



# **ASEAN Guideline on the Implementation of the Non-Punishment Principle for Protection of Victims of Trafficking in Persons**

2025



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# **ASEAN Guideline on the Implementation of the Non-Punishment Principle for Protection of Victims of Trafficking in Persons**

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# Guidelines at a glance



## Guideline

## How to achieve the Guideline in practice

### Implementing the non-punishment principle

#### ...in legislation

**Guideline [1]**  
**Strengthen counter-trafficking legislation to protect victims from punishment**

- Explore amending the trafficking in persons definition to include exploitation in criminal activities
- Draft or amend explicit statutory provisions
- Clarify the required connection between the trafficking and the victim's unlawful activity
- Clarify the burden and standard of proof required

**Guideline [2]**  
**Strengthen other (non-trafficking) legislation to protect victims from punishment**

- Explore amending criminal and administrative provisions to reduce risks of victims of trafficking being prosecuted
- Establish an appropriate minimum age of criminal responsibility
- Explore amending or enacting legislation to allow for criminal records of victims to be vacated, expunged or sealed

#### ...in preliminary screening and identification of victims of trafficking

**Guideline [3]**  
**Strengthen capacity of frontline officials to identify potential victims of trafficking among people they encounter as offenders**

- Strengthen understanding of the constituent elements of trafficking in persons
- Strengthen understanding of intersecting dimensions of trafficking in persons
- Capacitate officials to apply the presumptions of victimhood and minority
- Challenge misconceptions and unconscious bias about trafficking and victimization
- Promote non-discrimination in screening and identification processes
- Promote child-friendly, gender-sensitive, trauma-informed and skilled screening and identification
- Challenge State policies that raise risks of punishment of victims of trafficking

<p><b>Guideline [4]</b>  <b>Equip frontline officials with indicators to screen and identify victims</b></p>	<ul style="list-style-type: none"> <li>• Gather, review and adapt existing indicators to context</li> <li>• Ensure indicators do not exclude potential victims</li> <li>• Regularly update indicators</li> <li>• Disseminate indicators to stakeholders who may encounter victims</li> <li>• Sensitize practitioners on how to apply indicators in practice</li> <li>• Support harmonized indicators across the ASEAN region</li> </ul>
<p><b>Guideline [5]</b>  <b>Empower arresting officers to apply the non-punishment provision</b></p>	<ul style="list-style-type: none"> <li>• Ensure frontline officers understand and know how to exercise their discretions</li> <li>• Promote obligations to proactively investigate trafficking in persons</li> <li>• Build networks of practitioners to support victim screening and identification</li> <li>• Remove disincentives and create incentives to apply the non-punishment principle</li> <li>• Ensure officials know how to refer victims into protection channels</li> </ul>
<p><b>Guideline [6]</b>  <b>Ensure arresting officers fulfill their obligations to arrested persons</b></p>	<ul style="list-style-type: none"> <li>• Sensitize frontline officers to the impact of arresting victims of trafficking</li> <li>• Ensure arresting officers uphold the right of arrested persons to information</li> </ul>
<p><b>Guideline [7]</b>  <b>Recognise victim status of persons identified in other ASEAN Member States</b></p>	<ul style="list-style-type: none"> <li>• Explore amending existing bilateral agreements to strengthen application of the non-punishment principle</li> <li>• Implement existing agreements relevant to the non-punishment principle</li> </ul>
<p><b>...when victims of trafficking are facing trials</b></p>	
<p><b>Guideline [8]</b>  <b>Strengthen capacity of prosecutors to apply the non-punishment principle</b></p>	<ul style="list-style-type: none"> <li>• Clarify the relationship between victim status and non-prosecution</li> <li>• Ensure prosecutors understand their discretions and know how to apply them</li> <li>• Require prosecutors to check the <i>mens rea</i> element of the victim's alleged offence</li> <li>• Support prosecutors to reason through their decisions on whether to prosecute victims of trafficking</li> <li>• Ensure information is provided to victims about decisions to prosecute them</li> </ul>

<p><b>Guideline [9]</b>  <b>Strengthen capacity of defence lawyers to apply the non-punishment principle</b></p>	<ul style="list-style-type: none"> <li>• Ensure victims of trafficking facing punishment are provided with legal aid</li> <li>• Ensure defence lawyers know how to apply defences that are established in domestic legislation for victims of trafficking</li> <li>• Promote broad interpretation and application of defences in the context of trafficking</li> <li>• Ensure defence lawyers understand the irrelevance of consent as a defence to trafficking</li> </ul>
<p><b>Guideline [10]</b>  <b>Strengthen capacity of members of the judiciary to apply the non-punishment principle</b></p>	<ul style="list-style-type: none"> <li>• Sensitize judges to the elements of trafficking in persons and application of the non-punishable principle</li> <li>• Ensure judges understand their roles and responsibilities to detained victims</li> <li>• Sensitize judges to how fair trial rights support application of non-punishment</li> </ul>
<p><b>Guideline [11]</b>  <b>Apply restorative rather than retributive justice for victim-offenders</b></p>	<ul style="list-style-type: none"> <li>• Explore opportunities to apply restorative justice models to victims of trafficking are on trial</li> <li>• Ensure restorative justice approaches to children who commit crimes</li> </ul>
<p><b>...when victims have been convicted</b></p>	
<p><b>Guideline [12]</b>  <b>Avoid or mitigate sentences for convicted victims of trafficking</b></p>	<ul style="list-style-type: none"> <li>• Consider how rules relating to sentence mitigation can provide relief from punishment</li> <li>• Ensure that sentences imposed reflect the culpability of the victim-offender</li> </ul>
<p><b>Guideline [13]</b>  <b>Provide victims with remedies for wrongful punishments</b></p>	<ul style="list-style-type: none"> <li>• Explore existing opportunities for victims to seek remedies for wrongful punishment</li> <li>• Explore opportunities to vacate, expunge or seal convictions of victims of trafficking</li> <li>• Identify and address barriers victims face in having convictions eliminated</li> </ul>

... in monitoring and reporting

**Guideline [14]**

**Incorporate implementation of the non-punishment principle into national monitoring mechanisms**

- Develop indicators to measure implementation of the non-punishment principle
- Collect, protect, aggregate and analyse data on implementation of the non-punishment principle
- Apply a multi-stakeholder approach to monitoring implementation

**Guideline [15]**

**Report on implementation of the non-punishment principle**

- Report on implementation of the non-punishment principle to SOMTC
- Develop and apply a standardized approach to reporting on implementation of the non-punishment principle
- Public reports on implementation of the non-punishment principle

# Acronyms

ACTIP	ASEAN Convention against Trafficking in Persons, Especially Women and Children
AICHR	ASEAN Intergovernmental Commission on Human Rights (AICHR)
AMMTC	ASEAN Ministerial Meeting on Transnational Crime
ASEAN	Association of Southeast Asian Nations
ASEAN-ACT	ASEAN-Australia Counter-Trafficking
CSO	Civil Society Organisation
EU	European Union
IO	International Organisation
NGO	Non-Governmental Organisation
OHCHR	Office of the United Nations High Commissioner for Human Rights
SOMTC	ASEAN Senior Officials Meeting on Transnational Crime
TIP	Trafficking in persons
UN	United Nations
UNTOC	United Nations Convention against Transnational Organized Crime

# Glossary

Child	For the purpose of these Guidelines, a <b>child</b> is any person under eighteen years of age. <sup>1</sup>
Counter-trafficking practitioner	For the purpose of these Guidelines, a <b>counter-trafficking practitioner</b> is a State actor mandated to address trafficking in persons. State counter-trafficking practitioners may also include non-state actors who may be involved in supporting States to respond to trafficking in persons in line with international and regional law
Non-punishment principle	For the purpose of these Guidelines, the <b>non-punishment principle</b> refers to the ASEAN-recognised principle in which each ASEAN Member State 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. <sup>2</sup>
Presumed / potential victim of trafficking	For the purpose of these Guidelines, a <b>presumed victim of trafficking</b> or a <b>potential victim of trafficking</b> is a person credibly suspected by a frontline official of having been the object of trafficking in persons who have not been formally identified as such.
Trafficking for forced criminality (or for exploitation in criminal / unlawful / illegal activities)	For the purpose of these Guidelines, <b>Trafficking for forced criminality (or for exploitation in criminal / unlawful / illegal activities)</b> are interchangeable terms that can be understood as trafficking in persons for the purpose of exploitation of victims through forcing or otherwise compelling them to commit criminal acts for economic or other gains of traffickers or exploiters. <sup>3</sup>

1 Article 3(d) 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(d) of the ASEAN Convention against Trafficking in Persons, Especially Women and Children (ACTIP)

2 Article 14(7), ASEAN Convention against Trafficking in Persons, Especially Women and Children (ACTIP)

3 Source: adapted from [Casinos, cyber fraud, and trafficking in persons for forced criminality in Southeast Asia: Policy Report](#) (UNODC, September 2023) p.1

<p>Trafficking in Persons</p>	<p><b>Trafficking in persons</b> is defined in the United Nations Trafficking in Persons Protocol supplementing the UNTOC and the ASEAN Convention Against Trafficking in Persons, Especially Women and Children, as follows:</p> <p>(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.</p> <p>(b) The consent of the victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any means set forth in subparagraph (a) have been used;</p> <p>(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.</p> <p>(d) “Child” shall mean any person under eighteen years of age.</p>
<p>Victim of trafficking in persons</p>	<p>For the purpose of these Guidelines, a victim shall mean any natural person who is subject to an act of trafficking in persons as in the ASEAN Convention against Trafficking in Persons, Especially Women and Children.<sup>4</sup></p>
<p>Victim-offender</p>	<p>For the purpose of these guidelines, a victim-offender is a person who is a presumed victim or a victim of trafficking in persons who has also been involved in the commission of unlawful acts committed by them, if such acts are directly related to the acts of trafficking.</p>

<sup>4</sup> Article 2(e), ASEAN Convention against Trafficking in Persons, Especially Women and Children (ACTIP)

# Foreword from the ASEAN Intergovernmental Commission on Human Rights (AICHR)

Trafficking in persons continues to be one of the most pressing and devastating challenges of our time, stripping individuals of their dignity and freedoms while eroding the very fabric of our societies. Victims of trafficking often face not only exploitation but also the added injustices of stigma, criminalisation, and a lack of access to justice.

As the Representative of Indonesia to the ASEAN Intergovernmental Commission on Human Rights (AICHR) from 2019 to 2024, I have had the privilege of witnessing ASEAN's growing commitment to addressing the complexities of trafficking in persons.

The ASEAN Guideline on the Implementation of the Non-Punishment Principle for Protection of Victims of Trafficking in Persons represents a landmark step in our collective fight to address these injustices, reaffirming ASEAN's commitment to protecting victims and ensuring their rights are upheld. It reinforces the principle that protecting victims is not only a legal obligation but also a moral and humanitarian duty.

This Guideline is a product of tireless collaboration, reflecting the collective efforts of many dedicated actors across ASEAN. I extend my deepest appreciation to the Representatives of AICHR, the Senior Officials Meeting on Transnational Crime (SOMTC), and the ASEAN Sectoral Bodies. I also thank the experts and civil society organisations who generously lent their time, expertise, and commitment to shaping this important document.

This Guideline reflects the commitment of ASEAN Member States to the principles enshrined in the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP), and builds upon the foundation laid by the ASEAN Multi-Sectoral Work Plan Against Trafficking in Persons (Bohol TIP Work Plan 2.0).

It is a testament to the region's recognition that the non-punishment principle is not only a legal obligation but also a moral imperative. By preventing the criminalisation of victims, we affirm their dignity and enhance the effectiveness of our efforts to prosecute traffickers and dismantle criminal networks.

I would also like to express my sincere gratitude to the team at the ASEAN – Australia Counter Trafficking program and Dr. Marika McAdam that without them, this Guideline will not be realised. They have been instrumental in ensuring the Guideline's development was comprehensive, inclusive, and grounded in international best practices.

The Guideline represents ASEAN's shared resolve to ensure that victims of trafficking are never punished for crimes they were compelled to commit as a direct result of their exploitation. It offers practical and actionable steps for legislators, law enforcement agencies, judicial bodies, and other stakeholders across ASEAN Member States to implement the non-punishment principle.

More than a legal framework, it calls for a shift in mindset—prioritising a victim-centred approach, fostering stronger inter-agency collaboration, and aligning national efforts with the ACTIP.

It also calls for action as it challenges us to break down systemic barriers, to create environments where victims can seek protection without fear of reprisal, and to foster regional solidarity in the fight against trafficking. Its success, however, depends on us all—on the commitment of governments to adopt and enforce these practices, on the courage of civil society to advocate for change, and on the persistence of every individual dedicated to the cause of justice.

This Guideline is also a reminder of what is possible when we work together. It underscores the power of partnerships across governments, civil society, and regional mechanisms, showing that when we combine our strengths, we can dismantle systems of exploitation and build pathways to justice and empowerment. I am honoured to have been part of ASEAN's journey towards this milestone.

Let us embrace this Guideline not only as a tool but as an opportunity to reaffirm our shared values of human rights, justice, and equality. Together, we can transform this vision into reality, ensuring that victims are supported, empowered, and protected.

In doing so, we strengthen not just our systems but the very fabric of our ASEAN Community—one rooted in compassion, resilience, and the unwavering belief in the dignity of every person.

**Yuyun Wahyuningrum**

Representative of Indonesia to AICHR (2019–2024)

# Foreword from the ASEAN Senior Officials Meeting on Transnational Crime (SOMTC) - Philippines/Voluntary Lead Shepherd on TIP Priority Area

The ASEAN Senior Officials Meeting on Transnational Crime (SOMTC)-Philippines remains steadfast in its commitment to combating trafficking in persons through comprehensive, victim-centered approaches. A key initiative in this effort is the ASEAN Guideline on the Implementation of the Non-Punishment Principle for Victims of Trafficking in Persons, which stands as a testament to our collective dedication to ensuring both prevention and protection for all victims. This initiative, a product of close collaboration between SOMTC and the ASEAN Intergovernmental Commission on Human Rights (AICHR), reflects the importance of an integrated, cross-sectoral response to TIP.

As I reflect on our collective efforts, it is evident that the ASEAN Multi-Sectoral Work Plan on Trafficking in Persons (2023-2028) represents a milestone in our journey—one that fosters collaboration across diverse sectors, uniting our region in the fight against this heinous crime.

As the ASEAN Voluntary Lead Shepherd on Trafficking in Persons Priority Area, the Philippines recognizes the importance of promoting synergy among ASEAN Sectoral Bodies. The development of this Guideline was made possible through constructive dialogue and shared expertise among relevant stakeholders. This strong partnership highlights our region's collective will to strengthen the protection of trafficking victims and prevent their further victimization.

The non-punishment principle is integral to ASEAN's broader efforts in combating transnational crime while safeguarding human rights. Victims of trafficking often endure severe exploitation, and it is our duty to ensure that they receive protection rather than prosecution. The ASEAN Guideline provides a structured approach for ASEAN Member States to incorporate this principle within their national frameworks, in accordance with their respective legal systems. This approach aligns with international best practices and reinforces ASEAN's vision of a just and inclusive community.

SOMTC-Philippines acknowledges that addressing trafficking in persons requires a multi-dimensional strategy that includes prevention, protection, prosecution, policy and legislation, capacity building, and international cooperation. This Guideline serves as a practical resource for law enforcement officers, judicial authorities, and policymakers in navigating the complexities of applying the non-punishment principle. Moreover, the collaboration between SOMTC and AICHR in developing this Guideline underscores the importance for a human rights-based approach in addressing trafficking in persons.

The intersection of security and human rights considerations is crucial in tackling the root causes and consequences of trafficking. Victims must be treated with dignity and provided with the necessary support to rebuild their lives.

As a non-legally binding instrument, the Guideline is designed to complement existing national and regional initiatives to combat trafficking in persons. ASEAN Member States retain the flexibility to implement the Guideline in accordance with their domestic legal frameworks and international obligations.

In this context, the adoption of the non-punishment principle is a milestone to empower the ASEAN Member States to integrate it into their national policies and frameworks. SOMTC recognizes that the successful implementation of the non-punishment principle requires continuous capacity-building and knowledge-sharing among ASEAN Member States. The exchange of best practices and experiences will contribute and promote a more uniform application of this principle across the region.

As we move forward, ASEAN must remain agile and responsive to the evolving challenges of transnational crime, particularly trafficking in persons. The dynamic nature of this issue requires adaptable and forward-thinking measures to ensure victims receive the protection they deserve.

SOMTC-Philippines extends its sincere appreciation to AICHR-Indonesia and all partners for their invaluable contributions in developing the ASEAN Guideline. This collaborative effort ensures the Guideline serves as a robust and practical resource for ASEAN Member States in combatting trafficking and other transnational crimes, reaffirming our collective commitment to justice, human rights, and regional security.



**NESTOR B SANARES**  
ASEAN SOMTC-Leader Philippines  
ASEAN Voluntary Lead Shepherd on Trafficking-in-Persons Priority Area

# Foreword by the Australian Ambassador to ASEAN and the Australian Ambassador to Counter Modern Slavery, People Smuggling and Human Trafficking

Trafficking in persons remains one of the most pressing challenges of our time. Victims of trafficking often endure unimaginable suffering and exploitation. The evolving nature of the crime, including the rise of trafficking for forced criminality, underscores the need for continuous efforts to protect the rights of victims of trafficking.

For more than 20 years, Australia has partnered with ASEAN and ASEAN Member States to combat trafficking in persons. This collaboration continues through our ASEAN Australia Counter Trafficking program, which supports ASEAN and its member states to implement the ASEAN Convention against Trafficking in Persons, Especially Women and Children (ACTIP). ACTIP provides strong foundation for applying the non-punishment principle, in line with ASEAN Member States' domestic laws.

Upholding the “non-punishment principle” helps protect the rights of victims of trafficking and ensures that they are not punished or otherwise penalised for unlawful acts committed as a direct result of their trafficking.

The Australian Government is proud to support the development of this Guideline on the Implementation of the Non-Punishment Principle, through strong collaboration among ASEAN Member States, the ASEAN Senior Officials Meeting on Transnational Crime, the ASEAN Intergovernmental Commission on Human Rights, and various international and civil society organisations.

We extend our deepest gratitude to all those who contributed to the development of this Guideline. Let us continue to work together to ensure that victims of trafficking receive the justice and protection they deserve in accordance with ACTIP and international law.



**H.E. Tiffany McDonald**  
Australian Ambassador to ASEAN



**H.E. Lynn Bell**  
Australian Ambassador to Counter Modern  
Slavery, People Smuggling and Human  
Trafficking

# Acknowledgements

The ASEAN Guideline on the Implementation of the Non-Punishment Principle for Protection of Victims of Trafficking in Persons has been developed with the generous support of the Australian Government through the ASEAN-Australia Counter Trafficking program.

This ASEAN Guideline is the product of collaborative and consultative efforts of both the ASEAN Senior Officials Meeting on Transnational Crime (SOMTC) and the ASEAN Intergovernmental Commission on Human Rights (AICHR), recognising ASEAN's commitment to upholding the human rights of victims of trafficking in persons and responding to transnational crime impacting the region. It provides guidance to ASEAN Member States in implementing obligations under the ASEAN Convention Against Trafficking in Persons, Especially Women and Children and the ASEAN Multi-Sectoral Work Plan Against Trafficking in Persons 2023-2028 ('Bohol TIP Work Plan 2.0') to ensure that trafficked persons should not be held criminally or administratively liable for unlawful acts committed by them, if such acts are directly related to the acts of trafficking.

The proponents of this guideline, SOMTC and AICHR, adopted an inclusive process for developing the document, which included extensive consultation with all ASEAN Member State governments, other ASEAN Sectoral Bodies, civil society and international organisations. Consultative workshops were held on 10-12 June 2024 and on 2-3 September 2024 to gather insights and experiences from a range of counter-trafficking practitioners from within and beyond the ASEAN region. The draft guideline was circulated to all ASEAN Member State representatives of SOMTC and AICHR.

SOMTC and AICHR would like to acknowledge and thank Dr Marika McAdam, the consultant supporting the development of this ASEAN Guideline, and Ms Nurul Qoiriah, Gender Equality, Disability and Social Inclusion and Victim Rights Director of the ASEAN-Australia Counter Trafficking program for their technical and facilitative support throughout the process.

# Introduction

Member States of the Association of Southeast Asian Nations (ASEAN) are all parties to the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP). Article 14(7) of that instrument sets out the non-punishment principle as follows:

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.

The ASEAN Multi-Sectoral Work Plan Against Trafficking in Persons 2023-2028 ('Bohol TIP Work Plan 2.0'), adopted *ad referendum* by the 17th AMMTC on 21 August 2023 strengthens Article 14(7) of ACTIP in its Principle 3, which sets out that "Trafficked persons should not be held criminally or administratively liable for unlawful acts committed by them, if such acts are directly related to the acts of trafficking."<sup>5</sup>

Under the Bohol TIP Work Plan 2.0, the ASEAN Senior Officials Meeting on Transnational Crime (SOMTC) is the coordinating ASEAN sectoral Body on activities/programmes to give effect to the non-punishment principle in the anti-trafficking in persons laws, policies and practices of ASEAN Member States. The activities that fall within this mandate include encouraging ASEAN Member States to review, and where appropriate, to reform laws or prosecution codes or guidelines; to build capacity of law enforcement officials and prosecutors on the non-punishment principle; and to conduct regular screenings for persons in immigration and detention facilities to detect trafficked persons among them.

This non-legally binding ASEAN Guideline has emerged from the joint contribution of both SOMTC and the ASEAN Intergovernmental Commission on Human Rights (AICHR), in recognition of the fact that the non-punishment principle is both important for upholding the human rights of victims of trafficking in persons, and for responding to transnational crime. It is offered to support ASEAN Sectorial Bodies and ASEAN Member States in their ongoing work to strengthen the application of the non-punishment principle in practice, subject to each ASEAN Member State's domestic legislation and their international and regional obligations.

The ASEAN Guideline draws on [Implementation of the non-punishment principle for victims of human trafficking in ASEAN Member States](#) (ASEAN-ACT, 2022), which is recommended as a resource to support ASEAN Member States in their work<sup>6</sup> and two rounds of consultation in June and September 2024 attended by the representatives of SOMTC, AICHR, national TIP stakeholders, relevant ASEAN Sectorial Bodies, National Human Rights Institutions, and Civil Society Organisations (CSO).

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5 The non-punishment principle is found in the [OHCHR Principles and Guidelines on Human Rights and Human Trafficking](#) (2002). The principle is given further regional expression by 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; the ASEAN Practitioner Guidelines on Criminal Justice Response to Trafficking in Persons (2007); and the ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children.

6 Available in English, Bahasa Indonesia, Burmese, Khmer, Lao, Thai and Vietnamese.

## SECTION 1



# Understanding the non-punishment principle

## Section 1. Understanding the non-punishment principle

ASEAN Member States are obliged in international and regional law, subject to their own domestic laws, rules, regulations and policies, to investigate and prosecute traffickers, protect and assist victims of trafficking and cooperate to these ends. Member States should consider applying the non-punishment principle to fulfill these obligations.<sup>7</sup>

The ACTIP is a legally binding instrument. By virtue of Article 14(7) of the ACTIP, States party to the ACTIP have committed to 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.

Although the non-punishment principle applies across the ASEAN region, victims of trafficking have been detained in and deported from ASEAN countries for status related-offences, and prosecuted for minor and serious offences they have committed as a consequence of their trafficking or in efforts to escape it.<sup>8</sup> While the obligation is clear, ASEAN Member States need to strengthen the implementation of the non-punishment principle in practice.

### *What is the non-punishment principle?*

The non-punishment principle is a recognised principle setting out that states should consider not punishing victims of trafficking in persons for unlawful acts committed by them, if such acts are directly related to the acts of their trafficking. The purpose of the non-punishment principle is to guard against the arrest, detention, deportation, investigation, prosecution, conviction and sentencing of people for unlawful activities they have been involved in as a result of their trafficking. It also acts to guard against other forms of punishment, including but not limited to deprivation of citizenship.

