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Human trafficking and the rights of trafficked persons

An exploratory analysis on the application
of the non-punishment principle

IBA Legal Policy & Research Unit and British Institute of
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Foreword

Non-punishment is a major aspect of trafficked persons' rights set forth in various binding international instruments and European Union legislation, including the Council of Europe Convention on Trafficking, Directive 2011/36/EU and the International Labour Organization Protocol to the Forced Labour Convention, in addition to soft law documents such as the Recommended Principles and Guidelines on Human Rights and Human Trafficking of the UN Office of the High Commissioner for Human Rights. However, non-punishment is one of the least implemented provisions.

To shed light on the importance of this principle is paramount, to ensure that victims are identified and treated as such, and not (mis)identified as perpetrators, prosecuted and condemned for crimes they have not committed voluntarily.

This study explores international relevant documents and national laws, and for the first time, also relevant jurisprudence and practices in a significant number of countries across the world, namely Argentina, Australia, Canada, India, the United Kingdom and the United States. The study shows that a certain reluctance still exists regarding the non-punishment principle. The fear of encouraging 'impunity' seems to be a major obstacle hampering the correct implementation of relevant provisions, even when that obligation derives from binding international or regional instruments. Therefore, it is crucial to analyse and clarify all the implications of a human rights-based approach to non-punishment.

Critical issues emerge from the report overview. First of all, it becomes more and more evident that criminal provisions such as the defence of duress applicable to all crimes are not sufficient to comply with the non-punishment principle for trafficking victims. As a matter of fact, compelling or inducing trafficking victims to commit illicit activities is a specific modus operandi of perpetrators. From investigated cases, we know that one of the recurrent methods used by traffickers is to push their victims to commit crimes on their behalf and/or in their own interest. This happens for example when victims are used as mules in a drug traffic context, or to recruit and control other sexually exploited women. In other cases, people, especially children, are recruited for the specific purpose to exploit them in forced criminality such as pickpocketing or burglary. In all these cases, victims are induced to commit crimes or other illicit activities using force or violence or threat or deception, or more often by abuse of their position of vulnerability. Therefore, a specific provision or guidance addressing trafficking victims is needed, which should be broader than the duress defence.

Where a specific provision has been introduced into the penal code or into a binding document such as guidance for prosecutors, other issues arise. According to a correct interpretation of the non-punishment principle, its scope should include not only crimes but also administrative offences, which is crucial regarding violations of immigration regulations. It should apply not only to non-punishment *stricto sensu*, but also non-investigation and non-prosecution. In other words, it is not sufficient that a victim is not punished at the end of a long criminal proceeding often involving detention. On the contrary, they should be exempted from bearing all the negative consequences of a criminal investigation and prosecution. To this end, it is crucial that criminal proceedings are not initiated, or promptly terminated at an early stage. Finally, the non-punishment principle should extend its validity

to all consequences of pronounced convictions, if any. This implies adopting ‘vacatur’ provisions aimed at clearing criminal records of victims illegitimately prosecuted and convicted.

One of the more recurrent issues concerning the implementation of the principle is linked with the nature and gravity of crimes covered by relevant provisions. A registered trend is to limit its implementation to minor violations, or at least to exclude serious crimes such as drug trafficking. As I clarified during my tenure as UN Special Rapporteur on trafficking, such an exception is not consistent with a human rights-based approach. From the point of view of victims committing crimes without free will, the nature of the crime is irrelevant, as it is committed in the exclusive interest of their traffickers.

Finally, I would like to mention an often overlooked or misunderstood element, regarding the link between the trafficking situation and the committed crime. The study highlights that various countries have adopted different approaches. I could divide them into two types, a compulsion and a causation approach. The compulsion approach is generally understood as implying proof of coercion, compulsion or intimidation. The causation approach considers the committed crime as the result of the trafficking situation, and therefore requires only proof of a causality link.

The second solution is in line with a human rights-based approach. However, the compulsion approach should be interpreted in a broad sense, in the light of the agreed international trafficking definition. In particular, the list of illicit means used by traffickers includes the abuse of a position of vulnerability, not always implying coercion or intimidation, but for example a profound dependency of a victim on their trafficker. This is seen in many cases of sexual exploitation and also labour exploitation, especially in the context of domestic servitude.

This study provides a thorough analysis – using a human rights-based approach – of the mentioned interconnected aspects and trends concerning the interpretation and implementation of the non-punishment principle, by giving a reliable overview of legislation and practices in the selected countries. It constitutes an invaluable tool for legislators, lawyers, practitioners, police officials, prosecutors and judges.

Maria Grazia Giammarinaro

Judge (retired)

Former UN Special Rapporteur on trafficking in persons especially women and children

Key findings

Definition of the non-punishment principle

Trafficked persons shall not be punished – including, though not limited to, detained, charged or prosecuted – for the illegality of their entry into, or residence in, countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.

Findings

- Between 2002 and 2022, nine hard and soft international law instruments were adopted to address the issue and/or provide guidance.
- There are significant discrepancies among the thresholds contained in international instruments for the application of the principle. Generally, hard law instruments understand non-punishment and apply a compulsion criterion (similar to the criterion of a defence of duress), whereas soft law instruments apply a direct consequence (or causation) threshold.
- Among the selected case studies, there was notable variation in the definitions of the non-punishment principle, and the formulation of the causal nexus required between the exploitation and the unlawful act(s).
- The study identified variation in how the case study countries identify individuals as trafficked and who the burden of proof falls on, as well as a large divergence on whether the non-punishment principle can apply ex post – meaning whether a(n unfair) conviction can be later vacated and/or records expunged.
- Barriers to the application of the non-punishment principle were common across several or all jurisdictions studied. These include: lack of awareness and training on the application of the principle; systemic issues of identification of trafficked persons; the presence of procedural requirements and processes that act as barriers to non-punishment; and the thresholds and limitations placed on statutory protections.
- The lack of trained legal representatives and, more broadly, of actors in the law enforcement and judicial sectors, has emerged as a key barrier for trafficked persons in accessing the protection linked to non-punishment. This report thus recommends building awareness of the non-punishment principle and its application among all practitioners involved within and around the legal sector on trafficking cases.
- There is an increasing consensus around the need to enshrine the non-punishment principle domestically, and this report recommends that both countries and international organisations ensure their legal and policy framework provides for the non-liability of trafficked persons.
- Research should be undertaken on the quality of legal advice, the role of the private sector, the overlap between human trafficking and modern slavery in corporate supply chains, and on prison audits to locate previously unidentified trafficked persons.

Introduction

This project, implemented through a collaboration between the British Institute of International and Comparative Law (BIICL) and the International Bar Association (IBA), undertook research on the state of play of the non-punishment principle through a comparative analysis of how the principle is applied in law and practice across a number of jurisdictions, namely Argentina, Australia, Canada, India, the UK and the US.

For its most basic statement, the non-punishment principle stipulates that the involvement of trafficked persons in unlawful activities that result from their exploitation should not be criminalised and punished. Such unlawful activities include both ‘specific forms of exploitation’ to which trafficked persons are subjected (eg, engaging in illegal work, drug cultivation or soliciting prostitution), as well as ‘incidental or consequential acts’ (including criminal, immigration, administrative or civil offences).¹ There are three fundamental features of the non-punishment principle, as identified by the former United Nations Special Rapporteur on trafficking in persons, Maria Grazia Giammarinaro: ‘i) the domestic authorities’ duty not to punish a victim of trafficking for his or her involvement in a trafficking-related unlawful activity; ii) the victim’s involvement in an unlawful activity; and iii) the link between the victim’s involvement in such unlawful activity and his or her subjection to trafficking’.² Increasingly, non-punishment is seen as a core component of a rights-based approach to the protection of trafficked persons.

Several international and regional legal instruments include binding provisions on the non-punishment principle, including the Council of Europe Convention on Action against Trafficking in Human Beings (2005),³ the European Union Trafficking Directive 2011/36/EU,⁴ the Association of Southeast Asian Nations (ASEAN) Convention Against Trafficking in Persons, Especially Women and Children (2015)⁵ and the Protocol of 2014 to the Forced Labour Convention.⁶ It is also a requirement emanating from the case law of the European Court of Human Rights (ECtHR) and an expanding

1 Maria Grazia Giammarinaro, ‘The Importance of Implementing the Non-Punishment Provision: The Obligation to Protect Victims’ (2020) 3 www.ohchr.org/Documents/Issues/Trafficking/Non-Punishment-Paper.pdf accessed 25 August 2023.

2 See n 1 above 4.

3 Council of Europe, Council of Europe Convention on Action against Trafficking in Human Beings (CETS 197, 2005) <https://rm.coe.int/168008371d> accessed 25 August 2023. Art 26 provides that: ‘Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so’.

4 Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims (2011) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0036&from=en> accessed 25 August 2023. The directive provides that: ‘Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators. This safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in.’

5 ASEAN Convention Against Trafficking in Persons, Especially Women and Children (2015) www.asean.org/wp-content/uploads/2015/12/ACTIP.pdf accessed 25 August 2023. Art 14(7) provides that: ‘Each party shall, subject to its domestic laws, rules, regulations and policies, and in appropriate cases, consider not holding victims of trafficking in persons criminally or administratively liable, for unlawful acts committed by them, if such acts are directly related to the acts of trafficking’.

6 International Labour Organization, Protocol of 2014 to the Forced Labour Convention 1930 (P029) www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029 accessed 25 August 2023. According to Art 4(2), ‘[e]ach Member shall, in accordance with the basic principles of its legal system, take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour’.

list of soft law instruments.⁷ On 16 February 2021, the ECtHR delivered its first judgment concerning the principle of non-punishment, holding that the implementation of the principle is part of the states' obligation under Article 4 of the European Convention on Human Rights (ECHR),⁸ following a series of calls for the recognition of the non-punishment principle as a core component of a rights-based approach to anti-trafficking.⁹

Current research has focused on the application of the non-punishment principle for particular profiles of trafficked persons,¹⁰ and on particular countries (eg, the UK) or regions (eg, the Council of Europe).¹¹ It also provides both explanatory commentary¹² and critical analysis¹³ of the formulation and application of the non-punishment principle in regional and domestic settings. Work has been done, particularly by the UN Office on Drugs and Crime (UNODC), on mapping the enactment of the non-punishment principle in national legislation¹⁴ and compiling cases through the Sherloc database. There are also examples of legal analysis on the different models of the non-punishment provision in the grey¹⁵ and academic literature, as well as guidance on the legislative drafting of non-punishment provisions.¹⁶ Moreover, there are numerous statements from international organisations stressing the importance of states applying the principle.¹⁷

Despite the centrality of the non-punishment principle to a rights-based approach to trafficking, a global survey of the application of the principle in national legislation to facilitate comparative analysis of the legislative provision and implementation thereof has yet to be undertaken. Existing research indicates that the application of the principle is varied and inconsistent.¹⁸ This may be linked to the inconsistent way in which international instruments include (or do not include) the principle; the way

7 See Organization for Security and Co-operation in Europe (OSCE) (n 9); OSCE, 'Child Trafficking: From Prevention to Protection' (2018) 5 www.osce.org/files/f/documents/3/4/382333_1.pdf accessed 25 August 2023; and OSCE and Office for Democratic Institutions and Human Rights (ODIHR), 'Human Dimension Seminar – Rights of the Child: Children in Situations of Risk' (2017) 25 www.osce.org/files/f/documents/a/9/388961.pdf accessed 25 August 2023.

8 Art 4 prohibits slavery, servitude and forced labour, and was interpreted as to cover human trafficking as early as 2010 in the case of *Rantsev v Cyprus and Russia* App no 25965/04 (ECHR, 7 January 2010).

9 Including, eg, OSCE, 'Policy and Legislative Recommendations Towards the Effective Implementation of the Non-Punishment Provision With Regard to Victims of Trafficking' (2013) www.osce.org/files/f/documents/6/6/101002.pdf accessed 25 August 2023; Inter-Agency Coordination Group against Trafficking in Persons, 'Non-Punishment of Victims of Human Trafficking' (2020) Issue Brief 8 www.unodc.org/documents/human-trafficking/ICAT/19-10800_ICAT_Issue_Brief_8_Ebook_final.pdf accessed 25 August 2023.

