

REGIONAL REVIEW

on

Laws, Policies and Practices within ASEAN relating to the Identification, Management and Treatment of Victims of Trafficking, especially Women and Children

Regional Review on Laws, Policies and Practice within ASEAN relating to the Identification,
Management and Treatment of Victims of Trafficking, especially Women and Children



ASEAN : A Community of Opportunities

-  ASEAN
-  @ASEAN
-  www.asean.org



one vision
one identity
one community



REGIONAL REVIEW

on

Laws, Policies and Practices within ASEAN relating to the Identification, Management and Treatment of Victims of Trafficking, especially Women and Children



USAID
FROM THE AMERICAN PEOPLE



ASSOCIATION
OF SOUTHEAST
ASIAN NATIONS

The Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967. The Member States are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam. The ASEAN Secretariat is based in Jakarta, Indonesia.

For inquiries, contact:

The ASEAN Secretariat
Community Relations Division (CRD)

70A Jalan Sisingamangaraja

Jakarta 12110

Indonesia

Phone : (62 21) 724-3372, 726-2991

Fax : (62 21) 739-8234, 724-3504

E-mail : public@asean.org

Catalogue-in-Publication Data

Regional Review on Laws, Policies and Practices within ASEAN relating to the Identification, Management and Treatment of Victims of Trafficking, especially Women and Children
Jakarta, ASEAN Secretariat, October 2016

362.88

1. ASEAN – Human Trafficking – Standards & Guidelines

2. Protection of Rights – Protection for Victims - Prevention of Trafficking

ISBN 978-602-6392-09-1

ASEAN: A Community of Opportunities

The text of this publication may be freely quoted or reprinted, provided proper acknowledgement is given and a copy containing the reprinted material is sent to the Community Relations Division (CRD) of the ASEAN Secretariat, Jakarta.

General information on ASEAN appears online at the ASEAN Website:

www.asean.org

Copyright Association of Southeast Asian Nations (ASEAN) 2016.

All rights reserved.

Disclaimer

This Regional Review is a product of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC). The content of this Regional Review does not necessarily reflect the views of ASEAN or its Member States, USAID or the United States Government, and the European Union.

ACKNOWLEDGMENT

The development of the *Regional Review on Laws, Policies and Practices within ASEAN relating to the Identification, Management and Treatment of Victims of Trafficking, especially Women and Children* is a project of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) under the ACWC Work Plan 2012-2016, and led by H.E. Madame Chongchith Chantharanonh, Lao PDR's Representative to ACWC for Children's Rights. The successful completion of the Regional Review is due to the contribution of numerous people and organisations.

The ACWC would like to thank, H.E. Madame Chongchith Chantharanonh, Lao PDR's Representative to ACWC for Children's Rights, H.E. Prof. Dr. Datuk Chiam HHeng Keng, Malaysia's Representative to ACWC for Children's Rights, and H.E. Prof. Aurora Javate-De Dios, the Philippines' Representative to ACWC for Women's Rights, who were members of the Advisory Committee of the project. The Advisory Committee was responsible for the overall design, coordination and supervision of the Regional Review, while the consultants undertook its implementation, with the support from the Regional EU-ASEAN Dialogue Instrument Human Rights Facility (READI HRF), and ASEAN-US Partnership for Good Governance, Equitable and Sustainable Development and Security (ASEAN-US PROGRESS).

The data collection, coordinated by Dr. Apiradee Thienthong, was carried out by national researchers whose names are listed under the research team. ACWC would like to express appreciation to the national researchers namely: H.E. Datin Paduka Hajah Intan bte Haji Mohd Kassim (Brunei Darussalam), Mr. Phon Putborey (Cambodia), Ms. Hemasari Dharmabhumi (Indonesia), Ms. Phoukham Sipaseuth (Lao PDR), Dr. Sharuna Verghis (Malaysia), Ms. Naw Ku Ku (Myanmar), Ms. Melanie Reyes (Philippines), Dr. Sallie Yea (Singapore), Ms. Pusa Srivalas (Thailand), and Mr. Vu Anh Son (Viet Nam). ACWC would like to express appreciation for their dedication and diligence in conducting the interviews, analysis of the national data, the conduct of national consultations, and the consolidation of regional data. Most importantly, all of the respondents who gave their time to participate in this Regional Review and share valuable information with the national researchers is highly appreciated. Appreciation also goes to Dr. Anne Gallagher and Dr. Apiradee Thienthong, who jointly wrote the Regional Review, in coordination with H.E. Madame Chongchith Chantharanonh and with guidance from ACWC. ACWC would also like to thank the ASEAN Intergovernmental Commission on Human Rights (AICHR), Senior Officials Meeting on Transnational Crime (SOMTC), and Senior Officials Meeting on Social Welfare and Development (SOMSUD), for their valuable inputs and feedback to the Regional Review.

ACWC would like to acknowledge with appreciation the support of READI HRF and ASEAN-US PROGRESS, particularly Ms. Yuyun Wahyuningrum as the Team Leader of READI HRF, and Mr. Keith Doxtater as Chief of Party of the ASEAN-US PROGRESS, as well as their respective teams.

H.E. Datin Intan Haji Mohd Kassim, the former Chair of ACWC, and H.E. Lily Dorianty Purba, the current Chair of ACWC, are also acknowledged for their contribution and able leadership that led to the completion of the Regional Review. The Representatives of ACWC through their inputs, comments and feedback to the concept, design, drafts and final review as well as their support and assistance to their respective national researchers, have also contributed much to the success of this project.

ACWC would like to thank the ASEAN Secretariat, particularly H.E. Vongthep Arthakaivalvatee, Deputy Secretary-General for ASEAN Socio-Cultural Community (ASCC), Ms. Rodora Babaran, Director of the Human Development Directorate, ASCC Department, and Ms. Mega Irena, Assistant Director/Head of the Poverty Eradication and Gender Division, ASCC Department, together with her team, for contributing significantly to the completion of the Regional Review.

ACWC would also like to thank everyone who contributed in one way or another to the successful completion of TIPs but who are not named in this Acknowledgment.

FOREWORD



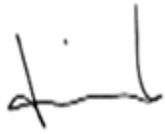
Trafficking in Persons is a thematic area of the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC), and the “Identification, Management and Treatment of Victims of Trafficking, especially Women and Children” is one of the projects in the ACWC Work Plan 2012-2016. This project started in 2015 with the support from the Regional EU-ASEAN Dialogue Instrument Human Rights Facility (READI HRF) and the ASEAN-US Progress Partnership for Good Governance, Equitable and Sustainable Development and Security (PROGRESS).

The *Regional Review on Law, Policies and Practices within ASEAN relating to the Identification, Management and Treatment of Victims, especially Women and Children* is based on the regional consolidation of the data collected from the ten AMS. Some of the key findings reported will provide information to better understand the current laws, policies and practices of AMS on trafficking in persons, especially women and children. This information would be useful for trafficking prevention, early intervention and responses, including protection and assistance to the victims, as well as contribute to the implementation of the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP).

The Regional Review contains detailed information about national, regional and international instruments, the situation and context of each ASEAN Member State, and the issues for policy consideration on eight (8) key thematic areas, namely: i) Definition and Criminalisation; ii) Victim Identification and Referral; iii) Protection, Support and Recovery Assistance to Victims; iv) Victims in the Criminal Justice Process; v) Access to Remedies including Compensation; vi) No Detention or Prosecution of Victims for Status Offences; vii) Return and Reintegration of Victims; and viii) Prevention of Trafficking.

Trafficking is one of the worse forms of violence against women and violence against children. This project is one of the ACWC’s initiatives to achieve the goal of ending violence against women and children. With the adoption of the Regional Plan of Action on the Elimination of Violence against Women, the Regional Plan of Action on the Elimination of Violence against Children, and the ASEAN Convention on Trafficking in Persons during the 28th ASEAN Summit in November 2015 in Kuala Lumpur, Malaysia, the ACWC will be pursuing more initiatives that would address the issue of trafficking in persons in ASEAN in collaboration with the ASEAN Intergovernmental Commission on Human Rights (AICHR), ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW), Senior Officials Meeting on Transnational Crime (SOMTC), ASEAN Committee on Women (ACW), the Senior Officials Meeting on Social Welfare and Development (SOMSWD), and other stakeholders.

On behalf of ACWC, I would like to thank all those who have contributed to making the Regional Review a success and who have provided valuable inputs to the Regional Review.

A handwritten signature in black ink, appearing to read 'Lily Purba', with a stylized flourish at the end.

H.E. LILY PURBA

Indonesia's Representative to ACWC for Women's Rights and ACWC Chair

MESSAGE



Trafficking in persons is a persistent threat to the security of each individual and the integrity of families and communities. Moreover, it is a human rights and development issue. The increasing modernisation of our society, coupled with economic and social circumstances such as migration, forced labour, and poverty, have exacerbated the occurrence of trafficking. Worse still, the vulnerabilities of women and children are being exploited and have made them more susceptible to being trafficked.

The formal launch of the ASEAN Community in 2015 marks a milestone in the history of the region as ASEAN envisions a more people-centred and people-oriented community. The launch of the ASEAN Community further strengthened the resolve to ensure that benefits of regional integration are inclusive and promote and protect human rights, especially of the vulnerable groups. As such, there is a compelling and urgent need to systematically and purposively address the issue of trafficking in persons in the region. The commitment of AMS has been strengthened with the signing of the ASEAN Convention Against Trafficking in Persons, Especially Women and Children (ACTIP) by the ASEAN Leaders at the 28th ASEAN Summit in November 2015 in Kuala Lumpur, Malaysia.

I am pleased to note that the ratification of the convention by the AMS is ongoing. The inter-sectoral cooperation on the implementation of the ACTIP has been translated into the ASEAN Plan of Action Against Trafficking in Persons, Especially Women and Children (APA). The APA is an instrument that provides for multi-sectoral collaboration and the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) is an important body that contributes to the implementation of the ACTIP and APA.

Towards this end, the Regional Review on Laws, Policies and Practices within ASEAN relating to the Identification, Management and Treatment of Victims of Trafficking, especially Women and Children is both timely and relevant. This Regional Review provides valuable information and insights on the initiatives of ASEAN and the Member States on trafficking in persons in relation to national, regional and international instruments as well as practices of AMS. Specifically, it covers the whole spectrum of prevention and identification of victims, to criminalisation of trafficking and handling victims of trafficking, especially women and children. Most valuable are the key considerations and recommendations that serve as fertile grounds for policy and programme development as well as cooperation among the AMS and ASEAN's partners. More importantly, the Regional Review is especially valuable because it adopted a rights-based perspective in the identification, management, and treatment of victims of trafficking.

I would like to congratulate the ACWC for this groundbreaking study. The ACWC has consistently made its mark in articulating the promotion and protection of the rights of women and children in ASEAN. This study is a testament of their unyielding commitment and advocacy to undertake pioneering studies that would lead to robust policy discourse on key issues and challenges facing the ASEAN Community.

I would also like to express appreciation to the Regional EU-ASEAN Dialogue Instrument Human Rights Facility (READI HRF), and ASEAN-US Partnership for Good Governance, Equitable and Sustainable Development and Security (ASEAN-US PROGRESS) for the strong commitment to collaborate with ASEAN on the conduct of the study.

It is my hope that policy makers, law enforcement agencies, relevant government agencies, civil society organisations, and other stakeholders would use this Regional Review to enhance understanding of the national and regional initiatives of ASEAN and the Member States and contribute to the collective action of ASEAN to eliminate trafficking in persons in the region, in order to safeguard the rights and welfare of the peoples of ASEAN, especially women and children.



H.E. LE LUONG MINH
Secretary-General of ASEAN

MESSAGE



I would like to extend my sincere appreciation to the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) for the publication of this *Regional Review on Laws, Policies and Practices within ASEAN relating to the Identification, Management and Treatment of Victims of Trafficking, especially Women and Children*.

This report is the product of a collaborative effort led by the ACWC with the support of the ASEAN-U.S. Partnership (PROGRESS project) and the Regional EU–ASEAN Dialogue Instrument and its Human Rights Facility (READI HRF), which aims at promoting dialogue on human rights issues between the EU and ASEAN.

It provides a description and assessment of laws, policies and practices within the ASEAN region related to trafficking in persons, and wants to be a tool to assist ASEAN and its Member States in their efforts to improve national and regional responses to assisting victims of trafficking. More specifically, the report should facilitate AMS' implementation of the *ASEAN Convention against Trafficking in Persons, especially Women and Children* (ACTIP) and its Plan of Action (APA), both adopted in late 2015.

It also aims at encouraging further research aimed at developing a more complete picture of the current situation.

Over the past decades, Europe too has stepped up its efforts to fight human trafficking by focusing on strengthening its member states' measures on prevention and protection. By acknowledging that trafficking is both a crime and a human rights violation, an "EU Anti-Trafficking Coordinator" was recently appointed to consolidate efforts between the EU and its Member States to respect, protect and promote the rights of all trafficked persons regardless of their country of origin.

We believe that human trafficking impacts women, men, girls and boys in different ways, and that gender imbalances contribute to special vulnerability to abusive recruitment and exploitation. Additionally, human trafficking disproportionately affects persons whose rights may already be compromised, including victims of sexual and gender-based violence, refugees, migrants, and minorities.

I truly hope that the present Regional Review consolidates a trend towards a more comprehensive understanding of the magnitude of this deeply unsettling exploitation, and the necessary policies to tackle it while respecting and protecting its victims.

A handwritten signature in blue ink, appearing to read 'Francisco Fontan'.

H.E. FRANCISCO FONTAN
EU Ambassador to ASEAN

MESSAGE



Trafficking in Persons (TIP) is a global affliction that offends our common values and humanity. Through its recent landmark endorsement of the *ASEAN Convention against Trafficking in Persons, especially Women and Children* (ACTIP), ASEAN has taken a bold position that within this region, trafficking in persons will not be tolerated in any of its forms.

While conventions and laws are essential foundational elements in the fight to counter TIP, practices on the ground, at the national level, ultimately have the direct impact on victims and perpetrators. Building on the momentum of the ACTIP, the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children (ACWC) commissioned this document, the *Regional Review on the Laws, Policies and Practices within ASEAN relating to the Identification, Management and Treatment of Victims of Trafficking, especially Women and Children*. The Review provides government officials and practitioners across all sectors with an accurate and current assessment of the TIP situation in the region. The report highlights best practices and recommendations for moving forward to counter this far reaching scourge.

The United States continues to be a global leader in combatting TIP, but recognizes, as President Barack Obama stated, that “no government, no nation, can meet this challenge alone.” True partnerships between governments and non-government actors are essential to addressing a problem as complex as TIP. If we work together, we can each contribute, on the one hand, to a safety net to support trafficking victims and, on the other, to a web to catch perpetrators.

As the U.S. Ambassador to ASEAN, I am pleased that we were able to work closely with the European Union to support the ACWC’s commitment to conduct this comprehensive regional review for ASEAN. Along with the ACTIP and its associated Plan of Action, the information and recommendations provided in this Review will support ASEAN as it establishes the necessary policies, practices, and procedures to counter human trafficking in the region. We look forward to partnering with ASEAN and AMS to fight TIP in the years to come.

A handwritten signature in black ink, appearing to read 'Nina Hachigian', written over a light blue horizontal line.

H.E. NINA HACHIGIAN
U.S. Ambassador to ASEAN

TABLE OF CONTENTS

ACRONYMS AND ABBREVIATIONS	7
INTRODUCTION	14
CHAPTER 1: DEFINITIONS AND CRIMINALISATION OF TRAFFICKING IN PERSONS	17
1.1: International and Regional Standards Relevant to Defining and Criminalizing Trafficking	18
1.2: Definitions and Criminalisation of Trafficking in the Laws of AMS	21
1.3: Defining and Criminalisation Trafficking - Issues for Consideration by AMS	25
1.3.1. Need for Clear Definitions of Terms Used in the Definition of Trafficking	26
Text Box 1: Defining Key Term “Abuse of a Position of Vulnerability”	26
1.3.2. Need for Related and Ancillary Offences to be Clearly and Separately Criminalised	27
1.3.3. Liability of Companies and Other Legal Persons	27
CHAPTER 2: VICTIM IDENTIFICATION AND REFERRAL	29
2.1: International and Regional Standards Relevant to Victim Identification and Referral	30
Text Box 2: Outcome Document Of the ASEAN And COMMIT Workshop on Identifying Victims Of Trafficking and Associated Forms of Exploitation: Developing Common Indicators For Practitioners, Kuala Lumpur, Malaysia, 15-16 December 2015.....	32
Text Box 3: Special Measures for Identification of Trafficked Children.....	34
Text Box 4: National Referral Mechanisms and National Competent Authorities for Identification of Victims of Trafficking.....	35
Text Box 5: Gender Sensitive Guidelines for Identification of Women Victims of Trafficking	36
2.2: Victim Identification and Referral in the Law, Policy and Practice of AMS	36
2.2.1. Legal Provisions on Victim Identification and Referral.....	36
2.2.2. AMS Policy and Practice around Victim Identification	37
Good Practice: Victim Identification Pamphlet.....	38
Good Practice: Trafficking in Persons Indicators Card	38
Text Box 6: Victim Identification in Cambodia.....	42
Good Practice: Agreement between Lao PDR and Viet Nam on Identification Criteria	43
2.3: Identification and Referral of Victims of Trafficking - Issues for Consideration by AMS.....	44
2.3.1. Low Levels of Victim Identification.....	44
2.3.2. Lack of Uniform Identification Procedures and Criteria	44
2.3.3. Issues around Mutual Recognition of Victim Identification Decisions among AMS	44

CHAPTER 3: PROTECTION, SUPPORT AND RECOVERY ASSISTANCE TO VICTIMS	46
3.1: International and Regional Standards Relevant to Victim Assistance	49
3.1.1. Core Obligation: Protection from Further Exploitation and Harm	49
3.1.2. Core Obligation: Provision of Immediate Support	50
Text Box 7: Gender Sensitive Guidelines for Handling of Women Victims of Trafficking in Persons	51
3.1.3. Key Issue: The Right to Privacy and Protection from Further Harm.....	51
Text Box 8: International and Regional Standards on the Right to Privacy	52
3.1.4. Key Issue: Unconditional Provision of Protection and Support	52
3.1.5. Key Issue: No Coercion in the Provision of Protection and Support	53
3.1.6. Key Issue: Care and Protection of Child Victims	54
Text Box 9: Protecting and Supporting Trafficked Children	54
3.1.7. Key Issue: Regularisation of Legal Status.....	55
Text Box 10: ASEAN Convention Against Trafficking in Persons Especially Women and Children’s Provision on Regularisation of Legal Status	56
3.2: Victim Assistance in the Law, Policy and Practice of AMS	56
3.2.1. Laws and Policies on Protection and Support	56
Text Box 11: Country of Origin Obligations with Regard to Victim Assistance	56
Text Box 12: Cambodian Guidelines on Cooperation with Victim Support Agencies in Protecting and Supporting Victims of Trafficking	58
Table 1 - Does the Legal and Policy Framework Provide for Special Measures of Protection and Support for Child Victims of Trafficking? (Yes/No).....	59
Table 2 - Does the Legal and Policy Framework Protect the Privacy of Victims of Trafficking? (Yes/No)	60
Text Box 13: Regularisation of Legal Status	62
3.2.2. AMS Practice in relation to Victim Protection, Support and Recovery	62
Text Box 14: Key Referral and Coordination Issues Encountered by Trafficked Persons	63
Good Practice: Supporting and Protecting Victims	64
Good Practice: Regularisation of Legal Status	66
Text Box 15: Provision of Healthcare to Victims of Trafficking.....	67
3.3: Victim Assistance and Protection: Issues for Consideration by AMS	68
3.3.1. Victims Not Identified	68
3.3.2. Inadequate Legislative Provision for Protection and Assistance	68
3.3.3. Provision of Immediate Protection and Support Tied to Cooperation with Criminal Justice Agencies and to Detention in Shelters	68
3.3.4. Lack of Awareness and Coordination Hampers the Delivery of Protection and Assistance	69
3.3.5. Inadequate Capacities and Resources to Deliver Effective Protection and Assistance	69

CHAPTER 4: VICTIMS IN THE CRIMINAL JUSTICE PROCESS	71
4.1: International and Regional Standards relevant to Victim Involvement in the Criminal Justice Process	72
Text Box 16: Supporting the Involvement of Foreign Victim-Witnesses	74
Text Box 17: Protecting Victims and Witnesses during the Trial Process	74
4.2: Victims in the Criminal Justice Process in the Law, Policy and Practice of AMS	75
4.2.1. Protection of the Right to be Present and Have Views Considered during Criminal Proceedings	76
4.2.2. Protection of Victim-witness Privacy	77
Good Practice: Legal Protection of Privacy	77
4.2.3. Protection for Victim-witnesses and Their Families	78
Good Practice: End-to-End Protection of Victim-Witnesses	79
4.2.4. Access to Information about Rights and Proceedings	80
4.2.5. Facilitating the Effective Participation of Victim-witnesses through Regulation of Legal Status and Permission to Work	82
4.2.6. Facilitating the Effective Participation of Victim-witnesses through Provision of Alternatives to Direct Testimony	82
4.2.7. Protection and Support for Child Victim-witnesses, including Special In-court Protections	84
Good Practice: Examination of Child Victim-Witnesses	86
Text Box 18: Case Studies of Trafficked Children as Victim-Witnesses	88
4.3: Victims in the Criminal Justice Process - Issues for Consideration by AMS	88
4.3.1. Challenges in relation to Involvement of Foreign Victims	88
4.3.2. Challenges in relation to Protection of Victims' Privacy	89
4.3.3. Challenges in relation to Protection of Victim-witnesses from Intimidation and Reprisals	89
4.3.4. Challenges in relation to Access to Legal Information and Assistance	90
4.3.5. Challenges in relation to Support of Child Victim-witnesses	90
CHAPTER 5: ACCESS TO REMEDIES INCLUDING COMPENSATION	93
5.1: International and Regional Standards relevant to Remedies for Victims of Trafficking	94
5.1.1. Legal Right to a Remedy in the Context of Trafficking in Persons	95
Text Box 19: Compensation in the Context of Trafficking	95
5.1.2. Identification, Right to Information and Other Means of Accessing Remedies	97
Text Box 20: ASEAN Recommendations on Realising the Right to a Remedy	97
5.2: Victims' Access to Remedies in the Law, Policy and Practice of AMS	98
Text Box 21: Obstacles to Victims' Access to Remedies	98
5.2.1 Progress in relation to Granting Victims a Legal Right to Access Remedies	99
Good Practice: Legal Provisions on Access to Remedies	99
Table 3 – Does the Legal and Policy Framework around Trafficking Provide Victims of Trafficking a Right to Access Remedies? (Yes/No)	101

5.2.2. Progress in relation to the Right to Information and Legal Assistance for Purposes of Accessing Remedies	101
5.2.3. Progress in relation to Obtaining Compensation	102
5.3: Victims' Access to Remedies - Issues for Consideration by AMS	104
5.3.1. Victims Not Identified, Traffickers Not Prosecuted.....	104
5.3.2. Inadequate Legal Provision for Criminal, Civil and Other Remedies.....	105
5.3.3. Procedural and Practical Obstacles to Accessing Remedies	105
5.3.4. Lack of Capacity to Provide Remedies for Violations of Labour Laws	105
CHAPTER 6: NO DETENTION OR PROSECUTION OF VICTIMS FOR STATUS OFFENCES	107
6.1: International and Regional Standards relevant to Non-detention of Victims and Non-prosecution for Status Offences	108
6.1.1. Standards relevant to Detention of Victims of Trafficking	108
Text Box 22: Understanding "Detention"	109
Text Box 23: When Does Victim Detention Become a Violation of Human Rights?	110
Text Box 24: Rules Relating to the Detention of Child Victims of Trafficking	111
6.1.2. Standards relevant to Non-prosecution for Status Offences	112
Text Box 25: Standards on Non-prosecution for Status Offences within ASEAN	113
6.2: Victims' Protection from Detention in the Law, Policy and Practice of AMS	114
Text Box 26: Gender and Sex-based Discrimination in the Detention of Victims of Trafficking	117
6.3: Victims' Protection from Prosecution for Status Offences Detention in the Law, Policy and Practice of AMS	117
Text Box 27: Examples of Legislative Protection against Prosecution for Status Offences	119
6.4: Non-prosecution and Non-detention - Issues for Consideration by AMS	119
6.4.1. Victims Not Identified, Prosecuted for Immigration and Work Offences	120
6.4.2. Victim Detention.....	120
CHAPTER 7: RETURN AND REINTEGRATION OF VICTIMS	121
7.1: International and Regional Standards relevant to Victims' Return and Reintegration	123
7.1.1. Standards relevant to Return.....	123
Text Box 28: Key International Legal Standards on Return of Trafficked Persons ..	123
Text Box 29: Forced Return of Victims of Trafficking	124
Text Box 30: Key Standards on Return of Child Victims.....	127
7.1.2. Standards relevant to Reintegration of Trafficked Persons	127
Text Box 31: Gender Sensitive Guidelines for Handling of Women Victims of Trafficking in Persons	129
Text Box 32: UNICEF Guidelines on Reintegration of Child Victims	130
7.2: Return and Reintegration of Victims in the Law, Policy and Practice of AMS	130
Table 4 – Does the Legal Framework Provide for Safe Return and Reintegration Support? (Yes/No)	130

7.2.1. AMS Return of Victims of Trafficking	132
Good Practice: Bilateral Standards on Return (Cambodia and Thailand)	132
7.2.2. Reintegration of Victims of Trafficking	135
Text Box 33: Cambodian Guidelines on the Role of Shelters in Reintegration.....	136
Good Practice: Bilateral Standards on Reintegration	137
Good Practice: Positive Reintegration Experiences at Destination and Origin.....	140
7.3: Return and Reintegration - Issues for Consideration by AMS	140
7.3.1. Inadequate Legislative Provision for Return and Reintegration	141
7.3.2. Challenges in the Return Process	141
7.3.3. Challenges in the Reintegration Process	141
7.3.4. The Need for Strong Bilateral Referral and Coordination Mechanisms.....	141
CHAPTER 8: PREVENTION OF TRAFFICKING	143
8.1: International and Regional Standards relevant to Prevention of Trafficking.....	145
Text Box 34: General Prevention Obligations of the UN TIP Protocol and the ASEAN Convention against Trafficking in Persons Especially Women and Children.....	146
8.1.1. Prevention through Addressing Vulnerability	146
Text Box 35: Vulnerabilities related to Discrimination and Violence against Women	148
Text Box 36: Reducing the Vulnerability of Children to Trafficking	149
Text Box 37: Regional Commitment to Prevent Trafficking by Reducing Vulnerability	150
8.1.2. Prevention through Addressing Demand.....	150
Text Box 38: A Human Rights-based Approach to Addressing Demand.....	151
8.1.3. Prevention through Addressing Corruption associated with Trafficking.....	153
8.2: Prevention of Trafficking in the Law, Policy and Practice in the ASEAN Region	154
8.2.1. Prevention in AMS Laws and Policies	154
Good Practice: A Legal Obligation to Prevent Trafficking	154
Good Practice: Criminalizing Bribery and Corruption in Trafficking Cases.....	155
Good Practice: Bilateral Commitment to Preventing Trafficking.....	156
Text Box 39: ASEAN Commitment to Preventing the Exploitation of Migrant Workers	157
8.2.2. Prevention in Practice in AMS	158
Good Practice: Regulatory Oversight of Labour Recruitment Agencies	159
Good Practice: Preventative Measures for Overseas and Overseas-bound Workers	160
Good Practice: Incentives for Migrant Workers	160
8.3: Prevention of Trafficking - Issues for Consideration by AMS.....	161
8.3.1. Inadequate Legislative and Policy Attention to Prevention.....	161
8.3.2. Addressing the Vulnerabilities of Migrant Workers	161
8.3.3. Addressing Gender and Child-specific Vulnerabilities to Trafficking.....	161
8.3.4. Addressing Corruption	162

ANNEX I: AMS' Definitions of Human Trafficking	163
ANNEX II: Identification of Victims by AMS (in 2014/2015)	174
ANNEX III: Summary of AMS Legal Provisions on Protection of Privacy of Victim-Witnesses	175
ANNEX IV: Summary of Recommendations	178

ACRONYMS AND ABBREVIATIONS

ACTIP	ASEAN Convention against Trafficking in Persons, against Trafficking in Persons Especially Women and Children
ACMW	ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection of the Rights of Migrant Workers
ACW	ASEAN Committee on Women
ACWC	ASEAN Commission on the Promotion and Protection of the Rights of Women and Children
Gender Sensitive Guidelines	Gender Sensitive Guidelines for Handling of Women Victims of Trafficking in Persons
AMS	ASEAN Member States
APA	ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children
ASEAN	Association of Southeast Asian Nations
ASEAN Practitioner Guidelines	ASEAN Practitioner Guidelines on Criminal Justice Responses to Trafficking in Persons
Cambodia-Thailand MOU	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
Cambodia-Viet Nam MOU	Agreement between the Royal Government of Cambodia and the Government of the Socialist Republic of Viet Nam on Bilateral Cooperation for Eliminating Trafficking in Women and Children and Assisting Victims of Trafficking
COMMIT	Coordinated Mekong Ministerial Initiative against Human Trafficking
COMMIT MOU	Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-Region
CRC	United Nations Convention on the Rights of the Child
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome
ICA	Immigration and Checkpoints Authority of Singapore
ICCPR	United Nations International Covenant on Civil and Political Rights
IOM	International Organization for Migration
Lao-Thailand MOU	Memorandum of Understanding between the

	Government of the Lao People’s Democratic Republic and the Government of the Kingdom of Thailand on Cooperation to Combat Trafficking in Persons
Lao-Viet Nam MOU	Agreement between the Government of the Lao People’s Democratic Republic and the Government of the Socialist Republic of Viet Nam on Cooperation in Preventing and Combating Trafficking in Persons and Protection of Victims of Trafficking
LGBT	Lesbian, gay, bisexual and transgender
LPSAHT	Law on Prevention and Suppression against Human Trafficking (2011) (Viet Nam)
MAPO	Council for Anti-Trafficking in Persons (Malaysia)
MHA	Ministry of Home Affairs (Singapore)
MLSW	Ministry of Labour and Social Welfare (Lao PDR)
MOI	Ministry of Interior (Cambodia)
MoM	Ministry of Manpower (Indonesia)
MoM	Ministry of Manpower (Singapore)
MOSVY	Ministry of Social Affairs, Veteran and Youth Rehabilitation (Cambodia)
MOU	Memorandum of Understanding
MSDHS	Ministry of Social Development and Human Security (Thailand)
NCA	National Competent Authority
NGO	Non-governmental Organization
NRM	National Referral Mechanism
OSCE	Organization for Security and Co-operation in Europe
PHT Act	Prevention of Human Trafficking Act (Singapore)
POEA	Philippine Overseas Employment Administration
PTSD	Post-traumatic Stress Disorder
SOMSVD	Senior Officials Meeting on Social Welfare and Development
SOMTC	Senior Officials Meeting on Transnational Crime
SOP	Standard Operating Procedures
SPF	Singapore Police Force
Thailand-Myanmar MOU	Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar on Cooperation to Combat Trafficking in Persons, Especially Women and Children

Thailand-Viet Nam MOU	Agreement between the Government of the Kingdom of Thailand and the Government of the Socialist Republic of Viet Nam on Bilateral Cooperation for Eliminating Trafficking in Persons, Especially Women and Children and Assisting Victims of Trafficking
TIP	Trafficking in Persons
TJS	Temporary Job Scheme (Singapore)
UNACT	UN Action for Cooperation against Trafficking in Persons
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
UN TIP Protocol	UN Protocol to Suppress, Prevent and Punish Trafficking in Persons, Especially Women and Children

Below is a list of international, regional, bilateral and national instruments that are referenced throughout the document.

International Instruments

Treaties	Non-Treaty Instruments
<i>The United Nations Protocol to Suppress, Prevent and Punish Trafficking in Persons, Especially Women and Children</i>	<i>The United Nations Principles and Guidelines on Human Rights and Human Trafficking</i>
<i>The United Nations Organized Crime Convention</i>	<i>The United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment</i>
<i>The United Nations Convention Against Corruption</i>	<i>Organization for Security and Co-operation in Europe (OSCE) Guiding Principles on Human Rights in the Return of Trafficked Persons</i>
<i>The United Nations Convention on the Rights of the Child (CRC)</i>	<i>UNICEF Guidelines on the Protection of Child Victims of Trafficking</i>
<i>The United Nations International Covenant on Civil and Political Rights (ICCPR)</i>	<i>Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law</i>
	<i>CRC General Comment No 6 (2005) - Treatment of Separated and Unaccompanied Children Outside their Country of Origin</i>

Regional Instruments

Treaties	Non-Treaty Instruments
<p>ASEAN Convention against Trafficking in Persons, Especially Women and Children (2015)</p>	<p><i>ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children (2015)</i></p> <p><i>Gender Sensitive Guidelines For Handling Of Women Victims Of Trafficking In Persons (2016)</i></p> <p><i>Guidelines for the protection of the Rights of Trafficked Children in Southeast Asia (2007)</i></p> <p><i>ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases (2010)</i></p> <p><i>ASEAN Practitioner Guidelines on an Effective Criminal Justice Response to Trafficking in Persons (2007)</i></p> <p><i>ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007)</i></p> <p><i>ASEAN Declaration against Trafficking in Persons Particularly Women and Children (2004)</i></p> <p><i>Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region (COMMIT) (2004)</i></p>

Bilateral Instruments

	Thailand	Viet Nam
Cambodia	<p><i>MOU on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking (2003); MOU on Bilateral Cooperation for Eliminating Trafficking in Persons and Protecting Victims of Trafficking (Updated) (2014)</i></p>	<p><i>Agreement on Bilateral Cooperation for Eliminating Trafficking in Women and Children and Assisting Victims of Trafficking (2005); Viet Nam-Cambodia Cooperation Agreement on Standard Operating Procedures (SOPs) for the Identification and Repatriation of Trafficked Victims (2009); Agreement between the Royal Government of Cambodia and the Government of the Socialist Republic of Viet Nam on Bilateral Cooperation for Counter-Trafficking in Persons, and Protecting Victims of Trafficking (Amendment) (2012)</i></p>
Lao PDR	<p><i>MOU on Cooperation to Combat Trafficking in Persons, Especially Women and Children (2005); MOU on Cooperation to Combat Trafficking in Persons (Updated) (2016)</i></p>	<p><i>Agreement on Cooperation in Preventing and Combating Trafficking in Persons and Protection of Victims of Trafficking (2010); Agreement on Cooperation in Prevention of Trafficking in Persons (2014)</i></p>
Myanmar	<p><i>MOU on Cooperation to Combat Trafficking in Persons, Especially Women and Children (2009)</i></p>	
Thailand		<p><i>Agreement on Bilateral Cooperation for Eliminating Trafficking in Persons, Especially Women and Children, and Assisting Victims of Trafficking (2008)</i></p>

National Instruments

Brunei Darussalam	<i>Trafficking And Smuggling Of Persons Order (2004)</i> [Also referred to in the text as “Brunei’s TIP Law”]
Cambodia	<i>Law on Suppression of Human Trafficking and Sexual Exploitation (2008)</i> [Also referred to in the text as “Cambodia’s TIP Law”]
Indonesia	<i>Law of the Republic of Indonesia No. 21 on Eradication of the Criminal Act of Human Trafficking (2007)</i> [Also referred to in the text as “Indonesia’s TIP Law”]
Lao PDR	<i>Penal Code (2006 revision); Law on Development and Protection of Women (2004); Law on Protection of the Rights and Interests of Children (2006); Anti-Human Trafficking Law (2015)</i> [The latter instrument also referred to in the text as “Lao PDR’s 2015 TIP Law”]
Malaysia	<i>Anti-Trafficking in Persons and Anti-Smuggling of Migrants (2007); Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Act(2015)</i> [Also referred to in the text as “Malaysia’s TIP Law”]
Myanmar	<i>Anti-Trafficking in Persons Law (2005)</i> [Also referred to in the text as “Myanmar’s TIP Law”]
Philippines	<i>Republic Act 9208; Expanded Anti-Trafficking in Persons Act (2012)</i> [Also referred to in the text as “the Philippines’ TIP Law”]
Singapore	<i>Prevention of Human Trafficking Act (2014)</i> [Also referred to in the text as “Singapore’s TIP Law”]
Thailand	<i>The Anti-Trafficking in Persons Act (2008) and the Amendments (No. 2) (2015)</i> [Also referred to, collectively, in the text as “Thailand’s TIP Law”]
Viet Nam	<i>Law on Prevention and Suppression Against Human Trafficking (2011)</i> [Also referred to in the text as “Viet Nam’s TIP Law” and “LPSAHT”]

INTRODUCTION

This Regional Review provides a description and assessment of laws, policies and practices within the ASEAN region related to trafficking in persons (TIP) – with a particular focus on the identification, management and treatment of victims of trafficking in persons, especially women and children.

The purpose of the Regional Review is to assist ASEAN and its Member States in their efforts to improve national and regional responses to assisting victims of trafficking, specifically by:

- Providing an accurate and up-to-date assessment of the current situation based on best available information;
- Highlighting good practices within the region;
- Identifying issues for consideration by AMS and presenting draft recommendations.

More immediately, the Regional Review is intended to provide AMS (AMS) with information and insight that will support implementation of the *ASEAN Convention against Trafficking in Persons, especially Women and Children* (ACTIP) and its Plan of Action (APA), both adopted in late 2015.

The methodology for preparation of the report was as follows:

An initial draft of the regional review was developed and presented to ACWC in August 2015. On the basis of ACWC's advice and direction, field research was then designed and conducted at the national level. This research sought to (i) check information on specific countries contained in the draft report; (ii) provide substantive inputs to the report based on empirical data and actual implementation of existing national laws, policies and guidelines; and (iii) to provide case studies of successful intervention programmes for trafficked persons. The research at the national level was conducted using a multi-method approach composed of desk reviews, key informant interviews, focus group discussions and shelter visits during the period of November 2015 – January 2016. The findings of the national studies were discussed with ACWC in February 2016. The initial draft was then revised to take account of these country-level findings and the feedback received from ACWC.

Note that all specific country findings in this report are drawn from the individual country studies referred to above unless another citation is given.

Note further that references to laws, policies and practices reflect the situation at the finalisation of the report (July 2016).

Structure of the Regional Review

The Regional Review is divided into eight chapters, each considering one major area of the anti-trafficking response that is of critical importance to victim identification, management and treatment. Importantly, the chapter divisions also generally correspond with the structure of international, regional and national norms and standards around trafficking in persons. Each chapter sets out to answer – or at least address – one or more central questions relevant to that chapter’s themes:

Chapter 1: Definitions and Criminalisation of Trafficking in Persons

How is trafficking defined and criminalised?

Chapter 2: Victim Identification and Referral

How are victims of trafficking identified? What happens then?

Chapter 3: Protection, Support and Recovery Assistance to Victims

What protection, support, recovery and other measures are victims of trafficking entitled to? What assistance do they actually receive?

Chapter 4: Victims in the Criminal Justice Process

What special measures are in place to protect / support victims who are – or who may be - involved as witnesses in the prosecution of their exploiter(s)?

Chapter 5: Access to Remedies including Compensation

What are victim entitlements with respect to access to justice including remedies such as compensation? To what extent are these entitlements enjoyed in practice?

Chapter 6: No Detention or Prosecution of Victims for Status Offences

To what extent are victims of trafficking protected, in both law and practice, from detention; and prosecution / punishment for status offences, such as illegal entry or illegal work?

Chapter 7: Return and Reintegration of Victims

How are victims’ right to safe and timely return protected in law and respected in practice? What measures are in place to ensure the successful reintegration of returned victims and to guard against re-trafficking? How effective are they?

Chapter 8: Prevention of Trafficking

What measures are in place to prevent trafficking in persons and to what extent are these measures considered to be effective?

The internal structure of each chapter is the same. Section One briefly sets out the international legal standards relevant to the area under consideration as well as applicable ASEAN standards: highlighting relevant provisions of the *ASEAN Convention against Trafficking in Persons* and commitments under the ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children. Section Two provides an assessment of current laws, policies and practices within the ASEAN region with respect to the chapter focus. Section Three draws on Sections One and

Two to identify issues for consideration by AMS in relation to that particular area and presents several draft recommendations.

Draft recommendations from each chapter are summarized in **Annex IV**.

Scope and Limits of the Assessment

Much of the information provided in this regional review is drawn from publicly accessible documents: international, national and regional laws, policies and guidelines; official documents and reports; external reports and studies. Information secured by the authors through other sources (including from national officials) has not been included unless it could be verified through a publicly available document or reports. Additional insight, especially into policy and practice, was secured through in-country assessments. AMS were asked to verify the information collected through this process. Any country information contained in this report that is not directly sourced to a specific report or publication is drawn from the relevant in-country assessment.

Not surprisingly, information sources around laws and policies proved to be strongest and most reliable. It was much more difficult to accurately assess how official commitments are actually being implemented in practice, even in the context of in-country assessments. For example, few AMS provide official figures on the number and profile of victims of trafficking who are repatriated each year. In addition, even if numbers for official repatriation were available, their reliability and usefulness is limited by the fact that they would not include trafficked persons who are *not* identified as such, but rather quickly deported as irregular immigrants.

Similarly, while there is some information available on AMS prevention strategies, and the country studies were able to provide valuable supplementary insight, it has proved to be extremely difficult to meaningfully assess the impact and effectiveness of those strategies.

Certainly, there is a growing body of information focusing on AMS trafficking responses from the perspectives of practice, impact and effectiveness. However, as with official data, the quality and completeness of that information varies widely. This regional review has highlighted the resulting gaps in an effort to encourage further research aimed at developing a more complete picture of the current situation.

CHAPTER 1:

DEFINITIONS AND CRIMINALISATION OF TRAFFICKING IN PERSONS

Key message: Trafficking should be generally defined in accordance with the international legal definition as affirmed in the ASEAN Convention against Trafficking in Persons Especially Women and Children and, as far as possible, concepts within that definition that are not otherwise defined in national law should be clarified. Trafficking acts conducted by legal persons should be criminalised, as should an appropriate range of related and ancillary offences.

ASEAN Convention against Trafficking in Persons Especially Women and Children Provision

“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.

The recruitment, transportation, transfer, harbouring or receipt of a child [any person under eighteen years of age] for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth [above].

Article 2

ASEAN Member State commitments under the 2015 ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children

Criminalisation of trafficking:

We, Member States of the ASEAN, resolve to ...

- a. Establish trafficking in persons as a criminal offence, consistent with Article 5 of the ACTIP;*
- i. Ensure the liability of all categories of perpetrators of trafficking in persons, including the liability of legal persons and entities as appropriate, in line with the ACTIP.*

Excerpted from **Part IV.C.**

Introduction

This chapter seeks to ascertain how trafficking is defined and criminalised in national law and, as an extension of this, how the concept is understood and applied in practice across AMS. For example, are legal definitions of “trafficking” confined to women and children or do they extend to include men as well? Do they include or cover the full range of exploitative purposes set out in international law, such as forced labour? Do

national definitions and understanding of trafficking affirm that the “means” element (i.e. coercion, deception, fraud, threat, abduction, force or abuse of power or position of vulnerability) is not required in relation to child victims? Are criminalisation provisions in line with international obligations with regard to conspiracies, attempts and trafficking by legal entities such as private companies? Are trafficking-related offences – such as forced labour – adequately captured in national law so as to provide potential alternative offences? While not all of these questions are addressed in depth in the chapter, they are important to consider when determining the extent to which national definitions align with international and regional standards.

The chapter is divided into three sections. Section 1.1 briefly sets out the international legal and ASEAN standards relevant to defining and criminalizing trafficking in persons and identifies the various ASEAN policy documents that have affirmed the international legal definition. 1.2 provides an overview of how AMS have defined and criminalised trafficking in their national laws. 1.3 analyses the information set out in the first two sections to identify issues for consideration by AMS with respect to the definition of trafficking and criminalisation of trafficking in national law.

1.1: International and Regional Standards Relevant to Defining and Criminalizing Trafficking¹

Trafficking in persons was not subject to an agreed definition in international law until 2000 when Member States of the United Nations adopted the *Protocol to Suppress, Prevent and Punish Trafficking in Persons, Especially Women and Children (UN TIP Protocol)*. The accepted international legal definition of trafficking in persons, which has been incorporated - without modification - into the *ASEAN Convention against Trafficking in Persons*, is set out in Article 3 of that instrument.

“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.

The definition contains a provision that affirms that the consent of the victim to the intended exploitation “*shall be irrelevant where any of the means [coercion, deception, abuse of vulnerability, etc.] have been used*”. This is also repeated in the *ASEAN Convention against Trafficking in Persons Especially Women and Children* at Article 2(b).

¹This section draws on A. Gallagher, *The International Law of Human Trafficking* (2010); OHCHR, *Commentary to the United Nations Recommended Principles on Human Rights and Human Trafficking* (2010) pp 175-182, and OHCHR, *Human Rights and Human Trafficking, Fact Sheet No. 36* (2014).

Box 1: Key elements of the international and ASEAN legal definition of trafficking in persons

KEY ELEMENT	
Action	Recruitment, transportation, transfer, harbouring or receipt of persons.
Means	Threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving payments or benefits to achieve consent of a person having control over another.
Purpose	Exploitation (including, 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).

The definition of trafficking in children, as set out in both the *UN TIP Protocol* and the *ASEAN Convention against Trafficking in Persons Especially Women and Children*, is slightly different to the definition of trafficking that is applicable to adults. In relation to persons under the age of eighteen years, it is only necessary to show (i) an “action” such as recruitment, buying and selling, and (ii) that this action was for the specific purpose of exploitation. In other words, trafficking will exist according to international law where the child was subject to some act such as recruitment or transportation, the purpose of which is the exploitation of that child. There is no need to establish the “means” element such as deception or coercion. This makes the identification of child victims of trafficking and the identification of their traffickers easier.

Box 2: Key elements of the international and ASEAN legal definition of trafficking in children

KEY ELEMENT	
Action	Recruitment, transportation, transfer, harbouring or receipt of persons.
Purpose	Exploitation (including, 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).

The key features of the international and ASEAN legal definition can be summarized as follows:

- Trafficking can take place both within and across national borders;
- Trafficking can take place for a range of purposes, including but not limited to sexual exploitation, and can involve men and boys as well as women and girls as victims;
- The concept of trafficking in international law does not just refer to the *process* by which an individual is moved into a situation of exploitation - it extends to

include the maintenance of that person in a situation of exploitation. Accordingly, it is not just the recruiter, broker or transporter who can be identified as a trafficker, but also the individual or entity involved in initiating or sustaining the exploitation.

- The “means” of trafficking in adults – an inherent part of the trafficking definition – will operate to nullify consent. As such “consensual trafficking” is a legal impossibility (for children as well as for adults).

International law requires States to criminalise and punish a range of conduct related to trafficking. The obligation to criminalise trafficking when committed intentionally is contained in Article 5 of the *UN TIP Protocol* and Article 5 of the *ASEAN Convention against Trafficking in Persons Especially Women and Children*. The same articles also oblige States Parties to criminalise attempts to commit such an offence; participating as an accomplice in such an offence; organizing or directing others to commit such an offence and obstruction of justice when carried out with respect to offences established by the *Protocol* and *Convention*. These obligations extend to both natural and legal persons although the liability for legal persons does not need to be “criminal”.

Through the *UN Organized Crime Convention*, international law requires States to ensure that penalties for trafficking take into account and be proportionate to the gravity of the offences. The *Organized Crime Convention* also operates to oblige States Parties to take other measures with respect to trafficking offences including to:

- Criminalise the laundering of the proceeds of trafficking;
- Establish a long statute of limitations period for trafficking offences;
- Provide, to the greatest extent possible, for the tracing, freezing and confiscating of proceeds of trafficking in both domestic cases and in aid of other State Parties;
- Provide other States Parties with mutual legal assistance in investigation, prosecution and judicial proceedings for trafficking offenses;
- Protect victims and witnesses from potential retaliation or intimidation;
- Take appropriate measures to encourage those involved in trafficking to cooperate with or assist national authorities; and,
- Provide for channels of communication and police-to-police cooperation in relation to the investigation of trafficking offences.

The *ASEAN Convention against Trafficking in Persons Especially Women and Children*, which has incorporated many elements of the *Organized Crime Convention*, operates with similar effect.

In addition to the *ASEAN Convention against Trafficking in Persons Especially Women and Children*, various ASEAN policy documents have endorsed the international understanding of trafficking as set out above. For example, the *Gender Sensitive Guidelines for Handling of Women Victims of Trafficking in Persons (Gender Sensitive Guidelines)* directly refers to the *UN TIP Protocol* and explicitly adopts the definition set out in that instrument (1, 1.1.). The *ASEAN Practitioner Guidelines on Criminal Justice Responses to Trafficking in Persons (ASEAN Practitioner Guidelines)* affirm that “[a]ll forms of trafficking in persons and related crimes should be criminalised in accordance with applicable international standards” (1.A.1).

1.2: Definitions and Criminalisation of Trafficking in the Laws of AMS

Over the past decade, AMS have made great progress in incorporating the substance of the international legal definition of trafficking into their national laws. When the *UN TIP Protocol* was adopted in 2000, only a very small number of ASEAN States had criminalised trafficking – and even in those cases, the definition generally only encompassed trafficking of women and children for purposes of sexual exploitation. These laws could not be used to prosecute those who engaged in the trafficking and exploitation of men; or those responsible for trafficking any person for other exploitative purposes such as forced labour or slavery-like practices such as debt bondage and servile marriage. Those legislative gaps were significant, as investigations in the ASEAN region have uncovered trafficking of men, women and children for a wide range of exploitative purposes including in factories, on fishing boats and construction sites, and in private households. Presently, all AMS have in place their own specialist TIP laws, or are in the process of establishing one.

Annex I to this report sets out the legal definition of trafficking in persons that is operating in each ASEAN Member State. The following provides a brief summary that seeks to illustrate both similarities and differences between AMS approaches to the definition and to criminalisation of trafficking.

A note on related offences: It is important to recognize that the applicable legal framework around trafficking is generally much wider than the specialist trafficking law. For example, in all AMS, a range of trafficking-related offences such as slavery, assault, sexual assault, forced prostitution, child labour and the sexual exploitation of children are separately and fully criminalised, thereby providing additional or alternative bases for prosecuting trafficking-related crimes. In most AMS, labour laws provide important potential protections for at least some groups of victims of trafficking – those working in the informal sector may unfortunately be excluded from these protections. In all AMS, the Penal Code prohibits and punishes many acts associated with trafficking and laws around child protection provide further additional bases for prosecuting exploiters and protecting victims. The following analysis deals only with specific trafficking in persons offences and therefore does not provide a complete overview of the national legal framework of the Member State.

