risks of additional charges in the *Criminal Code B.E. 2499* and the *Prevention and Suppression of Prostitution Act B.E. 2539*. Foreign victims of trafficking in sexual exploitation have been charged with prostitution-related as well as irregular migration related offences. Where victims are deported as illegal migrants, their victimisation may only come to light after they have returned home.

**Particular vulnerability of victims of trafficking for the purpose of sexual exploitation:**

Offences in the *Criminal Code BE 2499* (1956) that victims of trafficking for the purpose of sexual exploitation may be subject to, include those ‘offences relating to sexuality’ (Sections 276 to 287); offences against life and body (Sections 288-300) and offences against liberty (Sections 309-321). Victims of trafficking for the purpose of sexual exploitation, including children, can and have been criminalized by the *Prevention and Suppression of Prostitution Act B.E. 2539*, notably, sections 5 and 6:

*Section 5. Any person who, for the purpose of prostitution, solicits, induces, introduces herself or himself to, follows or importunes a person in a street, public place or any other place in an open and shameless manner or causes nuisance to the public, shall be liable to a fine not exceeding one thousand Baht.*

*Section 6. Any person who associates with another person in a prostitution establishment for the purpose of prostitution of himself or herself or another person shall be liable to imprisonment for a term not exceeding one month or to a fine not exceeding one thousand Baht or to both.*

**Prosecution of people in the sex industry resulting from counter-trafficking efforts:**

Thai law protects victims of trafficking, leaving those who are not identified as victims vulnerable to criminalization. It was explained that people involved in the sex industry may be prosecuted for soliciting sex, fined 1500 Thai Baht and placed in custody for 48 hours. Those in irregular situations may be transferred to immigration authorities and deported. Even minor offences result in a criminal record. One participant expressed deep moral discomfort about his rescue efforts resulting in the criminalization of people who are not identified as victims of trafficking, who ask him why they have to go to jail for something that is so widespread in Thailand, that they did not know it to be illegal. He noted that he has no satisfactory answer to this question and suggested that laws should be introduced to regulate sex work of adults to ensure that efforts to rescue trafficked victims do not result in imprisonment and stigmatization of people involved in sex work. In this way, law enforcers could focus their efforts on addressing trafficking in persons, rather than criminalizing sex workers.

## Box 8: Raids and 'rescues' of trafficked victims resulting in criminalization of sex workers

The 'raid and rescue model' of victim identification and protection has been widely and heavily criticised. It may involve operations conducted to entrap people involved in the sex industry, in which police and representatives of anti-trafficking NGOs pose as customers and in some cases obtain sexual services from people suspected of being trafficked or committing prostitution-related offences. When it is deemed that there is sufficient evidence of either situation, authorities from several agencies, sometimes armed, and sometimes even accompanied by representatives of the media, will 'rescue' workers who are believed to be under 18 and those who identify themselves as trafficked who are over 18. Generally, those identified as victims are placed (sometimes against their will) in shelters often for indefinite periods of time, and are unable to work and have limited or no contact with their families. Those who are not identified as victims of trafficking may be arrested, detained and deported if they are undocumented, and have their passports stamped to identify them as having violated the law prohibiting prostitution.<sup>135</sup>



**Prosecution of child victims of trafficking:** The age of criminal responsibility in Thailand is 10 years old, according to Section 73 of the *Criminal Code BE 2499* (1956). In June 2020, the Thai cabinet gave in-principle support to increasing the age of criminal responsibility to 12. Examples were offered of child victims of trafficking being prosecuted for offences relating to prostitution, online sexual exploitation and trafficking, where they had played a role in recruiting others. In some cases, they financially benefit from recruiting their friends, but children have been prosecuted even where they have not benefited. Respondents explained that even if they are not witnesses, children should be protected both under the *Trafficking in Persons Act* and the *Child Protection Act*. The contrary view was also expressed, that child victims who profit from recruiting others should be charged with an offence to stop them from continuing this practice.

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**135** *Sex Workers organising for change: Self-representation, community mobilisation, and working conditions* (Global Alliance Against Trafficking Traffic in Women (GAATW, 2018) 50; also see *Hit and Run: The impact of anti-trafficking policy and practice on Sex Worker's Human Rights in Thailand* (RATS-W Team, Empower, 2012).

**Strategic criminalization of victims to protect traffickers / exploiters:** Examples were offered of employers counter-suing victims who file complaints against them, accusing them of crimes such as theft, which fall outside the protection offered by Section 41. Another example was offered, in which a potential victim of trafficked used social media to caution others about a particular person, who was sued for defamation. These tactics were noted as being a strategy used by employers to exert their power over victims and avoid liability. The 2020 US Trafficking in Persons Report also offered both these examples of exploitative employers convincing law enforcers to bring criminal charges for theft against exploited workers who attempted to leave or change jobs, as well as using criminal defamation laws to silence potential victims and workers' rights advocates.<sup>136</sup>

**Forms of victim punishment beyond prosecution:** Participants gave examples of administrative and other measures that can manifest as punishment of victims beyond criminal prosecution. Immigration detention before repatriation was cited as an example of non-prosecutorial punishment, that detracts from the ability of stakeholders to identify and assist potential victims. Lack of restitution was also pointed to as a form of victim punishment, and a discriminatory practice where victims are denied access to assistance funds because they are in irregular situations. Another example was the practice of recording prostitution-related offences in passports; a form of punishment that stigmatizes the passport-bearer and prevents them from returning to Thailand. Even people who have been identified as victims of trafficking have reportedly deported with a stamp in their passport referring to their involvement in prostitution. It was not clear whether this practice continues or not; some respondents were of the view that any such stamp in a victim's passport likely relate to offences committed before they were identified as victims of trafficking, or owing to mistakes made by local police who did not identify them as victims.

**Prosecution of Thai victims of trafficking abroad:** Practitioners emphasised the need for Thai victims of trafficking to be protected from prosecution abroad. An example was offered of a Thai victim who killed her exploiter during her escape. The country in question did not have counter-trafficking legislation in place at the time to recognise her as a victim, resulting in her prosecution for both irregular migration and manslaughter. Additional examples were offered, including of Thai victims detained in the Middle East to participate in criminal justice proceedings; of Thai fishing crews arrested in territorial waters of other countries and prosecuted without being screened for trafficking. Victims of forced labour – which is now captured in the *Anti-Trafficking in Persons Act B.E. 2551* (2008) – are also reportedly subject to punishment abroad. Respondents recommended that practitioners reflect on the application of the non-punishment principle in the context of labour and other laws of other countries, that impact Thai migrant workers abroad.

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**136** 2020 Trafficking in Persons Report: Thailand (US Department of State, 2020).

## 2.10 Vietnam

Two roundtable discussions were held in Viet Nam with a total of 52 participants representing State and non-state counter-trafficking entities. This section has drawn significantly on their insights, as well as on relevant open-source material.

### Non-punishment principle in law and policy

**No explicit non-punishment provision:** There are no provisions relevant to non-punishment of victims of trafficking in Vietnamese legislation. Law No 66/2011/QH12 on Prevention, Suppression Against Human Trafficking is silent on the issue of non-punishment. State officials explained that the non-punishment provision was not included in the 2011 Counter-Trafficking Law because it was not considered consistent with other provisions. However, they expressed the view that the principle is captured across other instruments, including the decree on victim protection. Decree No. 62/2012/ND-CP of August 13, 2012, prescribes the grounds for identification of trafficked victims and safety protection of victims and their relatives, and Decree No. 09/2013/ND-CP stipulates in detail a number of articles of the anti-human trafficking law, but do not address non-punishment. In the view of some respondents though, the absence of a specific non-punishment provision in law is compensated for by other instruments that uphold the principle, as well as in practice by police and immigration officials who act to protect rather than punish victims.

**Other relevant protections in legislation:** Respondents referred to the human rights set out in the Constitution as a minimum basis for victim protection in specialised trafficking laws and bilateral agreements that include the non-punishment principle (see below under International Cooperation). These laws were emphasised as being in line with international law, though it was acknowledged that further effort could be made to ensure their implementation. Practitioners also pointed to the Penal Code and Criminal Procedural Law relating to force and other mitigating factors to protect victims from punishment for offences, not on the basis that they are a victim of trafficking, but on the basis of non-liability for acts in the absence of the fault element, and the defences set out therein.

**Relevant provisions of the Penal Code:** Article 46 of the Penal Code (No. 15/1999/QH10) provides 'Circumstances extenuating penal liability', for which Courts may opt to apply lesser sentences than those prescribed. Some of these may be relevant to the crimes committed by trafficked persons as a direct result of their trafficking, including: (e) Crimes are committed in cases where offenders are mentally incited by the illegal acts of the victims or other persons; (f) Crimes are committed due to particular difficulty plights not caused by themselves; (i) Crimes are committed due to threats and/or coercion by other persons; and (j) Crimes are committed due to ignorance.

**Non-punishment not explicitly addressed in counter-trafficking policies:** The Minimum Standards in Provision of Services to Victims of Human Trafficking (Ministry of Labour, Invalids and Social Affairs, 2011), the 2016 – 2020 National Action Plan against Trafficking

in Persons are silent on the principle of non-punishment. The National Programme on Counter Trafficking in Persons during the period 2021-2025, with a vision to 2030 does not explicitly include non-punishment but details strong victim support and even speaks to referral mechanisms for those who do not meet the threshold of trafficked victims.

## Interpretation of the non-punishment principle

**Aversion to misuse of immunity from liability:** Some respondents expressed discomfort at generalized application of the non-punishment principle and emphasised the need to focus on the intentions of the victim-offender, elements of the crime committed, and the need for mitigating factors in criminal and administrative law to be considered. Both state and non-state actors underlined the vital work of criminal justice practitioners in applying the law and implementing the principle. Concern about misuse of non-punishment has been noted elsewhere; the 2021 US State Department Trafficking in Persons Report noted that government officials have suggested that victims inflate abuses to avoid immigration violations.<sup>137</sup>

**Relevance of the gravity of the victims' offence in applying the non-punishment principle:** State officials asserted that the gravity of the offence is relevant to interpreting the non-punishment principle. Some expressed the view that serious offences such as murder, drug trafficking or human trafficking should not be exempt from prosecution. The suggestion was made for a provision be included in anti-trafficking legislation to set out criteria for when victims will and will not be punished. One practitioner expressed preference that this not be called the non-punishment principle per se, but rather the 'principle of dealing with offences by victims of trafficking', to allow for victims of trafficking to be protected in law, but also to be prosecuted where they commit serious offences.

**Establishing the link between the victim's offence and his or her trafficking in applying the non-punishment principle:** State officials explained that where the elements of a victim's crime are established, he or she is liable to prosecution, subject to the application of any legitimate defences. It was explained that a victim who becomes a perpetrator should be prosecuted, unless traffickers have compelled him or her to be involved in offences as a direct consequence of being trafficked, where they are detained, compelled and forced to commit a criminal activity. But where a victim commits a crime that is not the direct result of being a victim, and had choices not to offend, he or she should face prosecution, with consideration given to potentially mitigating factors.

State officials pointed to the *Penal Code* and *Criminal Procedural Law* relating to force and other mitigating considerations to protect victims from punishment not on the basis that they are a victim of trafficking, but on the basis of the fault element and non-liability for acts that they did not intend, and the defences set out therein. In other words, victims should not be prosecuted for offences they have not intentionally commit, but should be

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**137** 2020 Trafficking in Persons Report: Viet Nam (US Department of State, 2020)



punished for crimes they voluntarily commit. Temporal considerations about the point at which victims should no longer be protected from punishment were raised, with the view expressed that those who have lived irregularly abroad for some time after having escaped from traffickers and stabilised, should not escape punishment for offences they commit.

## **Application of the non-punishment principle**

**Potentially inconsistent application of the non-punishment principle:** Some State practitioners felt that the principle has been broadly upheld in practice, notwithstanding the absence of an explicit legislative provision. However, another view expressed by both state and non-state actors, was that not having the principle explicitly captured in Vietnamese law may contribute to inconsistent application of the principle between central and provincial levels, pointing to the need for clear law and policies, supported by guidelines and protocols. It was noted that some local officials may be unaware of the non-punishment principle. Having the provision captured in law, it was suggested, would also give victims more assurance of being protected from punishment and so make them feel more comfortable to engage with authorities. To this end, non-state actors suggested better supporting victims to understand the non-punishment principle (including in countries of destination), as well as Vietnamese workers before they are sent abroad.

**Mitigated sentences as an approach to non-punishment:** State officials pointed to the use of reduced sentences for victims of trafficking who commit offences. Article 51 of the *Penal Code* allows practitioners to point to mitigating circumstances including the personal background, absence of a criminal record and whether a person has cooperated with law enforcement officers. A non-state respondent pointed to traffickers' former status as victims of trafficking potentially serving as an exonerating factor.

**Responding to challenges in applying the non-punishment principle in practice:** Respondents offered three points towards strengthening application of the non-punishment principle in practice. Firstly, while Viet Nam has committed to the principle through treaties and other agreements, its incorporation into domestic legislation was considered by some to be key to its implementation in practice. Secondly, participants emphasized the need to enhance knowledge, build capacity and strengthen relationships between investigating, prosecuting and adjudicating agencies to apply the non-punishment principle, and to train labour inspectors on the non-punishment principle. Here it was noted too that victim support and legal aid agencies should play a role during criminal justice processes to strengthen understanding. Thirdly, the value of roundtable consultations - such as that which took place to inform this study - were pointed to as useful forums to strengthen human rights-based approaches to human trafficking.



## International cooperation challenges

**Bilateral agreements in place that address non-punishment:** Viet Nam has entered into MOUs with Thailand (2013) and Cambodia (2004) confirming that victims are to be treated as victims rather than as offenders, and in which signatories agree not to punish women and child victims for illegal entry to or exit from its territory, or any other offences arising directly from human trafficking. The MOU between Lao and Viet Nam (2010) commits parties to ensuring that victims are ‘not detained and/or punished for illegal immigration or any other related administrative offence’ (article 4(1)(a)). In the MOU with China (2010) parties agree to not punish victims illegally entering or exiting their national territories, or other illegal acts as an immediate result of being trafficked (article 2A). Respondents were unable to provide specific examples of mutual legal assistance to identify victims of trafficking being provided or received on the basis of any bilateral agreement, treaty or on the basis of reciprocity.

**International cooperation challenges to protecting victims from prosecution abroad:** Non-state respondents pointed to inconsistent understandings between countries as to what constitutes trafficking as being a barrier to the non-punishment principle. State officials stated that the requirement for *notes verbales* to secure action in other jurisdictions contributed to victims’ risk of non-identification and prosecution. The possibility of the COMMIT process as a possible avenue to pursue the non-punishment principle within the immediate region was raised. Stronger cooperation with law enforcement agencies in the European Union was flagged as key to protecting Vietnamese victims, including through MOUs on victim support.

## Victim identification challenges

**Victim identification key to protecting them from punishment:** Emphasis was placed on the need to enhance victim-identification skills as key to protecting victims from punishment. There was a general view that victims who are identified as victims – and issued with victim-status certificates that exempt them from prosecution and punishments including administrative fines for irregular migration – are well-protected from prosecution. A non-state representative commended government efforts to identify victims and emphasised the crucial work of law enforcers to investigate situations in which victim-offenders have been compelled to perform criminal acts, both in Viet Nam and abroad. However, some shortcomings in identification procedures were noted that may have resulted in punishment rather than protection of victims.

**Scope to improve victim identification procedures:** The US State Department 2021 Trafficking in Persons Report noted that the victim identification process remained ‘overly cumbersome and complex’. Failure to systematically implement identification procedures meant that victims were not proactively identified – including among women and children in commercial sex – has resulted in some victims potentially penalized for unlawful acts traffickers compelled them to commit. According to that report, NGOs reported that

foreign victims were unlikely to come forward in fear of arrest by authorities for irregularly entering the country, and that Vietnamese victims feared reprisals for irregular migration, unlawful acts as a result of their trafficking, or criticism of the government.<sup>138</sup>

**Gender dimensions of non-identification and risks of punishment:** Female victims, particularly of trafficking for sexual exploitation, were considered to be at high risk of punishment because they account for the majority of trafficked persons. Female victims in non-sexual forms of labour exploitation may be less readily identified than those in sexual exploitation, and therefore exposed to risks of prosecution for migration-related offences. The fact that there is less acceptance of males being victims was also noted as a potential impediment to their identification resulting in risk of punishment.

**Challenges identifying Vietnamese victims abroad:** Both state and non-state respondents spoke to the challenges in proving that a Vietnamese citizen is a victim of trafficking abroad. Those Vietnamese citizens in irregular situations face language barriers and heightened risks of deportation without being identified and assisted.

## Victim punishment in practice

**Prosecution of Vietnamese victims abroad:** Participants noted that victims of forced prostitution or forced marriage in China may escape from their situation and be arrested and imprisoned for migration or document-related offences rather than supported as victims of trafficking. This may occur notwithstanding information from Vietnamese authorities confirming that they are victims of trafficking. Examples were also offered of Vietnamese victims of trafficking into cannabis cultivation facing criminalization; indeed, trafficking of Vietnamese citizens into criminal activity has been well-documented.<sup>139</sup> A 2014 report on exploitation in criminal activities in Europe offered insight into Viet Nam as a key source country for victims of trafficking, including children.<sup>140</sup> The prosecution of Vietnamese trafficking victims in the United Kingdom was the focus of the landmark decision in the case of European Court of Human Rights of *V.C.L and A.N. v The United Kingdom* (see Box 4).