10 See, eg, Patrick Burland, 'Villains Not Victims? An Examination of the Punishment of Vietnamese Nationals Trafficked for Cannabis Cultivation in the United Kingdom', International Seminar on Mixed Migration in Southeast and East Asia (2017). See also UNODC, 'Female Victims of Trafficking for Sexual Exploitation as Defendants: A Case Law Analysis' (2021) www.unodc.org/documents/human-trafficking/2020/final_Female_victims_of_trafficking_for_sexual_exploitation_as_defendants.pdf accessed 25 August 2023.

11 Evaluation conducted by the Group of Experts on Action against Trafficking in Human Beings (GRETA www.coe.int/en/web/anti-human-trafficking/country-reports accessed 25 August 2023). See also Carolina Villacampa and Núria Torres, 'Human Trafficking for Criminal Exploitation: Effects Suffered by Victims in their Passage through the Criminal Justice System' (2019) 25(1) International Review of Victimology 3; Nogah Ofer, 'Implementation of the Non-Punishment Principle in England: Why Are Victims of Trafficking Not Benefiting from the Protection from Prosecution Provided by International Law?' (2019) 11 Journal of Human Rights Practice 486; and Nayeli Urquiza-Haas, 'Vulnerability Discourses and Drug Mule Work: Legal Approaches in Sentencing and Non-Prosecution/Non-Punishment Norms' (2017) 56 The Howard Journal 309.

12 See, eg, Ryszard Wilson Piotrowicz and Liliana Sorrentino, 'Human Trafficking and the Emergence of the Non-Punishment Principle' (2016) 16 Human Rights Law Review 669.

13 See, eg, Alice Bosma and Conny Rijken, 'Key Challenges in the Combat of Human Trafficking: Evaluating the EU Trafficking Strategy and EU Trafficking Directive' (2016) 7(3) New Journal of European Criminal Law 315.

14 UNODC, 'Model Legislative Provisions Against Trafficking In Persons' (2020) Annex B www.unodc.org/documents/human-trafficking/2020/TIP_ModelLegislativeProvisions_Final.pdf accessed 25 August 2023.

15 Inter-Parliamentary Union, UNODC and United Nations Global Initiative to Fight Human Trafficking (UNGIFT), 'Combating Trafficking in Persons: A Handbook for Parliamentarians' (2009) www.refworld.org/pdfid/49ed7c0f2.pdf accessed 25 August 2023.

16 UNODC, 'Legislative Guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime' (2020) www.unodc.org/documents/human-trafficking/2020/TIP_LegislativeGuide_Final.pdf accessed 25 August 2023; OSCE (see n 7 above).

17 OSCE (see n 9 above); OSCE (see n 7 above) 5; and OSCE and ODIHR (see n 7 above) 25.

18 See, inter alia, Burland (see n 10 above); Urquiza-Haas (see n 11 above); and Villacampa and Torres (see n 11 above).

defences apply in different legal systems; and different interpretations of the principle both across legal fields and across and within jurisdictions.

It is with this context in mind that this project sought to explore a number of interconnected questions, focusing primarily on the scope and application of the non-punishment principle, including:

1. What are the sources of the non-punishment principle under international law? What is the nature of these sources and which states are bound?
2. How is the principle of non-punishment defined in national legislation, if at all? How does it interact with other defences under national law (eg, the common law defence of duress)?
3. How is the principle applied in practice (is it applied as a principle of non-liability, non-punishment, non-prosecution or even non-investigation)?
4. What level of connection is required between the trafficking situation and the committed crime for the non-punishment principle to be applied?
5. Which areas of law are covered by the principle? Is it only criminal punishment that is exempted or are other forms of ‘punishment’ (even if not considered as such under domestic law) (eg, immigration-related measures) also covered?

In order to address these questions, the project applied a mixed methods approach. Desk research was conducted at the BIICL in order to map the provisions and requirements of the non-punishment principle in international and regional legal instruments. Building on existing academic and grey literature, as well as existing jurisprudence databases, the BIICL identified gaps in the analysis of the non-punishment principle, as well as of its implementation. Considering the scarcity of data on the application of the non-punishment principle and the lack of a comparative study of its application across jurisdictions, the project team designed and distributed a global survey among members of the IBA, as well as other global anti-trafficking stakeholders. The survey resulted in 167 responses, which have been coded and analysed quantitatively and qualitatively. Lastly, the project team has coordinated six case studies: in Argentina (undertaken by a former BIICL member), Australia, Canada, India, the UK, and three states and the federal system in the US (undertaken by IBA members). The case studies were based on desk research, as well as individual interviews with key domestic stakeholders.

The findings of the project are collected in this final report, which outlines the legal bases of the non-punishment principle in international law and how the non-punishment principle is applied across selected jurisdictions. This research aims to provide a further tool to understand the structural, legal and practical barriers in the implementation of the principle, and to contribute to and further the ongoing conversation among judges, lawyers, legislators, and policy-makers on the protection of trafficked persons and, in particular, the application of the non-punishment principle.

Part I – The legal bases of the non-punishment principle in international law

Although the principle of non-punishment is absent in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime (UNTOC), it is arguably essential to the object and purpose of the protocol, namely to protect and assist trafficked persons with full respect for their human rights. As early as 2002, the Office of the UN High Commissioner for Human Rights (OHCHR) set out the principle in full in its Principles and Guidelines for Human Rights and Human Trafficking:¹⁹ ‘Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons’.

UNODC has also incorporated the principle in a number of soft-law instruments, including early instruments such as the 2008 *Toolkit to Combat Trafficking in Persons* and the 2009 Model Law Against Trafficking in Persons. Chapter 6 of the UNODC Toolkit, ‘Victim Identification’, includes a tool for the non-criminalisation of trafficking victims (Tool 6.1) and elaborates on how non-punishment should be established. Similarly, Article 10 of the Model Law provides for the ‘non-liability [non-punishment] [non-prosecution] of victims of trafficking in persons’. UNODC has supported the introduction of the non-punishment principle, not only in light of the objective and purpose of the Trafficking Protocol but also by extensively referring to, inter alia, the OHCHR’s Recommended Principles,²⁰ the Council of Europe Anti-Trafficking Convention,²¹ and the 2005 OSCE Action Plan.²² The Model Law’s 2020 update maintains a provision on non-punishment in Article 13, ‘Non-punishment of victims of trafficking in persons’. Relying on further sources that have become available in the ten years between the first and updated model laws,²³ the 2020 Model Legislation emphasises four aspects that ought to be considered when implementing the principle: (1) who can invoke the principle; (2) the scope of the principle; (3) the threshold needed to apply the principle; and (4) the burden and standard(s) of proof. Importantly for comparative purposes, the 2020 Model Legislation provides, in Annex B, a list of countries that have adopted non-punishment provisions, detailing where they are enshrined.²⁴

19 OHCHR, ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’, UN Doc E/2002/68/Add.1 (2003) Recommended Principles 7 and 8 www.ohchr.org/Documents/Publications/Traffickingen.pdf accessed 25 August 2023.

20 *Ibid.*

21 See n 3 above, Art 26.

22 OSCE, ‘OSCE Action Plan to Combat Trafficking in Human Beings’, Decision 557/Rev.1 (2003) www.osce.org/pc/15944 accessed 25 August 2023.

23 Including Art 4 of the Protocol of 2014 to the Forced Labour Convention, 1930 www.ilo.org/dyn/normlex/en/F?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029 accessed 25 August 2023 and CEDAW, ‘General recommendation No 38 on trafficking in women and girls in the context of global migration’, CEDAW/C/GC/38 (2020) para 98 www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no38-2020-trafficking-women accessed 25 August 2023.

24 See n 14 above, Annex B. The annex includes, among countries with non-punishment provisions, the UK, but interestingly, does not include Argentina despite, as our case study shows, a non-punishment provision being in force at the time of the publication of the annex. Other countries considered in our case studies, namely Australia, Canada, India and the US, are not present in the annex as they have not enshrined the principle in domestic law. For the US, see Part III of this report on the legislative differences between the federal and state levels.

In 2022, the Conference of the Parties to the UNCTOC published its ‘Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked’, recognising that: ‘The elaboration of the non-punishment principle has become more accepted over the years since the negotiation of the Trafficking in Persons Protocol, as States gained more experience in implementing their respective responses to trafficking in persons’.²⁵

Building on a previous recommendation issued by the Conference of the Parties to the UNCTOC in October 2020,²⁶ and reiterating the importance of applying the non-punishment principle, it suggests that states consider using the Mechanism for the Review of the Implementation of the UNCTOC and its supplementing protocols to share information and experiences when implementing the non-punishment principle, with a view to preventing trafficking in persons, protecting trafficked persons and ending impunity for traffickers.

Developments on the non-punishment principle have also been notable at the regional and sub-regional level. Some of the regional instruments, including, for example, the COE Anti-Trafficking Convention and the ASEAN Convention against Trafficking in Persons, Especially Women and Children have effectively and explicitly enshrined the non-punishment principle in their texts.

In addition, the principle has been included in the Organization of American States (OAS) Conclusions and Recommendations of the 2006 meeting of National Authorities on Trafficking.²⁷ Although not part of a binding treaty, the conclusions state: ‘The Member States must ensure, to the extent possible and in accordance with their respective domestic legislations, that the victims of trafficking in persons are not prosecuted for participating in illegal activities if they are the direct results of their being a victim of such trafficking’.

Beyond the strictly anti-trafficking frameworks, the non-punishment principle has also been included in several documents of the International Labour Organization (ILO). These include, most notably, the 2014 Protocol to the Forced Labour Convention 1930 (No 29), as well as a Recommendation that supplements both the Protocol and Convention No 29, Article 4(2) of the protocol, which provides for the non-punishment principle as follows:

‘Each Member shall, in accordance with the basic principles of its legal system, take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour’.

The principle is further elaborated in other ILO documents including, inter alia, the Global guidelines on the economic reintegration of victims of forced labour through lifelong learning

25 Conference of the Parties to UNCTOC, ‘Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked’, UN Doc CTOC/COP/WG.4/2022/2 (2022) para 9 www.unodc.org/documents/treaties/WG_TIP_2022/CTOC_COP_WG_4_2022_2/V2202024.pdf accessed 25 August 2023.

26 Encouraging states to ‘consider providing, in accordance with their domestic law, that victims of trafficking in persons are not inappropriately punished or prosecuted for acts they commit as a direct consequence of being trafficked and, where appropriate, provide access to remedies if they are punished or prosecuted for such acts and, accordingly, establish, as appropriate, domestic laws, guidelines or policies that espouse these principles’. See Conference of the Parties to UNCTOC, Resolution 10/3 (2020) www.unodc.org/documents/treaties/UNCTOC/COP/SESSION_10/Resolutions/Resolution_10_3_-_English.pdf accessed 25 August 2023.

27 OAS, ‘Conclusions and Recommendations of the first Meeting of National Authorities on Trafficking in Persons’ (2006) Topic IV.7.

and skills development approaches and the Standards on Forced Labour: The New Protocol and Recommendation at a Glance.

Moreover, in its General Recommendation No 38, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) also expressed its stance on the urgency of the adoption and implementation of the non-punishment principle, calling on states to:

- ‘(a) Ensure that the principle be enshrined in legislation and implemented through proper training to ensure that responders are able to identify victims of trafficking for such relief;
- (b) Not compel victims to provide evidence or testimony in exchange for immunity from prosecution, redress or services;
- (c) Provide recourse for victims of trafficking to clear their criminal records in cases in which they have been convicted of crimes that were committed as a direct consequence of being a victim of trafficking’.²⁸

<p>Council of Europe Convention on Action against Trafficking in Human Beings</p> <p>Article 26 – Non-punishment provision</p> <p>Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.</p> <p>ASEAN Convention against Trafficking in Persons, Especially Women and Children</p> <p>Article 14 – Protection of Victims of Trafficking in Persons</p> <p>7. Each Party shall, subject to its domestic laws, rules, regulations and policies, and in appropriate cases, consider not holding victims of trafficking in persons criminally or administratively liable, for unlawful acts committed by them, if such acts are directly related to the acts of trafficking.</p>

In 2020, the Inter-Agency Coordination Group against Trafficking in Persons (ICAT) issued a brief that provides a useful tool for a comparative analysis of the presence of the non-punishment principle in international and regional instruments and guidelines. The table below is an adapted excerpt from the brief. It seeks to map the conduct, threshold and outcomes considered by each of the international instruments in question.