The non-punishment principle reflects the nature of trafficking in persons as a serious human rights violation. Punishing victims would in certain cases be contrary to State commitments to consider protecting them, and can lead to further serious human rights violations.<sup>9</sup>

The non-punishment principle is also underpinned by criminal law, which only holds a person liable for committing crime where they have committed that crime intentionally. Assessment of criminal liability requires intention to commit a crime; the non-punishment principle does not prevent prosecution of people involved in unlawful activities of their own free will. Rather, the non-punishment principle recognises that where a person lacks criminal intent to commit a crime, because means have been used to traffic them, they cannot be held responsible for their unlawful actions. Traffickers use means against a victim – including force, fraud, coercion and the abuse of their vulnerability, to bend victims to their will. A victim of trafficking cannot be held liable for their involvement in unlawful activities where a trafficker has used means to damage or diminish any intention a victim may have had, meaning that the victim cannot be held responsible for their actions. In the case of child victims, the Special Rapporteur on Trafficking in Persons, Especially Women and Children has recommended that once the relationship between the offence committed and a child's status as a presumed or identified victim of trafficking is established, States should consider discontinuing proceedings, expunging already-issued conviction,

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7 See the United Nations Convention against Transnational Organized Crime (UNTOC) and its supplementary Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, as well as the ASEAN Convention against Trafficking in Persons, Especially Women and Children (ACTIP).

8 See Annex 4.

9 *Implementation of the non-punishment principle Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally*, UN Doc. A/HRC/47/34, 17 May 2021 [18]-[19].

and / or to immediately release a child from detention facilities.<sup>10</sup>

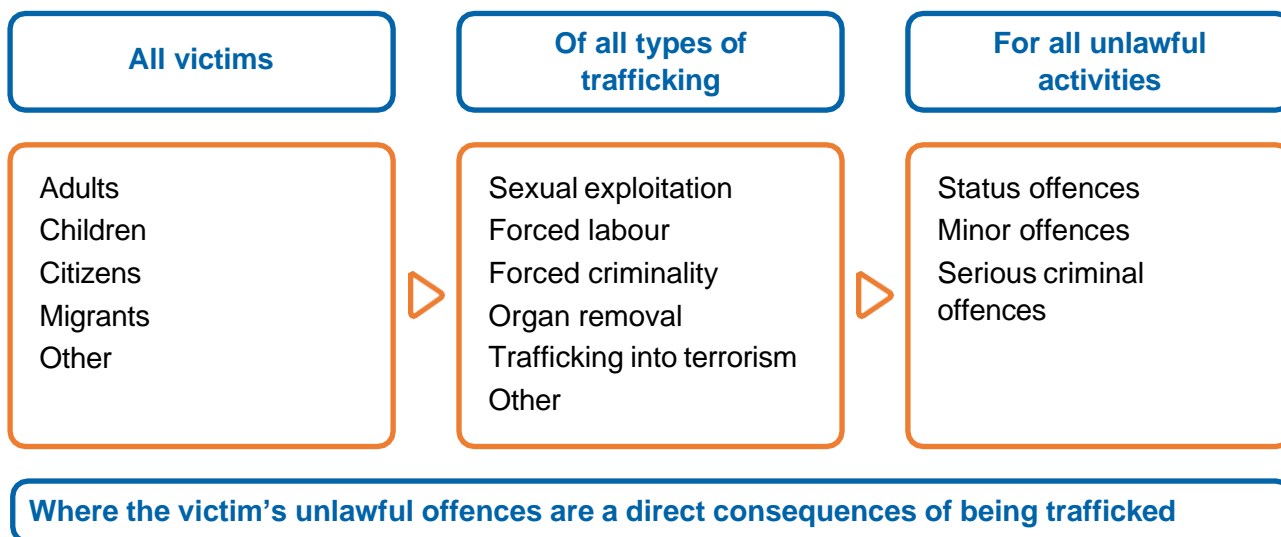
'Victim' and 'offender' are not binary concepts: a person may be both a victim and an offender. It may be appropriate for victims of trafficking to be protected from punishment for some unlawful activities, but be punished for others that do not relate to their being trafficked. For example, a victim may have been trafficked into criminality, for example, where they are exploited to sell illegal narcotics. In this case, they should not be punished for that drug-related offence, but it may still be appropriate to punish him or her for other unlawful activities they have been involved in that do not relate to having being trafficked.

## Scope

The non-punishment principle applies to all stages of trafficking and all stages of criminal justice. It should be applied as soon as frontline officials have a credible suspicion that the person may be a victim of trafficking, regardless of the gravity or the seriousness of the offence he or she has committed or been an accessory to. Some ASEAN Member States have policies in place to allow authorities that suspect a person is a victim of trafficking to treat the person as if he or she is a victim for the purpose of initial assistance and protection. This is known as the presumption of victimhood.<sup>11</sup> Where ASEAN Member States apply this presumption of victimhood, it should be applied (see Section 3, guideline 4) to protect presumed / potential victims from punishment.

The non-punishment principle applies to all stages of the trafficking process and in every stage of the criminal justice process. Victims should therefore be protected from being punished for civil, administrative, immigration and criminal offences.

Diagram: Scope of application of the non-punishment principle



10 *Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally*, UN Doc. A/HRC/47/34, 17 May 2021 [47]. Also see Guideline 8(3) of the [OHCHR Principles and Guidelines on Human Rights and Human Trafficking](#) (2002)

11 *Policy Guide on Identifying Victims of Trafficking: An Introductory Guide for policy makers and practitioners* (Bali Process, May 2015) p.3

The type or severity of unlawful activity is not the determinant of whether the non-punishment principle applies. Rather the non-punishment principle applies when the unlawful activity is directly related to the person being trafficked. In other words, where the criminal elements of the trafficking in persons offence that are required in the domestic law of a given State, are causally connected to the victim's offending, the State may determine that the non-punishment principle should apply. For example, where a victim is involved in a criminal activity as a direct result of being trafficked, the trafficker's use of means (including force, fraud, coercion, deceit, abuse of a position of vulnerability) to induce that involvement is such that the victim lacks sufficient intent to be held criminally responsible.

In short, there is no limit to the type of unlawful activity the non-punishment principle applies to. It should be applied even where victims have committed serious crimes as a direct result of being trafficked, such as drug cultivation or cyber-scramming or terrorism. These and other examples of unlawful activities that the non-punishment principle applies to are contained in Annex 5. Applying the non-punishment principle does not mean giving immunity to victims from being punished for any and all offences they commit, but rather that the principle should be applied to make a determination about their liability.

### ***Box: Guarding against the misuse of the non-punishment principle***

Some criminal justice practitioners and policymakers may express concerns that the non-punishment principle can 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.

All laws can be misused by nefarious actors and misapplied by practitioners who lack skills and capacity to appropriately apply the law. In practice, the non-application of the non-punishment principle to protect victims, presents a higher risk than its misapplication to protect offenders.

The risk 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 (act, means and purpose) test or two-element (act and purpose) test where the victim is a child to identify that a person is a victim of trafficking, and to prove or disprove the 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 in accordance with the legal system in the relevant jurisdiction as well as domestic and international human rights obligations.

### ***Why is the non-punishment principle important?***

The application of the non-punishment principle is an integral part of the obligation of the State to identify, protect and assist victims of trafficking in persons and to prosecute traffickers. It is also important to uphold the rule of law, to ensure that victims are not punished for conduct they would not otherwise have committed if it were not for their victimization. The principle is useful to support States to protect the people who need to be protected, to prosecute those who should be prosecuted. The application of the principle, results in optimal human rights outcomes as well as better criminal justice outcomes.

## Protection of victims of trafficking

States have obligations in trafficking in persons law and human rights law to protect people from being trafficked and to identify, protect and assist victims of trafficking in persons. The non-punishment principle is therefore a necessary part of State's protection obligations.

States must protect victims from punishment through administrative systems, migration and labour management systems and by criminal justice systems. The non-punishment principle aims to protect victims from being punished including through deprivation of liberty in immigration or other facilities, overstay fines, re-entry bans, deportation or removal. It also aims to protect victims from treatment that amounts to punishment, including being placed in shelters against their will, or provided with services they do not need or want.

The non-punishment principle also acts to guard against deprivation of nationality or citizenship and exclusion from international refugee protection, including through adherence to the principle of *non-refoulement*. Where the non-punishment principle is not effectively adhered to in a victim's country of origin, the risk that they will face irreparable harm or other serious human rights violation upon being returned, raises the *non-refoulement* obligations of the host state. Where rights-based return is not an option, victims of trafficking should have access to secure legal status and long-term social inclusion measures as a rights-based alternative to return.<sup>12</sup>

The principle also applies to ensure that victims are not wrongfully arrested and prosecuted as offenders, and requires that remedies are provided for the violation of their rights, including their wrongful detention, deportation or conviction.

The application of the non-punishment principle to victims of trafficking is beneficial to the criminal justice system. Unless they are protected from punishment, victims are unlikely to support authorities to effectively identify them. Furthermore, victims who are protected from punishment are more likely to cooperate with authorities in bringing traffickers and other serious criminals to justice. There are many reasons why victims may be reluctant to cooperate with criminal justice practitioners, including but not limited to the following:

- They may not trust authorities because they think – rightly or wrongly – that authorities are complicit in the activities of traffickers.
- They may be reluctant to support authorities to investigate and prosecute traffickers, because doing so will mean prolonged stays in shelters and missed opportunities to work and to support their families.
- They may fear that helping authorities will result in retaliation by traffickers.
- They may fear that cooperating with authorities will result in their own punishment, where the information they share implicates them in unlawful activities.

Overcoming these and other barriers point to the need to apply whistle-blower protections as well as witness protections in line with obligations in international, regional and domestic law, to victims of trafficking who may be involved in unlawful activities.<sup>13</sup> They also highlight the need for victim-centred approaches to protect and assist victims in accordance with their individual needs and preferences. These concerns also underline the importance of applying the non-punishment principle to protect victims, to encourage their cooperation and to bring traffickers and other serious criminals to justice.

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12 The Global Compact for Safe, Orderly and Regular Migration, Resolution adopted by the General Assembly on 19 December 2018, UN Doc A/RES/73/195, 11 January 2019, paragraph 26(h) calls for States to "Provide migrants who have become victims of trafficking in persons with protection and assistance, such as measures for physical, psychological and social recovery, as well as measures that permit them to remain in the country of destination, temporarily or permanently, in appropriate cases, facilitating victims' access to justice, including redress and compensation, in accordance with international law".

13 See *inter alia* article 24 of UNTOC concerning protection of witnesses.

### Box: Example (begging)

A, who has a learning disability, was brought to the city by a distant relative. His family was told that A would be given a good job in the city and have time to go to a special school where there are teachers who can help him. Instead, he is made to sit in the street and ask people for money. He has not been allowed to contact his family in the months since he has been in the city. One day, the police come and take him away and put him in place he is not able to leave. They tell him it is for his protection, but he just wants to go home to his family.

*Application of non-punishment principle:* Staff at the trafficking shelter where A is kept, recognise that he does not want to be in the shelter and does not understand why he is in the shelter. They explain to him that he needs to remain in the country because the police are investigating the people who brought him to the country and made him beg on the street, and that he will need to tell a court what happened to him. A is distressed and repeats that he wants to return home to his family. The social services worker who represents A's interests, liaises with investigators to arrange for A to make a pre-trial statement so that he does not need to give a testimony in court, and can return to his home as soon as possible.

## Prosecution of traffickers

States are obliged in international law to prevent and combat trafficking in persons, and prosecute its perpetrators. Countries with weak counter-trafficking capacity are attractive to organised criminals as they offer fertile conditions to operate without fear of prosecution. Traffickers often expose their victims to risks of punishment by shifting their own liability onto victims, as a deliberate strategy to frustrate efforts of criminal justice practitioners. Therefore, where States fail to apply the non-punishment principle to victims of trafficking, there is a danger that they are helping traffickers to carry out their criminal activities. A key tactic of traffickers is to threaten victims by telling them that authorities will arrest, detain and deport them or even prosecute them for the activities they have been involved in. Where State officials play into traffickers' hands by doing these things, traffickers are proven right, and the attention of authorities is diverted away from efforts to bring traffickers to justice, to instead punish victims. Therefore, States that prosecute or otherwise punish victims of trafficking, are not effectively investigating, prosecuting and disrupting trafficking in persons, rather, they are supporting traffickers and other criminals to commit their crimes with impunity.

States have a duty to investigate the connections between the victims of trafficking they encounter - whether in the sex industry, on an illegal, unreported and unregulated fishing (IUU) fishing vessel, or in a scamming compound or cannabis factory - and the people exploiting them. Where these connections are not made, States fail in their obligations to investigate and prosecute perpetrators of serious crimes.

Victim testimony is often crucial evidence in cases against traffickers, particularly where authorities are not proactively investigating trafficking in persons. Where victims are not protected from punishment, they are unable to cooperate with authorities in their efforts to investigate and prosecute their traffickers. Therefore, failing to apply the non-punishment principle can result in missed opportunities to convert victims into witnesses against perpetrators of human trafficking and other serious crimes.

## *Where does the non-punishment principle come from?*

### **International law**

The non-punishment principle is not explicitly contained in the Trafficking Protocol. However, the Article 14 savings clause of the Trafficking Protocol encourages States to apply that the Protocol in accordance with their international human rights obligations, while Article 25 of the UNTOC requires States parties to safeguard the rights of victims of organised crime. It is increasingly recognised in international jurisprudence and soft law instruments that the non-punishment principle is a best practice approach to the effective implementation of those instruments in ways that are human rights-based and victim-centred.

The non-punishment principle is clearly captured in Article 4(2) of the 2014 Protocol to the Forced Labour Convention No. 29.

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 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.

Forced labour or services as it is captured in ILO Convention No. 29, can involve labour or services performed in unregulated or even illegal sectors. Therefore, the application of non-punishment to forced labour will be particularly relevant for States who approach trafficking for the purpose of forced criminality as trafficking in persons for forced labour in their domestic legislation.

Several other international instruments reinforce the non-punishment principle, including the *Recommended Principles and Guidelines on Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights*.

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.

Guideline 4(5) sets out that States should consider:

Ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for activities they are involved in as a direct consequence of their situation as trafficked persons.

In specific relation to children, Guideline 8(3) sets out that States and where applicable, intergovernmental and non-governmental organizations, should consider:

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.

The non-punishment principle has been further reinforced in reports of the Special Rapporteur on Trafficking in Persons,<sup>14</sup> and Security Council Resolutions calling for States to not punish victims of trafficking.<sup>15</sup> These and other relevant instruments have been referred to throughout this ASEAN Guideline and are contained in Annex 4.

## Regional law

The ACTIP is a progressive instrument that explicitly captures the non-punishment principle at Article 14(7).

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 makes clear that ASEAN Member States should, with some degree of flexibility as to how the obligation is fulfilled, consider applying the non-punishment principle. All ASEAN Member States are parties to the ACTIP, meaning all are legally bound by Article 14(7).

Ten years before the ASEAN Convention was enacted, Article 26 of the 2005 Council of Europe *Convention on Action against Trafficking in Human Beings* (Council of Europe Treaty Series No. 197) captured the non-punishment principle as follows:

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.

While ASEAN Member States are not bound by the Council of Europe Convention, they may be able to learn from the efforts of other States to implement the non-punishment principle in practice, and in the guidance that is available to support their efforts.

## Domestic law

Most countries in ASEAN have explicit non-punishment provisions in their domestic legislation (see Annex 1). Exceptions are Cambodia, and Singapore have no explicit non-punishment provision in their domestic laws. Viet Nam amended its counter-trafficking in persons law in November of 2024 to include a non-punishment provision. That law will take effect from 1 July 2025.

Domestic non-punishment provisions take different approaches to establishing the relationship between a victim's unlawful conduct and his or her trafficking experience.

- One country (Indonesia) requires that the victim has been compelled to participate in the unlawful activity in order for the non-punishment principle to apply.
- Other countries (Brunei Darussalam, Lao PDR, Malaysia, and Viet Nam) require that unlawful acts committed by the victims are directly related to the acts of trafficking. The 2005 law in Myanmar required that the illegal activity was a 'direct consequence' of the trafficking in its 2005 law, but the 2022 law that repealed that earlier law does not explicitly specify the nexus required.

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14 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).

15 Security Council Resolution 2331 (2016); Security Council Resolution 2388 (2017)

- The Philippines domestic law understands unlawful acts as being those that are committed as direct result of, or as an incident or in relation to being trafficked, or in obedience to the order made by the trafficker thereto.
- Some provisions limit the scope of protection to specifically listed offences, being immigration and document-related offences (Brunei Darussalam, Malaysia); illegal immigration and prostitution (Lao PDR); and trafficking in persons, illegal entry, exit, stay and work as well as document-related offences (Myanmar). In Indonesia and the Philippines, protection from punishment is not limited to specified offences.
- Thailand requires that written permission be sought from the Minister of Justice to prosecute a victim of trafficking for immigration, prostitution, document or work-related offences.<sup>16</sup> Similarly the 2022 Myanmar law requires permission of the Central body to take action against victims of trafficking.

Non-punishment provisions captured in domestic laws of ASEAN Member States are provided in Annex 1.

It is good practice to enact clear provisions to implement the non-punishment principle in domestic law.<sup>17</sup> However, where States lack domestic legislation to explicitly capture the non-punishment principle, or where their domestic legislation does not apply to a victim's specific situation, there may still be other opportunities in legislation to protect victims from punishment, including by the application of general defences such as duress, that may be established in domestic legislation. Practitioners can also apply the non-punishment principle, by referring to their regional and international obligations in the UNTOC and the Trafficking Protocol and in the ACTIP.

### ***When should the non-punishment principle be applied?***

The application of the non-punishment principle should not be dependent on a formal determination of a person being a victim of trafficking. Opportunities to apply the non-punishment principle arise from the point that a presumed victim of trafficking is first encountered by authorities and throughout their engagement with the criminal justice process, as both victims or in some cases as offenders.

### **Screening and identification of victims of trafficking (Section 2)**

Victims are ideally identified as soon as authorities have credible suspicions that a person may be a victim of trafficking, prior to any punishment taking place. If victims of trafficking are not immediately identified, it is difficult to divert them back into protection channels. However, at every point that authorities encounter victims of trafficking, presents opportunities to apply the non-punishment principle.

As stated above, victim and offender are not binary concepts; a person may need to be protected from punishment for some unlawful activities but not others. It can be difficult for practitioners to determine which of the victim's unlawful activities relate to their trafficking, and which unlawful activities are unrelated to their trafficking for which it may be appropriate to approach victims as offenders. Their early and effective identification as victims of trafficking is critical to making this determination.

Labour, immigration and other officials who first encounter potential victims of trafficking involved in unlawful activities, can effectively screen and identify them as potential victims, and divert them away from criminal justice processes and into protection channels.

<sup>16</sup> Section 41 of the *Anti-Trafficking in Persons Act* B.E. 2551 (2008), amended in 2015 (BE 2558) and 2017 (BE 2560). The 2022 ASEAN-ACT study found that no written requests had been made.

<sup>17</sup> *Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of 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.

For example, labour inspectors may be investigating labour practices and encounter people who they suspect may have been trafficked to carry out particular types of work. Immigration officials who are investigating irregular migration may encounter people who have been trafficked. Police officers may be investigating serious crimes such as drug cultivation, contraband smuggling, or cyber-enabled crimes such as cyber-scamming and encounter situations of people having been trafficked into these situations. In all of these situations, where authorities correctly identify victims they encounter, they are able to immediately release them from pre-trial or immigration detention and divert them through protection channels.

Health professionals and other service providers also have a role to play in ensuring that the non-punishment principle is upheld. If they are able to recognise victims of trafficking among the people they come into contact with, they can support labour, immigration and other officials to recognise a person's victimhood and to effectively apply the non-punishment principle.

Frontline officials and others who come into contact with victims of trafficking, must be able to recognise a range of people as potential victims. This includes victims who may be particularly vulnerable because they are refugees; people fleeing conflict; members of the LGBTQI+ community; persons with disabilities; migrants in situations of vulnerability and others who may have particular protection needs.<sup>18</sup> People in conflict with the law – including young people among them – are at particular risk of having their protection and assistance needs not met. Officials must therefore overcome particular barriers – including their own unconscious bias – to effectively identify victims of trafficking and protect them from punishment.

These and other identification issues are discussed in section 2 below.

#### **When victims are facing trials (Section 4)**

Where frontline officials fail in their obligations to apply the non-punishment principle to divert victims into protection channels, victims may be deported contrary to the non-punishment principle. Where victims are arrested and charges are laid against them, criminal justice practitioners are the next line of defence against further wrongful punishment of victims.

When prosecutors have reasonable grounds to suspect a person they are prosecuting is a victim of trafficking, they should exercise their prosecutorial discretion to not prosecute, or request that proceedings be discontinued.

Where procedures continue against victims of trafficking, defence lawyers representing victims of trafficking, must apply defences to protect victims from conviction. Practitioners may also consider other opportunities that a person's status as a victim of trafficking may afford for protecting them from punishment




Members of the judiciary have further opportunities to apply the non-punishment principle in court. Depending on the circumstances of the case, courts may be able to discontinue proceedings against victims, or if they opt to proceed, they can decide not to convict them, or to mitigate the sentences imposed against them if they are convicted.

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<sup>18</sup> See, *inter alia*, the Global Compact for Safe, Orderly and Migration, UN Doc A/RES/73/195, 11 January 2019, Objective 7 being to address being to address and reduce vulnerabilities in migration.

## When victims have been convicted (Section 5)

Finally, as a last resort, where victims have been wrongfully convicted contrary to the non-punishment principle, States can pursue opportunities to vacate or expunge convictions, and provide victims with remedies for their wrongful punishment.

Opportunities to apply the non-punishment principle	
<p>When victims of trafficking are encountered by frontline officials</p> 	<ul style="list-style-type: none"> <li>• Frontline officials apply the presumption of victimhood in accordance with their identification policies in screening victims of trafficking</li> <li>• Frontline officials divert presumed victims of trafficking away from immigration and / or criminal justice processes into protection channels</li> <li>• Law enforcers exercise discretion to not arrest or charge victims of trafficking for their involvement in unlawful activities</li> </ul>
<p>When victims of trafficking face detention, return or other immigration sanctions contrary to the non-punishment principle</p> 	<ul style="list-style-type: none"> <li>• Immigration officials who recognise that persons in detention are presumed victims of trafficking, release them from immigration facilities and refer them for protection</li> <li>• Protection visas are given to foreign victims who are irregularly in the country to allow them to temporarily remain</li> </ul>
<p>When victims of trafficking are put on trial for unlawful activities resulting from their trafficking</p> 	<ul style="list-style-type: none"> <li>• Prosecutors exercise discretion to not prosecute victims or request that proceedings are discontinued</li> <li>• Defence lawyers apply defences that exist in domestic legislation to defend victims on trial for unlawful acts they committed in the context of their trafficking</li> <li>• Court does not convict victim of trafficking</li> <li>• Sentences imposed on victims of trafficking are mitigated</li> </ul>
<p>When victims of trafficking are wrongfully convicted</p>	<ul style="list-style-type: none"> <li>• Criminal records are vacated, expunged or sealed</li> <li>• Victims of trafficking have access to remedies for wrongful conviction</li> </ul>

States should also ensure that there are mechanisms in place to monitor the application of the non-punishment principle across all of these interactions and to hold to account those who misapply or fail to apply the principle in practice (Section 6).



## **Recommendation of the Special Rapporteur on Trafficking in Persons, especially women and children**

States are required to ensure that the principle of non-punishment is applied to:

- (a) All forms of trafficking, including for the purpose of sexual exploitation, labour exploitation and forced criminality, as well as to both cases of international trafficking and cases of internal trafficking;
- (b) Any unlawful activity carried out by a trafficked person as a direct consequence of their trafficking situation, regardless of the gravity or seriousness of the offence committed;
- (c) Criminal, civil, administrative and immigration offences, as well as other forms of punishment, such as arbitrary deprivation of nationality, denial of consular assistance or repatriation, exclusion from refugee status or other forms of international protection and family separation;
- (d) Any situation of deprivation of liberty, including immigration detention and detention pending removal, transfer or return proceedings.<sup>19</sup>

### ***Who is responsible for implementing the non-punishment principle?***

States are parties to international and regional law and are therefore duty bearers with obligations to protect victims of trafficking, to prosecute traffickers and to cooperate to these ends. State officials are therefore responsible for applying the non-punishment principle in accordance with international and regional obligations, subject to each ASEAN Member State's domestic laws, rules, regulations, and practices.