National definitions of trafficking in persons

The definition of trafficking in persons in most AMS closely tracks the definition set out in the *UN TIP Protocol* and the *ASEAN Convention against Trafficking in Persons*. Section 4 of **Brunei Darussalam Trafficking And Smuggling Of Persons Order (2004)** establishes a criminal offence in relation to “any person who recruits, transports, transfers, harbours or receives any person or persons for the purpose of exploitation by one or more of the following means: (a) threat; (b) use of force or other forms of coercion; (c) abduction; (d) fraud; (e) deception; (f) abuse of power or of a position of vulnerability; (g) the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”. Exploitation is defined in accordance with the *UN TIP Protocol* to include: “all forms of sexual exploitation (including sexual servitude and exploitation of another person’s prostitution), forced labour or services, slavery or practices similar to slavery, servitude and the removal of organs”. Section

5 sets out a two-element definition of trafficking in children that is consistent with the *UN TIP Protocol*. The law further provides, at Section 6, for another offence - "exploitation of trafficked persons" - that appears aimed at ensuring that those who may be involved in the ultimate exploitation (for example, a brothel or factory owner) will also be held criminally responsible.² The *Children and Young Persons Act (Cap 219)* also establishes a range of offences relating to the trafficking of children and young persons.

In 2008, **Cambodia** enacted a new law, *the Law on Suppression of Human Trafficking and Sexual Exploitation*, to address gaps in its previous laws on TIP. This new law contains a variety of new offences, most of which are component offences of the larger trafficking process or event. It is not clear whether or not there is any requirement to prove all three elements of the trafficking crime, including the critical element of "exploitation". This ambiguity has caused problems in the implementation of Cambodia's new TIP law. In 2010, there were several instances where the law was used to prosecute individuals for actions that fall well short of what is considered "trafficking" under the *UN TIP Protocol* (for example, the consensual and non-exploitative adoption of a child). These problems were brought to the attention of relevant officials and the Ministry of Justice subsequently issued implementing guidelines confirming that, unlike the *Protocol's* three-element definition:

*The [2008] Law ... seeks to separate out these acts into different offenses: thus, Chapter 2 of this law differentiates between the offenses of unlawful removal; unlawful recruitment; buying, selling or exchanging a person; transportation of a trafficking victim; and receipt of a trafficking victim. The Law treats separately each step of the Palermo Protocol's definition of trafficking in persons, providing for different offenses and different punishments.*³

Indonesia's Law No. 21 of 2007 on Eradication of the Criminal Act of Human Trafficking defines human trafficking as:

...any acts to recruit, transport, harbour, deliver, transfer or receipt someone by means of threat or abuse of force, kidnap, locking up, forging, deception, abuse of power or abuse of vulnerable position, debt bondage or to provide payment or benefit, in order to obtain consent from the person that holds control over the other person mentioned, either conducted domestic as well as across the border, with the intention of exploitation or to cause exploitation over other people.

While the formulation of this definition differs slightly to that set out in the *UN TIP Protocol* and the *ASEAN Convention against Trafficking in Persons*, it does establish the three elements of act, means and purpose. The law is unclear in relation to whether means are required in cases of trafficking in children.

²In 2012, the first case prosecuted under the Order involved a domestic worker subjected to physical abuse by her employers. The High Court rejected this case as an offence of trafficking in persons on the basis that "exploitation" had to occur from the beginning stage when the victim was recruited. In this case, non-exploitative recruitment, even when followed by exploitation, was found to be insufficient to establish the offence of trafficking.

³Explanatory Notes For *The Law On Suppression Of Human Trafficking and Sexual Exploitation 2009*

The *Penal Law of Lao PDR* (2005) criminalises trafficking in persons, defined as “the recruitment, moving, transfer, harbouring, or receipt of any person within or across national borders by means of deception, threats, use of force, debt bondage or any other means [and using such person in] forced labour, prostitution, pornography, or anything that is against the fine traditions of the nation, or removing various body organs, or for other unlawful purposes” (Article 134). A 2006 revision prohibits all forms of human trafficking and prescribes penalties for convicted traffickers. Further, trafficking in women and children is criminalised in the *Law on Development and Protection of Women* (2004), which uses the same definition of trafficking as set out in the *Penal Code* with some variations but does not apply to trafficking in men. Both laws criminalise acting as an accomplice to a trafficking offence. Most recently, the Government of Lao PDR passed the *Anti-Human Trafficking Law* (2015), which sets out a definition of trafficking in conformity with the international definition.

Malaysia’s *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* (Act 670 as amended in 2010 and subsequently through the *Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Act 2015*) criminalises trafficking and defines it in general accordance with the three-part definition set out in the *UN TIP Protocol* (act, means and purpose). The definition affirms the irrelevance of consent and further notes the irrelevance of movement to establishing the crime of trafficking in persons. The third element of the definition, exploitation, is defined to mean “all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs”.

Myanmar’s *Anti-Trafficking in Persons Law* (2005) generally follows the *UN TIP Protocol’s* three-part definition with some minor modifications. The law defines trafficking as, “the recruitment, transportation, transfer, sale, purchase, lending, hiring, harbouring or receipt of persons after committing ... threat, use of force or other forms of coercion; abduction, fraud, deception, abuse of power or a position of vulnerability; and giving or receiving of payment to obtain the consent of another, for purposes of the exploitation of a person with or without his or her consent”. Exploitation is defined in the legislation in accordance with the *Protocol*. The law does not contain a separate definition of trafficking in children. Myanmar is currently reviewing its anti-trafficking legislation.

The Philippines criminalised trafficking in 2003 through *Republic Act 9208*. The definitions of trafficking in adults and trafficking in children set out in Section 3 of the Act mirror those of the *UN TIP Protocol*: “Trafficking in Persons - refers to the recruitment, transportation, transfer or harboring, or receipt of persons with or without the victim’s consent or knowledge, within or across national borders by means of threat or use of force, or other forms of coercion, abduction, fraud, deception, abuse of power or of position, taking advantage of the vulnerability of the person, or, 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 which includes at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery, servitude or the removal or sale of organs. The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall also be considered as ‘trafficking in persons’ even if it does not involve any of the means set forth in the preceding paragraph”.

In 2012, the Philippines issued an *Expanded Anti-Trafficking in Persons Act* to broaden and clarify its 2003 law. The expanded act criminalised the acts of *obtaining* and *maintenance* of persons. For trafficking of children, the act component was expanded to include adoption of a child for any purpose of exploitation or when adoption is induced by any form of consideration for exploitative purposes. Additionally, the legislation defines a “child” not only as a person below 18 years of age, but also as a person who is over 18 years old but “is unable to fully take care of or protect himself or herself from abuse, neglect, cruelty, exploitation, or discrimination because of a physical or mental disability or condition”.

Singapore’s *Prevention of Human Trafficking Act (2014)* (PHT Act) provides as follows:

Any person who recruits, transports, transfers, harbours or receives an individual (other than a child) by means of (a) the threat or use of force, or any other form of coercion; (b) abduction; (c) fraud or deception; (d) the abuse of power; (e) the abuse of the position of vulnerability of the individual; or (f) the giving to, or the receipt by, another person having control over that individual of any monetary or other benefit to secure that other person’s consent, for the purpose of the exploitation (whether in Singapore or elsewhere) of the individual shall be guilty of an offence. (Section 3)

This definition contains each of the three elements of the trafficking crime as set out in the *UN TIP Protocol* (the action, means and purpose) for adult victims. The relevant section also follows the *Protocol* in establishing that only two elements (the action and purpose) are required to establish the crime of trafficking in children. It further affirms the irrelevance of consent when any of the stipulated means have been used. Importantly, the Singapore TIP law also includes definitions of key concepts used in the trafficking definition.

Thailand’s current law on trafficking was adopted in 2008 and recently amended in 2015. The definition of trafficking set out in the *Anti-Trafficking in Persons Act (2008) and the Amendments (No.2) (2015)* closely follows the *UN TIP Protocol’s* three-element definition with significant differences only in the purpose element. In relation to that element, “exploitation” is defined as “seeking benefits from the prostitution, production or distribution of pornographic materials, other forms of sexual exploitation, slavery, causing another person to be a beggar, forced labour or service, coerced removal of organs for the purpose of trade, or any other similar practices resulting in forced extortion, regardless of such person’s consent.” The principal differences with the *Protocol* in this regard are: inclusion of additional forms of exploitation (pornography, causing a person to be a beggar, practices resulting in forced extortion); omission of some forms (practices similar to slavery, servitude); express inclusion of the means element in some forms (removal of organs, practices resulting in forced extortion); and inclusion of the provision on consent (“regardless of consent”) within the element of exploitation rather than in connection with the “act” element. In addition, the umbrella phrase “or any other similar practices resulting in forced extortion” is used instead of “includes”.

The *Amended Act* has been in effect since April 28, 2015. *The Trafficking in Persons Criminal Procedure Act* was enacted and published in the Royal Gazette in June 2016 and is now in effect. Note that these changes do not affect the 2008 law's definition of trafficking. However, work is currently underway to develop a more comprehensive definition of key terms including "forced labour" and "debt bondage".

The *Penal Code* in **Viet Nam**, which criminalises trafficking, was first amended in 2009 and more recently in 2015. These amendments are designed to address some of the complications that arise in connection with Viet Nam's specialist TIP law, discussed further below. The *Penal Code (1999)*, for the first time, criminalised acts of trafficking in women and children. Amendments that came into effect in 2009 expanded the offence to "trafficking in persons". The 2015 amendments added provisions on crimes of human trafficking describing acts of human trafficking specifically, listing the acts which are considered human trafficking in line with the definition set out in the *UN TIP Protocol*. However, the *Penal Code (2015)* defines human trafficking in a broader sense than the *Protocol*; accordingly any behavior of transfer or receipt of persons for giving, receiving of payments, property or other material benefits with or without the purpose of exploitation shall be punishable as trafficking in persons in according to the *Penal Code*. These amendments to the *Penal Code* will also enter into force in July 2016.

Article 3 of **Viet Nam's Law on the Prevention of and Combat against Human Trafficking (2011)** does not define trafficking, rather listing a number of "prohibited acts" which includes "trafficking in persons as stipulated in Article 119 and Article 120 of the Penal Code" and the "recruitment, transportation, harbouring, transfer and receipt of persons for the purposes of sexual exploitation, forced labour, organ removal or "other inhuman purposes". While there are no "means" elements listed in the "prohibited acts" provisions, the definitions given for sexual exploitation and forced labour include elements of force and coercion (Article 2). However there appears to be no force, coercion or other means required for the act of organ removal or for other "inhuman purposes", which are not defined. Further, there is no penalty stipulated for these or any of the other ten "prohibited acts", which include "discrimination against victims" and disclosure of information regarding victims.

1.3: Defining and Criminalisation Trafficking - Issues for Consideration by AMS

The high level of conformity between the international and ASEAN legal definitions of trafficking and the definitions established in the national laws of AMS is encouraging. In addition to providing the necessary foundation for an effective national response, a uniform definition that meets international standards also helps to facilitate cooperation between States – an important aspect for a crime that is often transnational in commission and effect. For these reasons it will be important for those AMS that have not fully incorporated the international/ASEAN legal definition to consider doing so as soon as practicable.

The following issues for consideration are raised by an analysis of this aspect of the legal framework around trafficking.

1.3.1. Need for Clear Definitions of Terms Used in the Definition of Trafficking

Experience in other regions has shown the importance of ensuring that terms within the definition of trafficking are clearly understood – preferably through definitions that are themselves set out in the national law. Without the additional clarity provided by clear definitions, consistent and predictable application of the law becomes difficult and can complicate the important task of quickly and accurately identifying victims of trafficking.

An example is provided by concept of “abuse of a position of vulnerability”, which is included in the international legal definition and many national laws as a “means” by which trafficking takes place. The *UN TIP Protocol* does not explain exactly what “abuse of a position of vulnerability” actually means and very few States have included a definition of “abuse of a position of vulnerability” into their national trafficking laws. Fortunately, subsequent work by the United Nations has resulted in a consensus understanding that AMS may consider in interpreting and applying to their trafficking laws (see text box below).

Text Box 1: Defining Key Term “Abuse of a Position of Vulnerability”

“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 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.”

Source: UNODC 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 (2012)

Experience has also demonstrated the importance of ensuring that the various forms of exploitation stipulated in the law (slavery, servitude, forced labour, sexual exploitation, etc.) are also carefully defined – as far as possible in line with existing international legal definitions. This finding has been confirmed by a recent United Nations Office on Drugs and Crime (UNODC) study that examined law and practice in 12 countries and concluded that failure to carefully define forms of exploitation stipulated in anti-trafficking legislation can complicate and weaken the national response.⁴

Fortunately, anti-trafficking legislation of most AMS includes detailed definitions of each of the stipulated forms of exploitation, and these are generally in line with the relevant international legal definitions. For example, **Singapore’s *Prevention of Human Trafficking Act (2014)*** attaches definitions to certain forms of exploitation, such as debt bondage, servitude, servile forms of marriage and sexual exploitation. Similar provision is made in the **Philippines Republic Act No. 9208**. **Indonesia’s TIP Law** is particularly detailed with regard to definitions – extending them to include stipulated

⁴United Nations Office on Drugs and Crime, *The Concept of Exploitation in the Trafficking in Persons Protocol* (2015).

forms of exploitation as well as certain “acts” such as “recruitment” and “means” such as “use of force” (but not “abuse of a position of vulnerability”). However, in some AMS no such definitions – or only partial definitions - are provided. For example, while **Thailand’s** TIP Law provides a definition of “forced labour”, it does not provide definitions for other stipulated forms of exploitation. Relevant legislation in **Viet Nam** also omits definitions of forms of exploitation.

1.3.2. Need for Related and Ancillary Offences to be Clearly and Separately Criminalised

Experience has shown that it is sometimes quicker and more effective to pursue a trafficking offender under other legislation, either instead of - or as well as - pursuing a prosecution for trafficking. For example, in certain situations it might be more appropriate to prosecute an exploiter for forced labour than for trafficking. In another case, it may be appropriate to prosecute a person for money laundering as well as for trafficking. Experience has also shown that the inclusion of ancillary offences (such as *facilitating*, *being an accomplice in*, or *profiting from* trafficking crimes) is important as it allows prosecution of those who assist or support TIP crimes, without actually being the main perpetrator.

AMS have acknowledged the importance of related and ancillary offences to a comprehensive legal framework around trafficking. The *2007 ASEAN Practitioner Guidelines on Criminal Justice Responses to Trafficking in Persons* affirm that: “all forms of trafficking in persons and related crimes should be criminalised in accordance with applicable international standards”. They further affirm that: “offences of trafficking in persons, together with trafficking related crimes are recommended to be predicate offences in respect of money laundering legislation and assets confiscation provisions”.

The relevant laws of most AMS do indeed address both related and ancillary offences. Coverage is uneven however and there are some common gaps. For example, in some AMS, trafficking is not a predicate offence for money laundering legislation. This makes it difficult to pursue traffickers who are engaged in laundering the proceeds of their crime – an increasingly effective anti-trafficking strategy in other parts of the world. Some AMS have not separately and/or adequately criminalised forced labour, thereby relinquishing an important alternative opportunity to prosecute trafficking-related exploitation.

1.3.3. Liability of Companies and Other Legal Persons

Over the past several years, the involvement of private entities such as companies, associations and other legal persons in trafficking has been well documented. Within the AMS, trafficking and forced labour have been found in the supply chains of fishing companies as well as clothing and electronics manufacturers.⁵ Increasingly, there is scrutiny of exploitation in “labour supply chains”: the web of agencies and companies that manage recruitment of migrant workers for jobs within and outside the region.⁶

⁵See for example, Verite, *Forced Labour in the Production of Electronic Goods in Malaysia* (2015); International Labour Organisation, *Employment Practices and Working Conditions in Thailand’s Fishing Sector* (2013).

⁶See for example, International Labour Organization, *Regulating Labour Recruitment to Prevent Human Trafficking and to Foster Fair Migration* (2015)

An effective response to trafficking requires that companies and other legal persons be held liable for the exploitation of individuals under their authority and control. While not yet consistent across the region, the relevant laws in several AMS now apply to trafficking conduct that is perpetrated under the cover of companies, associations, charitable organisations and other legal persons. For example, the **Philippines’ Anti-Trafficking in Persons Act of 2003** provides that if the offender is a corporation, partnership, association, club, establishment or any juridical person, the penalty shall be imposed upon the owner, president, partner, manager, and/or any responsible officer who participated in the commission of the crime or who shall have knowingly permitted or failed to prevent its commission.⁷ **Thailand’s Anti-Trafficking in Persons Act (2008) and the Amendments (No.2) (2015)** (Section 53) contains a similar provision. In some legal systems it is not necessary to make such a stipulation. For example, **Singapore’s Prevention of Human Trafficking Act (2014)** criminalises the act of trafficking in persons and the act of abetment done by “any person” and section 2 of Singapore’s *Interpretation Act* specifies that “person” include any company or association or body of persons, corporate or unincorporated. However, the issue of corporate liability has not yet been specifically addressed in the legislation of a number of AMS.

Recommendations

1.1	AMS may consider reviewing their legislation with regard to the definition of trafficking in persons with a view to ensuring that terms used within the definition are clearly defined in accordance with international/ASEAN standards.
1.2	AMS may consider reviewing their national legal frameworks to ensure that related and ancillary offences are adequately captured – thereby providing criminal justice agencies with a sufficiently wide range of options for pursuing those involved in trafficking-related exploitation.
1.3	AMS may consider reviewing their national legal frameworks to ensure that legislation adequately provides for the imposition of criminal and civil sanctions on corporations and other legal persons for trafficking as well as related and ancillary offences.

⁷*Anti-Trafficking in Persons Act of 2003* (Philippines), Section 10(e).

CHAPTER 2:

VICTIM IDENTIFICATION AND REFERRAL

Key message: The prompt and accurate identification of victims of trafficking is critical in ensuring that they are assisted, supported and protected. Prompt and accurate victim identification is also fundamental to an effective criminal justice response. Mechanisms and procedures should be in place to guide and facilitate victim identification. As far as possible, these should be standardized across the ASEAN region in order to ensure appropriate coordination and equal treatment of victims.

ASEAN Convention against Trafficking in Persons Especially Women and Children Provision

“Victims” shall mean any natural person who is an object of an act of trafficking in persons as defined in this Convention.

Article 2(e)

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 assistance organisations.

Article 14(1)

In a case where 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.

Article 14(2)

Introduction

The prompt and accurate identification of victims of trafficking is the foundation of an effective national response to trafficking and therefore of central concern to all those who are working to strengthen that response. However, victim identification is problematic for all States within and outside of ASEAN. The largely covert nature of trafficking, the high levels of trauma and intimidation with which it is generally associated, distrust of law enforcement, and a lack of awareness among many individuals who have been trafficked as to their own status as victims are just some of the reasons for low rates of victim identification across the world. Other reasons relate to shortcomings in capacity, awareness and interest on the part of frontline officials and others who may be in a position to identify victims.

Victim identification is usually not a one-off act – rather, it can be complex and occur at several different steps or stages, with varying implications. For example:

- **Preliminary identification** of presumed victims can be made by non-governmental organizations (NGOs) or by frontline law enforcement officials (police or border guards).
- **Formal identification** of victims can be made by specialized police (or police units) for the purposes of deciding whether the crime of human trafficking has been committed and whether the identified person is a witness to that crime.

- **Procedural identification** can occur when there is an administrative mechanism in place to determine who is a victim of trafficking for purposes of assistance and support.
- **Judicial identification** (by a court) may be sought or required in order to grant victims the right to seek and receive compensation.

This chapter seeks to establish how victims of trafficking are identified in terms of both law and practice of AMS. For example, who is responsible for identification and at what stage? Who is actually engaging in victim identification, how does it happen and how effective is it considered to be? The assessment also considers whether specific protocols, checklists or policies are in place for victim identification and, if so, how these are used. An effort is made to determine the number of persons identified as victims of trafficking in the past year and, to the extent possible, explain how this determination was made and note the “form” of trafficking involved. A tabular summary of that information is set out in **Annex II**.

With regard to cross-border identification, Memoranda of Understanding (MOU) regarding bilateral cooperation on assistance to victims of trafficking, including in relation to identification, currently exist between a number of AMS.⁸ This chapter will consider the extent to which these agreements and other applicable instruments support cross-border identification. For example, does the country of origin accept the determination of the country of destination that an individual is a “victim of trafficking” and, if so, what are the consequences of this?

The chapter is divided into three sections. Section 2.1 briefly sets out the international and regional legal standards relevant to victim identification and referral. 2.2 provides an overview of AMS law, policy and practice with regard to victim identification and referral. 2.3 analyses the information set out in the first two sections to identify issues for consideration by AMS in relation to these issues.

2.1: International and Regional Standards Relevant to Victim Identification and Referral⁹

As explored further in subsequent chapters, international law recognizes that individuals who have been trafficked have special rights and that the State owes a particular duty of protection and support to those persons. However, the realization of those rights depends on accurate and timely identification of victims. If trafficked persons are not identified at all, or are incorrectly identified as illegal workers or undocumented migrants, then it is likely that they will be denied the rights to which they are entitled. They may also be unjustly arrested, prosecuted, detained or deported, thereby placing them at risk of being re-traumatized, re-victimized or re-trafficked.

The *UN TIP Protocol* does not make direct reference to victim identification. However, the *ASEAN Convention against Trafficking in Persons Especially Women and Children*

⁸For a full list of bilateral MOUs see table in the Introduction. Note also that five AMS – Cambodia, Lao PDR, Myanmar, Thailand and Viet Nam – along with China, entered into a Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Subregion in 2004.

⁹This section draws on A. Gallagher, *The International Law of Human Trafficking* (2010); OHCHR, *Commentary to the United Nations Recommended Principles on Human Rights and Human Trafficking* (2010) pp 175-182, and OHCHR, *Human Rights and Human Trafficking*, Fact Sheet No. 36 (2014).

contains two relevant provisions: one requiring States Parties to establish identification guidelines or procedures, and the other requiring one State Party to recognize the victim determination decision of another.

The importance of identification is clearly recognized in the *UN Principles and Guidelines on Human Rights and Human Trafficking*:

*A failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights. States are therefore under an obligation to ensure that such identification can and does take place.*¹⁰

While the *UN TIP Protocol* does not specifically address the issue of victim identification, guidance to legislators on implementation of its provisions recommends that States consider establishing some **process whereby victims or others acting on their behalf can be formally identified** as such, for example by:

- Allowing courts or tribunals that convict traffickers, or deal with trafficking in civil or other litigation, to certify as such any victims who are identified during the proceedings, whether or not they actually participate in those proceedings;
- Allowing a judicial or administrative determination to be made based on the application of law enforcement, border control or other officials who encounter victims in the course of investigations or prosecutions; and/or,
- Allowing a judicial or administrative determination to be made based on the application of the alleged victim personally or some representative, such as an NGO representative.¹¹

It is important to note that any formal identification process is likely to be time-consuming, potentially preventing victims of trafficking from accessing the services they require in a timely way. This problem has prompted agreement on the importance of a **presumption of victim status**: if there is good reason to believe someone has been trafficked, then that person should be treated as a victim unless and until another determination is made. This is especially important for a wide range of assistance, support and protection obligations on the part of the State that would not otherwise be provided. Another important **presumption relates to age** (see text box 3, below).

The *UN Principles and Guidelines* provide valuable direction on how identification could and should happen. For example, they note the importance of **written identification tools** such as guidelines and procedures that can be used by police, border guards, immigration officials and others involved in the detection, detention, reception and processing of irregular migrants to permit the rapid and accurate identification of individuals who have been trafficked. Below in text boxes 2 and 3 are examples of indicators for identifying victims of trafficking and associated exploitation as well as special measures for identifying child victims of trafficking. The *UN Principles and Guidelines* also note the need for cooperation between state officials and agencies involved in identification and for training to be delivered to them in identification and correct application of agreed guidelines and procedures.

¹⁰*Trafficking Principles and Guidelines*, Guideline 2.

¹¹UN Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, Part 2, at 289. See also UNODC Model Law, at Optional Article 18.

Text Box 2 : Outcome Document Of the ASEAN And COMMIT Workshop on Identifying Victims Of Trafficking and Associated Forms of Exploitation: Developing Common Indicators For Practitioners, Kuala Lumpur, Malaysia, 15-16 December 2015

Participants at the ASEAN/COMMIT workshop formulated the following list of visual signs and initial indicators that could be used by frontline officials and other first responders in seeking to establish whether a situation may be one requiring further investigation as a possible case of trafficking or related exploitation. The list is not exhaustive. Its purpose is not to be definitive but rather to provide a structure and impetus for States to develop their own more detailed and tailored identification frameworks for national application.

1. VISUAL SIGNS WARRANTING FURTHER INQUIRY

Frontline officials and other first responders may encounter a situation that causes concern as a possible site of trafficking or related exploitation. The (usually visual) signs that could trigger concern and a decision to make further inquiries (such as interviewing a potential victim) might include:

- Signs of control/surveillance (e.g. fences, cameras, weapons)
- Signs of fear/distress/depression/psychological abuse
- Demonstrates lack of familiarity with environment/situation
- Inability/unwillingness to communicate (language, no mobile phone, instructed on what to say, etc.)
- Age/status of potential victims (unaccompanied children; persons appearing to be under minimum legal age for situation / place of work; children in inappropriate situation)
- Signs of physical abuse, physical injuries, poor physical condition
- Working environment appears unusually dangerous with reference to the person's age/condition
- Conditions on the job appear to be very poor (e.g. working very long hours, no breaks, no time off)
- Living conditions appear to be very poor (e.g. food, sleeping arrangements, large numbers living at the place of work)

2. BASIC SCREENING QUESTIONS FOR FRONTLINE OFFICIALS/FIRST RESPONDERS

Frontline officials and other first responders may encounter a person they wish to speak to in order to establish whether there is cause to consider that person a possible victim of trafficking. The following questions (all of which should be asked in order to obtain an overall picture of the situation) should help to determine whether there are indeed indications of a possible case of trafficking or related exploitation that requires follow-up and referral. Note that the threshold for determining whether a person may be a victim of trafficking should be much lower when the person is or may be under the age of 18 years. Frontline responders must also accept that persons being questioned may not be prepared to respond immediately and/or in full.

Indicator 1: The person was paid nothing or less than what they expected or were promised. *Has the person not been paid – or paid less than what they expected or were promised?*

Indicator 2: The person's expected or promised payment/ability to access money has been withheld or deducted. *Has the person's expected or promised payment been withheld or deducted?*

Indicator 3: The person is in a job/situation different than he or she expected or was promised.
Is the person in a job/situation different to the one s/he expected or was promised?

Indicator 4: The conditions of the job and/or living conditions are different to those expected or promised. *Are the conditions of the job (such as working hours, time off) and/or the living conditions different to those expected or promised?*

Indicator 5: The person has been made to feel scared or unsafe at the workplace. *Has anyone at the workplace/situation made the person feel scared or unsafe (about themselves or their families?)*

Indicator 6: The person has been tricked or forced to do something they did not want to do. *Has anyone tricked or forced the person to do something they did not want to do?*

Indicator 7: The person has been pressured to have sexual contact with someone. *Has the person been pressured to have sexual contact with someone?*

Indicator 8: The person/the person's family owes money or other benefits to their employer or others who helped them to get a job.
Does the person (or their family) owe their employer or anyone who helped them to get a job or situation any money or other benefits?

Indicator 9: The person, or others in the workplace, has been harmed, or threatened with harm. *Has the person – or others in the same workplace or situation - been harmed or threatened with harm*

Indicator 10: The person has been made to feel that they cannot leave their workplace or the place where they live. *Has the person ever been told (or been made to feel) that they cannot leave their workplace or the place where they live?*

Indicator 11: The person is not in possession of their identification papers
Have the person's identification papers been taken away or kept?

Indicator 12: The person has been prevented from contacting anyone outside their place of work or situation. *Has the person's ability to communicate with the outside world been restricted?*

Indicator 13: The person's basic needs are not being met
Does the person have access to food, medical services, privacy, other basic needs?

Text Box 3: Special Measures for Identification of Trafficked Children

International law requires that child victims of trafficking be accorded special measures of protection and support. The nature of these measures will generally reflect the particular challenges involved in supporting and protecting children. For example, in relation to identification, it is important to acknowledge that not all child victims of trafficking will present as such. They may appear to be 18 or older. Their passports may have been destroyed or confiscated. They may be carrying false identity papers that misstate their age. Child victims of trafficking may lie about their age because this is what they have been told to do by their exploiters. They may lie because they are afraid of being taken into care or being sent back home. There is growing acceptance of a *presumption of age* in the case of children. Under such a presumption, a victim who *may* be a child is treated as a child unless or until another determination is made. It removes special or additional difficulties that would otherwise complicate the identification of child victims.

The presumption of age is linked to the presumption of status: that a child who *may* be a victim of trafficking is presumed to be a victim unless or until another determination is made. Regarding the laws, systems and procedures that should be in place to ensure rapid and accurate identification of child victims, the *UNICEF Guidelines* provide important guidance:

- States are to establish effective procedures for the rapid identification of child victims, including procedures to identify child victims at ports of entry and other locations;
- Efforts are to be made to share information between relevant agencies and individuals in order to ensure children are identified and assisted as early as possible; and
- Social welfare, health or education authorities are to contact the relevant law enforcement authority where there is knowledge or suspicion that a child is being exploited or trafficked or is at risk of exploitation or trafficking.

Source: *UNICEF Guidelines on the Protection of Child Victims of Trafficking*

There is growing recognition of the need for all countries to establish a **national referral mechanism** (NRM): a single institution or procedure that takes overall responsibility for guiding victim identification and referral. The system is most highly developed in Europe, where various legal instruments require States to establish a NRM as part of their response to trafficking. A national **competent authority** – authorized to make an official determination as to whether a person is a victim of trafficking – is often part of such a mechanism (see text box below).

Text Box 4: National Referral Mechanisms and National Competent Authorities for Identification of Victims of Trafficking

A **National Referral Mechanism (NRM)** is a coordination framework that brings together State and civil society agencies working on trafficking. At the core of every NRM is the process of locating and identifying likely (or “presumed”) victims of trafficking. This process includes all the different organizations involved in an NRM, which should cooperate to ensure that victims are offered assistance through referral to specialized services.

The basic aims of an NRM are to ensure that the human rights of trafficked persons are respected and to provide an effective way to refer victims of trafficking to services. In addition, NRMs can work to help improve national policy and procedures on a broad range of victim-related issues such as residence and repatriation regulations, victim compensation, and witness protection. NRMs can establish national plans of action and set benchmarks to assess whether goals are being met.

The structure of an NRM will vary in each country; however, NRMs should be designed to formalize cooperation among government agencies, as well as between government and non-governmental groups dealing with trafficked persons.

Adapted from: OSCE/ODIHR, *National Referral Mechanisms (2004)*

In some parts of the world, victims of trafficking can be provisionally identified as such for purposes of immediate protection and support. However, additional entitlements (such as Regularisation of status to allow a foreign victim to remain in the country of destination for a period of time and/or access to a “reflection period”) require a further, official identification procedure. This will usually be entrusted to a **National Competent Authority (NCA)** that consists of a team of specialists trained to determine whether a person is a victim of human trafficking. NCAs are considered to be important in standardizing victim identification, ensuring that victims are referred appropriately, and minimizing misidentification.

Adapted from: UNODC

At the regional level, and in addition to the victim identification guidelines set out in text box 2, ACWC adopted a set of gender-sensitive guidelines for handling women victims of trafficking in February 2015. These non-binding guidelines, which explicitly promote a rights-based and gender-sensitive approach to trafficking, are intended to guide frontline agencies and NGOs involved in supporting victims of trafficking, particularly women and girls. The guidelines make detailed and specific reference to victim identification. The most important provisions are set out in text box 5 below. Importantly, through this instrument, ACWC has called on each AMS to **designate a focal point system** (a version of the national referral mechanism/competent authority explained in text box 4 above) and to develop a **standard ASEAN procedure for the effective referral of victims and information sharing** that protects victims’ rights and supports their reintegration into the community.

Text Box 5: Gender Sensitive Guidelines for Identification of Women Victims of Trafficking

Below are some of the key provisions related to victim identification from the *Gender Sensitive Guidelines for Handling of Women Victims of Trafficking*, which was developed and adopted by the ACWC in February 2015:

- Presumption of victim status (i.e. the individual shall/should be treated as a victim and provided with support and services until conclusive evidence indicates otherwise)
- Presumption of age (i.e. the individual whose age is uncertain but could potentially be a child should be treated as such, in accordance with the principles of the UN Convention on the Rights of the Child)
- Utilize a victim-centric approach that respects victims' human rights
- Be sensitive and avoid actions that may re-traumatize victims
- Develop a standard checklist or identification form for conducting preliminary interviews with potential victims
- Include trained female personnel and female social workers for interviews with female victims
- Provide potential victims the opportunity to have a support person with them throughout the identification process
- Ensure the interview is conducted in a safe space, separate from suspects or perpetrators of trafficking
- Embassies should assign a point of contact responsible for coordinating with respective government agencies upon official notification to identify trafficking victims.
- Keep interviews as brief as possible and the results available for relevant agencies to use to avoid multiple interviews of the victims.

Source: *Gender Sensitive Guidelines for Handling of Women Victims of Trafficking*

2.2: Victim Identification and Referral in the Law, Policy and Practice of AMS

2.2.1. Legal Provisions on Victim Identification and Referral

The TIP laws of AMS do not generally refer to identification of victims of trafficking - nor do they establish a formal identification or referral procedure. However, the laws of several AMS make clear the critical connection between the definition of trafficking and identification by affirming that victims of trafficking are persons against whom one of the acts stipulated in the law have been committed. For example, under the relevant law of **Singapore**, a “trafficked victim” is defined to mean an individual against whom an offence under the section criminalizing the act of trafficking in persons is committed, and includes an alleged victim of the offence. Under **Malaysia’s** TIP law, a “trafficked person” means “any person who is the victim or object of an act of trafficking in persons”. In **Indonesia’s** TIP law, a “victim” is “a person suffering from psychological, mental, physical, sexual, economic, and/or social trauma caused by the criminal act of trafficking in persons”. These provisions should operate to ensure that anyone who is the presumed victim of an apparent or potential crime of trafficking is to be treated as a victim of trafficking for purposes of assistance, protection and support.

Irrespective of whether or not the relevant law defines “victim of trafficking”, it appears that a similar presumption generally applies in all AMS: victims are identified on the basis of there being some indication that a crime of trafficking has been committed

against them. What is not clear, in all cases, is whether this presumption of victim status is sufficient to enable those persons to access protection and assistance entitlements available to “victims of trafficking”.

Unlike many other AMS, **Viet Nam**’s legal framework provides relatively detailed guidance on how victims are to be identified and referred. The principal TIP law (LPSAHT, articles 24 and 25) provides that trafficked victims are referred to an appropriate government body where they are initially checked for basic information and given a “certificate of victim status” within three days and subsequently referred to appropriate care services. A 2012 decree on the identification and safety of victims and their relatives removes the requirement in the law that victim identification and support be contingent on the identification or arrest of the trafficker. The decree affirms that victim identification is based on a range of sources including documents and evidence by the agency conducting the proceedings; information and documents issued by the rescued victims; information and documents provided by the Vietnamese representative offices abroad; documents issued by the foreign counterpart; the testimony provided by the victim; and the testimony provided by witnesses. If these sources are insufficient, other factors (such as whether the person was rescued in the company of other victims, signs of sexual exploitation or forced labour, etc.) will be considered in deciding whether a person is a victim of trafficking.¹² These laws are supplemented by an earlier inter-ministerial circular setting out detailed guidelines specifically for the identification and reception of trafficked Vietnamese women and children from abroad. This 2008 circular identifies a focal point and responsible agencies and procedures for handling victim identification and referral in a range of scenarios (return from border and non-border countries; referral from a Vietnamese Representative Agency Overseas; victims who have been rescued or returned on their own, etc.).

2.2.2. AMS Policy and Practice around Victim Identification

As in all other parts of the world, victim identification in the ASEAN region remains a major challenge. It is likely that only a very small portion of the total number of persons who are trafficked within this region ever come to official attention. Of those, many are treated as irregular migrants. One AMS reports an ongoing problem with deported migrants, some of whom are later found to be victims of trafficking, being pushed back across the border. This example also serves to point out that the obligation of victim identification is one that lies with both country of destination and country of origin.

In most AMS, victim identification and referral procedures are dealt with outside the law, often through procedures and guidelines aimed at ensuring those on the frontline are able to recognize victims of trafficking and provide an adequate first response. For example, in **Thailand**, the Division of Anti-Trafficking in Persons under the Ministry of Social Development and Human Security (MSDHS) developed a pamphlet to assist frontline officials in victim identification. In addition, in order to explain elements of trafficking in persons (act, means, purpose), the pamphlet includes additional considerations to aid in the identification process when victims do not self-identify. To further assist frontline officials, there is a preliminary interview form for multidisciplinary

¹²Decree No. 62/2012/ND-CP on Prescribing the Grounds for Identification of Trafficked Victims and Safety Protection of Victims and Their Relatives(Viet Nam)

teams (which include interpreters) to use during initial interviews with potential victims. The form has been revised and the new version has been in use since early 2016.

Good Practice: Victim Identification Pamphlet

The Division of Anti-Trafficking in Persons developed a pamphlet to assist frontline officials in determining whether a person has been trafficked. The pamphlet clearly defines the range of acts, means and purposes of human trafficking before listing considerations for the identification process. It prompts officials to try and establish when the person was subjected to trafficking and whether she or he is a child. Other considerations that should be taken into account include the person's mental and physical appearance (e.g. wounded, panicked, depressed); whether the person was found in a place where people are trafficked; and, if their workplace or dwelling shows signs of confinement or detention. These considerations are useful particularly in cases where victims are unwilling or unable to self-identify. It is made clear that in cases where individuals may have given their initial consent for migration or issuance of a work permit, it does not mean that individual is not a victim of trafficking. The pamphlet also lists other laws under which certain actions not considered trafficking in persons may be considered an offense (i.e. *Penal Code, Child Protection Act, Labour Protection Act, etc.*).

Source: *Scope and Elements of Identification of Trafficked Persons, Thailand (2008)*

In **Malaysia**, the Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants (MAPO) has developed a small, portable checklist of indicators of trafficking (see *Trafficking in Persons Information Card* below) that frontline officials can carry with them while on duty. This card contains general indicators to identify trafficked persons such as: being deceived or forced to perform work other than that agreed upon; being sexually exploited; having unpaid wages (for three consecutive months); being forced to work with security threats against themselves or family; restricted movements or communication; confiscated or kept travel documents or passport; or any signs of physical or mental abuse.

Good Practice: Trafficking in Persons Indicators Card

BANTERAS PEMERDAGANGAN ORANG DAN PENYELUDUPAN MIGRAN

Sesialpa sahaja boleh menjadi MANGSA sekiranya:

1. Ditipu atau dipaksa bekerja selain yang dijanjikan.
2. Dilacurkan.
3. Tidak dibayar gaji (3 bulan berturut-turut).
4. Dipaksa bekerja dengan ancaman keselamatan terhadap diri atau keluarga.
5. Tidak dibenarkan bergerak atau berkomunikasi secara bebas.

Hak Pekerja Dipelihara!

- Dokumen perjalanan atau pasport tidak boleh disimpan oleh majikan;
- Pekerja dibayar gaji yang munasabah setiap bulan;
- Tiada penderaan fizikal atau mental.

Atau sekiranya anda mengetahui mengenai aktiviti penjualan bayi, pemindahan organ manusia secara tidak sah atau amalan menyerupai penghambaan, sila hubungi:

Majlis Antipemerdagangan Orang dan Antipenyeludupan Migran
www.tackberkas.org/ATP/Malaysia

A recent report recounted a case study in **Malaysia**, where a routine visit by Cambodian embassy staff to a local prison resulted in the positive identification of a Cambodian man trafficked to Malaysia and detained for illegal migration. Once identified, the embassy staff helped secure his release and arrange for his return to Cambodia, where he received training and in-kind assistance from a local organization to support himself as a barber.¹³

In **Singapore**, there is a system of stringent border controls and immigration checks. As a result, the government has kept the immigration offender numbers low and minimised the number of undocumented migrants; the latter, in particular, tend to be more vulnerable to being trafficked. Frontline officers are briefed and issued with TIP awareness cards to conduct preliminary assessments and surface any potential trafficking cases to the lead agencies (e.g. Ministry of Home Affairs (MHA) and Ministry of Manpower (MOM)) for follow-up investigations. This ensures that all frontline enforcement officers are aware of the behavioral indicators and definition of trafficking. The Singapore Police Force (SPF) and MOM have also implemented a Standard Operating Procedures (SOP) with the Immigration and Checkpoints Authority of Singapore (ICA) for the referral of potential TIP cases. This is an important process to flag cases for follow-up investigations by enforcement agencies, and to render assistance to victims. At the checkpoints, if ICA detects that foreign workers have outstanding labour claims, or cases to lodge against their employers, and are being repatriated against their will, the workers will be immediately referred to MOM or SPF for assistance.

Throughout the ASEAN region, the *practice* of victim identification is principally reactive: victims are not “found” by frontline responders such as police but will generally self-identify to police or support organizations while still in their situation of exploitation or once they have escaped their traffickers. For example, a study into identification of victims in Viet Nam found that 40 percent of the victims identified by the police are discovered through the national hotline service, while the other 60 percent come into contact with police through self-identification at police stations, e-mails sent by the victims, and rescue missions.¹⁴ An administrative circular published in 2013 affirms that identification of victims of trafficking in Viet Nam can occur through (i) criminal justice investigations; (ii) interviews with victims; (iii) receiving allegations from individuals and/or organizations; and (iv) collaboration with other countries (for example, if a Vietnamese victim of trafficking is identified by officials in another destination country).

In practice, country assessments found that most AMS experience difficulties identifying victims of trafficking, especially persons trafficked for forced labour. For example, it was reported that many enforcement personnel did not probe sufficiently and were dismissive of such cases as mere “labour problems” or “cases of abuse”. Similarly, there were reports that women trafficked for sexual exploitation may be charged for immigration-related offences rather than being screened for human trafficking. Examples were cited of cases with classic indicators of human trafficking such as withholding of passports, denial of freedom of mobility, unpaid wages, fraud, and forced overtime, being referred to labour officials rather than investigated as

¹³After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong Sub-region, Surtees, R., Nexus Institute/UNIAP, 2013.

¹⁴UNODC, Needs Assessment for establishing a national Referral Mechanism in Viet Nam (N.D.) p. 29.

trafficking crimes. In that context it has been noted that there are disincentives for officials to identify cases as “trafficking”, not least the heavy administrative burden that such cases attract. Other respondents in the country surveys noted lack of training and the shifting modus operandi of traffickers (e.g. use of fraudulent documentation to evade identification of victims on fishing vessels) as further obstacles to effective identification.

In **Indonesia**, it appears that most victims are identified after reports to the national authorities (by the victim, by an NGO or even by the media). The formal identification process for Indonesian victims of trafficking is done through interviews and observations. Police officials, social workers from the government authorities (the crisis centre and safe house, for example), NGOs and Citizen Service officers in 24 Indonesian embassies and consulates abroad can all be involved in identification. Detailed guidelines have been developed to assist in the identification process. Training sessions have been conducted to ensure officials undertaking this task have the capacity to identify victims accurately and without causing them further harm. It has been reported however, that trained officials are not always available, and that this can result in intimidation and other inappropriate approaches to victim identification.¹⁵

National victim identification guidelines are currently being developed in **Lao PDR**. Current practice is based on guidelines used by NGOs that provide victim assistance at local checkpoints in collaboration with law enforcement agencies. As Lao PDR is primarily a country of origin for victims of trafficking, formal identification generally takes place in the destination country. In Thailand for example, agreed procedures between Lao PDR and Thailand govern the identification process for Lao victims of trafficking. Following formal identification, victims are placed in shelter custody for the duration of court proceedings and repatriation will not occur until the prosecution process is completed. Repatriated victims are placed in a transit shelter administered by the Lao Ministry of Labor and Social Welfare (MLSW) for seven days so that their needs can be assessed and assistance offered/organised. This period is also used to enable Lao law enforcement officials to interview the returnees. After the seven-day period has elapsed, victims are generally returned to their place of origin and local officials are charged with providing further support as needed.

In **Myanmar**, victim identification is generally the responsibility of the specialist trafficking unit within the National Police. The need to develop systematic procedures for victim identification (both for national and foreign victims) is generally recognised. Myanmar also acknowledges the need for more systematic coordination between countries. For example, since officials from Myanmar are not able to cooperate with their counterparts in China, Myanmar victims of trafficking in China may be misidentified as irregular migrants and deported, rather than being treated as victims of a crime. Myanmar reports good cooperation with Thai authorities on the identification and treatment of Myanmar victims of trafficking in Thailand. However, even in this case, there can be challenges when the appropriate level of cooperation between relevant agencies does not occur.

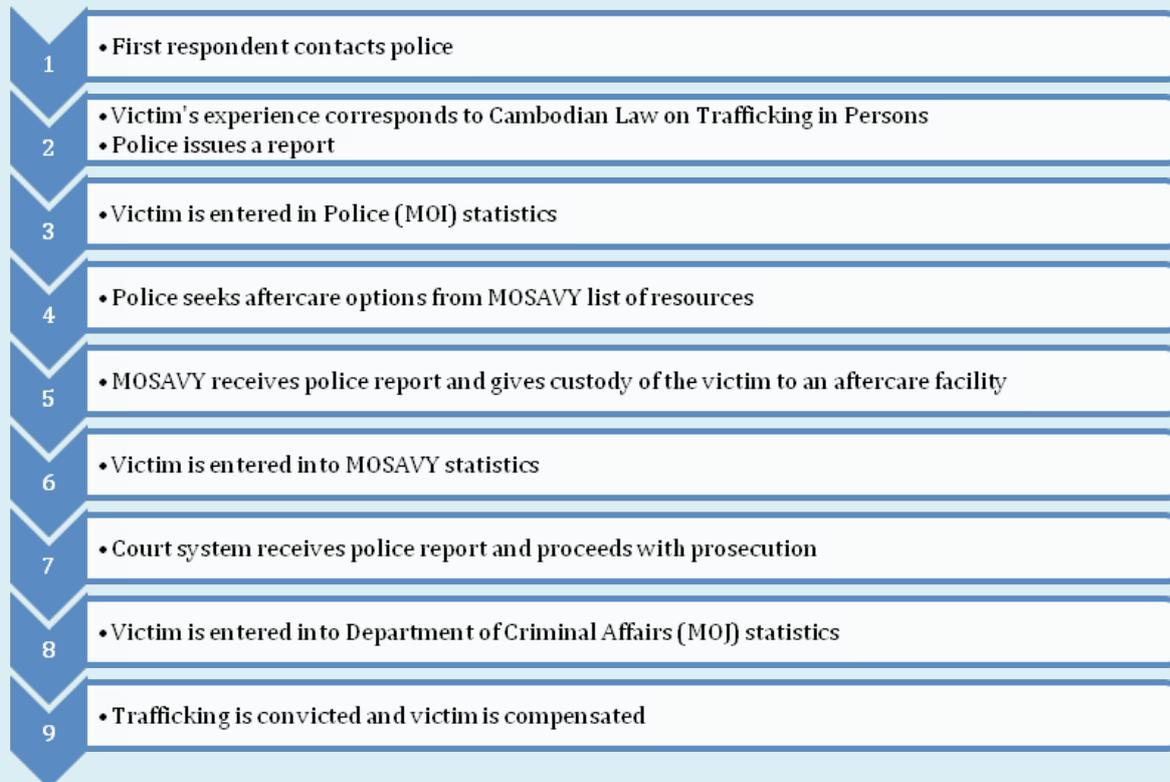
15 *PPPA Ministerial Regulation Number 22 year 2010 on National Action on counter trafficking and violence against children.*

The **Philippines** reports that victims of trafficking are commonly identified through rescue operations, interview screening at ports and borders, reports from embassies and consulates abroad, referral cases, and reports via calls to government and NGO hotlines/help lines. In some instances, cases of trafficking are detected during case build-up of similar cases, discussion during meetings or case conferences and other similar circumstances. In such cases, the service provider of the receiving agencies shall facilitate a rapid identification of trafficked women through three steps: an initial interview and assessment; use of an indicators checklist; and review of additional corroborative materials. It was noted during interviews that accurate identification depends heavily on the skills of the individual making the assessment. The presumption of victim status in relation to children who may have been trafficked (which is also part of Philippine law) was also highlighted as an important part of victim identification practice.

In **Singapore**, TIP victims may be identified through various avenues (e.g. at checkpoints, by frontline officers through raids, NGO referrals and other operations, etc.). Officers from specialised investigation teams within the MOM or SPF will then interview the TIP victim(s). Interpreters and/or female officers will assist in the interviews where necessary. TIP victims are treated with empathy and dignity. They will not be prosecuted for violations of employment and/or immigration laws, nor for any activity that they were involved in as a direct consequence of them being trafficked. These victims will be issued a Special Pass, which validates their continued stay in Singapore. The Inter-agency Taskforce on TIP recognises that NGOs play a useful bridging service and have established direct links with them for referral of possible TIP cases. NGOs have direct access to the Taskforce members and are thus able to provide information on possible TIP victims and their perpetrators for the government to follow up with formal investigations. To enhance this partnership, the Taskforce, in consultation with the NGOs, developed a TIP case referral mechanism in August 2013, to reduce procedural impediments in handling cases. The referral mechanism facilitates timely intervention to ensure that cases are surfaced and dealt with; and to enable more effective case-tracking by MOM and SPF. All referrals thus far have been investigated. Even though most of these referrals were not fully established as TIP cases, appropriate enforcement action was taken against errant employers under other relevant employment laws.

Text Box 6: Victim Identification in Cambodia

The **Cambodian** Government has highlighted the need for a more accurate system of identifying human trafficking victims, accepting that in order for victims to receive the needed services and care, a more standardized process of victim identification must be implemented nationwide. The victim identification and assistance process is supposed to work as follows:



MOI: Ministry of the Interior

MOSVY: Ministry of Social Affairs, Veteran and Youth Rehabilitation

In practice, victim identification is reported to be very difficult. There are no formal procedures operating for the identification of victims and no national referral mechanism. The MOI and MOSVY both have the mandate to identify victims, although both have distinctive purposes and ways of working, which can impact on their approach to victim identification. Typically, victims are only identified after they have escaped from their traffickers or been deported back to Cambodia by the country of destination. Obstacles to proactive identification are numerous and include the reality that some victims (e.g. children trafficked by their relatives for begging) will not self-identify.¹⁶ With respect to its nationals trafficked to other countries, Cambodia accepts the status determination of the destination country for purposes of providing returned victims with support and assistance. However, competent authorities are required to make a formal determination of victim status before taking further action, such investigation or collecting evidence to file a complaint.

Several databases have been established and the UN has assisted the Government of Cambodia to develop a Victim Identification Card, a Victim Identification Checklist and a Victim Screening Form. However, identification rarely takes place systematically and much identification and referral is ad-hoc, undertaken by NGOs or frontline police. A recent UN report indicated that lack of understanding and capacity can hamper effective identification. For example, a person – even a child - who indicates that he or she consented to some part of the trafficking (for example, to engage in sex work) may not be identified as a victim of trafficking.

Source: United Nations Office on Drugs and Crime, *Victim Identification Procedures in Cambodia* (undated); IOM, *Counter Trafficking and Assistance to Vulnerable Migrants - Annual Report of Activities 2011, 2012*; *Cambodia National Report* (December 2015).