Instrument	Nature	Conduct	Threshold	Outcome
2002 OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking	Soft law	Unlawful activities	Direct consequence	Non-prosecution, detention or punishment
2005 COE Convention on Action against Trafficking in Human Beings	Hard law	Unlawful activities	Compulsion	Non-imposition of penalties

²⁸ CEDAW (see n 23 above).

2005 OSCE Action Plan to Combat Trafficking in Human Beings	Soft law	Acts	Causation or direct relation	Non-punishment, penalisation or prosecution
2006 OAS Conclusions and Recommendations of the Meeting of National Authorities on Trafficking in Persons	Soft law	Illegal activities	Direct consequence	Non-prosecution
2009 UNODC Model Law	Soft law	Unlawful acts	Direct consequence	Non-liability or non-punishment
2011 EU Directive 2011/36/EU	Hard law	Criminal activities	Compulsion	Non-prosecution or imposition of penalties
2014 Protocol to the Forced Labour Convention 1930	Hard law	Unlawful activities	Compulsion	Non-prosecution and non-imposition of penalties
2015 ASEAN Convention against Trafficking in Persons, Especially Women and Children	Hard law	Unlawful acts	Direct consequence	Non-liability (criminal or administrative)
2022 Conference of the Parties to the CTOC	Soft law	Unlawful acts	Direct consequence	Non-punishment or prosecution
2022 UNODC Model Law	Soft law	Unlawful activities	Direct consequence	Non-liability or non-punishment

As the table above clearly shows, while the principle has been widely advocated for and incorporated (although mostly in soft law instruments), the covered conduct(s) and the threshold required for its application – as well the prescribed outcome(s) – still vary considerably between instruments. In particular, compulsion remains predominant in hard law instruments, whereas direct consequence is the standard in soft law instruments. The definitional and practical challenges in the adoption and implementation of the principle have been analysed in academic literature,²⁹ as well as in grey literature, including shadow reports.³⁰ Recognising the importance of the principle, the UN Special Rapporteur on Trafficking in Persons, Especially Women and Children dedicated one of her reports to the Human Rights Council to the principle. In her report, she addressed, at length, the scope of the non-punishment principle, as well as the threshold required for its application. More specifically on the scope of the principle, the Special Rapporteur argued that: ‘Ensuring a comprehensive response to human trafficking requires that the non-punishment principle is applied to unlawful acts, which are understood broadly to include criminal, immigration, administrative or civil offences, and not ‘status-related’ offences only’.

29 See Julia Muraszkiwicz, *Protecting Victims of Human Trafficking from Liability: The European Approach* (Palgrave Macmillan, 2018); Ofer (see n 11 above); Marija Jovanovic, ‘The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance’ (2017) 1 *Journal of Trafficking and Human Exploitation* 41; Urquiza-Haas (see n 11 above); and Villacampa and Torres (see n 11 above).

30 See eg, La Strada International, ‘La Strada International submission – Upcoming Report on the implementation of the non-punishment provision by the UN Special Rapporteur on Trafficking in Persons, especially women and children’ (2021) <https://documentation.lastradainternational.org/lsidocs/3388-La%20Strada%20International%20submission%20non%20punishment%20report%20UNSR%20Trafficking.pdf> accessed 25 August 2023; John Trajer, Gillian Kane, Marta Minetti and Sarah Craig, ‘Input for the Report on the Implementation of the Non-Punishment Principle’ (2021) QUB Human Rights Centre https://pure.qub.ac.uk/files/231110346/Queen_s_University_Belfast_Human_Rights_Centre_HTRN_Submission.UNSRT.pdf accessed 25 August 2023; Life Bloom Services International, Trace Kenya, People Serving Girls at Risk and Equality Now, ‘Joint Submission to the Special Rapporteur on Trafficking on the Principle of Non-Punishment’ (2021) www.equalitynow.org/resource/joint_submission_srtrafficking_feb_2021 accessed 25 August 2023; and Noemi Magugliani, ‘Trafficked Persons on Trial in the United Kingdom: New Court of Appeal Guidance’ (Oxford Human Rights Hub, 8 March 2022) <https://ohrh.law.ox.ac.uk/trafficked-persons-on-trial-in-the-united-kingdom-new-court-of-appeal-guidance> accessed 25 August 2023.

The tensions between the application of a causation criterion, on the one hand, and a compulsion criterion (or duress defence), on the other hand, had been highlighted already by UNODC in its 2009 *Combating Trafficking in Persons: A Handbook for Parliamentarians*. UNODC conducted an evaluation of the existing domestic provisions recognising the non-punishment principle and reached the conclusion that: ‘[C]ountries follow two main models when establishing the principle of non-criminalisation of the illegal acts committed by victims of trafficking: the duress model and the causation model. In the duress model, the person is compelled to commit the offences. In the causation model, the offence is directly connected or related to the trafficking.’³¹

UNDOC also recognised the existence of a third category, in which ‘[s]ome countries choose to make the exemption from criminal liability contingent upon the victims’ willingness to cooperate with the [relevant] competent authorities’. Such an approach, however, departs from a rights-based approach to anti-trafficking action. As the Special Rapporteur stated in the aforementioned report, in light of the purpose of the Trafficking Protocol and States’ existing due diligence obligations, the causation criterion ought to be considered as the best suited threshold considering that: ‘The causation criterion [as opposed to compulsion or duress] has the merit of highlighting that the offence committed by a trafficked person may arise as a result of their lack of independence or ability to exercise free will’.

The compulsion model also takes into account a lack of independence or ability to exercise free will, yet it is substantively linked – especially in practice – to the presence of an ‘immediate risk of harm’. In trafficking cases, however, it is often the continuing psychological and physical abuse that creates the conditions in which trafficked persons commit unlawful acts. The compulsion model fails to take into account the complex impact of trauma and ‘ongoing control’ endured by trafficked persons, even in absence of an ‘immediate risk’.

Beyond discussions around the scope of and the nexus required by the principle, it is worth mentioning that non-punishment was, as early as 2009 through the first UNODC Model Law, also framed as non-liability.³² The non-liability model is premised on the acceptance that threats, use of force, abduction, fraud, deception, abuse of power or of a position of vulnerability, and other forms of coercion may so severely impair an individual’s capacity for acting that *responsibility* is excused.³³ While the distinction may appear insignificant from the outcome perspective, non-liability significantly shifts the focus from punishment (or the absence of it), which does not exclude responsibility and culpability, to liability. This raises the question as to whether responsibility should ever be placed on the trafficked persons for the unlawful acts committed as a direct consequence of their trafficking situation. Non-liability also allows for an assessment of evidence as to who was genuinely in control of the criminality and whether the trafficked person was freely complicit or necessarily agreeing given his or her circumstances, while also applying policy considerations as to whether it is in the public interest to prosecute a trafficked person.

31 See n 15 above.

32 Muraszkiwicz (see n 29 above).

33 See n 1 above. See also Andreas Schloenhardt and Rebekkah Markey-Towler, ‘Non-Criminalisation of Victims of Trafficking in Persons – Principles, Promises, and Perspectives’ (2016) 4(1) *Groningen Journal of International Law* 21, 35.

Part II – A global snapshot on the incorporation, implementation and application of the non-punishment principle

Part II relies on data collected through our global survey, for which a total of 167 responses from 71 countries were collected. The majority of responses were collected in the Philippines (23), Nigeria (12), the US (12), Kenya (6), and South Africa (5). A full list of the surveyed countries is available in the annexes, together with the text of the questionnaire that was administered. The survey distribution list included, inter alia, judges, lawyers, prosecutors, representatives of international organisations and civil society organisations (CSOs), as well as academics and researchers. The majority of respondents were judges (66) and members of CSOs (33), followed by prosecutors (22).

Responses: Area of employment

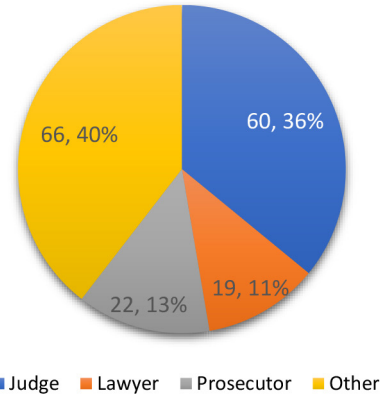


Figure 1: number of responses (and percentages of responses) by area of employment

Other: Breakdown

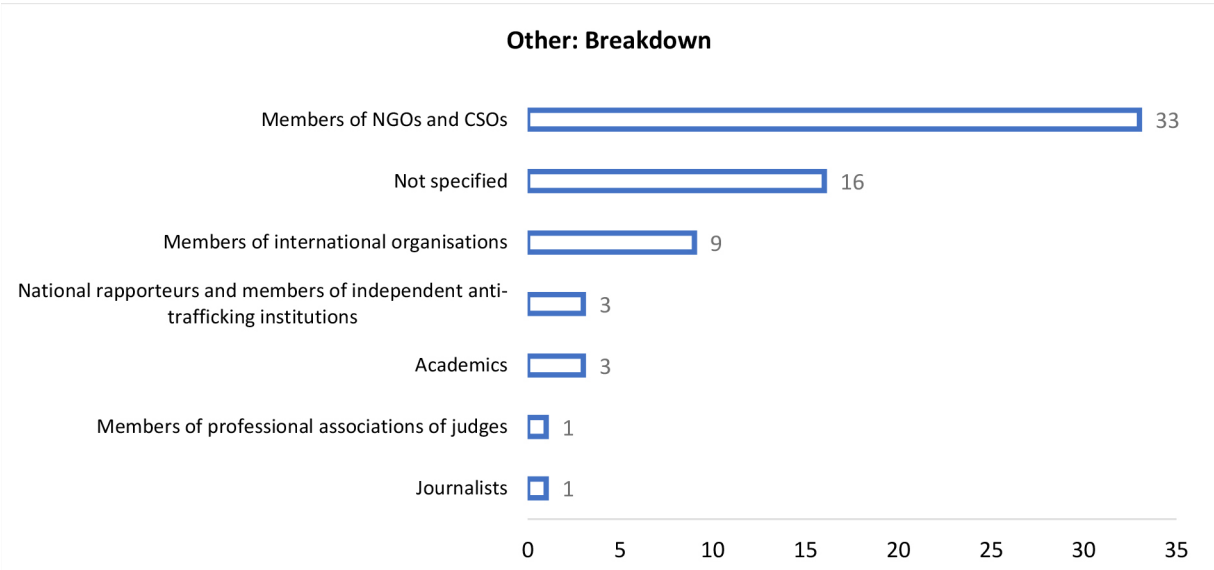


Figure 2: breakdown of the ‘Other’ category

We asked respondents to indicate whether the non-punishment principle is enshrined in domestic law or other instruments (eg, prosecutorial guidelines), or whether it was not present at all in their jurisdiction. Out of the 34 countries for which we received more than one answer,³⁴ there were 14 where the responses received were conflicting;³⁵ this tension that can be explained by the federal or regional nature of the particular state (eg, the US) or by varying degrees of awareness of the principle among the respondents (eg, the Philippines). With this limitation in mind, it is worth noting that 40 (out of 71) surveyed countries (56 per cent) had at least one answer indicating that the principle was enshrined in domestic law and/or in other instruments. It may also be that some jurisdictions have ad hoc decision-making not to prosecute vulnerable people that is not enshrined in a visible principle or policy for trafficked persons.

Among the countries where the non-punishment principle has been reported to be enshrined in domestic instruments (other than domestic law) are Australia, Belgium, Cameroon, Ethiopia, Finland, Guyana, Hong Kong SAR, Israel, Kenya, the Netherlands, the Philippines, Sweden, the UK and the US.