Other stakeholders, including ASEAN Sectoral Bodies, CSOs, non-governmental organizations (NGOs), and International Organisations (IOs), may be able to support States to fulfill these obligations, but it is ultimately the States who bear responsibilities.

#### **State officials**

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. Irrespective of this variance, immigration and consular officials, labour inspectors and police officials who come into contact with victims of trafficking have duties to them. Investigators, prosecutors, defence lawyers and members of the judiciary – all have a role to play in protecting victims from punishment and should therefore have the requisite skills, resources and capacity to fulfill their respective roles.

#### **Counter-trafficking bodies**

State interagency bodies with counter-trafficking responsibilities have a key role to play in non-punishment. They may have legislatively mandated duties to ensure that stakeholders who encounter potential victims in the course of their work, know what trafficking in persons is and know how to refer potential victims through national referral mechanisms. In the absence of effective national referral mechanisms, it should be clear who can be contacted for support in preventing identified victims of trafficking.

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<sup>19</sup> Source: *Implementation of the non-punishment principle Report of the Special Rapporteur on trafficking in persons, especially women and children*, Siobhán Mullally, UN Doc. A/HRC/47/34, 17 May 2021, [57]

Counter-trafficking bodies have a key role to play in building the capacity of their country to apply the non-punishment principle. That work may include issuing guidance, delivering training and mentoring to build capacity of both specialized and non-specialized practitioners in their countries to better understand trafficking in persons, identify victims and apply the non-punishment principle.

### Box: National counter-trafficking bodies

Brunei Darussalam	National Working Committee on Trafficking in Persons
Cambodia	National Committee for Counter-Trafficking (NCCT)
Indonesia	Task Force for the Prevention and Handling of Criminal Act of Human Trafficking ( <i>Gugus Tugas TPPO</i> )
Lao PDR	National Steering Committee on Human Trafficking (NSC)
Malaysia	Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants (NSO MAPO)
Myanmar	Central Body for the Suppression of Trafficking in Persons (CBTIP)
Philippines	Inter-Agency Council against Trafficking (IACAT)
Singapore	Interagency Trafficking in Persons Task Force (TIP-TF)
Thailand	Anti-Trafficking in Persons Committee (ATP Committee)
Viet Nam	National Steering Committee on Crime Prevention and Suppression (NSC)

## National Human Rights Institutions

National Human Rights Institutions have a key role to play in ensuring that States fulfill their human rights obligations to victims of trafficking. That work includes monitoring and reporting on the implementation of the non-punishment principle for victims of trafficking as well as advising State actors on how to implement the non-punishment principle in accordance with international human rights law.

For National Human Rights Institutions to be recognised by the international community, they must adhere to the standards set out in the Paris Principles relating to the Status of National Institutions (the Paris Principles), endorsed by the General Assembly in 1993.<sup>20</sup> In the Asia-Pacific region, there are several National Human Rights Institutions that are accredited by the Global Alliance of National Human Rights Institutions. In ASEAN, the National Human Rights Institutions are recognised as AICHR's partners and have been consulting in various AICHR's works in advancing human rights in the region. There are five National Human Rights Institutions that currently listed as AICHR partners, namely National Commission on Human Rights in Indonesia, the Human Rights Commission of Malaysia, the Commission on Human Rights in the Philippines, the National Human Rights Commission of Thailand.<sup>21</sup> These National Human Rights Institutions, together with the Provedor de Direitos Humanos e Justiça of Timor-Leste, are recognised as AICHR's partners and have been consulting in various AICHR's works in advancing human rights in the region.

20 The Paris Principles are available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-relating-status-national-institutions-paris>

21 Chart of the Status of National Institutions Accredited by the Global Alliance of National Human Rights Institutions, Accreditation Status as at 31 December 2024, available at: <https://www.ohchr.org/en/documents/tools-and-resources/current-chart-accreditation-nhris>

## **Role of non-state actors**

CSOs, NGOs and IOs may be able to support States to fulfill their obligations to identify victims of trafficking and to apply the non-punishment principle. They may be able to share their research findings, as well as their experience and expertise working with victims of trafficking who have been criminalized. They may be able to share insights on emerging trafficking trends that are relevant to reducing risks of punishment, that can support law enforcers to identify potential victims of trafficking in the sectors they operate.

Non-state actors may also be able to support capacity building of practitioners to apply the non-punishment principle in practice. They also have a role to play in monitoring the treatment that victims of trafficking receive throughout their contact with immigration and criminal justice systems, and ensuring that the non-punishment principle is upheld.

## SECTION 2



# **Strengthening legislation to uphold the non-punishment principle**

## Section 2. Strengthening legislation to uphold the non-punishment principle

States have several opportunities to strengthen counter-trafficking and other legislation to uphold the non-punishment principle.

States should consider amending the definition of trafficking in persons to include exploitation in criminal activities as an explicit form of trafficking. A definition of trafficking that includes this exploitative purpose can remove ambiguity for frontline officials who must screen for victims of trafficking and enliven them to the possibility that the people they encounter as offenders may have been trafficked. A definition that captures forced criminality as a form of exploitation also avoids the need for prosecutors to establish which alternative type of exploitation (for instance forced labour or service, slavery, practices similar to slavery, or 'other') applies in situations where victims of trafficking are exploited in criminal activities.

States should consider enacting specific non-punishment provisions in counter-trafficking legislation. These provisions should protect all victims of trafficking from punishment for all unlawful activities that are connected with their trafficking. Such provisions can empower law enforcers to take decisions not to make arrests, prosecutors to exercise their discretion to not pursue charges, and defence lawyers to defend the victim-offenders they represent.

There are also opportunities to strengthen legislation outside trafficking-specific legislation to protect victims from all forms of punishment. These opportunities relate to the offences that victims of trafficking are commonly at risk of being punished for; the minimum age for criminal responsibility; and laws to vacate, expunge or seal the criminal records of victims.

### [1] Strengthen counter-trafficking legislation to protect victims from punishment

States are encouraged to provide for the non-punishment provision in their domestic legislation to supplement the defences that exist in law. The scope of what the non-punishment principle applies to should not be limited; it should apply to all victims of trafficking on the basis of non-discrimination, regardless of the type of trafficking they were subject to and the type of unlawful activity they were involved in as a result.

### Explore amending the trafficking in persons definition to include exploitation in criminal activities

The trafficking in persons definition in international and ACTIP includes as forms of exploitation: exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs. These are included at a minimum, meaning States can capture additional forms and even amend their legislation to specify additional forms. For instance, Malaysia has included 'any illegal activity' as a form of exploitation to capture situations of victims exploited in criminal activities. Counter-trafficking in persons law in Viet Nam (promulgated in November 2024 to come into effect on July 1, 2025) includes 'compelling victims to commit crimes' as an inhumane purpose of trafficking in persons

Other ASEAN Member States can amend their trafficking in persons legislation to explicitly include criminal activities as a form of exploitation in the definition of trafficking. Capturing unlawful activities as a specific form of exploitation will support frontline officers and law enforcement officers to effectively identify cases of trafficking. It will also support prosecutors to pursue traffickers who have trafficked people into forced criminality.

In the absence of exploitation of criminal activities or forced criminality as an explicit form of exploitation specified in the trafficking in persons definition, criminal justice practitioners must understand how to capture such situations in existing forms of exploitation, whether as forced labour or services, slavery or practices similar to slavery, or simply as ‘other’. Where legislation provides a list of offences to which the provision applies, it should be stated as non-exhaustive.<sup>22</sup>

### Box: Example (Australia)

Australia does not include exploitation in criminal activities as a form of exploitation in its definition of trafficking in persons. A review of its legislation found that “Australia’s definition of exploitation likely already captures ‘exploitation of criminal activities’ because the forms of labour exploitation that are relevant to the definition can include both legal and illegal or irregular forms of labour and service. However, explicitly including a phrase that specifies exploitation can include exploitation activities may give greater effect to the non-punishment principle.”<sup>23</sup>

Lessons can be learnt from legislative approaches taken in other regions. Countries in the European Union have found the explicit inclusion of criminal activities as a form of exploitation useful to help practitioners effectively identify victims of trafficking.<sup>24</sup> In the European Union, EU Directive 2011/36/EU specifically recognises the phenomenon of traffickers subjecting victims to enforced criminality as one of the exploitative forms included in the definition of trafficking.<sup>25</sup> That EU Directive includes ‘exploitation of criminal activities’ as a form of exploitation, understood to be “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.”<sup>26</sup> The Directive further explains that Member States should protect victims 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.<sup>27</sup>

This 2011 Directive was amended by EU Directive 2024/1712 which came into force on 14 July 2024. The new directive further widens the scope of exploitation (to capture exploitation of surrogacy, forced marriage and illegal adoption) while retaining earlier forms including ‘exploitation in criminal activities.’ The 2024 Directive expresses particular concern for the targeting of children by organised crime groups to use them to commit criminal activities.<sup>28</sup>

This EU understanding informs both domestic understanding of trafficking in persons, and regional law enforcement efforts too. Europol notes that trafficking can “take the form of exploitation for the

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22 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.

23 Targeted Review of Modern Slavery Offences in Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth): Findings Report (Commonwealth of Australia, 2023), p.68

24 See Annex 2.

25 See 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, 2 at [3]

26 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 (5 April 2011) (entered into force 15 April 2011), paragraph (11) and Article 2(3).

27 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 (5 April 2011) (entered into force 15 April 2011), paragraph 14.

28 Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, paragraph 23

purpose of forced criminality, such as pickpocketing, shoplifting and drug trafficking.”<sup>29</sup> Informed by that understanding, joint law enforcement action days against trafficking in human beings, have addressed trafficking for the purpose of forced criminality among other forms of exploitation.<sup>30</sup>

## **Draft or amend explicit non-punishment provisions**

Defences that may be included in domestic legislation, such as duress and necessity are useful to protect victims of trafficking from punishment, but do not protect victims from being charged and put on trial in the first place. The enactment of clear and explicit non-punishment provisions is a good practice to implement the non-punishment principle before victims are put on trial.<sup>31</sup> Furthermore, general defences may only mitigate sentences rather than result in the acquittal of the accused person who has been unjustly arrested, charged and tried: experiences which in and of themselves amount to punishment contrary to the non-punishment principle.

Legislators should consider drafting or amending explicit provisions to codify the non-punishment principle in counter-trafficking legislation. In jurisdictions with mandatory prosecution, laws should 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 initiated when it comes to light that a person’s offending is a result of being trafficked.

The non-punishment provision should be drafted to apply to all victims on the basis of non-discrimination, regardless of the type of trafficking they have been subject to, or the type of offence they have committed as a direct result. ASEAN Member States may therefore consider enacting or amending non-punishment provisions to ensure that all unlawful activities of a victim of trafficking as a direct consequence of their trafficking are captured.<sup>32</sup> provisions should apply to a non-exhaustive range of civil, administrative, immigration and criminal offences, and be applicable to all victims on the basis of non-discrimination, 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>33</sup>

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29 <https://www.europol.europa.eu/crime-areas/trafficking-in-human-beings>

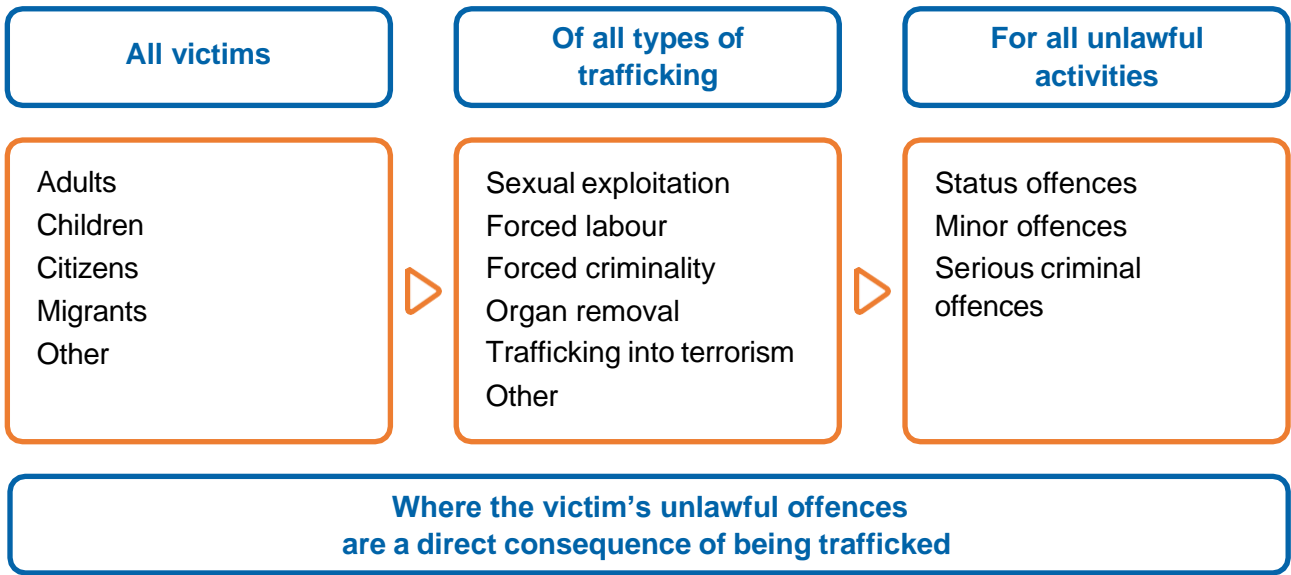
30 <https://www.europol.europa.eu/media-press/newsroom/news/human-trafficking-action-week-219-criminals-arrested-and-1-374-victims-identified>

31 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

32 *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, [57]

33 *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.

Diagram: Scope of application of the non-punishment principle



The type and severity of the unlawful activity is not the determinant of whether the non-punishment principle should be applied. Allowing broad application of the principle does not result in a general prohibition on prosecution of victims, but rather informs the standard of enquiry.<sup>34</sup> The principle requires authorities to consider not punishing victims where a link is established between the victim’s unlawful act and his or her trafficking.<sup>35</sup>

As explained by the former Special Rapporteur on Trafficking in Persons, especially women and children:

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>36</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>37</sup>

34 See Box: *Guarding against the misuse of the non-punishment principle* above.

35 *Case of V.C.L and A.N. v The United Kingdom*, (Applications nos. 77587/12 and 74603/12) Judgment Strasbourg, 16 February 2021, para. 158

36 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]

37 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 of the Special Rapporteur on Trafficking in Persons, especially women and children**

States should ratify and implement all relevant international instruments prohibiting trafficking in persons and providing for the right to non-punishment, including the ILO Protocol to the Forced Labour Convention, 1930 (No. 29).

States should adopt all appropriate legislative, policy, administrative and other measures to ensure the effective implementation of the principle of non-punishment of victims of trafficking and should:

- (a) Introduce a specific provision into domestic legislation to provide for the non-punishment of victims of trafficking;
- (b) Adopt prosecutorial guidelines in order to facilitate the consistent and systematic application of the non-punishment principle in all trafficking cases;
- (c) 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.<sup>38</sup>

### **Ensure that legislation clarifies the required connection between the trafficking and the victim's unlawful activity**

States take different approaches to determine whether or not to apply the non-punishment principle in situations where victims of trafficking are involved in unlawful activities. The two most common are the compulsion (or duress) model and the causation model.

- ▶ The **compulsion (or duress) model** applies the non-punishment principle where it can be shown that the victim of trafficking was compelled by the trafficker to participate in the unlawful activity in question.
- ▶ The **causation model** applies the non-punishment principle when it can be shown that the victim's unlawful activities were a direct consequence of the trafficking.

These models are expressed in non-punishment provisions in domestic counter-trafficking legislation. Such provisions are important for law enforcers in deciding whether to arrest a victim of trafficking for their unlawful activities; for prosecutors in exercising their discretion on whether or not to prosecute a victim of trafficking for unlawful activities; and for defence lawyers to defend victims of trafficking who are on trial for unlawful activities.

<sup>38</sup> Source: *Implementation of the non-punishment principle Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally*, UN Doc. A/HRC/47/34, 17 May 2021, [53-54]

## Approaches to the application of the non-punishment principle

### Compulsion (or duress) model

The victim's unlawful acts were compelled by the trafficker, meaning they were carried out under coercion or duress

### Causation model

The victim's unlawful acts were a direct result of the trafficking

### Examples

#### **Council of Europe Convention on Action against Trafficking in Human Beings (2005)**

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.

*Council of Europe Convention on Action against Trafficking in Persons (article 26)*

#### **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

*ASEAN Convention against Trafficking in Persons, Especially Women and Children (article 14(7))*

**Indonesia**

**Philippines**

**Brunei Darussalam**

(only immigration and document-related offences)

**Lao PDR**

(only illegal immigration and prostitution)

**Malaysia**

(only immigration and document-related offences)

**Myanmar**

(only trafficking in persons offences, immigration, work and document-related offences)<sup>39</sup>

**Phillipines**

**Viet Nam**

<sup>39</sup> The 2005 law in Myanmar required that the illegal activity was a 'direct consequence' of the trafficking in its 2005 law, but the 2022 law that repealed that earlier law does not explicitly specify the nexus required.

States drafting or amending their legislation should consider the practical implications of whichever model they adopt, and the limitations and challenges associated with implementing each.

Legislation should make clear to practitioners who are prosecuting or defending cases involving victims of trafficking, how to establish the nexus between the offending and the trafficking.

### ***In jurisdictions that apply the ‘compulsion’ model...***

It is important for practitioners to understand the full spectrum of ways that the victim’s free will can be damaged by traffickers. States that apply the compulsion model, should understand compulsion broadly to capture all the ‘means’ by which a trafficker can compel an adult victim according to the international and regional definition of trafficking in persons. In jurisdictions where the compulsion model applies, the standard required should not be the same as that required by traditional defences of duress and necessity that may require threat or imminent death or physical violence. Rather, the standard should contemplate the more subtle ways victims of trafficking can be ‘compelled.’ In other words, it should be understood that victims can be ‘compelled’ to engage in unlawful activities by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.<sup>40</sup>

The same is true when the term ‘forced criminality’ is used, which should not be understood to require that a victim be physically forced to participate in criminal activities, but should be understood to capture more subtle means a trafficker may use to exploit a person, including abuse of a position of vulnerability.<sup>41</sup> Abuse of a position of vulnerability requires not only the existence of the victim’s vulnerability but also its abuse by the trafficker. The following United Nations guidance is useful for understanding ‘abuse of a position of vulnerability’ as a means of trafficking.

The existence of vulnerability is best assessed on a case-by-case basis, taking into consideration the personal, situational or circumstantial situation of the alleged victim. Personal vulnerability for instance, may relate to a person’s physical or mental disability. Situational vulnerability may relate to a person being irregularly in a foreign country in which he or she is socially or linguistically isolated. Circumstantial vulnerability may relate to a person’s unemployment or economic destitution. Such vulnerabilities can be pre-existing and can also be created by the trafficker. Pre-existing vulnerability may relate (but not be limited) to poverty; mental or physical disability; youth or old age; gender; pregnancy; culture; language; belief; family situation or irregular status. Created vulnerability may relate (but not be limited) to social, cultural or linguistic isolation; irregular status; or dependency cultivated through drug addiction or a romantic or emotional attachment or through the use of cultural or religious rituals or practices.

Critically, a victim’s vulnerability may be an indicator of [abuse of a position of vulnerability], but it will not constitute a means of trafficking in persons unless that situation of vulnerability has also been abused to the extent that the victim’s consent is negated.

Abuse of a position of vulnerability occurs when an individual’s personal, situational or circumstantial vulnerability is intentionally used or otherwise taken advantage of, to recruit, transport, transfer, harbour or receive that person for the purpose of exploiting him or her, such that the person believes that submitting to the will of the abuser is the only real or acceptable option

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40 These means are specified in both article 2 of ACTIP and article 3 of the Trafficking Protocol.

41 See: [Abuse of a position of vulnerability and other ‘means’ within the definition of trafficking in persons](#) (UNODC, 2013) and the United Nations [Guidance Note on ‘abuse of a position of vulnerability’ as a means of trafficking in persons](#) also [available](#) in Bahasa Indonesia, Burmese, Khmer, Lao, Thai and Vietnamese.

available to him or her, and that belief is reasonable in light of the victim's situation. In determining whether the victim's belief that he or she has no real or acceptable option is reasonable, the personal characteristics and circumstances of the victim should be taken into account.<sup>42</sup>

In countries where legislation limits the means that can be used to exploit victims in unlawful activities, consideration should be given to how legislative amendments can be made or legislative guidance can be issued to ensure that victims are protected from punishment in accordance with their human rights.<sup>43</sup>

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>44</sup> The former United Nations Special Rapporteur on trafficking in persons, especially women and children, 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>45</sup>

Defences that may exist in domestic legislation should apply to children irrespective of the means used to exploit them in criminal activities. Means do not need to be proven to establish that children have been trafficked. Therefore, the relationship between their situation as a victim of trafficking and their resulting involvement in criminal activities should be sufficient to apply defences.

### **In jurisdictions that apply the 'causation' model...**

The causation model does not require that the unlawful activity result from the trafficker's use of means such as force, or duress or other means to 'compel' them. Rather, their unlawful activity must be a direct result of their trafficking experience.

Legislators should ensure that terms such as 'direct consequence' or 'direct result' and 'related to' are 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>46</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 would not fall within the scope of protection from punishment.

The ACTIP has adopted the causation model. It is also the model preferred by the Special Rapporteur on trafficking in persons and other counter-trafficking experts because it is broader and easier to prove than the compulsion model.<sup>47</sup> The causation model has the advantage of acknowledging that the unlawful

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42 *Guidance Note on 'abuse of a position of vulnerability' as a means of trafficking in persons 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* (UNODC, 2012) Paragraphs 2.3 to 2.5.

43 For instance, Indonesian legislation 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" (article 18, *Law Number 21 on The Eradication of the Criminal Act of Trafficking in Persons*, 2007). In this case, guidance should be provided to practitioners so that they can understand the many ways that a victim may be 'coerced'.

44 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.

45 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]

46 Ryszard Piotrowicz, [How far can we extend the non-punishment principle?](#) La Strada, 21 April 2021.

47 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

activity arose from the victim's lack of autonomy and independence. Therefore, the link between the victim's offence and his or her trafficking, would be particularly clear when the victim has been trafficked into criminality such as drug cultivation or trafficking, cyber-scamming or pick-pocketing.

### **Clarify the burden and standard of proof required**

The burden of proof to establish the link between the trafficking and the victim's unlawful activity, rests on the State. Non-punishment provisions may be drafted in a way that places the burden of proof on the victim-defendant to bring evidence that he or she was a victim of trafficking. In practice, it may be difficult for a victim to prove their victimization, particularly in jurisdictions where exploitation in criminal activities is not recognized as a form of trafficking in domestic law.<sup>48</sup> Placing the burden of proof on the victim is 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 considered to ensure that the burden of proof is always on the State to prove that 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>49</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 the victim of trafficking who has been accused of an offence does not have to prove the existence of a defence beyond reasonable doubt. Rather, the prosecution must prove that the defence does not apply:

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>50</sup>

Legislation may need to be enacted or amended to make clear to criminal justice practitioners, that when defences are invoked, it is for the State (prosecutor) to show that it does not apply.

### **Develop and disseminate legislative guidelines on the non-punishment principle**

It may not always be clear to criminal justice practitioners how to establish the link between the victim's offending and his or her trafficking in order to apply the non-punishment principle. Regardless of whether States have applied the compulsion or causation model, a combination of both approaches, or a different approach altogether, it is vital that practitioners understand it.

Inter-agency counter trafficking bodies – in consultation with criminal justice practitioners - should consider developing guidelines on non-punishment provisions and other legislation that may be relevant to non-punishment, and disseminate them to criminal justice practitioners who may not know that these provisions exist or know how to apply them in practice. Such guidelines are critical to ensure consistent and systematic application of the non-punishment principle throughout the justice system by prosecutors, defence lawyers and members of the judiciary.

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Rapporteur on trafficking in persons, especially women and children, Siobhán Mullaly, UN Doc. A/HRC/47/34 (17 May 2021) para. 52

48 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

49 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 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

50 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.