**Prosecution of Vietnamese victims returning to Viet Nam:** Non-state respondents note the challenge faced by returning Vietnamese citizens, who have been recognized as victims in destination countries, but not upon their return to Viet Nam where they are instead subject to fines for illegal exit and illegal work. Practitioners referred to a case of a Vietnamese victim trafficked into forced prostitution in China who murdered the owner of the brothel she was exploited in who was subsequently subject to 15 years

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<sup>138</sup> 2021 Trafficking in Persons Report: Viet Nam (US Department of State, 2021)

<sup>139</sup> *Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory Study and Good Practices* (Anti-Slavery International, 2014) 50, 57.

<sup>140</sup> Indeed, Viet Nam is the single largest source country for child trafficking into the UK, with Vietnamese gangs trafficking children as low-cost labour. Of the 308 children reportedly arrested for cannabis cultivation in the UK between 2011 and 2014, 245 were Vietnamese nationals, or 79.5% of the total number of foreign children arrested for such offences, many of whom are likely to have been victims of trafficking. *Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory Study and Good Practices* (Anti-Slavery International, 2014) 17-19.

in imprisonment upon her return to Viet Nam. Respondents explained that in this case, the victim had committed the crime as a direct consequence of being trafficked, pointing to the need for consideration to be given to whether a person has been compelled to commit a crime, or whether there were alternatives, for instance, self-defence that did not result in death.

**Prosecution of foreign victims of trafficking in Viet Nam and migration status considerations:** Opinions varied as to whether foreign victims are punished for offences they may have committed in the course of being trafficked in Viet Nam. Non-citizens were noted as being more difficult to identify and less likely to identify themselves to authorities, and therefore at higher risk of prosecution.

**Prosecution of victims-turned-trafficker:** Examples were offered of victims trafficked from Viet Nam to other countries, such as Malaysia or China, who learn routes and make contacts, and so return to Viet Nam as traffickers. In such cases, State respondents explained that they will be prosecuted where evidence can be achieved to prove their involvement in trafficking. Non-state actors also offered examples of victims-turned-traffickers; in one case a victim was allowed to return to Viet Nam if she recruited another victim in her place, and was sentenced to three years imprisonment for doing so. Another example involved a victim of trafficking for organ removal subsequently recruiting others to sell their organs too.

The background of the slide is a low-angle, upward-looking shot of a dense canopy of flags and string lights. The flags, which include various national and regional flags, are strung together and hang from above, creating a complex, web-like pattern. Interspersed among the flags are strings of small, round, white lights. The entire scene is bathed in a deep blue light, which is the primary color of the slide's background. The perspective makes the flags appear to be reaching towards the center of the frame, creating a sense of height and festivity.

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# Recommendations

Differences in legislation, the duties and powers of police, prosecutors and the courts, and the values and traditions of criminal justice systems, all influence how the non-punishment principle is interpreted and applied in different States.<sup>141</sup> But irrespective of this variance, criminal justice practitioners – from investigators through to prosecutors, defence lawyers and members of the judiciary – all have a role to play in protecting victims from punishment.

Ideally, officials who first encounter potential victims of trafficking will divert them away from criminal justice processes into protection channels. Where this safeguard fails and law enforcers lay charges against a victim, the next line of defence is their non-prosecution. Even in jurisdictions where prosecution is mandatory, prosecutors may still be able to order or request that judicial proceedings be discontinued and cases against traffickers be opened instead. Finally, where both safeguards fail to protect a victim from punishment, courts may be able to uphold the principle by not convicting victims, or as a last resort, by mitigating the sentences imposed.<sup>142</sup>

This section offers 26 recommendations on applying non-punishment safeguards throughout the criminal justice process. Stakeholders – law and policy makers and well as practitioners – are invited to consider these recommendations, adapt them to their context, and put in place mechanisms to monitor their implementation, towards upholding the non-punishment principle in practice.

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**141** *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons*, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (15 June 2020), paragraph 36.

**142** *The Importance of implementing the non-punishment provision: the obligation to protect victims*, Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children, United Nations, Geneva, 30 July 2020, 9-10

### **Box 9: Framework for analysis of the non-punishment principle in domestic practice**

In understanding how the non-punishment principle operates in their jurisdiction or in jurisdictions where their citizens have been trafficked, criminal justice practitioners may find the following questions useful to consider:

Is the non-punishment principle explicitly captured in law or policy?

What crimes does the non-punishment principle apply to? Does it apply to all offences or only some?

What causal relationship between the victim's experience of trafficking and his or her offending triggers application of the principle (e.g. causation or compulsion)?

Who has the burden of proving that link? With what standard of proof?







What are the legal effects of the principle on the victim's liability? Does it exclude their liability altogether, or merely to diminish it?

Adapted from: Marija Jovanović, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance' *Journal of Trafficking and Human Exploitation*, 2017, Vol. 1 Nr. 1, 41-76 at 58 and 62.



**Diagram 1:**

**Criminalization and non-criminalization of victims of trafficking**

Criminalization	Criminal Justice Process	Non-criminalization
<p>Victim not identified as potential victim of trafficking</p> <p>Victim identified, investigated and treated as offender</p> <p>Non-punishment provisions do not exist / are not applied</p> <p>Charges laid against victim</p> <p>Threat of arrest used to coerce victim cooperation</p>	<p><b>Identification / Investigation</b></p>  <p><b>Arrest / Charges</b></p> 	<p>Victim identified among potential offenders</p> <p>Victims diverted from criminal justice into protection and assistance</p> <p>Laws prohibiting prosecution of victim of trafficking</p> <p>Build rapport with victim to encourage cooperation</p> <p>No charges laid / victim diverted to trafficking-specialised courts</p>
<p>Victim prosecuted</p> <p>Non-punishment provisions do not exist / are not applied</p> <p>Defence does not call expert witness testimony on impact of trafficking in persons</p> <p>Victim convicted as offender</p>	<p><b>Prosecution / Defence</b></p>  <p><b>Conviction</b></p>  <p><b>Sentencing</b></p> 	<p>Prosecutor discontinues / seeks discontinuance by court</p> <p>Non-punishment provisions / defences applied</p> <p>Defence brings witness testimony on impact of trafficking in persons</p> <p>Prosecution opens case against traffickers</p> <p>Victim not convicted</p> <p>Alternatives to conviction sought</p> <p>Sentence deferred or mitigated</p> <p>Alternatives to incarceration (probation / community service)</p>
<p>Victim fined and/or imprisoned for offences related to their trafficking</p> <p>Once in prison system, convicted person presumed to be offender</p> <p>Convictions prevent victim reintegration and access to work / study / accommodation</p> <p>Victim vulnerable to re-trafficking</p>	<p><b>Post-conviction</b></p> 	<p>Convictions are sealed to protect victim privacy</p> <p>Convictions are vacated / expunged</p>

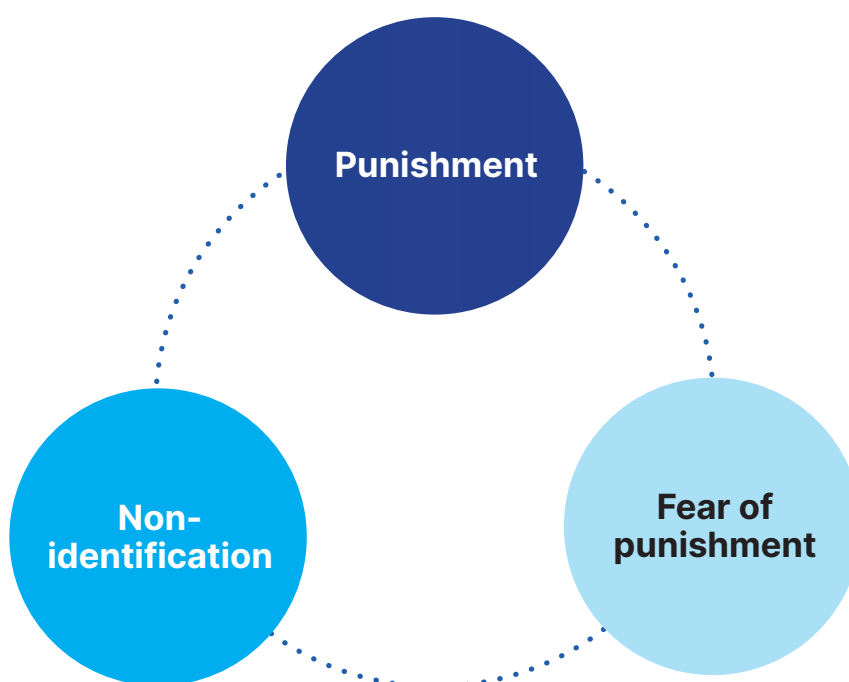


### 3.1 Identification and investigation

#### **Recommendation 1: Build capacity of frontline officials to identify potential victims of trafficking among people they encounter as offenders**

There is a critical nexus between non-identification of victims and their punishment.<sup>143</sup> Early and effective identification of victims is critical to their protection from punishment for unlawful acts they have committed as a direct consequence of being trafficked. Failure to identify victims may mean they are arrested and prosecuted or detained and deported for offences they commit in the course of being trafficked. The result for victims is that they may be revictimized, traumatized and humiliated in their experience of raids, arrest, detention, trials and incarceration. The result for authorities, is that they miss opportunities to identify victims and uncover information about organised crime groups involved in trafficking in persons. This destructive cycle of non-identification and victim punishment is self-perpetuating.

**Diagram 2:**  
**Cycle of victim punishment**



**143** Conference of the Parties to the UNTOC, Report on the meeting of the Working Group on Trafficking in Persons (14–15 April 2009), UN Doc. CTOC/COP/WG.4/2009/2, 21 April 2009, para 12.

To end this cycle, efforts must be made to ensure that victims can access justice and safely report to officials without fear of being punished, whether through detention, deportation or penalty.<sup>144</sup> Frontline officials including police, immigration and labour officials, must be provided with regular training to identify victims of trafficking among the people they encounter in the course of their work. Training should be gender-sensitive and trauma-informed to address why a person may not identify themselves as a victim and not want to cooperate with authorities. Crucially, training should not only be provided to frontline officials in central and urban areas, but also in provincial and remote areas where trafficking occurs. Such training should not only be provided to those who investigate human trafficking specifically, but should target officials who may encounter victims of trafficking in the course of investigating other crimes.

Frontline officials should be also provided with materials to support them to identify victims of trafficking, including evidence-based resources to address identification barriers;<sup>145</sup> regularly updated and context-specific indicators of trafficking; and open-ended, non-exhaustive lists of offences frequently related to trafficking, that victims may commit.<sup>146</sup>

## **Recommendation 2: Strengthen law enforcement understanding of control methods used by traffickers and their impacts on victims**

Law enforcers often underestimate the significant skill and effort required to effectively investigate trafficking. US Ambassador-at-large, John Cotton Richmond, has noted that 'law enforcement officers are used to investigating event-based crimes, not process-based crimes.'<sup>147</sup> As a result they may overlook the complexity of human trafficking and miss opportunities to identify victims and to investigate traffickers.

Investigators should be sensitized to the coercive tactics and modus operandi of traffickers, and the dynamics of trauma and stigma that may result in victims not telling the truth of what has happened to them at the first available opportunity. Notably, the irrelevance of victim consent where traffickers use 'means',<sup>148</sup> and the use of subtle means such as abuse of a position of vulnerability, may prove challenging for investigators to understand and to evidence in the course of their investigations. Accordingly, law enforcers should be supported to understand the definition of trafficking in persons in international, regional and domestic law, and the evidentiary challenges involved in proving the constituent elements of the trafficking, for both adult and child victims.

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**144** Global Combat for Safe, Orderly and Regular Migration, Objective 10 paragraph 26(e)

**145** For instance: *Trafficking Victim Identification: A Practitioner Guide* (NEXUS Institute and Bali Process Regional Support Office (NEXUS Institute / Bali Process RSO, 2021). This resource explores for practitioners in the ASEAN region, address challenges and barriers to effective victim identification.

**146** See: *Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullaly*, UN Doc. A/HRC/47/34 (17 May 2021), para. 54(c). Also see Annex 1 for a comprehensive list of offences victims of trafficking may commit.

**147** Survivor Justice Panel Discussion, Dressemer and Karana Rising, 7pm ET, 30 April 2021. Author's notes.

**148** Force and other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, and the giving or receiving of payments or benefits to achieve the consent of a person having control over another person are the 'means' specified in Article 3(a) of the Trafficking Protocol and article 2(a) of ACTIP.

### Recommendation 3: Challenge misconceptions and assumptions about the ‘ideal’ or ‘deserving’ victim of trafficking

Assumptions about who is ‘good’ and who is ‘bad’, and who is a ‘real’ or ‘innocent’ victim and who is not, significantly reduce law enforcement capacity to effectively identify victims and investigate traffickers. Victims are thereby exposed to the risk of being prosecuted and traffickers are allowed to evade justice. Stigmatisation of victims and bias against those considered less ‘deserving’ than others, may manifest in some victims benefiting from the non-punishment principle (e.g. those who were forced or deceived) and others not, for instance, those who knowingly travelled irregularly into a country to undertake particular types of work, and were subsequently exploited.

There may be gender dimensions to the misconceptions of criminal justice practitioners that inference with their capacity to effectively identify victims and investigate traffickers. Gender bias can manifest in different ways, including in the assumption that all females in the sex industry are victims of trafficking, and that males in the sex industry are not. These deficiencies can work to the advantage of traffickers. Identification procedures should also be disability-responsive and inclusive, so that a victim’s disabilities – whether psychosocial, intellectual or physical – do not hinder their identification as victims of trafficking, and the application of the non-punishment principle for any unlawful acts a disabled person may have committed as a result of being trafficked.

Criminal justice practitioners should be capacitated to understand that the non-punishment principle applies to all victims of trafficking on a non-discriminatory basis, regardless of their race, colour, sex, gender, gender-identity, language, disability, religion, political or other opinion, national or social origin, property, birth or other status<sup>149</sup> In the case of victims with disabilities, whether psychosocial, intellectual or physical, non-discrimination requires that reasonable accommodation be made to ensure that persons with disabilities can access identification and protection procedures on an equal basis to others.<sup>150</sup> At the same time, training and other capacity building measures should address ways that people of different ages, sexes, gender and other attributes can be specifically impacted by both trafficking and counter-trafficking response. Criminal justice practitioners should be encouraged to challenge the assumptions they may have about who is a victim deserving of protection. Training on the rights of victims of trafficking should include components on the gender and other dimensions of human trafficking and the unconscious bias that may be at play in criminal justice response to it. It also should reinforce that the non-punishment principle applies to all victims of trafficking, where there is a nexus between the offending and the trafficking.

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**149** See article 26 of the *International Covenant on Civil and Political Rights*, and article 2 of the *ASEAN Human Rights Declaration*. Also see the *Convention on the Elimination of Discrimination against Women* and the *Convention on the Rights of Persons with Disabilities*

**150** Convention on the Rights of Persons with Disabilities, article 2

## **Recommendation 4: Ensure that offenders who are potential victims of trafficking are effectively and efficiently referred for screening**

Officials should apply the non-punishment principle as soon as they have reasonable grounds to believe that a person is a victim of trafficking, irrespective of whether a victim has been formally identified or a trafficker has been indicted.<sup>151</sup> Where circumstances give rise to a credible suspicion that a person suspected of having committed a criminal offence may have been trafficked, he or she should be promptly assessed by trained and qualified individuals, to determine whether the person has been subject to trafficking in persons as defined in international, regional and domestic instruments. The non-punishment principle should never be misused by law enforcers, to achieve victim participation in criminal justice processes; its prompt application cannot be conditional on the victim's cooperation.

In the case of child offenders who are potential victims of trafficking, frontline officials should involve and engage child protection authorities at the earliest possible opportunity. The presumption of minority should apply in the treatment of potential children in the absence of conclusive proof of age.

Procedures should be put in place to ensure that police, immigration and labour officers are aware of the national referral mechanism that applies, so they can promptly refer potential victims into it. Where national referral mechanisms are not effectively used and applied to protect victims from punishment, barriers need to be identified and addressed, whether by disseminating information, providing skills training, or taking other measures to improve referral mechanisms.

## **Recommendation 5: Proactively investigate links between the offence of potential victim-offenders and the conduct of potential traffickers**

Traffickers may use victims as proxies for committing crimes, as part of their modus operandi to deflect criminal justice attention away from themselves and onto victims, so that it is victims who are at risk of arrest.<sup>152</sup> This is a deliberate strategy of traffickers; by turning victims into criminals who fear prosecution and punishment, they are unlikely to report their traffickers to law enforcers.<sup>153</sup> Traffickers may target people who have been in trouble with the law or have complicated relationships with authorities, making them easy to manipulate. Traffickers may tell victims that authorities will never believe them, but will view them as criminals for the offences they have committed. When authorities treat victims as potential offenders, traffickers are proven correct and victims' trust in authorities is damaged.

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<sup>151</sup> See: *Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children*, Siobhán Mullaly, UN Doc. A/HRC/47/34 (17 May 2021), para. 58

<sup>152</sup> *Report of the Special Rapporteur on trafficking in persons, especially women and children*, Maria Grazia Giammarinaro, 6 April 2020, UN Doc A/HRC/44/45, para. 29.