If respondents indicated that the non-punishment principle is not enshrined in domestic law or in other instruments, we asked whether trafficked persons could raise other defences under national law (eg, the common law defence of duress). In most countries, there are (in theory) other available defences that trafficked persons can raise.

Some respondents provided additional details with respect to how the principle and other defences (where enshrined and/or available) interact. A respondent from Lithuania, for example, indicated that ‘the principle is narrow and comes first if applicable, while [the] defence of duress is wider’. Similarly, a judge from the Philippines stated that ‘[t]he defence of [d]uress complements the non-punishment principle’. While in most countries it seems that the two coexist without tensions – the non-punishment principle acting as a specific defence and other available defences acting as a safety net – there were also respondents that highlighted tensions between the principle and other defences, in particular in the UK, where ‘[t]here is significant misunderstanding in the UK about the non-punishment [principle as the] [Crown Prosecution Service] CPS often want duress prove[n]’. This last example in particular reflects not only a tension between the non-punishment principle and traditional defences but also a substantive flaw in the way in which non-punishment is understood, that is, as merely another form of duress, ignoring the broader scope of the principle.

Whether or not the principle is enshrined in domestic law or other instruments (but there are other available defences), our research highlighted the crucial role of prosecutors and prosecutorial discretion in the implementation of the principle. The results of our survey highlight a very mixed picture in terms of prosecutorial discretion.

34 The 34 countries are: Australia, Belgium, Bosnia and Herzegovina, Cambodia, Canada, Chile, Ethiopia, Haiti, India, Indonesia, Ireland, Italy, Kazakhstan, Kenya, Lithuania, Mexico, Nepal, the Netherlands, New Zealand, Nigeria, Pakistan, Panama, Peru, the Philippines, Romania, South Africa, Spain, Thailand, Tunisia, Uganda, the UK, the US, Vietnam and Yemen.

35 The 14 countries are: Australia, Canada, India, Kazakhstan, Kenya, Mexico, Nigeria, Panama, the Philippines, Romania, South Africa, Spain, the UK and the US.

Figure 3: countries where the non-punishment principle is enshrined in domestic law (as reported by at least one respondent)

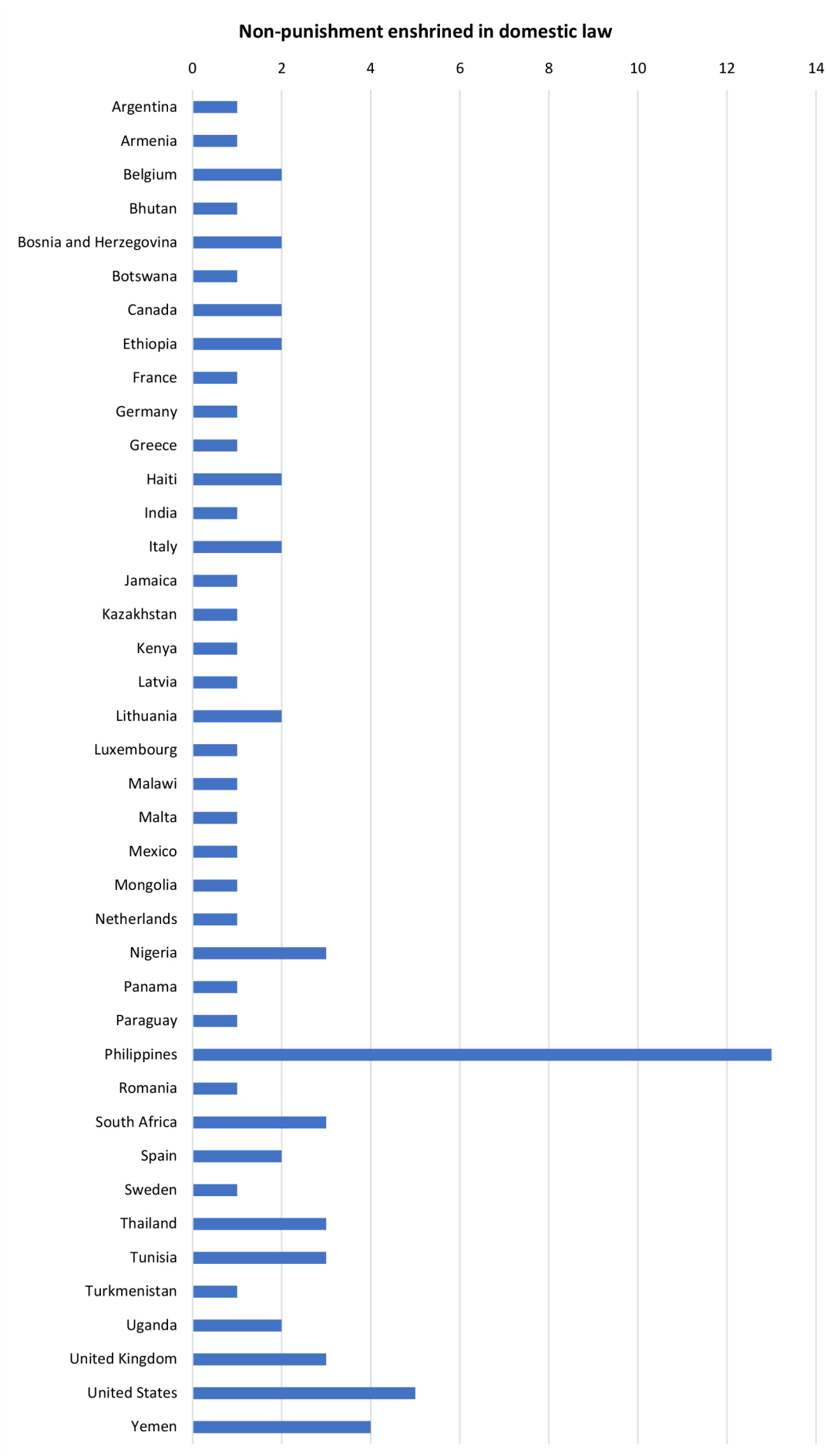
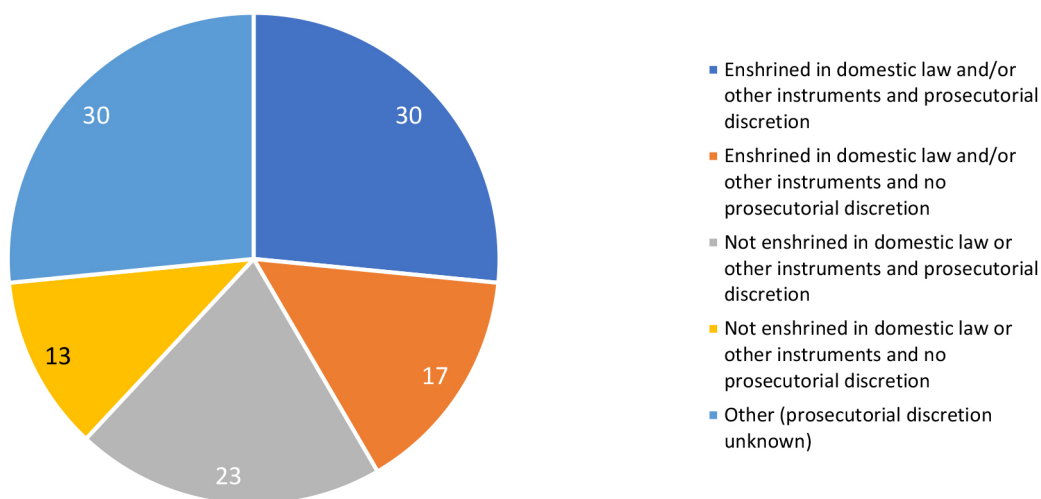


Figure 4: number of countries with at least one answer in the category

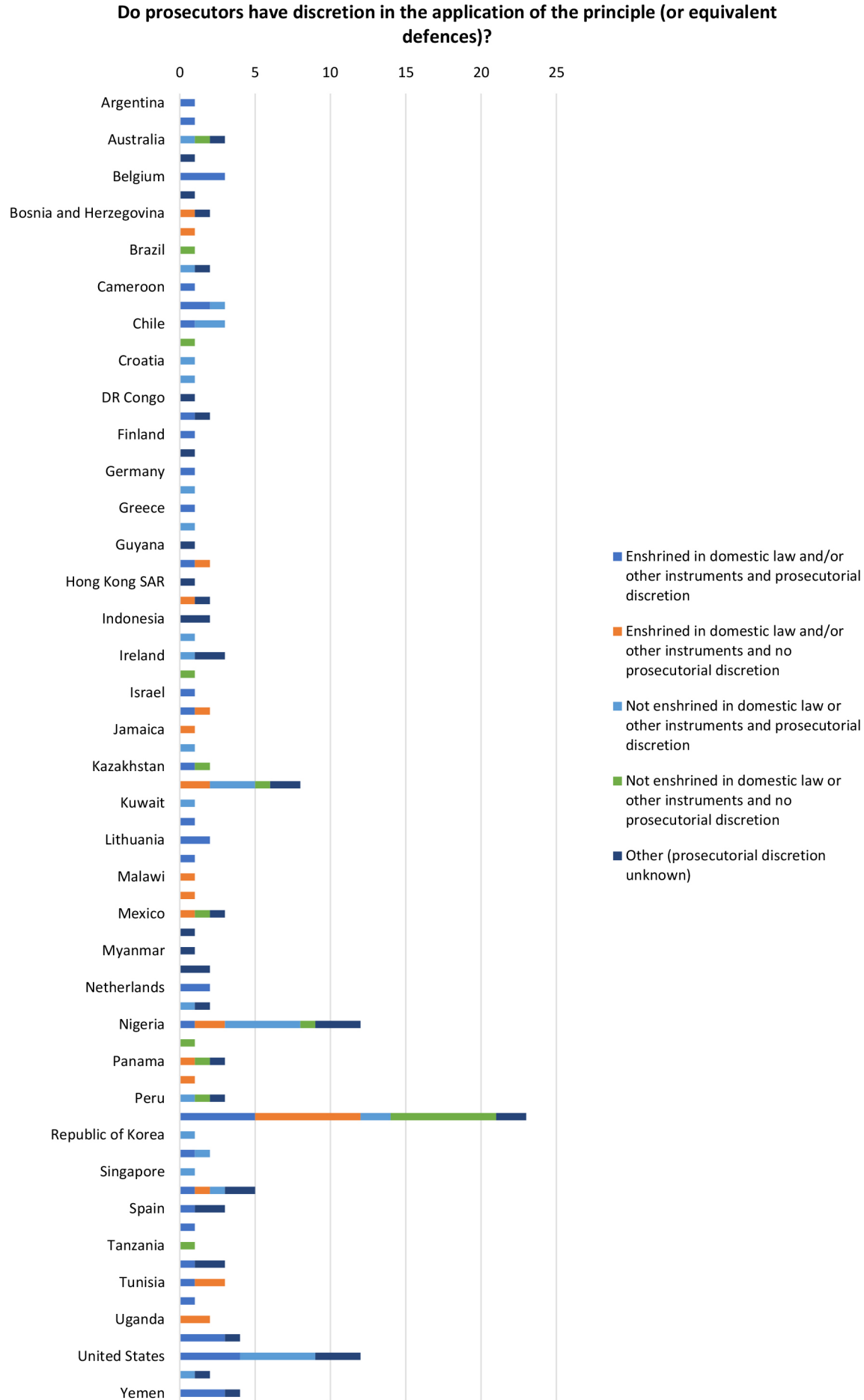
Do prosecutors have discretion in the application of the principle (or other available defences)?



The presence of prosecutorial discretion does not seem to be impacted by the presence (or absence) of the non-punishment principle in domestic law or other instruments. Where the principle is enshrined in domestic law or in other instruments, 46 respondents (48 per cent of relevant responses) indicated that there is prosecutorial discretion. Where the principle is not enshrined, 35 respondents (44 per cent) indicated the presence of prosecutorial discretion. The presence (or absence) of prosecutorial discretion is indeed not per se linked to the existence of the principle in domestic law or other instruments, but rather to the particular jurisdiction’s broader judicial system.