¹⁶IOM, Counter Trafficking and Assistance to Vulnerable Migrants - Annual Report of Activities 2011, 2012.

A useful example relating to cross-border identification of victims is provided by the 2010 MOU between **Lao PDR** and **Viet Nam**. This agreement outlines (i) the basis upon which to identify victims; (ii) the competent Lao and Vietnamese authorities in the identification and repatriation process; and, (iii) the procedure for assisting victims and arranging their return and readmission to country of origin (see text box below). Another example is provided by the **Viet Nam-Cambodia Cooperation Agreement on Standard Operating Procedures (SOPs) for the Identification and Repatriation of Trafficked Victims**. This agreement provides for mutual recognition of the identification of victims of human trafficking between Cambodia and Viet Nam and also details procedures for the handover and reception of victims.

Good Practice: Agreement between Lao PDR and Viet Nam on Identification Criteria

In 2010, the Governments of Lao PDR and Viet Nam entered into an agreement to strengthen bilateral cooperation in combating trafficking in persons and protection of victims. Unlike other bilateral or regional MOUs among AMS, this Agreement specifically outlines the mutually agreed bases upon which to identify victims of trafficking as well as procedures for the safe and timely repatriation of victims. The Agreement provides that victim identification is to be based on the following sources:

- (a) Evidence and materials provided by the two Parties;
- (b) Statement and evidence provided by the victims;
- (c) Screening results gained by Lao Ministry of Public Security and Vietnamese Public Security Forces, Vietnamese Border Guard Force;
- (d) Statements given by the person conducting trafficking in persons;
- (e) Information provided by relevant international organizations and governmental organizations;
- (f) Information from other sources.

Source: Agreement between the Government of the Lao People's Democratic Republic and the Government of the Socialist Republic of Viet Nam on Cooperation in Preventing and Combating Trafficking in Persons and Protection of Victims of Trafficking (2010)

Victim identification can sometimes involve members of the public, including NGOs or even the media. A useful recent example relates to the exposure of trafficking in the fishing industry of **Indonesia**. This case came to light following an investigation by the Associated Press (AP) which published a report in March 2015 entitled, "Are slaves catching the fish you buy?" On the basis of investigative journalism, law enforcement officials conducted an official investigation, subsequently identifying 369 people from Myanmar, Cambodia, Lao PDR, Thailand and Indonesia as victims of human trafficking. The victim identification process was conducted by Indonesian police officials, supported by identification officers from IOM Indonesia.

Recognition by one country of a victim status determination made by another country is important for ensuring that the rights of victims are protected throughout the process. In practice, it appears that AMS generally recognize victims identified and repatriated by governmental and non-governmental agencies in destination countries. This seems to be the case particularly for the major AMS “source” countries that have large numbers of overseas workers, such as Indonesia, Lao PDR, Myanmar and the Philippines. In the case of some AMS, the official tally of victims assisted included only those that were identified and repatriated from destination countries, implying that no persons returning home are subsequently identified as victims of trafficking. Overall however, the major problem appears to be inconsistent or inadequate identification of victims of trafficking in countries of destination resulting in the withholding of assistance, support and protection from those who need it.

2.3: Identification and Referral of Victims of Trafficking - Issues for Consideration by AMS

2.3.1. Low Levels of Victim Identification

A review of victim identification statistics applicable to AMS confirms that in this region, as in all others, far too few victims of trafficking are being identified and referred to appropriate support and protection services. It is highly likely that many victims of trafficking are being misidentified as irregular migrants and/or illegal workers, detained or deported without the benefit of rights and entitlements granted to them under national and international law. The reasons for low levels of identification are numerous and complex. Some factors, such as perceptions of corruption and complicity leading to victim distrust and reluctance to self-identify, will require long-term measures aimed at improving the credibility and professionalism of law enforcement agencies. However, other factors such as lack of awareness among frontline officials – such as police, border officials, labour inspectors, etc. – can be addressed through training and other capacity development initiatives. In this regard, it is important to note that ASEAN has, at its disposal, a comprehensive range of well-tested regional training programmes that can be used for this purpose.

2.3.2. Lack of Uniform Identification Procedures and Criteria

There are also reasons to be concerned about inconsistency in how different AMS determine whether an individual is a victim of trafficking – or a presumed victim – for purposes of protection and support. In some countries, it appears that a formal mechanism is required but this may not be functioning well. In other countries, responsibility for victim identification for purposes of protection and support is diffused among different agencies that may adopt different procedures and criteria.

2.3.3. Issues around Mutual Recognition of Victim Identification Decisions among AMS

The high levels of cross-border trafficking within the ASEAN region raise practical questions about recognition by one AMS of victim status granted by another AMS. For example, it may be important for matters as diverse as return, reintegration and compensation that a decision by country of destination authorities to recognize a

person as a victim of trafficking be accepted by the country of origin.

As a general rule, identification of a victim of trafficking will generally take place in the country in which the exploitation takes place (the country of destination). It is therefore the laws and procedures of that country which will determine whether a person is identified as having been trafficked. To ensure that identified victims are returned and reintegrated successfully it is important that the country of origin accept the decision of the country of destination. Conversely, it is often the case that countries of origin will identify a person as having been trafficked once they return home. In such cases, the country of destination should accept the determination made by the country of origin and work with that country to pursue criminal investigations and support any claims that the victims may have to compensation or other remedies. The establishment of common identification criteria is an essential step towards securing mutual recognition of victim determination decisions. Both aspects are recognized in Article 14 of the *ASEAN Convention against Trafficking in Persons Especially Women and Children*.

Recommendations

- | | |
|------------|--|
| 2.1 | AMS may consider reviewing current training and resources available to support capacity development of frontline officials who are in a position to improve the speed and accuracy of victim identification – as well as to contribute to a more consistent approach to identification throughout the region. |
| 2.2 | AMS may consider developing agreed guidelines for the identification and referral of victims of trafficking. The guidelines could affirm a presumption of victim status in certain situations as well as a presumption of age in favour of persons who may be under the age of 18 years and thereby entitled to a different standard of care and protection. |
| 2.3 | AMS may consider amending their laws and/or bilateral agreements to provide for the mutual recognition of other AMS' victim identification procedures as required under the <i>ASEAN Convention against Trafficking in Persons Especially Women and Children</i> . |

CHAPTER 3:

PROTECTION, SUPPORT AND RECOVERY ASSISTANCE TO VICTIMS

Key message: Victims of trafficking are entitled to, and should receive, immediate protection from exploiters and from the possibility of further harm, including through re-trafficking. Victims of trafficking are also entitled to, and should receive practical support such as shelter, medical assistance, and other measures aimed at ensuring their physical and psychological wellbeing and recovery. Regularisation of legal status of victims is required to ensure that protection and support can be delivered effectively.

ASEAN Convention against Trafficking in Persons Especially Women and Children Provisions

Each Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases. Each Party shall give appropriate consideration to humanitarian and compassionate factors to this end.

Article 14(4)

Each Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.

Article 14(5)

In appropriate cases and to the extent possible under its domestic laws, each State Party shall protect the privacy and identity of victims of trafficking in persons including, inter alia, by making legal proceedings related to such trafficking confidential.

Article 14(6)

Each Party shall communicate to identified victims of trafficking in persons within a reasonable period, information on the nature of protection, assistance and support to which they are entitled to under domestic laws and under this Convention.

Article 14(9)

Each Party shall, where applicable, provide care and support to victims of trafficking in persons, including in appropriate cases in cooperation with relevant non-governmental organisations, other organisations and other elements of civil society, in the following:

- (a) Appropriate housing;*
- (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;*
- (c) Medical, psychological and material assistance; and*
- (d) Employment, education and training opportunities.*

Article 14(10)

Each Party shall take into account, in applying the provisions of this Article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children.

Article 14(12)

Each Party shall make provisions for appropriate funds to be allocated, including where applicable, establishing national trust funds, for the care and support of victims of trafficking.

Article 14(14)

Each Party shall provide or strengthen programmes for relevant officials in the prevention of and fight against trafficking in persons, with focus on methods used in preventing trafficking, investigating and prosecuting the traffickers and protecting the rights of victims including protecting the victims and their families from the traffickers, and the privacy of victims.

Article 16(6)

ASEAN Member State commitments under the 2015 ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children

Protection of victims

We, Member States of the ASEAN resolve to ...

a. Reaffirm that the promotion and protection of human rights for all victims of trafficking and effective measures to respond to trafficking in persons are complementary and mutually reinforcing;

b. In line with Article 14, Paragraph 10 of the ACTIP, continue development of appropriate care, protection and support for victims of trafficking in persons;

c. Provide specialised services to identified victims of trafficking in persons, consistent with the ACTIP and other relevant international instruments, including access to health services, such as for the purpose of prevention, treatment, care and support services for HIV and AIDS and other blood-borne and communicable diseases for those victims of trafficking in persons that have been sexually exploited, taking into account the fact that trafficking in persons for the purposes of sexual exploitation has serious, immediate and long-term implications for health, including sexual and reproductive health;

d. Subject to domestic laws, rules, regulations and policies, and in appropriate cases, consider not holding victims of trafficking in persons criminally or administratively liable, for unlawful acts committed by them, if such acts are directly related to the acts of trafficking in persons;

e. Ensure that there are avenues for victims of trafficking in persons, with particular attention to child victims, to be provided with protection, assistance and services for the physical, psychological, social recovery and rehabilitation in cooperation with non-governmental organisations and other relevant organisations and sectors of civil society, where appropriate, such as the establishment of a network of service providers to provide for medical care, counselling, education and training opportunities, legal aid and translation services;

f. Develop and utilise an appropriate procedure for the rescue, protection, recovery, repatriation, and reintegration of the victim into his or her family and community, in accordance with domestic laws, with particular attention to child victims;

g. Ensure that domestic legal or administrative systems include measures to provide information to victims of trafficking in persons, in a language they understand, regarding their legal rights and the relevant court and administrative proceedings and facilitate their access to assistance in order to enable their views and concerns to be presented and considered at appropriate stages of such proceedings against offenders in a manner not prejudicial to the rights of the defence, consistent with the ACTIP;

h. Recognise the important role of civil society organisations in each ASEAN Member State in providing assistance and empowerment to victims of trafficking in persons, helping them to seek redress and facilitating the care of and provision of appropriate services to victims, including close cooperation and coordination with law enforcement officials.

Part IV.B.

Introduction

This chapter seeks to examine the situation of victims of trafficking with regard to assistance. This is a very broad topic and the chapter focuses on several key areas: protection from further harm and protection of privacy; medical, psychological and material assistance; and, employment and other opportunities. The question of whether assistance is available to *all* victims or whether some forms of assistance are restricted to certain persons/groups (e.g. female victims, citizens, etc.) is important and also considered along with the question of whether and how victims are able to regularize their legal status in countries of destination. This aspect is significant because Regularisation of legal status is often critical to ensuring victims can access important sources of subsistence and support, such as housing and work opportunities, and to enable them to participate effectively and meaningfully in legal proceedings against their exploiters. Recognition of status can also be important in countries of origin for returning victims who may require assistance with reintegration and protection against re-trafficking. While focusing on laws and policies, the chapter also considers, as far as is possible with reference to available information, what happens in *practice*. To what extent are legal entitlements found in law (or indeed policy commitments made by AMS) actually available to victims? What obstacles and opportunities can be identified from an examination of what is happening on the ground?

Note that the question of *when* protection and assistance obligations are triggered is crucial. For example, can those who are *presumed* to be victims of trafficking access support or is it necessary for a formal status determination to be carried out? Reference should be made to Chapter 2 for information on this aspect.

Chapter 3 is divided into three sections. Section 3.1 briefly sets out the international and regional legal standards relevant to victim assistance – with particular focus on protection, support and recovery. 3.2 provides an overview of AMS' laws, policies and practices in these areas. 3.3 analyses that information, as well as indications about how these laws and policies are actually implemented in practice, to identify issues for consideration by AMS in relation to victim assistance.

This chapter considers issues that are also relevant in other chapters. For example, the provision of protection and assistance is directly tied to victim identification – those who are not identified correctly or in a timely manner will be effectively prevented from accessing protection and assistance – even if the law grants them specific rights in this regard (Chapter 2: Victim Identification and Referral). The obligations considered in this chapter apply to all victims - including those who are participating in the criminal justice process (Chapter 4: Victims in the Criminal Justice Process) and thereby also entitled to additional measures of protection and assistance. The ability of victims to access remedies (Chapter 5: Access to Remedies including Compensation) will often depend on the extent to which they are provided protection and assistance. Finally, protection and assistance are key issues in relation to the safe return of victims of trafficking and their effective reintegration (Chapter 7: Return and Reintegration of Victims).

3.1: International and Regional Standards Relevant to Victim Assistance¹⁷

Victims who break free from their traffickers often find themselves in situations of great insecurity and vulnerability. They may be physically and emotionally injured. They may be afraid of retaliation from their traffickers. They are likely to have few, if any, means of subsistence. Unfortunately, the harm experienced by victims of trafficking does not necessarily end when they come to the attention of authorities. Mistreatment by public officials may result in the continuation of an exploitative situation or the emergence of a new one. The harm already done to victims can also be compounded by failures to provide medical and other forms of support—or by linking the provision of much-needed support to an obligation to cooperate with authorities that victims may not be willing or able to fulfill.

The State in which a victim is located is responsible for providing that person with immediate protection and support. This responsibility becomes operational when the State knows or should know that an individual within its jurisdiction is a victim of trafficking. The principle is applicable to all countries in whose territory the victim is located. It applies to all trafficked persons, whether victims of national or transnational trafficking.

3.1.1. Core Obligation: Protection from Further Exploitation and Harm

The first and most immediate obligation of that State is to ensure that the victim is protected from further exploitation and harm—from those who have already exploited that person as well as from anyone else. What this means in practice will depend on the circumstances of each case but international standards require States to take *reasonable measures* to this end. In most situations, reasonable protection from harm requires:

- Moving the trafficked person out of the place of exploitation to a place of safety;
- Attending to the immediate medical needs of the trafficked person;
- Assessing whether the trafficked person is under particular risk of intimidation or retaliation.

While the immediate obligation to protect from further harm relates primarily to the victim, it may also extend to others who could potentially be harmed or intimidated by traffickers and their accomplices. In addition to victims, this list could include informants, those giving testimony, family members, and those providing support services to the trafficked person.

Relevant international instruments affirm the obligations of protection that States owe to trafficked persons. The *UN TIP Protocol* requires each State Party to “endeavor to provide for the physical safety of victims of trafficking in persons while they are within its territory”.¹⁸ Article 14 of the *ASEAN Convention against Trafficking in Persons Especially Women and Children* contains an identical provision. While not very strong, this provision nevertheless obliges States Parties “to actually take at least some steps

¹⁷This section draws on A. Gallagher, *The International Law of Human Trafficking* (2010); OHCHR, *Commentary to the United Nations Recommended Principles on Human Rights and Human Trafficking* (2010) pp 175-182, and OHCHR, *Human Rights and Human Trafficking, Fact Sheet No. 36* (2014).

¹⁸*UN TIP Protocol*, Article 6(5)

that amount to an ‘endeavor’ to protect safety”.¹⁹ The *UN Organized Crime Convention* also requires States Parties: “to provide assistance and protection to victims [of trafficking], in particular in cases of threats of retaliation or intimidation”.²⁰ The *UN Trafficking Principles and Guidelines* specifically refer to the responsibility of States to “protect trafficked persons from further exploitation and harm”²¹ and the need for States and others to “ensure that trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons”.²²

3.1.2. Core Obligation: Provision of Immediate Support

In addition to ensuring their protection from further harm, the State in which a trafficked person is located is also required to provide that person with physical and psychological care that is adequate to meet at least immediate needs. Importantly, the provision of such care has been widely acknowledged to be a *non-negotiable right of the victim*: a right that should be recognized and implemented irrespective of that person’s capacity or willingness to cooperate with criminal justice authorities (see further below).

The scope and nature of the obligation on States to provide care and support to victims of trafficking will depend on many factors because the legal basis for such support is very wide. The *UN TIP Protocol*, for example, sets out a range of support measures that State Parties are required to *consider* implementing, including:

- Appropriate housing;
- Counseling and information, particularly regarding their legal rights, in a language that the victims of trafficking in persons can understand;
- Medical, psychological and material assistance; and
- Employment, educational and training opportunities.²³

The *ASEAN Convention against Trafficking in Persons Especially Women and Children* is more specific - Article 14 of that instrument requires States Parties to provide such care and support “where applicable”. However, it is unclear whether this is a reference to “where the law allows or requires” the provision of such support or where there is a need for such support.

Human rights law is another important source of obligations in this area. For example, if the victim of trafficking is a child, then the overarching rule of “the best interests of the child” must guide decision-making about support (see further below under “3.1.6. Key Issue: Care and Protection of Child Victims”).

Within the ASEAN region, Member States have together – and also in cooperation with external States - affirmed, through regional policy documents and bilateral MOUs, their understanding of what is required in terms of providing victims with immediate protection and support. For example, based on the MOU on Trafficking between China and **Viet Nam**, the two parties guarantee the safety and privacy of victims and commit to “provid[ing] appropriate assistance to victims including shelters, legal assistance,

¹⁹ *Legislative Guide to the Organized Crime Convention and its Protocols*, Part 2, para. 59.

²⁰ *Organized Crime Convention*, Article 25(1).

²¹ *Trafficking Principles and Guidelines*, Principle 8. See also Principle 2

²² *Trafficking Principles and Guidelines*, Guideline 6.6.

²³ *UN TIP Protocol*, Article 6. See also the *European Trafficking Convention*, Articles 10-17.

physical rehabilitation and psychological counseling”.²⁴ **Five AMS (Cambodia, Lao PDR, Myanmar, Thailand and Viet Nam)** plus China have also jointly committed to:

- Adopting policies and mechanisms to protect and support those who have been victims of trafficking; and,
- Providing all victims of trafficking with shelter, and appropriate physical, psycho-social, legal, educational and healthcare assistance.²⁵

Relevant provisions of the *Gender Sensitive Guidelines for Handling of Women Victims of Trafficking in Persons* are set out in the text box below.

Text Box 7: Gender Sensitive Guidelines for Handling of Women Victims of Trafficking in Persons

- Identified victims should be referred to the relevant police unit trained to investigate Trafficking in Persons cases, or to professionally trained social workers, who should then facilitate **medical assessment/necessary intervention**.
- If a victim is injured, the responsible service provider should take steps to provide him or her with immediate **medical attention**.
- In cases where the victim is unable to communicate, **interpreters**, screened and trained by relevant authorities, should be provided.
- The victim should be brought to a shelter/home/processing center and provided with **relevant services, which may include basic necessities and counseling**.
- There should be **no discrimination** in the referral of the victim to services or assistance.
- **Legal aid** should be made available to assist victims. This should take into account national legislations and contexts.

Source: *Gender Sensitive Guidelines*, 3.3, 3.4.5 and 3.4.6.

3.1.3. Key Issue: The Right to Privacy and Protection from Further Harm

In addition to being relevant to considerations of dignity, the right to privacy is an important aspect of protecting victims from further harm. Failure to protect privacy can increase victims' vulnerability to intimidation and retaliation. It can cause humiliation and hurt to victims, compromising their recovery and reintegration into their community. The key provisions relating to the right to privacy for victims of trafficking set out below confirm that the protection of privacy should be extended to all trafficked persons, including privacy from the media, unless there are reasonable grounds justifying interference—such as consideration of the rights of accused persons to a fair trial. For example, a blanket requirement that all legal proceedings related to trafficking be kept confidential could operate to interfere with the rights of accused persons, and may also prevent important external scrutiny of the criminal justice process.

²⁴UN TIP Protocol, Article 6. See also the *European Trafficking Convention*, Articles 10-

²⁵COMMIT MOU, Part III.

Text Box 8: International and Regional Standards on the Right to Privacy

“A State party is to protect the privacy and identity of victims of trafficking in appropriate cases and to the extent possible under its domestic law”.

Source: UN TIP Protocol, article 6

“In appropriate cases and to the extent possible under its domestic laws, each State Party shall protect the privacy and identity of victims of trafficking in persons including, inter alia, by making legal proceedings related to such trafficking confidential.”

Source: ASEAN Convention against Trafficking in Persons, article 14(6)

“There should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial.”

Source: UN Recommended Principles and Guidelines, guideline 6

“Service providers shall keep the affairs and information of victims confidential except where disclosure is required or permitted by the victim assistance process or permitted by the victim. In doing so, service providers shall understand the difference between private/confidential information and general information, and maintain victim confidentiality through this, mindful of the sensitivity of the case, in particular in relation to the media.”

Source: ACWC Guidelines, 2.3.

3.1.4. Key Issue: Unconditional Provision of Protection and Support

The linking of assistance and protection to cooperation with criminal justice agencies is common in all regions of the world. In some countries, the legal and regulatory frameworks explicitly condition any form of support on cooperation. But even where non-conditional assistance is guaranteed in law, victims still tend to be pressured into providing information and testimony in this way.²⁶

There are many problems with this approach. First, it appears that conditional provision of assistance is not compatible with States’ obligation to provide such assistance. While the *UN TIP Protocol* does not make any specific reference to this issue, the Legislative Guide to the *Protocol* states that: “... support and protection shall ... not be made conditional upon the victim’s capacity or willingness to cooperate in legal proceedings”.²⁷ The Guide cites the *UN Trafficking Principles and Guidelines*, which repeatedly affirm the requirement that protection and support not be made conditional on a trafficked person’s capacity or willingness to cooperate in legal proceedings against their exploiters. For example, in relation to shelter for victims, the Principles and Guidelines state that provision of such shelter: “should not be made contingent on the willingness of the victims to give evidence in criminal proceedings”.²⁸

²⁶See, for example, case studies provided in Global Alliance Against Trafficking in Women, *Collateral Damage: the Impact of Anti-Trafficking Measures on Human Rights Around the World* (2007).

²⁷*Legislative Guide to the Organized Crime Convention and its Protocols*, above note 186, Part 2, para. 62

²⁸Guideline 6.1

The second problem is a practical one: the linking of victim support to cooperation does not work. Such an approach is clearly motivated by an understanding of the critical importance of victim intelligence and testimony in securing convictions against traffickers. But experience shows that the compelled victim is unlikely to make a strong witness, particularly in the likely event that this person is still suffering from physical or psychological trauma or fears retaliation. Conditional assistance can be expected to exacerbate the high levels of distrust that may already exist between victims and law enforcement. Conditional assistance can even serve to undermine victim credibility in a manner that would be avoided if all identified victims were provided similar levels of assistance and support.

As one European study found:

Many victims will not have substantial information about their traffickers, and will therefore have little to offer in terms of cooperation. This group will then be barred from obtaining (temporary) residence. It may also instrumentalise victims of trafficking, putting the need to prosecute traffickers before the needs of victims. Putting pressure on victims to cooperate with authorities may also be inappropriate in certain situations, depending for instance on their personal situation and relationship with the trafficker(s). This is particularly difficult when victims have been exploited within family networks or have other close relationships with their traffickers.²⁹

In summary, separating protection and support from victim cooperation is a fundamental tenet of a human rights approach to trafficking.

3.1.5. Key Issue: No Coercion in the Provision of Protection and Support

Victims of trafficking are sometimes compelled to undergo medical tests and procedures such as examination for sexual assault and HIV testing. A human rights approach requires the provision of care and support to be both informed and non-coercive. Victims of trafficking should, for example, receive information on their entitlements so they can make an informed decision. As discussed above, care and support should not be made conditional on cooperation with criminal justice authorities. Victims should also be able to refuse care and support. They should not be forced into accepting or receiving assistance.

This position is supported by the *UN Trafficking Principles and Guidelines* which state that in relation to health care and counseling: "...trafficked persons should not be required to accept any such support and assistance and they should not be subject to mandatory testing for diseases including HIV/AIDS".³⁰ In a section entitled "Informed

Consent", the ACWC Guidelines provide that: "each victim should be able to make a choice based on all available facts, freely and voluntarily."³¹

²⁹A. Brunovskis, *Balancing protection and prosecution in anti-trafficking policies: A comparative analysis of reflection periods and related temporary residence permits for victims of trafficking in the Nordic countries, Belgium and Italy* (2012)

³⁰Guidelines 6.2. Note that the *European Trafficking Convention* is even broader, requiring that, in relation to all assistance measures provided for in that instrument, States Parties are required to ensure the relevant services: "...are provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and rights of children in terms of accommodation, education and appropriate health care". *European Trafficking Convention*, Article 12(7).

³¹ ACWC Guidelines, 2.4.1.

3.1.6. Key Issue: Care and Protection of Child Victims

International law is clear that the best interests of child victims of trafficking are to be a primary consideration in all decisions or actions that affect them. The *UN Recommended Principles and Guidelines* stipulate that child victims of trafficking are to be provided with appropriate assistance and protection with full account being taken of their special rights and needs.³² In accordance with the presumptions outlined in Chapter 2 relating to identification, *all persons identified as or reasonably presumed to be victims of trafficking and identified as or reasonably presumed to be under the age of 18 are entitled to this higher standard of protection and support.*

Appropriate assistance and protection for children includes the provision of immediate support, such as security, food and safe shelter. It would also include healthcare, counseling and social services delivered by trained professionals. The services should be appropriate for the child's age and any special needs, as well as for the child's sex, ethnic or cultural identity.

A human rights approach is not compatible with children being forced to accept assistance and protection. The Committee responsible for overseeing the Convention on the Rights of the Child (CRC) has also affirmed that: "States must refrain from imposing mandatory HIV/AIDS testing of children in all circumstances and ensure protection against it. While the evolving capacities of the child will determine whether consent is required from him or her directly or from his or her parent or guardian... States Parties must ensure that, prior to any HIV testing...the risks and benefits of such testing are sufficiently conveyed so that an informed decision can be made".³³ In this regard, as is the case in all matters affecting children who have been trafficked, the principle of the best interests of the child must be the primary consideration.

Text Box 9: Protecting and Supporting Trafficked Children

Key principles and rules that relate to the protection and support of trafficked children include:

- The trafficked child **should not be criminalised** in any way and should not be liable for prosecution for any status-related offences.
- The trafficked child should **never be placed in a law enforcement detention** facility, such as a police cell, prison or special detention centre for children. Any decision relating to the detention of children should be made **case by case and in their best interests**. Any detention of a child victim of trafficking should, in all cases, be for the shortest possible time and subject to independent oversight and review.
- Care and support should be made available to trafficked children as a right. It should **never be conditional** on their cooperation with criminal justice agencies.
- Children should **not be coerced** into receiving care and protection, including medical assistance and testing, unless it can be demonstrated, case by case, that this is in their best interests.

³²*Recommended Principles and Guidelines*, Guideline 8.

³³Committee on the Rights of the Child, General Comment No. 3: HIV/AIDS and the rights of the child, UN Doc. CRC/GC/2003/3 (17 March 2003) para. 23.

-
- Every child under the jurisdiction or control of a State is entitled to **care and protection on an equal basis**. This means that non-national child victims of trafficking are to enjoy the same rights as national or resident children.
- **The views of child victims** of trafficking should be respected and given due weight and they should be **provided with information** about their situation and entitlements.
- There should be **no arbitrary interference with the child's privacy**. States should ensure that the identity or details allowing the identification of a child victim of trafficking are not made public, save in exceptional circumstances.
- States should provide for representation of an identified (or presumed) child victim of trafficking by a **legal guardian**, organization or authority, for example to ensure that the child's best interests remain the paramount consideration in all actions or decisions; to ensure all necessary assistance, support and protection are provided; to be present during any engagement with criminal justice authorities; to facilitate referral to appropriate services; and to assist in identifying and implementing a durable solution.
- Measures should be in place to assist child victims of trafficking to **participate, safely and meaningfully, in court processes**. These may include Regularisation of legal status; provision of information, legal assistance and legal representation; and taking steps to minimize any trauma that such participation could cause, for instance by providing alternatives to direct testimony.

Sources: *Convention on the Rights of the Child, European Trafficking Convention, Recommended Principles and Guidelines, and UNICEF Guidelines. Table adapted from OHCHR, Human Rights and Human Trafficking, Fact Sheet #36 (2014)*

3.1.7. Key Issue: Regularisation of Legal Status

Victims of trafficking who are unlawfully in a country face special dangers and vulnerabilities as a result of their legal status. For example, in relation to the matters considered in this chapter, they may be unable to access important sources of subsistence and support, such as housing and work opportunities. They may be vulnerable to further exploitation as well as intimidation and retaliation. They risk being prevented from participating effectively and meaningfully in legal proceedings against their traffickers (Chapter 4). Without Regularisation of their status, victims also risk being detained in immigration facilities or shelters, or further punishment for status-related offences resulting from being trafficked (Chapter 6). In addition, they are liable to deportation at any time.

The *ASEAN Convention against Trafficking in Persons Especially Women and Children* recognizes the link between provision of protection, care and support and Regularisation of legal status. The relevant provision is set out in the text box below.

Text Box 10: ASEAN Convention Against Trafficking in Persons Especially Women and Children is Provision on Regularisation of Legal Status

Each Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases. Each Party shall give appropriate consideration to humanitarian and compassionate factors to this end.

Source: ASEAN Convention against Trafficking in Persons Especially Women and Children, Article 14(4)

3.2: Victim Assistance in the Law, Policy and Practice of AMS

3.2.1. Laws and Policies on Protection and Support

The law and policies of most - but not all - AMS provide all victims of trafficking with varying levels of entitlement to protection and support. In some cases these provisions are very detailed. For example, in **the Philippines**, the *Anti-Trafficking in Persons Act (2003)* provides a comprehensive list of services that must be made available to victims of trafficking including emergency shelter and housing; counseling; free legal services; medical and psychological services; livelihood and skills training and education for children.³⁴ Similar comprehensive provisions are made in the laws of **Thailand** and **Indonesia**. **Indonesia's** TIP law contains an additional, important provision obliging the State in the country in which an Indonesian victim is located to provide protection and support (text box 11, below). Under **Thailand's** *Anti-Trafficking in Persons Act (2008) and the Amendments (No.2) (2015)*, police can provide potential victims of trafficking with an initial 24-hour period of police protection that can be extended another seven days by court order if more time is needed to complete the identification process.³⁵ This is in addition to other measures of protection and support that are stipulated in the Act.³⁶

Text Box 11: Country of Origin Obligations with Regard to Victim Assistance

Indonesia's law directly addresses the common situation in which an Indonesian national is trafficked abroad and requires protection and support in the country of destination:

If a victim located in a foreign country requires legal protection as a consequence of the criminal act of trafficking in persons, the Indonesian government through its representative mission in the said country has the obligation to protect the person and interests of the victim, and must make efforts to return the victim to Indonesia, the expense arising from which will be borne by the state.

Source: Law of the Republic of Indonesia No. 21 2007 on Eradication of the Criminal Act of Human Trafficking, Article 54(1).

Lao PDR's Law on Development and Protection of Women (2004) provides that in cases where [women and child] victims are abroad and are Lao citizens, the concerned Lao embassy or consulate shall provide protection and necessary and urgent assistance for those victims.

Source: Law on Development and Protection of Women (2004).

³⁴*Anti-Trafficking in Persons Act of 2003 (Philippines)*, Section 23.

³⁵Royal Thai Government, 23. Act of 2003, *Efforts to Eliminate Human Trafficking in 2014*, Sect. 2.3.

³⁶Most particularly in Chapter 4 (Article 33-41) dedicated to victim protection and support.

More limited assistance and support is available under the laws of **Myanmar** and **Viet Nam**. In **Myanmar**, “preservation of dignity, physical and mental security” is enshrined in the law but only in respect of women, children and youth victims of trafficking (Article 12).³⁷ Other protections in the law, including medical assistance, vocational education and protection of privacy and freedom of information appear to be similarly restricted to women, child and youth victims. In **Lao PDR**, the *Anti-Human Trafficking Law (2015)* provides a range of assistance and support measures for victims of trafficking, providing an important supplement to the rights of assistance available to female and child victims of trafficking under the *Law on Development and Protection of Women (2004)*.

Singapore’s Prevention of Human Trafficking Act (2014) supplements existing protection measures that are being provided administratively, such as shelter, food, counseling services, medical care and temporary employment. For instance, the Act empowers the Director of Social Welfare (or any person authorised by him/her) to provide trafficked victims with any such assistance as he/she considers practicable and necessary. Each victim is assessed thoroughly on his or her respective needs, and the support measures are tailored and provided accordingly. In addition, the Act also protects vulnerable persons, it defines a child as a person under 18 years old, in line with international standards, and stipulates lower legal requirements for the TIP offence to be made out for child victims in recognition of their vulnerability to exploitation. In addition, the abuse of a victim’s vulnerability (such as his or her physical or mental incapacity) is an aggravating factor, possibly warranting heavier punishment. Under the PHT Act, the Court can order proceedings involving sexual exploitation offences to be held in-camera to protect the identity of victims and encourage them to testify in confidence. In-camera proceedings are mandatory where the victim is a child. In addition, a publication gag order will be in force for all sexual exploitation cases.

Under **Viet Nam’s Law on the Prevention and Suppression of Human Trafficking (2011)** victims of trafficking are to be provided with support for essential needs and travelling costs, healthcare, psychological and legal matters. Victims of Vietnamese nationality or permanent residents are additionally entitled to assistance with education study and trade learning, and initial support for investment loans.³⁸

Malaysia’s TIP law does not grant a general right of assistance and protection to victims of human trafficking, although it contains detailed provisions on “care and protection” of victims that are discussed in detail in Chapter 7 in relation to the issue of victim custody. In that regard, and as detailed further in that chapter, it is relevant to note that victims who are under the care of the State in shelters are entitled to a wide range of assistance measures.

³⁷Note that a subsequent provision provides that “the Central Body shall arrange and carry out for the security of life of trafficked victims and to arrange according to their wishes for repatriation and resettlement as much as possible.” It is unclear whether this provision relates only to the aforementioned women, children and youth victims or to all victims of trafficking.

³⁸Viet Nam’s *Guidelines on Process and Procedures of Identification and Reception of Trafficked Women and Children from Abroad ((Inter-Ministerial Circular 03/2008/ TTLT-BCA-BQP-BNG-BLĐTBXH) (8/5/2008))* establishes the procedures for the identification and reception of women and children trafficked abroad who are Vietnamese citizens. Under these Guidelines, women who are identified as victims and whose Vietnamese citizenship is established, are provided with support to return to their homes. Child victims and women who need medical care and psycho-social counselling, are handed over to the Department of Labour, Invalids and Social Affairs (DOLISA) in their home province. There are no provisions for assistance and support for victims trafficked internally.

In **Cambodia**, the *Law on Suppression of Human Trafficking and Sexual Exploitation* does not address issues of victim assistance and protection. However, a detailed policy instrument (*Policy on the Protection of the Rights of Victims of Human Trafficking*) goes some way to filling that gap, setting out minimum standards in this area (see text box 12 below).³⁹

Brunei Darussalam's *Trafficking and Smuggling of Persons Order* makes no reference to victim protection and assistance. However, other laws do set out a range of victim protection and assistance entitlements. For example, victim privacy can be protected through regulation that governs court proceedings. In addition, where offences under *the Trafficking and Smuggling of Persons Order* are pursued together with other offences under the *Women and Girls Protection Act* or the *Children and Young Persons Act*, provisions of those latter laws can be used to protect victim privacy and provide them with a range of assistance and support mechanisms.

Text Box 12: Cambodian Guidelines on Cooperation with Victim Support Agencies in Protecting and Supporting Victims of Trafficking

In 2007, the **Cambodian** Ministry of Social Affairs, Veteran and Youth Rehabilitation (MOSVY) released a set of guidelines regarding the provision of support and protection to victims of trafficking for authorities as well as service providers. Key provisions of the guidelines – which are not legally binding on the Government or service providers - include:

- Following the positive identification of a victim, authorities shall provide information to each victim about their rights and available services in a language the victim understands;
- The services available shall be provided whether or not the victim agrees to cooperate with the police in the investigation;
- Prevention of recording of photographs or disclosure of personal data of the victim;
- Required consent of victims to be housed at shelters;
- Shelters shall have a discreet/subtle exterior to prevent easy detection by traffickers;
- Provision of health services, counselling, education, professional skills training, opportunity to work and legal assistance; and,
- Monitoring and follow-up of victims in Cambodia should be undertaken six months after their reintegration to prevent re-trafficking.

Source: *Agreement on Guidelines for Practices and Cooperation between the Relevant Government Institutions and Victim Support Agencies in Cases of Human Trafficking (2007)*

³⁹Guidelines on Minimum Standards for Protection of the Rights of Victims of Human Trafficking, No: 857S.V.Y (2009) (Cambodia).

Table 1 - Does the Legal and Policy Framework Provide for Special Measures of Protection and Support for Child Victims of Trafficking? (Yes/No)

	Yes/No	Notes
Brunei Darussalam	N	The TIP law does not provide for special measures of protection and support for child victims of trafficking. However, the <i>Women and Girls Protection Act</i> and <i>Children and Young Person Act</i> do provide some provision for protection and shelter, to be determined by authorities.
Cambodia	Y	The TIP Law does not address these issues but the relevant policy framework allows for the right to information and confidentiality; presumption of age; safe, secure and child-friendly shelter; legalisation of stay; legal assistance; best interest principle
Indonesia	Y	The TIP law provides for support and protections in the best interests of the child, particularly in legal proceedings. Additional support for legal assistance, protection and confidentiality is provided in the Child Protection Law.
Lao PDR	Y	The TIP law provides for support and protection in the best interests of the child, particularly in legal proceedings, legal assistance, protection, shelter, information and confidentiality. In addition, under the <i>Law on Protection of Rights and Interests of Children (2006)</i> , child victims are allowed special protection and privileges in legal proceedings, including the right to have their privacy protected; “emergency measures” to protection and assistance; educational, medical and vocational assistance for reintegration.
Malaysia	N	The TIP law does not provide special measures of protection or support for child victims of trafficking although the <i>Evidence of a Child Witness Act</i> envisages the application of special measures in relation to child witnesses in legal proceedings. ⁴⁰
Myanmar	Y	The TIP law provides for protection of vulnerable victims including children and youth, although it does not prescribe measures to achieve this. The best interests principle to assisting children is set out in the Child Law and National Guidelines.
Philippines	Y	Children are granted special protections and assistance including right to information and confidentiality; respect for the child’s cultural identity and non-discrimination; and the best interests principle under the legal and policy framework.

⁴⁰Malaysia reports that the best interests of the child is a guiding principle in relation to the treatment of child victims of crime including trafficking.

Singapore	Y	The TIP law does not provide for special measures of assistance for children but stipulates protection of a child victim's privacy in relation to criminal proceedings. The <i>Children and Young Persons Act</i> provides for the possibility of trafficked children to be sheltered in a place of safety or a place of temporary care and protection, or to be committed to the care of an appropriate person.
Thailand	Y	While the TIP law does not provide for special measures of protection and support, the <i>Criminal Procedure Code</i> and <i>Child Protection Act</i> provide for special measures for protection of children and their privacy in the identification process and legal proceedings including in relation to providing evidence
Viet Nam	Y	In addition to the TIP law, the <i>Penal Code</i> provides protections and privileges for child victims in the investigation and trial process, though no provision excluding child from participating in a "confrontation" with the offender. Note that the Vietnamese legal framework considers children as those under the age of sixteen.

In relation to **protection of privacy** it is important to note that the relevant legislative provisions of most AMS link privacy to the involvement of victims in the criminal justice process (considered further in Chapter 4). No AMS has specifically affirmed the right of victims to privacy although a few AMS have included a general privacy provision in their legislation. For example, **Malaysia's** TIP law makes it an offence for the media to publish information or pictures that could reveal the identity of a trafficking victim.⁴¹

Table 2 - Does the Legal and Policy Framework Protect the Privacy of Victims of Trafficking? (Yes/No)

	Yes/No	Notes
Brunei Darussalam	N	The TIP Law does not specify considerations for protecting the privacy of victims of trafficking. However, the <i>Supreme Court Act</i> does prohibit the publishing any personal details or evidence that may lead to the identification of a witness in any proceedings, which can be applied in cases of trafficking and the <i>Children and Young Persons Act</i> also provides for protection of privacy.
Cambodia	Y	Article 49 of the <i>Law on Suppression of Human Trafficking and Sexual Exploitation</i> and the <i>Minimum Standards for Protection of the Rights of Victims of Human Trafficking</i> both require that government institutions and service providers protect victims' right to privacy and confidentiality.
Indonesia	Y	The TIP law guarantees anonymity during the investigation and court process, as well as the right to have confidentiality of identity protected.

⁴¹Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Malaysia), Clause 58.

Lao PDR	Y	The TIP law provides privacy protections for victims, supplementing the privacy protections available to women and child victims under the <i>Law on Development and Protection of Women (2004)</i> and the <i>Child Protection Law</i> .
Malaysia	Y	The TIP law indicates that trafficked persons are to have their name and any other identifying information kept confidential. If they are under the Witness Protection programme, the Court may allow their participation <i>in camera</i> . Additional legislation protects child witnesses in criminal proceedings.
Myanmar	Y	Provisions for anonymity and confidentiality appear only to apply during the trial phase, in the TIP Law, and only apply to women and children.
Philippines	Y	The TIP law states that all parties involved in a TIP case shall protect the right to privacy of the trafficked person, including prohibition on publication of the name or other information that could lead to the identification of a victim.
Singapore	Y	The TIP Law prohibits any acts likely to lead to identification of the trafficked victim of sexual exploitation. Proceedings for trafficked victims of sexual exploitation may be held <i>in camera</i> , while proceedings for child victims of sexual exploitation must be held <i>in camera</i> .
Thailand	Y	The TIP law prohibits and provides penalty for any act that may lead to the exposure of a victim's identity. Guidelines also advise that all information and communication regarding the victim must respect the victim's right to confidentiality and privacy.
Viet Nam	Y	The TIP law and subsequent governmental policies provide for the protection of privacy of victims and their relatives in the screening, identification, receiving and return process.

Lastly, the laws and policies of most AMS do not address the question of **regularisation of legal status**. This contributes to premature repatriation, detention and greater risk that victims will not be able to access much-needed protection and support. An important, albeit limited, exception to the general regional trend is provided by **Thailand's** TIP law, which recognises that it may be necessary to grant temporary stay for trafficking victims, on a case by case basis, for humanitarian, medical or legal reasons. Persons who have their status regulated in this way may also be granted temporary permission to work.

Text Box 13: Regularisation of Legal Status

Practice within ASEAN and other regions shows that victims of trafficking may have their situation regularized for a number of reasons and in a number of ways, for instance through:

- Granting of a *reflection and recovery period* during which non-conditional support is given with the aim of providing victims with time and space to decide on their options, including whether they will cooperate with criminal justice agencies in the prosecution of their exploiters;
- Granting of a *temporary residence permit linked to (usually criminal) proceedings against traffickers*; such visas usually require victim cooperation and terminate once legal proceedings are completed; and
- Granting of a *temporary residence permit on social or humanitarian grounds* that may be related to, for example, inability to guarantee a secure return and risk of re-trafficking.

Reflection and recovery periods are considered to be “best practice”. However, they are not mandated by law in any AMS and appear to be very rarely offered in practice.

3.2.2. AMS Practice in relation to Victim Protection, Support and Recovery

The question of how victim assistance operates *in practice* is difficult to assess and measure. Available information and data is patchy and not always verifiable. As a general observation, it certainly appears that the ASEAN region experiences similar problems as many other parts of the world in ensuring victims are adequately assisted and protected - even when laws and policies make adequate provision. These issues are discussed in further detail below, along with available examples of AMS practice.

Accessing Services: Referral and Information

Research for this study confirms previous findings that many identified victims in the ASEAN region reported never being referred to or informed of assistance options available to them. Any link with assistance services that had been established was typically broken after authorities from one country returned the victim to their country of origin. Even where formal procedures existed for victims to request assistance, some local officials were slow to respond, if at all. In these cases, several people reported not knowing where they could find information about where to seek assistance and what kind of assistance was available. There were multiple cases of forced shelter stays – either in destination countries or upon return home. Some foreign victims and a minor reported being told by authorities in one country that they would only be housed in a shelter for one week, when in actuality, they were held for several months without updates on the status of their release. Reports have noted that such situations, which in some respects echo the experience of being trapped in exploitation, can be stressful as well as frustrating, particularly when victims wish to return to their families and/or to work to avoid further economic losses. The lack of ability to earn a living while having their case processed is a common factor which operates to prevent victims of trafficking from reporting to the police or being involved in investigations.

What has been termed “forcible assistance” even has the potential to re-traumatize victims, especially when their movement is restricted, and can negatively impact victims’ attitudes toward authorities and service providers.⁴²

Accessing Services: Coordination and Awareness of Officials

Lack of coordination, within and between countries, appears to be a major factor in victims of trafficking being unassisted or under-assisted (see text box 14 below). In some cases, foreign victims have reported that the only assistance they received from destination country authorities related to their repatriation. Sometimes service providers and authorities are unfamiliar with their obligation to provide protection and assistance to victims of trafficking. For example, in **Indonesia**, NGOs and officials have reported that some National Police hospitals were unaware of their duty to provide free medical care to victims of trafficking or were simply unwilling to do so. A lack of understanding about victims’ protection needs is also apparent. For example, few victims in the region have reported that authorities provided official escorts to accompany them back home – but that this inadvertently caused harm by exposing them as trafficking victims to their communities.

Text Box 14: Key Referral and Coordination Issues Encountered by Trafficked Persons

Referral and Cooperation Issues in Transnational Referrals	Referral and Cooperation Issues in National Referrals
<ul style="list-style-type: none"> • Unassisted return, which can be stressful for trafficked persons, particularly if they fear retribution by their exploiter(s). 	<ul style="list-style-type: none"> • Lack of referral and cooperation between anti-trafficking organizations and institutions within a country, which can result in trafficked persons being under-assisted or receiving low-quality services.
<ul style="list-style-type: none"> • Inadequate referral of cases, which can result in people who were identified as trafficking victims in the destination country remaining unidentified for assistance upon their return home. 	<ul style="list-style-type: none"> • Lack of referral between anti-trafficking organizations and more general assistance organizations within a country, which means several assistance options for trafficked persons remain unexplored, when they could have helped avoid duplication of services and conserve resources.
<ul style="list-style-type: none"> • Lack of cooperative case planning and management while victims were abroad, meaning that victims of trafficking did not always experience continuity of care upon their return home. 	

⁴²Country assessments. See also *After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong Sub-region*, Surtees, R., Nexus Institute/UNIAP, 2013.

- **Administrative procedures prior to return, which can delay a trafficked person's return home and prolong their stay in a shelter.**

Source: *After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong Sub-region*, Surtees, R., Nexus Institute/UNIAP, 2013.

Good Practice: Supporting and Protecting Victims

Smooth coordination between authorities and service providers can make a significant, positive impact on victims' recovery and reintegration. It can also reduce their vulnerability to being re-trafficked.

- In 2013, **the Philippines** helped over a thousand Filipinos trafficked abroad with temporary shelter, counseling, medical attention, and legal and repatriation assistance through a system of coordination between the national government, representatives at diplomatic missions and NGOs abroad. A total of 1,979 victims, from 17 regions of the Philippines, received some form of assistance.
- Victims of trafficking in **Viet Nam** have reported receiving several forms of assistance, including for family members, after filing for assistance from commune-level authorities.
- In another case in Viet Nam, a woman reported receiving financial assistance and training in vegetable growing at the state agriculture station after having her case referred to the Department of Labour, Invalids and Social Welfare.
- **Myanmar** victims of forced labour, both of them men, reported that upon their return home, they were given letters by a social worker and policeman certifying their identity so they could apply for new identity documents free of charge.

Source: Country assessment reports; *After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong Sub-region*, Surtees, R., Nexus Institute/UNIAP, 2013

Availability of Services

In addition to problems with *accessing* services, victims of trafficking – once successfully identified, informed of their rights, and referred – may still fail to receive basic services due to lack of resources and/or capacity of national service providers – both governmental and non-governmental.

Gender can be an issue when it comes to availability of services. For example, in all AMS, protection and assistance services are targeted primarily to women and child victims, and are not commonly available to male victims. Where services for men are available, they are invariably less comprehensive. This problem is compounded by the reality that men are often very reluctant to identify themselves as victims of trafficking. Interviews conducted for this study also reveal that protection and assistance services appropriate to the special needs of lesbian, gay, bisexual and transgender (LGBT) victims are absent from the national context in many AMS. The **Philippines** Commission on Women noted the need for separate shelters for male and female

victims of trafficking, in accordance with existing guidelines that mandate gender-responsive handling of cases. That stated, research in some AMS suggests that where shelter facilities are separate, the movements of victims in the women’s shelter may be more restrictive than in the men’s shelter. While generally well-intentioned, in-country research indicates that this may operate to increase the reluctance of victims to enter or stay in shelter facilities. The establishment of standards of care or operations may help to further consistency of treatment of both male and female victims of trafficking across shelter facilities.

More practical problems are also common. For example, there appears to be a significant shortage of available shelter facilities for victims of trafficking (the issue of shelter detention is a separate one that is considered in detail in Chapter 6). It is reported that women, children and men are placed in the same shelters – or are placed in shelters alongside irregular migrants awaiting deportation.⁴³ Even when shelter facilities were separate, some victims received no other assistance from the shelters beyond basic accommodation.⁴⁴ Complaints of restrictive visitor policies, rigid schedules and limited freedom in shelters are very common. Sometimes shelters do not have staff on hand who can speak the same language as the victim, even in cases of domestic trafficking.⁴⁵ Moreover, some victims reported mistreatment by shelter staff members who were not sensitive to their situation.⁴⁶

In some countries, support is made available through the community. For example in **Viet Nam**, a number of community-based “self-help” groups have been established to provide livelihood options and other support to victims of trafficking and others in need of such assistance. Generally however, and despite significant shortcomings such as those outlined above, it appears that comprehensive victim protection and support is more likely to be available in shelters as compared to the victims’ own home communities. Many victims reported positive experiences in shelters, including ready access to needed services and helpful staff.

The right of victims of trafficking to work while they are in the country of destination is very important – as an increasing number of AMS are recognizing. For example, **Malaysia** recently amended its law to permit foreign victims of trafficking to work. Regulations are currently being finalised to ensure this new provision is implemented effectively. **Singapore** has a Temporary Job Scheme (TJS) to allow “special pass” holders (migrant workers or foreign nationals involved in a police investigation or has a legal case and has their work pass cancelled by employers) to work in certain sectors, such as factory work or domestic work. The conditions under TJS are aligned to the main work pass framework, and subject to employers’ willingness to hire.⁴⁷ In accordance to a provision under its law (see text box below), **Thailand** has issued a number of temporary work permits allowing foreign victims to work while awaiting

⁴³*After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong Sub-region*, Surtees, R., Nexus Institute/UNIAP, 2013.

⁴⁴*After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong Sub-region*, Surtees, R., Nexus Institute/UNIAP, 2013.

⁴⁵*Ibid.*

⁴⁶*After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong Sub-region*, Surtees, R., Nexus Institute/UNIAP, 2013.