Guidance provided to practitioners should consider explaining in clear and accessible language:

- whether the nexus between the victim's unlawful activity and his or her trafficking experience is premised on compulsion or causation
- how prosecutors and defence lawyers can bring evidence to establish that the victim's offence was or was not linked to his or her trafficking
- that the Trafficking in Persons Protocol and the ACTIP can be referred to in the absence of domestic non-punishment provisions and/or to supplement domestic provisions that limit the scope of protection
- that international and regional counter-trafficking and human rights instruments are important to the interpretation of defences of duress and necessity where a person has committed an offence in the context of trafficking in persons.

It is critical that any guidance material is not only provided to counter-trafficking practitioners, but also to generalist practitioners who may be involved in prosecuting or defending people in relation to offences that victims of trafficking may commit. Accordingly, guidelines should address not only non-punishment provisions in counter-trafficking legislation but also provisions in other legislation that may be useful to protect victims from punishment.

## **[2] Strengthen other (non-trafficking) legislation to protect victims from punishment**

Beyond their trafficking in persons legislation (discussed above at [1]) States should consider enacting or amending other legislation to reduce risk of victims of trafficking being inappropriately prosecuted for offences they have committed as a consequence of being trafficked. Amendments may be considered to reduce risks of immigration laws and other border governance measures being inappropriately applied to subject victims of trafficking to criminal and/or administrative sanctions for immigration violations. Practitioners may find specific provisions useful to support them to effectively apply the non-punishment provision in practice, instead of or as a supplement to whatever non-punishment provision may exist in domestic legislation. This section offers guidelines on additional opportunities States can take to strengthen non-punishment protection in their domestic legislation, beyond the use of non-punishment provisions.

### **Explore amending criminal and administrative provisions to reduce risk of victims of trafficking being prosecuted**

States should consider amending legislation that exposes victims to acute risks of being prosecuted. For instance, consideration should be given to how to protect victims from strict liability offences. For instance, the application of criminal or administrative provisions for immigration offences to migrants in irregular situations who are victims of trafficking may violate the non-punishment principle. Offences relating to narcotics, may expose victims who have been trafficked into those drug-related activities, to risk of prosecution, potentially resulting in corporal or capital punishment. Amendments of laws prohibiting sex work on victims of trafficking and other vulnerable and marginalized groups could also be considered. In specific relation to children, making the age of majority an element of offences related to the sex industry can mean it is not legally possible to prosecute children (including trafficked victims among them) for their involvement.<sup>51</sup>

<sup>51</sup> Ambassador-at-large, John Cotton Richmond, speaking at Survivor Justice Panel Discussion, Dressember and Karana Rising, 7pm ET, 30 April 2021.

### Box: Example

In Argentina the absence of ‘forced criminality’ as a specific purpose of trafficking has resulted in victims of trafficking who have been exploited as drug mules not being effectively identified as victims but instead being prosecuted for drug offences. Speaking on this issue, a federal defender noted that prisons “...are full of the last links of drug trafficking organizations, who use needy women, disabled people and, in many cases, illiterate people to distract the authorities.”<sup>52</sup>

To confront this challenge, the Public Ministry of Defence has requested that the drug law be amended to explicitly exempt from criminal liability, persons who have been trafficked to transporting narcotics as drug mules.

## Establish an appropriate minimum age of criminal responsibility

For the purpose of identifying and protecting victims of trafficking, a child is any person who is under the age of 18.<sup>53</sup>

To protect victims of children from prosecution, an appropriate minimum age of criminal responsibility needs to be established to ensure appropriate treatment of children on either side of that age.<sup>54</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 to give them the benefit of the doubt if a child’s age cannot be proven.<sup>55</sup>

## Explore amend or enacting legislation to allow for criminal records of victims to be vacated, expunged or sealed

States should explore amending or introducing legislation to allow for convictions and criminal records of trafficked 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).

Such laws are a vital remedy for victims of trafficking to be able to move on with their lives. Although they may already have suffered punishment through their arrest, prosecution and conviction, vacating convictions can go some way to restoring victims’ faith in a criminal justice system that had previously treated them like criminals. It can free them from the stigma, and lift barriers to opportunities.<sup>56</sup>

52 Jean-Pierre Gauci and Noemi Magugliani, *Human trafficking and the rights of trafficked persons: An exploratory analysis on the application of the non-punishment principle* (BIICL and IBA, 2023), p.34, referring to Ministerio Público de la Defensa, ‘[El MPD planteó ante el Senado la necesidad de la reforma de la Ley de drogas](#)’ (2020)

53 Trafficking in Persons Protocol, article 3(d); ACTIP, article 2(d).

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

55 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]

56 See Guideline 14.

## SECTION 3



# **Applying the non-punishment principle in preliminary screening and identification of victims of trafficking**

### Section 3. Applying the non-punishment principle in preliminary screening and identification of victims of trafficking

States are required by international and regional law to establish comprehensive approaches to prevent and combat trafficking in persons and to protect victims of trafficking. Fulfilling these obligations may require efforts to build capacity of law enforcement, immigration and other relevant authorities to identify perpetrators, victims and situations of trafficking.

The non-punishment principle must be applied in both preliminary screening as well as victim identification, and in the course of the protection and assistance they are provided with. Preliminary screening refers to the process whereby a person is considered to be a presumed victim of trafficking based on signals or indicators that arise through observing or interacting with him or her. Identification refers to the formal process by which a competent authority makes an official determination that a person is a victim of trafficking, and therefore is entitled to a range of rights and entitlements on the basis of that status.<sup>57</sup> The non-punishment principle should be applied where the competent authority determines that there is a sufficient link between the unlawful activity and the trafficking of the presumed / potential victim to treat him or her as a victim of trafficking for identification purposes.

Early and effective screening and identification of victims is the starting point for application of the non-punishment principle. Unless victims of trafficking are screened as potential victims of trafficking, they cannot be protected from punishment. Once a person is directed down the path of being treated as an offender, it is difficult to subsequently redirect down protection pathways. Therefore, the non-punishment principle should apply prior to any criminal justice processes being commenced, as soon as authorities encounter a person who they presume to be a victim of trafficking. Where indicators of trafficking in persons are present, frontline officials should refer presumed victims to national referral mechanisms. In the case of children or persons who are suspected to be children, best interest assessments and determinations should be undertaken as a matter of priority and child protection services contacted.

The application of the non-punishment principle should not be conditional on formal identification of a victim or on the prosecution of an alleged trafficker. Nor should it be conditional on the victim cooperating with authorities in criminal justice proceedings. Practitioners are not doing victims a favour by identifying them as victims of trafficking. Rather, they are fulfilling their legal duties and obligations, and need victims' support in order to perform their roles effectively.

Counter-trafficking response requires mechanisms to be put in place to ensure that victims can access justice and safely report to officials without fear of being detained, deported or otherwise penalized. Unfortunately, many States take a highly reactive approach rather than proactively investigating trafficking in persons, as authorities may rely on victims to identify themselves.<sup>58</sup> However, in practice most victims of trafficking do not self-identify – some may not accept that they are victims of trafficking even after they have been identified. There are many reasons why a victim may not want to be identified as a victim, including fear of retaliation by traffickers or their loyalty to them, as well as the fear of being punished by State officials. It is not the responsibility of victims to self-identify, it is the responsibility of State officials to identify victims of trafficking and to refer them for protection and assistance. Frontline officials who understand the psychological state of the people they engage can conduct more effective screening.

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57 See for instance, Surtees, Rebecca and Laura S. Johnson, *Trafficking Victim Identification: A Practitioner Guide* (Bangkok: Regional Support Office of the Bali Process (RSO) and Washington, D.C.: NEXUS Institute, 2021) p.2

58 The *Global Report on Trafficking in Persons 2022* (UNODC, 2023) revealed that most victims in adjudicated cases are 'self-rescued' suggesting that proactive identification remains limited.

Therefore, States should take screening and identification approaches that are human rights-based, gender sensitive, victim-centred and trauma-informed, and are likely to achieve more accurate screening results.<sup>59</sup>

The following guidelines are offered to support States to strengthen capacity of frontline officials to effectively identify victims involved in various forms of exploitation, including in unlawful activities, and refer them into protection channels

### **[3] Strengthen the capacity of frontline officials to identify potential victims of trafficking among people they encounter as offenders**

Police, immigration and labour officials should be capacitated to identify potential victims of trafficking in persons among people they may encounter, whether in the context of irregular immigration, commercial sex, agriculture, or in criminal sectors such as the drug trade, IUU fishing, or cyber-scamming or other sectors. Misconceptions and stereotypes about who is a 'real' or 'deserving' victim must be challenged, so that frontline officials are able to screen victims even among those involved in unlawful activities.

#### **Strengthen understanding of the constituent elements of trafficking in persons**

Practitioners must understand the definition of trafficking in persons in order to recognise potential victims among the people they encounter who are involved in lawful and unlawful activities. While there are some variations across ASEAN Member States, all have agreed to the international and regional definition of trafficking in persons, which is comprised of an act, by means in the case of adult victims, for the purpose of exploitation. This harmonized understanding of victimhood is important across the ASEAN region, so that people who are protected as victims in one country are not left unprotected in another.

Practitioners must understand that where traffickers use 'means' in the case of adults,<sup>60</sup> any consent that victims may have provided is irrelevant to establishing whether they have been trafficked, and that a child's consent is always irrelevant irrespective of the trafficker's use of means.<sup>61</sup>

Even where a victim of trafficking has a written contract in place, that contract does not negate the fact of exploitation. In some cases, the existence of a contract may be useful evidence of criminal activity, for instance, where traffickers contract victims to perform scamming and other illegal activities. Officials who encounter victims exploited in unlawful activities, must understand that a person cannot contract to commit a crime. Any such contract is void, and may be useful evidence of the exploitative intent of traffickers, as well as their intention to commit other crimes.

59 See for instance, *Human Rights, Gender Sensitive and Child-Friendly Approaches to Trafficking in Persons Cases for Frontline Officers: Training Manual* (ASEAN Intergovernmental Commission on Human Rights, 2023) p.36 and *ASEAN Do No Harm Guide for Frontline Responders* (ASEAN Intergovernmental Commission on Human Rights and ASEAN-ACWC) pp.71-72

60 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.

61 "Child" shall mean any person under eighteen years of age. Trafficking in Persons Protocol, article 3 (d)

### Box: Example (document-related offence)

During a vessel inspection, maritime authorities investigating IUU fishing, inspected the identity and seaman books of A and other persons who had been kept on the boat for several months. A and others were fined for document-related offences, and placed into immigration detention pending their deportation. An official told A that he was lucky not to be charged for IUU fishing.

*Application of non-punishment principle:* At the immigration detention centre, a trained immigration official interacts with A and has suspicions that A is a victim of trafficking in persons. A is taken out of immigration detention and referred through the national referral mechanism. Because A has irregular status, a reflection period is granted to him, so that he can remain in the country to receive protection and support before deciding on his next steps. A is informed of his right to seek compensation for his unlawful detention.

## Strengthen understanding of intersecting dimensions of trafficking in persons

Frontline officials need to be sensitized to how a victim's age, gender, ethnicity, nationality, migration status, socio-economic status, life experiences, level of maturity, disabilities and other factors, may intersect to shape how they are trafficked. These factors may also influence the unlawful activities a victim may be involved in, the impact that trafficking has on them, and how they are perceived, including by the frontline officials who may encounter them.<sup>62</sup> For instance, where an investigator takes time to learn about why a person is involved in unlawful activities, they may be better placed to identify them as being a potential victim of trafficking. Practitioners must be sensitized to the complex dynamics at play between traffickers and their victims, that can result in a challenging combination of trauma, fear of traffickers, or conversely, loyalty to them and fear or hostility towards authorities.

Victims who fear prosecution and punishment are unlikely to report their traffickers to law enforcers. 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 not 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.

It is critical for frontline officials to understand that recognising a person as a victim should not be tied to his or her willingness to cooperate with police, or even his or her understanding of him or herself as a victim of trafficking. It is the responsibility of frontline officials to identify victims, not for victims to identify themselves.

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62 An 'intersectional' approach to trafficking in persons considers how the experiences of men, women, and gender-diverse individuals, interact with other factors such as their class, race, age, ethnicity, sexual or other identities, in ways that influence how they are perceived in society. An intersectional approach is useful tool for frontline officials to understand the experiences of the people they encounter. See for instance, *Toolkit on mainstreaming gender and human rights in the implementation of the United Nations Convention against Transnational Organized Crime* (UNODC, 2023) pp.9-17 and *Gender-sensitive and victim-centred approaches for frontliners: Approaches to working with victims of trafficking in persons* (ASEAN ACWC and ASEAN-ACT, 2023) p.13.

### Box: Example (labour offences)

Labour inspectors carry out a raid on a farm where A and other workers have been made to work for long hours. A can come and go as he pleases but he is told that if he leaves, his mother in his home village will be harmed. The labour inspectors who carry out the raid do not ask A any questions but check his papers. They tell him that he has been working illegally in the country but will not charge him if he immediately accepts a voluntary return to his home country.

*Application of non-punishment principle:* Upon his return to his own country, authorities recognise indicators that he may have been a victim of trafficking into slavery on the vessel. They communicate this fact to the authorities in the destination country from where he was returned. Later an investigation into the fishing fleet reveals that there were several people on board the vessel who had been trafficked into slavery. Authorities contact A's country of origin as part of their investigation and identify him as a victim of trafficking. A is informed of his right to seek compensation for his wrongful detention.

## Capacitate officials to apply the presumptions of victimhood and minority

Law enforcement officials need to understand that trafficking in persons is a process and a crime of special intent of exploitation. Ideally, victims are identified before the exploitation phase, but it can be difficult to identify victims of trafficking before they are exploited. For instance, a person who is exploited in a cyber-scramming compound or in a brothel or in a premises where drugs are being cultivated, may be more readily identified as a victim of trafficking, than a person who is intercepted on route to those destinations who may instead be misidentified as a migrant in an irregular situation travelling to undertake irregular or illegal work.

Practitioners who encounter potential victims of trafficking should be capacitated to apply the presumption of victimhood, so that they treat a person who may be a victim of trafficking as if they are, for the purpose of applying the non-punishment principle. Therefore, in cases where there is insufficient evidence to establish that trafficking in persons has taken place, the presumption of victimhood should allow the victim to be treated in accordance with the non-punishment principle. For the purpose of victim identification, all ASEAN Member States should apply the definition of child contained in the Trafficking in Persons Protocol and the ACTIP, being persons under the age of 18.<sup>63</sup>

When a practitioner has reason to believe that a victim of trafficking may be a child, the presumption of minority should apply in screening processes so that the person is treated as a child for the purpose of applying the non-punishment principle. If actions are taken against a person for unlawful activities connected to their trafficking, they should not be punished at all. If those unlawful activities are not linked to their trafficking experience, the age of the victim-offender should be considered in relation to the application of defences that may be available, or in mitigating the sentence at the sentencing stage.

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63 Article 3(d) of the Trafficking in Persons Protocol; article 2(d), ACTIP.



## Recommendation of the Special Rapporteur on Trafficking in Persons, especially women and children

States must ensure that a child victim is not punished for unlawful acts that are related to their being trafficked. Where the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she must be presumed to be a child and be accorded special protection measures pending the verification of his or her age. Once the relation between the offence committed and a child's status as presumed or identified trafficking victim is established, that relation must be accepted as necessary and sufficient grounds to discontinue the proceedings or to expunge an already issued conviction, as well as to immediately release the child from detention facilities. With respect to children, given that no means are required in order to establish their status as victims of trafficking, no test of compulsion can be applied.<sup>64</sup>

### Challenge misconceptions and unconscious bias about trafficking and victimization

In order to effectively identify victims, practitioners need to overcome biases and misconceptions they may have about who can be a victim of trafficking and who should benefit from the non-punishment principle. Officials should not make assumptions about who is 'good' or 'bad' or who is a 'real' victim or not. Stigmatization and bias against particular people can result in attitudes about who is more 'deserving' than others, resulting in some people being more likely to be punished rather than protected. For instance, victims who are migrants in irregular situations, or who have a history of being in trouble with the law, or have alcohol or substance abuse issues, or disabilities, or are nationals of particular countries, or of particular ethnicities, sexual identities or gender identities, may be discriminated against in ways that violate the fundamental human rights principle of non-discrimination and damage law enforcement ability to recognise them.

Practitioners may also have unconscious bias against people who are involved in particular sectors, for instance, in the sex industry or in scamming. By way of example, law enforcers and their families may have been victimized by scammers, making them unconsciously biased against the people involved in ways that impede their ability to recognise potential victims of trafficking among them.

### Promote non-discrimination in screening and identification processes

Promoting non-discrimination among people in a position to identify victims of trafficking is vital to increasing their capacity to do so. Criminal justice practitioners should be capacitated to understand that the non-punishment principle applies to all victims where there is a nexus between their unlawful activities and their trafficking, on a non-discriminatory basis. In applying the non-punishment principle on a non-discriminatory basis, practitioners should understand how a person's migration status may intersect with other factors such as their race, colour, sex, gender, gender-identity, language, disability, religion, political or other opinion, national or social origin, socio-economic status, property, birth or other status, in ways that make them particularly vulnerable to discrimination.<sup>65</sup>

64 Source: *Implementation of the non-punishment principle Report of the Special Rapporteur on trafficking in persons, especially women and children*, Siobhán Mullally, UN Doc. A/HRC/47/34, 17 May 2021, [62]

65 See article 26 of the *International Covenant on Civil and Political Rights*, and article 2 of the *ASEAN Human Rights Declaration*. Also see article 2 of the *Convention on the Rights of the Child*, article 1 of the *Convention on the Elimination of Discrimination against Women* and article 5 of the *Convention on the Rights of Persons with Disabilities*. For more on intersectionality and discrimination, see [Guidance Note on Intersectionality, Racial Discrimination and Protection of Minorities](#) (UN, 2022) and [Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations](#) (UN, 2018).

States are required to ensure inclusion of people with disabilities in all anti-trafficking measures, including with respect to non-punishment. This requirement is urgent where persons with disability are at heightened risk of exploitation, including for the purpose of forced criminality.<sup>66</sup> In the case of presumed victims with psychosocial, intellectual or physical disabilities, non-discrimination requires that reasonable accommodation be made to ensure that persons with disabilities can access identification and protection procedures relevant to the application of the non-punishment principle on an equal basis to others.<sup>67</sup>

### Recommendation of the Special Rapporteur on Trafficking in Persons, especially women and children

States must ensure equal protection of the law and equality before the law in all anti-trafficking measures, including in ensuring the effective implementation of the non-punishment principle for trafficked persons with disabilities. States must take all appropriate steps to ensure non-discrimination on the basis of disability and to ensure that reasonable accommodation is provided, including the provision of procedural and age-appropriate accommodations, in order to facilitate effective access to justice and the participation of trafficked persons with disabilities in all legal proceedings, including identification procedures and at the investigative and other preliminary stages.<sup>68</sup>

### Promote child-friendly, gender-sensitive, trauma-informed and skilled screening and identification

Those responsible for identifying victims of trafficking must have sufficient skills to engage with a person in order to fulfill their function. This means that potential victims, including those who may have committed crimes, need to be treated with respect and in accordance with international and regional principles on victim identification and protection. A person need not be an extrovert who can clearly articulate what has happened to him/her, in order to be recognised as a victim of trafficking. Nor should they need to be able to speak the local language. Rather, the onus is on State officials to apply their skills to effectively identify persons who may be victims.

### Challenge State policies that raise risks of punishment of victims of trafficking

Contexts where victims are first encountered as offenders can pose particular challenges for victim identification. For instance, raids of premises where victims of trafficking may be living and working, including places where commercial sex takes place, or in compounds where cyber-scamming takes place, can result in victims being criminalized rather than identified.

Immigration management processes may involve authorities charging victims of trafficking for immigration and document-related offences, rather than recognising them as victims. This risk is exacerbated where trafficking in persons is conflated with irregular migration. The risk of non-identification is also raised when States have hostile policies towards undocumented migrants including criminalization of irregular migration and mandatory detention.

66 *Implementation of the non-punishment principle Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally*, UN Doc. A/HRC/47/34, 17 May 2021, [27]

67 Article 2, *Convention on the Rights of Persons with Disabilities*.

68 Source: *Implementation of the non-punishment principle Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally*, UN Doc. A/HRC/47/34, 17 May 2021, [61]

Priority issues such as ‘Wars on Drugs’ can also have detrimental effects on victim identification, resulting in criminalization of victims trafficked into drug offences, rather than their identification and referral. State counter-trafficking bodies who are mandated to address trafficking in persons, have a key role to play in challenging and raising awareness of how State policies undermine counter-trafficking objectives and obligations.



### **Recommendation of the Special Rapporteur on Trafficking in Persons, especially women and children**

The principle of non-punishment should be applied:

- (a) By all relevant domestic authorities, including the police, immigration and border officials, labour inspectorates and any other law enforcement agency or official, and they should be trained and qualified to identify potential victims of trafficking;
- (b) As soon as there are reasonable grounds to believe that a person has been trafficked or as soon as the trafficked person, or their legal representatives, raises a trafficking defence, in order to afford the trafficked person effective and full protection.

States are required to ensure the prompt and effective identification of victims of trafficking. Legal assistance should be provided throughout the identification process, to ensure the early identification of victims, referral for assistance and protection and effective implementation of the non-punishment principle.<sup>69</sup>

## **[4] Equip frontline officials with indicators to screen and identify victims**

Indicators - being signs that trafficking in persons may have taken place - are not conclusive evidence that a person is a victim of trafficking but are the starting point for further enquiries. Practitioners who are responsible for identifying irregular migrants, or inspecting places of work for labour violations, or investigating offenders of petty or even serious crimes, must be equipped with lists of indicators to support them to recognise the victims of trafficking among the people they encounter as potential offenders.

### **Gather, review and adapt existing indicators to context**

Significant time, resources and expertise have been invested to develop indicators, and to make them freely available to ASEAN Member States. Some indicators are specific to particular types of exploitation or sectors in which trafficking takes place. For instance, UNODC has developed indicators specific to trafficking for the purpose of forced criminality to commit cyber-enabled crimes (trafficking into cyber scamming compounds).

Responsible authorities in ASEAN Member States should gather and review existing sets of indicators and adapt them for their purposes.

<sup>69</sup> Source: *Implementation of the non-punishment principle Report of the Special Rapporteur on trafficking in persons, especially women and children*, Siobhán Mullally, UN Doc. A/HRC/47/34, 17 May 2021, [55-56]

### Box: Examples of open-source indicators available to ASEAN Member States

Common indicators for practitioners, adopted by ASEAN and the Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT Process) in Kuala Lumpur 15-16 December, produced in [Regional Review on Laws, Policies and Practices within ASEAN relating to the Identification, Management and Treatment of Victims of Trafficking, especially Women and Children](#) (ASEAN, 2016), pp.32-33

Generic UNODC [Human Trafficking Indicators](#)

ILO [Operational Indicators of trafficking in human beings](#)

Bali Process Policy Guide on Identifying Victims of Trafficking, including sets of indicators, are available in [Burmese](#), [English](#), [Filipino](#), [Khmer](#), [Malay](#), [Vietnamese](#), and [Thai](#) among other languages.

Screening and Referral Toolkit mobile application to screen and refer vulnerable persons arriving at borders, available for [download](#) in English, Malay, Indonesian and Thai

Specific indicators to support the identification of victims of trafficking in online scam centres in the ASEAN region:

[Key Indicators of Trafficking in Persons for Forced Criminality to Commit Cyber-Enabled Crimes](#) (UNODC, 2023).

[Key Indicators of Trafficking in Persons for the Purpose of Organ Removal](#), Tool 3 of [Toolkit on the Investigation and Prosecution of Trafficking in Persons for Organ Removal](#) (UNODC, 2022)

## Ensure indicators do not exclude potential victims

The profile of a victim should not be determinative of whether they are recognised as a victim of trafficking. ASEAN countries are destination countries for trafficking of both victims from within the region and from countries far beyond. Indicators must be responsive to who may be victim of trafficking (for instance, people of particular backgrounds and sexes may be more likely to be exploited in particular sectors), while at the same time, avoiding any bias or assumptions about who can be a victim of trafficking (on the basis of nationality, ethnicity, race, age, gender, sex, identity, migration status, socio-economic or other status).