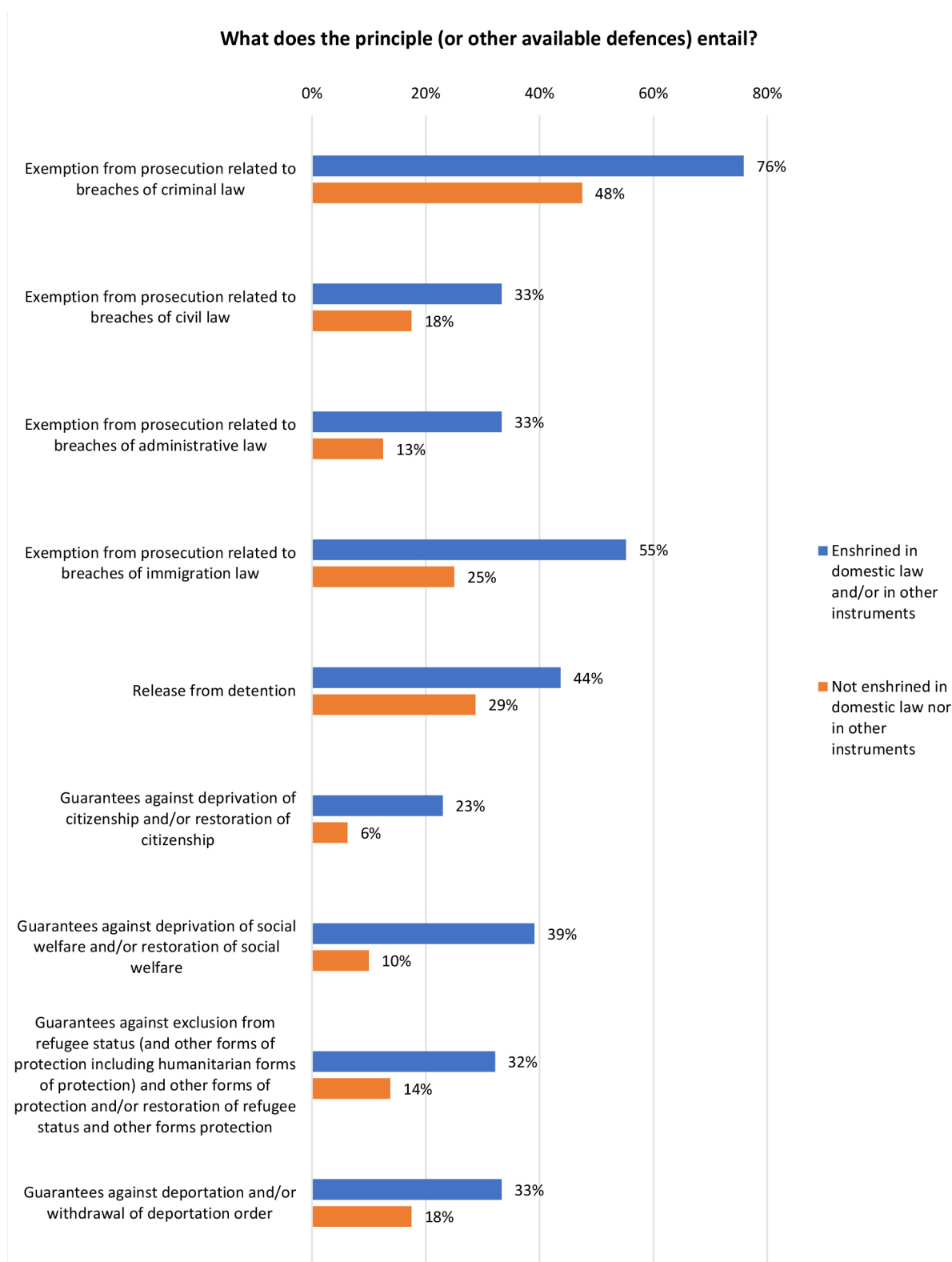
Once again, however, it is worth noting that, in most countries for which more than one answer was received, there were inconsistencies. In the Philippines, for example, responses pointed to six out of the seven potential combinations (with the exception of principle enshrined in other instruments and no prosecutorial discretion). Once again, these tensions and conflicts will be analysed in detail in Part III.

Figure 5: summary of responses by country



While the connections between the non-punishment principle and criminal law are readily identifiable, the principle’s application ought not to be limited to this particular area of law. As the table below clearly illustrates, when asked about what the principle entails, respondents’ answers varied quite significantly.

Figure 6: percentage of responses by status of the non-punishment principle

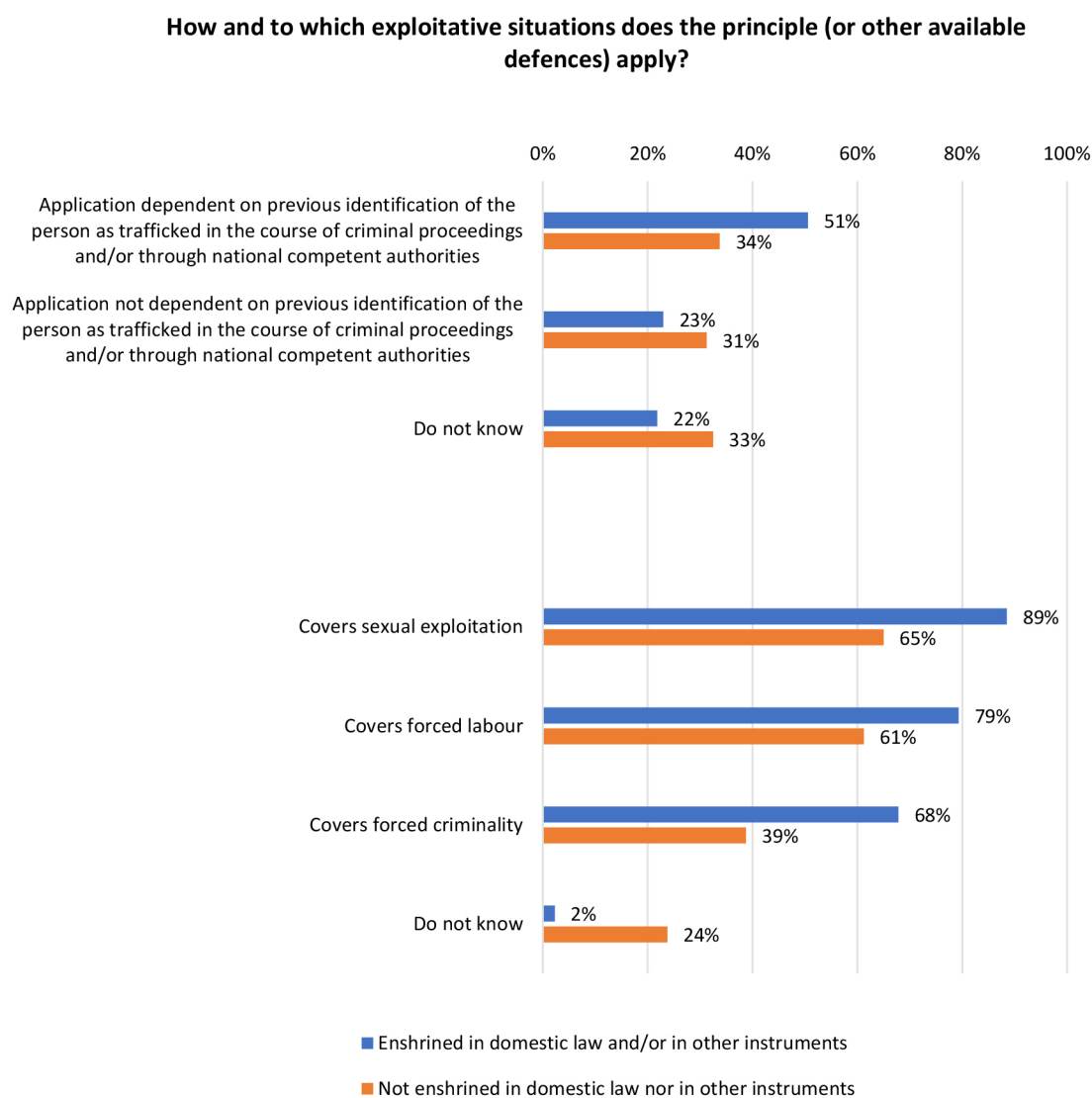


The principle entails exemption from prosecution for breaches of criminal law in the vast majority of jurisdictions, both where the principle is enshrined and where it is not, although notably, the percentage is significantly higher in the former category. An article by the IBA Asia Pacific Regional

Forum titled ‘Human trafficking and the proposed reintroduction of the death penalty’ observed in particular the importance of recognition of non-punishment in cases involving the death penalty. The second most common area covered by non-punishment is breaches of immigration law, although only slightly more than half of the respondents identified this to be the case in countries where the principle is enshrined. On the opposite end of the *spectrum*, respondents indicated that non-punishment provisions (and practice) seldom cover guarantees against deprivation of citizenship, guarantees against exclusion from refugee status recognition and safeguards against deportation orders. It should be noted that impacts on these areas often follow directly from the application of the non-punishment principle in the criminal and immigration contexts.

The limited application of the principle regarding areas of law (and offences) becomes even more problematic when we look at responses with respect to the so-called ‘status’ requirement and types of exploitative conditions covered by the principle.

Figure 7: percentage of responses by status of the non-punishment principle



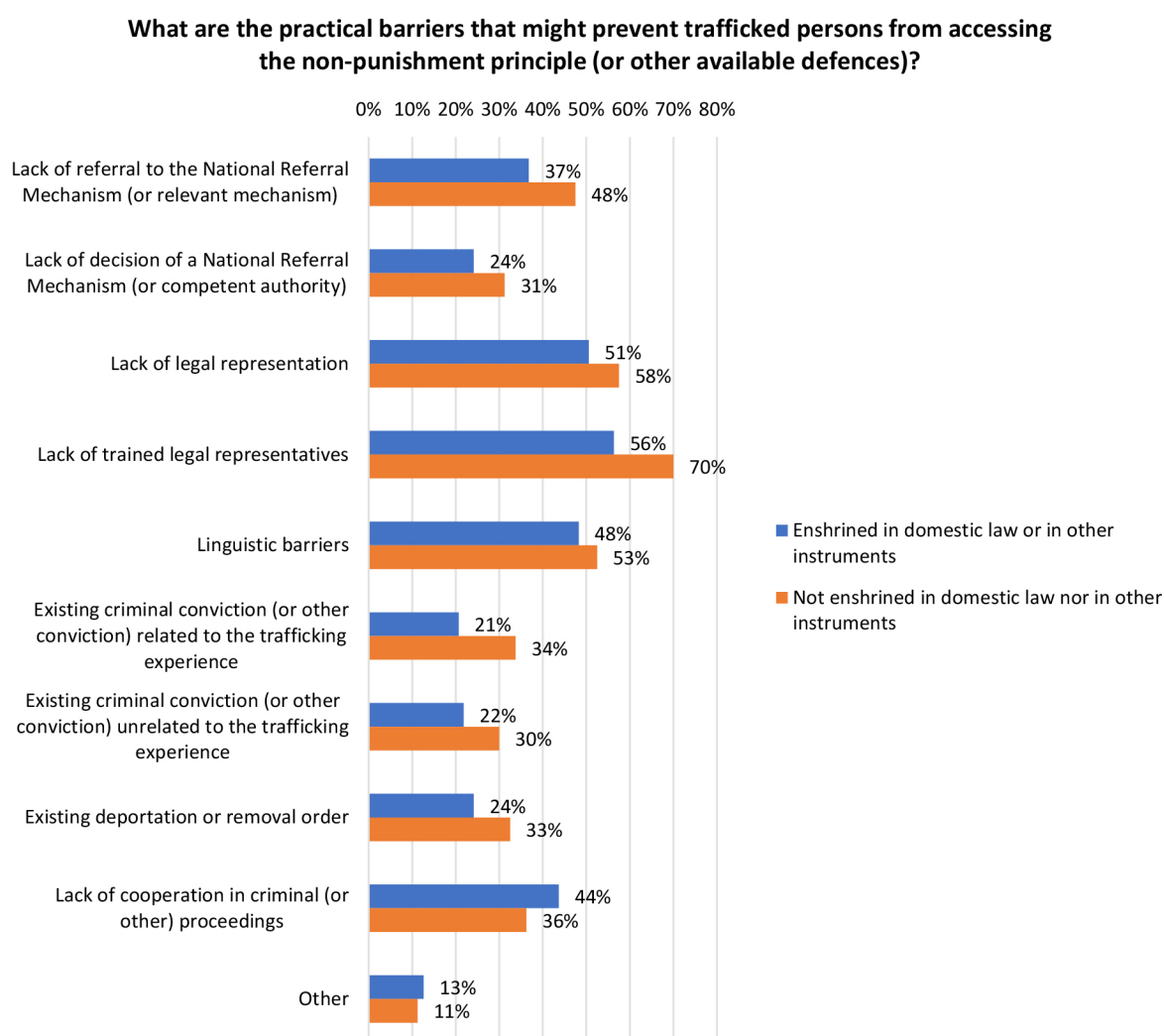
Indeed, more than half of the respondents indicated that – when the principle is enshrined in domestic law and/or other instruments – the application of the principle is dependent on a previous identification of the person as having been trafficked either during criminal proceedings against a

trafficker or through identification processes led by national anti-trafficking authorities (national referral mechanism (NRM) or equivalent processes). Responses were more balanced for countries where the principle was not enshrined, although the absence of an explicit recognition of the principle gives rise to other issues (especially regarding consistency and scope of application).

