

# Executive Summary

## 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.

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

Professor Siobhán Mullally







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.





Implementation of the non-punishment principle for victims  
of human trafficking in ASEAN Member States