<sup>153</sup> *Global Trafficking in Persons Report 2020* (UNODC, 2021) p.51

Law enforcers must understand these dynamics and proactively investigate parties who may be involved in controlling or managing victims or assets or establishments where trafficked victims are found, to identify whether they are traffickers or victims.<sup>154</sup> Police practices should be reviewed to consider how to encourage and incentivize investigators to apply their time, skill and effort to investigate serious and complicate cases, rather than make easy arrests of low-level offenders who may be victims of trafficking. In this respect, investigators should be sensitized to the positive obligation of States to investigate potential trafficking.

## 3.2 Arrest and charge

### **Recommendation 6: Ensure that frontline officers understand the impact of arrest on victims of trafficking and on criminal justice response to trafficking**

There have been instances of law enforcers and other criminal justice practitioners suggesting that arresting victims is in their interests, to get them away from traffickers and to protect them. However, the arrest of victims of trafficking is contrary to a victim-centred approach and can never be justified by claims of protecting and assisting them.<sup>155</sup>

Frontline officers must be sensitized to the impact of arrest on arrested persons, including trafficked persons, including their revictimization at the hands of the State and the shame of being arrested, photographed, fingerprinted, handcuffed and sometimes even made to endure medical examinations in the absence of informed consent. They must also understand how arrest stigmatizes victims and interferes with their recovery.

Further, frontline officers must be made aware of how victim arrest is detrimental to criminal justice response to trafficking in persons. Victims are often the main or only evidence in trafficking in persons cases; where victims lose trust in authorities, they are unlikely to cooperate with them in criminal justice processes against traffickers.

### **Recommendation 7: Ensure frontline officers understand their discretions and how to exercise them**

In some jurisdictions, investigators have discretion as to whether they will proceed to lay charges and/or in recommending the charges to be laid. This discretion to not arrest and not lay charges may be found in law and in policies that describe the discretion and the considerations that may inform it, including whether or not charging a person is in the public interest. In other jurisdictions, investigators may have limited or no discretion, but instead be obligated to arrest, lay charges and detain a person for alleged crimes. As a result, the decision on whether to proceed with a prosecution is passed to prosecutors or the courts.

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**154** Marcelo Colombo, Head Prosecutor, Specialized Office for Investigation of Kidnapping and Trafficking in Persons Cases (PROTEX), Argentina speaking on the principle of non-punishment of victims of trafficking in persons, being a side event to the 47<sup>th</sup> Session of the Human Rights Council 30 June 2021, 13:00 – 14:30 CET. Author's notes on file.

**155** *Prosecution at any cost? The Impact of Material Witness Warrants in Federal Human Trafficking Cases* (The Human Trafficking Legal Centre, 2020) 23

In all jurisdictions, it is essential that investigators understand what discretions they do and do not have in arresting or not arresting individuals and the charges they lay. Regardless of whether investigators have or exercise discretion, it is critical that all investigators carry out their duties to collect all available evidence of the alleged offence, including any surrounding circumstances that may speak to the fact that an offender has been a victim of trafficking. Such evidence may be relevant to substantiate defences that victims on trial may have recourse to.<sup>156</sup>

### **Recommendation 8: Incentivise law enforcers to apply the non-punishment principle**

Where police performance is measured by the number of arrests they make and charges they file, police may be disincentivised to apply the non-punishment principle to potential victims of trafficking they encounter as offenders. Consideration should therefore be given to how police can be incentivised to apply the non-punishment principle, including by performance measures that reflect their application of it in practice. For instance, referrals of people for screening who are subsequently confirmed to be victims of trafficking could be a metric used to positively measure police performance.

Measures could also be taken to ensure that law enforcers who do not arrest and lay charges against victims of trafficking on the basis of the non-punishment principle, are not liable for allegations of negligence in their duties but are commended for their application of the non-punishment principle. Such incentives must be designed in such a way as to not detract from wider law enforcement obligations to investigate and arrest criminal offenders; consideration can therefore be given to rewarding police for building evidence against serious crime types, including human trafficking, and their skilful investigative approach to offenders who are potential victims of trafficking.

### **Recommendation 9: Ensure that arresting officers understand their obligations to arrested persons**

Arrested persons – including victims of trafficking – have rights that law enforcers have duties to uphold. These include the right to be informed of the reasons for their arrest and any charges laid, and to be promptly brought before a judge or other official.<sup>157</sup> Article 36 of the Vienna Convention on Consular Relations requires that foreign nationals who are arrested or detained must be informed of their right to have their embassy notified, so they can receive consular advice and support. The fulfillment of these rights by arresting officers is critical to ensuring that victims receive appropriate advice and support from authorities, and are empowered to avoid punishment for crimes they have committed as a consequence of being trafficked. Frontline officials must therefore have sufficient capacity to fulfill their human rights obligations to arrested persons, including potential victims of trafficking among them.

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<sup>156</sup> *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons*, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (15 June 2020), paragraph 40-42.

<sup>157</sup> Article 9(2) *International Covenant on Civil and Political Rights*

### 3.3 Prosecution

#### Recommendation 10: Amend legislation to reduce risk of inappropriate prosecution of victims of trafficking

The prosecution of a victim of trafficking is a form of punishment, irrespective of whether it results in conviction. In the European context, it has been explained that '[t]hose states that have the most regard for [victims' human rights] implement measures not only to exempt trafficking victims from criminal liability, but also not to prosecute them for these offences at all.'<sup>158</sup> States should consider amendments to legislation to reduce risk of victims of trafficking being inappropriately prosecuted for offences they have committed as a consequence of being trafficked. There are several ways that this can be achieved. For instance, trafficking in persons legislation can be amended to explicitly include forced criminality as a form of exploitation in the definition of trafficking in persons. An explicit non-punishment provision can also be included in legislation (see Recommendation 16 at 3.4). Laws can also be put in place to allow convictions to be vacated (see Recommendation 25 at 3.6).

States may also wish to amend legislation that exposes victims to acute risks of being prosecuted. For instance, consideration can be given to the impact that strict liability offences, including those relating to narcotics, may have on exposing victims of trafficking to risk of prosecution, potentially resulting in corporal or capital punishment. States should also consider the impact of laws prohibiting sex work on victims of trafficking and other vulnerable and marginalized groups and consider appropriate amendments. For instance, in specific relation to children, consideration could also be given to making the age of majority an element of offences related to the sex industry, so that it is not legally possible to prosecute children (including trafficked victims among them) for their involvement.<sup>159</sup>

In specific relation to legislation to protect victims of children from prosecution, *General Comment No. 24 (2019) on children's rights in the child justice system* emphasises the need to establish an appropriate minimum age of criminal responsibility and ensure appropriate treatment of children on either side of that age, scaling up the diversion of children away from criminal justice processes and towards effective support programmes.<sup>160</sup> Article 40 of the *Convention on the Rights of the Child* does not specify a minimum age of criminal responsibility, though the Committee on the Rights of the Child encourages States to take note of scientific evidence and increase the age of criminal responsibility to 14, and give them the benefit of the doubt if a child's age cannot be proven.<sup>161</sup>

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**158** Carolina Villacampa and Núria Torres, Human trafficking for criminal exploitation: Effects suffered by victims in their passage through the criminal justice system, *International Review of Victimology*, 2019, Vol. 25(1) 3–18, at 5

**159** Ambassador-at-large, John Cotton Richmond, speaking at Survivor Justice Panel Discussion, Dressember and Karana Rising, 7pm ET, 30 April 2021. Author's notes.

**160** General Comment No. 24 (2019) on children's rights in the child justice system, UN Doc. CRC/C/GC/24, 18 September 2019 [6]

**161** General Comment No. 24 (2019) on children's rights in the child justice system, UN Doc. CRC/C/GC/24, 18 September 2019 [22–24]



## **Recommendation 11: Ensure that any decision to prosecute a victim of trafficking is only taken after formal identification processes and is clearly explained**

There is no general prohibition on the prosecution of victims of trafficking. For a victim to benefit from the non-punishment principle there must be a nexus between the offending and the trafficking, whether because the victim was compelled by traffickers to commit an offence (compulsion) or the offence was a direct consequence of the victim having being trafficked (causation). Even when there is no nexus between the offending and the trafficking, the State may still consider the prosecution of a victim to be at odds with its obligation to protect victims and to investigate and prosecute traffickers.

Prosecutors should not make any decisions on whether or not to prosecute, until a formal trafficking assessment has been made by competent authorities, in line with the criteria set out in the Trafficking Protocol and the ACTIP. As the European Court of Human Rights stated in the case of *V.C.L and A.N. v The United Kingdom*:

*...given that an individual's status as a victim of trafficking may affect whether there is sufficient evidence to prosecute and whether it is in the public interest to do so, any decision on whether or not to prosecute a potential victim of trafficking should – insofar as possible – only be taken once a trafficking assessment has been made by a qualified person. This is particularly important where children are concerned.*<sup>162</sup>

Even when a person has formally been identified as a victim of trafficking, a prosecutor may still decide to prosecute him or her for offences he or she has committed, but clear reasons should be set out as to why this decision has been taken, whether on the basis that there is no nexus between the offending and the trafficking, or because prosecuting the victim is in the public interest. Importantly too, court processes and decisions should be explained to victims. Courts should provide information and material to victims, in simple, non-legal terms and a language they understand, including about the non-punishment principle, so that they understand that they should not be punished for any crimes related to their trafficking.<sup>163</sup>

## **Recommendation 12: Clarify the relationship between victim status and non-prosecution**

In many jurisdictions, it is not clear what impact a victim status determination has on criminal justice processes against them.<sup>164</sup> As a result, even victims who have been formally

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<sup>162</sup> *V.C.L and A.N. v The United Kingdom* [Application nos. 77587/12 and 74603/12], European Court of Human Rights, 16 February 2021, para 161.

<sup>163</sup> TIP Victim Sensitive Court Indicators, ASEAN-ACT, 4.1(b)

<sup>164</sup> For instance, a 2019 report on counter-trafficking in the UK found that while the National Referral Mechanism reaches a decision that a person is a victim of trafficking on the basis of the balance of probabilities, that decision has no official status in criminal court that make decisions that must be reached to the standard of 'beyond reasonable doubt'. *Independent Review of the Modern Slavery Act 2015: Final Report* (Secretary of State for the Home Department, 2019) 18

identified as victims may still be prosecuted for crimes they commit as a consequence of being trafficked. States must therefore determine what the relationship is between a person's status as a victim of trafficking and the possibility or impossibility of his or her being prosecuted. Importantly, their non-punishment at the outset should not depend on formal identification of the victim or his or her trafficker; the threshold for its initial application should be reasonable grounds to believe that trafficking has taken place.

Laws, policies and guidance documents may need to explicitly state that victims of trafficking are not to be prosecuted for offences committed as a direct consequence of their trafficking. Measures may also need to be taken to sensitize prosecutors to the purpose and practice of non-prosecution of victims of trafficking, through appropriate dissemination of information about the principle. As a preliminary step, counter-trafficking stakeholders should familiarise themselves with the non-punishment provisions in existing law, policy and guidance documents.

Authorities should also familiarise themselves with existing bilateral agreements in place and the non-punishment provisions therein, towards implementing them in practice. Bilateral and regional agreements between countries should ensure that victim status afforded in one country is respected by other parties to the agreement, so the non-punishment protection applies across jurisdictions. Non-punishment provisions in bilateral and regional agreements should not be discriminatory, for instance by only applying to some victims (e.g. women and girls), leaving other victims (e.g. adult men) at risk of punishment. Nor should they limit the non-protection punishment only to certain types of offences (e.g. immigration and prostitution-related offences).

### **Recommendation 13: Ensure prosecutors understand their discretions and how to exercise them**

Prosecutorial discretion is an unreliable safeguard against victim prosecution, and so cannot be relied on to safeguard and uphold the non-punishment principle, but it can play an important role. In some jurisdictions, it may be mandatory to initiate a prosecution against a person alleged to have committed an offence. But in other jurisdictions, prosecutors may have discretion to not initiate criminal proceedings against victims, or where prosecutions are already underway, to discontinue proceedings where evidence comes to light that a person on trial is a victim of trafficking.<sup>165</sup>

It is imperative that prosecutors understand the discretion they have, and be equipped with sufficient capacity to exercise it. In jurisdictions where prosecutors have such discretion, they should be under a clear duty to discontinue proceedings against victims for offences

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**165** Interagency Coordination Group against Trafficking in Persons, *Non-punishment of victims of trafficking* (ICAT, Issue Brief 8/2020) 4; *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons*, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (15 June 2020), paragraph 44-45.

connected with their trafficking. In deciding whether to prosecute or not, prosecutors may assess whether they believe there is sufficient evidence to warrant prosecution on the basis of the elements of the crime at issue (including the fault element), factoring in available defences and public interest considerations that speak for or against pursuit of prosecution.

Prosecutors should be fully trained to understand the intent element of criminal offences and to check the intent element for any crime they prosecute, to identify whether the use of any means (such as force, coercion, abuse of a position of vulnerability and other means specified in Article 3(a) of the Trafficking Protocol and article 2(a) of ACTIP), may have damaged intent to commit the crime. This check may avoid situations of victims of trafficking being brought to trial and prosecuted for crimes they did not intend to commit. To incentivise prosecutors, their performance could be measured against whether they carry out this check.<sup>166</sup> They should also be held to account for prosecuting crimes in the absence of sufficient criminal intent.

### **Recommendation 14: Provide counter-trafficking training to prosecutors, particularly those who specialise in prosecuting offences that victims of trafficking commonly commit**

Across ASEAN and elsewhere, many prosecutors receive training on how to prosecute trafficking in persons cases. However, rarely are prosecutors of other crime trained to identify potential victims of trafficking among the persons they are pursuing convictions against for other criminal offences, and on how to respond to indicators of trafficking.

Prosecutors of crimes that trafficked victims commonly commit, should be familiarised with the possibility of discontinuing cases on the basis of the non-punishment principle. They should also be familiarized with the definition of trafficking in persons, the impact of trauma on victims, the use of means by traffickers, and the irrelevance of consent where means have been used. They should be trained to recognise the indicators of trafficking and referral mechanisms in place to allow victims to be removed from the criminal justice system and be referred to competent authorities for formal identification.

### **Recommendation 15: Strengthen understanding of the irrelevance of the victim's consent in trafficking in persons, in the application of the non-punishment principle**

Arguments that a victim has willingly commit an offence must not be used to deny victims access to protection from punishment. Where a person has full agency for his or her actions, then he or she is of course accountable for committing an offence. However, a victim of trafficking is by definition a person whose consent has been damaged by

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<sup>166</sup> Ambassador-at-large, John Cotton Richmond, speaking at Survivor Justice Panel Discussion, Dressember and Karana Rising, 7pm ET, 30 April 2021. Author's notes.

the trafficker's use of means, as set out in article 3(b) of the Trafficking Protocol and article 2(b) of ACTIP. Accordingly, a victim's consent to commit an offence should not be considered relevant where traffickers have used means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or given or received payments or benefits to a person with control over the victim, for the purpose of causing them to commit the offence at issue.

Criminal justice practitioners and particularly prosecutors who may be pursuing convictions against victims of trafficking for offences they have committed as a direct consequence of being trafficked, should be provided with information and training on role of the irrelevance of consent in trafficking in persons where means have been used, to better understand the commission of offences by victims in trafficking.<sup>167</sup>

### 3.4 Statutory defences

#### **Recommendation 16: Draft or amend explicit statutory provisions to give effect to the non-punishment principle, capturing all victims for all types of offence**

The enactment of clear and explicit statutory provisions is a recognised good practice to implement the non-punishment principle.<sup>168</sup> While general statutory defences such as duress and necessity are useful to protect victims of trafficking from punishment, they are limited in only applying when victims are on trial. Affirmative non-punishment provisions apply to protect victims from being put on trial in the first place. Furthermore, general statutory defences may only mitigate sentences rather than result in the acquittal of the accused person who has been unjustly arrested, charged and put on trial: experiences which in and of themselves amount to punishment, contrary to the non-punishment principle.

Legislators should therefore give consideration to drafting or amending explicit statutory provisions. In jurisdictions with mandatory prosecution, laws should be amended to require non-prosecution of victims of trafficking or cessation of prosecution at an early stage. In jurisdictions with discretionary prosecution, laws should ensure that prosecutors do not pursue prosecutions, or immediately discontinue those that have been initiated.

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**167** Recommended resources: *Issue Paper: The Role of 'Consent' in the Trafficking in Persons Protocol* (UNODC, 2014) available at: [https://www.unodc.org/documents/human-trafficking/2014/UNODC\\_2014\\_Issue\\_Paper\\_Consent.pdf](https://www.unodc.org/documents/human-trafficking/2014/UNODC_2014_Issue_Paper_Consent.pdf)

**168** *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons*, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (15 June 2020), paragraph 46.

## Box 10: Model statutory provisions on non-punishment

### Compulsion model

A person is not guilty of an offence if:

(a) They committed the act that constitutes the offence because they were compelled to do it and the compulsion was attributable to trafficking in persons; or

(b) The act that constitutes the offence was committed as a direct consequence of their situation as a trafficked person.

### Causation model

#### (UNODC)

A victim of trafficking in persons shall not be held criminally or administratively liable or liable under civil laws [punished] [inappropriately incarcerated, fined or otherwise penalized] for offences [unlawful acts] committed by them, to the extent that such involvement is a direct consequence of their situation as trafficked persons.