With respect to the types of exploitation covered, the vast majority of respondents noted that the principle covers sexual exploitation (89 per cent where the principle is enshrined and 65 per cent where it is not), followed by forced labour (79 per cent and 61 per cent), and forced criminality (68 per cent and 39 per cent).

The survey then asked respondents to identify practical barriers that might prevent trafficked persons from accessing the non-punishment principle (or equivalent defences), and respondents noted a wide variety of factors. The vast majority found that the lack of trained legal representatives, or lack of legal representation all together, negatively impacted access to the rights associated with the non-punishment principle, followed by linguistic barriers and lack of referral to national anti-trafficking identification mechanisms.³⁶

Figure 8: percentage of responses by status of the non-punishment principle

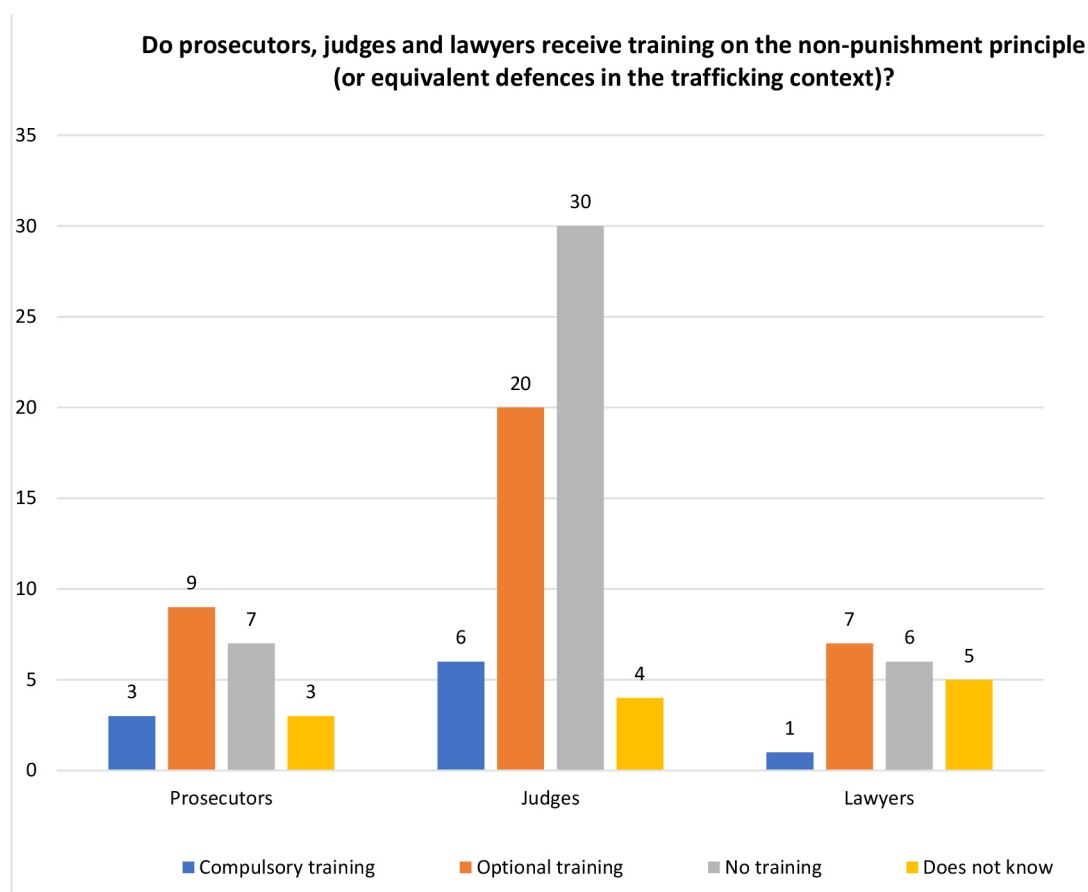


³⁶ This becomes even more significant when, as seen before, the application of the principle depends on formal identification of the person as having been trafficked in the context of criminal proceedings or by a competent authority.

A number of respondents also indicated other factors hindering access to the application of the non-punishment principle, including but not limited to: deportation happening prior to the individual having access to a court of law; unwillingness to testify in open court due to fear of reprisals or due to trauma-bonding; misidentification (in court) of the person as not trafficked often resulting from limited awareness of prosecutors and judges of the realities of trafficking; and inadequate defence.

The lack of trained legal representatives has emerged as a key barrier in accessing the protection linked to non-punishment. As a result, respondents were asked to indicate whether their category (prosecutors, judges or lawyers) had access to any form of training on the non-punishment principle and its application. The vast majority of respondents across the three categories indicated that no training was available to them or that, if it was, it was not compulsory. Only three prosecutors (out of 22), six judges (out of 60) and one lawyer (out of 19) stated that they received training and that such training was mandatory. It is particularly worrying that half of the surveyed judges stated that no training whatsoever was available to them and their colleagues.

Figure 9: number of responses by area of employment



Unsurprisingly, training was also one of the most common answers to the question on how the implementation of the non-punishment principle, where enshrined, can be improved (17 respondents), followed by awareness raising (ten) and the establishment of inter-agency cooperation mechanisms or protocols (five).

How can law, policies, institutional frameworks and practice be improved to ensure a 'better' application of the non-punishment principle in practice?	Frequency
Training	17
Awareness raising	10
Inter-agency cooperation	5
Improving identification	4
Adoption of guidelines	3
Enshrining principle in domestic law	2
Reducing prosecutorial discretion	1
Adoption of a comprehensive NRM	1
Adequate protection of trafficked persons against traffickers	1
Funding the national anti-trafficking institution	1
Joint training of involved actors	1
Ensure safety of trafficked persons and long-term economic security since the main reason is economic	1
Timely implementation of the principle	1
Training and victim protection	1
Broadening the scope of the principle	1
Anti-corruption and accountability mechanisms to ensure implementation	1
Adoption of comprehensive NRM and training	1
Clearer guidelines	1
Amendment of criminal and immigration laws	1
Linking domestic law to international law	1

In jurisdictions where the non-punishment principle is not (yet) enshrined, respondents highlighted the need to proceed with urgency to the adoption of the principle in domestic law and/or guidelines for prosecutors and the judiciary (13). Other responses, on the other hand, remained quite consistent: training was identified by 17 respondents as being key, followed by awareness raising (seven) and improvements in the identification process (three).

How can law, policies, institutional frameworks and practice be improved to ensure a 'better' application of the available defence(s) in practice?	Frequency
Training	17
Enshrining principle in domestic law	10
Awareness raising	7
Enshrining principle in domestic law or in other instruments (eg, prosecutorial guidelines)	3
Improving identification	3
Inter-agency cooperation	3
Good governance	2
Amending criminal and immigration laws	2
Social media	1
Ensuring that interpreters and legal representation are available	1
Applying the principle independent from cooperation with law enforcement	1

Part III – Identifying challenges and good practices: an analysis of selected jurisdictions

Supplementing the data collected through the global survey, Part III combines research and data collected through six case studies (Argentina, Australia, Canada, India, the UK and the US) conducted by IBA members,³⁷ as well as desk research focusing on jurisprudence contained in the UNODC Sherloc database. The data collected through these case studies is arranged thematically to facilitate a comparative analysis of how the non-punishment principle has been implemented and applied in law and practice across the six jurisdictions. The following table provides a snapshot of the state of play in each of the case studies:

Country	Is the non-punishment principle enshrined in domestic law?	Key cases
Argentina	Yes, in Law 26.364 (Article 5). There are also guidelines issued by the Argentinean Human Trafficking Prosecutor Office (PROTEX).	Oral Federal Tribunal of San Luis, <i>Ledesma Pedro et al</i> , Case No 2420-'L'-12-TOCFSL [2012] <i>Juzgado en lo Criminal y Correccional Federal No 3 Mar del Plata</i> , Case 6127, 'Av Pta Inf Ley 26.364' [2013] Federal Court of Necochea, <i>Blanco José Constantino</i> , Case 72000674/2013 [2014] Oral Federal Tribunal of Mar del Plata, <i>Dulcinea</i> , Case 91017032 [2014] Oral Federal Tribunal, <i>Landriel Daniel</i> , Case CFP 7677/2014/T01 [2018] Federal Court of Rio Gallegos, <i>Case FCR 1687/2017</i> [2022]
Australia	No. ³⁸	Although the principle of non-punishment is not itself implemented in Australian law yet, the courts have stated that the non-punishment principle does not extend to protecting trafficked persons who later become trafficking offenders. This can be seen in <i>Ho v The Queen and Leech v The Queen</i> [2011] VSCA 344 [129], where prior victimisation was not treated as a mitigating factor in sentencing as the court said the fact she was once a contracted slave had 'both positive and negative aspects from her perspective'.
Canada	No.	Although the principle of non-punishment is not itself enshrined in hard law, the omission of offences that punish victims of trafficking, relevant policies that allow for the protection of victims of human trafficking and seminal case law emphasise that victims of human trafficking are not punishable simply due to their actions arising from being trafficked.
India	No. The principle can be read into some penal provisions in both the 1956 Immoral Traffic (Prevention) Act and the Indian Penal Code, which deal with the offence of trafficking. ³⁹	

37 With the exception of the case-study on Argentina, which was conducted by María Barraco.

38 Felicity Gerry, 'Developing a Policy of Non-Prosecution for Trafficked Persons Who Commit Crime: A Victim Centred Approach' (2020) www.homeaffairs.gov.au/reports-and-pubs/files/national-action-plan-2020-24/nap-2020-24-submission-felicity-gerry.pdf accessed 25 August 2023. See also Felicity Gerry et al, 'Introducing a Modern Slavery Defence: Victim-Centred Approach' (2022) www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_/Submissions/075_Gerry_Keene-McCann_Read_Pagano_Ferguson_Redacted.pdf accessed 25 August 2023.

39 In 2012, the Ministry of Home Affairs released an Office Memorandum, which states that if foreign trafficked women or children are found without a valid passport or visa – which is an offence under the Foreigners Act of India – following investigation, then they should not be prosecuted. This is, however, the extent to which the non-punishment principle finds itself reflected in Indian law.