The type of unlawful activity a person is involved in should not be determinative of whether a person is recognized as a victim. Victims may be involved in a range of unlawful activities as a result of their trafficking, from immigration and administrative offences, to petty or serious crimes. They may commit a combination of offences. Indicators must reflect these realities to reduce risks of unidentified victims being punished.

## **Regularly update indicators**

Interagency counter-trafficking bodies must stay up-to-date with trafficking trends and modus operandi of traffickers, so that indicators remain relevant to the ways that victims are involved in unlawful activities.<sup>70</sup> Identifying victims of trafficking in different types of exploitation (whether sexual exploitation, forced labour, organ removal, or exploitation in criminal activities) may require different skill sets and specifically calibrated indicators.

Ensuring that indicators remain fit for purpose, requires regular research, data collection and consultation with practitioners who may be familiar with how trafficking in persons is evolving, the ways victims have been exploited, and the types of unlawful activities victims of trafficking may be involved in. State counter-trafficking bodies should consider requesting support from criminal justice practitioners and non-state actors such as CSOs, NGOs, IOs and others to ensure that indicators are responsive to evolving trafficking trends, and the types of unlawful activities victims may be involved in.

## **Disseminate indicators to stakeholders who may encounter victims**

Counter-trafficking bodies should ensure that relevant stakeholders have access to indicators that are relevant to their work. Law enforcement officers, labour inspectors, immigration authorities, as well as members of multi-disciplinary task forces established to respond to serious crimes in which trafficked persons may be exploited, such as drug trafficking or cyber-scramming, should be equipped with indicators. Many actors who encounter victims of trafficking are not part of interagency counter-trafficking bodies or networks, and so may benefit from the integration of indicators in their standard operating procedures.

Victims of trafficking may seek support from non-governmental and civil society organisations and engage with healthcare providers, child protection workers and others. While these stakeholders are not competent authorities for identification purposes, they may nonetheless be involved in supporting preliminary identification and so should be equipped with accurate and up-to-date indicators in order to perform this role effectively. These stakeholders also have a valuable role to play in updating indicators.

## **Sensitize practitioners on how to apply indicators in practice**

Practitioners should be sensitized to the fact that victims of trafficking may be involved in a range of unlawful activities as a consequence of being trafficked, regardless of the type of exploitation they are trafficked into. For instance, a person who is involved in unlawful activities in the sex industry, may have also violated immigration or labour regulations. A person trafficked into agriculture may have committed petty crimes to survive. Each situation is unique, meaning practitioners must have skills and take initiative to look closely at individual situations in determining whether a person may be a victim of trafficking.

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<sup>70</sup> For instance, in some countries it was previously understood that only women and children were victims of trafficking into sexual exploitation, but now there is understanding that people of all ages and genders can be trafficked for a range of exploitative forms. Similarly, it was previously understood that only people from lower socio-economic groups with low levels of education were trafficked, but emerging analysis of trafficking into forced criminality in cyber-enabled crimes, shows that well-educated people may be targeted by traffickers.

## Support harmonized indicators across the ASEAN region

Traffickers exploit people in similar ways across the ASEAN region, meaning there are valuable lessons to be learned and shared, towards achieving an even and effective response. Regardless of the constituent elements of trafficking in persons in domestic legislation, indicators of victimhood should be strengthened to support identification of victims and application of the non-punishment principle across the region. Counter-trafficking bodies in each ASEAN Member States should keep ASEAN Sectoral bodies informed of changing trafficking trends, towards building a regional understanding of trafficking and robust indicators to identify victims of trafficking involved in unlawful activities.

### [5] Empower arresting officers to apply the non-punishment principle

Officials should apply the non-punishment principle as soon as they have reason to presume that a person may be a victim of trafficking, irrespective of whether a victim has been formally identified or a trafficker has been indicted.<sup>71</sup> Where circumstances give rise to a credible suspicion that a person suspected of being exploited to commit a criminal offence, may have been trafficked, the non-punishment principle should be applied. Accordingly, prompt assessment by trained and qualified individuals must be carried out to determine whether the person has been the victim of the crime of trafficking in persons as it is defined in international, regional and domestic instruments. Legislation on non-punishment (see Section 2) can also empower arresting officers to apply the non-punishment principle and protect them from accusations that they have arrested the wrong people or have not carried out arrests when they should have.

### Ensure frontline officers understand and know how to exercise their discretions

Practitioners who encounter victims of trafficking should understand the discretions they have and know how to exercise them. Investigators should decide whether or not to charge a person based on the physical (*actus reus*) and mental (*mens rea*) elements of a crime. A skilled investigator would not charge a person for crimes they did not intend to commit but would check the intent element in determining whether or not to arrest and charge a person.

In jurisdictions where investigators have discretion, they must decide whether they will proceed to lay charges and/or in recommending the charges to be laid. This discretion to not arrest and not to lay charges may be found in law and in policies that explain the discretion and the considerations that may inform it, including whether or not charging a person is in the public interest. The non-punishment principle may also be expressed in counter-trafficking action plans and policies (see Annex 2).

<sup>71</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), para. 58

### Box: Non-punishment policies in the absence of non-punishment provisions

Cambodia does not have a non-punishment provision in its counter-trafficking legislation, but has guidelines in place stating that “foreigners who have been formally identified as victims shall not be detained or charged for illegal immigration and/or prostitution.”<sup>72</sup>

Similarly, Australia has not implemented the non-punishment principle in its legislation. However, the Australian Federal Police and the Commonwealth Director of Public Prosecutions give effect to the policy through the *Prosecution Policy of the Commonwealth* which requires consideration of whether prosecutions are in the public interest.<sup>73</sup>

In jurisdictions where investigators have limited or no discretion about whether to lay charges or not, the decision about whether to proceed with the prosecution of the offence is passed to prosecutors or the courts. In such cases, when arresting officers forward cases to prosecutors, they should promptly submit any information or evidence they may have for believing that a person is a victim of trafficking. Case files could include a standard section on non-punishment to capture information about whether the non-punishment principle has been applied, and on what legal basis.

### Box: Example (cyber-enabled scamming)

A has a degree in marketing and applies for a sales job abroad. After several rounds of interviews, he is given the job. After he arrives at his work place, he realises that something is wrong when his employers took away his passport and his phone. They tell him that he will be involved in scamming people of significant money by creating fake profiles online, and convincing targets to invest in scams. He is good at this work, which keeps him safe from the beatings that some of his colleagues receive. One day, he and other workers are told that their operation will be moved and that they will be relocated to another country. They are taken into the neighbouring country, and are intercepted by the immigration authorities and arrested for violating immigration laws.

Application of non-punishment principle: B, a senior police officer specialized in counter trafficking learns of A’s situation. He travels from the capital city to the border region where A and the others are being held at a police station. He informs the superintendent of his suspicion that the persons in his custody were victims of trafficking. After conducting preliminary screening to identify who among the group may be organisers of the operation and who are presumed victims, he arranges for the latter group – including A - to be removed from police custody and referred for protection and assistance. He is offered accommodation at a trafficking shelter. The prosecutor decides not to prosecute A.

## Promote obligations to proactively investigate trafficking in persons

Regardless of whether investigators have or exercise discretion, it is critical that they 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

72 Guidelines on Forms and Procedures for Identification of Victims of Human Trafficking for Appropriate Service Provision (NCCT, 2015), point 2 on p.12

73 See: Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process (CDPP, 2011) pp.4-7, and Targeted Review of Modern Slavery Offences in Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth): Findings Report (Commonwealth of Australian, 2023), p.118

relevant to substantiate defences that victims on trial may have recourse to.<sup>74</sup> This evidence may also be critical to identify and rescue other victims and to apprehend traffickers.

Where investigative efforts are focused on the unlawful activities of victims rather than on the linkages between those activities and their traffickers, criminal justice response to trafficking is weakened. 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>75</sup>

Evidence against traffickers – including the serious organised criminals involved at the higher levels of criminality – can only be achieved through proactive investigation. Law enforcers must understand the dynamics of victim offending and proactively investigate parties who may be involved in controlling or managing people, assets or establishments where trafficked victims are found, to identify whether they are traffickers or victims.<sup>76</sup>

Police practices should be reviewed to consider how to support and encourage investigators to apply their time, skill, effort and resources to investigate serious and complicated 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.

#### Box: Example (document-related offence)

A was recruited by an agency to do domestic work in another country. The recruitment agency provided her with the travel and identity documents that she needed. At the house where she worked, she was mistreated and underfed. She went to the recruitment agency for help, where staff told her that if she did not return to her employer the police would arrest her for using fake documents. A had thought that she was in the country legally and so went to the police station to ask for help. When she gave the police her documents, they charged her with using false documents and placed her in immigration detention.

*Application of non-punishment principle:* An NGO in the country learns about A's situation. They arrange for legal assistance, and together with the NGO and A's lawyer they arrange for the charges against A to be dropped. They gather evidence – including the travel and identity documents that were arranged for A – of her potential trafficking and provide this information to the police to mount an investigation.

### Build networks of practitioners to support victim screening and identification

Social services, health care providers, civil society organisations, National Human Rights Institutes and other state and non-state actors have roles to play in victim support. Counter-trafficking bodies should build robust networks of practitioners, so that law enforcers who come into contact with potential victims of trafficking know who to contact for support and advice, and have accurate contact information in the

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74 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.

75 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

76 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 47th Session of the Human Rights Council 30 June 2021, 13:00 – 14:30 CET.

event that they identify potential victims of trafficking. The use of multi-disciplinary teams to support screening and identification processes can be an effective way of ensuring that the non-punishment principle is applied to presumed victims of trafficking across the stages of the identification process. A broad network of practitioners may be required to protect victims of trafficking from the risks they may face, particularly where they have been victimized by organized crime groups.

Critically, when law enforcement operations are undertaken whether in cyber-scramming compounds or other premises into which people may be trafficked, such as in agriculture, the seafood industry, or the sex industry, advanced and detailed planning should take place to determine who is responsible for identifying potential victims encountered, and who is responsible for protecting and assisting those individuals. The views of authorities who are trained to identify victims of trafficking should take precedence over views of others in identifying victims.

### **Remove disincentives and create incentives to apply the non-punishment principle**

Where police performance is measured by the number of arrests made and charges filed, 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 appropriate application of the principle 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 not to detract from wider law enforcement obligations to investigate and arrest criminal offenders. Consideration can therefore be given to rewarding police for building evidence against criminals, including by taking a skilful approach to investigating offenders who are potential victims and witnesses of trafficking in persons and other serious organised crimes.

### **Ensure officials know how to refer victims into protection channels**

States are required to have procedures and mechanisms in place to ensure that police, immigration and labour officers who encounter victims of trafficking can promptly refer potential victims into national referral mechanisms in line with Article 14(1) of ACTIP.<sup>77</sup> Those protection channels must be appropriate to protect the human rights of victims, including by being age and gender-sensitive, trauma-informed and non-discriminatory.

Where national referral mechanisms are not yet effectively used and applied to divert victims from punishment, barriers to protection need to be identified and addressed, whether by disseminating information, providing skills training, or other measures. Those who come into contact with victims of trafficking should be provided with up-to-date contact information for stakeholders who should be contacted in the event potential victims of trafficking are encountered, including child protection authorities in the event that victims are minors.

Where child offenders are potential victims of trafficking, frontline officials should 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. Children in conflict with the law including for serious crimes in the context of armed or terrorist groups, should benefit from the principle of non-

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<sup>77</sup> Article 14(1) of ACTIP states that “Each Party shall establish national guidelines or procedures for the proper identification of victims of trafficking in persons, and where appropriate, may collaborate with relevant non-governmental victim assistance organisations.”

punishment and be recognized as victims of trafficking, as victims of grave violations of human rights and humanitarian law. Their recovery, reintegration and reunification should be prioritized.<sup>78</sup> The age of criminal responsibility is also relevant to the treatment of children who participate in unlawful activities in the course of being trafficked, and may have to be raised.<sup>79</sup>



### **Recommendation of the Special Rapporteur on Trafficking in Persons, especially women and children**

Recognizing that trafficking in persons is a serious human rights violation, the application of the non-punishment principle should not be conditional on the formal identification of a victim or on the prosecution of an alleged trafficker. Application of the non-punishment principle must not be conditional on the cooperation of the victim in criminal proceedings.

To ensure compliance with the principle of non-punishment, all presumed or identified trafficked persons must be promptly removed from detention or any situation of deprivation of liberty and provided with assistance and protection.

The principle of non-punishment must be applied without discrimination to all trafficked persons, including to trafficked persons seeking asylum or other forms of international protection.<sup>80</sup>

## **[6] Ensure arresting officers fulfill their obligations to arrested persons**

The arrest of victims of trafficking may be contrary to a victim-centred approach to trafficking in persons and the State's obligations to protect victims of trafficking. However, in other cases, it may be appropriate to arrest a victim-offender for unlawful activities that do not directly relate to their trafficking. When arresting officers opt to arrest people who may be victims of trafficking, it is critical that they fulfill their obligations - including fundamental human rights obligations - to the people they arrest, to reduce risk of further harm.

### **Sensitize frontline officers to the impact of arresting victims of trafficking**

Frontline officers must be sensitized to the impact of arrest on 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 post-trafficking recovery and reintegration.

Further, frontline officers must be made aware of how arrest of victims is detrimental to criminal justice response to trafficking in persons. Where investigators do not proactively investigate trafficking in persons, victims may be the main or only evidence in trafficking in persons cases. Where victims lose trust in authorities, they are unlikely to cooperate in criminal justice processes against traffickers.

<sup>78</sup> See Security Council Resolution 2388 of 2017.

<sup>79</sup> See Guideline 2.

<sup>80</sup> Source: *Implementation of the non-punishment principle Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally*, UN Doc. A/HRC/47/34, 17 May 2021, [58-60]

## Ensure arresting officers uphold the right of arrested persons to information

States have obligations to the people they arrest. Fulfilling those obligations is critical to ensuring that victims of trafficking in persons who are arrested, receive appropriate advice and support from authorities to avoid further punishment for crimes they have committed as a consequence of being trafficked. States must therefore take action to ensure that officials have sufficient capacity to fulfill their human rights obligations to arrested persons. Significantly, arrested persons – including victims of trafficking – have the right to be informed of the reasons for their arrest, any charges laid, and to be promptly brought before a judge or other official.<sup>81</sup>

Article 36 of the Vienna Convention on Consular Relations requires that foreign nationals who are arrested or detained are informed of their right to have their embassy notified so they can receive consular advice and support. They should also be informed of their right of access to diplomatic and consular representatives of their State of nationality, noting that refugees or asylum seekers may not wish to have contact or information shared with representatives of the State. This approach is in line with Article 14(3) of ACTIP which states that identification should be notified to sending parties without unreasonable delay “unless the victim otherwise informs.”

## [7] Recognise victim status of persons identified in other ASEAN Member States

Victims of trafficking who are identified in an ASEAN Member States should have that status recognised elsewhere in the region in compliance with Article 14(2) of ACTIP:

In a case where the trafficking takes place in more than one country, each Party shall respect and recognise the identification of victims of trafficking in persons made by the competent authorities of the receiving Party.

Where a victim of trafficking is not recognized as such in other jurisdictions, there is a risk that he or she will be protected from punishment in one country, but be punished in another.

## Explore amending existing bilateral agreements to strengthen application of the non-punishment principle

There are several bilateral agreements and memoranda of understanding (MOUs) between ASEAN Member States that explicitly include provisions on non-punishment of victims of trafficking (see Annex 3). However, some of these provisions apply only to a limited range of offences (e.g., immigration and prostitution-related offences). Some are discriminatory in that they apply to some victims (e.g., women and children) but not to others (e.g., men).

States should consider amending their bilateral agreements to capture the non-punishment principle in compliance with international and domestic law, to ensure that:

- a) trafficking in persons is understood in line with the international and regional definition for the purpose of bilateral agreements, so that any definitional differences in domestic law are harmonized for the purposes of victim identification;

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81 Article 9(2) *International Covenant on Civil and Political Rights*

- b) non-punishment provisions are non-discriminatory so they apply to all victims regardless of their age, sex, nationality or other status;
- c) the scope of what the non-punishment principle applies to is not limited, but applies to any and all unlawful activities or offences a victim of trafficking may have been involved in as a direct result of being trafficked.

In the absence of sufficient bilateral agreements, ASEAN Member States should consider using ACTIP as a basis for mutual recognition of victim status, or the UNTOC and supplementary Trafficking in Persons Protocol, where the relevant origin, transit and/or destination for trafficking is outside the ASEAN region.

### **Implement existing agreements relevant to the non-punishment principle**

Counter-trafficking authorities in ASEAN Member States must sensitize practitioners to bilateral agreements that include clauses relevant to the non-punishment principle (including those listed at Annex 3). They should also support criminal justice practitioners to apply these agreements to dismiss charges against victims; to recognise victim status of persons who have been identified in other countries; and/or to otherwise apply the bilateral agreement in support of the non-punishment principle. Counter-trafficking actors should also carry out scoping exercises to understand why bilateral agreements relevant to non-punishment are not implemented in practice, and take measures to address identified barriers in law, policy and practice.

## SECTION 4



# **Applying the non-punishment principle when victims are facing trials**

## Section 4. Applying the non-punishment principle when victims are facing trials

Where victims of trafficking are not identified, they are at risk of being prosecuted for offences they have committed in the course of being trafficked. In other situations, victims are identified but decisions may still be taken to prosecute them. In both cases, the responsibility to apply the non-punishment principle falls on criminal justice practitioners who are prosecuting or defending victim-offenders and must uphold their right to a fair trial.<sup>82</sup>

Practitioners are supported to fulfill their obligations where the domestic legislation at their disposal captures the non-punishment principle and does not limit it only to some unlawful activities (see Guideline 1). However, ASEAN Member States are at different stages of bringing their legislation in line with regional and international obligations. In the interim, in the absence of an explicit non-punishment principle, or where existing non-punishment provisions limit the scope of protection, practitioners should still strive to comply with the non-punishment principle as it is captured in Article 14(7) of ACTIP and international obligations.

Prosecutors must have capacity to determine when it is appropriate or inappropriate to prosecute a victim of trafficking, depending on the link between the unlawful activity and his or her trafficking. They must understand how to exercise their discretions and apply non-punishment provisions as well as defences that may exist in domestic legislation. Where the non-punishment principle has not been applied to prevent a victim from being put on trial, defence lawyers must have ability to effectively apply defences for the benefit of their clients. Members of the judiciary must also understand their role in upholding the non-punishment principle in judicial processes.

The following guidelines are offered to support States to strengthen the capacity of prosecutors, defence lawyers and members of the judiciary, to apply the non-punishment principle when victims are facing trials.

### **[8] Strengthen the capacity of prosecutors to apply the non-punishment principle**

For a victim to benefit from the non-punishment principle there must be a connection 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 been trafficked (causation). Even when there is no nexus between the offending and the trafficking, the State may still decide not to prosecute the victim because doing so would be at odds with the State's obligations to protect victims and to investigate and prosecute traffickers or would not be in the public interest. Where the decision is made to prosecute a victim of trafficking, reasons for this decision must be clearly and transparently explained.

In practice, prosecutors are more likely to be comfortable to prosecute on the basis of the Criminal Code, than to not prosecute on the basis of a provision in anti-trafficking legislation. Therefore, counter-trafficking stakeholders must support prosecutors to understand and exercise their duties to not prosecute victims of trafficking for offences that are a direct consequence of their trafficking, or to discontinue prosecutions of victims of trafficking where evidence or public interest considerations support that decision.

<sup>82</sup> The right to a fair trial is contained in article 14 of the International Covenant on Civil and Political Rights and article 20(1) of the ASEAN Declaration on Human Rights.

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

ASEAN Member States must determine what impact a victim status determination has on the possibility or impossibility of prosecuting a victim.<sup>83</sup> Counter-trafficking stakeholders should sensitize prosecutors to the impact of victim status determinations on their decisions, which includes providing them with information about the crime of trafficking in persons, and the application of the non-punishment principle.

Prosecutors should familiarize themselves with the definition of trafficking in persons, indicators of trafficking in persons, and mechanisms by which potential victims can be removed from the criminal justice system and be referred to competent authorities for formal identification. They should also familiarise themselves with the non-punishment provisions in existing law, policy and guidance documents and international and bilateral arrangements in situations where a person has been identified as a victim of trafficking in another jurisdiction.

## **Ensure prosecutors understand their discretions and know how to apply them**

Prosecutors should be under a clear duty not to prosecute or to discontinue proceedings against victims for offences connected with their trafficking. In some jurisdictions, it may be mandatory for prosecutors to initiate a prosecution against a person alleged to have committed an offence. In other jurisdictions, they may have discretion not to initiate criminal proceedings against victims of trafficking, or where prosecutions are already underway, to discontinue proceedings where evidence comes to light that a person on trial is a victim of 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.<sup>84</sup>

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<sup>83</sup> Importantly, the non-punishment of a victim 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.

<sup>84</sup> 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.

### Box: Example (murder).

A has been kept on a vessel at sea for many months and made to work in cruel and brutal conditions. He and other people on board are often beaten by their captors. One day, A's friend (F), almost loses his hand in a fishing net. They beg their captors to arrange for medical help, but instead of helping him, their captors made A push F overboard as a lesson to other workers on the consequences of getting injured.

One day, fisheries inspectors board the boat to check documents of the workers. A thinks this is his opportunity to escape and so begins to tell the inspectors that he wants to leave the vessel. Before he can do so, the captain tells the authorities that A has murdered one of the crew members. A confesses to killing F and is put on trial for murder.

*Application of the non-punishment principle:* A's assigned defence lawyer had no experience of trafficking in persons cases, and so did not recognise A's situation as a potential victim of trafficking. He explained to A that he will defend him on the basis of duress, given the threat of serious bodily harm he had faced. The public prosecutor appointed to prosecute A had experiences prosecuting trafficking in persons cases and suspects that A is a victim of trafficking. He requested a discontinuance of the case and suggested that A be referred for protection. A was removed from detention and referred for screening and protection through the national referral mechanism. An investigation is launched into the activities of the vessel on which A was arrested.



### **Recommendation of the Special Rapporteur on Trafficking in Persons, especially women and children**

To ensure compliance with the principle of non-punishment in prosecutorial decisions, States must ensure that:

- (a) Prosecutors are under a duty to discontinue proceedings against trafficked persons for all offences committed as a direct consequence of their situation as trafficked persons. If the prosecuting authorities fail to do so, domestic courts should have the authority to order a discontinuance on the grounds of abuse of process or on the grounds that the prosecution would be in breach of the non-punishment obligation;
- (b) All law enforcement authorities and prosecutors are fully trained to identify potential victims of trafficking and trafficking-related offences and to order, or request, the discontinuance of proceedings at as early a stage as possible.<sup>85</sup>

<sup>85</sup> Source: *Implementation of the non-punishment principle Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally*, UN Doc. A/HRC/47/34, 17 May 2021, [64]

## **Require prosecutors to check the *mens rea* element of the victim's alleged offence**

Prosecutors must understand and check the intent element (*the mens rea*) for any crime they prosecute. They should evaluate whether the use of any means by the trafficker (such as force, deception, coercion, or other means specified in Article 3(a) of the Trafficking Protocol and article 2(a) of ACTIP) may have damaged an accused person's intent to commit the alleged crime.<sup>86</sup> Carrying out this check may avoid situations of victims of trafficking being brought to trial and being prosecuted for crimes they did not intend to commit.

In the case of children, for whom means are not required to establish their status as victims of trafficking, it should be sufficient to establish the relationship between the offence committed and the child's status as a victim of trafficking, in order not to commence or to discontinue any proceedings against them.

The performance of prosecutors is generally likely to be measured by the prosecutions they pursue rather than those they do not. They may fear accusations of negligence when they do not pursue prosecutions. To incentivise prosecutors to apply the non-punishment principle, their performance could be measured against whether they check the intent element of an alleged offence before pursuing a prosecution. They should also be held to account for prosecuting crimes in the absence of sufficient criminal intent.