The provisions of this article shall be without prejudice to general defences available at law to the victim.<sup>169</sup>

#### (Special Rapporteur)

A victim of trafficking in persons shall not be held liable under criminal, civil or administrative laws for unlawful acts or immigration offences committed by them, to the extent that such involvement is a direct consequence of their situation as a trafficked person.

A child victim of trafficking shall not be prosecuted or punished for unlawful acts which are related to their trafficking.<sup>170</sup>

<sup>169</sup> *Model Legislative Provisions against Trafficking in Persons*, (United Nations, Vienna, 2020) 44. Also see Article 10 of *Model Law against Trafficking in Persons* (UNODC, 2009) pp.40-42

<sup>170</sup> *The Importance of implementing the non-punishment provision: the obligation to protect victims*, Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children, United Nations, Geneva, 30 July 2020, 5 at [29]

The non-punishment principle applies to all victims on the basis of non-discrimination, and regardless of the type of trafficking they have been subject to, or the type of offence they have committed as a consequence of it. However, in reality, the more serious the victim's offence is, and the more subtle the means used by the trafficker are, the less likely the non-punishment principle is to apply to protect victims from punishment. In some jurisdictions, non-punishment provisions may only apply to a limited range of offences, for instance, immigration or prostitution-related offences.<sup>171</sup> As a result, provisions may protect some victims of trafficking from punishment for some offences (e.g. victims of trafficking for sexual exploitation for prostitution-related offences), but may not help their defence for other crimes (such as theft or drug-related offences), nor help victims of all forms of exploitation, including non-sexual forms.

### Diagram 3: Implementation of the non-punishment principle

#### The non-punishment principle should apply to...



...where the link between the trafficking and the victim's offence can be established, on the basis of compulsion or causation, in accordance with domestic laws, policies and international commitments.

Statutory provisions should apply to a broad or non-exhaustive range of civil, administrative, immigration and criminal offences, and be applicable to all victims on the basis of non-discrimination, and regardless of the type of exploitation they have been trafficked into, and regardless of the gravity or seriousness of the offence they have committed.<sup>172</sup> Therefore, States should explicitly recognise trafficking of persons into forced criminality as a form of exploitation, or where legislation provides a list of offences to which the provision applies, it should be stated as non-exhaustive.<sup>173</sup>

<sup>171</sup> See for instance, Susan Coppedge (former US Ambassador at Large, Senior counsel with Krevolin & Horst, and attorney for Tiffany Simpson), *Justice is a part of healing for victims of human trafficking*, law.com, 18 February 2021, <https://www.law.com/dailyreportonline/2021/02/18/justice-is-a-part-of-healing-for-victims-of-human-trafficking/?slreturn=20210405034616> accessed 5 May 2021.

<sup>172</sup> See, inter alia, *Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children*, Siobhán Mullaly, UN Doc. A/HRC/47/34 (17 May 2021), para. 37.

<sup>173</sup> *Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children*, Siobhán Mullaly, UN Doc. A/HRC/47/34 (17 May 2021) paragraph 37 and 38.



The application of the non-punishment principle even to serious or grave offences is a well-recognised good practice. As one expert notes:

*There is no reason in principle why the obligation not to punish should not apply to most offences. If the essence of the duty is based upon the fact that the trafficked person was not a free agent and had no real choice but to commit the offence, then arguably they should not be criminally accountable, just as individuals may not be held accountable because they lacked the capacity to take full responsibility for their actions.<sup>174</sup>*

In applying the principle in practice to serious offences, the former Special Rapporteur on Trafficking in Persons explained that allowing broad application of the principle does not result in a blanket immunity, but rather the standard of enquiry:

*The more serious the offence, the more probing the enquiry will need to be to establish the circumstances in which the offence was committed and whether the right to non-punishment can validly apply. Far from entailing a sort of 'blanket immunity', such safeguard responds to (1) the necessity of identifying the true circumstances in which an offence is committed, (2) enables victims to be diverted into safeguarding and assistance features, to which they are entitled to receive and (3) encourages the investigation of the crime of human trafficking to take place, resulting in increasing the prosecution of traffickers and decreasing the prosecution of victims for offences they committed when they were subject to other's dominant influence or exploitation. In addition, the non-punishment principle will operate without prejudice to any defence in national law.<sup>175</sup>*

Importantly, application of the non-punishment principle must not be conditional on the prosecution of an alleged trafficker, or the cooperation of a victim in criminal proceedings.<sup>176</sup>

## **Recommendation 17: Provide training and guidance to practitioners on how to establish the link between the victim's offence and his or her trafficking**

In many countries – including in the ASEAN region – it is not clear to criminal justice practitioners how to establish the link between the victim's offending and his or her

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<sup>174</sup> Ryszard Piotrowicz, "Article 26, Non-punishment provision" in Julia Planitzer and Helmut Sax (eds.) *A Commentary on the Council of Europe Convention on against Trafficking in Human Beings* (Edward Elgar, 2020) p.320

<sup>175</sup> *The Importance of implementing the non-punishment provision: the obligation to protect victims*, Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children, United Nations, Geneva, 30 July 2020, 11 at [41]

<sup>176</sup> See: *Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children*, Siobhán Mullaly, UN Doc. A/HRC/47/34 (17 May 2021), para. 58



trafficking in order to apply the non-punishment principle. States have taken different approaches with some applying compulsion, others causation and others again may use a combination of both or a different approach altogether. Regardless of the approach is taken in domestic law, it is important that practitioners understand it.

**In jurisdictions that apply the ‘compulsion’ model (i.e. the victim was compelled to offend by the trafficker):** Where the compulsion model is applied, it is important for practitioners to understand the full spectrum of ways that the victim’s free will can be damaged by traffickers, including through any of the ‘means’ set out in the international and regional definition of trafficking in persons, including threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to a person who controls the victim.<sup>177</sup> Statutory defences should apply to all children irrespective of whether ‘means’ were used to traffic them. The model is broader than a traditional defence of duress and should not require the same evidence, as that standard would in effect, deny the victim the protection of the principle.<sup>178</sup> The former United Nations Special Rapporteur on trafficking in persons, especially women and children, has stated that the threshold for applying the offense should ‘not require clear evidence, but rather reasonable grounds to believe that trafficking is taking place.’<sup>179</sup>

**In jurisdictions that apply the ‘causation’ model (i.e. the victim’s offence is a direct result of being trafficked):** In jurisdictions that apply the causation model, authorities should ensure that the link between the trafficking and the commission of offence is understood broadly, through an informed understanding of the ongoing role that fear and trauma play, to ensure that terms such as ‘direct consequence’ or ‘direct result’ and ‘related to’ are clearly and broadly understood. Temporal questions may emerge about whether and when the passage of time or change in circumstance severs the connection between an alleged criminal act and a person’s trafficking. A broad understanding does not require a ‘direct and immediate’ connection, but recognizes that a nexus may still be present between the trafficking and the alleged offending, for instance because of the continuing fear and coercive issues at play.<sup>180</sup> On the other hand, a victim who is still in a situation of trafficking may commit an offence that is unrelated to the trafficking and so does not fall within the scope of protection from punishment.

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**177** See Trafficking in Persons Protocol, article 3(a) and ACTIP 2(a). Also note that in proving the criminal culpability of traffickers, the consent of the victim is irrelevant where any of these means is established, in the case of adult victims (article 3(b) of the Trafficking in Persons Protocol; and article 2(b) of ACTIP) and always in the case of a child, for whom the means element is not required (article 3(c) of the Trafficking in Persons Protocol and article 2(c) of ACTIP).

**178** *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons*, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (15 June 2020), paragraph 60.

**179** *Trafficking in persons, especially women and children, Report of the Special Rapporteur on trafficking in persons, especially women and children*, UN Doc. A/HRC/44/45 (6 April 2020) [36]

**180** Ryszard Piotrowicz, How far can we extend the non-punishment principle? La Strada, 21 April 2021, <https://www.lastradainternational.org/blog/how-far-can-we-extend-the-non-punishment-principle/>

Whether in the law or in guidance documents accompanying the law, the basis on which statutory provisions and defences can be invoked should be explained to practitioners through clear and accessible guidance. States should develop and disseminate guidance, including through training and capacity building activities, to inform criminal justice practitioners of what the non-punishment provisions in their respective jurisdictions say and mean, and to clearly explain how to bring evidence to bear to establish that the victim's offence was or was not linked to his or her trafficking.

### **Recommendation 18: Provide training and guidance to criminal justice practitioners on applying general defences for victims who have committed offences as a direct consequence of being trafficked**

Particularly in those countries that do not include specific non-punishment provisions for victims of trafficking in their legislation, criminal justice practitioners must instead rely on general defences set out in their criminal legislation. Defences that may be relevant to defending victims of trafficking include duress, entrapment, necessity and self-defence.

Rigid standards in applying general defences of 'duress' and 'necessity' may fail to capture the complexity of trafficking and prove to be a barrier to non-punishment.<sup>181</sup> For instance, depending on how the defence of duress is expressed and interpreted, it may only capture situations where a victim acts because of a serious or imminent threat, not capturing the more subtle means traffickers use to coerce and manipulate their victims. The burden of proof may be on the victim to prove the defence by bringing evidence of that threat.<sup>182</sup> These defences are therefore more limited than the broader non-punishment principle.<sup>183</sup> Accordingly, general defences should be broadly interpreted in the trafficking context, to ensure that subtle forms of coercion (including all the 'means' set out in the definition of trafficking in article 3 of the Trafficking Protocol and article 2(a) of ACTIP) are captured.<sup>184</sup> In the case of children, statutory defences should apply to all children irrespective of whether any 'means' have been used to traffic them.

Criminal justice practitioners should be supported with training and guidance on how to identify and apply general defences in protecting victim-offenders from punishment. It is critical that training and guidance is not only provided to counter-trafficking practitioners, but to generalist who prosecute or defend parties in relation to offences that victims of trafficking may commit.

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**181** United Nations Office on Drugs and Crime, *Female Victims of Trafficking for Sexual Exploitation as Defendants: A Case Law Analysis* (United Nations, Vienna, 2020) 6, 76-93

**182** Christine Anchan, "Protecting the imperfect victim: expanding 'safe harbours' to adult victims of sex trafficking" William & Mary Journal of Race, Gender and Social Justice, Vol 23 (2016-2017) November 2016, 127-128

**183** For instance, the Special Rapporteur on Trafficking in Persons differentiates the defence of duress provided for in the Rome Statute of the International Criminal Court, and its application in the case of *Prosecutor v Dominic Ongwen* from the wider non-punishment principle. See *Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullaly*, UN Doc. A/HRC/47/34 (17 May 2021) paragraph 51.

**184** See: *Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullaly*, UN Doc. A/HRC/47/34 (17 May 2021), para. 58

## Recommendation 19: Ensure that the burden of proof rests on the State and not on the victim

Non-punishment provisions may be drafted in a way that places the burden of proof on the victim-defendant to bring evidence to prove that he or she was a victim of trafficking. But this may be difficult to achieve, particularly in jurisdictions where exploitation in criminal activities is not recognized as a form of trafficking in domestic law.<sup>185</sup> Placing the burden of proof on the victim is also contrary to the best practice of ensuring that the burden rests on the State in accordance with its obligation to proactively identify and protect victims.

Accordingly, legislative changes may be required to ensure that the burden of proof is always on the State to prove that statutory defences do *not* apply, because the victim has the requisite criminal intent and that criminal intent has not been damaged by the trafficker's use of means.<sup>186</sup> In relation to the standard of proof required, guidance issued to the Working Group on Trafficking in Persons under the Conference of the Parties to the United Nations Convention against Transnational Organized Crime set out that:

*An accused person should not be required to prove the existence of a defence beyond a reasonable doubt or even on a balance of probabilities, as doing so could infringe on the presumption of innocence. Once the defence has become a live issue in a trial, the prosecutor should be required to show, beyond a reasonable doubt, that it does not apply.*<sup>187</sup>

Clear guidance should be made available to show who bears the onus of proof for raising the defence. Criminal justice practitioners should be made aware that when defences are invoked, it is for for the State (prosecutor) to show that it does not apply.

## Recommendation 20: Guard against the misuse of the non-punishment principle

Risks that the non-punishment principle could be misused by serious criminals to avoid criminal liability, can only be mitigated by skilled and faithful application of the law. States should therefore continually build criminal justice capacity to apply the three-element test to identify that a person is a victim of trafficking (or two where the victim is a child),

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<sup>185</sup> United Nations Office on Drugs and Crime, *Female Victims of Trafficking for Sexual Exploitation as Defendants: A Case Law Analysis* (United Nations, Vienna, 2020) 6, 76-93

<sup>186</sup> A 2018 decision by the United Kingdom Court of Appeal ruled that the burden of proof should lie with the Crown, meaning that it should fall to the prosecutor to disprove the applicability of the statutory defence beyond reasonable doubt. *Independent Review of the Modern Slavery Act 2015: Final Report* (Secretary of State for the Home Department, 2019) 18, referring to *MK v R* [2018] EWCA Crim 667

<sup>187</sup> *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons*, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (15 June 2020), paragraph 65.

and to establish or disprove that there is a link between the victim's perpetration and his or her victimisation. This approach is to be informed by the definition of trafficking in persons set out in the Trafficking Protocol and ACTIP, and in accordance with the legal system in the relevant jurisdiction.

### 3.5 Conviction and sentencing

#### **Recommendation 21: Sensitize members of the judiciary to the non-punishment principle and their role in applying it**

Where safeguards including statutory provisions and the exercise of investigative or prosecutorial discretions have failed to protect a victim from prosecution, there may be opportunities at the conviction and sentencing stage to protect victims from further punishment. Members of the judiciary have a key role to play. Challenges arise when judges are unaware of the principle of non-punishment and the statutory defences available.<sup>188</sup> Accordingly, members of the judiciary need to be sensitized to the non-punishment principle and its application to offenders on trial who are victims of trafficking. It is a good practice for the Court to consider any relevant defence that may be available for victims of trafficking, even when the defence or prosecution have not raised it.<sup>189</sup> Legislation may need to be amended to clarify this responsibility.

#### **Recommendation 22: Avoid or mitigate sentences for convicted victims of trafficking**

In practice there is tendency to narrow non-punishment to sentencing considerations rather than to guard against conviction.<sup>190</sup> But mitigated sentences are a last resort when victims have not been protected from prosecution and conviction. Even long after sentences are served the experience of criminalization can impede victim recovery and reintegration. Criminal records – even for minor offences – can be detrimental to victims' ability to migrate and travel; can jeopardize employment and educational opportunities; can deny access to housing, benefits and even custody of their children. Therefore, it is imperative that practitioners understand that mitigating sentences does not fulfill the non-punishment principle.

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**188** For insights in the UK, see Ofer, Nogah, Implementation of the Non-Punishment Principle in England: Why Are Victims of Trafficking Not Benefiting from the Protection from Prosecution Provided by International Law? *Journal of Human Rights Practice*, 11, 2019, 486–507 at 492–494.

**189** *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons*, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (15 June 2020), paragraph 66.

**190** See: *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (OSCE, 2013) 26, referring to Case of R v N, R v LE, EWCA Crim 189 (2012), paras. 13, 91 and 113

However, where victims of trafficking are convicted, the court may be able to give them some relief from punishment through its approach to sentencing. Where no specific non-punishment principles exist or general defences do not apply, rules relating to sentence mitigation will be particularly useful tools to upholding the principle in practice.<sup>191</sup> Members of the judiciary may have recourse to rules that allow them to *not* sentence victims of trafficking even though their liability has been established. In other jurisdictions, general rules can be applied to reflect the blameworthiness of the offender in sentences. The Inter-Agency Coordination Group against Trafficking (ICAT) emphasises that where a trafficked person has been found guilty of a crime and even in cases where a defence does not exist, sentences imposed should always reflect the degree of responsibility of the victim-offender and the seriousness of the crime committed.<sup>192</sup>

In determining the level of culpability in such situations, it is reasonable to assume that the stronger the nexus between the offending and the trafficking, the less culpable a person should be considered to be. In practice though, judges may hold trafficking experiences against victim-offenders and impose harsher penalties on a person on the basis that he or she ‘should have known’.<sup>193</sup> Criminal justice practitioners including judges should therefore be trained to focus on considerations of culpability and to interrogate their biases against and assumptions about victims of trafficking.

### **Recommendation 23: Consider restorative justice rather than retributive justice for victim-offenders**

In some jurisdictions, there are models in place for alternatives to conviction and incarceration for people who have committed some categories of offence. The goal here is to offer restorative rather than retributive justice, and to divert certain categories of offender away from criminal justice processes towards protection and assistance instead. Such models have been applied with some degree of success, with community-based court approaches to reduce criminalization of some victims of trafficking for some types of trafficking, notably in the context of sexual exploitation (see Box 11 below). States should consider the extent to which courts and court processes can be calibrated to support rather than punish victim-offenders.

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**191** *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons*, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (15 June 2020), paragraph 46.

**192** ICAT is a policy forum established in March 2017, pursuant to General Assembly Resolution 61/180, consisting of 25 entities mandated by the General Assembly to improve coordination among UN and other relevant international organizations to respond to trafficking in persons.

**193** United Nations Office on Drugs and Crime, *Female Victims of Trafficking for Sexual Exploitation as Defendants: A Case Law Analysis* (United Nations, Vienna, 2020) 7.