⁴⁷Singapore Country Report (December 2015)

repatriation or the completion of legal proceedings.⁴⁸ These permits enable holders to work outside their shelters for the entire duration of their legal proceedings on a voluntary basis. They may also opt for vocational and skills training available inside the shelters. While it is not clear how the system operates in practice, some successes have been reported. For example, one **Cambodian** man was in a Thai shelter for three months and was able to legally work while court proceedings were ongoing. This allowed him to earn money before he was returned to Cambodia, which eased his economic concerns and aided his reintegration.⁴⁹

Good Practice: Regularisation of Legal Status

For the purpose of taking proceedings against the offender under this Act, or providing medical treatment, rehabilitation or claiming compensation of the trafficked person, the competent official may assist the trafficked person to get permission to stay in the Kingdom temporarily and be allowed to work in accordance with the law. In so doing, the humanitarian reason shall be taken into account.

Source: Anti-Trafficking in Persons Act B.E 2551 (2008) and the Amendments (No.2) (2015) (Thailand), Section 37.

In addition to accommodation, victims of trafficking often have some form of health need – either physical or mental, or both. The range of health issues is significant and can coincide with the type of trafficking victims encountered. The sooner these are identified and addressed, the better the victim’s chances for recovery. For example, some studies have indicated that rates of depression and anxiety among victims in shelters are high.

In the UNIAP study, a woman from **Thailand** who was trafficked for prostitution to Japan reported that her social worker was able to help her access the medication she needed for a chronic medical condition. Thailand’s policy is to provide victims with a preliminary physical check-up upon arrival to a government shelter to determine whether any medical assistance is needed.⁵⁰ Individual health assessments of victims by qualified professionals are important to identify potential health issues, including mental health concerns. Thailand reports that professional psychologists and nurses are available at any government shelter. However, in serious cases, victims will be transferred to hospital for treatment. Further details on the health consequences faced by trafficked victims are contained in text box 15 below.

⁴⁸Royal Thai Government’s Significant Efforts to Eliminate Human Trafficking in 2014, Sect. 3.8. According to this report in 2014, 57 victims in Thai government shelters were able to work outside the shelter. Other victims who were unable or chose not to work were provided vocational training opportunities inside the shelter. Note that the report does not make clear the gender breakdown of those victims permitted to work.

⁴⁹After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong Sub-region, Surtees, R., Nexus Institute/UNIAP, 2013.

⁵⁰Royal Thai Government’s Significant Efforts to Eliminate Human Trafficking in 2014, Sect. 3.4.

Text Box 15: Provision of Healthcare to Victims of Trafficking

In February 2015, a report on health and human trafficking was released. Reflecting the experiences reported by over 1,000 women, men and children receiving post-trafficking services in **Cambodia, Thailand and Viet Nam**, the report identifies some of the key healthcare needs of victims of trafficking. Health consequences experienced by victims are both physical and mental - including depression, post-traumatic stress disorder (PTSD), reproductive health issues – caused by physical and verbal abuse, sexual abuse, unsafe working conditions, long working hours, forced drug use, and conditions of deprivation and confinement encountered before, during and after transit to the trafficking situation.

The report identified some recurring themes in the experiences of victims of trafficking with regard to delivery of basic assistance and protection. These included deficiencies in identification and provision of information; lack of appropriate facilities, staff and resources; inadequate procedures to assist specific groups of victims (such as children or adult males), including lack of functioning referral and coordination practices; and lack of sensitivity or autonomy for victims.

Specific findings of the report include:

- Nearly half of all adult men (49.3%) and well over half of adult women (60%) participating in the study reported experiences of sexual and/or physical violence while being trafficked. Over 35 percent of child victims reported experiencing violence.
- Nearly 60 percent of participants reported symptoms associated with depression; 41.9 percent reported symptoms of anxiety; and 35.6 percent reported symptoms indicative of PTSD. One in six participants (14.9%) reported having thoughts of ending their life (“suicidal ideation”) in the past week before their interview. These mental health symptoms have implications for victims’ longer-term recovery as well as their willingness or capacity to participate in legal proceedings due to fear of retribution and ability to provide testimony. Service providers should have in place counselling services and procedures in place to detect possible suicidal ideation and make referrals.
- Poor physical health was reported by over 15 percent of participants, particularly among those trafficked into the fishing industry. The report noted that victims may be more likely to report physical injuries to authorities or service providers as opposed to mental health problems, such as suicidal ideation, anxiety or memory loss, due to the stigma associated with psychological health. With their consent, victims should have a complete medical history taken and systems review as part of the routine post-trafficking medical care. Sexual assault referral services and reproductive healthcare should also be made available to victims.
- Around 11 percent of participants reported seeing a medical health professional while in a trafficking situation. This indicates the opportunity to engage and train medical health professionals in the identification of potential victims of trafficking and in delivering post-trafficking medical care.

Source: *Health and Human Trafficking in the Greater Mekong Subregion: Findings from a survey of men, women and children in Thailand, Cambodia and Viet Nam*, International Organization for Migration and London School of Hygiene and Tropical Medicine, 2014.

Key issues in the delivery of basic assistance to victims of trafficking include deficiencies in identification and provision of information; lack of appropriate facilities, staff and resources; inadequate procedures to assist specific groups of victims (such as children or adult males), including lack of functioning referral and coordination practices; and lack of sensitivity or autonomy for victims.

3.3: Victim Assistance and Protection: Issues for Consideration by AMS

In common with other parts of the world, the ASEAN region faces considerable challenges providing victims of trafficking with the protection and assistance they are entitled to under international law – and should be entitled to under national law. The following summarizes the main findings of the assessment of law and practice summarized above and includes draft recommendations.

3.3.1. Victims Not Identified

The issue of **victim identification** (addressed in Chapter 2) is critical to the issue of victim protection and support. It is probable that there are many victims of trafficking among the hundreds of thousands of persons who routinely come to the attention of national authorities. Since they are never properly designated as victims of trafficking, the chances of these persons receiving the level of protection and assistance they need – either in the destination country or upon return to their country of origin – is very low.

Singapore reports that presumed victims of trafficking are eligible for victim support services and assistance. They need not wait till their cases are fully established as TIP cases before they receive such services/assistance. Support services and assistance such as shelters, food and medical care are extendable even in instances where a full TIP case may not be established.

3.3.2. Inadequate Legislative Provision for Protection and Assistance

Only a small number of AMS have legislated adequately with regard to victim protection and support. In some AMS relevant laws specify no or very limited victim entitlements. While victims may theoretically be able to use other laws, the lack of a legal foundation for protection and assistance in trafficking legislation increases the likelihood that such protection and assistance will not be provided – or that it will be provided in a way that increases victims' vulnerability and the risk of further trauma. Few AMS have adequately protected victims' right to privacy, a fundamental aspect of protection from further harm.

3.3.3. Provision of Immediate Protection and Support Tied to Cooperation with Criminal Justice Agencies and to Detention in Shelters

Longer-term assistance to victims is often tied to their status as witnesses in criminal proceedings. Provided sufficient protections are in place, such practices are considered to be acceptable. However, the tying of immediately needed protection and support to victim cooperation is, as discussed in Section 3.1 above, highly problematic. While

no AMS has explicitly tied immediate victim assistance to victim cooperation, the legislation strongly suggests such conditionality operates widely in practice. In some cases, this is because the only facilities available to provide assistance to victims are closed, thereby effectively compelling the victim to both accept that assistance and to cooperate in criminal proceedings.

3.3.4. Lack of Awareness and Coordination Hampers the Delivery of Protection and Assistance

The assessment of national practice in the previous section confirms that both within and between AMS, there is insufficient coordination leading to situations where identified victims of trafficking are not correctly referred to those who are able to provide protection and assistance. Sometimes this is exacerbated by a lack of awareness among officials who are in contact with victims about their own responsibilities and the procedures and entitlements that are in place. Improved coordination and knowledge amongst service providers will help to facilitate appropriate referrals, avoid duplication of efforts and conserve resources.

3.3.5. Inadequate Capacities and Resources to Deliver Effective Protection and Assistance

Quality victim support is expensive and requires skilled personnel. In most AMS, inadequate delivery of victim protection and assistance is the direct result of a lack of capacity and lack of resources amongst governmental and non-governmental agencies responsible for supporting victims of trafficking. Throughout the region, external donors are heavily involved in supporting service delivery and capacity development. While this provides useful help, the model is unsustainable over the longer term.

The following summarizes the main findings of the assessment of law and practice above and includes draft recommendations.

Recommendations	
3.1	In accordance with the specific recommendations set out in Chapter 2, AMS may consider taking steps to improve the timely and accurate identification of victims of trafficking, ensuring that immediate protection and support is available to all persons who are suspected of having been trafficked.
3.2	AMS may consider examining and, if necessary, revising their laws to ensure that victims of trafficking (including persons who are presumed to be victims of trafficking) are entitled to immediate protection from further harm and assistance that is sufficient to meet their basic needs.

3.3	AMS may consider reviewing their laws and practices to determine the extent to which measures of protection and assistance are made conditional on victim's cooperation with national authorities. Efforts may subsequently be made to ensure that victim cooperation is not a direct or implied condition of immediate assistance and support given the risk of further harm to victims.
3.4	AMS may consider working to ensure that there are clear referral procedures between government social services and other service providers. The forms of assistance that are available to different groups of vulnerable persons (children, women victims of violence, exploited migrants, etc.) could be shared with anti-trafficking organizations, frontline officials and others who are involved in the identification and referral of trafficked persons.
3.5	AMS may wish to consider formally allocating funds in the national budget for victim protection and support. AMS may also consider working with external donors and agencies to develop systems and approaches that will ensure longer-term viability of protection and support mechanisms, both within and between Member States.

CHAPTER 4:

VICTIMS IN THE CRIMINAL JUSTICE PROCESS

Key message: Victims of trafficking should be encouraged, but not compelled, to participate in their prosecution of their exploiters. Before, during and after their involvement in the criminal justice process, victims should be provided appropriate information, assistance and support, including protection from re-traumatisation. Child victims in the criminal justice process have special needs that must be met and additional rights that must be respected.

ASEAN Convention against Trafficking in Persons Especially Women and Children Provisions

Each Party shall, consistent with the domestic laws of the sending and receiving parties, through informal cooperation or mutual legal assistance where appropriate, encourage the victims of trafficking in persons to voluntarily enter and stay temporarily in the territory of the receiving Party for purposes of testifying or otherwise cooperating in the prosecution of their traffickers, with due regard for the safety of the victims of trafficking in persons.

Article 16(5)

Each Party shall take all necessary steps to preserve the integrity of the criminal justice process including through protecting victims and witnesses from intimidation and harassment where necessary, and punishing perpetrators of such acts, in appropriate cases.

Article 16(7)

ASEAN Member State commitments under the 2015 ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children

Victims in the criminal justice process

We, Member States of the ASEAN resolve to ...

b. Develop pro-active investigation methods and where appropriate, to conduct surveillance and other pro-active measures to gather evidence to establish a case to prosecute trafficking in persons cases even without the testimony of victims;

h. Continue the development of suitable and effective protection mechanisms for witnesses of trafficking in persons, where appropriate;

j. Waive, to the extent possible under domestic laws, immigration fees to facilitate the entry and stay of the victim of trafficking in persons temporarily in the territory of an ASEAN Member State for purposes of testifying or otherwise cooperating in the prosecution of traffickers.

Excerpted from Part IV.C.

Introduction

This chapter seeks to explore the position of victims who engage in legal proceedings as witnesses in connection with their exploitation (Note that the separate issue of victim involvement in legal proceedings connected with remedies - such as compensation - is dealt with in Chapter 5). Key questions include whether the victim-witness is entitled to (and receives) special protection and support before, during or after legal processes; whether they are compelled to testify against their exploiters; and whether foreign victims are required to remain in the destination country for the duration of criminal justice proceedings. The question of *practice* is also considered - How do victims enter the criminal justice system and, once there, how are they treated? To what extent do their experiences inform the way in which criminal justice agencies and others engage with victims?

The chapter is divided into three sections. Section 4.1 sets out the international and regional legal standards relevant to victim involvement in the legal process, with particular focus on information, protection and support. Also captured are key aspects of the considerable standard setting to date within ASEAN. In particular, it makes detailed reference to the 2007 ***ASEAN Practitioner Guidelines on Effective Criminal Justice Responses to Trafficking in Persons***. In 4.2, an attempt is made to summarize trends in national criminal justice responses. This part updates information presented in chapter 6 of an earlier (2011) ASEAN publication: ***Progress Report on Criminal Justice Responses to Trafficking in Persons in the ASEAN Region***. 4.3 analyzes the information presented in the earlier sections to identify issues for consideration by AMS in relation to victim involvement in the legal process – with specific reference to their protection and support.

Note that the subject matter of this chapter connects directly to several others. For example, the treatment of victims in the criminal justice process is closely tied to the question of how they are identified (Chapter 2: Victim Identification and Referral) and whether and how they are able to access protection and assistance including medical and social support (Chapter 3: Protection, Support and Recovery Assistance to Victims). The subject matter of this chapter also cuts across considerations around victim detention (Chapter 6: No Detention and Prosecution of Victims for Status Offences), not least because the detention of victims in shelters is sometimes justified with reference to the need for them to be available as witnesses in criminal prosecutions.

4.1: International and Regional Standards relevant to Victim Involvement in the Criminal Justice Process⁵¹

International law and ASEAN policy, as set out in the 2007 *ASEAN Practitioner Guidelines on an Effective Criminal Justice Response to Trafficking in Persons (ASEAN Practitioner Guidelines)*, accept the central role that victims can and should be able to play in the prosecution of their exploiters and the need to fully support them in this process. In practical terms, this involves the following:

⁵¹The information in this section draws on A. Gallagher, *The International Law of Human Trafficking* (2010), Chapter 7, and A. Gallagher and P. Holmes: "Criminal Justice Responses to Human Trafficking: Lessons from the front Line, *International Criminal Justice Review* (2008).

Upholding the victim’s right to be involved: Victims of trafficking are entitled to be involved in court proceedings and have their views made known in any case concerning them.⁵² As a practical matter, this could involve a personal appearance by the victim but might also include the presence of the victim’s legal representative or a victim’s statement through submission of a written document or video testimony.

Respecting privacy and protecting against reprisals: Criminal justice agencies should be aware that victims of trafficking are often unwilling to assist in criminal investigations for fear of harm to themselves or their families by their traffickers. Those fears can be well founded and the State should do all within its power and resources to assess risks and ensure effective protection to victims who are cooperating in criminal investigations.⁵³ This includes during the trial process itself (see text box 16 below). The *ASEAN Convention against Trafficking in Persons Especially Women and Children* requires States Parties to protect victims against intimidation and harassment.⁵⁴ Protection of privacy is a critical aspect of victim protection. As stated in the *ASEAN Practitioner Guidelines*: “Victim-witnesses and where necessary, their families, should be protected from reprisals. Laws should be in place to protect the privacy of victim-witnesses and the confidentiality of their identities.”⁵⁵

Support, assistance and information: All victims of trafficking participating in the investigation or prosecution of their exploiters should be provided with adequate support and assistance for the duration of their involvement in criminal proceedings. They should also be provided with information on their rights and legal processes in a language and manner that they understand.⁵⁶ The provision of free legal counsel to victim-witnesses is another way to support their involvement in criminal trials.

Special provision for child witnesses: There should be special legislative provisions governing the involvement of children in legal proceedings against traffickers that reflect the “best interests” principle set out in the *UN Convention on the Rights of the Child* (i.e. that all decisions made and actions taken with respect to children in this context should prioritize their best interests). More generally, child witnesses must be subject to special measures aimed at ensuring their privacy, safety and wellbeing given their age and stage of development.⁵⁷

No premature return: Victim-witnesses should not be repatriated – unless expressing a wish to return home in the intervening period – until after the completion of relevant legal proceedings and the successful receipt of compensation or other remedies that are available to them.⁵⁸ In practice, this means that the State will have to find some way to regularize the legal status of foreign victims who lack that status (see text box 17, further below). International law recognizes that premature repatriation compromises the right of victims to be present and have their views known during legal proceedings.

⁵²*UN TIP Protocol*, Article 6(2)(b). See also *UNTOC*, Article 25(3).

⁵³*UNTOC*, Article 24. See also ACWC Guidelines 3.6.5 and 3.6.6.

⁵⁴*ASEAN Convention against Trafficking in Persons*, Article 16(7).

⁵⁵*ASEAN Practitioner Guidelines*, Part One E.1 and E.2.

⁵⁶*UN TIP Protocol*, Article 6; *UN Trafficking Principles and Guidelines*, Guideline 6. ACWC Guidelines, 3.6.4.

⁵⁷This is recognised in the *UN Trafficking Principles and Guidelines*, Guideline 8.8.

⁵⁸*UN TIP Protocol*, Article 8.

Enabling return of victim-witnesses: Victims who have returned home may be required to come back to the country in which they were exploited to participate in the prosecution of their traffickers. This requires close cooperation between the two concerned States. The *ASEAN Convention against Trafficking in Persons* requires States to encourage the voluntary return of victims in these circumstances, noting the need to ensure that the victim’s safety is protected.⁵⁹

Text Box 16: Supporting the Involvement of Foreign Victim-Witnesses

Regularizing the legal status of foreign victim-witnesses is essential to ensuring their safe and effective involvement in the prosecution of their exploiters. Some destination countries now provide special visa arrangements for victim-witnesses. These arrangements usually include provision for victims to take some time - a “reflection period”- to consider whether they wish to be involved in criminal proceedings. The most generous arrangements envisage, at the end of this reflection period, the granting of more extended residence permits to victims of trafficking on, for example, humanitarian grounds. Experience in many countries has confirmed the importance of providing victims with time, information and power to decide their future as part of their recovery and reintegration. The *ASEAN Practitioner Guidelines* have recognised this by stating that:

Administrative and/or legal provisions should be put in place to enable consenting and cooperating victim-witnesses to remain in the country for the purposes of assisting with the investigation and/or testifying in criminal proceedings.

Source: *ASEAN Practitioner Guidelines, Part One C.4*

Cooperation with victim support agencies: Criminal justice officials, including prosecutors, should cooperate with victim support agencies to support victims throughout their involvement as witnesses in criminal proceedings.⁶⁰

Text Box 17: Protecting Victims and Witnesses during the Trial Process

Victims of trafficking will be understandably reluctant to give evidence if this means being identified by the media or standing up in a public courtroom, often in view of their exploiter, and talking about traumatic personal experiences. They can also be at real risk of retaliation and intimidation. It is essential that national criminal justice systems find ways to assist victims of trafficking to participate safely and meaningfully in court processes.

The *ASEAN Practitioner Guidelines* recognise the importance of alternatives to direct testimony that are aimed at protecting the witness’s identity, privacy and dignity. The *Guidelines* also identify a range of additional measures that could be used to increase the productive involvement of victims in criminal prosecutions against traffickers:

⁵⁹ASEAN Convention against Trafficking in Persons, Article 16(5)

⁶⁰ASEAN Practitioner Guidelines, Part One C.5.

In order to make trials less stressful for testifying victim-witnesses, a range of alternatives to testifying in open court should be explored; this may include the opportunity to testify from behind a screen, or at a closed session of the trial proceedings or by means of a video link.⁶¹ Other practical court support measures could include: pre-trial courtroom visits; escorts to and from court buildings, the use of separate entrances to the court building, private waiting areas and the regular provision of information concerning the conduct of the trial from the prosecution side throughout the court proceedings.

Source: ASEAN Practitioner Guidelines, Part One F.4.

There is an important **gender dimension** to consider in the context of victims of trafficking during the trial process. The *ACWC Gender-Sensitive Guidelines* propose an important role for prosecutors and the judiciary in **protecting victims from hostile cross-examination** by defence counsel. This will be especially important in cases of trafficking for sexual exploitation. They also endorse the use of **special measures** such as closed courts and live video links to protect victims from intimidation. **Fast tracking** of trafficking cases and **training of court officials** are also suggested as additional means by which the court process can be made less traumatic for victim-witnesses.

Source: ACWC Gender-Sensitive Guidelines, 3.6.

Ensuring a fair trial for accused persons: When developing systems and processes to encourage the participation of victims in court processes, it is essential to remain mindful that the rights of accused persons to a fair trial must not be compromised in any way.⁶²

Even when assured of protection and support, victims may be unwilling to cooperate in legal proceedings that, ultimately, are unlikely to benefit them in any meaningful way. In fact, such involvement typically comes at great personal cost to the victim. It is not an uncommon situation for, relevant officials to be unfamiliar with provisions in law or policy that support a victim's rights in the criminal justice process. In some cases, officials may be complicit in trafficking or otherwise motivated to thwart law enforcement and judicial processes intended to hold traffickers accountable. Lack of transparency and general public distrust in the judicial system can also dissuade victims from participating in legal proceedings against their traffickers. States committed to strengthening their criminal justice response to trafficking should therefore consider making it easier for victims to cooperate by going beyond the mandated support and protection requirements set out above. Such provisions must, of course, be developed and implemented in a way that will not affect the credibility of the victim as a witness or otherwise compromise the integrity of the trial process.

4.2: Victims in the Criminal Justice Process in the Law, Policy and Practice of AMS

The following information adapts and updates that contained in Chapter 6 of the 2011 *ASEAN Progress Report on Criminal Justice Responses to Trafficking in Persons in the ASEAN Region*. The sub-sections in this part are organized by different aspects of the criminal justice process, under which the laws, policies and, to the extent possible,

⁶¹ASEAN Practitioner Guidelines, Part One F.3

⁶²ASEAN Practitioner Guidelines, Part One F.5; *UN Trafficking Principles and Guidelines*, Guideline 6.6.

practices of AMS are discussed.

While this chapter deals with the experience of *victims* in the criminal justice process, it is important to recognize that the strength and effectiveness of that process itself is highly relevant to victims and their participation. The country assessments and other available information pointed to multiple challenges with this aspect of the trafficking response. These included uneven understanding by criminal justice officials of key concepts; insufficient preparation of the victim-witness; poor contact and communication between enforcement/judicial personnel and the victim-witness; and, weak understanding of the impact of trauma on victims among enforcement and judicial staff. Trafficking cases are often very difficult to prosecute successfully – even under the best of circumstances. But country assessments noted that problems in investigation and prosecution, including lack of robustness of evidence, contributed to dismissal of cases and low conviction rates. Low rates of conviction (such as has been experienced in **Malaysia**) can act as a strong disincentive for victims to cooperate in the prosecution of their exploiters, especially given the length of time that most cases take and the fact that victims' lives are often on hold during that entire period.

The issue of the length of the criminal justice process in which victims are expected to be involved was regularly raised during the country assessments undertaken for this study. In **Thailand** for example, on average, the investigation of a trafficking case is expected to take only two weeks, but some cases may take considerably longer. This is similar for all AMS. Police officials interviewed in **Myanmar** noted that the longer the trial, the less willing victims are to maintain their involvement (including due to family pressures and the possibility of intimidation or enticement from the side of the alleged trafficker). Longer legal processes also make it much more difficult to secure a conviction. Some countries, such as the Philippines, are experimenting in expedited trial procedures. Thailand has recently established a special division within the Criminal Court to handle trafficking cases. This is expected to make the trial process much more efficient and thereby reduce the burden on victims.

4.2.1. Protection of the Right to be Present and Have Views Considered during Criminal Proceedings

In most AMS, relevant laws do not explicitly grant victims a right to be present and have their views considered during criminal proceedings against persons accused of trafficking. In some cases however, this right may be found in non-legal instruments or in general criminal procedure codes. For example, in **Cambodia**, while the TIP law does not address issues related to victims in the criminal justice process, an administrative instruction affirms the right of victims of trafficking to be present and have their views considered during criminal proceedings against persons accused of trafficking crimes (Article 6, *Prakas on Minimum Standards for the Protection of the Rights of Victims of Human Trafficking*). Victims of trafficking may have some rights to participate in criminal proceedings under the general criminal procedure codes of both **Lao PDR** and **Viet Nam**. For example, in **Viet Nam**, article 51 of the *Criminal Procedure Code* stipulates that victims of crime (that is, persons who have suffered from physical or mental injury or property loss caused by crime) or their legal representatives have various rights including a right to participate in the court session and a right to

complain or appeal against decisions or judgments. However these rights may not be sufficient to support positive practice. Under **Lao PDR's Criminal Procedure Code**, witnesses have the right to give testimony and to receive protection from any resulting threats. Furthermore, the **Lao-Viet Nam Agreement on Cooperation in Preventing and Combating Trafficking in Persons and Protection of Victims of Trafficking (2010)** enables Vietnamese victims in Lao PDR to participate in legal proceedings, with the same protections and assistance available to Lao victims. In practice however, victims of trafficking are routinely excluded from the courtroom. Challenges in implementation may relate to the limited legal capacity in the country to handle trafficking cases.⁶³ This has implications for the accused person's right to a fair trial (the right to cross-examine witnesses) as well as the right of the victim to participate in the prosecution of his or her exploiters.

4.2.2. Protection of Victim-witness Privacy

Some ASEAN States provide a general protection of privacy for victims of trafficking. In recognition of their greater vulnerability and additional, particular needs, other AMS have supplemented a general privacy provision with additional protections aimed directly at victims in the criminal justice process. It is important to note that in some countries, privacy protections for victim of trafficking may be located in – or further strengthened by - provisions in the penal code or specialist laws such as those related to child protection.

Strong privacy provisions in the TIP laws of several AMS (**Indonesia**,⁶⁴**Malaysia**, **Philippines** and **Thailand**⁶⁵) can be applied to protect the privacy of victim-witnesses – not only during trial but also in the pre-trial and post-trial periods.

Good Practice: Legal Protection of Privacy

The **Philippines'** TIP Law contains a separate provision on confidentiality that recognizes the importance of securing victim privacy and provides practical direction on how this can be done during the trial process:

Confidentiality - At any stage of the investigation, prosecution and trial of an offense under this Act, law enforcement officers, prosecutors, judges, court personnel and medical practitioners, as well as parties to the case, shall recognize the right to privacy of the trafficked person and the accused. Towards this end, law enforcement officers, prosecutors and judges to whom the complaint has been referred may, whenever necessary to ensure a fair and impartial proceeding, and after considering all circumstances for the best interest of the parties, order a closed-door investigation, prosecution or trial. The name and personal circumstances of the trafficked person or of the accused, or any other information tending to establish their identities and such circumstances or information shall not be disclosed to the public.

Source: Article 8, Republic Act No. 9208

⁶³Lao PDR Country Report (December 2015).

⁶⁴TIP Law, articles 33 and 44.

⁶⁵TIP Law, Section 36.

In **Singapore**, proceedings for trafficked victims *may* be held in camera, while proceedings for child victims of sexual exploitation *must* be held in camera. The court also has the power to: (i) order that no person is to do any act likely to lead to identification of the victim-witness; (ii) prohibit the publication of the name, address or photograph of any witness or any other thing likely to lead to the identification of the victim-witness; or (iii) order that the name, address or photograph of any victim-witness, or any other thing likely to lead to identification of the victim-witness, be redacted from court documents. The prohibition on publication of identifying information is mandatory for trafficked victims of sexual exploitation.

Legal protection for the privacy of victim-witnesses is less comprehensive in other AMS. For example, **Cambodia's** provisions on victim privacy during the trial process are strong, but only set out in non-binding guidelines, not in the TIP law itself. Under these guidelines, government institutions and service providers (including NGOs) are requested to protect victims' right to privacy and confidentiality.⁶⁶ An additional set of guidelines regulating cooperation between the government and civil society in this area require victims' identity to be protected at every step in the prosecution process.⁶⁷ A comprehensive summary of AMS legal provisions regarding protection of victim privacy is provided in **Annex III**.

There is little verifiable information available on how the right to privacy of victim-witnesses is respected in practice. On the positive side, it is now relatively uncommon for victims of trafficking to be publicly identified through the media (e.g. clearly identifiable press photographs) or through government. Protection of privacy remains a challenge, however. There have been some reports of victims being forced to testify in courts in some countries in front of the alleged exploiters, and even forced to disclose sensitive information, such as their address. One respondent in the country assessments who accompanies victims to investigation appointments recounted a case when a victim was interviewed in plain sight of the alleged perpetrators, leading the woman to retract her statements about the offender. Government personnel participating in a roundtable discussion related to this review concurred that confidentiality and victim rights could be compromised due to the lack of infrastructure and human resources.

4.2.3. Protection for Victim-witnesses and Their Families

The laws in most but not all AMS provide victim-witnesses and their families with a right to protection from threats to their physical safety due to retaliation or intimidation. As with protection of victim privacy, the right may not be provided in the anti-trafficking law but another relevant law.

Indonesia's TIP law provides that where a witness or victim or their family has received threats that endanger life or property, the police force must provide protection prior, during and/or after the trial process.⁶⁸ In addition, under the Indonesian *Law on Witnesses and Victims Protection*, all victims and witnesses have various rights including the right to obtain protection of their personal, family and property safety,

⁶⁶Minimum Standards for Protection of the Rights of Victims of Human Trafficking, Article 21.

⁶⁷Guidelines for Practices and Cooperation between the Relevant Government Institutions and Victim Support Agencies in Cases of Human Trafficking, Article 8.

⁶⁸Law of the Republic of Indonesia Number 21 of Year 2007 on Eradication of the Criminal Act of Human Trafficking (Indonesia), Article 47.

against any threat which is related to the testimony which they will give, are giving or have given; the right to be informed about the release of the offender; the right to obtain a new identity; and the right to be relocated.⁶⁹ In the **Philippines**, the TIP law provides victims with preferential entitlement to the witness protection programme.⁷⁰

Good Practice: End-to-End Protection of Victim-Witnesses

Under **Thailand's Anti-Trafficking in Persons Act of 2008 and the Amendments (No.2) (2015)**, relevant officials are required to provide for the safety and protection of trafficked persons under their care in all cases, irrespective of where that person stays, whether this is before, during or after the proceeding. The law also makes more specific provision for victim-witnesses, noting that:

In cases where the trafficked person will make a statement or testify as a witness in the offence of trafficking in persons under this Act, the trafficked person, as a witness, shall be under the protection according to the law on the protection of witness in a criminal case in all respects.

According to **Thailand's Criminal Procedure Code (1999)**, the police are required to provide protection when a child victim is willing to testify as a witness. When the child is visiting a crime scene, the police station or court, he or she must be accompanied by a social worker or psychologist, public prosecutor; and children's advocate/counsel as requested by the child's lawyer or caretaker.

Significantly, the **Thailand's Anti-Trafficking in Persons Act of 2008 and the Amendments (No.2) (2015)** also refers to the situation where a trafficked person returns home:

If the trafficked person has to return to the country of residence or domicile or if the family members of the trafficked person live in another country, the competent official shall coordinate with the agency in such country whether it be a government or a private agency and whether it be done via the embassy or consular office of such country, with a view to continuously provide safety protection for the trafficked person and family members in that country.

Sources: Thailand's Anti-Trafficking in Persons Act of 2008 and the Amendments (No.2) (2015) (Thailand), Section 36; Royal Thai Government's Significant Efforts to Eliminate Human Trafficking in 2014 Report, Sect 3.5 Services for Child Victim.

While the TIP law in **Malaysia** allows Magistrates to grant an interim protection order for a trafficked person, it does not explicitly grant victim-witnesses a right to protection. However, the Malaysian *Witness Protection Act* does provide that the "Director-General shall take such actions, as he considers necessary and reasonable, to protect the safety and welfare"⁷¹ of witnesses (who could include family and associates of the victim). This may include accommodation, relocation, change of identity, financial support, and assistance in obtaining employment or education.

In **Viet Nam**, the TIP law states that agencies, units or persons under the People's Police and People's Army assigned to combat or prevent human trafficking shall "take necessary measures to protect victims, reporting persons and witnesses and

⁶⁹Law of the Republic of Indonesia 13/2006 on Witness and Victims Protection (Indonesia), Article 5.

⁷⁰Republic Act No. 9208 (Philippines), Section 18

⁷¹Witness Protection Act 2009 (Act 696) (Malaysia), Article 13.

their relatives when these persons have or are threatened to have their life, health, honor, dignity or property infringed upon.”⁷² The *Governmental Decree No. 62 on the Identification and Safety of Victims and their Relatives* specifically allows responsible agencies to arrange security at their residence or at court hearings; and arrange new places of residence, work or study to protect the lives and health of victims and their families.

The laws on the protection of victim-witnesses and their families are less comprehensive in the remaining AMS. In **Myanmar**, the law provides for the security and protection of women, child and youth victims “during the period of prosecution” and “during the period of instituting a suit for compensation.”⁷³ There is no mention of protection for victims not involved in legal proceedings – or indeed for the protection of adult male victims at any stage. In **Singapore**, while the TIP Law does not specifically address victim or witness protection, victims of harassment and stalking may apply directly to the court for a protection order under the *Protection from Harassment Act*. Further, gag orders to protect identities of witnesses in court proceedings may be made under section 7 of the *State Courts Act* and section 8 of the *Supreme Court of Judicature Act*.

4.2.4. Access to Information about Rights and Proceedings

The laws in several AMS specifically provide that victim-witnesses have a legal right to information and advice. The **Philippines’** *Anti-Trafficking Act*, for example, provides that victims are entitled to receive free legal services, including information about their rights and the procedures for filing complaints, claiming compensation and other available legal remedies. In **Thailand**, the *Anti-Trafficking in Persons Act (2008) and the Amendments (No.2) (2015)* affirms the trafficked person’s right to legal aid. The Act *requires* the investigator or public prosecutor to inform the trafficked person of this right at the first opportunity. This is an important recognition of the fact that victims must be informed of their rights if they are to have any hope of realising them. Moreover, the Royal Thai Police is mandated to keep trafficked persons or witnesses regularly informed of the progress on criminal case investigations in writing and in accordance with a standard form.⁷⁴

In **Indonesia**, witnesses in trafficking cases have the right to obtain information regarding progress of the case. This right applies throughout the duration of the investigation, prosecution and court examination process.⁷⁵ While victims of trafficking do not have an automatic right of access to legal advice and assistance, the law provides that they can claim restitution for any legal costs. Child victims are entitled to legal assistance under Indonesia’s *Child Protection Law*. Under its *Law on Witnesses and Victims Protection*, victims of crime have a number of rights, including a right to be informed of developments in court proceedings, a right to be informed about the court’s verdict, the right to be informed about the release of the offender and the right to obtain legal advice.⁷⁶

⁷²*Anti-Human Trafficking Law (2011) (Viet Nam), Article 21.*

⁷³*Anti Trafficking in Persons Law (Law No. 5/2005) (Myanmar), Section 17.*

⁷⁴Working Group for Development of Handbook for Officials on Implementation of Prevention and Suppression of Trafficking in Persons (2013) cited Thailand Country Report (December 2015).

⁷⁵*Law of the Republic of Indonesia Number 21 of Year 2007 on Eradication of the Criminal Act of Human Trafficking (Indonesia), Article 36.*

⁷⁶*Law of the Republic of Indonesia 13/2006 on Witness and Victims Protection (Indonesia), Article 5.*

The law in **Cambodia** provides that all victims of trafficking shall have access to legal services and to all information that pertains to them. Victims who do not speak or read Khmer are to be provided with a translator so they can understand all written and verbal information. Practitioners interviewed for the assessment noted that this does occur in practice, at least in relation to Vietnamese victims of trafficking for sexual exploitation. The law in **Viet Nam** (*Penal Code*, article 51) accords all victims of crime various rights, including a right to be informed of the conclusion of the relevant investigation.⁷⁷ Legal aid is available to poor persons and others specially designated. A recent directive from the Department for Legal Aid requires provincial legal aid centres to provide TIP victims with legal aid. This directive is not legally binding and it is unclear whether victims of trafficking are aware of their administrative entitlement to legal assistance.

Legislative provision for victims of trafficking to be provided with information about their rights and about legal proceedings and access to legal assistance, are not yet in place in **Brunei Darussalam, Malaysia or Singapore**. **Lao PDR's** 2015 TIP Law does provide victims with the right to information and legal assistance. Victims may also access their case files but only after the investigation (and presumably related legal proceedings) have been completed. According to officials, **Myanmar** law does not permit victims of trafficking to be provided information as this would be contrary to making any communication about the case. This has been understood to mean that prosecutors or lawyers cannot discuss the situation including roles and responsibilities, timeframes, consequences, and the importance of victim participation.

There is little verifiable information available on how the right of victim-witnesses to information about their legal rights and proceedings are respected in practice. Some positive developments were reported through the country assessments. For example, in **Thailand**, staff at government shelters, including social workers and legal officers, reportedly liaise with lawyers, interpreters and NGOs to ensure victims' legal rights are respected and that they are promptly informed of their rights, available protection and legal procedures. Additionally, the government has developed child-friendly media, such as cartoons, in seven different regional languages to notify child victims of their rights.⁷⁸ However, language barriers remain an issue hindering the provision of information about rights, protections and legal procedures – either due to a lack of interpreters or quality issues regarding the accurate conveyance of meaning across languages.⁷⁹

Overall, few AMS were able to confirm the existence of effective procedures and protocols that ensure victims of trafficking are provided with appropriate information about their rights and the state of legal proceedings in which they are or may be involved. In several of the country assessments conducted for this study, victims were said to experience anxiety due to lack of information about the progression of their cases, when they would be required in court, and when they could return home.

⁷⁷ *Criminal Procedure Code* (Viet Nam), Article 51.

⁷⁸ *Royal Thai Government 1.3/2006 on Witness and Victims Protection and Trafficked Persons in the Greater Mekong Sub-region*

⁷⁹ *After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong Sub-region*, Surtees, R. (2013), Bangkok: UNIAP/NEXUS Institute

4.2.5. Facilitating the Effective Participation of Victim-witnesses through Regulation of Legal Status and Permission to Work

Trafficking victim-witnesses will often be foreign nationals. Many of these persons naturally wish to return home as quickly as possible, or to stay and engage in non-exploitative work in the country of destination. As discussed further in Chapter 7, victims' reintegration can be hindered by pressure from their families or communities to return with money, despite the hardship endured. As such, many victims prefer to quickly move on and secure a new job, rather than be involved in (often lengthy) legal proceedings.

In practice, many foreign victims throughout ASEAN are placed in shelters or other facilities for the duration of any proceedings in which they are involved – or in some cases, even longer. Currently, only Thailand and Malaysia have taken legislative steps to regulate the legal status of victims of trafficking who are foreign nationals. **Thailand** has reported that during 2014 a number of foreign victims were issued six-month work permits allowing them to legally work in Thailand during the course of legal proceedings.⁸⁰ Subsequent information put that figure at 108 persons who were granted visas for a temporary stay. Relevant government departments have established guidelines regarding categories of work for permit holders and guidelines to ensure their protection and welfare.

For details on amendments to **Malaysia's** law to permit victims of trafficking to engage in work, see Chapter 2 above. As mentioned in Chapter 3, **Singapore** also has a system to grant Special Passes to migrant workers or other foreign nationals involved in a police investigation or have a legal case and had their work pass cancelled by their employers. A Temporary Job Scheme enables victims of trafficking to gain some form of employment and therefore income while investigations and legal proceedings are ongoing.

4.2.6. Facilitating the Effective Participation of Victim-witnesses through Provision of Alternatives to Direct Testimony

Along with regulation of victim legal status, the use of pre-trial depositions can also facilitate the effective participation of foreign victim-witnesses in criminal proceedings. As discussed in Chapter 4 of the *ASEAN Progress Report on Criminal Justice Responses to Trafficking in the ASEAN Region*, depositions allow prosecutors to bring a victim-witness to court at an early stage in the proceedings (sometimes even before charges have been laid) so the court can hear and record the victim's testimony. Depositions give victim-witnesses an opportunity to participate in legal proceedings without having to wait (sometimes for years) to give evidence in a full trial.

Depositions are provided for in the TIP law of **Malaysia**⁸¹ and Section 295 of the Criminal Procedure Code of **Singapore**.⁸² The **Philippines' Rules on Examination of a Child Witness** provides for child victim-witnesses to be deposed as well as adult

⁸⁰ *Thailand Progress Report on Anti-Trafficking Efforts*, 31 Mar 2015.

⁸¹ *Anti-Trafficking in Persons Act (Act 670) (2007) (Malaysia)*, Section 52.

⁸² *Criminal Procedure Code 2010 (Singapore)*, Section 295.

witnesses under certain circumstances.⁸³ **Thailand's** *Criminal Procedure Code* (1999) allows for pre-trial depositions to be taken from witnesses when there is a reasonable ground to believe that a witness will leave Thailand, has no fixed residence or lives far away from the trial court, or there is reasonable ground to believe that the witness will be directly or indirectly jeopardised.⁸⁴ Moreover, Thailand's TIP law contains a special section that provides for depositions to be taken in every case based on the discretion of the prosecutor of the case or upon the victim's request. These depositions may then be tendered as evidence in the trial. This procedure ensures the participation of the victim-witness while reducing the period victims must wait to testify and the time they must stay in the shelter. Depositions have been used in many trafficking cases in Thailand, particularly where the victims are foreigners and there are plans to pilot a scheme whereby victims of trafficking who have returned to Myanmar can testify via video link from the Thai Embassy in Yangon.

Another option to support the effective participation of foreign victim-witnesses is to permit those who wish or need to return home to do so, and then assist them to give evidence remotely. In **Brunei Darussalam**, the *Criminal Procedure Code* (2007) allows evidence by television link if the witness is outside Brunei, or if the witness is a child (defined as under the age of 14), and the offence in question is specifically nominated in the Code.⁸⁵ While older offences relating to trafficking of women and children are included in this list, unfortunately the newer 2004 TIP laws are not listed in the Code.

The **Cambodian** *Agreement on Guidelines for Practices and Cooperation between the Relevant Government Institutions and Victim Support Agencies in Cases of Human Trafficking*⁸⁶ provides courts with a degree of flexibility with regard to how and when victim-witnesses give their evidence. The Agreement allows the victim-witness to give his/her testimony by an appropriate alternative means, including by video link or video recording, or testifying in advance of the trial and having that statement read out by someone else during the trial. The investigating judge procedure in Cambodia should also be mentioned, as it resembles, in key respects, a pre-trial deposition. There does not appear to be provision for depositions in any of the remaining AMS.

Section 18 of Singapore's *Prevention of Human Trafficking Act 2014* provides the following, "Where any person is charged with or convicted of an offense... involving the sexual exploitation of a trafficked victim, the court hearing any matter or proceedings... where the trafficked victim in a child, shall hear the matter or proceedings in camera". The court may also order proceedings to be heard in camera in other circumstances.

Under the **Indonesian** TIP law, victims have the right to make a witness statement outside the courtroom; and the right to have the defendant removed from the courtroom while the witness provides a statement in court.⁸⁷ The *Law on Witnesses and Victims Protection* also provides victim-witnesses with alternatives to direct testimony. They

⁸³*Rules on the Examination of a Child Witness* (2000) (Philippines). Also note deposition rules pertaining to adults under the *Criminal Procedure Code*, Rule 119, Section 15.

⁸⁴*Criminal Procedure Code* (Thailand), Article 237.

⁸⁵*Criminal Procedure Code* (Brunei), Section 236B.

⁸⁶*Agreement on Guidelines for Practices and Cooperation between the Relevant Government Institutions and Victim Support Agencies in Cases of Human Trafficking* (2007) (Cambodia).

⁸⁷*Law of the Republic of Indonesia Number 21 of Year 2007 on Eradication of the Criminal Act of Human Trafficking* (Indonesia), Articles 34 and 37.

may, for example, with the judge's approval, provide testimony without being present in court; provide testimony in writing, on paper or through electronic means. Alternative means of providing testimony will more often be used if the victim is a child. It is important to note, however, that these alternatives are only *allowed*, not *required*. In a majority of cases, the judge will prefer in-court testimony by a witness. The country assessment noted that failure of victims to testify in person could have the effect of reducing the sentence, perhaps by damaging the apparent strength of the case.

In other AMS, the legal situation with regard to alternatives to direct testimony for victim-witnesses in trafficking trials is unclear. Alternatives for direct testimony in the case of child witnesses are discussed further below.

4.2.7. Protection and Support for Child Victim-witnesses, including Special In-court Protections

The laws, policies and procedures in most but not all AMS make special provision for in-court protections for children who testify in trafficking trials. This is especially important given that the stage of development of children affects their ability to comprehend courtroom proceedings and their sensitivity to experiences may make them vulnerable to re-traumatization.

Indonesia's TIP law provides that: "Investigation, prosecution and court examination, of child witness and/or child victim shall be conducted by considering the best interest of the children by not wearing formal judge or official attire."⁸⁸ Indonesia's *Law on Child Protection* provides additional protection by requiring the assignment of counselors, special infrastructure and facilities, and that a child's identity not be released. The same law also provides for special supervision, protection, care and rehabilitation efforts for children who have been victims of kidnapping, sale or trading. Indonesia has also enacted regulations with regard to the establishment of special service centres for victims of trafficking. These regulations specify that: "In the event the witness and/or victim is a child (minor), services shall be specially provided to the best interest of the child."⁸⁹

Thailand's *Anti-Trafficking in Persons Act (2008) and the Amendments (No.2) (2015)* requires the relevant agency to provide assistance to trafficked persons, recognising differences in such things as age.⁹⁰ Presumably this provision would require that a different and higher level of support be provided to child victims in relation to their involvement in criminal justice proceedings. There is also the *Criminal Procedure Code Amendment Act (No. 26) (2007)* which outlines provisions concerning the involvement of children in criminal investigations and in court proceedings, stipulating procedures for gathering witness statements from children (allowing use of video link or recording) and allowing the presence of a prosecutor, social worker, or child psychologist at the inquiry. Case analysis and court observation indicates that, at least in the capital, a

⁸⁸Law of the Republic of Indonesia Number 21 of Year 2007 on Eradication of the Criminal Act of Human Trafficking (Indonesia), Article 38 (Unofficial translation).

⁸⁹Government Regulation No. 9 of 2008 on the Procedure and Mechanism of Recovery Centre for Witnesses and/or Victims of Human Trafficking dated 4 February 2008, cited in IOM, *Guidelines for Law Enforcement and the Protection of Victims of Trafficking in Handling Trafficking in Persons Cases* (IOM, 2009), at page 52. Presumably this would require service providers to advocate for and ensure respect for the best interests of each particular child, including with regard to the child's involvement in any criminal justice procedures.

⁹⁰Anti-Trafficking in Persons Act B.E 2551 (2008) (Thailand), Section 33.

female prosecutor is usually selected to participate in these interviews.⁹¹ It is also reported that the Royal Thai Police has, in recent years, taken action to increase the capacity of female inquiry officers to support child and gender-sensitive investigation in cases relating to children, women and human trafficking.⁹² In addition, Thailand expanded the establishment of special rooms in courts across the country, aimed at preventing the defendant from seeing the witness.⁹³

In other AMS, the relevant law either makes no specific reference to child victim-witnesses or specifies additional measures in non-legal instruments. For example, the *Guidelines for the Protection of the Rights of Trafficked Children of the Kingdom of Cambodia* make special provision for child victim-witnesses. Specifically, they require that a trafficked child not be forced to be a witness; that his or her readiness to be a witness should be assessed by competent authorities; and that child witnesses should be provided with special protection measures. These recommended protection measures include using video-taped interviews, video-link and other measures to render unnecessary the child's physical presence in the court room. The *Guidelines* further advise that child victims be accompanied by counselors or support workers during the taking of evidence, if a psychological assessment of the child deems this necessary. They affirm that during all stages of the investigation, prosecution and hearing the privacy of the trafficked child should be protected. There is no verifiable information available on the extent to which these recommendations are being implemented.⁹⁴

In **Singapore**, the *Criminal Procedure Code* provides that the court may allow any witness under the age of 16 to give evidence via video link. This is a mandatory requirement under the *Prevention of Human Trafficking Act 2014* in cases involving sexual exploitation of a trafficked child victim. The *Women's Charter* provides that court proceedings must be conducted in camera (closed court) when the alleged victim of certain offences that would include trafficking is under the age of 16 years. This protection does not extend to trafficked boys. Nevertheless, section 7 of the *State Courts Act* and section 8 of the *Supreme Court of Judicature Act* provide that the court has the power to hear any matter or proceedings in camera if the court is satisfied in the interests of justice, public safety, public security or propriety, or for other sufficient reason to do so.

⁹¹ *Thailand Progress Report on Anti-Trafficking Efforts*, 31 Mar 2015.

⁹² Thailand Country Report (December 2015)

⁹³ *Thailand Progress Report on Anti-Trafficking Efforts*, 31 Mar 2015.

⁹⁴ However it has been reported that in 2009 the Cambodian Ministry of Justice received donor support to build screens in all courts throughout Cambodia and that it is now required that before any court proceeding involving child victim-witnesses, the judge or prosecutor can ask the victim if they wish to use the screen. See Progress Report on Criminal Justice Responses to Trafficking in Persons in the ASEAN Region (2011), p. 78.

Good Practice: Examination of Child Victim-Witnesses

In the **Philippines**, all children who are victims of crime are entitled to the comprehensive protections afforded under the *Rules on the Examination of a Child Witness*. These include:

- The right to testify in an open court unless the court decides to exclude all members of the public who do not have a direct interest in the case;
- The right to have questions posed by a facilitator, rather than directly by counsel for either party;
- The right to have one or two support persons present at trial (including the right to hold the child's hand while testifying);
- The right to change the layout of the court room to make it less intimidating for a child witness, including permitting a judge to wear civilian clothing and allowing the child to testify from somewhere other than the witness stand;
- The right to request to provide testimony by live video link from outside the courtroom;
- The right to use screens, one way mirrors or other devices to shield the child from the accused;
- The right to take a video-taped deposition to be used as evidence in court; and,
- The right to confidentiality.

Source: *Rules on the Examination of a Child Witness*

In the **Philippines**, all children who are victims of crime, including child victims of trafficking, are entitled to the comprehensive protections afforded under the *Rules on the Examination of a Child Witness*. These include:

- The right to testify in an open court unless the court decides to exclude all members of the public who do not have a direct interest in the case;
- The right to have questions posed by a facilitator, rather than directly by counsel for either party;
- The right to have one or two support persons present at trial (including the right to hold the child's hand while testifying);
- The right to change the layout of the court room to make it less intimidating for a child witness, including permitting a judge to wear civilian clothing and allowing the child to testify from somewhere other than the witness stand;
- The right to request to provide testimony by live video link from outside the courtroom;
- The right to use screens, one way mirrors or other devices to shield the child from the accused;
- The right to take a video-taped deposition to be used as evidence in court; and,
- The right to confidentiality.

In **Brunei Darussalam**, the *Criminal Procedure Code* provides that the accused cannot cross-examine child victims who are witnesses. The court can allow children

to provide video-recorded evidence.⁹⁵ Note that it is unclear to which age group these provisions apply. In the *Criminal Procedure Code* a child is defined as a person under 14 years of age while the TIP law adopts the international standard, specifying that a child is a person under 18 years of age.

In **Thailand**, child witnesses are accompanied to court by social workers. The *Criminal Procedure Code* provides that child witnesses may give evidence via video conference, and the questions may be repeated or paraphrased through a psychologist or social worker to the child.⁹⁶ If a child is unable to attend a trial due to special circumstances, the video recording of the child's interview with investigators may instead be tendered as evidence. The video recorded interview may also be played to the court prior to the child's testimony, and may be considered part of the child's testimony if so ordered by the Court.