## **Support prosecutors to reason through their decisions on whether or not to prosecute victims of trafficking**

In assessing each case, prosecutors will carefully consider all factors before deciding whether to prosecute an individual who has been identified as a victim of trafficking. For example, their reasons for prosecuting a person who has been identified as a victim of trafficking, may be because there is no nexus between the person's offending and his or her trafficking, and because prosecuting them is in the public interest.

The European Court of Human Rights in the case of *V.C.L and A.N. v The United Kingdom* (summarized in Annex 4) offers useful insight on the importance of a human trafficking assessment by a competent authority. In that case, the European Court of Human Rights found that the United Kingdom's decision to prosecute victims of trafficking for cannabis production, violated their human rights.<sup>87</sup>

...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>88</sup>

In that case, the European Court of Human Rights emphasized that there is no general prohibition on the prosecution of victims of trafficking. However, the United Kingdom had failed to provide reasons for continuing to prosecute the people concerned, even though there was credible suspicion that they were victims of trafficking into cannabis cultivation. The European Court explained – in terms that are useful to

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86 The 'means' as set out in article 3 of the Trafficking Protocol and article 2(a) of ACTIP are 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.

87 Specifically, article 4 of the European Convention on Human Rights prohibiting slavery or servitude, and forced or compulsory labour, and article 6 concerning the right to a fair trial.

88 *Case of V.C.L and A.N. v The United Kingdom*, (Applications nos. 77587/12 and 74603/12) Judgment Strasbourg, 16 February 2021, para. 161.

guide prosecutorial decisions in ASEAN – that:

Once a trafficking assessment has been made by a qualified person, any subsequent prosecutorial decision would have to take that assessment into account. While the prosecutor might not be bound by the findings made in the course of such a trafficking assessment, the prosecutor would need to have clear reasons which are consistent with the definition of trafficking contained in the Palermo Protocol and the Anti-Trafficking Convention for disagreeing with it.<sup>89</sup>

### Box: Example (trafficking in persons).

A was arrested alongside another person (B) on suspicion of trafficking people into sexual exploitation. At the brothel, A kept an eye on the other women but did not exert coercion over them. Statements from victims identified at the brothel and wiretap reports revealed that the victims did not see A as suspect, but as another victim. She also worked in the sex industry and handed over her money to the accused. She was under the influence of the B who had promised her a future with him and she loved him. A controlled the other women to prevent the suspect from mistreating or threatening her again, and was afraid of B.

*Application of non-punishment principle:* The court of first instance found that A was not a victim of trafficking at the time she committed the crime, because she had graduated to become a trafficker. Both A and B were convicted of trafficking in persons. On appeal, the Court of Appeal reasoned that the non-punishment principle applied to prevent punishment of victims for criminal acts they have committed under duress. They reasoned that the public prosecutor should have reached the same conclusion on the basis of wiretap evidence and statements of other victims. The Court acquitted A and awarded damages to be paid by B.<sup>90</sup>

## Ensure information is provided to victims about decisions to prosecute them

Court processes and decisions should be explained to the people who are being prosecuted. Courts should provide information in simple, age-appropriate, disability-inclusive, non-legal terms and in a language they can understand, including about the non-punishment principle, so that they understand that they should not be punished for any crimes that directly relate to their trafficking.<sup>91</sup>

By way of example, Lao PDR has a handbook for handling human trafficking cases in court that sets out that Courts are to provide information and appropriate documents in a variety of formats to victims in a simple manner, without using legal words and in easily understandable language. The information provided is to include the principle of non-punishment so that the victims will understand that they are not criminally or administratively responsible for the illegal acts they have committed, if those acts are directly related to human trafficking in line with Article 14(7) of ACTIP. This same approach to providing information to victims of trafficking should also apply when they are on trial for unlawful activities they were involved in as a result of their trafficking.

89 *Case of V.C.L and A.N. v The United Kingdom*, (Applications nos. 77587/12 and 74603/12) Judgment Strasbourg, 16 February 2021, para. 162.

90 This example is based on the case of [ECLI:NL:RBSGR:2009:BK8237](#), being a case from the Kingdom of the Netherlands in which article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings (non-punishment) was applied.

91 TIP Victim Sensitive Court Indicators, ASEAN-ACT, 4.1(b). Also see the [Victim Sensitive Courts: A Handbook for ASEAN Member States](#) (ASEAN-ACT, 2022) developed by ASEAN-ACT together with ASEAN Member States.

## [9] Strengthen the capacity of defence lawyers to apply the non-punishment principle

It is not enough for an explicit non-punishment provision to be captured in counter-trafficking legislation and for defences to be available in criminal codes. These provisions must be used in practice by legal professionals who have sufficient skill to apply them to the situation of victims of trafficking who are facing prosecution, in accordance with the victim's right to a fair trial. Therefore, legal practitioners must be provided with ongoing training to ensure that they understand the non-punishment principle, and oversight mechanisms need to be put in place to ensure that they apply the principle in practice.

### Ensure victims of trafficking facing punishment are provided with legal aid

Legal aid is an essential component of the human right to a fair trial.<sup>92</sup> ASEAN Member States are therefore obliged to provide legal aid to persons on trial, including victims of trafficking facing prosecution. The stakes are particularly high in situations where victims are facing corporal or capital punishment for offences that relate to their trafficking.

Providing legal aid is the responsibility of the State, but stakeholders in the legal profession, CSOs and NGOs, may be involved in providing or in funding legal aid.<sup>93</sup> CSOs and NGOs may play a critical role in championing States to provide legal aid, and assisting victims on trial to understand court and appeal processes. Accordingly, mechanisms for cooperation between state and non-state CSOs and NGOs should be put in place, for instance, through the creation of a joint platform for coordination, resource allocation and information sharing on best practices in legal aid.

#### Box: Example (administrative offence)

During the covid-19 pandemic, clients stopped coming to the brothel where A was made to work. A's manager made her go to private homes to service clients to continue to pay off her debts. One evening, when she was returning back to the brothel after visiting a client at his house, she was arrested by police and charged with violating curfews. A was scared of also being charged for her involvement in the sex industry and so said nothing to the police about her situation.

*Application of non-punishment principle:* A is assigned a legal aid lawyer to represent her. After many conversations, A finally tells the lawyer where she was coming and going that night and shares some details of her situation. The lawyer suspects that A is a victim of trafficking. She refers A through the national referral mechanism and arranges for the charges against her to be dropped. Police launch a trafficking in persons investigation of A's manager at the brothel.

92 ICCPR, article 14, ASEAN Declaration on Human Rights, article 20(1).

93 ASEAN Intergovernmental Commission on Human Rights (AICHR) – Thematic Study on Legal Aid (Jakarta: ASEAN Secretariat, July 2019) p.13

## Ensure defence lawyers know how to apply defences that are established in domestic legislation for victims of trafficking

Particularly in countries that do not include specific non-punishment provisions for victims of trafficking in their counter-trafficking 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. For example, a person may have committed a crime because another person threatened to kill or seriously harm the victim or their family members if they refused.

Counter-trafficking bodies should ensure capacity building opportunities and guidance material are provided to defence lawyers on how to identify victims and apply general defences contained in the Penal or Criminal Code in defending victim-offenders on trial.<sup>94</sup>

### Box: Example (manslaughter)

A has been trapped in a situation of sexual exploitation for many months. She is controlled by a man (B) who watches her every move and punishes her with beatings if she does not submit to his requests to service clients. One day, she sees an opportunity to escape. When B is at the top of a steep staircase, she pushes him with all her strength. B falls down the staircase and his neck breaks. A flees the building and seeks help. She finds her way to the police station and tells them what she did. She is arrested for manslaughter.

*Application of the non-punishment principle:* The non-punishment provision applicable in the country does not protect A from a charge of murder. She has been recognised as a victim of trafficking. A's defence lawyer presents evidence to the Court to show the conditions that A had endured, and raise the defence of self-defence. The Court dismisses the case against her.

### Box: Example (shoplifting)

A is working off a debt to the people who brought her to the city by working in a factory. They tell her that she cannot leave her job until she pays off her debt. The cost of her accommodation is taken from her pay, and the price of food she buys from them is added to her debt for three times what it would cost if she bought it elsewhere. To save money and shorten her time there, she eats less than she needs and is always hungry. One day, she visits a local store. She buys some food from the store, and also slips some more food in her bag. She is caught and arrested for shoplifting.

*Application of non-punishment principle:* A's legal representative becomes aware of the circumstances of A's shoplifting. She informs counter-trafficking authorities of her suspicions that A is a victim of trafficking and provides them with as much evidence as she can to support that claim hoping that the police will launch an investigation. In the meantime, at the trial, she raises the non-punishment principle at court, on the basis of her country's legislation which prevents victims of trafficking from being punished for offences they have committed as a consequence of their crime. However, the police prosecutors point out that this provision is only available for offences relating to immigration and prostitution. A's lawyer instead raises the defence of necessity. She supports her argument with expert witness testimony from a doctor who confirms the emaciated state A was in when she was arrested.

<sup>94</sup> For example, article 35 of the 2017 Penal Code of Lao PDR exempts from liability any committing an offence under force or duress, while article 65 mitigates criminal liabilities where a serious crime is committed under force or threat or force. Similarly, article 22 of the Penal Code of Viet Nam sets out that 'justifiable force in self-defence' does not constitute a criminal offence.

## Promote broad interpretation and application of defences in the context of trafficking

Rigid approaches to general defences may fail to capture the complexity of trafficking and prove to be a barrier to protection from punishment. Depending on how the defence of duress is expressed and interpreted, there is a risk it may only capture situations where a victim acts because of a serious or imminent threat, but fail to capture more subtle means traffickers use to coerce and manipulate their victims, such as abuse of a position of vulnerability.

By way of example, consider the situation of a victim of trafficking into sexual exploitation who has graduated from servicing clients to instead manage other victims. This situation has come about through her romantic relationships and situation of dependency on the trafficker. A court that takes a narrow approach to the defence of duress, may consider that the victim has not been forced to perform this role and so will treat her as a trafficker without applying the non-punishment principle. A broader approach to the defence of duress, may consider the victim's circumstances, including her position of vulnerability, relationship of dependence on and fear that the trafficker will demote her to a reduced situation again. That broader approach may recognise the more subtle forms of coercion that may have been used, in order to apply the defence of duress and so protect the victim from punishment.<sup>95</sup>

### Box: Example (trafficking in persons)

Two people (A and B) were arrested and charged with trafficking in persons on the basis that they had abused the vulnerable position of two minor girls and one young woman to transport and harbour them in the capital city for the purpose of exploiting them in prostitution. Both A and B were arrested and charged with trafficking in persons.

*Application of the non-punishment principle:* The court of first instance found that A was not a victim of trafficking at the time she committed the crime. While she had initially been trafficked, she had graduated from being a victim to being a trafficker and was a trafficker at the time she committed the crime. The court of appeal dismissed the case against A because she had the same characteristics of poverty and vulnerability that were abused by the other defendant, and because her own escape from being prostituted herself, was owing to the defendant's financial assistance.<sup>96</sup>

## Ensure defence lawyers understand the irrelevance of consent as a defence to trafficking

The Trafficking in Persons Protocol and the ACTIP state that the victim's consent to exploitation is irrelevant (as a defence) where means have been used in the case of adults, and always in the case of children for whom means need not be proven.<sup>97</sup>

Lawyers representing adult victims of trafficking who are being prosecuted, should understand the irrelevance of the victim's consent so they can counter arguments brought by the prosecution that the victim consented to participate in illegal activities.<sup>98</sup> Defence lawyers should be equipped to counter

95 See for example the case of C.M.S y Guillemet Gastón, summarized here: [https://sherloc.unodc.org/cld//case-law-doc/traffickingpersonscrimetype/arg/2018/c.m.s.\\_y\\_guillemet\\_gaston\\_.html?lng=en&tmpl=sherloc](https://sherloc.unodc.org/cld//case-law-doc/traffickingpersonscrimetype/arg/2018/c.m.s._y_guillemet_gaston_.html?lng=en&tmpl=sherloc)

96 This case is based on the Argentinian case of [C.M.S y Guillemet Gastón](#), being an Argentinian case.

97 See article 2(b) of ACTIP and article 3(b) of the Trafficking in Persons Protocol.

98 For more on the irrelevance of consent in trafficking in persons, see: [The Role of 'Consent' in the Trafficking in Persons Protocol](#) (UNODC, 2014)

arguments brought by the prosecution to prove the fault element (*mens rea*) of the victim's alleged offence. By showing how the use of means by the trafficker or traffickers, diminished the victim's consent to participate in unlawful activities, they can prove that the victim lacked the guilty mind required to be held liable for the crime they are accused of committing.<sup>99</sup>

As discussed above, the means used by traffickers to damage any consent the victim may have given to their exploitation, can be overt means (such as force) as well as more subtle means (such as coercion and abuse of the victim's position of vulnerability). There is a risk that the burden of proof may wrongly fall on the victim to bring evidence of that threat, meaning defences are more limited than the broader non-punishment principle.<sup>100</sup> Therefore, general defences should be broadly interpreted to ensure that subtle forms of coercion are captured, including all the 'means' set out in the definition of trafficking in Article 3 of the Trafficking Protocol and Article 2(a) of ACTIP.<sup>101</sup> In the case of children, for whom means need not be proven to establish that they have been trafficked, defences established in domestic legislation should apply irrespective of the 'means' used to traffic them.

To support defence lawyers in their work, States should consider training practitioners to gather and present evidence of the 'means' used by traffickers to manipulate victims and damage their consent. Capacity building could include specialized training through the provision of case studies, simulations and regular updates on defence methods. Adequate resources need to be allocated to lawyers to access guidance materials and technical support in handling complex cases.

### Recommendation of the Special Rapporteur on Trafficking in Persons, especially women and children

Pending the implementation of a specific legal provision on non-punishment, States should comply with their non-punishment obligation by interpreting existing domestic legal norms, including defences of duress or a state of necessity, as general clauses of exemption of liability. States should ensure that those defences are adapted to the trafficking context, recognizing the many subtle forms of coercion experienced by victims of trafficking, including abuse of a position of vulnerability and all the means set out in the definition of trafficking.<sup>102</sup>

## [10] Strengthen the capacity of members of the judiciary to apply the non-punishment principle

Judges who adjudicate cases for offences that victims may be on trial for having committed, may not be familiar with the complex crime of trafficking in persons. Where they lack an understanding of trafficking in persons, they may not consider the link between an accused person's persons offence and his or her status as a victim of trafficking. They may also be unaware of the non-punishment principle. Members of the judiciary therefore need to be sensitized to trafficking in persons as well as the non-punishment principle and its application to offenders on trial for crimes they committed that relate to being trafficked.

99 The 'means' as set out in article 3 of the Trafficking Protocol and article 2(a) of ACTIP are: 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.

100 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.

101 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.

102 Source: *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, [67]

## **Sensitize judges to the elements of trafficking in persons and application of the non-punishment principle**

Counter-trafficking stakeholders should sensitize members of the judiciary to the definition of trafficking in persons and the interplay between its elements and the victim's offending. Judges should familiarise themselves with any non-punishment provision in their domestic law, policy and guidance documents as well as in international and bilateral arrangements, and inform themselves of opportunities they have to discontinue cases against victims where there is a nexus between their offending and their trafficking. Judges should also be given ongoing capacity building opportunities, including in relation to domestic and international human rights obligations in tandem with non-punishment requirements, to keep their knowledge current and relevant and to ensure that they properly protect the rights of parties involved.

Judges should consider how the legal system can effectively facilitate the application of relevant defences without relying solely on the initiative of the defence or prosecution. 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>103</sup>

## **Ensure judges understand their roles and responsibilities to detained victims**

Victims of trafficking in persons must be protected from arbitrary detention in criminal or immigration contexts, and in the context of placement in closed shelters. Both the ASEAN Declaration on Human Rights and the International Covenant on Civil and Political Rights protect the right of persons not to be arbitrarily detained.<sup>104</sup> Judges have a role to play in ordering the release from detention of any persons arbitrarily detained contrary to the non-punishment principle and other human rights obligations by ordering remedies, including compensation for wrongful detention by the State. For instance, legislation in the Philippines entitles persons who have been unjustly detained or arbitrarily detained by State authorities to apply for compensation.<sup>105</sup>

Counter-trafficking bodies and National Human Rights Institutions (where they exist) should support members of the judiciary to understand the role of the non-punishment principle in hearing any *habeas corpus* claims brought before it by detained victims of trafficking. States should ensure that guidelines are in place so that victims who are wrongfully convicted understand how to access compensation channels.

Oversight and / or evaluation mechanisms can be useful to understand whether the non-punishment principle is being applied. Anti-trafficking bodies and National Human Rights Institutions can play an active role in supporting monitoring and evaluation of the application of the non-punishment principle when victims of trafficking are facing trials.

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103 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.

104 ICCPR, article 9(4) and ASEAN Declaration on Human Rights, article 12.

105 The Philippine Republic Act No 7309 (March 30, 1992) (*An Act creating a board of claims under the department of justice for victims of unjust imprisonment or detention and victims of violent crimes and for other purposes*) entitles a range of people to apply for compensation including those who have been unjustly detained and released without being charged or those arbitrarily detained by authorities.

## Sensitize judges to how fair trial rights support application of non-punishment

Due process and fair trial rights are crucial for the effective application of the non-punishment principle in cases where victims of trafficking are on trial. Article 20(1) of the ASEAN Declaration on Human Rights states that:

Every person charged with a criminal offence shall be presumed innocent until proved guilty according to law in a fair and public trial, by a competent, independent and impartial tribunal, at which the accused is guaranteed the right to defence.

Where defences are evoked, countries may take different approaches to where the burden and standard of proof lies. In some, the evidential burden may fall on the accused person to raise his status as a trafficked person to evoke the defence, but the burden to disprove the application of that defence remains with the defence. Elsewhere, the trafficked person may have to prove that he or she was trafficked and that the criminal conduct resulted from the trafficking. Or the accused person may have to raise the defence, shifting the burden onto the State to prove beyond reasonable doubt that the defendant was not trafficked. Courts may also take different approaches to the evidentiary value of decisions by competent authorities about victim status, placing weight on it in some, and not requiring a person to have been formally identified in others.<sup>106</sup>

Judges must therefore understand where the evidentiary burden lies in their jurisdiction, so they can ensure that the non-punishment principle is effectively applied in trials they adjudicate. They must understand their responsibilities in respect of this obligation, including but not limited to appointing a public defender to represent victims of trafficking, with sufficient capacity to apply the non-punishment principle to be able to provide an effective defence for the victim of trafficking who is on trial. Judges must ensure that victims on trial have access to legal aid. Counter-trafficking bodies should provide judges with guidelines and standards to ensure that the legal assistance victims of trafficking are provided with is of high quality.<sup>107</sup>

## [11] Apply restorative rather than retributive justice for victim-offenders

Alternatives to conviction and incarceration may be available for some people who have committed some categories of offence, with a view to achieving restorative rather than retributive justice. In the case of victims of trafficking, the use of restorative justice can divert victims away from criminal justice processes towards protection and assistance. ASEAN Member States should explore how courts and court processes can apply restorative justice to avoid punishing offenders who have offended on account of being trafficked.

106 Jean-Pierre Gauci and Noemi Magugliani, *Human trafficking and the rights of trafficked persons: An exploratory analysis on the application of the non-punishment principle* (BIICL and IBA, 2023), pp.37-39

107 See for instance: *ASEAN Intergovernmental Commission on Human Rights (AICHR) – Thematic Study on Legal Aid* (Jakarta: ASEAN Secretariat, July 2019)

## **Explore opportunities to apply restorative justice models to victims of trafficking who are on trial**

Members of the judiciary should consider the application of restorative justice approaches as a way of diverting victims from retributive criminal justice processes. They should familiarize themselves with opportunities they have at their disposal and how those opportunities can be calibrated to the context of victims of trafficking who have committed offences.

To support the judiciary in this work, counter-trafficking bodies and National Human Rights Institutions in ASEAN Member States that have them, should assess the restorative justice opportunities that courts and court processes can take advantage of for the benefit of both adult and child victims of trafficking. These stakeholders have a role to play in championing alternative pathways to divert victims away from punishment. ASEAN Member States should develop and adopt specific models and guidelines for restorative justice to be implemented in human trafficking cases. Such models should take into account local contexts and conditions to ensure that the approach taken is effective and sensitive to the needs of parties involved.

Defence lawyers, prosecutors and judges should receive appropriate and ongoing training to ensure that restorative justice principles and practices are appropriately applied. Such training should include how to identify appropriate cases for this approach, and how to manage restorative justice processes with sensitivity to the needs of the victim-offender.

Anti-trafficking agencies and National Human Rights Institutions have a role to play in promoting adherence of these standards to State stakeholders in their countries. These stakeholders should evaluate existing restorative justice mechanisms to ensure their fair and effective application to different types of victims, including children among them. On the basis of that evaluation, adjustments may need to be made to ensure that restorative justice mechanisms are appropriate to cases in which victims of trafficking are offenders.

Civil society and non-governmental organizations with experiences applying restorative justice and child protection to the situation of victims of trafficking who are facing trials should be involved in the design and implementation of restorative justice mechanisms. CSOs and NGOs may be able to provide additional perspectives – including that of victims of trafficking – to support the development and achievement of best practices.

## **Ensure restorative justice approaches apply to child victims who commit crimes**

In the particular case of children who commit crimes in the context of being trafficked, non-judicial measures are recommended to focus on rehabilitation and reintegration of children as an alternative 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.<sup>108</sup>

The primary focus in the case of children should be on recovery, reintegration and reunification. Best interest assessments and best interest determinations should be carried out for all children in conflict with the law, including victims of trafficking who have been involved in unlawful activities. The priority in these cases should be to effectively provide for their needs and to develop comprehensive plans for their recovery and reintegration.

For example, where children in conflict with the law in the Philippines are found responsible for an

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<sup>108</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.

offence, the Diversion Committee may determine that a child should be diverted and referred to alternative measures or services. Similarly, in Thailand, the Department of Juvenile Observation and Protection has introduced a diversion programme based on restorative justice.

In cases of 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.

Counter-trafficking bodies in ASEAN Member States should monitor adherence to these Security Council Resolutions. ASEAN Member States should also adopt clear standard operating procedures and guidelines to ensure that children involved in armed conflicts or with armed groups are treated in accordance with these Security Council Resolutions. The development of standard operating procedures should involve all relevant stakeholders, including but not limited to child protection agencies, international organizations, CSOs, NGOs and local community groups, to ensure consistent and effective implementation of non-punishment to children associated with armed groups.

National human rights institutions in ASEAN Member States should continuously promote awareness of and compliance with international standards regarding the treatment of children associated with armed groups. This advocacy is critical to influence policy and practice at both national and local levels.

The Government of Thailand supported the United Nations Office on Drugs and Crime to produce, in collaboration with the Thailand Institute of Justice, a *Handbook on Restorative Justice*.<sup>109</sup> That resource is recommended to support the application of restorative justice approaches to the context of victims of trafficking.

#### Box: Example (terrorism / armed conflict)

When he was thirteen, A was abducted from his village by an armed group. He was made to participate in several activities, from running errands for his commander, to controlling and sometimes beating other people who were captured by the group. Another one of the children, B, was 16 at the time he was captured along with A. He initially served as an assistant to a high-ranking commander. After being initiated into a higher role by carrying out an execution of a prisoner, he was given more active combat roles carrying out attacks on targets. He also brutally raped some girls who were captured by the group. After three years living in this way, the group were captured.

*Application of non-punishment principle:* Authorities recognised that A was a victim of trafficking (being recruited and abducted for the purpose of exploitation) as well as a victim of grave human rights violations. A was handed to child protection actors, with a view to his rehabilitation, reintegration and family reunification.<sup>110</sup>

109 [Handbook on Restorative Justice](#) (Second Edition, UNODC, 2020)

110 See Security Council Resolution 2427 (2018), applicable to the treatment of children associated or allegedly associated with non-State armed groups including those who commit acts of terrorism.