### **Box 11: Community-based trafficking courts in the United States**

Community-based court models are generally applied to people encountered in the sex industry. They hear cases relating to prostitution and loitering and provide alternatives to criminal punishment, and may help to identify and support victims of trafficking. Some Courts may even use the language of ‘sex trafficking’ or ‘human trafficking’, for instance, the Chicago Prostitution and Trafficking Intervention Court, the REducing Sexually Exploited and Trafficked (RESET) Court in Sacramento County, California and the Human Trafficking Intervention Court (HTIC) in Queens Country New York.<sup>194</sup> Yet the names of others suggest that the focus is on addressing the conduct and changing the behaviour of potential victims, rather than of alleged traffickers. For instance, Changing Actions to Change Habits (CATCH) Court in Franklin Country, Ohio; Succeeding Through Achievement and Resilience (STAR) Court in Los Angeles County, California; and Reaching Independence through Self-Empowerment (RISE) Court in Tarrant County, Texas.

Such Courts consist of an assigned judge and prosecutors who are authorized to determine whether defendants are eligible for alternatives to incarceration, as well as dedicated defence attorneys and service providers to support defendants.<sup>195</sup> The Courts have shown success in reducing the criminalization of people for specific categories of crimes - including those who may be trafficked among them. However, there are several limitations of such courts in protecting victims of trafficking from punishment.

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**194** Teresa C. Kulig & Leah C. Butler (2019) From “Whores” to “Victims”: The Rise and Status of Sex Trafficking Courts, *Victims & Offenders*, 14:3, 299-321 at 309.

**195** *Clearing the Slate: seeking effective remedies for criminalized trafficking victims*, International Women's Human Rights Clinic (IWHRC) at the City University of New York School of Law, May 2015, 29

These courts have been criticised for conflating sex work with human trafficking and sex workers with victims of trafficking. They are also not relevant to protect people who have been trafficked into non-sexual forms of exploitation. In some cases, they apply only to females and not males, or only to minors and not adults, betraying insufficient understanding of the operation of ‘means’ used by traffickers to damage the victim’s consent and free will.<sup>196</sup> There are also concerns that in some cases the approach is coercive, in that people engaged in the sex industry are given a choice of being prosecuted or agreeing to participate in a programme of services, some of which are provided by or affiliated with religious groups.<sup>197</sup> Coercive approaches to restorative justice do not fulfill the principle of non-punishment which should not be conditional; victims should not be threatened with conviction in the first place. Furthermore, these courts may exclude people with prior convictions, reinforcing the divide between the ‘guilty’ and the ‘innocent’, such that ‘[a] claim for an exception will likely downplay individual agency in favor of the argument that the individual was coerced or deceived into the illegal activity.’<sup>198</sup> Again misconceptions about ‘ideal’ and ‘deserving’ victims emerge to challenge to implementation of the non-punishment principle in practice.

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**196** Christine Anchan, “Protecting the imperfect victim: expanding ‘safe harbours’ to adult victims of sex trafficking” *William & Mary Journal of Race, Gender and Social Justice*, Vol 23 (2016-2017) November 2016, 123-125; Dempsey, Michelle Madden, *Decriminalizing Victims of Sex Trafficking*, *American Criminal Law Review*, 2015, Vol 52:207, 223-224

**197** Teresa C. Kulig & Leah C. Butler (2019) From “Whores” to “Victims”: The Rise and Status of Sex Trafficking Courts, *Victims & Offenders*, 14:3, 299-321 at 305.

**198** Sabrina Balgamwalla, *Trafficking in Narratives: Conceptualizing and Recasting Victims, Offenders, and Rescuers in the War on Human Trafficking*, *Denver Law Review* Vol 94:1, January 2016, 28





Restorative justice is particularly important in the protection of children who commit crimes in the context of being trafficked. In specific relation to children who have been trafficked into armed conflict and terrorism who are at acute risk of being penalised, Security Council Resolution 2388 (2017) urges Member States to not punish child victims of trafficking; Resolution 2427 (2018) refers to the treatment of children associated with non-State armed groups, including those who commit acts of terrorism, and calls for the establishment of standard operating procedures to ensure their appropriate treatment. Non-judicial measures are also recommended to focus on rehabilitation and reintegration of children as alternatives to prosecution, and the need for due process for all children associated with armed forces and groups. The non-punishment principle is tantamount to due process in this respect.<sup>199</sup>

## **Recommendation 24: Protect victims of trafficking from corporal and capital punishment**

Some countries impose corporal punishment such as caning and whipping for some offences, including those which victims of trafficking may have committed as a result of their trafficking. In some places, this may include immigration violations. Victims of trafficking may also be at risk of facing capital punishment for offences they have committed while being trafficked. Indeed, at the time this study was written, victims of trafficking were awaiting the execution of death sentences for offences they committed as a consequence of being trafficked (see Box 5).

Where the death penalty is imposed following a trial that is not fair, both the right to fair trial (article 14, *International Covenant on Civil and Political Rights* (ICCPR)) and the right to life (article 6, ICCPR; article 20 *ASEAN Human Rights Declaration*) are violated.<sup>200</sup> Crucially, in the case of children who are in conflict with the law, article 37 of the *Convention on the Rights of the Child* (CRC) states that ‘Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.’ Fulfillment of these human rights obligations is critical for States in approaching cases where victims of trafficking are convicted for serious offences.

The imposition of the death penalty diminishes State criminal justice capacity against trafficking in persons in significant ways. Firstly, fear of it deters victims from seeking support and identifying themselves and their traffickers to authorities. Secondly, it plays into the hands of traffickers, as key evidence against them is quite literally eliminated. Thirdly, it interferes with opportunities for mutual legal assistance, extradition and other forms of international cooperation that may be required to successfully confront transnational trafficking. Fourthly, it poses barriers for international organisations and

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<sup>199</sup> *Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullaly*, UN Doc. A/HRC/47/34 (17 May 2021) paragraph 39.

<sup>200</sup> The death penalty is prohibited for States parties to the *Second Option Protocol to the International Covenant on Civil and Political Rights (ICCPR)*, *Aiming at the Abolition of the Death Penalty* adopted in 1989. In the ASEAN region, only the Philippines is party to this treaty.

donor States who are working to assist States to strengthen their criminal justice systems and may require them to reduce or withdraw their support.<sup>201</sup> Where corporal and capital punishment are imposed on victims of trafficking, States should be transparent about whether and how the non-punishment principle has been considered, and why it has not been applied.

### 3.6 Post-conviction remedies

#### **Recommendation 25: Explore opportunities in legislation to eliminate criminal records of victims of trafficking**

Where safeguards throughout the criminal justice system fail to protect trafficked persons from punishment, the outcome may be that they are convicted, imprisoned, re-traumatized and their recovery and reintegration is jeopardized.<sup>202</sup> Even convictions for very small offences can have long-lasting impact on victims. Long after sentences have been served, criminal records can interfere with a person's ability to access education, employment, accommodation, loans, immigration and protection visas, social security, licences, and even custody of their children.<sup>203</sup> Therefore, the elimination of victims' criminal records can be integral to avoiding negative long-term consequences.<sup>204</sup>

In some jurisdictions, legislation is in place to allow for criminal records of victims to be vacated (conviction is undone), expunged (conviction remains but is removed from the victim's criminal record) or sealed (conviction remains, but a court order is required for it to be seen).<sup>205</sup> For many victims, the result of having their criminal record vacated, expunged or sealed, is that they are freed from the stigma of past convictions that limit opportunities in their post-trafficking life.

While such laws are a vital remedy for victims of trafficking to be able to move on with their lives, they are not sufficient to uphold the non-punishment principle in practice; the damage may already have been done by their arrest, prosecution and conviction.

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**201** UNODC *Toolkit for mainstreaming human rights and gender equality into criminal justice interventions to address trafficking in persons and smuggling of migrants* (UNODC, 2021) p.75

**202** Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, 6 June 2012, UN Doc. A/HRC/20/18, [7]

**203** See inter alia, *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons*, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (15 June 2020), paragraph 48; *Clearing the Slate: seeking effective remedies for criminalized trafficking victims*, International Women's Human Rights Clinic (IWHRC) at the City University of New York School of Law, May 2015, 15-16, 21-25; *Christine Anchan*, "Protecting the imperfect victim: expanding 'safe harbours' to adult victims of sex trafficking" *William & Mary Journal of Race, Gender and Social Justice*, Vol 23 (2016-2017) November 2016, 127-128; *Non-Criminalization Practice Guide* (Warnath Group, Washington DC, 2021)

**204** Interagency Coordination Group against Trafficking in Persons, *Non-punishment of victims of trafficking* (ICAT, Issue Brief 8/2020) 4

**205** See for instance, *Post-Conviction Advocacy for Survivors of Human Trafficking: A Guide for Attorneys* (American Bar Association, 2016) p.9

However, vacating convictions can also go some way to restoring their faith in a criminal justice system that had previously treated them like criminals.<sup>206</sup> Victims have a right to an effective and enforceable remedy for any violation of their rights both in international law, and by virtue of article 5 of the ASEAN Human Rights Declaration. States should consider introducing legislation to allow for convictions of trafficked victims to be vacated, expunged or sealed, or identify existing legislation and improve its implementation in practice.

### Box 12: Best practice recommendations for vacatur laws

A study conducted in the United States arrived at a series of best practice recommendations for vacatur laws, including those set out below.<sup>207</sup>

#### ***Vacatur laws should...***

- Take a broad definition of victims of trafficking
- Apply to a broad range of convictions for a broad range of offences
- Include confidentiality provisions to protect identity of victims
- Result in convictions being effectively erased
- Provide for judicial discretion to take additional action to vacate convictions
- Provide funding for legal support for victims to seek to have their convictions vacated

#### ***Vacatur laws should...***

- Not require unreasonable proof or corroborating evidence of their victimizations
- Not be conditional on cooperation with law enforcement
- Not impose unreasonable time limitations for seeking vacation of convictions

<sup>206</sup> *Clearing the Slate: seeking effective remedies for criminalized trafficking victims*, International Women's Human Rights Clinic (IWHRC) at the City University of New York School of Law, May 2015, 26-27

<sup>207</sup> *Clearing the Slate: seeking effective remedies for criminalized trafficking victims*, International Women's Human Rights Clinic (IWHRC) at the City University of New York School of Law, May 2015, 31-32

## Recommendation 26: Identify and address barriers victims of trafficking face in having convictions eliminated

For convictions to be vacated, the victim files a motion to the court to have the conviction removed, and if successful, the Court acknowledges that the conviction was made in error and reverses the conviction.<sup>208</sup> In some jurisdictions, the result of this reversal will be to entitle a victim to state that he or she was not charged or convicted. In other States, the charge may be removed from the victim's record, but the conviction remains.<sup>209</sup>

There are limitations to vacatur legislation. Some may also only apply to select offences (such as prostitution-related offences) and not to other crimes that a victim of trafficking may have committed as a result of his or her trafficking, therefore potentially excluding victims of trafficking for non-sexual forms of exploitation altogether. In some cases though, courts have managed to interpret vacatur laws broadly.<sup>210</sup> The burden to prove that the conviction was in error falls to the victim, who must prove the conviction was the result of being trafficked.<sup>211</sup> Noting these challenges and opportunities, criminal justice practitioners should familiarise themselves with options in law, the circumstances under which victims of trafficking are eligible to use them, and the processes for pursuing this option. Counter-trafficking stakeholders should identify and address the legislative, procedural and other barriers victims face in having their criminal records vacated or expunged. Sufficient funding should be allocated for courts to be able to implement vacatur laws including through provision of legal aid to reduce undue burdens on victims.<sup>212</sup> Consideration should also be given to removing barriers that some victims may have in accessing remedies, including by ensuring that post-conviction remedies are child-friendly and accessible to children and young people, and are disability-inclusive in line with internal law requirements relating to access to justice and effective remedies.

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**208** *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons*, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (15 June 2020), paragraph 50.

**209** Human Trafficking Issue Brief: Vacating Convictions (Polaris, 2015) 1

**210** For instance, in the case of *New York v. G.M.* 32 Misc. 3d 274 (Criminal Court of the City of New York, Queens County, Apr. 29, 2011), the court vacated charges for trespassing and possession of a controlled substance, alongside prostitution charges ruling that these charges were also a result of being trafficked, and the statute allowed the court to order additional actions that are appropriate under the circumstances. Case referred to in Human Trafficking Issue Brief: Vacating Convictions (Polaris, 2015) 1

**211** Human Trafficking Issue Brief: Vacating Convictions (Polaris, 2015) 1

**212** *Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children*, Siobhán Mullaly, UN Doc. A/HRC/47/34 (17 May 2021) paragraph 50.

### ***Box 13: Vacatur laws to support criminalized victims of trafficking***

In 2016, the then US Ambassador-at-Large for the Office to Monitor and Combat Trafficking in Persons at the US Department of State contributed an opinion piece to the CNN Freedom Project, on the value of vacatur laws.

While government efforts can never fully undo the trauma that results from human trafficking, we can start by improving our laws and policies to ensure that human trafficking victims are not prosecuted for crimes they have been forced to commit in the first place. If prosecuted and convicted, we must have a system in place to vacate, or expunge, the criminal records of trafficking victims. In 2010, New York became the first state to pass a law allowing survivors of trafficking to vacate their convictions for prostitution offenses. In 2013, Florida's law went even farther, providing for the expungement of "any conviction for an offense committed while . . . a victim of human trafficking." Vacatur laws provide trafficking victims not only with an opportunity to correct past injustices, but also help them rebuild their lives.<sup>213</sup>

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**213** Susan Coppedge, "Stop criminalizing the victims", CNN Freedom Project 17 March 2016 available at: <https://edition.cnn.com/2016/03/17/opinions/coppedge-freedom-project-new-lives/index.html>



# Annexes

## Annex 1: Offences for which victims of trafficking have been criminalized

This Annex provides a non-exhaustive list of examples of offences for which victims of trafficking have been punished.<sup>214</sup>

### Immigration and document-related offences

In countries where there is a strong tendency to criminalize irregular migration and prosecute irregular migrants, trafficked persons have also been criminalized.<sup>215</sup> Offences that victims of trafficking have been prosecuted for may include unauthorized departure, illegal entry, illegal stay, document fraud or falsification, possession or use of falsified documents, and related offences. The ASEAN region has been pointed to as a region where counter-trafficking and migration regulation are conflated, resulting in high risk of trafficked persons being identified and deported as irregular migrants. As one 2021 study notes:

*Domestic criminal laws and antitrafficking legislation in ASEAN Member States are vastly different. The scope of human trafficking is imprecise, with some national legislations blurring the line between human trafficking and migrant smuggling. Therefore, action against human trafficking is commonly tied with, and subordinate to, immigration regulation, especially in migrant receiving countries.*<sup>216</sup>

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**214** The Special Rapporteur on Trafficking in Persons recommends that States “adopt an open-ended and non-exhaustive list of offences frequently related to trafficking in persons, which should be disseminated to and included in training and in published guidance for all law enforcement authorities and all persons likely to come into contact with trafficked persons.” See: *Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullaly*, UN Doc. A/HRC/47/34 (17 May 2021), para. 54(c).

**215** *Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro*, 6 April 2020, UN Doc A/HRC/44/45, 35.

**216** Marija Jovanović, *International Law and Regional Norm Smuggling: How the EU and ASEAN Redefined the Global Regime on Human Trafficking*, *The American Journal of International Law*, 2021, Vol. XX, 1, 19

The same is true in other regions. For instance, Nigerian migrants engaged in sex work in Europe have been labelled as ‘victims of trafficking’ or as ‘criminals’ or ‘undocumented migrants’ in destination countries and upon their return to Nigeria. This reality speaks to a tension between the humanitarian impulse to rescue people who have been victimized, and a simultaneous punitive interest in cracking down on ‘economic migrants’ who violate immigration laws. The former may be identified as victims if they denounce traffickers, and be ‘returned’ to their country of origin, while the latter is ‘deported’, though the material difference for the person concerned may be immaterial.<sup>217</sup>

There also may be a risk of victims of trafficking being prosecuted for involvement in sham marriages to facilitate irregular migration. For instance, in Europe there have been cases of people, usually female, coerced, kidnapped or transported and forced to marry third-country nationals for the purpose of their obtaining status in the EU. The trafficker will receive money for making this arrangement. Many of the women entered into such arrangements reportedly have mental disabilities, are victims of sexual abuse and are kept under tight control.<sup>218</sup>

## Prostitution-related offences

In countries that criminalize prostitution, victims of trafficking can be prosecuted for activities, such as solicitation and loitering.<sup>219</sup> In countries where prostitution is regulated, victims of trafficking may be punished for operating outside of regulatory requirements.<sup>220</sup> The conflation of non-coerced engagement in prostitution and trafficking for the purpose of sexual exploitation has resulted in a great deal of confusion as to who is and who is not a victim.<sup>221</sup> GAATW offers examples of trafficking for sexual exploitation being uncovered by sex worker organizations (South Africa) and several cases from India where young women were brought to brothels and sex workers organisations were able to identify that they arrived through trafficking.<sup>222</sup> The same conflation has been reported in Europe, where migrant sex workers are particularly affected.<sup>223</sup>

Concern about the misuse of the Trafficking in Persons Protocol in ways that crudely divides ‘innocent victims’ and ‘guilty migrants’ has long permeated counter-trafficking

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**217** Sine Plambech, “Between “Victims” and “Criminals”: Rescue, Deportation, and Everyday Violence among Nigerian Migrants, *Social Politics*. Vol. 24. No. 3, 2014, 382-402 at 384-385.