Malaysia's Evidence of Child Witnesses Act allows children to give evidence from behind a screen, by live video link, and by a prior video recording. Child witnesses may be examined through an intermediary, who may explain the questions or answers so far as is necessary to enable them to be understood by the child witness. The Act applies to persons under the age of 16, rather than the international standard of 18 years of age.

Article 71 of **Viet Nam's Child Law** (to come into effect June 2016) provides for measures to protect child victims/witnesses who have violated laws.⁹⁷

In **Lao PDR**, children are protected under the *Law on Protection of Rights and Interests of Children (2006)* and the *Child Procedure Law (2013)*. This law provides child victim-witnesses with the right to be protected from coercion, threat, and all types of danger, including their family members. In addition, child victims of human trafficking are categorized as "Children in Need of Special Protection", and therefore eligible for "emergency measures" of protection, assistance and support, including in relation to their involvement in legal proceedings.

With some exceptions noted above, reliable information is not available as to how and to what extent the available legal protections are being applied in practice. The case studies set out in the text box below provide some insight into emerging good practices as well as current challenges.

⁹⁵*Criminal Procedure Code* (Brunei), Sections 236C and 236E.

⁹⁶*Criminal Procedure Code* (Thailand), Section 172.

⁹⁷*Child Law 2016* (Viet Nam, Article 71).

Text Box 18: Case Studies of Trafficked Children as Victim-Witnesses

One girl from Myanmar was six years old when trafficked to Thailand for street selling. She was assisted in a shelter in Thailand while a case was brought against her exploiter, and she stayed there for six months. In that time she explained that she gave testimony in court several times. She couldn't remember how many times she went to court.

One Thai girl, trafficked internally within the country for prostitution, stayed in a shelter for a long time because of the lengthy duration of the legal case against her trafficker. When asked about problems she had faced, she explained that she wished the legal process could have been faster.

One girl from Lao PDR, trafficked to Thailand for prostitution, was well-supported through the legal process by staff at the shelter where she stayed in Thailand. The staff explained to her what would happen in court, and that she would be permitted to testify through a video connection so she would not have to face her exploiter.

One girl from Myanmar, trafficked to Thailand for work in a factory, explained that she did not want to give testimony in court but the police "encouraged her strongly." She was provided with a lawyer, and both the police and her lawyer thoroughly explained the steps involved in the case and the possibility of getting compensation.

Source: *After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong Sub-region*, Surtees, R., Nexus Institute/UNIAP, 2013.

4.3: Victims in the Criminal Justice Process - Issues for Consideration by AMS

Note: The following continues the revision and update of information contained in Chapter 6 of the 2011 ASEAN publication: *Progress Report on Criminal Justice Responses to Trafficking in Persons in the ASEAN Region*.

As noted above, investigations and prosecutions are usually difficult and sometimes impossible without the cooperation and testimony of victims. While victim involvement in prosecutions is fraught with dangers and pit-falls, not least for the individual involved, it is also important to acknowledge that trafficked persons are the major (and often only) source of evidence necessary to secure convictions of traffickers for the grave physical, sexual and psychological abuses that they inflict upon their victims. Accordingly, it is essential that States work towards a situation whereby victims of trafficking are sufficiently informed and supported to enable those who wish to do so to participate effectively and safely in the criminal justice process. A safe, secure and supported victim is more likely to be in a position to provide coherent and effective testimony at trial. However, achieving this goal is difficult for many reasons. This section highlights some of the challenges that are facing AMS

4.3.1. Challenges in relation to Involvement of Foreign Victims

As noted above, most AMS have not made specific legislative provision for foreign victims to be able to participate in criminal justice proceedings against their exploiters. Obstacles include: failure to make or enforce legislative provisions for foreign victims to remain in the country of destination; a lack of options for foreign victims to return to

testify or to testify before departing; and lack of support (social, housing, permission to work, etc.) that would facilitate a foreign victim's participation. Other problems relate to the widespread practice of confining foreign victims of trafficking to shelters until the court case in which they are involved is finalised. This can result in victims of trafficking remaining in shelters for months and years, often with little or no interaction with criminal justice officials, and often being provided little or no information about the status of the case (see further, Chapter 6).

4.3.2. Challenges in relation to Protection of Victims' Privacy

As outlined above, there has been important progress in the ASEAN region on legislative protection of victim-witnesses, including protection of their privacy. However, without effective implementation, legal protections are next to useless. Unfortunately, all too often the names and other identifying information about victims of trafficking can be found in newspaper articles and other media. Also, case analysis indicates that in some AMS, while judges are supposed to close the court to the public in trafficking trials, this is not routinely done. This suggests there is still work to be done on ensuring proper policies and procedures are in place to implement laws designed to protect the privacy of victim-witnesses.

4.3.3. Challenges in relation to Protection of Victim-witnesses from Intimidation and Reprisals

In the ASEAN region, as in many other parts of the world, victims of trafficking are often bribed or intimidated into silence. Case analysis conducted in 2011 confirmed that victims are at risk right up to and during the trial phase.⁹⁸ Witness intimidation or tampering is a major obstacle to an effective criminal justice response to trafficking. It also undermines the rule of law and community confidence in the State's capacity to address impunity of criminals. While the majority of AMS have enacted laws to protect trafficked victim-witnesses, these protections are rarely extended in practice.

The need to protect victims continues throughout and beyond the trial process. For most victims of trafficking, the experience of testifying in court is traumatic. While it is not possible to completely remove the negative aspects of this experience, all national criminal justice agencies have the capacity to ensure that victims are safe during their involvement and that trauma is minimised wherever possible. While resource limitations may prevent the establishment of expensive mechanisms and facilities, basic improvements to in-court protection for victim-witnesses can be provided at little or no cost. For example, if the waiting area for witnesses is publicly accessible, exposing the victim to possible interference, the prosecutor could arrange for an official to be assigned to sit and wait with the victim; or a testifying victim could be provided private transport to court rather than having to rely on public transport.

Unfortunately, even low cost, low-effort protections are not yet routinely provided in practice. For example, many victim-witnesses do not benefit from practices and facilities such as pre-trial court visits, court escorts, or secure entry or private waiting areas. Some AMS do not appear to have adopted even basic measures to prevent the victim or witness from further traumatization by the trial process, such as ensuring that

⁹⁸*Progress Report on Criminal Justice Responses to Trafficking in Persons in the ASEAN Region (2011)*

victim-witnesses are accompanied at all times.

4.3.4. Challenges in relation to Access to Legal Information and Assistance

While several AMS have created a legal right to information, as a practical matter, victims of trafficking in the ASEAN region do not routinely receive the information and assistance on legal proceedings that is required to ensure they can participate effectively in those proceedings. Case analysis indicates that victims are often not even provided with minimal information about the progress and the outcome of the case. Failure to keep victims informed extends from the investigation phase through the various stages of the trial. Prosecutors (and investigators) simply do not see the provision of information about case progress as part of their job.

4.3.5. Challenges in relation to Support of Child Victim-witnesses

All victims of trafficking who are cooperating in prosecutions require ongoing support and protection. However, in recognition of their special vulnerabilities, child victims should benefit from a special regime of support and protection. The above analysis confirmed that the laws and procedures of most AMS provide for special in-court protections to be extended to children who are testifying. However, application of these important protections is often less than optimal,⁹⁹ suggesting that more work needs to be done to ensure that all criminal justice officials, including prosecutors, are aware of the availability and importance of in-court protections for children, and that judges are requiring their use in all appropriate circumstances.

⁹⁹See examples in *Progress Report on Criminal Justice Responses to Trafficking in Persons in the ASEAN Region* (2011)

Recommendations

- 4.1** AMS may wish to consider developing a comprehensive programme aimed at supporting the participation of foreign victims of trafficking in criminal proceedings against their exploiters. Development of such a programme should be based on a clear understanding of the obstacles facing foreign victims and the programme itself should aim to address those obstacles. In seeking to ensure the safe and effective participation of foreign victims, AMS may draw on lessons learned within and outside the region including in relation to:
- Developing clear, transparent and predictable procedures to enable the status of foreign victims to be regularised for the duration of their involvement in criminal and other legal proceedings (such as those related to remedies including compensation);
 - Ensuring that the mechanisms and procedures are in place to enable this regularisation process to proceed in all appropriate cases without delay;
 - Avoiding the detention of foreign trafficked persons through regularisation of their legal status and any other appropriate measures;
 - Authorising the use of pre-trial depositions (at the instigation of the prosecutor as well as on request of the victim) in order to ensure the participation of the victim-witness and reduce the period victims must wait to testify;
 - Exploring options for those victims who wish or need to return home to testify from their home country (for example, through video link-up).
- 4.2** AMS that have enacted legislation to protect the privacy of victim-witnesses should continue taking steps to ensure that these laws are effectively implemented. AMS that do not have a solid legislative basis for such protection should consider enacting the necessary laws and working to ensure their effective implementation. In improving implementation of legal protections, AMS may wish to draw on lessons learned within and outside the region including in relation to:
- Prohibiting the publication of any details that could lead to the public identification of victim-witnesses;
 - Clarifying the forms of media or other mediums in which disclosure of the victim's and/or witness's identity is prohibited;
 - Extending the right to privacy to adult and child victims of all forms of trafficking;
 - Training for judicial officials and prosecutors regarding required or allowable practices that help to safeguard victims' privacy, particularly in cases of child victims.

<p>4.3</p>	<p>AMS that have enacted legislation to protect victim-witnesses from intimidation and reprisals and to guard against witness tampering should continue working to ensure that these laws are effectively implemented. AMS that do not have a solid legislative basis for such protection may consider enacting the necessary laws and taking steps to ensure their effective implementation. In improving implementation of legal protections, AMS may draw on lessons learned within and outside the region including in relation to:</p> <ul style="list-style-type: none"> • Providing emergency protection for potential victims of trafficking for up to a 24-hour period during the identification stage; • Routinely conducting individualized risk assessments and taking the necessary steps to protect victim-witnesses from reprisals or other forms of intimidation; • Providing criminal justice agencies with sufficient resources to protect victim-witnesses who are at risk of intimidation or reprisals; • Developing and implementing basic measures that can protect victims during the trial process itself – such as providing escorts and ensuring separate entrances and waiting areas.
<p>4.4</p>	<p>AMS may wish to consider taking steps to ensure that victims of trafficking routinely, and as a legal right, receive information and advice about: (i) their legal status including the nature or extent of legal obligations, if any, to cooperate with investigators and prosecutors; (ii) criminal justice procedures and the victim’s role; (iii) progress of the case; and (iv) procedures for filing complaints, claiming compensation and other available legal remedies. AMS may draw on lessons learned within and outside the region including in relation to:</p> <ul style="list-style-type: none"> • Affirming the legal right of victims to information about rights, protections and legal proceedings to victims in a language and manner they can understand; • Training interpreters to effectively assist victims of trafficking, with a greater understanding of the rights and the psychology of victims of trafficking; • Developing standard operating procedures and tools that facilitate the provision of information to victims of trafficking at various stages of service delivery and legal proceedings, particularly for victims placed in shelters.
<p>4.5</p>	<p>AMS may consider reviewing their laws and procedures that apply to child victims of trafficking who may be – or are – participating in criminal proceedings as witnesses. The review should establish whether current practices and procedures meet the required “best interests of the child” standard. AMS may draw on lessons learned within and outside the region including in relation to:</p> <ul style="list-style-type: none"> • Notifying children of their rights, protection processes and legal proceedings in a language and manner/method that is appropriate for their age; • Appointing a guardian, during the pre-trial phase, to represent the child and ensure his or her best interests; • Conducting an assessment to determine whether it’s in the best interest of the child to participate in proceedings with the help of a child psychologist or social worker; • Allowing the child-witness to testify in camera or in a separate room with the presence of a psychologist and/or a social worker; • Allowing the questioning of a child-witness to be done by a psychologist or social worker.

CHAPTER 5:

ACCESS TO REMEDIES INCLUDING COMPENSATION

Key message: All victims of trafficking have the right to access and receive justice for the crimes and human rights violations committed against them. In particular this includes a right to remedies such as compensation for harm and for unpaid wages.

ASEAN Convention against Trafficking in Persons Especially Women and Children **Provision**

Each Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.

Article 14(13)

Each Party shall communicate to identified victims of trafficking in persons within a reasonable period, information on the nature of protection, assistance and support to which they are entitled to under domestic laws, and under this Convention.

Article 14(9)

Introduction

This chapter seeks to explore the position of victims in relation to their entitlements and ability to access justice for the crimes committed against them. The idea of access to justice recognizes that trafficked persons will rarely be able to benefit from the protection of the law due to inhibiting factors such as poverty, discrimination and uncertain legal status. On their part, trafficked persons often lack knowledge of their legal entitlements and may anyway be reluctant to engage in official procedures, even if there is some hope of a benefit.

In most cases, *access to justice* for victims of trafficking (outside the criminal prosecution of their exploiters, addressed in Chapter 4) concerns remedies. The chapter will thereby focus primarily on AMS laws, policies and practices with regard to victims' access to compensation for the harms committed against them - one particularly important form of remedy. Laws and policies around compensation as a remedy for trafficking will be identified and analysed in this chapter to gain insight into how information and access to justice obligations, in the context of compensation, are implemented in practice. It is important to note at this point that compensation is something legally and qualitatively different to financial assistance that victims may be eligible to receive as part of the support provided to them.

The chapter is divided into three sections. Section 5.1 briefly sets out the international legal standards relevant to access to remedies for victims of trafficking, as well as key aspects of regional standards within ASEAN. In 5.2, an attempt is made to summarize trends in national laws and practices in AMS with regard to victims' access to remedies, most particularly compensation. 5.3 analyses the information presented to identify issues for consideration by AMS in this area.

Note that the subject matter of this chapter connects directly to several others. The term "remedies" is a broad one that goes well beyond compensation to include

other forms of redress, such as *restitution*: actions that aim to restore the situation that existed prior to the violation. Measures of restitution in the context of trafficked persons may include, for example: protection, support and recognition of legal identity and citizenship (Chapter 3: Protection, Support, and Recovery Assistance to Victims); release from detention (Chapter 6: No Detention or Prosecution of Victims for Status Offences); and safe and voluntary repatriation to the country of origin, as well as assistance and support necessary to facilitate social integration (Chapter 7: Return and Reintegration of Victims). *Recovery* is another crucial form of reparation for trafficked persons, including medical and psychological care, as well as legal and social services (Chapter 3: Protection, Support and Recovery Assistance to Victims).

Matters addressed in other chapters are also directly relevant to victims' capacity to access remedies. For example, victims who are not recognized as having been trafficked in the first place (Chapters 1: Definitions and Criminalisation of Trafficking in Persons and 2: Victim Identification and Referral) or who do not receive protection, support and information on their legal entitlements (Chapter 3: Protection, Support and Recovery Assistance to Victims) will likely lack the ability to successfully access remedies even if these are theoretically available. The issue of foreign victims' return (Chapter 7: Return and Reintegration of Victims) is also relevant as it may be practically (or even legally) impossible for victims who have left the country of destination to access remedies to which they are entitled.

5.1: International and Regional Standards relevant to Remedies for Victims of Trafficking¹⁰⁰

Remedies are a critical aspect of the international legal response to trafficking in that they confirm trafficked persons as victims of crime and of human rights abuse. Over the past decade, the international community has come to better understand the true consequences of trafficking – an essential prerequisite to consensus on what constitutes “effective” and “appropriate” remedies for trafficking-related harm. There have also been great improvements in the establishment and acceptance of legal obligations owed by States to prevent and respond to such harm.

In the context of trafficking, the obligation to provide remedies and the right to access remedies normally arise from a State's obligations under human rights law or under one or more of the specialist trafficking treaties. Most international and regional human rights treaties require States to provide access to remedies for violations of human rights. The work of human rights courts and mechanisms, such as the European Court of Human Rights and the UN treaty bodies, has been very important in confirming the right to remedies, including for specific offences, such as torture, and in relation to particular groups, such as women, who have experienced gender-based violence.¹⁰¹

In 2005, the United Nations General Assembly adopted an important set of principles clarifying the rules on remedies and reparation applicable to human rights violations committed by or implicating States.¹⁰² The *Basic Principles and Guidelines on the Right*

¹⁰⁰This section draws on A. Gallagher, *The International Law of Human Trafficking* (2010) chapter 6; OHCHR, *Commentary to the United Nations Recommended Principles on Human Rights and Human Trafficking* (2010) pp 175-182, and OHCHR, *Human Rights and Human Trafficking*, Fact Sheet No. 36 (2014).

¹⁰¹See Further, A. Gallagher, *The International Law of Human Trafficking*, pp. 355-362.

¹⁰²*Basic Principles and Guidelines on the Right to a Remedy*.

to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines on the Right to a Remedy) identifies the purpose of remedies (or reparation) as promoting justice by redressing violations. It confirms that the general obligation on States to ensure respect for and to implement human rights law includes an obligation to ensure equal and effective access to justice and the availability of remedies. It also confirms that the right to a remedy for gross violations of human rights - a term that would incorporate the most serious cases of trafficking - includes the right of access to justice, the right to reparation for harm suffered *and* the right of access to information concerning violations and reparation mechanisms. Access to justice is seen as including protection of victims' privacy and safety in the course of any legal proceedings, as well as measures to ensure that victims can actually exercise their rights to a remedy.

5.1.1. Legal Right to a Remedy in the Context of Trafficking in Persons

The legal right to a remedy has been repeatedly confirmed in the context of trafficking. For example, the *UN TIP Protocol* requires States Parties to ensure that their domestic legal systems contain measures that offer victims of trafficking the possibility of obtaining compensation for damage suffered (Article 6(6)). The *ASEAN Convention against Trafficking in Persons Especially Women and Children* contains an identical provision (Article 14(3)). These provisions do not amount to an obligation to provide remedies as States only need offer the legal possibility of compensation.¹⁰³ According to the Legislative Guide that has been published by the United Nations to assist States in implementing the *Protocol*, this requirement would be satisfied by the State establishing one or more of three options:

- Provisions allowing victims to sue offenders for civil damages;
- Provisions allowing criminal courts to award criminal damages (paid by offenders) or to impose orders for compensation or restitution against persons convicted of trafficking offences; or
- Provisions establishing dedicated funds or schemes to allow victims to claim compensation from the State for injuries or damages.¹⁰⁴

Text Box 19: Compensation in the Context of Trafficking

Compensation is a common form of remedy intended to make good the damage caused by the trafficking to the victim to the extent possible. The term includes awards made by dedicated, state-funded schemes as well as awards made in criminal, civil or labour law proceedings. In the trafficking context, compensation includes payment of wages that have been withheld as well as payment for general damages (non-monetary aspects of the specific harm suffered, such as physical or emotional pain and suffering) and special damages (quantifiable monetary losses such as out of pocket medical expenses, repair or replacement of damaged property and lost earnings).

¹⁰³Legislative Guide to the Organized Crime Convention and its Protocols, Part 1, para 368

¹⁰⁴Legislative Guide to the Organized Crime Convention and its Protocols, Part 1, para 60.

The UN *Model Law on Trafficking* expands this list by noting that court-ordered compensation could include payment for or toward:

- Costs of medical, physical, psychological or psychiatric treatment required by the victim;
- Costs of physical and occupational therapy or rehabilitation required by the victim;
- Costs of necessary transportation, temporary childcare, temporary housing or the relocation of the victim to a place of temporary safe residence;
- Lost income and due wages according to national law and regulations regarding wages;
- Legal fees and other costs or expenses incurred, including those costs related to the participation of the victim in the criminal investigation and prosecution process;
- Payment for non-material damages resulting from moral, physical or psychological injury, emotional distress, pain and suffering suffered by the victim as a result of the crime committed against him or her; and,
- Any other costs or losses incurred by the victim as a direct result of being trafficked and reasonably assessed by a court.

Source: United Nations Model Law on Trafficking in Persons (UNODC)

The UN *Trafficking Principles and Guidelines* make an important point under Principle 17 about the appropriate *standard* of remedy, requiring access to “adequate and appropriate” remedies. Guideline 9.1 of that same instrument refers to “fair and adequate remedies” that may be criminal, civil or administrative in nature and that “include the means for as full rehabilitation as possible.” More generally, it is accepted that remedies or reparation should be proportionate to the gravity of harm suffered by the victim.¹⁰⁵

Various ASEAN policy instruments have affirmed the right of victims of trafficking to access remedies. For example, the ***Gender-Sensitive Guidelines*** place responsibility on prosecutors to apply for victim compensation where available (at 3.6.9). The ***ASEAN Practitioner Guidelines*** state that:

To the extent possible, the legal framework should enable victims to seek and receive remedies including compensation from appropriate sources including those found guilty of trafficking and related offences.

The Practitioner Guidelines make a further, important link between compensation for victims and confiscation of the assets of their exploiters, stating that:

As far as possible, confiscated assets should be used to fund both victim compensation claims and, where appropriate, other forms of counter-trafficking initiatives.

The *ASEAN Convention against Trafficking in Persons Especially Women and Children* does not link confiscation of assets (Article 17) to victim compensation.

¹⁰⁵Basic Principles and Guidelines on the Right to a Remedy, Principle 15.

5.1.2. Identification, Right to Information and Other Means of Accessing Remedies

International and regional standards both acknowledge that realization of the right to a remedy requires much more than an affirmation of that right in the law. The right to a remedy is illusory if victims are not correctly identified in the first place. Even when identified correctly, victims who are returned home before being able to pursue compensation are also denied access to remedies. Often, the right to a remedy is not effectively available to trafficked persons because they are unaware of the possibilities and processes for obtaining remedies.

A right of access to effective remedies means that, in addition to making such remedies available under criminal or civil law, States should ensure that victims are provided with information and legal assistance that will enable them to actually secure the compensation or restitution to which they are entitled. The *UN Trafficking Principles and Guidelines* require States to ensure that victims are provided with both information and legal assistance for the purpose of pursuing the remedies to which they are entitled (Guideline 9.2).

An additional and important co-requisite for realizing the right to a remedy is the presence of the victim in the country where the remedy is being sought. The *UN Trafficking Principles and Guidelines* request States to make arrangements to enable trafficked persons to remain safely in the country in which the remedy is being sought for the duration of any criminal, civil or administrative proceedings (Guideline 9.3).

Text Box 20: ASEAN Recommendations on Realising the Right to a Remedy

- **Victim identification** is an essential prerequisite for the realisation of the right to a remedy. AMS should work to ensure victims of trafficking are identified as quickly and accurately as possible.
- AMS should work towards ensuring that laws, mechanisms and procedures are in place to enable all victims of trafficking-related exploitation, irrespective of their migration status, to **compensation for harm suffered and restitution of unpaid wages**.
- AMS should also consider establishing a **dedicated fund** that would enable victims to access compensation for injuries and damages.
- AMS should work to ensure that the common obstacles to accessing remedies are addressed. It is especially important that criminal justice officials and others are made aware of the **need for victims to be fully informed of their legal rights**, including their rights to access remedies through judicial and administrative proceedings, promptly and in a language and form they understand.

Source: *Progress Report on Criminal Justice Responses to Trafficking in Persons in AMS (2011)*

5.2: Victims' Access to Remedies in the Law, Policy and Practice of AMS

Across the globe, it remains rare for victims of trafficking to receive remedies, including compensation, for the harms committed against them. The text box below summarizes the major obstacles that prevent victims of trafficking from accessing this important form of justice.

Text Box 21: Obstacles to Victims' Access to Remedies

Obstacles to victims' access to remedies include:

- Failure **to identify** victims of trafficking correctly
- Routine **detention and deportation** of trafficked persons
- Failure to provide victims with **legal assistance, information and support**
- Inadequate **legal frameworks** – no or inadequate legal provision for remedies
- Arrest/**prosecution failures** (especially where offender identification/prosecution and conviction is a prerequisite for certain remedies)
- **Lack of protection** to victims and victim-witnesses
- **Discrimination** on the basis of nationality and citizenship, for example, preventing foreign victims from remaining in the country of exploitation to pursue a claim for compensation
- **Absence** of effective **international legal cooperation**
- **Low success rates** in **tracing and seizing profits** of trafficking-related crimes, which means lack of resources to compensate victims.

Sources: Gallagher, A., *The Right to an Effective Remedy for Victims of Trafficking in Persons* (Office of the UN High Commissioner for Human Rights 2011); *ASEAN Progress Report on Criminal Justice Responses to Trafficking in Persons in the ASEAN Region (2011)*

Despite these obstacles there has been important progress in recent years towards making access to remedies a legal and practical possibility. For example, some countries of Europe and North America have expressly granted victims of trafficking the right to private action against their traffickers, regardless of their nationality or migration status. Others have included mandatory restitution to trafficked persons as part of the criminal sentencing of traffickers.¹⁰⁶ As explained in detail below, several AMS have taken similar steps and others have sought different ways of securing victims' right to a remedy.

It is important to note that in the ASEAN region, as in other parts of the world, the specialist trafficking law may not be the sole source of rights and obligations with regard to remedies. In some countries, general legislation regarding criminal injuries compensation will apply to trafficking cases. Victims may be able to access remedies under tort law or they may be able to claim compensation for unpaid wages and other losses through labour courts or employment tribunals.

¹⁰⁶OSCE, Office for Democratic Institutions and Human Rights, *Compensation for Trafficked and Exploited Persons in the OSCE Region (2008)*. See also National Crime Victim Law Institute (USA), *Ensuring Full Restitution for Trafficking Victims: An Overview of Mandatory Restitution Awards Under the Trafficking Victims Protection Act (2013)*.

5.2.1 Progress in relation to Granting Victims a Legal Right to Access Remedies

There has been substantial progress in the ASEAN region in relation to legal recognition of the right of victims to access compensation. In some instances, such as in **Thailand** (see text box below), this right is framed as an obligation on the part of the State to take action where the trafficked person has a right to compensation and has expressed his or her intention to make a claim. While **Singapore's** *Prevention of Human Trafficking Act* does not address compensation for victims, other legal avenues remain applicable. For instance, when convicting an offender for a TIP offence, the Court may additionally make an order under the *Criminal Procedure Code* (CPC) to compensate the victim for the harm caused and losses incurred. Under Section 359 of the CPC, a court is bound to consider whether or not to award compensation after convicting a person of an offence (including offences related to trafficking in persons).

Good Practice: Legal Provisions on Access to Remedies

In **Thailand**, the *Anti-Trafficking in Persons Act (2008) and the Amendments (No.2) (2015)* **requires** the Public Prosecutor to claim compensation for a trafficked person, where that trafficked person has a right to compensation and has expressed his or her intention to make a claim (Section 35). That claim may be brought by the Public Prosecutor either with the criminal prosecution or by way of motion filed at any time during the trial of the criminal case. Critically, the law also makes provision for foreign victims to remain and work in Thailand where they are claiming compensation (Section 37). As explored further in Chapter 7, this provision addresses a significant and common problem whereby foreign victims are returned home before they get a chance to seek and obtain remedies.

In other AMS, the right of trafficked persons to remedies such as compensation is not made explicit – rather, it is derived from the *obligation of traffickers to provide restitution to their victims*. For example, **Cambodia's** 2008 TIP Law states that a person who has benefited from a trafficking-related act is liable to make restitution for “unjust enrichment” (Chapter 7, Article 46). An aggrieved person (a victim of a trafficking-related act) may, in addition, claim for damage and is to be given preference in relation to claims for compensation and restitution. In this regard, their claims are to be given preference in relation to any property confiscated by the State (Article 47). The *Sub-Decree on the Management of the Sending of Cambodian Workers Abroad through Private Recruitment Agencies* provides for the possibility of deposits paid by recruitment agencies being used to resolve issues that affect the interests of workers. It is unclear whether this source of funds has ever been used to provide compensation for victims of trafficking.

In **Lao PDR**, Article 25(4) of the *Law on Development and Protection of Women* affirms the right of female victims of trafficking to make a request for compensation. The same law elsewhere affirms that offenders are required to compensate victims for costs such as those related to medical treatment, mental damage, travel, board and lodging (Article 27). Lao PDR's 2015 TIP Law affirms the right of victims (male and female) to seek compensation from offenders.

In several AMS, the right of victims of trafficking to access compensation is either unclear or unstated. For example, **Myanmar's** TIP law does not explicitly grant victims the right to access remedies. Rather, it requires certain actions of the authority created under that law, which imply that certain victims (women, children and youth) are eligible for compensation for damages in tort from the offender for the trafficking act.

The **Philippines'** TIP law does not explicitly affirm the right of victims to remedies. The existence of such a right is inferred from a provision requiring the State to provide victims with legal advice in connection with compensation (Section 23, see further below) and another dealing with confiscation and forfeiture of the proceeds of trafficking crimes (Section 14) that envisages the possibility of such confiscated proceeds being utilized in "awards for damages".

In **Viet Nam**, the TIP law provides the rights of victims – both Vietnamese and foreign – including the right to compensation as well as the right to receive legal counseling and aid to claim for compensation of damages caused by being trafficked. Access to civil remedies in criminal cases is also guaranteed under Viet Nam's *Penal Code*.

In **Brunei Darussalam**, Section 19 of the *Trafficking and Smuggling of Persons Order* provides that where fines have been imposed following a successful prosecution of a trafficking case, the court may, upon the application of the Public Prosecutor, and, if it thinks fit, direct that the whole or any part of such fine - when recovered - be paid as compensation to the trafficked person. While a fund has been established under that law, compensation is not stipulated as one of the purposes for which monies from the fund can be used. A right of compensation, which could potentially be used by trafficked persons, also exists under the *Criminal Procedure Code*.

The TIP laws of both **Malaysia** and **Singapore** make no reference to a right of victims to access remedies. However, the 2015 Amendment to **Malaysia's** TIP law includes provision for courts to order convicted traffickers to pay a fixed amount, to be determined by the court, by way of compensation to the trafficked person. In the case of no conviction, the Court shall make an order for payment of wages in arrears to an alleged trafficked person.¹⁰⁷ Section 359 of **Singapore's** *Criminal Procedure Code* makes it mandatory for a court to consider whether to make a compensation order after convicting a person of an offence – this includes offences connected to human trafficking. Such order must be made where it is appropriate. Any order for compensation will also not affect any separate right to a civil remedy.

¹⁰⁷*Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Act 2015* (Malaysia), New sections 66A and 66B.

Table 3 – Does the Legal and Policy Framework around Trafficking Provide Victims of Trafficking a Right to Access Remedies? (Yes/No)

	Yes/No	Notes
Brunei Darussalam	N	The legal framework around trafficking does not provide victims a right to access remedies but the legal possibility of compensation through fines exists.
Cambodia	N	The right is not made explicit but inferred through obligation of traffickers to provide restitution to victims; Official guidelines on protection of the rights of trafficked children say a trafficked child should receive civil compensation from perpetrator through the court system. Restitution limited in practice by legal requirement that compensation be paid only following completion of convicted offender's jail term.
Indonesia	Y	The right to compensation is provided for victims in the TIP law and the <i>Civil and Criminal Procedure Codes</i> .
Lao PDR	Y	The right for victims to access compensation applies to all, including women and children victims, except if cases are pursued as Labour Law violations.
Malaysia	Y	The 2015 Amendment to the TIP law allows courts to order convicted traffickers to pay compensation to victims, or wages in arrears in the case of no conviction.
Myanmar	N	Implied that victims may be eligible for compensation for damages in tort, but not explicitly stated.
Philippines	N	Inferred though not explicitly stated.
Singapore	N	No specific provision in the TIP law although other legislation requires the court to consider whether to make a compensation order after convicting a person of an offence, including offences related to human trafficking.
Thailand	Y	The Public Prosecutor is required to make a claim for compensation on behalf of the victim. Victims' right to compensation for damages is provided under the TIP law, <i>Criminal Procedure Code</i> and <i>Damages for Injured Persons and Compensation and Expense for the Accused in Criminal Case Act</i> (2001).
Viet Nam	Y	Provided for in the TIP law and the <i>Penal Code</i>

5.2.2. Progress in relation to the Right to Information and Legal Assistance for Purposes of Accessing Remedies

As previously noted, the right of victims to receive information and legal assistance can be critical to their ability to access remedies, including compensation. While AMS practice on this point is considered in detail in Chapter 4, it is relevant to highlight instances of national legislation supporting access to remedies through information. For example, the **Philippines' Anti-Trafficking Act** provides that victims are entitled to

receive free legal services, including information about their rights and the procedures for claiming compensation and other available legal remedies (Section 23). **Thailand's Anti-Trafficking in Persons Act (2008) and the Amendments (No.2) (2015)** requires the Ministry of Social Development and Human Security to provide victims with a range of assistance measures, including legal aid in connection with legal proceedings to obtain compensation (Section 33). Under Section 34, the inquiry official or public prosecutor is required to notify the trafficked person of his or her right to compensation for damages and entitlement to legal aid (Section 34).

A significant barrier that remains to the provision of information to victims about their rights is language. **Cambodia's** non-binding guidelines on cooperation between government agencies and victim support organizations regarding victim assistance state that, "after a positive investigation as a victim, the police shall provide information to each victim about their rights and services available to them in a language the victim understands. Services are to be provided regardless of prosecution."

5.2.3. Progress in relation to Obtaining Compensation

Compensation through criminal proceedings may be awarded to victims as part of the penalties imposed upon finding the accused persons guilty of the offence as charged. While the number of successful prosecutions is increasing slowly, the awarding of compensation for trafficked persons through criminal proceedings is the exception rather than the rule in all parts of the world including the ASEAN region. Even where such avenues for compensation are enshrined in law, practice often falls far short. For example, a recent review of cases in the United States indicated that U.S. courts ordered compensation in only 36 percent of cases, although U.S. law orders convicted traffickers to pay lost wages to victims.¹⁰⁸

In many countries, including several AMS, the possibility of compensation through criminal proceedings hinges upon identification, arrest, trial and conviction of traffickers. As discussed in detail in the previous chapter, this remains a great challenge – very few traffickers are ever prosecuted and punished in the ASEAN region, and instances of victims of trafficking being awarded compensation in the context of criminal proceedings have been isolated. Even where compensation is awarded in such settings, it appears that victims experience significant difficulty in securing payment of the damages they have been awarded.

In 2014, **Cambodian** Courts adjudicated a case involving the exploitation of 74 Cambodian fishermen who were trapped on boats working off the African coast. Along with five accomplices (who had escaped custody), the owner of the recruitment company involved was sentenced to 10 years in prison and ordered to pay compensation - between US\$1,500 and US\$15,000 to each victim. However, the perpetrator filed an appeal against the decision, delaying the compensation process.¹⁰⁹ The outcome of that appeal has not been reported but it appears that victims have still not received any compensation.

¹⁰⁸*When Mandatory Does Not Mean Mandatory: Failure to Obtain Criminal Restitution in Federal Prosecution of Human Trafficking Cases in the United States*, The Human Trafficking Pro Bono Legal Center and WilmerHale (2014), p. 3.

¹⁰⁹See further, Winrock International, *Where is the Horizon? Trafficking on Fishing Vessels* (2014).

In **Indonesia**, seven of the 11 court judgments on human trafficking secured in 2014 granted the right to restitution for victims. The prosecutor did not request restitution in the other four cases for reasons that are unclear. The adequacy of restitution is an issue in Indonesia. In one case accessed during the assessment, the victim was awarded damages of less than US\$15. Another weakness is the possibility for the court to order a longer prison sentence in lieu of restitution in cases where the convicted trafficker is unable to pay. This provision fails to recognize the right of victims to compensation and the obligation of the State to ensure that victims can access such a remedy.

Trafficked persons may also pursue civil claims on the basis of losses incurred caused by the crime of trafficking pursuant to relevant national law. Although there have been cases in other regions which resulted in a substantive amount of compensation for trafficked persons,¹¹⁰ experience shows it is still extremely difficult for them to receive compensation through civil proceedings and this study was unable to find examples of successful civil claims in any AMS beyond a report from the Government of **Thailand** stating that 14 Thai victims and 43 foreign victims were awarded a total of US\$269,166 in civil cases in 2014.¹¹¹ Some of the difficulties associated with civil proceedings include the tendency of such proceedings to be time-consuming, expensive and complicated. Other obstacles include complications in calculating the basis of damages and the relative novelty of non-material damages, such as pain and suffering, in some States.¹¹²

Trafficked persons may also have the opportunity of claiming compensation based on labour law violations, such as discrimination, illegal recruitment fees, withholding of wages, breach of national minimum wage, and unreasonable overtime. While there have been encouraging developments in some parts of the world¹¹³, the possibility for trafficked persons to obtain compensation through labour proceedings or similar avenues is often very low. The situation is particularly difficult for foreign victims who have been working in a sector that is informal and unregulated or under-regulated (such as domestic work) or who have been trafficked into the sex industry which, being outside the law, is not a recognized form of employment to which labour protection applies.

In **Thailand**, the *Anti-Trafficking in Persons Act (2008) and the Amendments (No.2) (2015)* allows the public prosecutor, on behalf of the trafficked person, to claim compensation for damages. The victim may also claim for compensation under the *Criminal Procedure Code (1999)* pending a decision in the criminal case. Thailand has also established a special fund to provide compensation to victims of trafficking and labour exploitation. According to government officials interviewed during the country assessment, the following amounts (calculated as approximate amounts in U.S. Dollars) were granted:

- In 2014: US\$106,000 (US\$276 per victim)
- In 2015: US\$202,000 (US\$424 per victim)

¹¹⁰See for example UK cases cited in the Anti-Trafficking Monitoring group, *Compensation for Trafficked Persons* (2013), available at: http://www.antislavery.org/includes/documents/cm_docs/2011/c/compensation.pdf. In relation to the United States, see *When Mandatory Does Not Mean Mandatory: Failure to Obtain Criminal Restitution in Federal Prosecution of Human Trafficking Cases in the United States*, The Human Trafficking Pro Bono Legal Center and WilmerHale (2014).

¹¹¹*Royal Thai Government Trafficking in Persons Report 2014*, Section 3.9.

¹¹²See United States Agency for International Development (USAID), *Best practices for programming to protect and assist victims of trafficking in Europe and Eurasia*, (2008) p. 32.

¹¹³For example proceedings in the United States against a marine services company and others who lured hundreds of Indian workers to a Mississippi shipyard with false promises of wages and US residency. See: <https://www.aclu.org/news/federal-jury-awards-14-million-indian-guest-workers-victimized-labor-trafficking-scheme-gulf>

Compensation payments for unpaid wages and other labour rights violations are also available in Thailand. The Government has provided the following figures:

- In 2014: US\$21,400 (US\$5,623 per victim)
- In 2015: US\$95,000 (US\$1,234 per victim)

Victims of forced labour or other situations of labour exploitation in **Viet Nam** have the right to pursue individual labour disputes with their employer or recruitment agency in court, but only after they first attempt resolution through mediation with a Labour Mediator, according to the Vietnamese Labour Code. Typically this avenue is prohibitively expensive for victims to pursue. Additionally, Viet Nam's labour laws do not prescribe criminal penalties for violations. The country assessment confirmed that, to date, there is no record of any compensation being awarded by a court to a labour trafficking victim.

Other reasons why victims are unable or unwilling to access compensation reflect systemic weaknesses. For example, a general lack of transparency within the system and low levels of trust in its ability to deliver justice can act as disincentives for victims to pursue remedies. See Chapter 4 for further discussion of victims in the criminal justice process.

5.3: Victims' Access to Remedies - Issues for Consideration by AMS

As noted above, victims of trafficking rarely receive remedies for the crimes and human rights violations that are committed against them. Similar to most other parts of the world, AMS have recorded very few instances of victims being awarded and receiving compensation. The following issues are relevant to this situation and to considerations of how it could be improved.

5.3.1. Victims Not Identified, Traffickers Not Prosecuted

Chapter 2 addressed the low levels of victim identification throughout the ASEAN region and Chapter 4 noted the infrequency of trafficking prosecutions and convictions. These features of the current response to trafficking contribute directly to the difficulties that victims face in securing remedies for the exploitation they have suffered. In relation to identification, a victim of trafficking who is not identified properly, if at all, will never be able to access remedies because the very first hurdle in making a claim – establishing that he or she is in fact a victim of trafficking – cannot be cleared. While the legal and regulatory systems of most AMS envisage remedies for violations of labour laws, it is only in very rare instances that trafficking and related exploitation for purposes of forced labour is identified.

An inadequate criminal justice response can be equally fatal to victims' chances of realizing their right to a remedy. In most AMS, a claim for compensation or other remedy (whether criminal or civil) will be legally and/or practically impossible without an identified perpetrator and a criminal conviction.

5.3.2. Inadequate Legal Provision for Criminal, Civil and Other Remedies

While several AMS have explicitly affirmed the right of victims of trafficking to remedies for the harms committed against them, few if any have established a strong legal framework to that end. As noted above, some AMS only grant that right to certain groups of victims (women, youth and children). The laws of some AMS *imply* a right to a remedy but do not specify that right in sufficient detail. The legal framework around trafficking in at least three AMS makes no reference at all to compensation or other remedies for victims of trafficking. In no case is a standard for remedies (e.g., adequate and appropriate) specified.

5.3.3. Procedural and Practical Obstacles to Accessing Remedies

As noted above, even in countries where victims of trafficking have a legal right to access remedies, their quest for compensation can be thwarted through a wide range of procedural obstacles, including lack of information about legal entitlements and lack of legal assistance in pursuing claims for compensation. Few AMS explicitly provide victims with a right to information about remedies. No AMS grant victims a right to legal assistance in pursuing remedies specifically.

In some AMS, foreign victims with a legal right to pursue remedies are returned to their country of origin before being able to commence or complete proceedings. In **Thailand** however, the *Anti-Trafficking in Persons Act of 2008 and the Amendments (No.2) (2015)* provide that a foreign victim may obtain permission to stay and/or work temporarily in the Kingdom while they are pursuing a claim for compensation (Section 37).

5.3.4. Lack of Capacity to Provide Remedies for Violations of Labour Laws

Many situations of trafficking for purposes of forced/exploitative labour also involve violations of national labour laws and regulations. Accordingly, victims should be able to access labour courts and tribunals in order to seek compensation for lost wages and other damages. That rarely happens, however. Sometimes this avenue is denied to victims because the sector in which they suffered exploitation (e.g. domestic service, fisheries) is not one that falls within national labour laws. Foreign victims who are in the country without authorisation (a common situation for many trafficked persons) may be similarly excluded. Even where they are entitled to access remedies through such channels, victims may lack the necessary information or support to realise this entitlement.

Recommendations

- | | |
|------------|--|
| 5.1 | In accordance with the specific recommendations set out in Chapter 2, AMS may consider taking steps to improve the timely and accurate identification of victims of trafficking. In accordance with the specific recommendations set out in Chapter 4, AMS may consider taking steps to strengthen the criminal justice response to trafficking in order to support greater access to remedies for victims. |
| 5.2 | AMS may wish to consider reviewing their national legal frameworks to ensure that the right of all victims of trafficking to access adequate and appropriate remedies is explicitly guaranteed. |
| 5.3 | AMS may wish to consider reviewing their national legal frameworks to ensure that the right of all victims of trafficking to access adequate and appropriate remedies is accompanied by: (i) a right to information about remedies; (ii) a right to legal assistance in pursuing remedies; and (iii) a right of foreign victims to remain and work in the country of destination for the duration of legal proceedings for compensation or other remedies. AMS may wish to further consider taking practical steps to ensure that victims know about their right to a remedy and about how this right can be accessed. |
| 5.4 | AMS may wish to examine the legal and procedural framework around compensation for violations of labour laws to determine the accessibility of these systems to persons who have been trafficked. AMS may consider revising laws, policies and procedures to ensure that victims of trafficking are able to use such avenues to recover withheld wages and other damages. |

CHAPTER 6:

NO DETENTION OR PROSECUTION OF VICTIMS FOR STATUS OFFENCES

Key message: Victims of trafficking should not be prosecuted or punished for crimes that have been committed in the course of their trafficking including illegal entry, illegal stay and illegal work. Victims of trafficking should not be held in immigration detention or detained in shelters or other facilities against their will.

ASEAN Convention against Trafficking in Persons Especially Women and Children Provisions

Each Party shall, subject to its domestic laws, rules, regulations and policies, and in appropriate cases, consider not holding victims of trafficking in persons criminally or administratively liable, for unlawful acts committed by them, if such acts are directly related to the acts of trafficking.

Article 14(7)

Each Party shall not unreasonably hold persons who have been identified by its competent authorities as victims of trafficking in persons in detention or in prison, prior to, during or after civil, criminal, or administrative proceedings for trafficking in persons.

Article 14(9)

Introduction

This chapter considers the detention of victims of trafficking as well as the issue of their prosecution for “status offences”: crimes that have occurred in the course of trafficking.

Detention of victims of trafficking generally occurs in the following situations:

- The victim is not correctly identified and is detained as an illegal migrant pending deportation;
- The victim is identified correctly, but is unwilling or unable to cooperate in criminal investigations (or her/his cooperation is not considered useful) and is sent to immigration detention pending deportation;
- The victim, correctly or incorrectly identified, is detained as a result of her or his engagement in illegal activities, such as prostitution or unauthorized work;
- The victim is identified correctly and is placed in a shelter or other welfare facility from which she or he is unable to leave. Often this is referred to as “protective custody” and is justified with regard to the need to protect victims from further harm. Other justifications offered for this form of detention include the need to provide shelter and support and the need to secure victim cooperation in investigation and prosecution of traffickers.

In addition to being detained, victims of trafficking may also be subject to prosecution for violations of immigration and labour laws or for illegal work, such as prostitution. In some cases, these prosecutions proceed even where it is recognized that the individual involved is a victim of trafficking. In most cases, however, prosecution of

victims for status offences is tied to an underlying failure to identify them in the first place. In other words, trafficked persons are charged, not as victims of trafficking, but as smuggled or illegal migrants, or unlawful/illegal migrant workers. Countries of origin sometimes also directly criminalise victims upon their return, penalising them for unlawful or unauthorized departure.

The chapter is divided into three sections. Section 6.1 briefly sets out the international legal standards relevant to these two closely related issues, as well as applicable ASEAN standards. In 6.2, an attempt is made to summarize trends in national laws and practices in AMS with regard to the detention of victims and their prosecution for status offences. 6.3 uses that information to identify issues for consideration by AMS in this area in order to present several draft recommendations and to flag areas requiring further research.

This chapter intersects with issues considered elsewhere in this assessment report. As already noted above, the detention of victims in immigration shelters and their prosecution for immigration or labour law offences typically indicates a failure to identify them correctly and in a timely manner (Chapter 2: Victim Identification and Referral). Victims are sometimes detained against their will in order to protect them from further harm (Chapter 3: Protection, Support and Recovery Assistance to Victims) or to facilitate their involvement in criminal proceedings against traffickers (Chapter 4: Victims in the Criminal Justice Process). As a consequence of being prosecuted and/or detained, victims may be unable to access the remedies they are legally entitled to (Chapter 5: Access to Remedies Including Compensation). And finally, detention and prosecution will invariably interfere with a victims' international legal right to return home (Chapter 7: Return and Reintegration of Victims).

6.1: International and Regional Standards relevant to Non-detention of Victims and Non-prosecution for Status Offences¹¹⁴

6.1.1. Standards relevant to Detention of Victims of Trafficking

The *UN TIP Protocol* does not refer specifically to the issue of detention of victims of trafficking. However, the *UN Trafficking Principles and Guidelines* confirm that the detention of victims without clear and individualized justification is inappropriate and possibly also illegal. Under their provisions, States are required to ensure that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody.¹¹⁵

The *ASEAN Convention against Trafficking in Persons Especially Women and Children* goes beyond the Protocol in requiring States Parties to not unreasonably hold victims of trafficking in detention or in prison at any point including before, during or after criminal, civil or administrative proceedings.¹¹⁶

¹¹⁴This section draws on A. Gallagher, *The International Law of Human Trafficking* (2010); OHCHR, *Commentary to the United Nations Recommended Principles on Human Rights and Human Trafficking* (2010) pp 175-182, and OHCHR, *Human Rights and Human Trafficking, Fact Sheet No. 36* (2014).

¹¹⁵*Trafficking Principles and Guidelines*, Guidelines 2.6, 6.1.

¹¹⁶*ASEAN Convention against Trafficking in Persons*, Article 14(9).

Text Box 22: Understanding “Detention”

International law defines detention as the condition of “any person deprived of personal liberty except as a result of conviction for an offence”. The term can therefore cover a wide range of situations in which victims of trafficking are held in prisons, police lock-ups, immigration detention facilities, shelters, child welfare facilities, and hospitals.

Source: United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, General Assembly resolution 43/173.

International human rights law provides additional and important guidance by affirming States’ obligation to victims of human rights abuses and crimes (such as trafficking) to ensure their dignity and protect them from further harm. **The right to freedom of movement** is a core human right, protected by major international and regional human rights treaties. Analysis elsewhere has confirmed that for trafficked persons who are lawfully within the relevant country, their detention in any kind of public or private facility would generally violate their right to freedom of movement.¹¹⁷ The situation is not as clear for trafficked persons whose presence in the country is unauthorized. In such cases, States may seek to justify their detention with reference to allowable exceptions such as public order, national security and public health.¹¹⁸ Such justifications would need to be tested on their merits. As noted by the UN Human Rights Committee, (the body responsible for the *International Covenant on Civil and Political Rights* (ICCPR), to which all AMS are party), any restrictions on the right to freedom of movement must meet three criteria to be considered lawful:

- It must be provided for by law;
- It must be consistent with other rights (such as the prohibition on sex-based discrimination);
- It must be necessary to protect the individual concerned.¹¹⁹

As shown in text box 23, these conditions have been expanded and refined with reference to the detention of victims of trafficking.

Another important human right relevant to the issue of victim detention is the **right to liberty and prohibition of arbitrary detention**. The relevant provision of the ICCPR states that:

*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.*¹²⁰

International law recognizes that States must retain the ability to use measures that deprive people of their liberty. Deprivation of liberty only becomes problematic in legal

¹¹⁷See Commentary to the *Trafficking Principles and Guidelines* at pp 134-135.

¹¹⁸These exceptions are provided in treaties that affirm the right to freedom of movement such as the *United Nations Covenant on Civil and Political Rights* (Article xx).

¹¹⁹Human Rights Committee, *General Comment No 27: Freedom of Movement*, UN Doc. CCPR/C/21/Rev.11/Add.9 (2 November 1999), para. Xx.

¹²⁰ICCPR Article 9(1)

terms when it is unlawful and arbitrary. The principle of legality is violated if someone is detained on grounds that are not clearly established in domestic law or are contrary to such law. Critically, it is not enough that the national law prohibits detention of victims of trafficking. The prohibition must extend to *arbitrary* detention. Importantly, a situation of detention that may not have been arbitrary when first imposed might *become* arbitrary if it continues over time without proper justification.

Finally, States are required, under international law, to ensure that necessary procedural guarantees are in place to identify and respond to situations of unlawful or arbitrary deprivation of liberty. The ICCPR specifies several of these procedural guarantees, including an individual's entitlement to test the lawfulness of his/her detention before a court, as well as an enforceable right to a remedy should the detention be found unlawful.

Text Box 23: When Does Victim Detention Become a Violation of Human Rights?