### Box: Example (terrorism / armed conflict) - continued

Although B was recognised as being a victim of child trafficking notwithstanding that at the time of his apprehension, he was 18 years old. However, authorities took a different view of his situation in respect of the offences he was involved in. Although they recognised that defences of duress and necessity should take into account the context of his trafficking, they considered that some of the crimes he committed were not connected to his situation of trafficking. Some of the crimes B committed – including the brutal rape of girls – could have been avoided and were not committed as a result of any imminent threat to him. He was therefore held criminally responsible for those offences.<sup>111</sup>



### Recommendation of the Special Rapporteur on Trafficking in Persons, especially women and children

Children detained for association with armed groups, including designated terrorist groups, should be recognized as victims of grave violations of human rights and humanitarian law. Recovery, reintegration and family reunification should be prioritized, not punishment. Recalling Security Council Resolution 2388 (2017), all States should refrain from the use of administrative detention of children who are victims of trafficking, including children associated or allegedly associated with all non-State armed groups, including those who commit acts of terrorism. Standard operating procedures should be adopted to ensure the timely handover of children associated with armed conflict or armed groups to civilian child protection actors.<sup>112</sup>

111 See for instance, [the case of \*The Prosecutor v Dominic Ongwen ICC-02/04-01/15\*](#), concerning a former child soldier who was found guilty by the International Criminal Court in 2020, of 61 crimes against humanity and war crimes in Uganda between July 2002 and December 2005.

112 Source: *Implementation of the non-punishment principle Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally*, UN Doc. A/HRC/47/34, 17 May 2021, [63]

## SECTION 5



# **Applying the non-punishment principle when victims have been convicted**

## Section 5. Applying the non-punishment principle when victims have been convicted

Where non-punishment safeguards have failed to protect a victim from being prosecuted and convicted, there may be opportunities at the sentencing stage to protect victims from further punishment. Where victims of trafficking have been wrongly convicted contrary to the non-punishment principle, they must have access to remedies including restitution and compensation for the wrong done to them by the State that has failed to protect their rights.

All persons – including convicted persons – have human rights that must be upheld by States. Victims may suffer the effects of conviction long after their sentences have been served. Criminal records or administrative sanctions even for minor offences can pose barriers to victim recovery and reintegration. Criminal records for crimes committed in the course of being trafficked can pose a barrier to victims' access to compensation.<sup>113</sup> They can be detrimental to asylum or residency claims and travel. They can deny them access to housing, education and employment opportunities. Criminal records can mean they are unable to apply for loans or licences, or social security, and may even have posed a barrier to their custody of their children. These realities point to the vital need for criminal records to be vacated, expunged or sealed.

The following guidelines are offered to support States to strengthen their capacity to protect victims from further punishment and to provide remedies to victims who have been wrongfully convicted.

### [12] Avoid or mitigate sentences for convicted victims of trafficking

Members of the judiciary may be able to discontinue proceedings, acquit victims, or as a last resort, to mitigate the sentences imposed on victims who are convicted. Avoiding or mitigating sentences does not protect victims from the experience of being criminalized. Arrest, prosecution and conviction should be guarded against in the first instance. Sentence mitigation alone therefore does not fulfill State's obligations to protect victims from punishment, but can be an important last line of defence.

### Consider how rules relating to sentence mitigation can provide relief from punishment

Rules relating to sentence mitigation will be useful tools to provide victims some relief from punishment where they have not been protected from conviction.<sup>114</sup> Members of the judiciary should have recourse to rules that allow them not to 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.

### Ensure that sentences imposed reflect the culpability of the victim-offender

Where a trafficked person has been found guilty of a crime, sentences imposed should always reflect the degree of responsibility of the victim-offender and the seriousness of the crime committed. Members of the judiciary should be capacitated to analyse the culpability of victims of trafficking who have committed offences by understanding the nexus between their offending and their trafficking.

<sup>113</sup> *National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons* (2<sup>nd</sup> edition, OSCE, ODIHR, 2022), p.233.

<sup>114</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

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 is likely to be. Members of the judiciary should also be encouraged to interrogate their own biases and assumptions about victims of trafficking and their offending, so that their decisions are fair and impartial. They should familiarize themselves with the mitigating circumstances that may apply in situations when victims of trafficking are involved in an offence.<sup>115</sup>

### Box: Example (drug trafficking)

A is a young single mother, struggling to support her son and her aging mother. She falls in love with a wealthy and charming man from another country, who is often in her city for his import/export business. After many months of seeing each other when he is in town, he buys her a flight ticket to come and visit him for a week. A is excited to visit him in his city for the first time. He asks her to collect some things from one of his colleagues on the way to the airport and to bring them to him. A complies with this request. After she lands in the city, she is taken aside by authorities who find narcotics in her luggage. She is arrested for trafficking cocaine.

*Application of the non-punishment principle:* The prosecutor requests that the Court dismiss A on the basis of the non-punishment principle. While the Judge recognises that A has been trafficked into forced criminality, he noted that domestic legislation does not recognise forced criminality as a purpose of trafficking in persons, and that the non-punishment provision was limited to protect victims from punishment for immigration and prostitution-related crimes. On this basis, the Judge reluctantly convicts A. However, the judge mitigates A's sentence on the basis of A's personal circumstances, and sentences her to a minimal period of imprisonment, suspended for a probation period.

## [13] Provide victims with remedies for wrongful punishment

The failure of authorities to apply the non-punishment principle to protect victims of trafficking from wrongful conviction or sentencing amounts to a violation of their human rights. 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 Declaration on Human Rights. The due diligence principle requires States to take effective measures to remedy this failure by expunging or vacating convictions, sealing criminal records, and removing any wrongful sanctions (including fines) that have been imposed on the basis of administrative, immigration, civil, criminal or other decisions.

### Explore existing opportunities for victims to seek remedies for wrongful punishment

Like all rights-holders, victims of human trafficking have a right of compensation for wrongful conviction or miscarriage of justice.<sup>116</sup> ASEAN Member States should ensure that rights of appeal are accessible to victims of trafficking who have been wrongfully convicted contrary to the non-punishment principle. For instance, legislation in the Philippines allows for compensation to be sought by a range of people, including those unjustly accused, convicted and imprisoned.<sup>117</sup> Legislation in Lao PDR allows court

<sup>115</sup> For instance, article 51 of the Penal Code of Viet Nam sets out mitigating facts that may be relevant including where the crime was committed

<sup>116</sup> ICCPR, article 14(6); ASEAN Human Rights Declaration, article 5.

<sup>117</sup> See Philippine (March 30, 1992), Republic Act No 7309 (*An Act creating a board of claims under the department of justice for victims of unjust imprisonment or detention and victims of violent crimes and for other purposes*) entitles the following persons to apply for

decisions to be nullified or amended on specific grounds.<sup>118</sup>

Barriers that particular categories of victims face in accessing legal channels should be identified and overcome. Critical assessment of those barriers should include those that relate to discriminatory grounds whether owing to the nationality, status, disability, language, type of trafficking, or other grounds. It should also assess the extent to which punishment of victims is itself a barrier to accessing justice. Those barriers may be a result of criminal records imposed on them that challenge their access to remedy, or travel prohibitions imposed owing to immigration violations, that make victims unable to travel in order to access compensation channels. Barriers may also be the result of victims who have been recognised as victims in one ASEAN country not being recognised in others.

Grievance mechanisms should be put in place for victims of trafficking who have been wrongfully punished contrary to the non-punishment principle. Funds should be established or adapted to be accessible to victims who have had their rights violated through wrongful punishment.<sup>119</sup> Remedies that are available to victims who have been wrongfully punished, should be available on a non-discriminatory basis to victims who have suffered wrongful punishment whether as a result of deportation, detention, return or conviction.

#### Box: Example (drug trafficking)

A is a 19-year-old person with disabilities who must use a wheelchair. He has been unemployed for several months and is struggling to support his aging mother. A local drug trafficking cartel recruits him to sell drugs, telling him that if he does not sell drugs for them, they will make his mother do it instead. They tell him that he will be successful in the drug trade as the authorities will not suspect a man in a wheelchair to be a drug dealer. A receives a percentage of the profits he makes from selling drugs on the streets. One day, he sells drugs to an undercover police officer who arrests him.

Application of the non-punishment principle: Evidence is presented at A's trial, including testimony from the undercover police officer, the drugs that he purchased, and the money for those drugs that was seized from A after the purchase, prove that A was selling illegal drugs. He is convicted to spend many years in jail. In the early months of his incarceration, A has a medical check with a doctor. During the conversation that A and the doctor have, the doctor becomes concerned that A may have been trafficked to commit the crime he was convicted of. Competent authorities identify A as a victim of trafficking who was recruited into criminality by means of threats against his mother and abuse of his position of vulnerability. The case is appealed. The court of appeal dismisses the case against A on the basis of evidence of his victim status, and orders restitution for his wrongful conviction.

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compensation: those unjustly accused, convicted and imprisoned and subsequently acquitted; those unjustly detained and released without being charged; those arbitrarily detained by authorities; or those who are victims of violence crimes including rape and offences committed with malice, which results in death or serious physical and/or psychological injuries, permanent incapacity or disability, insanity, abortion, serious trauma, or committed with torture, cruelty or barbarity..

118 The Lao *Criminal Procedure Code* allows for appeals and requests for objection against the decision of the court (article 214). Article 223 allows decisions to be nullified or amended on specified grounds, including: 1. The investigation-interrogation or the trial of the case is not comprehensive, thorough or objective; 2. The court's reasoning is not in conformity with the actual facts of the case; 3. The imposition of the penalty is not appropriate to the nature, degree of danger to the society of the offence and the personality of the offender; 4. There is a breach of regulations on criminal procedure or an incorrect use of the Penal Law.

119 Point 3 of the ASEAN Declaration on Strengthening Cooperation in Protecting and Assisting Witnesses and Victims of Transnational Crime (21 August 2023) Encourages ASEAN Member States "to establish procedures to provide access to compensation and restitution for victims of crime, including transnational crimes, and to enable the views and concerns of victims to be presented and considered at appropriate stages of the criminal proceedings."

## **Explore opportunities to vacate, expunge or seal convictions of victims of trafficking**

Members of the judiciary and criminal justice practitioners should familiarize themselves with vacatur laws in place and the circumstances in which victims of trafficking may have recourse to them. They must understand the process for pursuing options to vacate (undo the conviction), expunge (removing the conviction from the criminal record) or seal (require court orders for convictions to be seen) convictions to provide victims with effective remedies. Legal professionals have a role to play in supporting victims to file motions in court to have their conviction removed, and should increase their capacity to pursue remedies for victims, including across borders through international cooperation.

Counter-trafficking bodies and National Human Rights Institutions (where they exist) should assess vacatur legislation in their jurisdictions. They should determine whether Court decisions to reverse convictions in their jurisdiction entitle the victim to state that he or she was not charged or convicted, or result in the charge being removed from the victim's record but the conviction remaining.<sup>120</sup>

These bodies should also identify any limitations and barriers that opportunities to vacate, expunge or seal criminal records may pose, to give full effect to the non-punishment principle for victims of trafficking. For instance, some may only apply to select offences (such as immigration or prostitution-related offences) but not to other crimes that victims of trafficking may have committed as a result of being trafficked. Courts should be encouraged to take broad interpretations of vacatur laws in the context of cases involving offenders who are victims of trafficking.

## **Identify and address barriers victims face in having convictions eliminated**

Counter-trafficking bodies and National Human Rights Institutions should identify and address the legislative, procedural and practical barriers that victims face in having their criminal records vacated or expunged. Consideration should be given to seeking the support of non-state actors including NGOs and CSOs to identify and address these barriers.

Ensuring access to remedies may require ASEAN Member States to allocate sufficient funding for courts to be able to implement vacatur laws, including by providing legal aid to reduce undue burdens on victims to prove that the conviction was in error.<sup>121</sup>

Measures may need to be put in place to remove discriminatory barriers that some victims may face in accessing remedies. For instance, information about post-conviction remedies must be conveyed in languages that convicted victims can understand. Information must also be conveyed and processes implemented in ways that are child-friendly and accessible to children and young people, and must be disability-inclusive in line with internal law requirements relating to access to justice and effective remedies.

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120 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.

121 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.



## **Recommendation of the Special Rapporteur on Trafficking in Persons, especially women and children**

When domestic authorities fail to apply the non-punishment principle and a conviction or sentence is issued against a trafficked person, the due diligence principle requires States to remedy such failure. Ensuring the full and effective implementation of the non-punishment principle requires provision for expungement or sealing of all related criminal records and relief of any sanctions imposed, including fines or other administrative sanctions. Such relief should be provided for in legislative and other necessary measures and be supported through the provision of legal aid, to avoid an undue burden being placed on a trafficked person and to enable full recovery.

States should ensure that a conviction of a trafficked person resulting from a failure to apply the non-punishment principle or from the suspicion that a trafficked person has been involved in trafficking-related offences will not result in refusal of a residence permit or of a recovery and reflection period, denial of social security or other benefits, restrictions on access to employment or education or restrictions on access to compensation.<sup>122</sup>

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<sup>122</sup> Source: *Implementation of the non-punishment principle Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally*, UN Doc. A/HRC/47/34, 17 May 2021, [65-66]

## SECTION 6



# **Monitoring and reporting on the implementation of the non-punishment principle**

## Section 6. Monitoring and reporting on the implementation of the non-punishment principle

At the regional level, the SOMTC is the coordinating body on efforts to give effect to the non-punishment principle in laws, policies and practices of ASEAN Member States. SOMTC is also responsible for reporting on implementation of the ACTIP to the AMMTC. As stated in ACTIP:

### Article 24 Monitoring, Reviewing and Reporting

1. The ASEAN Senior Officials Meeting on Transnational Crime (SOMTC) shall be responsible for promoting, monitoring, reviewing and reporting periodically to the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) on the effective implementation of this Convention.
2. The ASEAN Secretariat shall provide the support for supervising and coordinating the implementation of this Convention and assist the SOMTC in all matters relating thereto.

SOMTC should explore opportunities to raise the non-punishment principle in its monitoring, reviewing and reporting work, including through its Bohol TIP Work Plan 2.0. AICHR can support SOMTC in its monitoring, reviewing and reporting work by ensuring that human rights considerations are effectively integrated into monitoring criteria – including in relation to Article 14(7) of ACTIP – and that the monitoring approaches themselves adhere to human rights standards.

### [14] Incorporate implementation of the non-punishment principle into national monitoring mechanisms

#### Develop indicators to measure implementation of the non-punishment principle

ASEAN Member States are recommended to ensure that national mechanisms to monitor counter-trafficking response explicitly include monitoring of implementation of Article 14(7) of ACTIP.

The Bohol TIP Work Plan 2.0 suggests the following potential indicators for measuring achievements with respect to implementation of the non-punishment principle:

- Number of victims of TIP who benefit from the non-punishment principle
- Number of victims of TIP identified in immigration detention and transferred out of immigration detention facilities into shelters or other forms of appropriate accommodation for TIP victims.

States should develop further indicators on the basis of consultation with law enforcement, prosecutors, defence lawyers, members of the judiciary, civil society groups and other stakeholders. Indicators should be designed to measure State efforts including but not limited to:

- Allocate financial and human resources to support the implementation of the non-punishment principle in accordance with this Guideline
- Adopt new laws and policies that strengthen implementation of the non-punishment principle
- Advocate for the implementation of the non-punishment principle
- Build capacity of frontline officials to apply the non-punishment principle including by providing them with up-to-date indicators to screen for victims of trafficking who may be involved in unlawful activities
- Divert presumed victims away from criminal justice channels into protection pathways
- Build capacity of criminal justice practitioners to apply the non-punishment principle including through the integration of the non-punishment principle into training curricula

- Increase the number of court or administrative decisions that grant the non-punishment principle to presumed victims of trafficking.

Indicators should be specific, measurable, achievable, relevant and time-bound. Their development should be informed by insights provided by state and non-state actors and by victims of trafficking in persons, requiring that mechanisms be in place to gather their inputs.

### **Collect, protect, aggregate and analyse data on implementation of the non-punishment principle**

Counter-trafficking bodies should identify how quantitative and qualitative data can be collected, protected, aggregated and analysed in accordance with privacy rights. State authorities should determine how data can be centralized and analysed, to determine whether victims of trafficking have been protected from punishment, and whether those who have been wrongfully punished were able to access compensation. They should consider other sources of information that can support monitoring bodies to determine the extent to which the non-punishment principle is or is not being applied in practice in their jurisdictions. Consideration can be given to capturing non-punishment in case files, to record whether or not the non-punishment principle has been applied in a given case and on which legal grounds decisions have been made.

Beyond quantitative data, States should also provide qualitative data. Included among qualitative information shared for the benefit of practitioners within the State and elsewhere, should be information about the challenges States have faced in fulfilling their non-punishment obligations as well as best practices and lessons learnt from development of legislation. It would also be useful for States to gather data on victim identification, and the types of unlawful activities victims have been involved in during their trafficking. Lessons could also be usefully learnt and challenges identified and addressed through the collection of qualitative data on the application of the non-punishment principle to victims who are on trial and/or have been convicted of offences.

### **Apply a multi-stakeholder approach to monitoring implementation**

National anti-human trafficking bodies and, where they exist, National Human Rights Institutions have a key role to play in monitoring adherence to the non-punishment principle. They also must hold State officials to account for failing to apply the non-punishment principle in any decisions to arrest, detain, deport, prosecute and convict a victim of trafficking. National Human Rights Institutions should monitor identification processes as well as any trials of the victims of trafficking who are being prosecuted for their involvement in unlawful acts. They should determine the adherence of court processes to human rights norms and standards that are necessary to give effect to the non-punishment principle. They should also establish systems to allow other stakeholders – including victims – to provide inputs into national monitoring mechanisms, without fear of intimidation.

Non-state actors, including NGOs and CSOs, have a role to play in supporting counter-trafficking bodies and National Human Rights Institutions to monitor implementation of the principle in practice. For instance, they can help State actors to determine indicators and human rights-based processes for monitoring. They can also support States to integrate the perspectives and experiences of victims of trafficking into the design of monitoring mechanisms. Crucially, non-state actors and civil society actors may be able to provide independent and transparent monitoring of State implementation of the non-punishment principle. Independent monitoring can support expert and objective analysis of how States fulfill their obligations. The insights obtained through independent monitoring may be richer than the insights that emerge when States monitor their own activities.

## [15] Report on implementation of the non-punishment principle

Measuring implementation is not a valuable undertaking unless the results of what is learnt are reported on and acted on to strengthen cooperation. Critically, reports should result in actions taken to remedy any shortcomings. States are recommended to invest financial, human and other resources into strengthening application of the non-punishment principle in light of insights yielded through reporting. ASEAN Member States should support efforts to report on implementation of the non-punishment principle across the ASEAN Region.

### Report on implementation of the non-punishment principle to SOMTC

The SOMTC is responsible for monitoring effective implementation of ACTIP and reporting periodically to the AMMTC on its implementation.<sup>123</sup>

ASEAN Member States should expedite the appointment of National ACTIP Representatives in line with the Terms of Reference adopted *ad referendum* by the AMMTC in 2022.<sup>124</sup> National ACTIP Representatives should be mandated to promote, monitor, review and report to SOMTC on the implementation of article 14(7) of the non-punishment principle. In that capacity, National ACTIP Representatives can collect and aggregate data from court records and law enforcement records to identify achievements, challenges and best practices in applying the non-punishment principle.

ASEAN Member States should report on the implementation of activities / programmes to implement the non-punishment principle, to the SOMTC Working Group on Trafficking in Persons (SOMTC Working Group on TIP).<sup>125</sup> The SOMTC Working Group on TIP is mandated to receive annual reports from ASEAN Member States participating in the Bohol TIP Work Plan 2.0.

### Develop and apply a standardized approach to reporting on implementation of the non-punishment principle

The SOMTC Working Group on TIP should develop a standardized reporting template in accordance with its monitoring, evaluation, reporting and learning (MERL) framework. The template should be designed to capture implementation of the non-punishment principle, and disseminated at the national level. AICHR can provide human rights expertise in the design and development of the template and supports its use to review ASEAN Member State practice. A cross-sectoral approach should be taken to the identification and development of recommendations to improve the implementation of the non-punishment principle at the national level.

### Publish reports on implementation of the non-punishment principle

Efforts to implement the non-punishment principle should be transparent. Monitoring results are recommended to be published so that achievements, challenges and best practices of ASEAN Member States in implementing the non-punishment principle can be learnt by others across the region and beyond.

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123 ACTIP article 24.

124 See [Terms of Reference National Representatives for the Implementation of ASEAN Convention against Trafficking in Persons, Especially Women and Children \(ACTIP\) National ACTIP Representatives](#), Adopted by the 16<sup>th</sup> AMMTC on 21 September 2022.

125 Bohol 2.0, B.1.4.

# ANNEXES

## Annex

### Annex 1: Legal provisions on non-punishment in ASEAN Member States

<p><b>Brunei Darussalam</b></p> <p>(only immigration and document-related offences)</p>	<p>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.</p> <p>Section 47, <i>Anti-Trafficking in Persons Act</i>, Chapter 230</p>
<p><b>Cambodia</b></p>	<p>No explicit non-punishment provision</p>
<p><b>Indonesia</b></p>	<p>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.</p> <p>Article 18, <i>Law Number 21 on The Eradication of the Criminal Act of Trafficking in Persons</i>, 2007</p>
<p><b>Lao PDR</b></p> <p>(only illegal immigration and prostitution)</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, <i>Law Number 21 on The Eradication of the Criminal Act of Trafficking in Persons</i>, 2007</p>
<p><b>Malaysia</b></p> <p>(only immigration and document-related offences)</p>	<p>A trafficked person shall not be liable to criminal prosecution in respect of—</p> <p>(a) his illegal entry into the receiving country or transit country;</p> <p>(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.</p> <p>Section 25, <i>Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act</i> 2007</p>
<p><b>Myanmar</b></p> <p>(trafficking in persons offences, illegal entry, transit, exit; illegal stay, work; document-related offences)</p>	<p>16. The trafficked victim shall not be taken action against, arrested, detained or punished under trafficking in persons relating to any of the following acts:</p> <p>(a) involvement of the trafficked victim according to his/her consent or not;</p> <p>(b) illegal entry into, passing through, or leaving for, illegally residing in or working in a foreign country;</p> <p>(c) acquiring or possession in hand of any fraudulent travelling evidence or documents.</p>

<b>Myanmar (Continued)</b>	<p>17. If a situation where the trafficked victim is found guilty of involving in a crime under any existing laws with relation to human trafficking leading to a matter to take action against him/her arises, the Enforcement Police Force members, Enforcement Officers and investigation offices shall seek the approval from the Central Body via the respective Working Committee.</p> <p><i>The Prevention and Suppression of Trafficking in Persons Law (Law No. 41/2022)</i></p>
<b>Philippines</b>	<p>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.</p> <p>"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."</p> <p><i>Section 17, Anti-Trafficking in Persons Act (RA No. 9208) of 2003, as amended by the Expanded Anti-Trafficking in Persons Act of 2012 (RA 10364)</i></p>
<b>Singapore</b>	No explicit non-punishment provision
<b>Thailand</b>  (only immigration, document-related and prostitution-related offences)	<p>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.</p> <p><i>Section 41, Anti- Trafficking in Persons Act B.E. 2551 (2008)</i></p>
<b>Viet Nam</b>	<p>Depending on the specific cases and related legal provisions, victims whose unlawful acts are a direct result of human trafficking may not be subject to administrative penalties or criminal prosecution for such acts.</p> <p><i>Article 4(5). Law No. 53/2024/QH15 on Human Trafficking Prevent and Combat passed on 28 November 2024 to take effect 1 July 2025</i></p>

## Annex 2: Policy provisions on non-punishment in ASEAN Member States

<p><b>Brunei Darussalam</b></p>	<p><i>National Action Plan on Trafficking in Persons (2020 - 2024)</i></p> <p><i>National Standard Operating Procedure for TIP (2021)</i></p> <p>Neither of these documents could be located to determine whether or not the non-punishment principle is mentioned therein.</p>
<p><b>Cambodia</b></p>	<p><i>National Guideline on Forms and Procedures for Victim Identification for appropriate services provision (2015).</i></p> <p>“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.” (2.C, 2)</p> <p><i>The Decision on the Guideline for the Protection of the Rights of Trafficked Children of the Kingdom of Cambodia (NCCT, 20 December 2007)</i></p> <p>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 offence related to their situation as trafficked children (Article 4, 2.3(a))</p> <p><i>Guidelines on the Implementation of the Law on Suppression of Human Trafficking and Sexual Exploitation (Unofficial UNIAP translation 2008) General Guidelines</i></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 offender under new legislation.</p> <p><i>Policy and Minimum Standards for Protection of the Rights of Victims of Human Trafficking (Ministry of Social Affairs, Veterans and Youth Rehabilitation, 2009)</i></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)</p>
<p><b>Indonesia</b></p>	<p><i>The National Action Plan for Eradication of Human Trafficking (2015 – 2019)</i> does not mention the non-punishment principle.</p> <p><i>The National Action Plan for Eradication of Human Trafficking (2020 – 2024)</i> does not mention the non-punishment principle.</p>

<b>Lao PDR</b>	<i>The Guidelines for the protection, assistance and referral of victims of trafficking</i> (Ministry of Public Security, Secretariat for the National Steering Committee on Human Trafficking, 2020) do not mention the non-punishment principle.
<b>Malaysia</b>	The <i>National Action Plan on Anti-Trafficking in Persons 2021-2025</i> does not mention the non-punishment principle.
<b>Myanmar</b>	Myanmar Fourth Five-Year National Plan of Action to Combat Trafficking in Persons (2022-2026) does not mention the non-punishment principle.  However, in implementing the 2024 Annual Work Plan of NPA, the awareness programs on the non-punishment principle are conducted. Also, the activities on the non-punishment principle will be included in the Annual Work Plans for 2025 and 2026.
<b>Philippines</b>	<i>Guidelines on the Protection of the Rights of Trafficked Women</i> (Philippine Commission on Women in coordination with the Inter-Agency Council Against Trafficking (IACAT) 2013)  “trafficked women should be treated as victims not offenders” (5.3.8.1.1.)  <i>Guidelines on the Referral System Involving Trafficking in Persons Cases</i> adopted by the Inter-Agency Council Against Trafficking (IACAT) 2 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.”
<b>Singapore</b>	<i>National Approach against Trafficking in Persons 2016 – 2026</i> (Singapore Inter-Agency Task Force on Trafficking in Persons)  In relation to victims of trafficking: “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.”
<b>Thailand</b>	<i>The Action Plan for Prevention and Resolution of Human Trafficking Problems to support the National Security Strategy</i> (2018 – 2037) of the Ministry of Social Welfare and Development (MSDHS) does not mention the non-punishment principle.
<b>Viet Nam</b>	The <i>Minimum Standards in Provision of Services to Victims of Human Trafficking</i> (Ministry of Labour and Social Affairs, 2011); and 2016-2020 <i>National Action Plan against Trafficking in Persons and the National Programme on Counter Trafficking in Persons during the period 2021-2025 with a vision to 2030</i> do not mention the non-punishment principle.