**218** For instance, in the United Kingdom, *Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory Study and Good Practices* (Anti-Slavery International, 2014) 64, 72-73

**219** *Report of the Special Rapporteur on trafficking in persons, especially women and children*, Maria Grazia Giammarinaro, 6 April 2020, UN Doc A/HRC/44/45, 35.

**220** *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons*, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (15 June 2020), paragraph 7.

**221** See inter alia, Parmanand, Sharmila (2021). *Salvation as violence: anti-trafficking and the rehabilitation of rescued Filipino women into moral subjects*. *Journal of International Women's Studies*, 22(2), 78-91

**222** Borislav Gerasimov, speaking at ISRSE webinar on ‘Sex Work, Migration, Exploitation and Trafficking in Europe’, 17 May 2021.

**223** *From vulnerability to resilience: sex workers organising to end exploitation* (International Committee on the Rights of Sex Workers in Europe, May 2021) 8



discourse. Notably, the practice of ‘raids and rescues’ carried out under the pretext of ‘rescuing victims of trafficking’ been widely criticised for the harms it does to people on the premises, whose rights have been abused by law enforcement authorities and others carrying out the raids, including but not only, those among them who are victims of trafficking. While significant progress has been made to strengthen understanding of the use of means and the complexities of consent in trafficking situation, misapplication of the counter-trafficking framework continues to have negative consequences for marginalized groups, including people involved in the sex industry.<sup>224</sup> One result of insufficient nuance around these issues is that victims of trafficking for sexual exploitation may be criminalized for their involvement in the sex industry, particularly where more subtle means have been used by traffickers to place and maintain them there. In some cases, minors have even been prosecuted for offences relating to prostitution.

### **Case study: child victims of trafficking arrested for prostitution**

“I was 13 and on the streets of D.C. My trafficker made another teen 16 year old girl show me what to do when men pulled up in their cars to buy me. It was their third night selling me downtown just blocks from the White House. I was cold, hungry and had no idea what to do. Then, the police showed up,” [...] “Police cars were everywhere and five officers started asking me questions. I was terrified. I tried to lie to the female police officer and say I was 18. There are a lot of rules when you are being sex trafficked and lying about your age is one of them. Breaking the rules could be a beating, or worse. As a child, I thought arrest was the lesser of the evils.” [...] “I spent hours in central booking where they grilled me over and over about my trafficker. I was so scared that I wouldn’t talk. The police arrested me for prostitution and sent me to a detention facility. It was humiliating. All these other girls were in there for little stuff like truancy and there I was arrested for prostitution.” [...] “The judge didn’t even look at me as she determined that I should be sent to a locked facility for treatment. I wanted to ask her why it was me who was being locked up when all these grown men who had sex with a child were walking free?”<sup>225</sup>



Gender assumptions are at play in the treatment of victims as offenders, that can result

<sup>224</sup> See for instance, *Hit and Run: The impact of anti-trafficking policy and practice on Sex Worker's Human Rights in Thailand* (RATS-W Team, Empower, 2012).

<sup>225</sup> Ashley Lowe, quoted in ‘An Arrested Childhood: Ashley Lowe’s Journey as an incarcerated child sex trafficking victim’, by Andrea Powell, Co-Founder and Executive Director, Karana Rising with Ashley Lowe, Survivor Leader and Advocacy Director, Karana Rising, <https://www.dressembler.org/blog/ashleylowejourney>

in females being judged on the basis of expectations of what it means to be a 'good' or a 'bad' girl or women. Victims of trafficking, particularly women for sexual exploitation may be arrested owing to a paternalistic view that arrest and incarceration is in the best interests of a victim.<sup>226</sup> This gender dynamic may also operate to result in male victims being treated as perpetrators rather than as victims. For instance, in the case of male victims of trafficking into sexual forms of exploitation, the assumption may be that a boy is not a victim of sexual exploitation is not a victim because boys 'want sex'.<sup>227</sup>

## Drug-related offences

**Drug use:** Victims of trafficking may use illicit drugs, whether because traffickers have targeted them for their dependency or created such dependence as a means of control. Where these dynamics are not understood, victims may be at risk of being criminalized for drug use; in many countries including in the ASEAN region, sentences can be very severe.

**Drug cultivation:** Victims of trafficking for drug cultivation have been criminalized in some jurisdictions notwithstanding that they have been identified as victims of trafficking. The result is that victims of trafficking for drug cultivation have been prosecuted for drug-related offences, while traffickers are not prosecuted for trafficking people into drug cultivation.<sup>228</sup>

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<sup>226</sup> Sabrina Balgamwalla, *Trafficking in Narratives: Conceptualizing and Recasting Victims, Offenders, and Rescuers in the War on Human Trafficking*, Denver Law Review Vol 94:1, January 2016, 33-34

<sup>227</sup> Survivor Justice Panel Discussion, Dressember and Karana Rising, 7pm ET, 30 April 2021. Author's notes.

<sup>228</sup> See for instance, Dr Patrick Burland, *Villains not Victims? An Examination of the Punishment of Vietnamese Nationals Trafficked for Cannabis Cultivation in the United Kingdom*, 2016.

### **Case study: Criminalisation of victims of trafficking for drug offences**

Son Van Trinh (39) and his family fell into financial hardship and were struggling to put food on the table. Along with his family he made the difficult decision to leave his native Vietnam in search of work and find a way to support his family. He paid £25,000 to be smuggled in the back of a lorry through Chechnya and into France before arriving in the UK. He was taken to a large house in Lancashire where he was told he would have to tend to 319 plants and was given only a mattress on the floor to sleep on and some food rations. When the house was raided by the police he was found inside frightened and confused, having no idea which country he was in. He was charged with drug offences and sentenced to 16 months in prison. The judge, when handing down his sentence said 'You were engaged maybe by pressure and coercion, but it is probably right to say that you were involved through naivety and exploitation.'

Source: Extracted from *Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory Study and Good Practices* (Anti-Slavery International, 2014) 29 referring to Lancashire Evening Post, 18<sup>th</sup> December 2013, Cannabis Farmer gets Locked Up after Bust. Available at; [lep.co.uk/news/local/cannabis-farmer-gets-locked-up-after-bust-1-6323095](http://lep.co.uk/news/local/cannabis-farmer-gets-locked-up-after-bust-1-6323095)



Victims of trafficking – adult and children – have been exploited in cannabis cultivation. There have also been reports of trafficked persons involved in production of methamphetamine (crystal meth).<sup>229</sup> A study conducted in 2014 showed that of those identified as having been exploited in cannabis cultivation in the United Kingdom in 2011 to 2012, 96% were from Viet Nam, 81% of which were children.<sup>230</sup> In 2016, of 142 potential child victims of trafficking reported for criminal exploitation in the UK, 71 (50%) were exploited for benefits claims, 29 (21%) for cannabis cultivation, of whom 25 were Vietnamese.<sup>231</sup> There are significant concerns that those involved in cannabis cultivation have been treated as offenders rather than victims contrary to the non-punishment principle, including in the United Kingdom, Ireland, Netherlands.<sup>232</sup> One study in Europe also found that when government policies are waging a ‘war on drugs’ the problem of criminalization of victims may be unintentionally perpetuated.<sup>233</sup> The issue of criminalization of victims of trafficking for drug-related offences rose in prominence through the landmark judgement of the European Court of Human Rights of *V.C.L and A.N. v The United Kingdom* [Application nos. 77587/12 and 74603/12] discussed at Box 4.

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**229** For instance, in the United Kingdom, *Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory Study and Good Practices* (Anti-Slavery International, 2014) 64

**230** *Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory Study and Good Practices* (Anti-Slavery International, 2014) 18

**231** Unicef, *Victim, Not Criminal: Trafficked Children and the Non-Punishment Principle in the UK* (Unicef, 2017) 3

**232** *Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory Study and Good Practices* (Anti-Slavery International, 2014) 5-6; Ofer, Nogah, Implementation of the Non-Punishment Principle in England: Why Are Victims of Trafficking Not Benefiting from the Protection from Prosecution Provided by International Law? *Journal of Human Rights Practice*, 11, 2019, 486–507 at 489.

**233** *Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory Study and Good Practices* (Anti-Slavery International, 2014) 9

### **Case study: trafficking for forced labour in cannabis cultivation**

Fifteen-year-old Hai grew up in a village in Vietnam and did not go to school. When his father died, Hai tried to make a living in the capital selling plastic bottles for recycling. A man approached him and said he could earn lots of money in Europe. Hai would have to raise several thousand dollars for an agent to take him. His mother took out a loan against their house and an uncle raised the rest.

After 14 months of travelling, Hai was dumped at a service station in England. Here he was met by another Vietnamese man called Cuong who drove to a house in Scotland. Hai was told that he now owed more money for the trip, plus interest. He would have to water cannabis to pay off his debt and be able to send money to his mother and sisters. Hai asked why he could not work in a restaurant, as promised, but Cuong said this was his only option.

Cuong left Hai alone in the house with instructions and locked the doors from the outside. Cuong returned to the house every few days with bits of food and water. Hai asked Cuong if he could go home but Cuong hit him and said he must go nowhere or the police would arrest and beat him.

Three months later, the police raided the house. Hai was arrested and taken into custody. When asked questions, he was confused and too scared to tell them anything. A solicitor advised him to plead guilty. Hai was sentenced to 24 months in an adults' prison and told he would be deported after he had served his sentence.

Source: Extracted from *Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory Study and Good Practices* (Anti-Slavery International, 2014) 17



**Drug transportation / trafficking:** Victims of trafficking have been exploited as drug mules, often in extremely dangerous ways where drugs are placed inside their bodies.<sup>234</sup> The trafficking of children to transport or traffic drugs has been well-documented. In the United Kingdom, the *county lines* cases involve the exploitation of vulnerable children, including trafficked children to transport drugs across the country.<sup>235</sup> The same phenomenon has occurred transnationally, with children recruited into drug trafficking along migrant routes from the Middle East to Europe.<sup>236</sup>

Many people exploited in this way are arrested and prosecuted for drug smuggling, rather than being identified and treated as victims of trafficking. In some cases, the reluctance to treat people as victims may be owing to the seriousness of the offence, as well as the passage of time between the offending and the trafficking. It can also be difficult to prove a person's victimisation and credibility.<sup>237</sup> This phenomenon occurs in many parts of the world, and affects citizens of ASEAN Member States.

Justice Centre Hong Kong has reported that victims and potential victims of trafficking have been convicted and imprisoned for drug-related offences in Hong Kong. Its report, *Not Stopping Here: Hong Kong as a Transit Site for Human Trafficking* documented a case of a woman who was asked by her boyfriend (who she thought was a businessperson) to take clothes from Guangzhou in China, to Kuala Lumpur, Malaysia, via Hong Kong, unaware that the items she was carrying were drugs. Several other incidents were reported of people deceived, coerced or threatened into trafficking drugs through Hong Kong from South America or Africa to China, with men deceived through friendships and women through romantic relationships.<sup>238</sup> Reports have also been made of women from mainland China tricked into trafficking drugs to Malaysia. In all these cases, where people are not identified as potential victims of trafficking, they are instead prosecuted for drug trafficking.<sup>239</sup>

In many regions, including ASEAN, aggressive efforts to combat drug trafficking have resulted in high risks that victims of trafficking will be subject to capital punishment. Notably, the current case of Mary Jane Veloso who awaits execution for drug trafficking in Indonesia, although she has been recognised as having been trafficked for that purpose by Philippine authorities, where her traffickers are in custody (see Box 5).

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**234** Drugs may be trafficked anally or orally, but also otherwise. In a case in Spain, a victim had drugs placed in her as breast implants. Carolina Villacampa and Núria Torres, Human trafficking for criminal exploitation: Effects suffered by victims in their passage through the criminal justice system, *International Review of Victimology*, 2019, Vol. 25(1) 3–18, at 9.

**235** *County Lines Violence, Exploitation and Drug Supply 2017: National Briefing Report* (National Crime Agency, November 2017) 15

**236** Healy, Claire., *The Strength to Carry On: Resilience and Vulnerability to Trafficking and Other Abuses among People Travelling along Migration Routes to Europe* (ICMPD, 2019), pp.210–212

**237** Carolina Villacampa and Núria Torres, Human trafficking for criminal exploitation: Effects suffered by victims in their passage through the criminal justice system, *International Review of Victimology*, 2019, Vol. 25(1) 3–18, at 10.

**238** Justice Centre Hong Kong, *Not Stopping Here: Hong Kong as a Transit Site for Human Trafficking* (January 2019) p.10, 14.

**239** Justice Centre Hong Kong, *Submission for the Working Group on Arbitrary Detention's Study on arbitrary detention relating to drug policies* (March 2020)

## Murder and manslaughter

There are cases of victims being made to assault other victims as a means of control, which traffickers may subsequently leverage as a form of coercion, for instance, by threatening victims that they cannot go to the police.<sup>240</sup> There are situations where victims of trafficking are forced or coerced to commit violence crimes or even murder someone, not having free will to do so. In some cases, children have also been made to participate in murders.<sup>241</sup>

### Case study: Victim of trafficking convicted of murder

In a Dutch case, S, an Indian national was exploited in domestic work in the household of R and P, an Indian couple living in the Hague. R and P requested that S abuse Mehak, a baby girl living at the house with her parents, who according to R and P was taken by a curse. Mehak died, leaving S both a victim of trafficking and also facing manslaughter charges because of her role. S was prosecuted in the first instance, and the decision was upheld in the Court of Appeal for co-perpetration of murder. The Appeal Court ruled against the defence that S was under duress inapplicable on the basis that she could have reasonably spared the baby's life by risking the anger of R and P. The judge also did not apply the non-punishment principle in sentencing, considering that the manslaughter did not relate to the trafficking. S was convicted and imprisoned, and her status as a victim of trafficking was given little or no attention in her applications for asylum.<sup>242</sup>



In determining whether the non-punishment principle can apply where a victim of trafficking has committed murder or manslaughter, it has been considered reasonable to require a temporal overlap between the human trafficking and the crime, in that it was committed during the human trafficking experience, and that the mere presence of means is not enough, but also that there were no subjective or objective alternative options for the victim to act differently, and that the burden of proof be placed on the defence.<sup>243</sup>

**240** Survivor Justice Panel Discussion, Dressemer X Karana Rising, 4pm PT / 7 PM ET, 30 April 2021. Author's notes.

**241** Global Trafficking in Persons Report 2020 (UNODC, 2021) p.50. In the United States, there are some high-profile cases of victims of trafficking having been charged with murder, including Cyntoya Brown, Jessica and Jordan Hampton and Tiffany Simpson.

**242** Corinne Dettmeijer-Vermeulen and Luuk Esser, "The victim of human trafficking as offender: A combination with grave consequences A reflection on the criminal, immigration and labour law procedures involving a victim of human trafficking in the Dutch Mehak case" *Journal of Trafficking and Human Exploitation*, 2017, Vol. 1 Nr. 1, 77-94.

**243** Corinne Dettmeijer-Vermeulen and Luuk Esser, "The victim of human trafficking as offender: A combination with grave consequences A reflection on the criminal, immigration and labour law procedures involving a victim of human trafficking in the Dutch Mehak case" *Journal of Trafficking and Human Exploitation*, 2017, Vol. 1 Nr. 1, 77-94 at 85.



## Terrorism, violent extremism and armed conflict

People may be trafficked for exploitation in armed conflict and terrorism, whether in combat or non-combat roles, such as cooks, porters, or even human shields. Recruitment into armed terrorism, violent extremism and armed conflict can result in multiple forms of exploitation, from forced marriage and sexual exploitation to criminal exploitation in armed conflict, including to commit terrorism, war crimes and crimes against humanity.<sup>244</sup> Situations of children recruited into armed conflict almost always constitute trafficking in persons (requiring only an act and an exploitative purpose). Children who are recruited into armed conflict should be recognised in international law as victims of grave violations of human rights and humanitarian law; failure to recognise them as such can result in protection failures. In some cases, people who are exploited as child soldiers graduate onto exploiting others. Children exploited in these contexts should be treated primarily as victims of human trafficking and of grave violations of human rights and humanitarian law, but very often they are criminalized instead. Where their victimization is not recognized they are at risk of being prosecuted for their involvement with terrorism and armed conflict groups, and may be treated as a threat to security rather than being referred to protection authorities.<sup>245</sup>

### Case study: Conviction of Dominic Ongwen by the International Criminal Court

The International Criminal Court delivered its verdict on 4 February 2021 in the case of *The Prosecutor v Dominic Ongwen*, ICC-02/04-01/15, finding Mr Ongwen guilty of crimes against humanity and war crimes committed in Northern Uganda between 1 July 2002 and 31 December 2005. The crimes Mr Ongwen was convicted of include murder, forced marriage, torture, rape, sexual slavery and enslavement, and conscripting children under 15 years of age to participate in hostilities. On 6 May 2021, the ICC sentenced Mr Ongwen to 25 years imprisonment. Mr Ongwen had himself been abducted by the Lord's Resistance Army (LRA) in 1987 at the age of around 9, but nonetheless found that he committed the crimes he was charged with as a fully responsible adult and commander of the LRA. On 21 May 2021, Mr Ongwen's Defence Council submitted notification of its intent to appeal the trial judgment. Among its many grounds for appeal, the Defence submits that the Chamber erred in disregarding evidence of Mr Ongwen's own abduction, indoctrination and experiences as a child soldier in the LRA.<sup>246</sup>

<sup>244</sup> Global Trafficking in Persons Report 2020 (UNODC, 2021) p.50

<sup>245</sup> See *Countering Trafficking in Persons in Conflict Situations* (UNODC, 2018).