The risk of detention being characterized as unlawful or arbitrary detention is high if it can be shown that such detention meets one or more of the following criteria:

- The detention is not specifically provided for in law or is imposed contrary to law;
- The detention is provided for - or imposed in - a discriminatory manner (e.g. only applicable to women and girls/children);
- The detention is imposed for a prolonged, unspecified or indefinite period;
- The detention is unjust, unpredictable and/or disproportionate;
- The detention is not subject to judicial or administrative review which can confirm its legality and that it continues to be necessary in the circumstances, allowing the possibility for release where no grounds for its continuation exist.

Source: OHCHR, *Commentary to the UN Trafficking Principles and Guidelines*, pp 135-136.

It is important to note that international law places additional obligations on States with regard to the **detention of children** – including child victims of trafficking. The rules are governed by the overriding principle of respect for the child's best interests. The strictness of rules around juvenile detention recognizes the fact that detained children are highly vulnerable to abuse, victimization and violation of their rights. Under the provisions of the *Convention on the Rights of the Child* (CRC), no child is to be deprived of his or her liberty unlawfully or arbitrarily.¹²¹ This prohibition does not just cover penal detention, but also includes deprivation of liberty on the basis of the child's welfare, health and protection and is therefore directly relevant to the situation of child victims of trafficking detained in immigration centres, shelters or welfare homes.

International law further requires any form of juvenile detention to be in conformity with the law; used only as a measure of last resort; and imposed for the shortest appropriate period of time.¹²² In addition to stipulating the circumstances under which a child can be detained, international law also imposes conditions on the conduct of such detention. Once again, the overriding principle is respect for the best interests of the child including respect for his or her humanity and human dignity.¹²³ Other rules

¹²¹CRC, Article 37(a).

¹²²CRC, Article 37(a); Rules for the Protection of Juveniles Deprived of their Liberty, Sections I(1), III(17);

¹²³Article 8(3) of the *CRC Optional Protocol* requires States Parties to ensure that, in the treatment by the criminal justice system

that are directly relevant to the detention of child victims of trafficking are set out in the text box below.

Text Box 24: Rules Relating to the Detention of Child Victims of Trafficking

The detention of a child victim of trafficking ***must be in the best interests of that child.***

Further, it must be:

- In conformity with the law;
- Non-arbitrary and non-discriminatory; and,
- For the shortest appropriate period of time.

A child who is detained has the following rights:

- To be separated from adults unless it is considered in the child's best interests not to do so;
- To maintain contact with his or her family through correspondence and visits (barring exceptional circumstances, such as involvement of the family in the trafficking situation);
- To prompt access to legal and other appropriate assistance, including support for physical and psychological recovery, and social reintegration in an environment that fosters his or her health, self-respect and dignity;
- To challenge the legality of the deprivation of his or her liberty before a court or another competent, independent and impartial authority, and to receive a prompt decision.

Source: OHCHR, *Commentary to the UN Principles and Guidelines on Human Rights and Human Trafficking*; UNICEF *Guidelines on the Protection of Child Victims of Trafficking* (2006)

In line with the recently adopted *ASEAN Convention against Trafficking in Persons*, ASEAN policy documents and standards reflect a general rejection of the practice of victim detention but there is not agreement in the “forms” of detention that should fall within this prohibition. The *ACWC Guidelines* take a broad and rights-based approach, stating that:

*Victims should not be detained, charged or prosecuted for any crime they may have committed as a direct and immediate result of their being trafficked.*¹²⁴

Multilateral and bilateral agreements between AMS also address this issue. For example, five of ten AMS – **Cambodia, Lao PDR, Myanmar, Thailand and Viet Nam** – have entered into a MOU, along with China, on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region (COMMIT). Through this MOU, these six countries commit to “ensuring that persons identified as victims of trafficking are not held in detention by law enforcement authorities.”¹²⁵ Additional bilateral MOUs exist between five AMS which address mutually agreed upon measures for assisting victims of trafficking. The first MOU concluded between **Cambodia and Thailand** in 2003

of children who are victims of trafficking in persons and related exploitation, the best interest of the child shall be a primary consideration.

¹²⁴ ACWC *Gender Sensitive Guidelines for Handling Women and Child Victims of Trafficking*, 3.6.1.

¹²⁵ *Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-Region*, Section III - In the area of Protection, Recovery and Reintegration

establishes that trafficked women and children shall not be detained in an immigration detention center while awaiting the official repatriation process.¹²⁶ However, shelter and protection shall be provided to victims “according to the policy of each state”.

6.1.2. Standards relevant to Non-prosecution for Status Offences

The *UN TIP Protocol* does not specifically address the issue of prosecution for status related offences. However, there have been important developments since the adoption of the *Protocol* indicating a growing consensus on this issue.¹²⁷ The *UN Principles and Guidelines* are clear that trafficked persons should not be charged or prosecuted for “violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons”.¹²⁸ Where possible, this should be enshrined in law.¹²⁹

The aim of such a provision is to safeguard the human rights of victims, to avoid further victimization and to encourage them to act as witnesses in criminal proceedings against the perpetrators.¹³⁰ In this regard, the non-criminalisation principle reflects other basic principles recognized by most legal systems relating to responsibility and accountability for criminal offences. It is not intended to confer a general immunity on trafficked victims who may commit non-status related crimes with the requisite level of criminal intent. For example, if a trafficked person engages in a criminal act such as robbery or unlawful violence on his or her own initiative (not because he or she was compelled to commit that criminal act as part of the trafficking situation) then he or she should be subject to the normal criminal procedures with due attention to available lawful defences.

Within ASEAN, there is evidence of increasing effort to avoid the prosecution of trafficked persons for status offences. Most significantly, the *ASEAN Convention against Trafficking in Persons Especially Women and Children* goes beyond the provisions of the *UN TIP Protocol* in requiring States Parties, in appropriate cases, to consider not holding victims criminally or administratively liable for status offences.

The text box below summarizes some of those efforts, both regional and bilateral.

¹²⁶*MOU on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking* (2003), Article 7.

¹²⁷Article 26 of the *European Trafficking Convention*, for example, requires States Parties, in accordance with the basic principles of their legal systems, to: “provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so. Article 8 of the 2011 EU Trafficking Directive states that: “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 [trafficking]”.

¹²⁸*Principles and Guidelines*, Guideline 2.5. See also Principle 7.

¹²⁹*Principles and Guidelines*, Guideline 4.5.

¹³⁰See *EU Trafficking Directive*, Introductory para 14.

Text Box 25: Standards on Non-prosecution for Status Offences within ASEAN

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.

Source: ASEAN Convention against Trafficking in Persons, Article 14(7)

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

Source: Gender Sensitive Guidelines, 3.6.1.

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

Source: ASEAN Practitioner Guidelines, Part 1, C2.

Victims of trafficking in persons shall be considered victims, not violators or offenders of the immigration law. Therefore, ... victims of trafficking in persons shall 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.

Source: Thailand – Myanmar MOU, Article 8.

Trafficked persons [trafficked women and children] shall be considered victims, not violators or offenders of the immigration law. Therefore, ... trafficked persons [trafficked women and children] shall not be prosecuted for illegal entry into the country.

Source: Thailand – Cambodia MOU, Article 6; Thailand – Viet Nam MOU, Article 6.

The abovementioned MOU between **Cambodia** and **Thailand** establishes that trafficked women and children shall not be prosecuted for illegal entry.¹³¹ The 2008 MOU between **Thailand** and **Viet Nam** contains similar provisions. The 2005 MOU between **Cambodia** and **Viet Nam** specifies that trafficked women and children shall not be charged and prosecuted for prostitution, in addition to illegal entry. The 2009 MOU between **Myanmar** and **Thailand** states that victims of trafficking including men, women and children shall not be prosecuted “for illegal entry to or exit from the country, and for any other offences arising as a direct consequence of trafficking in persons.” It also advises the implementation of child sensitive procedures throughout protection, judicial proceedings and the repatriation process.¹³² Other MOUs do not provide specific direction on non-detention or non-prosecution for status offenses although in general terms, all call for the humane treatment of victims of trafficking throughout the protection, repatriation and judicial process which prevents further victimization, stigmatization or traumatization of the victim.

¹³¹Royal Thai Government *Significant Efforts to Eliminate Trafficking in Persons 2014*, pg. 122.

¹³²MOU on Cooperation to Combat Trafficking in Persons, Especially Women and Children (2009), Article 8.

6.2: Victims' Protection from Detention in the Law, Policy and Practice of AMS

The laws in several AMS establish or envision various forms of detention/custody for victims of trafficking, usually in shelters. This is reflected in bilateral agreements reached between Member States. For example, as noted above, the **Thailand-Cambodia** MOU and the **Thailand-Viet Nam** MOU both state that while trafficked persons/trafficked women and children “shall not be detained in any immigration centre” prior to their repatriation, they should be placed under the care of the relevant social service ministries responsible for providing shelter and protection according to national policy.¹³³ The **Thailand-Myanmar** MOU extends the prohibition on immigration centre detention to include law enforcement detention facilities while retaining the provision requiring victims to be placed under the care of relevant social service agencies.¹³⁴

While **Brunei Darussalam** TIP law does not refer to shelters or detention, under the *Women and Girls Protection Act*, women and girls who may be considered in “moral danger” or who are believed to have been ill-treated and in need of protection may be detained in a “place of safety”. The Act also authorizes the competent authority to make rules for the care, detention, maintenance, and education of women and children detained. There has been no reported occasion when this provision of the act has been used. Under the *Children and Young Persons Act*, victims under 18 years of age can be sheltered in a welfare home for their own safety and well-being.

Lao PDR's *Law on Development and Protection of Women* affirms the right of (women and child) victims of trafficking “not to be prosecuted and detained on any charge of trafficking in women and children, prostitution, [or] illegal immigration”.¹³⁵ The law does not specify whether victims could be detained for other reasons. The new TIP law extends that protection to all victims of trafficking. The Government reports that the current practice is to keep returned victims in shelters for seven days in order to enable health checks to be done and assistance to be provided.

According to **Singapore's** *Prevention of Human Trafficking Act 2014*, assistance may be provided to a trafficked victim including temporary shelter and counselling services. Under the *Women's Charter* any woman or girl may, on her own application, be received into a place of safety if it is assessed that she is in urgent need of refuge. Under the same law, any woman or girl whom the Director of Social Welfare believes to have been ill-treated and is in need of protection, or whom the Director considers to be in moral danger or in other extenuating circumstances, may be detained in a place of safety until an inquiry has been held as to the circumstances of her case. The *Women's Charter* provides that the woman or girl shall not be detained except for the purposes of an inquiry, and after necessary arrangements have been made for her welfare, or after she attains the age of 21 or marries. A decision to detain can be subject to an appeal and independent review. A discharge committee appointed by the Minister reviews all the cases of all women and girls detained when they have been

detained for six months, and may recommend discharge or release on licence. If the woman or girl breaches her licence, she is brought back before the Director and may

¹³³*Thailand – Cambodia MOU*, Article 6; *Thailand – Viet Nam MOU*, Article 6. For generally equivalent provisions see *Thailand-Myanmar MOU* at Article 8.

¹³⁴*Thailand-Myanmar MOU*, Article 8.

¹³⁵*Law on Protection and Development of Women and Children (2004)*, Article 25.

be detained for a further period.

In **Malaysia**, the relevant law empowers authorities to take into temporary custody any person on reasonable suspicion that he is a trafficked person and produce him before a Magistrate within 24 hours for the purpose of obtaining an interim protection order. The interim protection order allows the person taken into temporary custody to be surrendered to a Protection Officer and placed at a refuge for a period of 21 days for the purpose of carrying out an investigation and enquiry.¹³⁶ A subsequent clause suggests that the purpose of the refuge is to provide care and protection.¹³⁷ A 2015 Amendment to the TIP law significantly shortens the period of time that a trafficked person who is a Malaysian national may be placed in a place of refuge from two years to three months. The period of time that non-nationals may be detained remains at three months. The amendment also provides that trafficked persons, including foreign nationals, *may* be granted permission to “move freely or to be employed, engaged or contracted with to carry out work in any occupation during the period of the interim protection order or Protection Order.”¹³⁸ However there is no obligation on the State in this regard. It has been suggested that the concept of placing the person into the refuge by order of a Magistrate implies that it is forced and compulsory custody rather than refuge.¹³⁹ This interpretation is bolstered by a further clause in the law, unchanged by the recent amendments, making provision for any person escaping from the place of refuge to be returned and punished.¹⁴⁰

Thailand’s Anti-Trafficking in Persons Act (2008) and the Amendments (No.2) (2015) empower authorities to take a person reasonably suspected of having been trafficked into temporary custody for a period not exceeding 24 hours (exceptionally extended to seven days) and not in a detention cell or prison.¹⁴¹ It appears that the consent of the person is not required for this temporary custody. However, a subsequent section of the same law appears to authorize indeterminate detention, providing that a trafficked person *may be placed in the care of a primary shelter or other government or private welfare centers*.¹⁴² While the law states that the opinion of the trafficked person is to be sought in connection with the right to receive protection, it is unclear what weight is given to the opinion of the trafficked person and whether this extends to the right to refuse protection.¹⁴³ The Immigration Bureau of Thailand reports having a strict policy in place to interview migrants in immigration detention due to be deported in order to re-screen for victims of trafficking.¹⁴⁴

¹³⁶ *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* (Malaysia), Clause 44; 2015 Amendment of section 44.

¹³⁷ *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007* (Malaysia), Clause 51(3)(a).

¹³⁸ *Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Act 2015* (Malaysia), new section 51A.

¹³⁹ *UNIAP study* pp 31-32.

¹⁴⁰ *Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Act 2015* (Malaysia), new section 51A.

¹⁴¹ *2008 Anti-Trafficking in Persons Act (Thailand)*, Section 29.

¹⁴² *2008 Anti-Trafficking in Persons Act (Thailand)*, Section 33.

¹⁴³ See *UNIAP Study*, p. 33

¹⁴⁴ *Royal Thai Government’s Significant Efforts to Eliminate Human Trafficking in 2014*, p. 143.

The TIP laws and policies of other AMS do not make reference to detention of victims. In the **Philippines**, the *Guidelines on the Protection of the Rights of Trafficked Women* appear to only proscribe detention in particular facilities or at particular stages. For example, prior to identification, “trafficked women should not be detained or held in immigration detention facility or other forms of custody depriving them of their liberty”. The guidelines further provide that trafficked women should not be held in immigration/ police detention centers, military camps or in the private custody of law enforcers/ health/social welfare personnel before transfer to an authorized shelter. **Indonesia’s Immigration Law No. 6 of 2011** and *Government Regulation no. 31 of 2013* refer to victims being given temporary shelter prior to repatriation but do not specify the nature of the shelter and whether victims are able to leave if they wish. **Cambodia’s** non-binding *Agreement on Guidelines for Practices and Cooperation between the Relevant Government Institutions and Victim Support Agencies in Cases of Human Trafficking* makes extensive reference to shelters, detailing the conditions that are to apply to shelters that accommodate victims of trafficking. The *Guidelines* affirm that: “a victim who stays at the shelter shall have given his/her prior consent or that of his/ her guardian to remain at the shelter as well as having obtained the prior approval of the shelter.”¹⁴⁵ **Viet Nam’s Decree on the Identification and Protection of Trafficked Victims** – which guides implementation of its TIP law - states very clearly that identified victims have the right to refuse protection. However, should a victim refuse, he or she is responsible for their own safety.¹⁴⁶

While information on AMS *practice* pertaining to victim detention/custody is not readily available, it is clear that custody of victims in shelters continues to be a routine practice in several AMS including but not limited to **Malaysia, Thailand** and the **Philippines**. In most cases, this custody is justified with regard to the need to protect victims from their exploiters; to conduct family tracing for purposes of safe repatriation; and to ensure victims’ safety as witnesses in criminal proceedings and that the integrity of the criminal case is preserved (e.g., by avoiding opportunities for witness intimidation). Authorities in one AMS that practices shelter detention expressed the view that restrictions of movement, especially towards foreign victims, are temporary measures aimed at promoting victim protection and welfare - and thereby in their safety and best interests. They also pointed out that shelter conditions are far better than those in other facilities (such as immigration detention). However, recent studies and reports document cases of victims of trafficking being misidentified as irregular migrants and held in immigration detention; of correctly identified victims of trafficking, including children, also being held in detention centres; of both adults and children being held in custody in shelters, often for extended periods of time. The report noted that prolonged, pre-repatriation detention can cause considerable anxiety, particularly as victims often want to see their families and start working again, and contribute to negative attitudes toward assistance providers.¹⁴⁷

¹⁴⁵Agreement on Guidelines for Practices and Cooperation between the Relevant Government Institutions and Victim Support Agencies In Cases of Human Trafficking, Article 63.

¹⁴⁶No. 62 Decree on Identification of Trafficked Victims and Safety Protection of Victims and Their Relatives (Viet Nam), Article 3.

¹⁴⁷*After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong Sub-region*, Surtees, R., Nexus Institute/UNIAP, 2013, p. 73.

Text Box 26: Gender and Sex-based Discrimination in the Detention of Victims of Trafficking

The practice of victim detention is often highly gendered - the overwhelming majority of trafficked persons detained in welfare shelters in the ASEAN region are female. One reason is that women and girls are more likely to be identified as victims of trafficking through official channels and therefore more likely to enter both formal and informal protection systems compared to men and boys. Male victims are more likely to be misidentified as illegal migrants, transferred to immigration detention facilities and eventually deported. Even when correctly identified as having been trafficked, adult males are often ineligible for public or private shelter and protection.

But the arguments used to justify victim detention, particularly shelter or welfare detention, are also highly gendered. A study of shelter detention in the ASEAN region confirmed that protection from further harm is one of the most commonly cited justifications for detaining trafficked persons against their will. Female victims of trafficking are widely considered to need this protection much more than their male counterparts. Females, both women and girls, are also perceived as being less competent to make decisions about their own safety.

Sources: *Commentary to the UN Trafficking Principles and Guidelines*, p. 136; Gallagher and Pearson (2008).

6.3: Victims' Protection from Prosecution for Status Offences Detention in the Law, Policy and Practice of AMS

The law in several AMS specifically provides that victims of trafficking shall not be prosecuted for criminal acts conducted while in the course of being trafficked. As shown in the text box below, the formulation of the protection varies from country to country. For example, as noted above, **Lao PDR's** relevant law affirms the right of (women and child) victims of trafficking "*Not to be prosecuted and detained on any charge of trafficking in women and children, prostitution, [or] illegal immigration*".¹⁴⁸ The **Philippines** protects trafficked persons from prosecution for "crimes directly related to the acts of trafficking", while **Indonesia** protects trafficked persons from punishment for *all illegal acts they are forced to commit*, thereby extending the protection to trafficking for forced criminality. However, application of this provision appears to be restricted to cases in which a conviction of the trafficker has been secured. **Malaysia's** extension of immunity from prosecution is restricted to immigration offences (illegal entry, illegal stay, and procurement or possession of fraudulent documents) while **Thailand's** provision extends further to include non-prosecution for involvement in prostitution and other unlawful acts as well as a full range of immigration offences.

The relevant laws of **Brunei Darussalam, Cambodia, Singapore** and **Viet Nam** do not provide protection for trafficked persons from prosecution for status offences. However, **Singapore** reports that, as a matter of policy, TIP victims will not be prosecuted for violations of employment and/or immigration laws, nor for any activity that they were involved in as a direct consequence of them being trafficked. **Brunei** also reported that victims of trafficking found to have committed certain offences have not been

¹⁴⁸Law on Protection and Development of Women and Children (2004), Article 25.

charged. Officials and victim support workers in **Cambodia** confirmed that no victim of trafficking has been prosecuted for status offences such as illegal entry or prostitution. However, they noted that foreign trafficking victims not correctly identified could be at risk of being charged with immigration offences. **Lao PDR's** 2015 TIP Law provides that victims shall be exempt from criminal liability and furthermore, shall not be held criminally or administratively liable for immigration offences.

A survey of practice in the region indicates that once a person is formally identified as having been trafficked, he or she is generally not prosecuted for status offences such as illegal work and illegal entry. This practice is affirmed by a case in **Indonesia**, which was reported during the country assessment, whereby foreign sex workers who declined to identify as victims of trafficking were subsequently moved out of a shelter facility into immigration detention and charged with immigration offences. There is not yet strong information available on whether persons who have been trafficked for criminal exploitation (such as drug smuggling or begging) are able to use their status as a victim of trafficking to avoid criminal charge and conviction. In at least one country surveyed (**Myanmar**), it appears that victims of trafficking found smuggling drugs, for example, would still be charged but their case may be considered differently by the Court due to their status as victims of trafficking. Similarly, victims of trafficking who are themselves involved in the trafficking of others may still be charged as an accomplice, for example.

Available information does however indicate that prosecution for status offences is still very common amongst trafficked persons who have not been formally identified as such, and are instead classified as irregular migrants and/or illegal workers. In the **Philippines**, for example, despite legislative protection against prosecution for status offences, some officials expressed concern that victims exploited in prostitution are sometimes treated as criminals and not offered support.

Text Box 27: Examples of Legislative Protection against Prosecution for Status Offences

Indonesia's TIP law provides that:

*A victim [who] commits criminal acts after being forced by the person convicted of the criminal act of human trafficking shall not be punished.*¹⁴⁹

The relevant **Malaysian** law has a section entitled “immunity from criminal prosecution”, under which the following provision can be found:

A trafficked person shall not be liable to criminal prosecution in respect of —

(a) his illegal entry into the receiving country;

(b) his period of unlawful residence in the receiving 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,

*Where such acts are the direct consequence of an act of trafficking in persons that is alleged to have been committed or was committed.*¹⁵⁰

Under a section entitled “legal protection of trafficked persons”, the TIP law of the **Philippines** provides that:

Trafficked persons shall be recognized as victims of the act or acts of trafficking and as such shall not be penalized for crimes directly related to the acts of trafficking enumerated in this Act or in obedience to the order made by the trafficker in relation thereto.

Thailand's Anti-Trafficking in Persons Act (2008) and the Amendments (No.2) (2015) provides that:

*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.*¹⁵¹

6.4: Non-prosecution and Non-detention - Issues for Consideration by AMS

The prosecution and detention of victims of trafficking remains commonplace throughout the ASEAN region despite improvements in law and policy. The following issues are relevant to this situation and to considerations of how it could be improved.

¹⁴⁹Law of the Republic of Indonesia Number 21 of Year 2007 on Eradication of the Criminal Act of Human Trafficking, Article 18.

¹⁵⁰Anti-Trafficking in Persons Act (Act 670) (2007) (Malaysia), Section 25.

¹⁵¹2008 Anti-Trafficking in Persons Act (Thailand), Section 41.

6.4.1. Victims Not Identified, Prosecuted for Immigration and Work Offences

Chapter 2 addressed the low levels of victim identification throughout the ASEAN region. This weakness directly contributes to the persistence of victim prosecution for status offences. While persons formally identified as victims of trafficking are less often prosecuted for status offences than was the case in the past, the prosecution of persons who have been trafficked (or may have been trafficked) for immigration and work offences offenses remains common throughout the region.

6.4.2. Victim Detention

Victim detention remains a problem throughout the region. Identification weaknesses suggest that victims of trafficking are hidden within the population of the region's immigration detention facilities. Once formally identified, it appears that victims are not placed in immigration detention – or will be removed from such facilities following a positive determination. However, in at least several AMS, persons identified as having been trafficked (typically women and children) are still subject to routine detention/ custody in shelters and welfare facilities.

Recommendations

- | | |
|------------|--|
| 6.1 | In accordance with the specific recommendations set out in Chapter 2, AMS may consider taking steps to improve the timely and accurate identification of victims of trafficking, taking particular care to ensure that identification procedures reach relevant populations, including irregular migrants and irregular migrant workers. Additionally, AMS may consider explicitly affirming that the principle of non-prosecution for status offences operates irrespective of whether a conviction for trafficking has been secured. |
| 6.2 | AMS may consider reviewing their national legal frameworks as well as their procedures in accordance with the requirements of the <i>ASEAN Convention against Trafficking in Persons</i> in ensuring that victims of trafficking are protected from all forms of detention, including detention in shelters or welfare facilities. In the case of child victims, the review should seek to ensure that children are only detained when this can be shown to be in their best interests and for the shortest possible period of time. |

CHAPTER 7:

RETURN AND REINTEGRATION OF VICTIMS

Key message: To the extent possible, the return of victims of trafficking should be voluntary and undertaken in accordance with clear procedures that protect safety and rights, including their right to remain during legal proceedings. Victims who wish to return home should not be prevented from doing so. To be lawful, non-voluntary return should not operate to violate any rights, including the right to a remedy and the right to protection from the risk of persecution. Alternatives to return should be available for humanitarian, safety or other reasons. The country of destination and the country of origin should coordinate to ensure safe return and that all returned victims of trafficking have access to reintegration assistance aimed at promoting their well-being and preventing re-trafficking.

ASEAN Convention against Trafficking in Persons Especially Women and Children **Provision**

Reintegration

Each Party shall make its best effort to assist in the reintegration of victims of trafficking in persons into the society of the sending party.

Article 14(11)

Each Party shall take into account, in applying the provisions of this Article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children.

Article 14(12)

Repatriation and return

1. *The Party of which a victim of trafficking in persons is a national or in which the person has the right of permanent residence at the time of entry into the territory of the receiving Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.*

2. *When a Party returns a victim in accordance with Article VII (1), such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking.*

3. *In accordance with Paragraphs 1 and 2 of this Article, at the request of a receiving Party, a requested Party shall without undue or unreasonable delay, verify whether a person is its national or permanent resident, whichever is applicable, at the time of entry into the territory of the receiving Party.*

4. *In order to facilitate the return of a victim of trafficking in persons who is without proper documentation, the Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving Party shall agree to issue, at the request of the receiving Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.*

5. *Each Party shall adopt such legislative or other measures as may be necessary to establish repatriation programmes where appropriate, and if necessary, involving relevant national or international institutions and non-governmental organisations.*

6. *This article shall be without prejudice to any rights afforded to victims of trafficking in persons by any domestic law of the receiving State.*

7. *This article shall be without prejudice to provisions of any applicable bilateral or multilateral agreement or immigration arrangements that provide for more favourable rights and privileges to victims of trafficking in persons.*

Article 15.

AMS commitments under the 2015 ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children

Victims in the criminal justice process

We, Member States of the ASEAN resolve to ...

f. Develop and utilise an appropriate procedure for the rescue, protection, recovery, repatriation, and reintegration of the victim into his or her family and community, in accordance with domestic laws, with particular attention to child victims.

Excerpted from Part IV.B.

Introduction

This chapter focuses on assistance to victims of trafficking with regard to their return to their country (or community) of origin and their reintegration back into the community. These two issues are at the heart of any discussion of a “rights-based approach” to assisting victims of trafficking because it is often at this point that victims are most vulnerable to further harm. In addition to facing arrest and detention, trafficked persons are routinely deported from countries of transit or destination whether they are identified or not. Deportation to the country of origin or to a third country can have serious consequences for victims: they may be subject to punishment from the authorities for unauthorized departure or other alleged offences; they may face social isolation or stigmatization and be rejected by their families and communities; they may be subjected to violence and intimidation from traffickers—particularly if they have cooperated with criminal justice agencies or owe money that cannot be repaid. For these reasons, victims who are forcibly repatriated, particularly without the benefit of supported reintegration, may be at significant risk of re-trafficking.

The chapter is divided into three sections. Section 7.1 briefly sets out the international legal standards relevant to safe return and reintegration assistance as well as applicable ASEAN standards. 7.2 contains an assessment of current laws and practices within the ASEAN region in these areas. 7.3 uses that information to identify issues for consideration by AMS in relation to assisting trafficked persons’ return and reintegration; to present several draft recommendations; and to flag areas requiring further research.

This chapter intersects with issues considered in other chapters. For example, unsafe repatriation is often a direct consequence of failures to identify trafficked persons correctly and in a timely manner (Chapter 2: Victim Identification and Referral). The detention of foreign victims of trafficking in shelters or other facilities (Chapter 6: No Detention or Prosecution of Victims for Status Offences) denies those persons their basic human rights to return to their country of nationality or citizenship. Premature return can compromise criminal justice proceedings and may deny victims their right to participate in the prosecution of their exploiters (Chapter 4: Victims in the Criminal Justice Process) or their right to access remedies (Chapter 5: Access to Remedies

Including Compensation). Victims' rights to assistance and protection (Chapter 3: Protection, Support and Recovery Assistance to Victims) can be similarly put at risk through premature return or inadequate reintegration assistance.

7.1: International and Regional Standards relevant to Victims' Return and Reintegration¹⁵²

7.1.1. Standards relevant to Return

International law supports a standard of "safe and preferably voluntary return" for trafficked persons, supplemented by important additional obligations on countries of destination and countries of origin respectively (see text box 28 below).

The obligation to provide *safe and preferably voluntary return* implies that the returning State will conduct an assessment of any risks to the trafficked persons whose return is being proposed. As discussed further below, risk assessment is especially important in the case of children. Risk assessments should preferably be undertaken on an individual basis and take into account the particular circumstances of each case. Factors that should contribute to a consideration of whether safe return is possible include:

- The way in which that person was trafficked (for example, did the trafficking take place with the complicit or involvement of public officials in the country of origin?);
- The extent to which the victim has cooperated in the prosecution of their exploiters;
- Whether or not the victim believe he or she owes money to traffickers;
- The victim's age and gender;
- The victim's family situation (including whether relatives were involved in her or his recruitment or exploitation); and,
- The capacity of the country of return to provide effective protection.

Text Box 28: Key International Legal Standards on Return of Trafficked Persons

*Trafficked persons are **protected from deportation** when there are reasonable grounds that this would constitute a risk for the person or his or her family.*

*The **safety of the trafficked person and their families**, including the risk of re-trafficking, is taken into account in any decision on repatriation.*

*The **return of a trafficked person is, where possible, voluntary and takes place with due regard for the rights, safety and dignity of the trafficked person and the status of legal proceedings.***

Sources: UN TIP Protocol, Article 8, Article 16; ASEAN Convention against Trafficking in Persons, Article 15; UN Trafficking Principles and Guidelines, Principle 11, Guidelines 4(6) and 16(2).

¹⁵²This section draws on A. Gallagher, *The International Law of Human Trafficking* (2010); OHCHR, Commentary to the United Nations Recommended Principles on Human Rights and Human Trafficking (2010) pp 175-182 and OHCHR, *Human Rights and Human Trafficking*, Fact Sheet No. 36 (2014). See also OSCE *Guiding Principles on Human Rights in the Return of Trafficked Persons* (2014).

“Safe return” refers to both the *process* and the *outcome* of a victim’s return. In relation to the process, the obligation to provide safe return requires the returning State to ensure that the manner in which the return is conducted does not violate the rights of trafficked persons, including their right to dignity. The standard further imposes an obligation on the returning State to individually assess and manage risks associated with return, including the different risks that arise due to a trafficked person’s age, gender or membership within a particular ethnic, religious, social or other group. “Safe return” also implies that a procedure is in place to *monitor* both the process and outcome of return in order to assess and ensure the safety of the trafficked person.

Text Box 29: Forced Return of Victims of Trafficking

Forced return can be dangerous and has been repeatedly linked to an increased risk of re-trafficking. Under international law, forced return is only permissible when it can be shown that the return is safe and does not interfere with the rights of the person being returned, including the right of access to a remedy and the right to be protected from re-trafficking and the risk of persecution.

Forced return is most likely to happen when the State of destination fails to identify victims of trafficking in the first place. Mass deportations of irregular migrants are a particular problem in this regard.

Within the ASEAN region, a number of bilateral agreements on trafficking have been concluded. These Agreements or MOUs all contain specific provisions on return to country of origin, which generally prohibit the deportation of victims of trafficking while requiring cooperation to ensure their rapid repatriation (see Good Practice text box in Section 7.2.1). Note that in some of these agreements, for example, the **Thailand-Viet Nam** MOU protections related to repatriation¹⁵³ apply only to women and children who have been identified as trafficked. This is the same formulation used in the 2003 MOU between **Cambodia** and **Thailand**. However, in the revised agreement concluded between Cambodia and Thailand in 2014, this was changed to “trafficking in persons”. It is expected that the **Thailand-Viet Nam** agreement will be similarly revised. International and regional standards also govern other aspects of return, as follows:

An entitlement to return - obligations of countries of origin: All victims of trafficking, children as well as adults, who are not residents of the country in which they find themselves, are entitled to return to their country of origin.¹⁵⁴ This right places an obligation on the part of the country of origin to *receive* its returning nationals or residents “*without undue or unreasonable delay*” and “*with due regard for the safety of that person*”.¹⁵⁵ In the case of trafficking, this likely involves the country of origin quickly conducting verification in order to determine whether the victim is a national or rightful permanent resident and, if so, ensuring that individual possesses the required papers to travel and re-enter its territory.

¹⁵³For example, *Thailand-Viet Nam MOU*, Article 15.

¹⁵⁴For a detailed examination of this aspect of return see A. Gallagher, *The International Law of Human Trafficking*, at pp. xx-xx.

¹⁵⁵*UN TIP Protocol*, Article 16.

An entitlement to return - obligations of countries of destination: The right to return also implies an obligation on the country of destination to *permit those victims who wish to return to do so* – again without undue or unreasonable delay. Detention of trafficked persons in shelters, prisons or immigration detention facilities, discussed in Chapter 6, is a clear violation of the right to return. Compelling victims to remain for the duration of lengthy criminal proceedings can also constitute an unlawful interference with the right of return.

No return when there is a risk of persecution: The return of trafficked persons is not permitted when there is a serious risk that she or he will be subject to persecution or abuse in the country of origin. This principle of *non-refoulement* is well established in international law and the importance of protecting this principle in the context of trafficked persons is also widely accepted.¹⁵⁶ Human rights treaty bodies and regional human rights courts have also confirmed that return of individuals who risk torture or cruel, inhuman or degrading treatment or punishment is contrary to international law.¹⁵⁷ The prohibition on return when there is a risk of persecution is usually understood with reference to risks of persecution that come from States and agencies or officials of the State. More recently, there has been some recognition that the prohibition might also apply in certain situations where the fear of persecution comes from non-State actors *and* the relevant State is unable to provide appropriate or effective protection. Such circumstances may well arise in the context of a trafficking case, where the State of origin is unable to offer protection against, for example, reprisals or re-trafficking by criminal groups. Victims of trafficking who are returned to situations of conflict are also in danger and their return should be considered in light of these rules.

Return does not compromise the right to a remedy: As noted above, international standards oblige countries of destination to conduct return “with due regard for ... the status of any related legal proceedings”.¹⁵⁸ It is therefore necessary to ensure that the return of trafficked persons does not jeopardize the initiation and/or successful completion of any legal proceedings involving or implicating the victim, including those related to compensation. As discussed further in Chapter 5, the presence of the trafficked person in the country in which remedies are being sought is often a practical – and sometimes a legal – requirement for that person to secure remedial action. In some countries, civil action to recover damages cannot commence until criminal proceedings have been concluded. Repatriation must take account of the victim’s right of access to remedies to avoid obstructing the free and effective exercise of that right. At the very least, there should be a deferral of return, accompanied by temporary Regularisation of legal status until the victim has been able to participate in the relevant legal proceedings.

Alternatives to return: In some cases, return of the victim to her or his country of origin, even in the longer term, will not be a good option due to ongoing risks to the victim’s safety and security, such as risks of retaliation or re-trafficking. It may also be due to humanitarian considerations that relate, for example, to the victim’s health or the support networks that she or he has established in the destination country.

¹⁵⁶See further UNHCR. *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked* (2007).

¹⁵⁷See further, A. Gallagher and F. David, *The International Law of Migrant Smuggling* (2014) at pp xx-xx.

¹⁵⁸UN TIP Protocol, Article 16.

While the *UN TIP Protocol* does not address this issue directly, other legal and policy instruments, by recognizing the possibility of temporary visas and even permanent residency, envisage circumstances in which it may be appropriate to allow a trafficked person to remain in the country of destination.¹⁵⁹ Legal obligations of AMS in this regard will depend on the specific situation. For example, States may be required to provide alternatives to repatriation in situations where return would pose unacceptable risks to the safety of the victim and/or the victim's family.

Return of trafficked children: As in all other aspects of the trafficking response, international law imposes different and additional obligations on States with respect to children. For example, in relation to child victims of trafficking, local and third country integration may be appropriate options for a durable solution in cases where return to the country of origin is not in the child's best interests. This may be in cases where the child's family is determined to have been involved to some degree in their trafficking. The Committee on the Rights of the Child has affirmed that repatriation is not an option if it would lead to a "reasonable risk" that such return would result in the violation of fundamental human rights of the child.¹⁶⁰

The key considerations and standards relevant to the return of child victims of trafficking are set out in text box 30, below.

¹⁵⁹For example, the *European Trafficking Convention*

¹⁶⁰Committee on the Rights of the Child, General Comment No. 6, para. 84

Text Box 30: Key Standards on Return of Child Victims

In cases where the victim's age is uncertain and there are reasons to believe that the victim is a child, the **presumption shall be that the victim is a child**.

As soon as an **unaccompanied child** is identified as a victim, every effort must be made to **locate the family**, provided that this is considered to be in the best interests of the child.

All decisions taken with respect to a child victim, regardless of whether or not they are unaccompanied, must take the **child's best interests** as a primary consideration. Return to the country or place of origin shall only be arranged if return is deemed to be in the best interests of the child.

Relevant and necessary **considerations in a best interests determination** include: the safety and security of the child; the availability of care arrangements; the views of the child; the extent of the child's integration in the country of destination; the child's right to preserve her or his identity, including nationality, name and family relations; and the desirability of continuity in a child's upbringing. Non-rights-based arguments, such as those relating to general migration control, cannot override best interests considerations. Child victims who are not nationals/residents of the country in which they find themselves have the **right to return** to their country or place of origin, as do their parents.

The return of a trafficked child should be **coordinated in advance** between the authorities of the returning country/place and the authorities of the country/place of the child's origin. Return should only be considered when **safe family reunification** can be ensured and that further separation from family members is not determined to be in the best interests of the child due to the involvement of the child's family members in her/his trafficking, for example.

Every stage of the return process must be conducted in a **safe, child-appropriate and gender-sensitive manner**. States should ensure the provision of specialized needs-tailored training for officials working with children, including separated and unaccompanied children, as well as training on dealing with cases of trafficking in children.

These special protection measures also apply to the **children of trafficked persons**.

Adapted from: OSCE Guiding Principles on Human Rights in the Return of Trafficked Persons (2014)

7.1.2. Standards relevant to Reintegration of Trafficked Persons

In this context, the term "reintegration" refers to the process of recovery, and economic and social inclusion following a trafficking experience. This process can take place after a person has returned to their home country and home community. However, if the trafficked person stays in the country of destination or goes to a third country or a new place in their country of origin then that same process is better described as "integration". Note however that in accordance with established terminology, "reintegration" is used in this chapter to refer to both situations.

Supported reintegration is a critical aspect of safe return. Studies have shown that victims of trafficking who are provided with reintegration assistance are much less likely to be re-trafficked – and conversely, those who are forcibly returned without support are at a much higher risk of subsequent exploitation.¹⁶¹ Returned victims of trafficking who have access to reintegration support may also - depending on the nature and quality of support provided - be less vulnerable to intimidation, retaliation, social isolation and stigmatization. Supported reintegration is a right owed to trafficked persons by virtue of their status as victims of crime and human rights violations. It must be accompanied by respect for the repatriated individuals' rights, including their right to privacy and the right not to be discriminated against.

COMPREHENSIVE (RE)INTEGRATION SERVICES

- **Accommodation:** safe, secure and affordable housing options
- **Medical and psychological assistance:** including emergency and longer-term care options
- **Education and professional/vocational training:** formal education, re-enrolment programmes, information education, life skills, vocational training
- **Economic opportunities:** job placement, micro/small business development (including loans/grants), income generating activities.
- **Legal and administrative assistance:** accessing state services, involvement in civil procedures, document processing
- **Food, clothing and financial assistance**
- **Support with legal proceedings:** including advice in criminal and civil procedures, support for victims/witnesses and assistance with victim compensation claims
- **Family mediation, counselling and support:** Counseling with family members to address tensions and conflicts, provision of guidance on skills for childcare
- **Assistance to secondary beneficiaries** (e.g. victim's children, siblings, parents)
- **Case management:** including monitoring and follow-up

Source: After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong Sub-region, Surtees, R., Nexus Institute/UNIAP, 2013, p. 41.

While the *UN TIP Protocol* does not refer explicitly to reintegration, the *ASEAN Convention against Trafficking in Persons* requires each State Party “to make its best effort” to assist in reintegration.¹⁶² The *UN Trafficking Principles and Guidelines* endorse **supported repatriation** when such repatriation is safe and preferably voluntary and, in the case of children, in that child's best interests. They request States and others to ensure, in partnership with NGOs, that:

*Persons who do return to their country of origin are provided with the assistance and support necessary to ensure their well-being, facilitate their social reintegration and prevent re-trafficking. Measures should also be taken to ensure the provision of appropriate physical and psychological health care, housing and educational and employment services for returning victims of trafficking.*¹⁶³

¹⁶¹See, for example, IOM, *The Causes and Consequences of Re-Trafficking: Evidence from the IOM Human Trafficking Database* (Geneva: IOM, 2010) and IOM, *Evaluation of the Effectiveness of Measures for the Integration of Trafficked Persons* (Paris: IOM, 2013).

¹⁶²ASEAN Convention against Trafficking in Persons, Article 14(11).

¹⁶³*Principles and Guidelines*, Guideline 6.8.

Successful reintegration requires cooperation between repatriating and receiving countries. The importance of cooperation between countries in supported repatriation of victims of trafficking is recognized in key international and regional policy documents.¹⁶⁴

Text Box 31: Gender Sensitive Guidelines for Handling of Women Victims of Trafficking in Persons

A comprehensive programme in the country of origin should be established that will ensure adequate recovery and reintegration services be provided to trafficked persons. Utilizing a multi-sectoral approach, the programme should deliver a complete package of services that will enhance the psychological, physical health, social and economic needs of the victims, as well as, raise awareness to prevent the stigma and discrimination against trafficked persons who return home. Information sharing should be undertaken within the ASEAN cooperation framework.

Source: *Gender Sensitive Guidelines*, 3.7.1.

On a practical level, implementation of obligations with regard to victims' return and reintegration requires that certain procedures and mechanisms are in place. Pre-departure risk assessment, an essential element of safe return, is an important element of any successful reintegration plan. An adequate and appropriate reintegration plan should reflect the victim's individual needs and should be tailored to the family and community environment to which she or he is returning. Critically, the country receiving the returned victims must have the capacity to deliver adequate assistance and support. Lastly, planning for reintegration requires cooperation between the receiving country and the returning country to ensure continuity of assistance and protection to the victim.

As with arranging safe return, there are also special considerations for handling the reintegration of child victims of trafficking, outlined in text box 32, below.

¹⁶⁴See for example *UNICEF Guidelines*, Guideline 3.8.3; *COMMIT MOU*, para. 21.

Text Box 32: UNICEF Guidelines on Reintegration of Child Victims

- In the country or place of origin, child victims shall have a guardian and are entitled to access long-term care and protection including security, food, accommodation in a safe place, access to healthcare, psychosocial support, legal assistance, social services and education with a view to their social reintegration.
- Authorities in the country or place of origin shall not be informed of the status of the child as a victim of trafficking without the explicit consent of the child, where appropriate, or their guardian.
- Authentic and accurate information shall be provided to the child’s guardian about appropriate contact information and telephone numbers of NGOs, lawyers, and social welfare agencies that can assist in the country or region of origin.
- Additional appropriate assistance shall be provided to children with specific needs, particularly in case of disability, psychosocial distress, illness or pregnancy.
- Child victims are to be cared for by professionals who are appropriately trained, including on gender issues and related needs. Such care shall be provided in cooperation with relevant international and non-governmental organizations.
- Social service authorities, in collaboration with the guardian, shall conduct an individual needs assessment for each child victim in order to ensure appropriate and personalised care and avoid risks of re-victimization, stigma and marginalization.
- Social service authorities shall ensure that every child victim has a legal guardian and that an individual integration plan is elaborated for each child.

Source: *UNICEF Trafficking Guidelines*, Section 9.2.1.

7.2: Return and Reintegration of Victims in the Law, Policy and Practice of AMS

Table 4 – Does the Legal Framework Provide for Safe Return and Reintegration Support? (Yes/No)

	Safe Return	Reintegration Support	Note
Brunei Darussalam	N	N	The TIP law does not provide for the safe return and reintegration support for victims of trafficking.

Cambodia*	N	N	The <i>Law on Suppression of Human Trafficking and Sexual Exploitation</i> does not provide for safe return and reintegration support. However, the <i>Policy on the Protection of the Rights of Victims of Human Trafficking</i> addresses support for victims' return and reintegration in detail. Further, Cambodia has concluded MOUs with Thailand and Viet Nam indicating victims are not to be deported but have repatriation arranged and conducted in their best interests. Cambodia has also entered into agreements with other AMS to regulate aspects of the trafficking response, including reintegration and has developed guidelines around reintegration in the context of its regulation of shelters for victims of trafficking.
Indonesia	Y	Y	The TIP law provides for both the safe return and reintegration support for victims of trafficking.
Lao PDR*	Y	Y	The TIP law provides for both the safe return and reintegration support for victims of trafficking.
Malaysia	Y	N	The amended TIP law indicates immigration officials shall facilitate safe return of victims without unnecessary delay. However, it does not provide for reintegration support for victims who are so returned.
Myanmar*	Y	Y	The TIP law provides for both the safe return and reintegration support for victims of trafficking.
Philippines	Y	Y	The TIP law grants foreign nationals a stay of 59 days (renewable) to participate in proceedings before being returned. Standard Operation Procedure states police are to facilitate voluntary return.
Singapore	N	N	The TIP law does not have provisions for safe return and reintegration support for victims.
Thailand*	Y	Y	The TIP law provides for safe return and reintegration support for victims of trafficking.
Viet Nam*	Y	Y	The TIP law provides for safe return and reintegration support for victims of trafficking.

(*) – Indicates a signatory to the multilateral COMMIT and/or a bilateral MOU which commits them to ensuring cross-border cooperation in the safe return of trafficked persons, and facilitating the recovery and reintegration of trafficked persons.

7.2.1. AMS Return of Victims of Trafficking

AMS Legal and Policy Frameworks around Return

The TIP laws of all AMS except **Brunei Darussalam, Cambodia** and **Singapore** make specific reference to return of victims. **Singapore** reports that, as a matter of policy, it works with suitable partners both locally and in foreign jurisdictions to ensure that, when a victim is identified and returns home, the victim is properly rehabilitated and reintegrated, in order to prevent the victim from re-entering the trafficking cycle.

Cambodia has entered into several agreements with neighboring AMS to regulate aspects of the trafficking response, including return (see the Good Practice box below). **Brunei** and **Singapore** have not entered into any sub-regional or bilateral agreements.

Good Practice: Bilateral Standards on Return (Cambodia and Thailand)

- Persons, especially women and children, who have been identified as victims of trafficking shall not be deported.
- The parties are required to develop arrangements to facilitate the rapid identification and repatriation of victims.
- Responsible authorities in the repatriating country are required to use diplomatic channels to inform their counterparts in the country of origin of repatriation arrangements.
- A working group is to be set up by each party to arrange and implement repatriation; to provide security for victims in the repatriation process; and to endeavor to monitor and follow that process.
- Repatriation of trafficked persons, especially women and children, is to be arranged and conducted “*in their best interests with safety and dignity*”.

Source: Thailand – Cambodia MOU (2014), Articles 15 and 16.

The relevant legal provisions on return of several AMS are framed with reference to the right of victims to receive assistance in returning home. For example, **Indonesia’s** TIP law (at Article 51) affirms a right of victims “to receive medical and social rehabilitation, return assistance, and social reintegration from the government if such victim suffers physical and psychological hardship as a result of the criminal act of trafficking in persons.” The relevant authorities are obliged to provide such assistance within seven days of a claim being made by a victim or another person connected to the case.¹⁶⁵ An explanation attached to this provision affirms that: “the right to return assistance must be provided under the condition that the victim is indeed willing to return home, and that there is no greater risk awaiting the victim”.¹⁶⁶

Lao PDR’s *Law on Development and Protection of Women (2004)* affirms that a trafficked woman or a child has the right to receive suitable assistance in the form of repatriation. The law specifies that in cases of women/child Lao citizens trafficked and located abroad, those persons are to be repatriated and the relevant Lao embassy or consulate is *required to provide protection and necessary and urgent assistance for*

¹⁶⁵Law of the Republic of Indonesia No. 21 2007 on Eradication of the Criminal Act of Human Trafficking, Articles 51, 52.

¹⁶⁶Law of the Republic of Indonesia No. 21 2007 on Eradication of the Criminal Act of Human Trafficking, Elucidation of Article 51.

those victims, including protection in relation to their safety and welfare. In the case of foreign victims of trafficking located in Lao PDR, national authorities are required to coordinate their repatriation with the embassy or consulate of the victim's country.¹⁶⁷ The 2015 TIP Law grants all victims the right to a range of assistance measures including with regard to reintegration into family and society.

Malaysia's Anti-Trafficking in Persons Act (2007) and its 2015 Amendment addresses return in the context of foreign victims who are released from "a place of refuge" (see further, Chapter 6). Work and movement privileges may be granted to foreign nationals who are under protection orders but the State is under no obligation in this regard. Any other cases, foreign trafficked persons are to be placed in the custody of immigration officials to be returned to their country of origin.¹⁶⁸ Immigration officials are required to "take all necessary steps to facilitate the return of that trafficked person to his country of origin without unnecessary delay, with due regard for his safety." However, if it is determined by immigration officials that the victim of trafficking released from refuge detention "is in need of further care and protection", then a new order can be made returning that person to the place of refuge.¹⁶⁹

The **Myanmar** TIP law requires designated authorities to coordinate and cooperate with relevant governmental and non-governmental bodies for the repatriation of the trafficked victims. This involves both enquiring into family circumstances (presumably to avoid repatriation where there are risks to the victim) as well as arranging and carrying out the repatriation. Importantly, the law requires that Myanmar embassies abroad provide protection for trafficked Myanmar victims and coordinate repatriation. A further provision indicates that in the case of women, children and youth, victims are to be sent back to their parents or guardian, if considered to be in their best interests. The law also provides that in the case of Myanmar citizens or permanent residents trafficked abroad, the responsible embassy is required to provide them the necessary protection and coordinate their repatriation.¹⁷⁰

Republic Act 9208 (2003) of the **Philippines** (Section 25) assigns responsibility to specific government agencies for the repatriation of trafficked persons, regardless of whether they are documented or undocumented. The Act further provides that "if, however, the repatriation of the trafficked persons shall expose the victims to greater risks, the [Department of Foreign Affairs] shall make representation with the host government for the extension of appropriate residency permits and protection, as may be legally permissible in the host country."¹⁷¹

Thailand's Anti-Trafficking in Persons Act (2008) and the Amendments (No.2) (2015) requires the relevant authorities to consider providing assistance as appropriate to a trafficked person to return to the country of his or her original domicile. While the law does not stipulate compelled return, it does require relevant authorities to facilitate the repatriation of a trafficked foreign person without delay unless otherwise granted an official work permit by relevant Ministries. In repatriation, the security and welfare of such a person shall be taken into account Under Section 37, a trafficked person may

¹⁶⁷ *Law on Development and Protection of Women* (2004) Articles 25 and 28.