UK	<p>Yes, in the 2015 Modern Slavery Act. The scope is, however, restricted, as Schedule 4 provides a list of common law offences (eg, false imprisonment, kidnapping, manslaughter and murder) and other offences (eg, Offences Against the Person Act 1861, Firearms Act 1968 and Theft Act 1968) to which the section 45 defence does not apply. This includes all alleged accessories.</p> <p>The CPS has also published guidelines on the principle: ‘Modern Slavery, Human Trafficking and Smuggling’.</p>	<p><i>L, HVN, THN, and T v R</i> [2013] EWCA Crim 991 (UK)</p> <p><i>R v L(C)</i> [2014] 1 All ER 113</p> <p><i>R v VSJ</i> [2017] EWCA Crim 36</p> <p><i>R v D</i> [2018] EWCA Crim 2995</p> <p><i>R v MK and Gega</i> [2018] EWCA Crim 667</p> <p><i>GS</i> [2018] EWCA Crim 1824</p> <p><i>A</i> [2020] EWCA Crim 1408</p> <p><i>MS (Pakistan) v Secretary of State for the Home Department</i> [2020] UKSC 9</p> <p><i>R v Breani</i> [2021] 2 Cr App R 12</p> <p><i>AAD, AAH, AAI</i> [2022] 1 Cr App R 19</p> <p><i>VCL and AN v United Kingdom Apps Nos 77587/12 and 74603/12</i> (ECtHR, 5 July 2021).</p>
US	<p>Not at the federal level, but non-punishment provisions exist at state level in most jurisdictions (see the examples below).</p>	
US: New York	<p>Yes, in New York Penal Law section 230.01, which provides an affirmative defence to prostitution if the defendant is a victim of sex trafficking.</p> <p>New York Criminal Procedure Law section 440.10 also provides broad post-conviction relief (<i>vacatur</i>) of any crimes committed as a result of being a trafficking victim.</p>	<p><i>People v GM</i>, 922 NYS 2d 761 (NY Crim Ct 2011)</p> <p><i>People v Gonzalez</i>, 927 NYS 2d 567, 570 (NY Crim. Ct. 2011)</p> <p><i>People v Doe</i>, 34 Misc 3d 237 (Bronx County S Ct 2011)</p> <p><i>People v Samantha R</i>, 33 Misc 3d 1235(A) (Kings County Crim Ct 2011)</p> <p><i>People v AB</i>, 35 Misc 3d 1243(A) (NY County Crim Ct, NY County 2012)</p> <p><i>People v SS</i>, 36 Misc 3d 610 (NY County Crim Ct, NY County 2012)</p> <p><i>People v LG</i>, 972 NYS2d 418 (NY Crim Ct 2013)</p> <p><i>People v CC</i>, 45 Misc 3d 1218(A) (NY County Crim Ct, NY County 2014)</p> <p><i>People v PV</i>, 100 NYS 3d 496, 504 (NY Crim Ct 2019)</p> <p><i>People v Smith</i>, 69 Misc 3d 1030 (NY County Ct, Erie County 2020)</p>
US: Wyoming	<p>Yes, under Wyoming’s safe harbour law section 6-2-708(a) – which provides that trafficked persons are not criminally liable for any ‘commercial sex act’ or for any other offence committed ‘as a direct result of or incident to being a victim of human trafficking’.</p> <p>Section 6-2-708(c) also provides broad post-conviction relief for trafficked persons.</p>	
US: Nebraska	<p>Yes, in section 28-801, although it is limited to prostitution charges.</p> <p>Section 29-3005 also provides post-conviction and post-adjudication relief for prostitution-related offences and for ‘any other offence committed’ by a person trafficked for the purpose of sexual exploitation (in so far as the offence is directly related to the trafficking element).</p>	
US: Oklahoma	<p>Yes, in sections 748 and 748.2 of the Oklahoma Statutes (Title 21) – which provide trafficked persons an affirmative defence against prosecution for any offence committed during the time that they were trafficked.</p> <p>Oklahoma Criminal Procedure section 22-19c also provides for <i>vacatur</i> of past prostitution-related offences.</p>	<p>2014 OK CR 15 (Okla Crim App 2014)</p>

1. Definition of the principle

There is significant variation in the extent to which, and manner in which, the non-punishment principle has been defined and enshrined in the domestic legal systems of the states selected as case studies. Of the six countries considered, the non-punishment principle has only been enshrined in domestic legislation in Argentina, the UK and many states in the US. The scope, comprehensiveness and operation of the relevant legislative scheme in each of these states also differs greatly, which in turn has significant impacts on the extent of protection available to trafficked persons in each jurisdiction.

For example, **Argentina** criminalised human trafficking and enshrined the non-punishment principle through Law 26.364 as early as 2008. Article 5 of Law 26.364 provides that:

‘[English translation] Trafficked persons will not be punished for the commission of any offence that is the direct result of having been subjected to human trafficking. The sanctions and impediments established in immigration law will also not be applicable, when the infractions are a consequence of the activity carried out during the commission of the illegal act that harmed them.’⁴⁰

The non-punishment principle is supplemented by other defences under national law that have similar effects, including the defence of *state of necessity*, enshrined in Article 34 of the Argentinian Criminal Code, and the principle *in dubio pro reo*, enshrined in Article 3 of the Criminal Procedural Code. It is a clear example of moving policy objectives to a legal requirement intended to provide the visible protection envisaged by the protocol, even in the most serious of organised criminal activity.

In a similar manner, the **UK** has given the non-punishment principle domestic legal effect through the Modern Slavery Act 2015, the Nationality and Borders Act 2022 and the power of the criminal courts to stay a prosecution as abuse of process and through the review process via the appellate courts. While there is no absolute bar on prosecution of trafficked persons, it is recognised that the trafficked person is often drawn into a cycle of abuse, trafficking and exploiting others as part of their own exploitation. Section 45 of the Modern Slavery Act 2015 reads, in respect of adults:

- (1) ‘A person is not guilty of an offence if –
 - (a) the person is aged 18 or over when the person does the act which constitutes the offence,
 - (b) the person does that act because the person is compelled to do it,
 - (c) the compulsion is attributable to slavery or to relevant exploitation, and
 - (d) a reasonable person in the same situation as the person and having the person’s relevant characteristics would have no realistic alternative to doing that act’.

With regard to children, it reads:

- (4) ‘A person is not guilty of an offence if –

⁴⁰ Original text: ‘Las víctimas de la trata de personas no son punibles por la comisión de cualquier delito que sea el resultado directo de haber sido objeto de trata. Tampoco les serán aplicables las sanciones o impedimentos establecidos en la legislación migratoria cuando las infracciones sean consecuencia de la actividad desplegada durante la comisión del ilícito que las damnificara.’

- (a) the person is under the age of 18 when the person does the act which constitutes the offence,
- (b) the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, and
- (c) a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act'.

The situation in the **US** differs slightly, and analysing the presence and implementation of the non-punishment principle in the US is a complex exercise because federal law and state law coexist to create an intricate picture. Federal law-makers enacted a comprehensive statute in 2000, the Trafficking Victims Protection Act (the TVPA),⁴¹ and all 50 states have enacted similar laws establishing criminal and civil penalties for traffickers seeking to profit from labour or sexual servitude. The federal government and an increasing number of states also have embraced the underlying elements of the non-punishment principle. However, there are variations both in the anti-trafficking legislation and with regard to non-punishment of trafficked persons accused of crime. At the time of the introduction of the TVPA, Congress published a statement as part of the law that '[v]ictims of severe forms of trafficking⁴² should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked'.⁴³ In December 2021, the Biden Administration published the National Action Plan to Combat Human Trafficking ('National Plan'), which includes a key 'Protection' principle to '[s]afeguard victims of human trafficking from being inappropriately incarcerated, fined, or otherwise penalized for unlawful acts committed as a direct result of being trafficked'.⁴⁴

Yet, the TVPA does not include specific statutory provisions to give binding effect to these aspirational statements,⁴⁵ and while Congress has proposed further, more specific, legal protections for trafficked persons, these are yet to be made law at the federal level.⁴⁶ Instead, this matter is primarily left to the discretion of individual states, and there are significant differences in the level of protection states provide to trafficked persons who face criminal charges for activities directly resulting from their trafficking, and even in whether states incorporate the non-punishment

41 This act was reauthorised multiple times between 2003 and 2019 as the Trafficking Victims Protection Reauthorization Act; for the purposes of this report, both statutes are referred to as the 'TVPA'.

42 22 USC s 7102(11) defines 'severe forms of trafficking' as (A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery'.

43 Pub L No 106-286, enacted at 22 USC s 7101(b)(19).

44 The White House, The National Action Plan to Combat Human Trafficking (December 2021) 31 www.whitehouse.gov/wp-content/uploads/2021/12/National-Action-Plan-to-Combat-Human-Trafficking.pdf accessed 25 August 2023.

45 Jeffrey Zeeman and Karen Stauss, 'Criminal Conduct of Victims: Policy Considerations' (2017) 65 US Attorneys' Bulletin 139. See also 22 USC s 7106(b)(2), which includes as a factor in whether a country meets the minimum standards for the elimination of trafficking, '[w]hether the government of the country protects victims of severe forms of trafficking in persons and encourages their assistance in the investigation and prosecution of such trafficking, including provisions for legal alternatives to their removal to countries in which they would face retribution or hardship, and ensures that victims are not inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts as a direct result of being trafficked, including by providing training to law enforcement and immigration officials regarding the identification and treatment of trafficking victims using approaches that focus on the needs of the victims' [emphasis author's own].

46 See, eg, Trafficking Survivors Relief Act of 2017, HR 459, 115th Congress (2017) (including *vacatur*, expungement relief). See n 45 above, 144: 'Prosecutors should also keep in mind that Congress and state legislatures have been keenly focused on the enactment of *vacatur* and expungement laws for human trafficking victims'.

principle at all.⁴⁷ These differences are important because many of the crimes associated with trafficking – including forced sex work, soliciting sex work, gang activities, kidnapping, drug possession and distribution, and property crimes – are typically prosecuted at the state level rather than the federal level. Four US states were considered in more detail for the purposes of the case study. The selection considered three states that have been recognised as leaders in the adoption and implementation of the non-punishment principle, and one state that recently adopted legislation in that respect.

First, **New York** was the first state to enact a law vacating criminal convictions for trafficked persons in 2010, under Criminal Procedure Law section 440.10.⁴⁸ Under the provision, state courts can vacate a conviction where satisfied that the conviction was *a result of* sex trafficking, labour trafficking, aggravated labour trafficking, compelling prostitution or trafficking under the federal TVPA.⁴⁹ In addition to these *vacatur* laws, New York Penal Law section 230.01 also provides an affirmative defence to a charge of prostitution if the accused person has been trafficked for the purpose of sexual exploitation. The New York judiciary also established the country's first system of dedicated courts, the Human Trafficking Intervention Courts, designed specifically to protect and support people trafficked for the purpose of sexual exploitation.⁵⁰ Judges, defence attorneys and prosecutors evaluate cases of individuals who have been arraigned for sex work-type offences and direct them to these courts when appropriate.⁵¹ These specialised courts can then help trafficked persons gain access to services including, for example, drug treatment, shelter, immigration assistance, healthcare, education and job training.⁵²

An affirmative statutory defence and *vacatur* laws have also been enacted in **Wyoming**, a state that has been widely recognised for its strong protections for trafficked persons.⁵³ These two important protections are set out under Wyoming's safe harbour law, section 6-2-708.⁵⁴ First, section 6-2-708(a) provides broad immunity from prosecution, providing that trafficked persons are not criminally liable for any 'commercial sex act' or for any other offence committed 'as a direct result of or incident to being a victim of human trafficking'.⁵⁵ Second, section 6-2-708(c) provides equally broad post-conviction relief for trafficked persons, providing that courts may vacate their convictions for any offences that resulted from the trafficking experience.⁵⁶

47 See Polaris Project, 'State Report Cards: Grading Criminal Record Relief Laws for Survivors of Human Trafficking' (2019) <https://polarisproject.org/resources/state-report-cards-grading-criminal-record-relief-laws-for-survivors-of-human-trafficking> accessed 25 August 2023. See also Allison Cross, 'Slipping Through the Cracks: The Dual Victimization of Human- Trafficking Survivors' (2013) 44 McGeorge Law Review 395, 407–408.