<sup>246</sup> *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15, <https://www.icc-cpi.int/uganda/ongwen>

Research conducted into human trafficking by ISIS has revealed a systemic approach to targeting specific individuals and recruiting them into sexual exploitation, domestic servitude, forced labour and other forms of exploitation including to participate in terrorism. Research conducted by Reprieve into the trafficking of British citizens by ISIS found that the majority of British women detained in North East Syria (63%) are trafficked.<sup>247</sup> In some cases, rather than being identified as victims of trafficking, responsible State authorities will instead deprive them of citizenship, refuse them consular assistance, deny their right to return to their country of citizenship, or indefinitely detain them on the basis that they have chosen ‘of their own volition’ to participate in acts, which may not be the case. A significant portion of people who have been affected are children.<sup>248</sup>

## Trafficking in persons

Victims of trafficking may be convicted for trafficking in persons offences. In some cases, victims may be involved in the recruitment or supervision of other victims, which they may have done in a bid to receive differential or less harsh treatment by traffickers with more power.<sup>249</sup> For instance, there are cases of women trafficked into sexual exploitation who repaid their debts and subsequently became madams / mamasans. Some have even been prosecuted as traffickers for bringing other women to work abroad in the sex industry without use of means (such as force, fraud or coercion).<sup>250</sup>

A 2020 UNODC study titled *Female Victims of Trafficking for Sexual Exploitation as Defendants: A Case Law Analysis* analysed 53 cases from 16 jurisdictions, with a focus on Europe. It found that traffickers use victims to shield themselves from prosecution by using victims to commit acts such as recruitment of new victims, control, collecting proceedings from exploitation and advertising of services. Many victim-defendants continue to be sexually exploited themselves, but are motivated to perform these trafficking roles to alleviate their own exploitation, secure their traffickers’ favour and affection, or have no choice but to perform these roles. However, in the cases examined for the purpose of that study it was found that courts did not discuss the non-punishment principle, did not recognize the defendant as a victim, or simply rejected the application of the principle, resulting in their prosecution, conviction and punishment; outcomes that are tantamount to their double victimization.<sup>251</sup>

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**247** *Trafficked to ISIS: British families detained in Syria after being trafficked to Islamic State* (Reprieve, 2021) 11

**248** *Trafficked to ISIS: British families detained in Syria after being trafficked to Islamic State* (Reprieve, 2021). Also see Maya Foa, Co-Executive Director, Reprieve, speaking on the principle of non-punishment of victims of trafficking in persons, being a side event to the 47<sup>th</sup> Session of the Human Rights Council 30 June 2021, 13:00 – 14:30 CET. Author’s notes on file. Also see Maya Foa, *Shamima Begum is a victim of trafficking – and the UK should treat her as such*, Guardian 27 February 2021 (accessed 31 August 2021) available at: <https://www.theguardian.com/commentisfree/2021/feb/26/shamima-begum-trafficking-uk-citizenship-rights>.

**249** *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons*, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (15 June 2020), paragraph 8.

**250** *A Brief Guide on Collateral Damages of Anti-Trafficking Laws and Measures on Sex Workers* (International Committee on the Rights of Sex Workers in Europe, 2019) 33.

**251** United Nations Office on Drugs and Crime, *Female Victims of Trafficking for Sexual Exploitation as Defendants: A Case Law Analysis* (United Nations, Vienna, 2020).

### Case study: Tiffany Simpson – convicted of trafficking in persons

Tiffany Simpson has served ten years of her 30-year prison sentence, in Georgia, USA. Tiffany was trafficked when she was 17, beaten, stabbed, provided with drugs and forced to traffic other minors. She became pregnant to her trafficker. Instead of being treated as a victim of trafficking, she was prosecuted by the South Georgia District Attorney's Office and charged with offences relating to trafficking a juvenile. In her prosecution, Tiffany was unable to speak up for herself. As her legal representative explained:

The prosecution of trafficking victims should not happen but, historically, has happened as victims under the control of their trafficker are often unable to speak up or help themselves, bound by the same fear and control inherent in their victimization that also compelled them to commit a crime. Because of the trauma she had suffered and the fear she had of her trafficker, Tiffany did not recognize herself as a crime victim and pleaded guilty to two charges. Tiffany was sentenced to 30 years with 20 to serve. Tiffany has served nine years of that sentence. Legally, Tiffany could not form the intent, known as the *mens rea*, to commit the crime of trafficking another, as she was compelled to do so out of fear for her own safety and that of her grandmother. Morally, Tiffany should be receiving services to aid in her recovery, not be punished for the human trafficker's crime against her and the other victim.<sup>252</sup>

Source: Susan Coppedge (former US Ambassador at Large, Senior counsel with Krevolin & Horst, and attorney for Tiffany Simpson), *Justice is a part of healing for victims of human trafficking*, law.com, 18 February 2021



## Smuggling of migrants

Victims of trafficking may begin their journey as smuggled migrants, paying for their passage to reach another country. In instances where migrants perform smuggling tasks, such as driving smuggling vehicles or steering vessels in lieu of a smuggling fee or in exchange for a discount, the result may be that victims of trafficking are prosecuted as migrant smugglers. A particular risk has been noted for minors, including in the prosecution of Indonesian children for smuggling offences for their role in transporting

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**252** Susan Coppedge (former US Ambassador at Large, Senior counsel with Krevolin & Horst, and attorney for Tiffany Simpson), *Justice is a part of healing for victims of human trafficking*, law.com, 18 February 2021, <https://www.law.com/dailyreportonline/2021/02/18/justice-is-a-part-of-healing-for-victims-of-human-trafficking/?slretu rn=20210405034616> accessed 5 May 2021.

people to Australia.<sup>253</sup> The risk that victims of trafficking may be charged instead for migrant smuggling offences is exacerbated in jurisdictions where the two crime types are conflated and criminal justice practitioners lack the capacity to differentiate them.

## Financial and identity crime

**Fraud:** Victims have been used by traffickers to commit welfare / benefit fraud, for instance, where people with disabilities are made to claim benefits that are kept by traffickers.<sup>254</sup> There have also been cases of victims of trafficking being given someone else's identity during their exploitation for other purposes, and prosecuted for identity fraud.<sup>255</sup> Credit card fraud has also been reported.<sup>256</sup> Traffickers may also use victims to commit tax fraud, resulting in victims facing civil and criminal investigations for tax investigations sometimes for years after they were trafficked. In practice, it can be difficult for victims to claim duress in these situations.

### Case study: Rebekah

In an unfortunately typical case in the United States, a victim of trafficking, Rebekah, was subject to sexual exploitation by a violent trafficker. Her trafficker also purchased homes and cars in her name, and made her open a bank accounts under false names and social security numbers to distance himself from illicit profits. He did not allow her to file tax returns for income deposited into these accounts. Rebekah was subsequently indicted for the financial crimes she was forced to commit, and having been manipulated to not cooperate with authorities, did not disclose the trafficker's involvement in these crimes. She pleaded guilty to tax evasion and was sentenced to 13 months in prison. After her release from prison, the trafficker forced her to file back tax returns resulting her owing more than a quarter of a million US dollars in taxes.<sup>257</sup>



**253** Palmer, W., & Missbach, A. (2017). Trafficking within migrant smuggling operations: are underage transporters 'victims' or 'perpetrators'? *Asian and Pacific Migration Journal*, 26(3), 287-307.

**254** *Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory Study and Good Practices* (Anti-Slavery International, 2014) 72.

**255** Survivor Justice Panel Discussion, Dressemer and Karana Rising, 7pm ET, 30 April 2021. Author's notes.

**256** Carolina Villacampa and Núria Torres, Human trafficking for criminal exploitation: Effects suffered by victims in their passage through the criminal justice system, *International Review of Victimology*, 2019, Vol. 25(1) 3-18, at 4

**257** *An Advocate's Guide to Tax Issues Affecting Victims of Trafficking*, (The Human Trafficking Legal Centre, Ropes & Gray LLP, and the University of Baltimore Law School, 2019) 4

**Online / phone scams:** There have been cases of East Asian victims of trafficking exploited for the purpose of scamming at call centres, made to defraud wealthy people while being made to live in subhuman conditions without receiving any remuneration; a scheme that has been observed in both Australia and Europe and may also occur elsewhere.<sup>258</sup>

**Corruption-related offences:** Victims of trafficking may commit corruption-related offences, whether during irregular migration from their point of origin to the point of exploitation, or during the exploitation phase, for instance, when law enforcers extort them for financial or other material benefits, including sexual services. In some cases, bribes will be extorted through threats of punishment for illegal work or activities they are engaged in.<sup>259</sup>

## Other offences

**Petty crimes:** Victims have been prosecuted for larceny,<sup>260</sup> illegal charity collection and for their exploitation in petty crimes including pickpocketing, bag-snatching, shoplifting, ATM theft and distraction thefts. Those involved in pickpocketing and sale of counterfeit goods in countries including the UK, are people from marginalized ethnic groups, primarily Roma. French authorities dismantled a highly organised criminal network involved in the exploitation of more than 2000 children in theft, operating across the south of France, Spain, Italy and beyond.<sup>261</sup> Trafficking for metal theft (whereby victims are made to scavenge for metal that traffickers subsequently sell) has been reported in Europe.<sup>262</sup>

**Begging:** Begging may in some jurisdictions not be identified as forced nor recognized as a trafficking issue, meaning victims of trafficking into forced begging may not be identified. For instance in the Netherlands, begging has been considered an issue of public order, with those involved treated as perpetrators rather than identified them as potential victims of trafficking. Elsewhere in Europe (e.g. Romania and Bulgaria) begging is criminalised, exposing victims of trafficking into begging to risks of prosecution. Exploitation of children in begging, can be high-profit and low-risk crime for traffickers, who also take advantage of the age of criminal responsibility (which may be ten or eight years old) which means that children cannot be prosecuted, and therefore can be moved across Europe for continued exploitation.<sup>263</sup>

**Obstruction of justice:** Victims may be interrogated by police who want to find out about traffickers or other criminals they have been associated with. In some cases, victims' survival instinct prevents them from cooperating with police owing to fears for their safety

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<sup>258</sup> Global Trafficking in Persons Report 2020 (UNODC, 2021) p.51

<sup>259</sup> See: *Corruption as a Facilitator of Smuggling of Migrants and Trafficking in Persons in the Bali Process Region with a focus on Southeast Asia* (UNODC and RSO, 2021) pp.10, 33, 35-36.

<sup>260</sup> Survivor Justice Panel Discussion, Dressemer and Karana Rising, 7pm ET, 30 April 2021. Author's notes.

<sup>261</sup> Global Trafficking in Persons Report 2020 (UNODC, 2021) p.50

<sup>262</sup> For instance, in the United Kingdom, *Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory Study and Good Practices* (Anti-Slavery International, 2014) pp.5, 15, 64, 73, 89.

<sup>263</sup> *Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory Study and Good Practices* (Anti-Slavery International, 2014) pp.6, 22, 61, 64.

if they are perceived as having helped police.<sup>264</sup> Victims may be at risk of prosecution under domestic law, including trafficking law. For instance, in Singapore, Law No. 24 of 2014 on trafficking in persons prohibits obstruction of police officer or enforcement officer (article 17); false statements, information etc. (article 20), both of which are offences attracting a fine of up to \$10,000 and/or imprisonment not exceeding 12 months. In many jurisdictions, people can be arrested and made to appear in court as witnesses.

**Defamation / libel:** Sources including the US Trafficking in Persons Report 2020 note that exploitative employers have used defamation laws to bring criminal charges against victims and their advocates to silence them from criticising employment conditions. It offers the example from Thailand in which a company has pursued complaints against rights advocates who have made public allegations of working conditions indicative of forced labour, notwithstanding whistle-blower protections contained in the Anti-Trafficking Law. Another example from Myanmar involves authorities charging factory workers for going on strike after being subjected to forced overtime at a Chinese-owned factory.<sup>265</sup>

**Surrogacy-related offences:** Where people are trafficked for the purposes of surrogacy, and exploitation surrogacy is not recognised as a form of exploitation, victims may remain unidentified, instead facing criminalization for offences relating to commercial surrogacy or reproductive technology.

**Organ selling / organ trafficking:** In many jurisdictions trafficking in persons for the purpose of organ removal is not effectively identified and responded to. Instead, parties concerned including victims of trafficking who have been trafficked for the purpose of organ removal, may be prosecuted for organ selling or trafficking. The present study found anecdotal situations of men from poor countries travelling transnationally, including in the ASEAN region, to sell their kidneys, subsequently criminalized under human trafficking law in relation to organ removal.

**Offences relating to Illegal, Unreported and Unregulated (IUU) fishing:** Persons exploited in the fishing industry are highly vulnerable to criminalization for crimes they commit in the course of being trafficking, including illegal fishing, poaching, smuggling and illegal entry into national territories.<sup>266</sup> People trafficked into the fishing industry may be prosecuted and punished for their involvement in IUU fishing.<sup>267</sup> The present study uncovered significant concern that victims of trafficking into the fishing industry across the ASEAN region, with citizens particularly of Cambodia, Indonesia and the Philippines having been subject to punishment and subject to fines for their involvement in IUU in countries elsewhere, including not only in Asia, but also in other regions including the Pacific. Indeed, citizens of ASEAN countries have been trafficked into the fishing industry have been trafficked to several regions of the world. In some cases, these individuals have been identified by NGOs as victims of trafficking, but are not formally identified and protected as such.

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**264** Survivor Justice Panel Discussion, Dressemer and Karana Rising, 7pm ET, 30 April 2021. Author's notes.

**265** 2020 Trafficking in Persons Report: Burma (US Department of State, 2020)

**266** 2021 Trafficking in Persons Report: Indonesia (US Department of State, 2021)

**267** Sallie Yea, *Human Trafficking and Modern Slavery in Asia*, ABC Big Ideas, 10 May 2021



## Annex 2: Facilitation tool for roundtable discussion

### Roundtable consultation on non-punishment of victims of trafficking in law, policy and practice in ASEAN Member States

**Facilitator instructions:** This form has been designed for AACT Country Teams to use in conducting roundtable discussions on the principle of non-punishment. It is to be used:

- By facilitators to facilitate roundtable discussions
- By note takers to record the discussions: one form is to be completed by the notetaker for each roundtable discussion held.

This form is not to be shared with invitees / participants to the roundtable discussion.

**For Country Team to complete in advance of the meeting and checked during:**

Date / time / place of roundtable discussion	
Date:	
Time:	
Place:	
ASEAN-ACT team at the roundtable discussion	
Name of facilitator:	
Name of notetaker:	
Name of Interpreter:	
Other AACT staff present:	
Total number of participants:	
Profile of participants at the roundtable discussion	
Government / non-government:	
Participant number / gender:	Number of males: Number of females: <u>Total</u> number of participants:
Role of participants (please describe): [e.g. law enforcement official, immigration official, prosecutor, defense lawyer, judge, victim service provider, other etc.]	



### **For facilitator's introduction:**

**Background:** ASEAN-Australia Counter Trafficking (ASEAN-ACT) is elaborating a paper titled 'Implementation of the principle of non-punishment of victims of trafficking in persons in ASEAN Member States.' The paper is being prepared by Marika McAdam, International Law and Policy Advisor to ASEAN-ACT. To inform this study, we wish to draw on insights and experiences of government and non-government practitioners across ASEAN Member States.

The principle of non-punishment sets out that victims of human trafficking should not be punished for unlawful activities they have committed as a consequence of being trafficked. The principle does not confer blanket immunity for all offences a trafficked person may have committed, but nor is it meant to exclude serious crimes. The principle is captured in article 14(7) of the *ASEAN Convention against Trafficking in Persons, especially women and children* (2015): "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." Additionally, the non-punishment principle is captured in the *ACWC Gender Sensitive Guidelines for Handling Women Victims of Trafficking in Persons* (Part III, 3.6.1) and Part 1, C2 of the *ASEAN Practitioner Guidelines on Effective Criminal Justice Response to Trafficking in Persons* (2007). Furthermore, most countries across the ASEAN region have specific legislation in place capturing the non-punishment principle.

**Purpose of this discussion:** Through this discussion, we would like to ask you a series of questions on topics such as:

- Understanding and application of the non-punishment principle
- Prosecution of trafficked persons for offences committed in the course of being trafficked
- The role of legislation to protect victims from prosecution and punishment
- Guidelines, policies and bilateral and regional agreements relevant to non-punishment
- Challenges and good practices in upholding and applying the non-punishment principle

Of course, you may skip any questions and do not need to answer questions you do not wish to. We estimate that this discussion will take approximately **2.5 hours**.

**Confidentiality:** We will include a list in the study of the organisations and agencies we have consulted with, but will not be attributing any comments in the paper to individuals or their affiliations anywhere in the report. Any notes taken of the discussions will only be used for the purpose of informing this study, and will not be shared beyond the ASEAN-Australia Counter-Trafficking project team.

**Questions:** Do you have any questions before we proceed?

## Part 1: General questions (20 mins)

**Facilitator to explain:** The non-punishment principle states that a trafficked person should not be punished or otherwise penalised for offences he or she has committed as a direct consequence of being trafficked or that traffickers compelled him or her to do.

### *From your perspective...*

**Question 1:** Do you think this principle is well understood and applied in your country?

- Why or why not?