¹⁶⁸ *Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Act 2015* (Malaysia), Amendment of section 54.

¹⁶⁹ *Anti-Trafficking in Persons Act* (2007) (Malaysia), Article 54.

¹⁷⁰ *2005 Anti-Trafficking in Persons Law* (Myanmar), Sections 10, 14, 16, 19 and 20.

¹⁷¹ *Republic Act No. 9208* (Philippines), Section 25

temporarily get permission to stay and/or work in the Kingdom in accordance with the law. Thailand's TIP Law requires authorities to coordinate with their counterparts in the victim's country of origin "*to provide continuous safety protection for trafficked persons returning to their country of residence*". In cases concerning confirmed Thai nationals who are located in another country and wish to return home, the law requires relevant authorities to undertake that person's return to Thailand without delay, and to do so *with consideration to the safety and welfare of the person*.¹⁷²

Viet Nam's legal framework allows authorities to provide support to victims located within Viet Nam for travel expenses if they wish to return to their place of residence. It also indicates that authorities "shall notify a relative to receive child victims or assign a person to take the child victim to his/her place of residence." For Vietnamese victims abroad, the TIP law requires the overseas Vietnamese mission, consulate or other representative agency verify the victim's identity, grant travel documents and arrange their return. Upon return to Viet Nam, the Ministry of Public Security, Ministry of Foreign Affairs or Ministry of National Defense shall receive the victim; arrange food and travel expenses; and guide the victim in obtaining any needed medical, psychological, legal, education or vocational support.¹⁷³ Viet Nam has also entered into agreements with other AMS that address return assistance. For example, in its MOU with Thailand, both parties have agreed that: "women and children identified as victims of trafficking shall not be deported" and that their repatriation "shall be arranged and conducted in their best interests". The agreement further requires cooperation between the relevant authorities of both parties including the establishment of a focal point to coordinate the repatriation process.¹⁷⁴

AMS Practice around Return

There is limited data on AMS practice around return of victims of trafficking to their country or place of origin. However there is abundant evidence throughout the region of forced return of groups of irregular migrants, among whom are likely to be victims of trafficking. Such returns, when not accompanied by adequate screening for indicators of trafficking – and for a range of protection risks including the risk of persecution – violate the well-established international and regional human rights standards set out in Section 7.1 above.

Much of the available information specific to trafficking cases is based on victim reports that indicate both positive and negative experiences. Some victims reported receiving assistance from authorities to return home, but were not informed of other assistance options available to them. In other cases, victims were prevented from returning home: required to stay in shelters for long, often indeterminate periods of time, despite expressing their wish to leave. On this aspect further reference should be made to the case studies set out in Chapter 6.

Recent studies have documented positive experiences of safe and well-coordinated return. One example concerns a Thai man who was trafficked to Israel for forced labour. The victim was provided repatriation assistance by a local organization in

¹⁷²*Anti-Trafficking in Persons Act* (2008) (Thailand), Articles 33, 36, 38 and 39.

¹⁷³*2012 Law on Human Trafficking Prevention and Combat* (Viet Nam), Article 26.

¹⁷⁴*Thailand-Viet Nam MOU* (2008), Articles 15, 16.

Israel. Upon his return to **Thailand** the victim was met by service providers, who interviewed him about his experiences and his needs for further assistance. On that basis the victim was helped by a social worker to return home and subsequently provided seeds and equipment for farming.¹⁷⁵ The country assessment in **Indonesia** highlighted a 2015 case involving trafficked fishers from Myanmar. Coordination between Indonesian and Malaysian authorities resulted in rapid repatriation of the victims to Myanmar and arrangements for their subsequent return to Indonesia to testify against their exploiters. All expenses were borne by Indonesia. While this case study is encouraging it is important to acknowledge that, in all parts of the world, such examples of comprehensive and coordinated return and reintegration assistance remain the exception.

7.2.2. Reintegration of Victims of Trafficking

AMS Legal and Policy Frameworks around Reintegration

The TIP laws of most AMS make specific reference to the reintegration (or rehabilitation) of victims of trafficking. However there are some exceptions, specifically, the relevant laws of **Brunei Darussalam, Cambodia, Singapore** and **Malaysia** are silent on reintegration. **Singapore** reports that, as a matter of policy, the Government works with suitable partners both locally and in foreign jurisdictions to ensure that, when a victim is identified and returns home, the victim is properly rehabilitated and reintegrated, in order to prevent the victim from re-entering the trafficking cycle.

In some countries, especially those that are primarily points of origin for victims of trafficking, reintegration is generally presented as one purpose of the law's general provisions on assistance and support. For example, medical, education and social assistance provisions in the relevant **Myanmar** law are set out under a chapter entitled: "Repatriation, Reintegration and Rehabilitation".¹⁷⁶ The extensive and mandatory victim assistance and protection provisions of the **Philippines Anti-Trafficking in Persons Act** (see further Chapter 3) are aimed at "ensur[ing] recovery, rehabilitation and reintegration into the mainstream of society".¹⁷⁷ Recovery, rehabilitation and reintegration of victims into the mainstream of society are also specified as the policy of the Act.¹⁷⁸ **Thailand's Anti-Trafficking in Persons Act (2008) and the Amendments (No.2) (2015)** refer to "rehabilitation" in the context of victim protection provisions and in connection with potential grounds for regularizing the legal status of a foreign victim.¹⁷⁹ Note however that Thailand has entered into a number of bilateral agreements with other AMS that specify a range of actions required in connection with reintegration/rehabilitation (see the Good Practice box below for an example).

While **Cambodia's** TIP law is silent on reintegration, that country has entered into several agreements with other AMS to regulate aspects of the trafficking response, including reintegration. In addition, Cambodia has sought to develop guidelines around reintegration in the context of its regulation of shelters for victims of trafficking. The substance of those provisions is set out in text box 33 below.

¹⁷⁵ *After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong Sub-region*, Surtees, R., Nexus Institute/UNIAP, 2013

¹⁷⁶ *2005 Anti-Trafficking in Persons Law (Myanmar)*, Chapter VII.

¹⁷⁷ *Republic Act No. 9208 (Philippines)*, Section 23

¹⁷⁸ *Republic Act No. 9208 (Philippines)*, Section 2.

¹⁷⁹ *2008 Anti-Trafficking in Persons Act (Thailand)*, Sections 33, 37.

Text Box 33: Cambodian Guidelines on the Role of Shelters in Reintegration

Article 76

For the reintegration of the victim, the shelter shall [ensure the consent of the victim] and certify the activities of the victim during his/her stay in the shelter. In the case of a minor victim, the [shelter] shall specify the background information of the person who will have guardian authority of the victim later on, the place where the victim will live (village, commune) and the follow-up, monitoring and evaluation procedure. The shelter shall arrange the involvement of a parent or relative in the victim's rehabilitation and reintegration process whenever possible.

Article 77

For the reintegration of a victim with specific skills, the shelter should, if possible, facilitate or provide the opportunity for the victims to get a cash loan, which permits them to start up a small business, which will provide a livelihood. Such loans will be interest free and to be repaid gradually.

Article 78

After reintegrating a [Cambodian] victim, [the relevant Ministries] shall cooperate with [victim support agencies] and shelters ... to monitor, follow-up and evaluate the victim in order to prevent re-trafficking at least for the first half year after reintegration.

Source: *Agreement on Guidelines for Practices and Cooperation between the Relevant Government Institutions and Victim Support Agencies In Cases of Human Trafficking, Chapter 12.*

As noted above, **Indonesia's** TIP law affirms a right of victim assistance, including "social reintegration" from the government "if such victim suffers physical and psychological hardship as a result of the criminal act of trafficking in persons." That assistance is to be provided within seven days of a claim being made.¹⁸⁰

Lao PDR's *Law on Development and Protection of Women (2004)* explicitly affirms that women and child victims of trafficking have a right to be rehabilitated and to be reintegrated into society.¹⁸¹ The new Lao PDR TIP Law extends the right of assistance in reintegration to all victims of trafficking and clearly defines the steps of reintegration support (Article 50). A 2005 MOU between Lao PDR and Thailand specifies that both parties are to "undertake every measure to help the victims, especially women and children, to safely and efficiently reintegrate themselves into society and their families in order that their dignity, freedom and self-esteem are restored".¹⁸²

¹⁸⁰Law of the Republic of Indonesia No. 21 2007 on Eradication of the Criminal Act of Human Trafficking, Elucidation of Article 51.

¹⁸¹Law on Development and Protection of Women (2004), Article 25.

¹⁸²Thailand-Lao PDR MOU (2005).

Good Practice: Bilateral Standards on Reintegration

- Parties are to undertake measures to assist victims “**to reintegrate into their families and societies in a safe and timely manner, in order that their dignity, freedom and self-esteem be restored, and that each is empowered as a survivor**”;
- Victims shall not suffer re-victimization, stigmatization, discrimination or trauma during the process or ... repatriation and reintegration;
- Individualized reintegration programme to be developed to ensure the provision of age-, gender- and culturally-appropriate services that are responsive to victims’ needs;
- Returning victims to be provided with **social, medical, psychological and other necessary support**;
- Returning **child victims** are to be ensured appropriate educational opportunities.

Source: Thailand – Myanmar MOU on Cooperation to Combat Trafficking in Persons, Especially Women and Children (2009), Article 20.

- Parties are to make all possible efforts towards the “**safe and effective integration of victims of trafficking into their families and communities**”, where this is appropriate, “**in order to restore their dignity and well-being**”;
- Returning victims and their families are to be provided with **social, medical and psychological support**;
- Returning victims are not be **discriminated against or stigmatized** or suffer further in the reintegration process;
- Returning **child victims** are to be ensured appropriate educational opportunities;
- Special support is to be provided to pregnant women and those with a disability or suffering HIV/AIDS;
- Reintegration should be **gender sensitive** and be undertaken in the **best interests of the victim**.

Source: Thailand – Cambodia MOU on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking (2003), Article 18.

Viet Nam’s legal framework allows for medical and psychological assistance, legal aid, general education and vocational training and an initial difficulty allowance or support to obtain a loan for Vietnamese citizens and stateless persons permanently residing in Viet Nam.¹⁸³ Furthermore, it states that public social security establishments shall “assess victims’ ability to integrate into the community and providing information on support policies, regimes and services for victims in the community.”¹⁸⁴ Uniquely, the Vietnamese TIP law, in addition to criminalizing the act of trafficking in persons, also prohibits stigmatizing or discriminating against victims.¹⁸⁵ Viet Nam has also entered in agreements with other AMS concerning victims’ reintegration. For example, in its MOU with Thailand, both parties have agreed that they will make “all possible efforts towards the safe and effective reintegration of victims of trafficking into their families and communities in order to restore their dignity, freedom and self-esteem” and to take a number of concrete steps to that end, including ensuring that the reintegration

¹⁸³2012 Law on Human Trafficking Prevention and Combat (Viet Nam), Article 32.

¹⁸⁴2012 Law on Human Trafficking Prevention and Combat (Viet Nam), Article 40.

¹⁸⁵2012 Law on Human Trafficking Prevention and Combat (Viet Nam), Article 3.

process meets victims' needs and does not cause them further harm.¹⁸⁶

ASEAN Practice around Reintegration

Solid, verifiable information on ASEAN practice around reintegration is scarce. However, a recent study on reintegration of victims of trafficking in the Greater Mekong Sub-region provides valuable insight into the actual experiences of victims. The study relays both positive and negative reintegration experiences of trafficked persons in the region but, on the whole, confirms that many victims of trafficking are unassisted or severely under-assisted.¹⁸⁷ The main reasons for this were identified as follows:

- Victims are not identified as such;
- No services are available – abroad or at home;
- Services are not available for some types of victims (for example, men or victims of trafficking for forced/exploitative labour);
- Even when identified, trafficked persons are not being referred for assistance;
- Trafficked persons are not aware of available assistance;
- Trafficked persons are uncomfortable requesting assistance;
- Some victims accept their bad experiences as normal (as in “it’s normal for people like me”).

While some trafficked persons interviewed for that study reported receiving some assistance, many indicated it was not tailored to their individual needs, situations, interests or capacities. For example, they received training for a vocation that was not economically viable in their home community or there were not any assistance options that appealed to their interests. The primary reasons for ill-fitting assistance or “under-assistance” include the lack of individual needs assessment; inadequate time spent assessing needs; limited beneficiary participation; and limited communication between destination and origin countries.¹⁸⁸

Other issues include lack of resources and/or beneficiary follow-up, which can render basic or initial assistance unusable. For example, a Cambodian man received a field plough in-kind from an assistance organization. However, it was not the appropriate size for his rice fields and soon broke. He never received follow-up from the assistance organization to obtain support to fix it or receive a more suitable plough. In other cases, assistance was only available through shelters and not in the communities. Some victims were offered assistance for continuing their education or receiving vocational training, but it required them to stay in the shelter where the services were delivered, rather than at home with their families.¹⁸⁹

Trafficked persons interviewed for the study raised the need for comprehensive assistance that accounts for their family situation. Economic hardship is often what leads people to inadvertently enter into risky situations where they may be exploited. Once victims of trafficking are returned to their home community, they often have no job or wages to support themselves or their family. Addressing debts may also be

¹⁸⁶ *Thai-Viet Nam MOU (2008)*, Article 17.

¹⁸⁷ *After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong Sub-region*, R. Surtees, UNIAP / NEXUS, 2013

¹⁸⁸ *Ibid.*, p. 10.

¹⁸⁹ *Ibid.*, p. 109.

a pressing concern for returned victims. They may have mental or physical health conditions that put further strain on their finances. These factors can give rise to problems and tension within the family, effectively causing family members to become “secondary victims of trafficking.” Due to these pressures, victims of trafficking may feel compelled once again to migrate and/or enter into risky employment situations despite their prior trafficking experience.

The report highlighted the importance of ensuring that assistance is consensual: offers of assistance to victims should be ongoing and without pressure from service providers, even though victims may initially decline assistance. There are several reasons why victims may initially refuse assistance (trust issues, psychologically unprepared to make decisions, etc.). As discussed in Chapter 3, victims have endured challenging experiences that often have long-term mental and physical health consequences, requiring sensitive and appropriate handling. The country assessments conducted for this review confirmed some of these findings. For example, in Indonesia, a government scheme to help victims of trafficking start their own business has faltered because many victims have much more immediate financial needs, such as medical expenses or school fees.

Good Practice: Positive Reintegration Experiences at Destination and Origin

One Cambodian man trafficked to Malaysia for work aboard a fishing boat was initially arrested by police and charged with illegal migration. However, staff from the Cambodian embassy visited the prison and recognised him as a trafficking victim. The embassy worked alongside a Cambodian NGO to secure his release and arrange for his return. In Cambodia he was identified as a trafficking victim and given money to travel to his village. Shortly thereafter another assistance organisation visited him in his village and offered him different forms of assistance. He asked to be trained as a barber and they arranged for him to attend a training course in a nearby town. He then received some funds to buy barber tools and has since set up a barber shop in his home village. He is able to support himself with this job and enjoys the work.

One Laotian woman received comprehensive assistance after her return from Thailand where she was trafficked for sexual exploitation. She was accommodated in a shelter where she received a range of services. She received training to become a beautician, and after completion, was provided with a small grant to open her own salon. Her business is doing well and she is now able to support herself and send money home to help her parents.

One Vietnamese woman reported receiving comprehensive assistance from the Department of Labour, a social welfare agency and an anti-trafficking programme in Viet Nam which supported her with financial assistance, in-kind equipment and training to grow vegetables and rear livestock.

A Cambodian man trafficked to Thailand for forced labour in a factory was rescued by Thai-Cambodian police. After being screened and identified as a victim of trafficking, he was referred to a Thai shelter while a case was being opened against his trafficker. In the three months he was at the shelter, he was able to work and reported being treated with respect and dignity by the staff. He was escorted to the Cambodian border by embassy staff and given travel expenses to return to his village. Once home, he received additional financial assistance and pigs to raise in order to generate income. He was also able to obtain a job in construction.

Source: *After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong sub-region*, R. Surtees, UNIAP / NEXUS, 2013

7.3: Return and Reintegration - Issues for Consideration by AMS

Return and reintegration remain difficult issues for the ASEAN region. Because of weaknesses in identification procedures and practices, many people who may be victims of trafficking are summarily deported without the benefit of the protections outlined in Section 7.1 above. Furthermore, without being formally identified as victims of trafficking, these persons are also unable to receive reintegration assistance or support that could aid their recovery and prevent them from being re-trafficked.

With the exception of the first recommendation, which addresses legislative weaknesses, the following recommendations focus on practical and procedural obstacles that are currently preventing AMS from attaining the aforementioned standards of “safe and

preferably voluntary return” and needs-oriented reintegration that protects returning victims from further harm.

7.3.1. Inadequate Legislative Provision for Return and Reintegration

While the legal frameworks of some AMS make reference to return and reintegration, the relevant provisions are often overly broad and vague. For example, no AMS has explicitly affirmed the right of victims of trafficking to return. The obligation on the State to return victims safely, and to ensure that both the process and the outcome of return do not violate established rights, is also not well articulated. References to reintegration are similarly vague. The laws of some AMS, including several major countries of destination for victims of trafficking, are entirely silent on issues of return and reintegration.

7.3.2. Challenges in the Return Process

There is some evidence that throughout the region, the right of victims of trafficking to return home is not being upheld. The detention of victims in shelters (commonly in the country of destination but also reported in countries of origin) is a major contributing factor to this problem. In other situations, victims are being returned home without adequate support and/or without an appropriate risk assessment, including their risk of being re-trafficked.

7.3.3. Challenges in the Reintegration Process

Recent research has confirmed that the reintegration needs of many victims of trafficking are not sufficiently met due to flaws in the design and function of the reintegration response. Reintegration assistance across the region and within countries is highly variable and rarely robust enough to comprehensively support victims, particularly those with special needs (such as children, persons with mental and/or physical disabilities, people with chronic health conditions, illiteracy, etc.). Other more practical challenges that obstruct successful reintegration include lack of information and resources, weak referral systems, and administrative barriers.¹⁹⁰

7.3.4. The Need for Strong Bilateral Referral and Coordination Mechanisms

Return and reintegration of transnational victims of trafficking can never be the responsibility of a single ASEAN Member State. Cooperation and communication between countries of destination and countries of origin are essential for the safe return of victims and for their effective reintegration. While some progress has been made on this with several AMS entering into bilateral agreements, the implementation of existing referral and coordination mechanisms appear to be very weak.

¹⁹⁰ *After Trafficking: Experiences and Challenges in the (Re)integration of Trafficked Persons in the Greater Mekong sub-region*, R. Surtees, UNIAP / NEXUS 2013, p.233

Recommendations

7.1	AMS may consider reviewing their national legal frameworks to ensure that victims' rights in return are explicitly protected and that obligations of the State with regard to return and reintegration are made clear.
7.2	AMS may consider reviewing their return mechanisms, procedures and practices with a view to ensuring that the key principle of "safe and preferably voluntary return" is respected; that the practice of return does not violate established rights; and that child victims are provided additional protections in return appropriate to their needs and in accordance with the "best interests" principle.
7.3	AMS may wish to conduct a careful and detailed review of their reintegration mechanisms, procedures and practices to evaluate their effectiveness and identify ways in which they could be strengthened, including through capacity development of personnel and the provision of adequate financial resources. AMS already working in partnership on the return and reintegration of victims of trafficking should consider collaborating on such a review in order to improve the effectiveness of their joint efforts.

CHAPTER 8: PREVENTION OF TRAFFICKING

Key message: States have an obligation to work to prevent trafficking by addressing its underlying causes including the vulnerabilities that increase the risk of trafficking such as discrimination, conflict and violence; lack of opportunities for decent work; and failures to protect migrants, children and other vulnerable groups. A comprehensive approach to prevention also requires States address demand for the goods and services produced through trafficking and further, to confront the role that public sector corruption plays in trafficking and related exploitation.

ASEAN Convention against Trafficking in Persons Especially Women and Children Provisions (regarding prevention)

1. States Parties shall establish comprehensive policies, programmes and other measures:
 - (a) To prevent and combat trafficking in persons; and
 - (b) To protect victims of trafficking in persons, especially women and children, from re-victimization.
2. States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.
3. Policies, programmes and other measures established in accordance with this article shall, as appropriate, include cooperation with non-governmental organizations, other relevant organizations and other elements of civil society.
4. States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.
5. States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.

Article 11

ASEAN Convention against Trafficking in Persons Especially Women and Children Provisions (regarding corruption)

RECOGNISING that trafficking in persons is caused by a combination of factors, including government corruption, poverty, economic instability, inefficient legal systems, organised crimes, and the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking, which must be effectively addressed;

Criminalisation of Corruption

1. Each Party shall, in relation to offences covered by this Convention as provided in Article 3, adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
 - a. The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;
 - b. The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties
2. Each Party shall also consider establishing as criminal offences other forms of corruption.
3. Each Party shall also adopt such measures as may be necessary to establish as a criminal offence participation as an accomplice in an offence established in accordance with this Article.

Article 8

Law Enforcement and Prosecution

1. Each Party shall take effective and active steps to detect, deter and punish corruption, money laundering, participation in an organised criminal group and obstruction of justice that contributes to trafficking in persons

Article 16

AMS commitments under the 2015 ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children

Prevention of Trafficking in Persons

We, Member States of the ASEAN resolve to ...

a. Increase awareness campaigns to educate all levels of society on trafficking in persons and its linkage to violation of human rights, targeting those most at risk with effective involvement of mass media, relevant non-governmental organisations, private sectors, and community leaders;

b. Continue capacity building of law enforcement, immigration, education, social welfare, labour and other relevant officials in the prevention of trafficking in persons, taking into account the need to respect human rights, child and gender-sensitive issues, and encourage cooperation, where appropriate, with civil society, non-governmental organisations and other relevant organisations;

c. Put in place effective mechanisms and ensure their proper implementation to effectively prevent the movement of traffickers and victims of trafficking in persons through appropriate border control systems, issuance of identity papers and travel documents, and through measures that prevent counterfeiting, forgery or fraudulent use of identity papers and travel documents;

d. Enhance cross-border cooperation and sharing of intelligence and exchange of information to disrupt the operations of traffickers;

e. Adopt and implement appropriate labour laws or other mechanisms that promote and protect the interests and rights of workers to reduce their risk of being trafficked;

f. Adopt and ensure implementation of national action plans, where applicable, to identify and prioritise key policies and programmes aimed at preventing trafficking in persons, and strengthen the implementation and coordination and monitoring mechanisms of such plans;

g. Conduct or support research studies on relevant topics to be used by AMS in combatting trafficking in persons and collect suitable data to enable analysis and better understanding of the nature and extent of trafficking in persons both nationally and regionally;

h. Develop national data collection systems in relation to trafficking in persons and methods of exchange of such data between and among AMS with a view to developing a regional database for trafficking in persons;

i. Utilise existing regional guidelines as well as develop or strengthen national guidelines for the identification of victims of trafficking in persons, including applying appropriate and non-discriminatory measures that help to identify victims of trafficking in persons among groups who are more susceptible to trafficking. The early detection of possible cases of trafficking in persons will allow swift responses to deter and prevent trafficking in persons and minimise the exploitation of victims;

j. Increase and support prevention efforts in each ASEAN Member State by focusing on discouraging both the demand and supply that fosters the exploitation of persons, especially women and children, that leads to trafficking;

k. In the case of cross-border trafficking, to explore how the country of origin can implement intensive preventive measures in cooperation with the receiving country who can provide useful information gathered from the victim of trafficking; and

l. Strengthen prevention measures to discourage demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking, including to protect victims of trafficking in persons, especially women and children, from re-victimisation.

Part IV.A.

Introduction

This chapter examines ASEAN Member State commitments and responses to trafficking in persons that focus on prevention. In this context, prevention refers to *measures aimed at stopping future acts of trafficking from occurring*. This requires attention to the underlying causes of trafficking such as vulnerability triggered by poverty, lack of opportunity, discrimination or other factors; demand for the cheap goods and services produced by trafficking; and the corruption that facilitates exploitation and maintains impunity for traffickers.

The chapter is divided into three sections. Section 8.1 briefly sets out the international legal standards relevant to prevention of trafficking, as well as applicable ASEAN standards. 8.2 contains an assessment of current law and practice within the ASEAN region in the area of trafficking prevention. 8.3 draws on that information to identify issues for consideration by AMS; to present several draft recommendations; and to flag areas requiring further research.

It is important to note that “prevention” of trafficking cuts across many aspects of the trafficking response. Accordingly, the information presented and considered in this chapter intersects with several others. For example, protection and support to victims (Chapter 3: Protection, Support and Recovery Assistance to Victims) and their safe return and reintegration (Chapter 7: Return and Reintegration of Victims) can both help to prevent re-trafficking. An effective criminal justice response, made possible through the involvement of victims as witnesses (Chapter 4: Victims in the Criminal Justice Process), can operate as a strong disincentive to future trafficking.

8.1: International and Regional Standards relevant to Prevention of Trafficking¹⁹¹

As detailed in text box 34, international law requires States to take certain steps to prevent trafficking in persons. These obligations are affirmed and expanded by international policy instruments such as the *UN Principles and Guidelines on Human Rights and Human Trafficking* and regional policy instruments such as the *ACWC Guidelines*. Additional information on these standards is provided in the following sections, which consider prevention from the perspective of: (i) addressing vulnerability; (ii) addressing demand; and (iii) addressing public sector corruption and complicity

¹⁹¹This section draws on A. Gallagher, *The International Law of Human Trafficking* (2010); OHCHR, *Commentary to the United Nations Recommended Principles on Human Rights and Human Trafficking* (2010) ppxx-xx, and OHCHR, *Human Rights and Human Trafficking, Fact Sheet No. 36* (2014). See also OSCE *Guiding Principles on Human Rights in the Return of Trafficked Persons* (2014).

Text Box 34: General Prevention Obligations of the UN TIP Protocol and the ASEAN Convention against Trafficking in Persons Especially Women and Children

Both the *UN TIP Protocol* and the *ASEAN Convention against Trafficking in Persons* require States Parties to establish comprehensive policies, programmes and other measures to prevent and combat trafficking in persons. States Parties are further required to:

- Endeavour to undertake measures such as **research, research, information and mass media campaigns and social and economic initiatives** to prevent and combat trafficking in persons. (*Protocol*, Art. 9(2); *ASEAN Convention* Art. 11(2))
- **Cooperate with non-governmental organizations** and other elements of civil society on prevention policies and programmes. (*Protocol*, Art. 9(3); *ASEAN Convention* Art. 11(3))
- Take or strengthen measures, including through bilateral or multilateral cooperation, to **alleviate the factors that make persons, especially women and children, vulnerable to trafficking**, such as poverty, underdevelopment and lack of equal opportunity. (*Protocol*, Art. 9(4); *ASEAN Convention* Art. 11(4))
- Adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to **discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking**. (*Protocol*, Art. 9(5); *ASEAN Convention* Art. 11(5))

Source: *UN TIP Protocol*, Article 9; *ASEAN Convention against Trafficking in Persons*, Article 11

8.1.1. Prevention through Addressing Vulnerability

There are several factors that interlink - in a complex and not completely understood way - to sustain the exploitation that is associated with trafficking. One major factor is the vulnerability of an individual, a social group, a community or a society to trafficking due to poverty, inequality, discrimination, gender-based violence and other human rights violations. These conditions of economic deprivation and social hardship limit individual choice, allowing traffickers and exploiters to operate more easily.

Factors that shape vulnerability to trafficking tend to have different and disproportionate impact on groups already lacking power and status in society including women, children, migrants, and persons fleeing violence and conflict. International practice has demonstrated the importance of understanding the nature of particular vulnerabilities in order to ensure that responses are targeted, appropriate and effective. An example of a short-term, specific vulnerability is one caused by a lack of information about safe migration options and the dangers associated with trafficking. This vulnerability could be addressed through initiatives aimed at improving the information position of potential migrants, including those who could be trafficked. Poverty, discrimination and lack of access to safe, legal and non-exploitative migration options are much more

complex contributions to vulnerability which require long-term and more comprehensive approaches to their effective resolution.

International and regional standards acknowledge the complexities involved in the prevention of human trafficking. However they also recognize that States have an obligation to *act* - that failing to understand and respond to trafficking-related vulnerabilities will limit the effectiveness of other anti-trafficking measures. In addition, while there may be differences in what countries of origin and countries of destination are required to do to prevent trafficking, it is widely accepted that both have equally important roles to play.

The *UN TIP Protocol* requires States Parties to “take or strengthen measures...to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity”.¹⁹² Article 31 of the *Protocol’s* parent instrument, the *Organized Crime Convention*, also requires States to address the adverse social and economic conditions believed to contribute to the desire to migrate and hence, to the vulnerability of victims of trafficking.¹⁹³ Both treaties highlight the need for education and awareness-raising aimed at improving understanding of trafficking; mobilizing community support for action against trafficking and providing advice and warning to specific groups and individuals that may be at high risk of victimization.¹⁹⁴

¹⁹²*UN TIP Protocol*, Article 9(4).

¹⁹³*Organized Crime Convention*, Article 31(7). See also *Legislative Guide to the Organized Crime Convention and its Protocols*, above note 186, Part 2, para. 71.

¹⁹⁴*UN TIP Protocol*, Article 9(2), *Organized Crime Convention*, Article 31(5). See also *Legislative Guide to the Organized Crime Convention and its Protocols*, above note 186, Part 2, para. 71.

Text Box 35: Vulnerabilities related to Discrimination and Violence against Women

Vulnerability related to discrimination: Human rights treaties and the laws of AMS prohibit discrimination on a number of grounds including race, sex, language and religion. Discrimination can be linked to trafficking in a number of ways. It is no coincidence that those most likely to be trafficked (irregular migrants, stateless persons, non-citizens and asylum seekers, members of minority groups) are especially susceptible to discrimination and intolerance, based on their race, ethnicity, religion and other distinguishing factors. Some groups, such as migrant women and girls, are vulnerable to multiple discriminations. In addition to increasing individuals' risk of trafficking, discriminatory attitudes, perceptions and practices generally contribute to shaping and fueling the demand for trafficking.

Vulnerability related to violence against women: While trafficking can be a form of violence against women, violence directed against or primarily affecting women can also be a factor increasing vulnerability to trafficking. For example, women may take dangerous migration decisions in order to escape the consequences of gender discrimination, including family violence and lack of security. Women may also be more vulnerable than men to coercion and force at the recruitment stage, increasing their susceptibility to being trafficked in the first place. States can help reduce vulnerability to trafficking-related to discrimination and violence against women through a range of practical measures such as the provision of safe shelter for women experiencing violence including medical, psychological and legal facilities. Longer-term measures that seek to address the social, cultural and structural causes of violence are also important. These may include: reforming legislation that either discriminates against women or fails to address violence against women; ensuring the prompt investigation and prosecution of complaints related to violence against women; providing access to effective remedies for gender-based violence; and implementing education initiatives aimed at educating the public and relevant officials about violence against women.

Adapted from: *Commentary to the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking (2010)* and Office of the United Nations High Commissioner for Human Rights *Fact Sheet Number 36 – Human Rights and Human Trafficking*. See also A. Gallagher, *The International Law of Human Trafficking (2010)*, Chapter 8.

Other international instruments are relevant to determining the nature of States' obligation to prevent trafficking by addressing vulnerability. For example, as shown in text box 35, international human rights treaties - to which most (if not all AMS) are party - require States Parties to take specific actions to reduce discrimination and violence against women. By so doing, States are able to reduce the vulnerability of women to trafficking. Text box 36 confirms a similar link in relation to children. For example, effective implementation of the international legal obligation to ensure birth registration for all children (found in the UN *Convention on the Rights of the Child*) has been shown to reduce the vulnerability of children to exploitation through trafficking.

Text Box 36: Reducing the Vulnerability of Children to Trafficking

Actions to reduce the vulnerability of children to trafficking include:

- Ensuring that appropriate legal documentation (including for birth, citizenship and marriage) is in place and available;
- Tightening passport and visa regulations in relation to children, particularly unaccompanied minors and minors accompanied but not by an immediate family member;
- Improving children's access to educational opportunities and promoting school attendance, in particular by girls;
- Protecting children from violence, including family and sexual violence;
- Combating discrimination against girls;
- Raising public awareness of the unlawful nature and effects of child trafficking and exploitation.

Adapted from: *Commentary to the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2010), drawing on the United Nations Convention on the Rights of the Child and CRC General Comment No 6 (2005) *Treatment of Separated and Unaccompanied Children Outside their Country of Origin*

Within the ASEAN region, a number of multilateral and bilateral agreements contain specific provisions on prevention through addressing vulnerability to trafficking. For example, the 2004 *ASEAN Declaration against Trafficking in Persons Particularly Women and Children* acknowledges “that social, economic and other factors that cause people to migrate also make them vulnerable to trafficking in persons”. The *COMMIT MOU*, concluded between five AMS as well as China, contains a similar acknowledgement and also specified certain actions to be implemented to reduce such vulnerability (see further text box 37, below).

A number of bilateral MOUs on trafficking concluded between AMS also contain specific provisions on prevention through addressing vulnerability to trafficking. For example, the MOU between **Thailand** and **Cambodia** commits both parties to a range of measures aimed at increasing opportunities for employment and improving social services and other protections, with a view to reducing the vulnerabilities that lead to trafficking.¹⁹⁵ That same instrument also includes an important acknowledgement of the link between migration policies and vulnerability to trafficking.

¹⁹⁵*Thailand-Cambodia MOU*, Articles 4 and 5. See also *Thailand-Myanmar MOU* at Article 3; *Thailand and Lao PDR MOU* at Articles 4 and 5; and *Thailand-Viet Nam MOU* at Article 5.

Text Box 37: Regional Commitment to Prevent Trafficking by Reducing Vulnerability

Recognizing that:

- Poverty, lack of access to education, and inequalities, including lack of access to equal opportunity, make persons vulnerable to trafficking
- Trafficking is intensified by discriminatory attitudes, practices and policies based on gender, age, nationality, ethnicity and social grouping

Solemnly commit to the following actions:

- Adopting measures to reduce vulnerability including supporting poverty reduction programmes; increasing economic opportunities; ensuring access to quality education and skill training and providing necessary personal legal documentation including birth registration.
- Applying national labour laws to protect the rights of all workers based on the principles of non-discrimination and equality.

Source: Memorandum of Understanding on Cooperation against Trafficking in the Greater Mekong Sub-region, Preamble and Part IV

8.1.2. Prevention through Addressing Demand

It is widely recognized that trafficking largely serves a global market constantly seeking cheap, unregulated and exploitable labour – as well as the many goods and services that such labour can produce. It is this realization that has prompted calls for States and others to consider demand as part of the problem of trafficking and to acknowledge demand reduction as an important element of any comprehensive approach to prevention.

In the context of trafficking, the term “demand” can mean different things:

- *Employer demand* for cheap and exploitable labour – which can make the goods or services being produced more competitive and increase profits;
- *Consumer demand* for the cheaper goods or services produced or provided by trafficked persons; or,
- *Demand generated by exploiters* and others involved in the trafficking process such as recruiters, brokers, transporters and corrupt officials who rely on trafficking and victims of trafficking to generate income.

International law requires States take at least some measures to discourage the demand that fosters trafficking-related exploitation. For example, the *UN TIP Protocol* requires States Parties to “adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking”.¹⁹⁶ The *UN Trafficking Principles and Guidelines* explicitly state that “strategies aimed at preventing trafficking shall address demand as a root cause of trafficking”.¹⁹⁷ In seeking to prevent trafficking, States are advised to “analys[e] the factors that generate demand for exploitative

¹⁹⁶*UN TIP Protocol*. Article 9(5).

¹⁹⁷Principle 4

commercial sexual services and exploitative labour and taking strong legislative, policy and other measures to address these issues.”¹⁹⁸

Amongst AMS, five have concluded a multilateral agreement on cooperative action against trafficking that includes specific reference to addressing demand.¹⁹⁹ However, none of the bilateral MOUs on trafficking concluded between AMS (and between AMS and China) address the issue of demand. The following text box draws on international standards to isolate the elements of a human rights-based approach to addressing demand for trafficking and for the goods and services produced through trafficking.

Text Box 38: A Human Rights-based Approach to Addressing Demand

Focus and Scope

- The obligation to address demand rests primarily with the country within which the exploitation takes place because it is within these countries that both consumer and employer demand is principally generated.
- The links between demand and supply noted above also imply certain obligations on countries of origin.
- Demand reduction required under international law is not restricted to demand for exploitative sexual services but encompasses demand for the full range of exploitative practices identified in the international definition of trafficking.
- States are not precluded by international law from regulating prostitution as they consider appropriate subject, of course, to their obligation to protect and promote the human rights of all persons within their jurisdiction.

Demand and Discrimination

- Demand in the context of trafficking is often shaped by discriminatory attitudes (including cultural attitudes) and beliefs. Women may be preferred for certain forms of exploitation because they are perceived as weak and less likely to assert themselves or claim the rights to which they are entitled. Certain ethnic or racial groups may be targeted for trafficking-related exploitation on the basis of racist or culturally discriminatory assumptions relating to, for example, their sexuality, servility or work capacities.
- Demand for prostitution supplied through trafficking may reflect discriminatory attitudes and beliefs based on both race and gender.
- Rights-based strategies to address demand should focus on addressing discriminatory attitudes and beliefs; particularly those directed against women and migrants.

¹⁹⁸Guideline 7.1.

¹⁹⁹For example, the *COMMIT MOU* which: “encourag[es] destination countries [within and outside the region] to effectively enforce national laws in order to reduce acceptance of exploitation of persons that fuels the continuing demand for the labour of trafficked persons”. Part IV.

The Role of the State

- States are able to shape demand for the goods and services produced by trafficking through laws and policies on a range of matters including immigration, employment, welfare and economic development. For example, failure to provide legislative protection to certain individuals such as domestic workers, “entertainers”, or migrant workers creates an environment that encourages demand.
- Laws and policies that institutionalize discrimination can also shape demand as can a failure on the part of the State to effectively challenge discriminatory social attitudes, practices and beliefs.
- A failure on the part of the State to effectively investigate, prosecute and punish trafficking and related exploitation can contribute to demand generated by traffickers and exploiters by maintaining trafficking as a low-risk, high-profit crime.
- State failure to protect the rights of certain persons including women, children, and migrants can further contribute to constructing demand by exacerbating vulnerability, and thereby, exploitability.
- Poor or inadequately implemented labour standards are a major incentive for trafficking.

The Importance of Labour Protection

- Poor or inadequately enforced labour standards in countries of destination sustain a demand for trafficked labour. Demand for trafficked persons’ labour or services is absent or markedly less where workers are organized and where labour standards regarding wages, working hours and conditions, and health and safety are monitored and enforced.
- Rights-based strategies to address demand for cheap and controllable labour should therefore aim to secure adequate labour protection, including through properly monitored regulatory frameworks, for all persons including migrants and those working in the informal economy.
- Non-violation of established rights
- Human rights-based strategies to address trafficking-related demand must not compromise established rights, in particular, the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum seekers.

Adapted from: *Commentary to the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking (2010)* and reproduced in OHCHR, *Fact Sheet No. 35: Human Rights and Human Trafficking (2012)*

8.1.3. Prevention through Addressing Corruption associated with Trafficking

In many situations of trafficking, particularly those that are widespread and serious, there will be some level of direct or indirect involvement of public officials. Direct involvement refers to situations whereby public officials are part of the trafficking process - for example, as recruiters, brokers or exploiters. There are also many types of less direct official involvement, such as:

- Border officials accepting bribes or inducements to permit the passage of persons who may be trafficked;
- Officials who facilitate the issuance of falsified identification and/or travel-related documentation;
- Law enforcement officials accepting favours in exchange for protection from investigation or prosecution;
- Labour inspectorates or health and safety officials accepting bribes to certify dangerous or illegal workplaces;
- Law enforcement or other public officials maintaining commercial interests in businesses using the services of trafficked persons, such as brothels; and
- Criminal justice officials, including prosecutors and judges, accepting bribes to dispose of trafficking cases in a particular way.

Public sector complicity in trafficking, whether direct or indirect, undermines confidence in the rule of law and the fair operation of the criminal justice process. It fuels demand for illegal markets such as trafficking and facilitates the efforts of organized criminal groups to obstruct justice; exacerbates victim vulnerability; and renders almost impossible the full discharge of a State's obligation to investigate and prosecute trafficking cases with due diligence.

The UN *Organized Crime Convention* (the parent instrument of the *UN TIP Protocol*) acknowledges the strong link between corruption and organized criminal activities such as trafficking. It requires States to take strong measures to criminalise all forms of corrupt practices and ensure their laws are harmonized so as to facilitate cooperation. States Parties are required to adopt measures designed to promote integrity and to prevent and punish corruption of public officials. They must also take measures to ensure effective action by domestic authorities in the prevention, detection and punishment of corruption of public officials including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions.²⁰⁰ The provisions of this *Convention* affirm the more specific obligations of the *UN Convention Against Corruption* – to which all AMS are Party.

The *ASEAN Convention against Trafficking in Persons Especially Women and Children* directly addresses the issue of trafficking-related corruption, requiring States Parties to take a range of measures aimed at identifying, responding to and preventing such corruption.

²⁰⁰*Organised Crime Convention* (complete citation with relevant article #s)

8.2: Prevention of Trafficking in the Law, Policy and Practice in the ASEAN Region

Over the past decade, all AMS have taken steps to prevent trafficking in persons occurring within their territory or against their nationals. The principal focus has been on providing additional protection, information and support to groups considered to be particularly vulnerable. Some steps have also been taken to address the demand for trafficking. However, prevention of trafficking by addressing corruption has received much less attention. Additional detail is provided below.

8.2.1. Prevention in AMS Laws and Policies

The TIP laws of most AMS do not contain specific provisions on prevention of trafficking through addressing vulnerability. For example, the relevant laws of **Brunei Darussalam, Cambodia, Malaysia, and Myanmar** make no substantive reference to prevention in this or any other context. **Singapore's** TIP law is titled "Prevention of Human Trafficking Act" but does not contain any provisions directly related to prevention.²⁰¹ **Thailand's** TIP law makes repeated reference to "prevention and suppression" of trafficking in persons but also contains no specific provisions on prevention. The Thai law does however require relevant officials to exercise power and perform duties for the purpose of suppressing the offences and preventing future cases. The TIP law of the **Philippines** indicates that funds raised through the confiscation of traffickers' assets may be used for prevention activities and requires programmes to be established for, amongst other purposes, preventing trafficking.²⁰² The Philippines TIP law also states that the relevant Government institution is to institute information and prevention campaigns against trafficking in persons.²⁰³ As shown in the Good Practice text box below, **Indonesia's** legal framework specifically obliges the Government and the wider Indonesian community to take action to prevent trafficking. However, no detail is provided on how such prevention could or should occur.

Good Practice: A Legal Obligation to Prevent Trafficking

The Government, Regional Governments, the community, and families, have the obligation to prevent the criminal act of trafficking in persons.

The Government and Regional Governments have the obligation to formulate policies, programmes [and] actions and to allocate budgets to prevent and address trafficking in persons.

Source: Law Of The Republic Of Indonesia on the Eradication Of Trafficking In Persons, Art. 57

²⁰¹Note that the Singapore Inter-Agency Taskforce on Trafficking in Persons formulates and coordinates national policies and programmes to prevent and combat human trafficking. The Government reports that initiatives to prevent the occurrence of TIP have included strengthened border controls and immigration checks, continued proactive enforcement and detection of cases, raised awareness among vulnerable groups and key stakeholders and enhanced communications and outreach to migrant workers.

²⁰²2003 Republic Act 9208 (Philippines), Sections 15 and 16.

²⁰³Expanded Anti-Trafficking in Persons Act of 2003 (Philippines).

Viet Nam's Law on the Prevention and Suppression of Human Trafficking (2011) contains an entire section (Chapter II) addressing prevention of trafficking. Chapter VI of the same instrument sets out responsibilities for prevention of trafficking among different state and civic entities. The Government's responsibilities as related to prevention include launching campaigns for communities to participate in crime prevention and detection; to incorporate human trafficking awareness and prevention into programmes on poverty reduction, vocational training, employment general, gender equality and child protection; and, international cooperation to support human trafficking prevention. Further preventative measures are listed in text box 40, below. The law also recognizes the importance of involving communities in prevention through information, communication and education, addressing both vulnerability to trafficking and the demand that leads to trafficking. The law recognizes vulnerabilities among certain groups, indicating a need to "increase information, communication and education for women, young people, teenagers, children, pupils, students and inhabitants of border, island, deep-lying and remote areas, areas of socio-economic difficulties and areas with lots of trafficking cases".²⁰⁴ Types of information related to trafficking, such as what actions to take in suspected cases of trafficking, and the ways in which it can be disseminated, such as mass media or cultural activities, are specified.

While AMS laws do not address the issue of public sector involvement in trafficking, some AMS have included provisions that may operate to prevent trafficking-related corruption. For example, **Indonesia's** TIP law criminalises obstruction of justice in trafficking cases²⁰⁵ and in the **Philippines**, trafficking committed by a military or law enforcement official is subject to additional penalty.²⁰⁶ **Thailand's** law imposes heavier penalties on persons using their official status or misusing their authority to commit trafficking offences.²⁰⁷ In addition, a number of AMS have enacted anti-corruption laws that could be used to prosecute officials' involvement and thereby deter trafficking-related corruption. However, to date there is no indication that such laws have been applied in the context of trafficking involving public officials.

Good Practice: Criminalizing Bribery and Corruption in Trafficking Cases

The *Anti-Trafficking in Persons Law* of **Myanmar** explicitly addresses the problem of bribery and other forms of corruption in the investigation, prosecution and adjudication of trafficking offences:

Any public official who demands or accepts money and property as gratification either for himself or another person in carrying out investigation, prosecution or adjudication of any [trafficking] offence shall, on conviction be punished with imprisonment for a term which may extend from a minimum of three years to a maximum of seven years and may also be liable to a fine.

Source: The Anti-Trafficking in Persons Law (2005), Article 30

Bilateral agreements concluded between AMS are generally more specific on the issue of prevention. An example provision, drawn from the MOU concluded between **Viet**

²⁰⁴Law on the Prevention of and Combat against Human Trafficking (2011) Article 7.

²⁰⁵Law of the Republic of Indonesia No. 21 2007 on Eradication of the Criminal Act of Human Trafficking, Article 22.

²⁰⁶2003 Republic Act 9208 (Philippines), Section 5(f).

²⁰⁷2008 Anti-Trafficking in Persons Act (Thailand), Article 12 ("whoever commits the offences under this Act by professing himself to be an official and exercising the functions of an official without being an official having the power to do so, shall be liable to twice the punishment stipulated for such offence.")

Nam and Cambodia (and applicable only to prevention of trafficking in women and children) is provided in the Good Practice text box, below. Similar provisions are found in the **Thailand-Viet Nam MOU**;²⁰⁸ the **Thailand-Cambodia MOU**;²⁰⁹ the **Thailand-Myanmar MOU**;²¹⁰ and the **Lao PDR-Thailand MOU**.²¹¹ These MOUs also operate to offer full protections and benefits to migrant workers.²¹² Similarly, **Malaysia-Indonesia** and **Malaysia-Philippines** MOUs provide some protections for domestic workers.²¹³

Good Practice: Bilateral Commitment to Preventing Trafficking

The Parties shall make the best effort to prevent trafficking in women and children through the following preventive measures:

- 1. Implement programmes of education and vocational training for women and children in order to increase the opportunity for education and employment and hence reduce vulnerability to trafficking*
- 2. Increase social services such as assistance in job searching and income generating and provision of medical care to women and children vulnerable to trafficking*
- 3. Enhance public understanding on the issue of trafficking in women and children*
- 4. Disseminate information to the public on the risks and consequences involved in trafficking of women and children and on the businesses that are exploitative to women and children.*

Source: Cambodia-Viet Nam MOU (2005), Article 4.

Another important area of trafficking-related prevention for ASEAN relates to migrant workers. In 2007, AMS adopted the *ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers*. This important instrument affirms the contributions of migrant workers to the society and economy of both receiving and sending states of ASEAN. It also recognises the very real vulnerability of migrant workers in the region to trafficking and other forms of exploitation and acknowledges the need to address cases of abuse and violence against migrant workers. The text box below summarises the core commitments of the Declaration.

²⁰⁸Thailand-Viet Nam MOU, Article 5

²⁰⁹Thailand-Cambodia MOU, Articles 4 and 5

²¹⁰Thailand-Myanmar MOU, Articles 3-5,

²¹¹Lao PDR-Thailand MOU, Articles 4-5.

²¹²Royal Thai Government Significant Efforts to Eliminate Human Trafficking in 2014, p. 11.

²¹³U.S. Department of State Trafficking in Persons Report, 2014.

Text Box 39: ASEAN Commitment to Preventing the Exploitation of Migrant Workers

Obligations of Receiving States

- To intensify efforts to protect the fundamental human rights, promote the welfare, and uphold human dignity of migrant workers;
- To work towards the achievement of harmony and tolerance between receiving states and migrant workers;
- To facilitate access to resources and remedies through information, training and education, access to justice, and social welfare services as appropriate and in accordance with the legislation of the receiving state, provided that they fulfill the requirements under applicable laws, regulations and policies of the said state, bilateral agreements and multilateral treaties;
- To promote fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers;
- To provide migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal and judicial system of the receiving states; and
- To facilitate the exercise of consular functions to consular or diplomatic authorities of states of origin when a migrant worker is arrested or committed to prison or custody or detained in any other manner, under the [relevant national and international] laws and regulations.

Obligations of Sending States

- To enhance measures related to the promotion and protection of the rights of migrant workers;
- To ensure access to employment and livelihood opportunities for their citizens as sustainable alternatives to migration of workers;
- To set up policies and procedures to facilitate aspects of migration of workers, including recruitment, preparation for deployment overseas and protection of the migrant workers when abroad as well as repatriation and reintegration to the countries of origin; and
- To establish and promote legal practices to regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies.

Source: ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007)

In addition to addressing trafficking and vulnerabilities of specific groups in trafficking laws and MOUs, some preventative measures may be found in labour-related laws and regulations. For example, **Thailand's Regulation to Protect Labour in the Sea Fishing Industry (2014)** requires that workers on sea fishing vessels are at least 18 years old. It further prescribes a daily rest period of at least 10 hours; a work contract signed with consent by both parties; and minimum annual leave of 30 days. Similarly, the **Ministerial Regulation to Protect Agricultural Workers (2014)** requires that agricultural workers are at least 15 years old. The regulation further stipulates a right to three days leave with pay for every 180 consecutive working days or the payment of an equivalent amount of cash in case of no leave.²¹⁴

²¹⁴Royal Thai Government's Significant Efforts to Eliminate Human Trafficking in 2014, p. 14.