### Annex 3: Examples of bilateral and sub-regional agreements relevant to non-punishment

Agreement	Parties	Non-punishment provision
Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT) Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region (2004)	Cambodia China Lao PDR Myanmar Thailand Viet Nam	III. In the area of Protection, Recovery and Integration: 16. Ensuring that victims identified as victims of trafficking are not held in immigration detention by law enforcement authorities
Agreement between the Royal Government of Cambodia and the Government of the Socialist Republic of Vietnam on Bilateral Cooperation for Eliminating Trafficking in Women and Children and Assisting Victims of Trafficking (2005)	Cambodia Viet Nam	Article 2. The Parties recognise that examples of purposes of trafficking in women and children include, but are not limited to, the following: 10. Use in criminal activities.  Article 5. Trafficked persons shall be considered victims and not violators or offenders of the immigration law. Therefore, 1. Trafficked women and children shall not be charged and prosecuted for illegal immigration or prostitution 2. Trafficked women and children shall not be detained in an immigration detention centre during the time of waiting the official repatriation process. They shall be put under the care of competent authorities of the Parties. Shelter protection shall be provided to the victims in accordance with the legal regulation of each State.
Agreement between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Vietnam on Bilateral Cooperation for Eliminating Trafficking in Persons, Especially Women and Children and Assisting Victims of Trafficking (2008)	Thailand Viet Nam	Article 6. “Trafficked women and children shall be considered victims, not violators or offenders of the immigration law. Therefore, 1. Trafficked women and children shall not be prosecuted for illegal entry to the country; 2. Trafficked women and children shall not be detained in an immigration detention centre while waiting for repatriation, but shall be put under the care of the Ministry of Public Security (Vietnam) or the Ministry of Social Development and Human Security (Thailand), and shelter and protection shall be provided to the victims according to the policy of each country”

<p>Memorandum of Understanding between the Kingdom of Thailand and the Government of the Union of Myanmar on Cooperation to Combat Trafficking in Persons, especially women and children (2009)</p>	<p>Myanmar Thailand</p>	<p>Article 8. Victims of trafficking in persons shall be considered a victim of a crime, not violators or offenders of immigration law. Therefore, (a) Victims of trafficking in persons should not be prosecuted by either party for illegal entry to or exit from the country, and for any other offences arising as a direct consequence of trafficking in persons; (b) Victims of trafficking in persons shall not be detained in any law enforcement or immigration detention centres while waiting for repatriation, but shall be placed under the care of the Department of Social Welfare (Myanmar), Department of Social Development and Welfare (Thailand), or temporary shelters. Shelter and protection shall be provided to the victims of trafficking in persons according to the Laws and policies of each Party</p>
<p>Memorandum of Understanding between the Government of the Union of Myanmar and the Government of the People's Republic of China on Strengthening the Cooperation on Combating Human Trafficking (2009)</p>	<p>Myanmar China</p>	<p>Article 5: Both parties shall take appropriate measures to protect victims of trafficking, who shall be treated as the victims of criminal behaviour rather than the offenders or criminal suspects. Therefore</p> <ol style="list-style-type: none"> <li>1. Neither party shall punish the victims for illegal entry or exit from its territory or any other offences arising directly resulting human trafficking</li> <li>2. Persons who have been identified as victims of trafficking shall not be deported by formally repatriated in a timely manner.</li> </ol>
<p>Agreement between the Government of the Lao People's Democratic Republic and the Government of the Socialist Republic of Vietnam on Cooperation in Preventing and Combating Trafficking in Persons and Protection of Victims of Trafficking (2010)</p>	<p>Lao PDR Viet Nam</p>	<p>Article 4(1)(b) "The Parties commit to take appropriate measures to protect victims. The Parties' competent authorities must ensure the victims safety as follows: Being treated equally and provided with legal support; not detained and/or punished for illegal immigration or any other related administrative offence."</p>
<p>Agreement between the Government of the Socialist Republic of Vietnam and the Government of the People's Republic of China on Strengthening Cooperation on Preventing and Combating Human Trafficking (2010)</p>	<p>Viet Nam China</p>	<p>Article 2: The two parties shall take appropriate measures to protect the personal safety of the victims. A. The two parties shall not punish acts of victims illegally entering (exiting) their national territories or other illegal acts as an immediate result of being trafficked.</p>

<p>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 (2014)</p>	<p>Cambodia Thailand</p>	<p>Chapter IV Article 6: Trafficked persons shall be considered victims, not violators or offenders of the immigration law. Therefore,</p> <ul style="list-style-type: none"> <li>(a) Trafficked persons shall not be prosecuted for illegal entry to the country;</li> <li>(b) Trafficked persons shall not be detained in an immigration detention centre during the times awaiting the official repatriation process, but shall be put under the care of the Ministry of Social Affairs, Veterans and Youth Rehabilitation (Cambodia) or the Department of Social Development and Welfare (Thailand), and shelter and protection shall be provided to the victims according to the policy of each state</li> </ul>
<p>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)</p>	<p>Lao PDR China</p>	<p>Article 4: The two Parties shall take appropriate measures to protect victims of trafficking in the following areas</p> <ul style="list-style-type: none"> <li>1. Either Party shall not punish the victims for illegal entry to or exit from its territory, or any other offences arising directly from trafficking in persons;</li> </ul>
<p>COMMIT Guidelines on Victim Identification and Referral Mechanisms: Common Guidelines for the Greater-Mekong Subregion (2016)</p>	<p>Cambodia China Lao PDR Myanmar Thailand Viet Nam</p>	<p>“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”</p>

## Annex 4: International best practice guidelines

The following guidelines have been extracted verbatim from their original source.

### **Recommendations of the Special Rapporteur on Trafficking in Persons, Especially Women and Children** <sup>126</sup>

53. States should ratify and implement all relevant international instruments prohibiting trafficking in persons and providing for the right to non-punishment, including the ILO Protocol to the Forced Labour Convention, 1930 (No. 29).

54. States should adopt all appropriate legislative, policy, administrative and other measures to ensure the effective implementation of the principle of non-punishment of victims of trafficking and should:

- (a) Introduce a specific provision into domestic legislation to provide for the non-punishment of victims of trafficking;
- (b) Adopt prosecutorial guidelines in order to facilitate the consistent and systematic application of the non-punishment principle in all trafficking cases;
- (c) 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.

55. The principle of non-punishment should be applied:

- (a) By all relevant domestic authorities, including the police, immigration and border officials, labour inspectorates and any other law enforcement agency or official, and they should be trained and qualified to identify potential victims of trafficking;
- (b) As soon as there are reasonable grounds to believe that a person has been trafficked or as soon as the trafficked person, or their legal representatives, raises a trafficking defence, in order to afford the trafficked person effective and full protection.

56. States are required to ensure the prompt and effective identification of victims of trafficking. Legal assistance should be provided throughout the identification process, to ensure the early identification of victims, referral for assistance and protection and effective implementation of the non-punishment principle.

57. States are required to ensure that the principle of non-punishment is applied to:

- (a) All forms of trafficking, including for the purpose of sexual exploitation, labour exploitation and forced criminality, as well as to both cases of international trafficking and cases of internal trafficking;
- (b) Any unlawful activity carried out by a trafficked person as a direct consequence of their trafficking situation, regardless of the gravity or seriousness of the offence committed;
- (c) Criminal, civil, administrative and immigration offences, as well as other forms of punishment, such as arbitrary deprivation of nationality, denial of consular assistance or repatriation, exclusion from refugee status or other forms of international protection and family separation;
- (d) Any situation of deprivation of liberty, including immigration detention and detention pending removal, transfer or return proceedings.

58. Recognizing that trafficking in persons is a serious human rights violation, the application of the

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<sup>126</sup> These recommendations have been extracted from the Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally, on *Implementation of the non-punishment principle*, UN Doc. A/HRC/47/34, 17 May 2021. They are also included throughout this ASEAN Guideline.

non-punishment principle should not be conditional on the formal identification of a victim or on the prosecution of an alleged trafficker. Application of the non-punishment principle must not be conditional on the cooperation of the victim in criminal proceedings.

59. To ensure compliance with the principle of non-punishment, all presumed or identified trafficked persons must be promptly removed from detention or any situation of deprivation of liberty and provided with assistance and protection.

60. The principle of non-punishment must be applied without discrimination to all trafficked persons, including to trafficked persons seeking asylum or other forms of international protection.

61. States must ensure equal protection of the law and equality before the law in all anti-trafficking measures, including in ensuring the effective implementation of the non-punishment principle for trafficked persons with disabilities. States must take all appropriate steps to ensure non-discrimination on the basis of disability and to ensure that reasonable accommodation is provided, including the provision of procedural and age-appropriate accommodations, in order to facilitate effective access to justice and the participation of trafficked persons with disabilities in all legal proceedings, including identification procedures and at the investigative and other preliminary stages.

62. States must ensure that a child victim is not punished for unlawful acts that are related to their being trafficked. Where the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she must be presumed to be a child and be accorded special protection measures pending the verification of his or her age. Once the relation between the offence committed and a child's status as presumed or identified trafficking victim is established, that relation must be accepted as necessary and sufficient grounds to discontinue the proceedings or to expunge an already issued conviction, as well as to immediately release the child from detention facilities. With respect to children, given that no means are required in order to establish their status as victims of trafficking, no test of compulsion can be applied.

63. Children detained for association with armed groups, including designated terrorist groups, should be recognized as victims of grave violations of human rights and humanitarian law. Recovery, reintegration and family reunification should be prioritized, not punishment. Recalling Security Council resolution 2388 (2017), all States should refrain from the use of administrative detention of children who are victims of trafficking, including children associated or allegedly associated with all non-State armed groups, including those who commit acts of terrorism. Standard operating procedures should be adopted to ensure the timely handover of children associated with armed conflict or armed groups to civilian child protection actors.

64. To ensure compliance with the principle of non-punishment in prosecutorial decisions, States must ensure that:

(a) Prosecutors are under a duty to discontinue proceedings against trafficked persons for all offences committed as a direct consequence of their situation as trafficked persons. If the prosecuting authorities fail to do so, domestic courts should have the authority to order a discontinuance on the grounds of abuse of process or on the grounds that the prosecution would be in breach of the non-punishment obligation;

(b) All law enforcement authorities and prosecutors are fully trained to identify potential victims of trafficking and trafficking-related offences and to order, or request, the discontinuance of proceedings at as early a stage as possible.

65. When domestic authorities fail to apply the non-punishment principle and a conviction or sentence is issued against a trafficked person, the due diligence principle requires States to remedy such a failure. Ensuring the full and effective implementation of the non-punishment principle requires provision for

expungement or sealing of all related criminal records and relief of any sanctions imposed, including fines or other administrative sanctions. Such relief should be provided for in legislative and other necessary measures and be supported through the provision of legal aid, to avoid an undue burden being placed on a trafficked person and to enable full recovery.

66. States should ensure that a conviction of a trafficked person resulting from a failure to apply the non-punishment principle or from the suspicion that a trafficked person has been involved in trafficking-related offences will not result in refusal of a residence permit or of a recovery and reflection period, denial of social security or other benefits, restrictions on access to employment or education or restrictions on access to compensation.

67. Pending the implementation of a specific legal provision on non-punishment, States should comply with their non-punishment obligation by interpreting existing domestic legal norms, including defences of duress or a state of necessity, as general clauses of exemption of liability. States should ensure that those defences are adapted to the trafficking context, recognizing the many subtle forms of coercion experienced by victims of trafficking, including abuse of a position of vulnerability and all the means set out in the definition of trafficking.

#### [Security Council Resolution S/RES/2388 \(2017\)](#)

17. *Urges* Member States thoroughly to assess the individual situation of persons released from the captivity of armed and terrorist groups so as to enable prompt identification of victims of trafficking, their treatment as victims of crime and to consider, in line with domestic legislation, not prosecuting or punishing victims of trafficking for unlawful activities they committed as a direct result of having been subjected to trafficking

### **United Nations Recommended Principles and Guidelines for Human Rights and Human Trafficking**

#### *Principle 7*

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.

#### *Guideline 4: Ensuring an adequate legal framework*

The lack of specific and/or adequate legislation on trafficking at the national level has been identified as one of the major obstacles in the fight against trafficking. There is an urgent need to harmonize legal definitions, procedures and cooperation at the national and regional levels in accordance with international standards. The development of an appropriate legal framework that is consistent with relevant international instruments and standards will also play an important role in the prevention of trafficking and related exploitation.

States should consider:

5. Ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons.

*Guideline 5: Ensuring an adequate law enforcement response*

Although there is evidence to suggest that trafficking in persons is increasing in all regions of the world, few traffickers have been apprehended. More effective law enforcement will create a disincentive for traffickers and will therefore have a direct impact upon demand. An adequate law enforcement response to trafficking is dependent on the cooperation of trafficked persons and other witnesses. In many cases, individuals are reluctant or unable to report traffickers or to serve as witnesses because they lack confidence in the police and the judicial system and/or because of the absence of any effective protection mechanisms. These problems are compounded when law enforcement officials are involved or complicit in trafficking. Strong measures need to be taken to ensure that such involvement is investigated, prosecuted and punished. Law enforcement officials must also be sensitized to the paramount requirement of ensuring the safety of trafficked persons. This responsibility lies with the investigator and cannot be abrogated.

States and, where applicable, intergovernmental and non-governmental organizations should consider:

5. Guaranteeing that traffickers are and will remain the focus of antitrafficking strategies and that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed as a consequence of their situation.

*Guideline 8: Special measures for the protection and support of child victims of trafficking*

The particular physical, psychological and psychosocial harm suffered by trafficked children and their increased vulnerability to exploitation require that they be dealt with separately from adult trafficked persons in terms of laws, policies, programmes and interventions. The best interests of the child must be a primary consideration in all actions concerning trafficked children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Child victims of trafficking should be provided with appropriate assistance and protection and full account should be taken of their special rights and needs.

States, and where applicable, intergovernmental and non-governmental organizations, should consider, in addition to the measures outlined under Guideline 6:

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.

**Convention on Action against Trafficking in Human Beings (Council of Europe Treaty Series No. 197)**

Article 26

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.

**Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims replaces Article 8 of the EU Trafficking Directive 2011/36/EU (EU Directive)<sup>127</sup>**

*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 or other unlawful 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.

**European Court of Human Rights Case of *V.C.L and A.N. v The United Kingdom*, (Applications nos. 77587/12 and 74603/12) Judgment Strasbourg, 16 February 2021,**

*Case summary:* Police officers in the United Kingdom discovered two Vietnamese minors working on cannabis farms. They were arrested and charged with drug-related offences and pleaded guilty on advice of their legal representative and were convicted. A competent authority recognised them as victims of trafficking, but the prosecution service, reviewing its decision to prosecute them, concluded that they were not victims. The Court of Appeal found that the decision to prosecute them had been justified.

The case went to the European Court of Human Rights. The applicants relied on article 4 (prohibition of forced labour) and article 6(1) (right to a fair trial) of the European Convention on Human Rights, complain that the authorities failed to protect them following their trafficking, and failed to adequately investigate their trafficking, and that their trial had not been fair.

**In relation to Article 4 (prohibition on forced labour):** The European Court of Human Rights found that international law does not provide immunity from prosecution, but that States could not prosecute where forced criminality was apparent. The decision to prosecute in this case was at odds with its obligation to take measures to protect the applicants where there was a credible suspicion that they had been trafficked. Once that suspicion arose, a proper assessment should be carried out by a qualified person. A decision to prosecute should only follow such an assessment, especially where the individual was a minor. The prosecutor would need clear reasons consistent with international law to disagree with that assessment. The fact that the applicants were discovered on a cannabis farm when they were minors should itself have given rise to a credible suspicion that they were victims, but rather than being

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<sup>127</sup> "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 [their victim status]."

referred to, the applicants were instead charged. The prosecution had not given clear reasons consistent with the definition of trafficking in persons, from reaching a different decision to that of the competent authority.

**In relation to Article 6(1) (right to a fair trial):** The European Court had to determine whether the UK's failure to recognise the applicants as potential victims raised issues under the European Convention of Human Rights. The Court found that the applicants had entered their guilty pleas without having full awareness of the facts. The lack of an assessment as to whether or not they had been victims potentially prevented them from security evidence which may have helped their defence. The Court of Appeal had not remedied this unfairness, because its consideration was limited to whether there had been abuse of process and reliance on factors which did not appear to go to the core of the internationally accepted definition of trafficking in persons. The proceedings therefore had not been fair and had violated the applicants' right to a fair trial. The Court ordered the United Kingdom to pay the applications 25,000 Euros each in respect of non-pecuniary damage and 20,000 euros each in costs and expenses.<sup>128</sup>

The following are extracts of the Court's judgement:

158. It is clear that no general prohibition on the prosecution of victims of trafficking can be construed from the Anti-Trafficking Convention or any other international instrument. Indeed, the "non-punishment" provisions in Article 26 of the Anti-Trafficking Convention, Article 8 of the Anti-Trafficking Directive and Article 4 § 2 of the 2014 Protocol to the ILO Forced Labour Convention (see, respectively, paragraphs 103, 106 and 98 above) all contain two important qualifications: the victim of trafficking must have been compelled to commit the criminal activity; and, where that is the case, the national authorities should be entitled, but are not obliged, to decide not to prosecute. While compulsion does not appear to be necessary to bring a child within the scope of either Article 26 of the Anti-Trafficking Convention or Article 8 of the Anti-Trafficking Directive, there is nothing in either instrument which could be interpreted as precluding the prosecution of child trafficking victims in all circumstances.

159. Nevertheless, the Court considers that the prosecution of victims, or potential victims, of trafficking may, in certain circumstances, 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. In the Court's view, the duty to take operational measures under Article 4 of the Convention has two principal aims: to protect the victim of trafficking from further harm; and to facilitate his or her recovery. It is axiomatic that the prosecution of victims of trafficking would be injurious to their physical, psychological and social recovery and could potentially leave them vulnerable to being re-trafficked in future. Not only would they have to go through the ordeal of a criminal prosecution, but a criminal conviction could create an obstacle to their subsequent integration into society. In addition, incarceration may impede their access to the support and services that were envisaged by the Anti-Trafficking Convention.

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<sup>128</sup> See [V.C.L and A.N v The United Kingdom](#) (Applications Nos. 77587/12 and 74603/12), Press Release [summary](#) ECHR 058 (2021) 16.02.2021

160. In order for the prosecution of a victim or potential victim of trafficking to demonstrate respect for the freedoms guaranteed by Article 4, his or her early identification is of paramount importance. It follows that, as soon as the authorities are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual suspected of having committed a criminal offence may have been trafficked or exploited, he or she should be assessed promptly by individuals trained and qualified to deal with victims of trafficking. That assessment should be based on the criteria identified in the Palermo Protocol and the Anti-Trafficking Convention (namely that the person was subject to the act of recruitment, transportation, transfer, harbouring or receipt, by means of threat of force or other form of coercion, for the purpose of exploitation) having specific regard to the fact that the threat of force and/or coercion is not required where the individual is a child.

161. Moreover, 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 – in so far as possible – only be taken once a trafficking assessment has been made by a qualified person. This is particularly important where children are concerned. The Court has acknowledged that as children are particularly vulnerable, the measures applied by the State to protect them against acts of violence falling within the scope of Articles 3 and 8 should be effective and include both reasonable steps to prevent ill-treatment of which the authorities had, or ought to have had, knowledge, and effective deterrence against such serious breaches of personal integrity (see, for example, *Söderman v. Sweden* [GC], no. 5786/08, § 81, ECHR 2013; *M.P. and Others v. Bulgaria*, no. 22457/08, § 108, 15 November 2011; and *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V). Such measures must be aimed at ensuring respect for human dignity and protecting the best interests of the child (see *Söderman*, cited above, § 81). Since trafficking threatens the human dignity and fundamental freedoms of its victims (see *Rantsev*, cited above, § 282), the same is also true of measures to protect against acts falling within the scope of Article 4 of the Convention.

162. Once a trafficking assessment has been made by a qualified person, any subsequent prosecutorial decision would have to take that assessment into account. While the prosecutor might not be bound by the findings made in the course of such a trafficking assessment, the prosecutor would need to have clear reasons which are consistent with the definition of trafficking contained in the Palermo Protocol and the Anti-Trafficking Convention for disagreeing with it.

## Annex 5: Example of offences the non-punishment principle applies to

Examples of offences the non-punishment principle applies to are offered below. These lists are non-exhaustive; the non-punishment principle applies to all offences that victims of trafficking may commit as a direct result of being trafficked.

### Status offences (Administrative and criminal)

- Immigration (criminal, administrative or civil offences)
  - Irregular entry
  - Irregular labour status
  - Irregular migration status
  - Irregular stay
  - Lack of documentation
  - Fraudulent work permit/ authorization
- Use or possession of falsified or fraudulent identity document
- Falsification or possession of fraudulent identity document
- Other

### Other criminal offences

- Alcohol-related offences
- Begging
- Disorderly conduct
- Pickpocketing
- Possession of drugs
- Prostitution / soliciting
- Public order or public morals / indecency
- Selling counterfeit products
- Shoplifting
- Use of drugs
- Vagrancy
- Assault or battery (e.g., to escape the trafficking situation)
- Burglary
- Credit card fraud
- Cyber-enabled crime
- Cybercrime
- Drug possession
- Drug production or cultivation (e.g., in cannabis farms and meth labs)
- Drug trafficking or smuggling
- Identity theft
- Manslaughter or murder
- Money laundering through illicit use of cryptocurrencies
- Illicit organ donation, offering or receiving monetary benefits in exchange for an organ
- Participation in armed groups
- Scamming
- Social security or social benefit fraud
- Terrorism
- Trafficking in persons (often as a result of victims becoming traffickers or being otherwise involved in the recruitment or exploitation of other victims)
- Other