**Question 2:** In your counter-trafficking capacity, what is your specific role in upholding and applying the principle of non-punishment in your country?

#### Counter-trafficking capacity

[E.g. investigator, prosecutor, defence lawyer, judge, immigration / border official / labour inspector, victim service provider / other (please specify)]

Note: one line per participant

#### Role in upholding and applying the non-punishment principle:

Participant 1:

Participant 2:

Participant 3:

Participant 4:

Participant 5:

Participant 6:

Participant 7:

Participant 8:

Participant 9:

Participant 10:

Participant 11:

Participant 12:

## Part 2: Victim punishment and prosecution in practice (40 mins)

**Facilitator to explain:** Victims may commit offences in the course of being trafficked. These include document or immigration-related offences where victims are trafficked transnationally. During the exploitation phase, victims may commit offences related to illegal work, particularly where prostitution is illegal. Victims of trafficking for the purpose of organ removal may be convicted for organ trafficking rather than be protected as victims. And victims who are trafficked into criminal activities (such as drug cultivation, illegal cigarette production, pocketing, theft, and sale of counterfeit goods and benefit fraud) are at particular risk of being prosecuted for crimes they were trafficked to commit.

**Question 3:** Do you know of any situations where trafficked persons or presumed trafficked persons who have not been formally identified as victims of trafficking, have been prosecuted for the following offences? Please briefly describe the situation:

Offence	Example in practice
Illegal entry	
Illegal departure	
Illegal stay	
Illegal work (e.g. prostitution / other)	
Document-related offences	
Corruption-related offences	
Defamation / libel related offences	
Organ selling / organ trafficking	
Surrogacy-related offences	
Drug cultivation or drug trafficking	
Trafficking-related offences (e.g. trafficking of others)	
Crimes related to terrorism / armed conflict	
Petty crimes	
Other (please specify)	

**Question 4:** Do you know of any situations where trafficked persons who have been formally identified as victims of trafficking have been prosecuted for offences they have committed in the course of being trafficked? Which offences? Please briefly describe the situation:

Offence	Example in practice

**Question 5:** Do you have examples of victims of trafficking facing the following situations in your country? Had these victims been formally identified or not identified? Please briefly describe the situation.

Arrest	
Detention in law enforcement or immigration facility	
Detention in shelter or care facility	
Deportation / forced return	
Charged immigration fees / penalties	
Non-renewal of stay or work permit	
Deprivation of citizenship	
Other (please specify)	

**Question 6:** In what ways, if any, do you think the following categories of trafficked persons are uniquely affected by risks of being punished for offences they commit as a consequence of being trafficked?

Male victims	
Female victims	
Lesbian, gay, bisexual transgender, intersex, queer victims	
Child victims	
Citizens of the country	
Non-citizens	
Undocumented citizens	
Victims of sexual forms of exploitation	
Victims of non-sexual forms of exploitation	
Other (please specify)	

### Part 3: Legislation relevant to non-punishment (40 mins)

**Facilitator to explain:** The *ASEAN Convention against Trafficking in Persons, especially women and children* (2015) sets out that: '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.' (Article 14(7)).

At the national level, in **Brunei Darussalam** the non-punishment principle is captured in Article 47 of the *Anti-Trafficking in Persons Order of Brunei Darussalam* (2019), stating that a trafficked person shall not be liable to criminal prosecution in respect of illegal entry, unlawful residence and procurement or possession of fraudulent travel or identity documents as a direct consequence of a trafficking offence.

At the national level, in **Cambodia** article 44 of the *Law on Suppression of Human Trafficking and Sexual Exploitation* (2008) prevents punishment of persons under the age of 15, for some stipulated offences including sexual intercourse with a minor under fifteen years (article 42) and indecent act against a minor under fifteen years (article 43).

At the national level, in **Indonesia** article 18 of *Law of the Republic of Indonesia Number 21 (2007) on the Eradication of the Criminal Act of Trafficking in Persons*, states that '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.'

At the national level, in **Lao PDR** article 39(7) of the *Law on Anti-Trafficking in Persons* (2015) sets out the right of victims 'To be exempted from the criminal liability and shall not be detained for prostitution offence and illegal immigration.' Further, article 25(6) of the *Law on Development and Protection of Women* (2004) in Lao PDR sets out that woman and child victims have the right 'Not to be prosecuted and detained on any charge of trafficking in women and children, prostitution, [or] illegal immigration.'

At the national level, in **Malaysia**, the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act* (2007), sets out in Section 25 that trafficked persons shall not be liable to criminal prosecution in respect of illegal entry, unlawful residence and procurement or possession of fraudulent travel or identity documents for entering, where such acts are a direct consequence of his or her trafficking.

At the national level, in **Myanmar** Chapter V of the *Anti-Trafficking in Persons Law* (2005) safeguarding the rights of trafficked victims sets out that the Central Body shall not take action against trafficked victims for any offence under the *Anti-Trafficking in Persons Law*, and shall determine whether it is appropriate to take action against them for any offence arising as a direct consequence of being trafficked.

At the national level, in the **Philippines**:

- Section 17 of *Republic Act No. 9208* (2003) as amended by *RA 10364* (2012) sets out that trafficked persons shall not be penalized for unlawful acts committed as a direct result or, or as an incident or in relation to, being trafficked, or in obedience to the order made by the trafficker. That section also protects victims of trafficking for purposes of prostitution from prosecution, fine or other penalty under the *Revised Penal Code*.
- Section 88 of the Revised Rules and Regulations Implementing Republic Act No. 9208, as amended by Republic Act No. 10364, provides 'Protection against suits for unlawful acts committed in relation to trafficking or upon direct orders of the traffickers' stating that "The consent of trafficked person to the intended exploitation is irrelevant. Trafficked persons shall not be penalized for unlawful acts committed as a direct result of, or as an incident or in relation to, being trafficked, or in obedience to the order made by the trafficker in relation to said acts." Further Section 89 offers 'Protection against suits under Article 202 of the Revised Penal Code' stating that 'Persons trafficked for prostitution shall not be prosecuted, fined or penalized under the provisions of Article 202 of the Revised Penal Code.'

In **Singapore** the *Prevention of Human Trafficking Act 2014* (No. 45 of 2014) does not contain any specific provision to protect victims of trafficking from punishment or prosecution.

In **Thailand** Section 41 of Thailand's *Anti-Trafficking in Persons Act B.E. 2551*(2008) states that criminal proceedings cannot be taken against trafficked persons for illegal entry or stay, providing false information, document-related offences, prostitution-related offences, work related offences, without written permission of the Minister of Justice. Thailand is also signatory to the ILO Protocol of 2014 to the Forced Labour Convention, which States that Members shall in accordance with the basic principles of their legal system, 'take 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.'

In **Viet Nam** there are no provisions relevant to non-punishment in Law No. 66/2011/QH12 on Prevention, Suppression Against Human Trafficking. Similarly, the non-punishment principle is not captured in Decree No. 62/2012/ND-CP of August 13, 2012 prescribing the grounds for identification of trafficked victims and safety protection of victims and their relatives, and Decree No. 09/2013/ND-CP stipulating in detail a number of articles of the anti-human trafficking law.



**In relation to the law that exists in your country, in your view...**

<p><b>Question 7:</b> Is this law useful to protect trafficked persons from punishment?</p> <ul style="list-style-type: none"> <li>• Why or why not?</li> </ul>	
<p><b>Question 8:</b> To what extent is this law applied in practice?</p> <ul style="list-style-type: none"> <li>• Can you give examples of where and how it has been applied?</li> <li>• In what types of trafficking cases is it applied and for what types of offences?</li> </ul>	
<p><b>Question 9:</b> For this provision to apply, does the trafficked person need to be formally identified as a victim of trafficking?</p>	
<p><b>Question 10:</b> What role if any do these provisions play a role at the <u>investigation</u> stage?</p> <ul style="list-style-type: none"> <li>• Do investigators have discretion in whether or not to lay charges?</li> </ul>	
<p><b>Question 11:</b> What role if any do these provisions play at the <u>prosecution</u> phase?</p> <ul style="list-style-type: none"> <li>• Do prosecutors have discretion in whether or not to prosecute?</li> </ul>	
<p><b>Question 12.</b> Do courts have discretion in how they approach cases where offenders are trafficked?</p> <ul style="list-style-type: none"> <li>• For instance, can judges not sentence victims, or mitigate sentences or not record sentences?</li> </ul>	

**Question 13 (for causation):** In applying this provision, how is the link established between the trafficked person's offence and his or her trafficking?

**Question 13 (for compulsion):** In applying this provision, how is the link established between the trafficked person's offence and his or her being compelled by the trafficker?

**Beyond anti-trafficking legislation:**

**Question 14:** Are there any other provisions in administrative or criminal law that may be relevant to upholding the principle of non-punishment in your country?

For example:

Statutory defences in domestic law

Laws to vacate or expunge criminal records

**Question 15:** To your knowledge, have these provisions been effectively applied to uphold the principle of non-punishment?

Why or why not?

Can you offer any examples of their application?

## Part 4: Guidelines, policies and agreements (20 mins)

**Facilitator to explain:** There are several regional guidelines that are relevant to the principle of non-punishment principle, including

- The *ACWC Gender Sensitive Guidelines for Handling Women Victims of Trafficking in Persons* (Part III, 3.6.1): 'Victims should not be detained, charged or prosecuted for any crime they may have committed as a direct and immediate result of their being trafficked.'
- *ASEAN Practitioner Guidelines on Effective Criminal Justice Response to Trafficking in Persons* (2007) (Part 1, C2): 'To the extent possible, victims of trafficking should not be charged or prosecuted in relation to crimes committed by them that are a direct consequence of their status as victims of trafficking.'
- The *COMMIT Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region* (2004) commits Cambodia, China, Lao, Myanmar, Thailand and Viet Nam to 'Ensuring that victims identified as victims of trafficking are not held in immigration detention by law enforcement authorities' (paragraph 16)
- The *COMMIT Guidelines on victim identification and referral* (for Cambodia, China, Lao, Myanmar, Thailand and Viet Nam) state that 'Trafficked persons are not, in any circumstances, prosecuted for violations of immigration laws or for activities they are involved in as a direct consequence of their situation as trafficked persons; or held in detention'

At the national level, in **Brunei Darussalam** - ?

At the national level, in **Cambodia** there are several policy documents, guidelines forms and procedures that are relevant to the non-punishment principle.

- The *Guidelines on Forms and Procedures for identification of victims of trafficking for appropriate service provisions* (National Committee for Counter Trafficking in Persons, NCCT, 2015) state at 2.C, 2: 'During the process [of preliminary identification] the foreigners who have been formally identified as victims shall not be detained or charged with illegal immigration and / or prostitution. They shall be provided with shelter and protection while awaiting the official repatriation process.'
- The *Decision on the Guideline for the Protection of the Rights of Trafficked Children of the Kingdom of Cambodia* (Cambodian National Council for Children, CNCC, 20 December 2007, No. 107): Article 4, 2.3(a) Trafficked children are victims of human rights violations. They should not be treated as offenders or subjected to or threatened with criminal sanctions for any offense related to their situation as trafficked children.

- *Guidelines on the Implementation of the Law on Suppression of Human Trafficking and Sexual exploitation* (Unofficial UNIAP translation 2008) General Guidelines: (4) Prostitutes are to be regarded as victims of procurement for prostitution. Prostitution is not a crime; thus the individual prostitutes are not punished as offenders under the new legislation.
- Cambodia also has MOUs in place with Thailand and Viet Nam in which parties confirm that women and child victims are to be treated as victims not as offenders, and are not to be punished victims for illegal entry to or exit from its territory, or any other offences arising directly from human trafficking.

At the national level, in **Indonesia** the *National Action Plan for Eradication of Human Trafficking year 2015-2019* is silent on the principle of non-punishment. The national action plan for 2020-2024 is not yet available. The Guidelines for Law enforcement and the protection of victims of trafficking in persons in handling trafficking in persons cases (2009) completed with utilization of Law No.21 Year 2007 raises the challenge of victims who may also be considered perpetrators of crimes related to their trafficking (p.36) and emphasizes the need for officials to have specialized skills to understand that victims may have committed offences in relation to trafficking (p.41).

At the national level, in **Lao PDR**, the *Guidelines for the protection, assistance and referral of victims of trafficking* (Ministry of Public Security, Secretariat for the National Steering Committee on Anti-Human Trafficking, 2020), do not explicitly mention the non-punishment principle. However, they uphold principles of human rights; victims' rights to protection; and protection, assistance and referral of victims in line with their best interests and on the basis of consent.

- The 2014 MOU with China states that parties 'shall not punish the victims for illegal entry to or exit from its territory or any other offences arising directly from trafficking in persons.'
- The 2017 MOU between Lao and Thailand does not specifically address non-punishment but speaks to justice, legal protection (article 6) and the need to not subject them to further victimization in legal proceedings (article 17).

At the national level, in **Malaysia** there is no clear policy or other guidance to give effect to the non-punishment principle. Standard operating procedures have been developed by the Council of Anti-Trafficking in Persons and Anti-Smuggling of Migrants (MAPO) to support victim identification. The Nation Action Plan on Anti-Trafficking in Persons 2016-2020 (MAPO) affirms commitment to victim-centred and human rights-based approach to treatment of trafficked persons, and to improve the quality or protection and rehabilitation 'through promotion of and in keeping with international human rights at all level, regardless of gender, age and religion of the victims.' The 2021-2025 National Action Plan is currently being finalized.

At the national level, **Myanmar** includes various victim protection action plans in its 2017-2021 Action Plan, though none that specifically speak to non-punishment. It also has MOUs in place in which parties confirm that victims are to be treated as victims not as offenders, and agree not to punish victims for illegal entry to or exit from its territory, or any other offences arising directly from human trafficking, including with Thailand (2009, article 8(a)) and with China (2009, article 5(1))

In the **Philippines**, The Guidelines on the Protection of the Rights of Trafficked Women (Philippine Commission on Women in coordination with the Inter-Agency Council Against Trafficking (IACAT) 2013) emphasize that 'trafficked women should be treated as victims not offenders' (5.3.8.1.1.)

The *Guidelines on the Referral System involving Trafficking in Persons Cases adopted by the Inter-Agency Council Against Trafficking* (IACAT) on 02 March 2017 through Resolution No.006 Series of 2017, state that trafficked persons have the right to: 'not be criminalized (or charged, or punished) for their involvement in unlawful activities during their trafficking experience.'

In **Singapore** the *National Approach against Trafficking in Persons 2016-2026* of the Singapore Inter-Agency Task Force on Trafficking in Persons, is silent on the issue of non-punishment.

#### In **Thailand**

- The *Second National Policy, Strategies and Measures to Prevent and Suppress Trafficking in Persons 2017-2021* (Ministry of Social Development and Human Security, 2017) is silent on the non-punishment principle but does set out to strengthen identification of victims.
- Thailand also has MOUs in place in which parties confirm that victims are to be treated as victims not as offenders, and agree not to punish victims for illegal entry to or exit from its territory, or any other offences arising directly from human trafficking, including with Myanmar (2009, article 8(a)); and with Cambodia (2014) for women and children (article 6) and Viet Nam (2008) for women and children (article 6). The 2017 MOU between Lao and Thailand does not specifically address non-punishment but speaks to justice, legal protection (article 6) and the need to not subject them to further victimization in legal proceedings (article 17).

In **Viet Nam** the *Minimum Standards in Provision of Services to Victims of Human Trafficking* (Ministry of Labour, Invalids and Social Affairs, 2011) are silent on the principle of non-punishment. There are MOUs in place with Thailand (2013) and Cambodia (2004) confirming that victims are to be treated as victims not as offenders, and in which Parties agree not to punish women and child victims for illegal entry to or exit from its territory, or any other offences arising directly from human trafficking. In the MOU between Lao and Viet Nam (2010) parties commit to ensuring that victims 'not detained and/or punished

for illegal immigration or any other related administrative offence.’ In the MOU with China (2010) parties agree to not punish victims illegally entering or exiting their national territories, or other illegal acts as an immediate result of being trafficked (article 2A).

**Question 16:** To your knowledge, what has been the role of these instruments in protecting trafficked persons from punishment?

Can you give examples of how they have been applied in practice?

**Question 17:** What other guidelines or policy documents exist in your country that are relevant to the non-punishment principle?

Can you give examples of how they have been applied in practice?

## Part 5: Closing questions (20 mins)

**Facilitator to explain:** We are now coming to the end of our discussion. In the time remaining, I would like to seek your final input and advice towards effectively upholding and applying the non-punishment principle.

**Question 18:** What do you think are the key **challenges** and/or limitations in law, policy and practice to the non-punishment principle in your country?

**Question 19:** What **good practice** examples and recommendations do you have to achieve the non-punishment principle in law, policy and practice?

**Question 20:** Finally, do you have:

- any further comments about the principle of non-punishment in your country,
- any recommendations of material (e.g. case law, research reports) we should look at
- or suggestions of experts we should talk to?

Further comments:

Recommended materials:

Experts:

### **Points for Facilitator to make in closing:**

- If you would like to share any further comments in writing, or direct us to any research, reports, case law, or other material, please feel free to send them to us via: [email]
- We will be translating our notes into English to provide to the author of the paper. We will not be recording your names in those notes.
- We would like to thank you for your time today, and for giving your time and your expertise to this important study.
- We look forward to sharing the final study with you when it is published.



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