8.2.2. Prevention in Practice in AMS

Prevention is one of the most complex aspects of a comprehensive anti-trafficking approach and prevention efforts are especially resistant to measuring impact and effectiveness. The following information (which focuses on the typology of prevention set out in Section 8.1 above: reducing vulnerability; addressing demand; and confronting corruption) is therefore intended to show only a very general overview of current efforts.

To a degree, all AMS have undertaken prevention efforts such as public awareness-raising campaigns, registering migrant or overseas-bound workers, and investigating unlawful practices of recruitment agencies and officials suspected of being involved in trafficking. Below are some prevention efforts reported by AMS.²¹⁵

Efforts Addressing Vulnerabilities:

- Public awareness campaigns on human trafficking through radio, billboards and print media (**all AMS**)
- Expanded use of biometric travel documents to make it more difficult to falsify travel documents (**Brunei Darussalam, Indonesia, Philippines**)
- Regular pre-departure orientation seminars for prospective and outbound overseas workers (**Cambodia, Lao PDR, Philippines, Thailand**)
- Provision of pre-departure employment information for prospective workers in their home countries (**Singapore**)
- Trained community anti-trafficking watch groups (**Myanmar, Lao PDR**)
- Establishment of temporary passport and/or migrant registration centres in order to issue official identification or documentation of legal status (**Myanmar, Thailand**)
- Reduction in costs of migrant labour registration (**Thailand, Viet Nam**)
- Establishment of dedicated hotlines and other avenues for case reporting (**Cambodia, Lao PDR, Myanmar, Philippines, Thailand, Viet Nam**)
- Tighter procedures for the licensing of recruitment agencies and license revocation where agencies have violated relevant rules (**Cambodia, Thailand, Viet Nam**)
- Reduction of passport issuing fees (to US\$4) for migrant workers and students who wish to study and work abroad as well as streamlining of the administrative process for migration to encourage use of legal migration channels and thereby reduce the risk of trafficking and other exploitation (**Cambodia**)
- Establishment of Migrant Resource Centers and Job Centers in hot spots to facilitate legitimate recruitment and safe employment (**Lao PDR**)
- Reduced visa and registration fees for migrant workers recruited through existing MOUs who completed a nationality verification process and obtained passports (**Thailand**)

Efforts Addressing Demand:

- Campaigns on the illegality of sex tourism (including child sex tourism) aimed at reducing demand (**Cambodia, Lao PDR, Thailand**)
- Investigation, punishment and blacklisting of unlawful recruitment agencies or brokers (**Philippines, Thailand, Viet Nam**)

²¹⁵ As set out in various reports cited in this study and captured through country assessments.

- Inspections of work sites, fishing vessels and entertainment venues (**Thailand**)
- Policy to refuse marriage registrations where elements of trafficking or fraud are suspected (**Viet Nam**)

Efforts Addressing Corruption related to Trafficking:

- Training on human trafficking, including corruption issues, to officials, diplomats and military forces posted abroad (**Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Philippines, Thailand**)
- Establishment of an anti-corruption hotline for anonymous reporting of suspected corruption with interpretation services available (**Thailand, Viet Nam**)
- Legal protections for informers to encourage reporting of trafficking or suspected trafficking activity (**Singapore, Thailand, Viet Nam**)
- Anti-corruption campaign specifically focused on the issuing of false identification papers to potential victims of trafficking (**Indonesia**)

Good Practice: Regulatory Oversight of Labour Recruitment Agencies

Indonesia's Ministry of Manpower and Transmigration (MoMT) regulates the permit process for labour recruitment agencies, commonly used by larger companies to hire workers from origin countries such as Indonesia and the Philippines. Permits must be renewed every five years and MoMT reports conducting semi-annual or annual monitoring visits to ensure compliance. Agencies are required to have enough financial holdings to guarantee payment of workers insurance. Agencies can receive warnings or have their permit revoked if they provide false information on the age of recruits, send workers to illegal destinations such as Kuwait and Jordan, or hire workers to fill jobs that are not in accordance with stated contractual agreements.

Source: *Step Up: Improving the Recruitment of Migrant Workers in Indonesia*, BSR, 2011.

Some AMS have issued moratoriums on travel to specific countries in order to reduce the flow of job-seekers to destinations where there have been past incidences of trafficking and/or of labour exploitation. For example, **Indonesia** maintains a moratorium on sending domestic workers to Saudi Arabia and **Cambodia** prohibits the migration of women to Malaysia and China for domestic work. An MOU between Indonesia and Saudi Arabia regulates the placement of Indonesians working in domestic service, and contains the following protections: prohibition on passport withholding; one rest day required per week; and access to cell phones. However, it is difficult to determine to what extent these measures have stemmed trafficking and labour exploitation. It is reported that undocumented workers, or those with falsified documents, are still able to migrate to these countries or migrated to other countries where they remain vulnerable to being trafficked.²¹⁶ It is therefore equally important to ensure information about the risks of trafficking and illegal recruitment also target prospective overseas workers, or those already located overseas. The **Philippines** has taken several steps to arm its many outbound or overseas workers with information and tools to prevent against exploitation and trafficking (see Good Practice Box below).

²¹⁶U.S. Department of State *Trafficking in Persons Report*, 2014.

It is important to note that prevention measures need to be carefully targeted and avoid causing further harm. There is some evidence of prevention measures that may exacerbate rather than ameliorate risks to vulnerable groups, indicating a lack of understanding about how people fall victim to trafficking. For example, a policy that places the burden of paying for immigration and employment authorization fees on foreign workers could increase their risk of falling into debt bondage. Another significant challenge within the region is the extension of prevention measures to historically underserved and under-resourced groups - such as stateless persons, refugees, and ethnic groups - and who remain highly vulnerable to trafficking and other forms of exploitation.

Good Practice: Preventative Measures for Overseas and Overseas-bound Workers

The **Philippine** Overseas Employment Administration (POEA) regularly offers free pre-employment orientation seminars for prospective or outbound overseas workers on overseas job application procedures, required documentation and costs involved, and how to safeguard against illegal recruitment. In 2014, the POEA conducted nearly 700 seminars for over 80,000 prospective or outbound Filipino overseas workers. It also offers a free online version of the seminar. The POEA also developed a mobile phone app, which allows users to verify the status of recruitment agencies, check validity of job offers, be aware of how to avoid illegal recruitment and contact link to the POEA.

Source: The Philippine Overseas Employment Administration; U.S. State Department Trafficking in Persons Report 2014.

Good Practice: Incentives for Migrant Workers

Thailand has undertaken measures to incentivize migrant workers in Thailand to take precautions that will reduce their vulnerability to exploitation and trafficking, such as:

- Reduced visa and registration fees for migrant workers recruited through existing MOUs and who completed a nationality verification process and obtained passports
- Establishment of temporary one-stop service centres nationwide to register over 1.6 million formerly illegal migrant workers from Cambodia, Lao PDR and Myanmar by verifying documents, collecting personal data, conducting health checks and issuing temporary non-national ID cards

By following these measures, the Government reports that migrant workers will be able to work legally under the MOU framework and receive protection and benefits afforded by Thai laws.

Source: Royal Thai Government's Significant Efforts to Eliminate Human Trafficking in 2014 (2015)

8.3: Prevention of Trafficking - Issues for Consideration by AMS

In all parts of the world, including in the ASEAN region, attention to the prevention aspect of the trafficking response has been piecemeal and inconsistent. That is not surprising. Prevention is perhaps the most complex and difficult aspect of the trafficking response. Addressing prevention in any meaningful way requires a thorough understanding of the many political, economic, social, and structural factors that establish and sustain vulnerability to trafficking – and the myriad factors that create perverse incentives for governments, business and exploiters to maintain the status quo. In addition, prevention is, understandably, often an afterthought. The task of responding to trafficking: of passing laws and seeking to enforce them; protecting victims and prosecuting perpetrators, is a difficult one, often leaving little attention and scarce resources to devote to the difficult task of addressing future trafficking.

Nevertheless, AMS have clearly and consistently acknowledged the central importance of prevention – that an anti-trafficking response that deals only with the *results* of trafficking is incomplete and insufficient. The following recommendations seek to support greater and more consistent attention to prevention of trafficking within and between AMS, with a special focus on reducing vulnerabilities, especially among migrant workers; addressing demand; and ending trafficking-related corruption.

8.3.1. Inadequate Legislative and Policy Attention to Prevention

While the legal frameworks of some AMS briefly reference prevention, the relevant provisions are typically broad and vague. Policy instruments, including bilateral MOUs, provide some more detail but generally do not provide clear guidance to States on what is required of them to fulfill the general obligation of prevention.

8.3.2. Addressing the Vulnerabilities of Migrant Workers

Most victims of trafficking identified in the ASEAN region are migrant workers originating from other AMS. The vulnerability of migrant workers to abuse, exploitation and trafficking is well established and has been explicitly acknowledged by ASEAN and its Member States. Important steps have been taken to develop a common regional policy around migrant workers but much remains to be done at both national and regional levels.

8.3.3. Addressing Gender and Child-specific Vulnerabilities to Trafficking

Women and girls are particularly vulnerable to certain forms of trafficking-related exploitation. Highly feminized sectors such as prostitution, “entertainment” and domestic service are often excluded from scrutiny and protection and are thereby sites of much trafficking-related exploitation. The *causes* of trafficking are also highly gendered: for example, family violence, employment discrimination and lack of access to resources can compel women and girls to take dangerous migration decisions that lead to trafficking and related exploitation.

Experience in this region and elsewhere has confirmed that children may be vulnerable to trafficking in additional and different ways to adults. Prevention strategies in countries

of origin and countries of destination should be tailored to address those vulnerabilities.

8.3.4. Addressing Corruption

While there have been visible and wide-ranging efforts to prevent trafficking throughout the region, several factors continue to facilitate the trafficking and exploitation of men, women and children. Official corruption remains one of the most significant factors, particularly in relation to the issuance of false travel documents, allowing transportation of undocumented migrants, and downgrading human trafficking charges.

Recommendations	
8.1	AMS may wish to consider reviewing and, if necessary, revising their national legal frameworks as well as bilateral agreements to ensure that protection issues are explicitly addressed. Key areas for attention include reducing vulnerability to trafficking; addressing demand; and ending impunity for trafficking-related corruption.
8.2	Sending and receiving AMS may wish to consider reviewing their current laws and policies around migrant workers in relation to commitments enshrined in the 2010 <i>ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers</i> . In the context of preventing trafficking, receiving States may wish to pay particular attention to: “promot[ing] fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers”. In the same context, sending States may consider taking action to: “regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies”.
8.3	AMS may wish to conduct gender and child-specific analyses of vulnerabilities to trafficking with a view to taking action to reduce such vulnerabilities. This could include for example, extending labour protections to cover feminised work sectors; improving school attendance rates and ensuring birth registration of all children.
8.4	AMS should consider reviewing their laws and policies around trafficking to ensure that the issue of public sector complicity and corruption in trafficking can be addressed comprehensively. Existing anti-corruption bodies should be explicitly tasked with exposing and responding to trafficking-related corruption.

ANNEX I: AMS' Definitions of Human Trafficking

ASEAN Member State	Trafficking Legislation (adults)	Trafficking Legislation (children)	Notes
<p>Brunei Darussalam</p> <p><i>Trafficking and Smuggling of Persons Order, 2004</i></p>	<p>People trafficking means the recruitment, transportation, transfer, harbouring or receipt of a person by one or more of the following means – threat; 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 - for the purposes of exploitation, including all forms of sexual exploitation (including sexual servitude and exploitation of another person's prostitution), forced labour or services; slavery or practices similar to slavery, servitude and the removal of organs (<i>Article 4</i>).</p>	<p>Child trafficking means the recruitment, transportation, transfer, harbouring, or receipt of a child by any means for the purposes of exploitation, as previously defined (<i>Article 5</i>).</p>	<p>None of the forms of exploitation listed are defined in the legislation.</p>

Cambodia

Law on the Suppression of Human Trafficking and Sexual Exploitation, 2008

Unlawful Removal with Purpose shall mean the unlawful removal (to remove a person from his current place of residence to a place under the actor’s or a third person’s control by means of force, threat, deception, abuse of power or enticement, or without legal authority or any other legal justification, to take a minor or a person under general custody or curatorship or legal custody away from the legal custody of the parents, caretaker or guardian) of another for the purpose of profit making, sexual aggression, production of pornography, marriage against will of the victim, adoption or any form of exploitation, including the exploitation of the prostitution of others, pornography, commercial sex act, forced labor or services, slavery or practices similar to slavery, debt bondage, involuntary servitude, child labor or the removal of organs;
Selling, Buying or Exchanging a Person shall mean to unlawfully deliver the control over a person to another, or to unlawfully receive the control over a person from another, in exchange for anything of value including any services and human beings.

Minor shall mean a person less than eighteen years of age.

In 2010, there were several instances where the law was used to prosecute individuals for actions that fall well short of what is considered “trafficking” under the *UN TIP Protocol* (for example, the consensual and non-exploitative adoption of a child). After these problems were brought to the attention of relevant officials, the Ministry of Justice issued a Guideline on implementing the law that makes clear that establishing the crime of trafficking requires proof of all three elements (the action, means and exploitative purpose). No separate definition of trafficking in children, though the penalties are greater in cases of trafficked minors.

Not all forms of exploitation listed in the legislation are defined; only “prostitution” and “pornography”.

The Act of Selling, Buying or Exchanging Human Beings With Purpose is the selling, buying, or exchanging of another person for the purpose of profit making, sexual aggression, production of pornography, marriage against the will of the victim, adoption or any form of exploitation; **The Act of Selling, Buying or Exchanging A Human Being for Cross-border Transfer** is the selling, buying or exchanging of another person for the purpose of delivering or transferring that person to outside of the Kingdom of Cambodia; **Transportation with Purpose** is the transportation of another person knowing he or she has been unlawfully removed, recruited, sold, bought, exchanged or transported for the purposes of exploitation previously mentioned; The consent of the victim to any of the intended purpose of exploitation set forth shall be irrelevant where any of the means set forth in this law is used (*Chapter 2*).

Indonesia

Law on the Eradication of the Criminal Act of Trafficking in Persons, 2007

Trafficking in Persons shall mean the recruitment, transportation, harboring, sending, transfer, or receipt of a person by means of threat or use of force, abduction, incarceration, fraud, deception, the abuse of power or a position of vulnerability, debt bondage or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, whether committed within the country or cross-border, for the purpose of exploitation (which includes but is not limited to prostitution, forced labor or service, slavery or practices similar to slavery, repression, extortion, physical abuse, sexual abuse, abuse of the reproductive organs, or the illegal transfer or transplantation of body organs or the use of another persons' labor or ability for one's own material or immaterial profit) or which causes the exploitation of a person (*Article 1*). The consent of a victim of the criminal action of trafficking in persons shall not eliminate the prosecution of the offender of such a crime (*Article 26*).

A **child** shall mean a person under the age of eighteen years old, including an unborn baby (*Article 1*). Anyone who adopts a child by promising or giving something with the intention of exploiting [such child] or, anyone who sends a child within the country or to another country using any means, thus causing such child to be exploited, shall be punishable (*Articles 5,6*).

The law does not contain a separate definition of trafficking for children. Not all of the forms of exploitation listed in the legislation are defined, except for "force", "sexual exploitation" and "debt bondage".

Lao PDR

Law on Anti-Trafficking in Persons, 2015

Trafficking in Persons refers to the recruitment, abduction, giving of any place for stay or hide, movement, transportation or bringing from or sending to, receiving any person in the country or abroad by forms of propaganda, of guide, of deception, of buying, of attraction, of incitement, of abuse of power, of threat, of coercion, using of debt-bondage, adoption, concealed adoption, concealed engagement, concealed marriage, the use of surrogate mothers, beggar the production of pornography, or for pornographic performance, distribution of pornographic or unlawful materials or by other forms for the labour exploitation, sexual exploitation, slavery, prostitution, forced work in prostitution, removal of organs for the purpose of trade, contradicting to the national fine art and tradition or other objectives to gain unlawful advantages (*Article 2*).

Article 9 of the Law on Anti-Trafficking in Persons defines the trafficking of children (persons under the age of 18 years) requiring only an act and purpose.

<p>Malaysia</p> <p><i>Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act, 2007 (including 2010 and 2015 Amendments)</i></p>	<p>Trafficking in Persons means all actions involved in acquiring or maintaining the labour or services of a person through coercion, and includes the act of recruiting, conveying, transferring, harbouring, providing or receiving a person for the purposes of this Act (Part I); the Offence of Trafficking in Persons is the trafficking in persons, not being a child, for the purpose of exploitation (defined as all forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, any illegal activity or the removal of human organs), including by one of the following means – threat; use of force or other forms of coercion; abduction; fraud; deception; abuse of power; abuse of the position of vulnerability of a person to an act of trafficking in persons; or the giving and receiving of payments or benefits to obtain the consent of a person having control over the trafficked person. It shall not be a defence that the trafficked person consented to the act of trafficking in persons (<i>Part III</i>). Neither movement nor conveyance of the trafficked person is irrelevant, but rather, that they were subject to exploitation (<i>Section 17A</i>).</p>	<p>Offence of Trafficking in Children in any person who traffics in persons being a child, for the purpose of exploitation (<i>Part III</i>).</p>	<p>None of the forms of exploitation listed in the legislation are defined, though understanding of “slavery or practices similar to slavery and servitude” are offered in Section 371 of the Penal Code.</p>
--	---	--	---

Myanmar

The Anti Trafficking in Persons Law, 2005

Trafficking in Persons means recruitment, transportation, transfer, sale, purchase, lending, hiring, harbouring or receipt of persons after committing any of the following acts for the purpose of exploitation (receipt or agreement for receipt of money or benefit for the prostitution of one person by another, other forms of sexual exploitation, forced labour, forced service, slavery, servitude, debt-bondage, or the removal and sale of organs from the body) of a person with or without his consent: threat, use of force or other forms of coercion; abduction; fraud; deception; abuse of power or of position taking advantage of the vulnerability of a person; giving or receiving of money or benefit to obtain the consent of a person having control over another person (*Chapter 1*).

Child means a person who has not attained the age of 16 years. **Youth** means a person who has attained the age of 16 years but not the age of 18 years (*Chapter 1*).

The law does not contain a separate definition of trafficking for children. Not all of the forms of exploitation listed in the legislation are defined; only “prostitution”, “debt bondage” and “pornography”. Myanmar is in the process of reviewing its anti-trafficking legislation.

The Philippines

Expanded Anti-Trafficking in Persons Act, 2012

Anti-Trafficking in Persons Act, 2003

Trafficking in Persons refers to the recruitment, obtaining, hiring, providing, offering, transportation, transfer, maintaining, harboring, or receipt of persons with or without the victim's consent or knowledge, within or across national borders, by means of threat, use of force, or other forces of coercion, abduction, fraud, deception, abuse of power or of position, taking advantage of the vulnerability of the person, or, the giving and receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of exploitation which includes at a minimum, the exploitation or the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery, servitude or the removal or sale of organs (*Section 3*).

The recruitment, transportation, transfer, harboring, adoption or receipt of a child for the purpose of exploitation or when the adoption is induced by any form of consideration for exploitative purposes shall also be considered as 'trafficking in persons' even if it does not involve any of the means set forth in the preceding definition of 'trafficking in persons'. **Child** refers to a person below eighteen years of age, or one who is over eighteen but is unable to fully take care of or protect himself/herself from abuse, neglect, cruelty, exploitation, or discrimination because of a physical or mental disability or condition (*Section 3*).

Expanded definition of "child" to include persons who are over eighteen, but otherwise unable to take care of or protect himself or herself due to the aforementioned reasons.

Singapore

**Prevention
of Human
Trafficking Act,
2014**

Any person who recruits, transports, transfers, harbours or receives an individual (other than a child) by means of the threat or use of force, or any other form of coercion; abduction; fraud or deception; the abuse of power; the abuse of the position of vulnerability of the individual; or the giving to, or the receipt by, another person having control over that individual of any money or other benefit to secure that other person's consent, for the purpose of the exploitation (defined as sexual exploitation, forced labour, slavery or any practice similar to slavery, servitude or the removal of an organ) (whether in Singapore or elsewhere) of the individual shall be guilty of an offence . Whether the alleged victim of the offence consented to the actual or intended exploitation shall be irrelevant (Section 3).

Child means an individual below the age of eighteen years (*Part 1*). Any person who recruits, transports, transfers, harbours or receives a child for the purpose of exploitation (whether in Singapore or elsewhere) of the child shall be guilty of an offence (*Part 2*). Whether the child, or the child's parent or guardian, consented to the actual or intended exploitation shall be irrelevant (*Part 2*).

Clause 3(4) clarifies that a person who carries out trafficking in persons partly in and partly outside of Singapore is guilty of the offense in Singapore, recognizing the transnational nature of trafficking in persons. The Singaporean legislation, under Clauses 5 and 6, also criminalises the abetment of trafficking in persons, including ringleaders or masterminds who order their subordinates to carry out the offending acts, also agents and middlemen who knowingly make arrangements to place victims with their exploiters, as well as receiving payments in connection with exploitation of trafficked victims. The legislation includes definitions of the forms of exploitation listed including "prostitution", "sexual exploitation", "pornography", "debt bondage", "forced labor", "slavery" and "involuntary servitude".

Thailand

Anti-Trafficking in Persons Act, 2008 and the Amendments (No.2) (2015)

Trafficking in persons means committing any of the following acts procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving any persons, by means of the threat or use of force, abduction, fraud, deception, abuse of power, or of the giving [of] money or benefits to achieve the consent of a person having control over another person in allowing the offender to exploit the person under his control (*Section 6*).

Trafficking in persons also means the procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving a child (*Section 6*).

The principal differences with the *Protocol* in this regard are: inclusion of additional forms of exploitation (pornography, causing a person to be a beggar, practices resulting in forced extortion); omission of some forms (practices similar to slavery, servitude); express inclusion of the means element in some forms (removal of organs, practices resulting in forced extortion); and inclusion of the provision on consent (“regardless of consent”) within the element of exploitation rather than in connection with the ‘act’ element. In addition, the umbrella phrase “or any other similar practices resulting in forced extortion” is used instead of ‘includes’. None of the forms of exploitation listed in the legislation are defined except for forced labour and services.

<p>Viet Nam</p> <p><i>Law on Prevention and Suppression against Human Trafficking, 2012</i></p>	<p>Trafficking in Persons means recruiting, transporting or harboring, transferring or receiving persons for sexual exploitation, forced labor, removal of human organs or other inhuman purposes or for committing an act stipulated in Article 119 or 120 of the <i>Penal Code (Article 3)</i>.</p>	<p>Trafficking in women and children is criminalised under Articles 119 and 120 of the <i>Penal Code</i>.</p>	<p>While there are no ‘means’ elements listed in the “prohibited acts” provisions, the definitions given for sexual exploitation and forced labour include elements of force and coercion (<i>Article 2</i>). However there appears to be no force, coercion or other means required for the act of organ removal or for other “inhuman purposes”, which are not defined. Further, there is no penalty stipulated for these or any of the other ten “prohibited acts”, which include “discrimination against victims” and disclosure of information regarding victims. The legislation includes definitions of the following forms of exploitation -“sexual exploitation”, “sexual slavery” and “forced labor”.</p>
--	--	---	---

ANNEX II: Identification of Victims by AMS (in 2014/2015)

Country reports were used to update/verify number of victims identified in each AMS. Where country reports did not provide statistical information regarding victims identified, external sources were used which draw on information provided by AMS governments.

	Number of Victims Identified	Countries of Origin of Identified Victims	Type of Trafficking Involved (if known)
Brunei Darussalam ²¹⁷	Total: 2	Not available.	Sexual exploitation
Cambodia ²¹⁸	Total: 1,413 (436 identified by authorities in Thailand and Viet Nam and repatriated)	Cambodia; China; Indonesia; Malaysia; Thailand; Viet Nam	Sexual exploitation; forced labour (including on fishing vessels)
Indonesia ²¹⁹	Total: 2,063 (1,302 repatriated from Malaysia, Saudi Arabia, UAE)	Not available	Not available.
Lao PDR ²²⁰	Total: 253 Male: 11 Female: 242 Children: 200	166 victims identified by Lao authorities were from other countries 157 from Thailand, 8 from China and 1 from Viet Nam	Not available
Malaysia ²²¹	Total: 303	Indonesia; Philippines; Viet Nam	Not available
Myanmar ²²²	Total: 385	317 victims were from China; Indonesia; Thailand	Not available
Philippines ²²³	Total: 1,075	Not available	Sexual exploitation; forced labour
Singapore ²²⁴	Total: 33	Not available	Labour exploitation; sexual exploitation
Thailand ²²⁵	Total: 471	Cambodia; Lao PDR; Myanmar; Bangladesh; Rohingya, Thailand	Labour exploitation; sexual exploitation; begging.
Viet Nam ²²⁶	Total: 1,031	Not available	Not available

²¹⁷U.S. Department of State *Trafficking in Persons Report 2015*, p. 101.

²¹⁸U.S. Department of State *Trafficking in Persons Report 2015*, p. 106.

²¹⁹U.S. Department of State *Trafficking in Persons Report 2015*, p. 188.

²²⁰Number of victims identified in 2014 according to government reports, *Lao PDR Country Report (December 2015)*.

²²¹U.S. Department of State *Trafficking in Persons Report 2015*, p.235.

²²²U.S. Department of State *Trafficking in Persons Report 2015*, p. 106.

²²³Number of human trafficking cases provided with recovery and reintegration services in the Philippines as of August 31, 2015, *Philippines Country Report (December 2015)*.

²²⁴U.S. Department of State *Trafficking in Persons Report 2015*, p 303.

²²⁵*Thailand Country Report (December 2015)*.

²²⁶*Viet Nam Country Report (December 2015)*, citing 2014 statistics from the Steering Committee 138/CP6 from 2008 – 2014.

ANNEX III: Summary of AMS Legal Provisions on Protection of Privacy of Victim-Witnesses

This section draws on the legal provisions in each ASEAN Member State that provides for the protection of the privacy of victim-witnesses. It should be noted that this does not include non-legal measures, such as guidelines, that may be in place and practice in each AMS intended to support the protection of the privacy of victim-witnesses.

	Adult Men	Adult Women	Children (under the age of 18 unless otherwise specified)
Brunei Darussalam	Brunei’s TIP law does not provide for any specific protections in relation to privacy of victims and victim-witnesses. However legislation such as the <i>Supreme Court Act</i> and the <i>Subordinate Courts Act</i> enable courts to protect privacy including through the holding of proceedings in camera and protecting the identity of witnesses.		Under the <i>Children and Young Persons Act</i> , it is an offence to publish, or cause to be published, the name or other identifying information of any child or young person concerned in any court proceedings. ²²⁷
Cambodia	The <i>Law on Suppression of Human Trafficking</i> prohibits newspapers and all other mass media from publishing, broadcasting or disseminating any information, which could lead to public knowledge of the identities of victims. ²²⁸		
Indonesia	The <i>Law on the Eradication of Trafficking in Persons</i> guarantees anonymity during the investigation and court process for all victims of trafficking, as well as their right to have the confidentiality of their identity protected. ²²⁹ The <i>Child Protection Law</i> states that “all children who are victims of crime have right to have their identity protected from the media”, which applies to victims of trafficking crimes. ²³⁰		
Lao PDR	Lao PDR’s 2015 TIP Law provides privacy protections for all victims of trafficking.	The <i>Law on Development and Protection of Women (2004)</i> provides that women and children victims of trafficking have the right not to be photographed, video recorded or broadcast on television where this will “affect their personal honor”. Police are required to maintain confidentiality for victims and witnesses involved in the investigation and prosecution of a criminal case of trafficking in women and children. Additionally, protection of privacy must also be provided by the concerned Lao embassy or consulate to victims abroad who are Lao citizens, and by the Lao officials to victims in the Lao PDR who are citizens of foreign countries. ²³¹ The <i>Law on Protection of Rights and Interests of Children</i> states that children victims and witnesses in criminal proceedings shall have the right to have their privacy protected. Any person who reveals the identity or personal information of a child who is a victim, suspect, defendant, or convicted person may be punished. ²³²	

²²⁷*Children and Young Persons Order* (2006) (Brunei), Section 95.

²²⁸*Law on Suppression of Human Trafficking* (Cambodia), Article 49.

²²⁹*Law on the Eradication of Trafficking in Persons* (Indonesia), Article 24, 33, 44

²³⁰*Child Protection Law* (Indonesia), Article 64.

²³¹*Law on Development and Protection of Women* (2004) (Lao PDR), Article 25(7), 27,28; The Prime Minister 18.

²³²*Law on Protection of Rights and Interests of Children* (2007) (Lao PDR), Article 44, 85

Malaysia	<i>Anti-Trafficking in Persons Act</i> prevents the media from revealing any details that could lead to the identification of an individual as being a trafficked person or a witness to any proceedings (Section 58).	<i>Evidence of Child Witnesses Act 2007</i> prohibits the publication of information that would identify any child witness ²³³ , which applies to child victim-witnesses in trafficking cases.
Myanmar	No provisions apply to adult male victims, although the criminal laws in Myanmar apply to trafficking of men, women and children.	<i>Anti Trafficking in Persons Law</i> requires protection of the privacy of “women, children and youth” victims of trafficking. ²³⁴ In the conduct of trafficking trials, if the victims are women, children and youth, the court shall close the court and special permission must be obtained to publish “news at any stage of investigation, prosecution, adjudication”. ²³⁵
The Philippines	The <i>Anti-Trafficking in Persons Act</i> allows for closed-door investigation, prosecution or trial should law enforcement, prosecutors or judges deem it necessary. The name and personal circumstances of trafficked persons, or any other information tending to establish their identities and such circumstances or information shall not be disclosed to the public. A 2012 amendment to the act allows the names of suspected traffickers to be reported and publicized for the purpose of the investigation.	
Singapore	Under the overall legislative framework, proceedings for trafficked victims may be held in camera, while proceedings for child victims of sexual exploitation must be held in camera. The court also has the power to: (a) order that no person is to do any act likely to lead to identification of the victim-witness; (b) prohibit the publication of the name, address or photograph of any witness or any other thing likely to lead to the identification of the victim-witness; or (c) order that the name, address or photograph of any victim-witness, or any other thing likely to lead to identification of the victim-witness be redacted from court documents. These prohibitions on publication of identifying information are mandatory for trafficked victims of sexual exploitation.	
Thailand	<i>The Anti-Trafficking in Persons Act (2008) and the Amendments (No.2) (2015)</i> specifies prohibited acts in order to protect the privacy of victims of trafficking, including: (1) Taking, circulating or, printing a picture, recording or airing voice of any person, at any stage, which may lead to the identification of the trafficked person; (2) Publishing or disseminating content appearing in the course of inquiry of the inquiry official or the course of the court hearing, which may reveal the name of the trafficked person or their family members, through whatever type of information communication media; (3) Publishing or disseminating content, picture or voice, through whatever type of information communication media, disclosing the history, place of living, place of work or place of education of the trafficked person. ²³⁶	

²³³Evidence of Child Witnesses Act 2007 (Malaysia), Act 676, s.14.

²³⁴Anti Trafficking in Persons Law (Law No. 5/2005) (Myanmar), Section 16.

²³⁵Anti Trafficking in Persons Law (Law No. 5/2005) (Myanmar), Section 11(b). Note that the scope for the term “news” is unclear.

²³⁶2008 Anti-Trafficking in Persons Act (Thailand), Section 56

Viet Nam

The *Penal Code* permits closed hearings to protect the “secrecy of persons concerned”²³⁷ and also provides protection for victims and witnesses by competent procedure-conducting bodies through applying necessary measures according to law when their life and health are endangered, their honour, dignity or property are infringed upon.²³⁸

The *Law on the Prevention of and Combat against Human Trafficking (2011)* allows courts to consider closed trials of human trafficking cases as requested by the victim-witness or their lawful representatives. It also prohibits the disclosure of information about victims without their consent or that of their legal representatives.

The Vietnamese legal framework considers children to be persons below the age of 16.

²³⁷Criminal Procedure Code (Viet Nam), Article 18.

²³⁸Criminal Procedure Code (Viet Nam), Article 7.

ANNEX IV: Summary of Recommendations

This table summarizes the recommendations contained in each chapter of the main report. It should be noted that these recommendations illustrate the kinds of issues and areas that AMS could consider, rather than as prescriptive recommendations. These recommendations are put forth on the basis of international/ASEAN standards.

Background	Recommendations
Without additional clarity provided by clear definitions, consistent and predictable application of the law becomes difficult and can complicate the important task of quickly and accurately identifying victims of trafficking.	Recommendation 1.1: AMS may consider reviewing their legislation with regard to the definition of trafficking in persons with a view to ensuring that terms used within the definition are clearly defined in accordance with international/ASEAN standards.
Experience has shown that it is sometimes quicker and more effective to pursue a trafficking offender under other legislation, either instead of - or as well as - pursuing a prosecution for trafficking. Experience has also shown that the inclusion of ancillary offences (such as <i>facilitating, being an accomplice in, or profiting from</i> trafficking crimes) is important as it allows prosecution of those who assist or support TIP crimes, without actually being the main perpetrator.	Recommendation 1.2: AMS may consider reviewing their national legal frameworks to ensure that related and ancillary offences are adequately captured – thereby providing criminal justice agencies with a sufficiently wide range of options for pursuing those involved in trafficking-related exploitation.
An effective response to trafficking requires that companies and other legal persons be held liable for the exploitation of individuals under their authority and control.	Recommendation 1.3: AMS may consider reviewing their national legal frameworks to ensure that legislation adequately provides for the imposition of criminal and civil sanctions on corporations and other legal persons for trafficking as well as related and ancillary offences.
The prompt and accurate identification of victims of trafficking is critical in ensuring that they are assisted, supported and protected. Prompt and accurate victim identification is also fundamental to an effective criminal justice response. Many victims of trafficking may be misidentified as irregular migrants and/or illegal workers, detained or deported without the benefit of rights and entitlements granted to them under national and international law.	Recommendation 2.1: AMS may consider reviewing current training and resources available to support capacity development of front line officials who are in a position to improve the speed and accuracy of victim identification – as well as to contribute to a more consistent approach to identification throughout the region.

<p>Consistency in determining whether an individual is a victim of trafficking – or a presumed victim – is important for purposes of protection and support.</p>	<p>Recommendation 2.2: AMS may consider developing agreed guidelines for the identification and referral of victims of trafficking. The guidelines could affirm a presumption of victim status in certain situations as well as a presumption of age in favour of persons who may be under the age of eighteen years and thereby entitled to a different standard of care and protection.</p>
<p>The establishment of common identification criteria is an essential step towards securing mutual recognition of victim determination decisions between countries of origin and countries of destination.</p>	<p>Recommendation 2.3: AMS may consider amending their laws and/or bilateral agreements to provide for the mutual recognition of victim identification procedures of other AMS as required under the <i>ASEAN Convention against Trafficking in Persons</i>.</p>
<p>The issue of victim identification (dealt with in Chapter 2) is critical for victims to receive the protection and support that they are entitled to. Victims of trafficking are entitled to, and should receive practical support such as shelter, medical assistance, and other measures aimed at ensuring their physical and psychological wellbeing and recovery.</p>	<p>Recommendation 3.1: In accordance with the specific recommendations set out in Chapter 2, AMS may consider taking steps to improve the timely and accurate identification of victims of trafficking, ensuring that immediate protection and support is available to all persons who are suspected of having been trafficked.</p>
<p>Victims of trafficking are entitled to, and should receive, immediate protection from exploiters and from the possibility of further harm, including through re-trafficking.</p>	<p>Recommendation 3.2: AMS to examine, and if necessary, consider revising their laws to ensure that victims of trafficking (including persons who are presumed to be victims of trafficking) are entitled to immediate protection from further harm and assistance that is sufficient to meet their basic needs.</p>
<p>Longer-term assistance to victims is often tied to their status as witnesses in criminal proceedings. Provided sufficient protections are in place, such practices are considered to be acceptable. However, the tying of immediately needed protection and support to victim cooperation is, as discussed in Part 1 above, highly problematic.</p>	<p>Recommendation 3.3: AMS may consider reviewing their laws and practices to determine the extent to which measures of protection and assistance are made conditional on victim’s cooperation with national authorities. Efforts may subsequently be made to ensure that victim cooperation is not a direct or implied condition of immediate assistance and support.</p>

<p>Improved coordination and knowledge amongst service providers will help to facilitate appropriate referrals, avoid duplication of efforts and conserve resources in the provision of assistance and protection to victims of trafficking.</p>	<p>Recommendation 3.4: AMS may consider working to ensure that there are clear referral procedures between government social services and other service providers. The forms of assistance that are available to different groups of vulnerable persons (children, women victims of violence, exploited migrants, etc.) could be shared with anti-trafficking organizations, frontline officials and others who are involved in the identification and referral of trafficked persons.</p>
<p>A sustainable funding mechanism for assisting victims of trafficking will lessen reliance on foreign donors and improve overall access to and quality of service delivery.</p>	<p>Recommendation 3.5: AMS may wish to consider formally allocating funds in the national budget for victim protection and support. AMS may also consider working with external donors and agencies to develop systems and approaches that will ensure longer-term viability of protection and support mechanisms, both within and between Member States.</p>

Victims of trafficking should be encouraged, but not compelled, to participate in their prosecution of their exploiters. Before, during and after their involvement in the criminal justice process, victims should be provided appropriate information, assistance and support, including protection from re-traumatization.

Recommendation 4.1: AMS may wish to consider developing a comprehensive programme aimed at supporting the participation of foreign victims of trafficking in criminal proceedings against their exploiters. Development of such a programme should be based on a clear understanding of the obstacles facing foreign victims and the programme itself should aim to address those obstacles. In seeking to ensure the safe and effective participation of foreign victims, AMS may draw on lessons learned within and outside the region including in relation to:

- Developing clear, transparent and predictable procedures to enable the status of foreign victims to be regularised for the duration of their involvement in criminal and other legal proceedings (such as those related to remedies including compensation);
- Ensuring that the mechanisms and procedures are in place to enable this regularisation process to proceed in all appropriate cases without delay;
- Avoiding the detention of foreign trafficked persons through regularisation of their legal status and any other appropriate measures;
- Authorising the use of pre-trial depositions (at the instigation of the prosecutor as well as on request of the victim) in order to ensure the participation of the victim-witness and reduce the period victims must wait to testify;
- Exploring options for those victims who wish or need to return home to testify from their home country (for example, through video link-up).

Criminal justice agencies should be aware that victims of trafficking are often unwilling to assist in criminal investigations for fear of harm to themselves or their families by their traffickers. Those fears can be well founded and the State should do all within its power and resources to assess risks and ensure effective protection to victims who are cooperating in criminal investigations. A safe, secure and supported victim is more likely to be in a position to provide coherent and effective testimony at trial.

Recommendation 4.2: AMS that have enacted legislation to protect the privacy of victim-witnesses should continue taking steps to ensure that these laws are effectively implemented. AMS that do not have a solid legislative basis for such protection should consider enacting the necessary laws and working to ensure their effective implementation. In improving implementation of legal protections, AMS may wish to draw on lessons learned within and outside the region including in relation to:

- Prohibiting the publication of any details that could lead to the public identification of victim-witnesses;
- Clarifying the forms of media or other mediums in which disclosure of the victim's and / or witness's identity is prohibited;
- Extending the right to privacy to adult and child victims of all forms of trafficking;
- Training for judicial officials and prosecutors regarding required or allowable practices that help to safeguard victims' privacy, particularly in cases of child victims.

Witness intimidation or tampering is a major obstacle to an effective criminal justice response to trafficking. It also undermines the rule of law and community confidence in the State's capacity to address impunity of criminals. Furthermore, for most victims of trafficking, the experience of testifying in court is traumatic. While it is not possible to completely remove the negative aspects of this experience, all national criminal justice agencies have the capacity to ensure that victims are safe during their involvement and that trauma is minimised wherever possible.

Recommendation 4.3: AMS that have enacted legislation to protect victim-witnesses from intimidation and reprisals and to guard against witness tampering should continue working to ensure that these laws are effectively implemented. AMS that do not have a solid legislative basis for such protection may consider enacting the necessary laws and taking steps to ensure their effective implementation. In improving implementation of legal protections, AMS may draw on lessons learned within and outside the region including in relation to:

- Providing emergency protection for potential victims of trafficking for up to a 24-hour period during the identification stage;
- Routinely conducting individualized risk assessments and taking the necessary steps to protect victim-witnesses from reprisals or other forms of intimidation;
- Providing criminal justice agencies with sufficient resources to protect victim-witnesses who are at risk of intimidation or reprisals;
- Developing and implementing basic measures that can protect victims during the trial process itself – such as providing escorts and ensuring separate entrances and waiting areas.

Victims of trafficking that are participating in legal proceedings against their traffickers should be entitled to information and assistance on legal proceedings to ensure they can participate effectively in those proceedings.

Recommendation 4.4: AMS may wish to consider taking steps to ensure that victims of trafficking routinely, and as a legal right, receive information and advice about: (i) their legal status including the nature or extent of legal obligations, if any, to cooperate with investigators and prosecutors; (ii) criminal justice procedures and the victim's role; (iii) progress of the case; and (iv) procedures for filing complaints, claiming compensation and other available legal remedies. AMS may draw on lessons learned within and outside the region including in relation to:

- Affirming the legal right of victims to information about rights, protections and legal proceedings to victims in a language and manner they can understand;
- Training interpreters to effectively assist victims of trafficking, with a greater understanding of the rights and the psychology of victims of trafficking;
- Developing standard operating procedures and tools that facilitate the provision of information to victims of trafficking at various stages of service delivery and legal proceedings, particularly for victims placed in shelters.

<p>Child victims in the criminal justice process have special needs that must be met and additional rights that must be respected.</p>	<p>Recommendation 4.5: AMS may consider reviewing their laws and procedures that apply to child victims of trafficking who may be – or are – participating in criminal proceedings as witnesses. The review should establish whether current practices and procedures meet the required “best interests of the child” standard. AMS may draw on lessons learned within and outside the region including in relation to:</p> <ul style="list-style-type: none"> • Notifying children of their rights, protection processes and legal proceedings in a language and manner/method that is appropriate for their age; • Appointing a guardian, during the pre-trial phase, to represent the child and ensure his or her best interests; • Conducting an assessment to determine whether it’s in the best interest of the child to participate in proceedings with the help of a child psychologist or social worker; • Allowing the child-witness to testify in camera or in a separate room with the presence of a psychologist and/ or a social worker; • Allowing the questioning of a child-witness to be done by a psychologist or social worker.
<p>A victim of trafficking who is not identified properly, if at all, will never be able to access remedies because the very first hurdle in making a claim – establishing that he or she is in fact a victim of trafficking – cannot be cleared.</p>	<p>Recommendation 5.1: In accordance with the specific recommendations set out in Chapter 2, AMS may consider taking steps to improve the timely and accurate identification of victims of trafficking. In accordance with the specific recommendations set out in Chapter 4, AMS may consider taking steps to strengthen the criminal justice response to trafficking in order to support greater access to remedies for victims.</p>
<p>All victims of trafficking have the right to access and receive justice for the crimes and human rights violations committed against them. In particular this includes a right to remedies such as compensation for harm and for unpaid wages. Remedies are a critical aspect of the international legal response to trafficking in that they confirm trafficked persons as victims of crime and of human rights abuse.</p>	<p>Recommendation 5.2: AMS may wish to consider reviewing their national legal frameworks to ensure that the right of all victims of trafficking to access adequate and appropriate remedies is explicitly guaranteed.</p>

<p>Even in countries where victims of trafficking have a legal right to access remedies, their quest for compensation can be thwarted through a wide range of procedural obstacles, including lack of information about legal entitlements and lack of legal assistance in pursuing claims for compensation.</p>	<p>Recommendation 5.3: AMS may wish to consider reviewing their national legal frameworks to ensure that the right of all victims of trafficking to access adequate and appropriate remedies is accompanied by: (i) a right to information about remedies; (ii) a right to legal assistance in pursuing remedies; and (iii) a right of foreign victims to remain and work in the country of destination for the duration of legal proceedings for compensation or other remedies. AMS may wish to further consider taking practical steps to ensure that victims know about their right to a remedy and about how this right can be accessed.</p>
<p>Many situations of trafficking for purposes of forced / exploitative labour also involve violations of national labour laws and regulations. Accordingly, victims should be able to access labour courts and tribunals in order to seek compensation for lost wages and other damages.</p>	<p>Recommendation 5.4: AMS may wish to examine the legal and procedural framework around compensation for violations of labour laws to determine the accessibility of these systems to persons who have been trafficked. AMS may consider revising laws, policies and procedures to ensure that victims of trafficking are able to use such avenues to recover withheld wages and other damages.</p>
<p>Victims of trafficking should not be prosecuted or punished for crimes that have been committed in the course of their trafficking including illegal entry, illegal stay and illegal work. Low levels of victim identification directly contribute to the persistence of victim prosecution for status offences.</p>	<p>Recommendation 6.1: In accordance with the specific recommendations set out in Chapter 2, AMS may consider taking steps to improve the timely and accurate identification of victims of trafficking, taking particular care to ensure that identification procedures reach relevant populations including irregular migrants and irregular migrant workers. Additionally, AMS may consider explicitly affirming that the principle of non-prosecution for status offences operates irrespective of whether a conviction for trafficking has been secured.</p>
<p>Victims of trafficking should not be held in immigration detention or detained in shelters or other facilities against their will.</p>	<p>Recommendation 6.2: AMS may consider reviewing their national legal frameworks as well as their procedures in accordance with the requirements of the <i>ASEAN Convention against Trafficking in Persons</i> in ensuring that victims of trafficking are protected from all forms of detention, including detention in shelters or welfare facilities. In the case of child victims, the review should seek to ensure that children are only detained when this can be shown to be in their best interests and for the shortest possible period of time.</p>

<p>To the extent possible, the return of victims of trafficking should be voluntary and undertaken in accordance with clear procedures that protect safety and rights, including their right to remain during legal proceedings. The country of destination and the country of origin should coordinate to ensure safe return and that all returned victims of trafficking have access to reintegration assistance aimed at promoting their well-being and preventing re-trafficking.</p>	<p>Recommendation 7.1: AMS may consider reviewing their national legal frameworks to ensure that victims' rights in return are explicitly protected and that obligations of the State with regard to return and reintegration are made clear.</p>
<p>Victims who wish to return home should not be prevented from doing so. To be lawful, non-voluntary return should not operate to violate any rights, including the right to a remedy and the right to protection from the risk of persecution. Alternatives to return should be available for humanitarian, safety or other reasons.</p>	<p>Recommendation 7.2: AMS may consider reviewing their return mechanisms, procedures and practices with a view to ensuring that the key principle of "safe and preferably voluntary return" is respected; that the practice of return does not violate established rights; and that child victims are provided additional protections in return appropriate to their needs and in accordance with the 'best interests' principle.</p>
<p>Access to quality reintegration assistance should be made available for all victims of trafficking in order to support their longer-term needs and lessen their vulnerability to further exploitation or being re-trafficked.</p>	<p>Recommendation 7.3: AMS may wish to conduct a careful and detailed review of their reintegration mechanisms, procedures and practices to evaluate their effectiveness and identify ways in which they could be strengthened, including through capacity development of personnel and the provision of adequate financial resources. AMS already working in partnership on the return and reintegration of victims of trafficking should consider collaborating on such a review in order to improve the effectiveness of their joint efforts.</p>
<p>States have an obligation to try to address trafficking's underlying causes including the vulnerabilities that increase the risk of trafficking such as discrimination, conflict and violence, lack of opportunities for decent work, and failures to protect migrants, children and other vulnerable groups. A comprehensive approach to prevention also requires addressing demand for the goods and services produced through trafficking.</p>	<p>Recommendation 8.1: AMS may wish to consider reviewing and, if necessary, revising their national legal frameworks as well as bilateral agreements to ensure that prevention issues are explicitly addressed. Key areas for attention include reducing vulnerability to trafficking; addressing demand; and ending impunity for trafficking-related corruption.</p>

<p>Migrant workers are vulnerable to trafficking due to a relative lack of power and status; lack of information about safe migration options and the dangers of trafficking; and lack of appropriate employment protections and access to decent working conditions.</p>	<p>Recommendation 8.2: Sending and receiving AMS may wish to consider reviewing their current laws and policies around migrant workers in relation to commitments enshrined in the 2010 <i>ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers</i>. In the context of preventing trafficking, receiving States may wish to pay particular attention to: “promot[ing] fair and appropriate employment protection, payment of wages, and adequate access to decent working and living conditions for migrant workers”. In the same context, sending States may consider taking action to: “regulate recruitment of migrant workers and adopt mechanisms to eliminate recruitment malpractices through legal and valid contracts, regulation and accreditation of recruitment agencies and employers, and blacklisting of negligent/unlawful agencies”.</p>
<p>Gender plays an important role in shaping particularly women and girls’ vulnerability to trafficking. Additionally, experience has confirmed that children may be vulnerable to trafficking in additional and different ways to adults.</p>	<p>Recommendation 8.3: AMS may wish to conduct gender and child-specific analyses of vulnerabilities to trafficking with a view to taking action to reduce such vulnerabilities. This could include for example, extending labour protections to cover feminised work sectors; improving school attendance rates and ensuring birth registration of all children.</p>
<p>Official corruption remains one of the most significant factors, particularly in relation to the issuance of false travel documents, allowing transportation of undocumented migrants, and downgrading human trafficking charges.</p>	<p>Recommendation 8.4: AMS should consider reviewing their laws and policies around trafficking to ensure that the issue of public sector complicity and corruption in trafficking can be addressed comprehensively. Existing anti-corruption bodies should be explicitly tasked with exposing and responding to trafficking-related corruption.</p>

Additional / alternative recommendations on prevention for consideration:

- Analyse the factors that generate demand for exploitative commercial sexual services and exploitative labour and take strong legislative, policy and other measures to address these issues.
- Develop programmes that offer livelihood options, including basic education, skills training and literacy, especially for women and other traditionally disadvantaged groups.
- Improve children's access to educational opportunities and increase the level of school attendance, in particular by girls.
- Ensure that potential migrants, especially women, are properly informed about the risks of migration (e.g. exploitation, debt bondage and health and security issues, including exposure to HIV/AIDS) and have avenues available for legal, non- exploitative migration.
- Develop information campaigns for the general public to promote awareness of the dangers of trafficking. Such campaigns should be informed by an understanding of the complexities surrounding trafficking and of the reasons why individuals may make potentially dangerous migration decisions.
- Review and modify policies that may compel people to resort to irregular and vulnerable labour migration. This process should include examining the effect on women of repressive and/or discriminatory nationality, property, immigration, emigration and migrant labour laws.
- Examine ways of increasing opportunities for legal, gainful and non- exploitative labour migration. The promotion of labour migration by the State should be dependent on the existence of regulatory and supervisory mechanisms to protect the rights of migrant workers.
- Strengthen the capacity of law enforcement agencies to arrest and prosecute those involved in trafficking as a preventive measure. This includes ensuring that law enforcement agencies comply with their legal obligations.
- Adopt measures to reduce vulnerability by ensuring that appropriate legal documentation for birth, citizenship and marriage is provided and made available to all persons.