48 Cheyenne Burke, 'Combating Human Trafficking: NYSBA Recommendations Become Law' (2021) <https://nysba.org/combating-human-trafficking-nysba-recommendations-become-law/#:-:text=In%202010%2C%20New%20York%20became,and%20other%20sex%2Drelated%20offenses> accessed 25 August 2023.

49 NY Crim Proc Law s 440.10 (McKinney 2022).

50 Lori Waichman, 'Vacating Criminal Convictions for Victims of Human Trafficking: Weighing Opportunities for Expansion with a State Interest in Finality' (2018) 1 International Comparative Policy and Ethics Law Review 473, 497. See also New York State Unified Court System, 'NY Judiciary Launches Nation's First Statewide Human Trafficking Intervention Initiative' (2013) www.nycourts.gov/press/PR13_11.pdf.

51 Alyssa M Barnard, 'The Second Chance They Deserve: Vacating Convictions of Sex Trafficking Victims' (2014) 114 Columbia Law Review 1463, 1478.

52 New York State Unified Court System, 'Human Trafficking Intervention Courts: Overview' (2020) ww2.nycourts.gov/courts/problem_solving/htc/index.shtml accessed 25 August 2023. *Ibid* 1479.

53 See, eg, Polaris Project (see n 47 above) 28 (ranking Wyoming second among all states for criminal record relief for trafficking survivors); and National Conference of State Legislatures, 'Prosecuting Human Traffickers: Recent Legislative Enactments' (2018) (highlighting recent legislative efforts in Wyoming, particularly on criminal asset forfeiture) www.ncsl.org/research/civil-and-criminal-justice/prosecuting-human-traffickers.aspx accessed 25 August 2023.

54 Wyo Stat Ann s 6-2-708 (2013).

55 *Ibid*, S 6-2-708(a).

56 *Ibid*.

Like New York and Wyoming, **Nebraska** has also been recognised for its protection of trafficked persons and has introduced legislative measures that provide both a statutory defence for trafficked persons accused of prostitution and post-conviction relief for trafficked persons. In this regard, the non-punishment principle is reflected in two statutes: sections 28-801 and 29-3005.⁵⁷ Under section 28-801, law enforcement officials have the discretion to determine, ‘after a reasonable detention for investigative purposes’, ‘that a person suspected of [prostitution] engag[ed] in those acts as a direct result of being a trafficking victim’.⁵⁸ Such a determination provides ‘immun[ity] from prosecution for a prostitution offence’.⁵⁹ If law enforcement officers do not use their discretion to release a (trafficked) person at this stage, the person may raise his or her ‘victim status’ at trial as an affirmative defence to the prostitution charge.⁶⁰ In these cases, the judge or jury ultimately deciding the criminal case would make the decision on whether the defence is warranted. The defence under section 28-801 is available to both minors and adults who have been trafficked for sexual exploitation. In addition, section 29-3005 provides post-conviction and post-adjudication relief for prostitution-related offences and for ‘any *other* offence committed’ that directly resulted from or was proximately caused by the subjection to sex trafficking.⁶¹ The provision provides that if a trafficked person is convicted of an offence related to sex work despite his or her ‘victim status’, the court must, upon motion, set aside the conviction for any sex work-related offences committed,⁶² or any other convictions or adjudications that were ‘a direct result of’ or ‘proximately caused by’ the movant’s trafficking status.⁶³ The same laws apply for juvenile adjudications.⁶⁴ A separate provision of the Nebraska code also allows trafficked persons to seal criminal records of set aside convictions or juvenile adjudications that resulted from their status as trafficked individuals.⁶⁵

More recently, **Oklahoma** has begun to recognise elements of the non-punishment principle through two new affirmative defences. Section 748 of the Oklahoma Statutes Title 21, like the New York and Wyoming statutes, provides trafficked persons an affirmative defence against prosecution where ‘during the time of the alleged commission of the offence, the defendant or alleged youthful offender or delinquent was a victim of human trafficking’.⁶⁶ Section 748.2 provides a set of procedural rights, including mandatory access to shelter, food, medical care and certain legal services, as well as a prohibition on inappropriate detention, jailing and fines.⁶⁷ In addition to these affirmative defences, Oklahoma Criminal Procedure section 22-19c provides for *vacatur*s of past convictions. Specifically, ‘[t]he court, upon its own motion or upon petition by the defendant and for good cause shown, may enter an order for expungement of law enforcement and court records

57 Neb Rev Stat s 28-801(3) (2016).

58 *Ibid.*

59 *Ibid.*

60 *Ibid.*

61 Neb Rev Stat s 29-3005 (2018).

62 *Ibid.*, S 29-3005(3).

63 *Ibid.*, S 29-3005(2). Once a court has granted a motion to set aside a conviction or an adjudication under s 29-3005 for prostitution or other offence, the victim may file a motion to have their criminal record(s) of the conviction(s) or adjudication(s) at issue sealed, which will automatically be granted: *Ibid.* s 29-3523(4) (2018).

64 *Ibid.*

65 *Ibid.* s 29-3523(4).

66 Crimes and Punishments, 2022 Okla Sess Law Serv Ch 20 (HB 4224) (formerly Okla Stat Ann Tit 21 s 748 (West)).

67 Under s 748.2, human trafficking victims may neither be ‘detained in facilities inappropriate to their status as crime victims’ nor ‘be jailed, fined, or otherwise penalized due to having been trafficked’: Crimes and Punishments, 2022 Okla Sess Law Serv c 20 (HB 4224). Furthermore, victims must be provided ‘appropriate shelter’ and ‘food’, ‘medical’ and ‘mental health care’, ‘legal assistance’, ‘translation services’ and ‘protection if the safety of the victim is at risk’. *Ibid.*

relating to a charge or conviction for a prostitution-related offence committed as a result of the defendant having been a victim of human trafficking'.⁶⁸

By contrast, other countries considered within the case studies are yet to implement laws embodying the non-punishment principle, and are still discussing whether and how to enshrine it in their domestic legal systems. For instance, current laws relating to trafficking, slavery, forced labour and sexual exploitation in **India** lack an explicit provision of 'non-punishment'. The Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, which was tabled before Parliament in 2021, aims to introduce one central and comprehensive law on all forms of trafficking. Importantly, the bill enshrines the non-punishment principle in its provisions as follows:

'Non-liability of acts committed by victim under coercion, compulsion, intimidation, etc.

37. A victim under the provisions of this Act shall not be held criminally or otherwise liable for any act that constitutes an offence under any law for the time being in force, unless such act is committed or attempted to have committed by him as a direct consequence of his situation as such a victim, or if the offence is committed or attempted to have been committed by him under coercion or compulsion or intimidation or threat or undue influence by any person and where, at the time of committing the offence, the victim is subjected to reasonable apprehension of his death, grievous hurt or any other injury to him or to his spouse, children or any blood relation'.

However, the bill is yet to be passed, so there is a possibility that the language and content might change, or that it may lapse altogether. It is crucial to note that a separate bill introduced in 2018 on trafficking did not pass and lapsed in 2019.

Similarly, **Australia** criminalised human trafficking in sections 270 and 271 of its Criminal Code (Cth),⁶⁹ and enacted legislation specifically requiring the corporate reporting of modern slavery in 2018. There is a current National Action Plan (NAP) urging a victim-centred approach to trafficking and slavery,⁷⁰ but there are presently no specific legislative protections or defences available to people with lived experiences of modern slavery or trafficking in Australia. Furthermore, while there was a recommendation for the implementation of the non-punishment principle in 2017, to date Australia's domestic legal framework 'currently leaves protection to policy-based responses'; save for the NAP, no prosecuting department publishes a protective policy.⁷¹ While one state judicial college has issued guidance on modern slavery in criminal law, there is no mention of non-punishment at all. However, some general criminal defences may be available to people with lived experiences of modern slavery or trafficking under limited circumstances, and state and federal prosecutorial policies include a public interest test that may militate against pursuing charges against people with lived experiences of trafficking or modern slavery for offences committed during their exploitation.

In February 2017, the Attorney-General of Australia asked the Joint Standing Committee on Foreign Affairs, Defence and Trade to inquire into the establishment of modern slavery laws in Australia. A particular focus of the committee's inquiry was assessing the effectiveness of the

68 Okla Stat Tit 22-19c (2019).

69 Currently the subject of a targeted review https://consultations.ag.gov.au/crime/modern-slavery-offences/user_uploads/targeted-review-of-divisions-270-and-271-of-the-criminal-code.pdf accessed 25 August 2023.

70 See, eg, Commonwealth of Australia, 'National Action Plan to Combat Human Trafficking and Slavery 2015-2019' (2014) 18 www.homeaffairs.gov.au/criminal-justice/files/trafficking-national-action-plan-combat-human-trafficking-slavery-2015-19.pdf accessed 25 August 2023.

71 See n 38 above.

UK's 2015 Modern Slavery Act, and the committee's report ultimately recommended that similar or improved measures could be introduced in Australia. Relevantly for present purposes, the committee made the following recommendations on the incorporation of the principle of non-punishment in modern slavery legislation:⁷²

'The Committee recommends that the Australian Government introduce defences for victims of modern slavery offences who are compelled to commit a crime due to exploitation, similar to but improving on section 45 of the UK Modern Slavery Act 2015 and drawing from international best practice. This should include a pathway for appeal and/or expungement of criminal convictions for victims of modern slavery who have legitimate defences.

The Committee recommends that specific guidance (including sentencing guidance) be developed to support the introduction of these defences, which takes into account the impact of modern slavery, exploitation, coercion and vulnerability on victims.'

However, although the committee's overall recommendation for the enactment of modern slavery laws was adopted by Parliament, its recommendation for defences and a pathway to appeal was not, and nor has there been any subsequent amendment to State or Federal criminal laws to reflect this recommendation. Instead, the Modern Slavery Act 2018 (Cth), which came into force on 1 January 2019, is limited to corporate reporting of slavery in supply chains.

While the non-punishment principle is not enshrined in Australian law at present, the NAP includes an initiative to undertake a targeted review of the support and legislative protections that is now underway.⁷³

Much like Australia, the Canadian Government has not yet taken concrete steps towards enshrining the non-punishment principle in its domestic legal framework, although **Canada** has increasingly adopted a rights-based and victim-centred approach to combatting the issue of human trafficking over the past two decades. For example, both the Protection of Communities and Exploited Persons Act 2014 and the National Strategy to Combat Human Trafficking 2019–2024 outline the objective of protecting trafficked persons, while still exercising enforcement mechanisms against those who perpetrate trafficking. In addition, both the Criminal Code of Canada and the Immigration and Refugee Protection Act proscribe the perpetration of and benefit from trafficking of persons, and legislative materials relating both of these statutes outline policies for the protection of individuals who have been, or are being, trafficked. However, despite the Canadian Government's objectives of providing protection for individuals who have been trafficked, non-governmental organisations and academics have critiqued legislation and policies for continuing to cause harm to trafficked persons. Legislation, both in the criminal and immigration contexts, is vague and does not enshrine the non-punishment principle.

In the countries that have not (yet) formally enshrined the non-punishment principle in domestic law, other more general criminal defences may be available to trafficked persons who commit an offence. For example, while no specific protection or defence embodying the non-punishment

72 Parliament of the Commonwealth of Australia, 'Hidden in Plain Sight: An inquiry into establishing a Modern Slavery Act in Australia' (December 2017) https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024102/toc_pdf/HiddeninPlainSight.pdf;fileType=application%2Fpdf accessed 25 August 2023.

73 Commonwealth of Australia, 'National Action Plan to Combat Modern Slavery 2020-2025' (2020) 26–27 www.homeaffairs.gov.au/criminal-justice/files/nap-combat-modern-slavery-2020-25.pdf accessed 25 August 2023.

principle has been enacted under **Australian** law, a number of general defences under the Criminal Code Act 1995 (Cth) may be available to victims and survivors of modern slavery and trafficking under certain circumstances, including:

- the defence of duress in both federal and state legislation provides that a person is not criminally responsible for conduct constituting an offence if such conduct is committed as a reasonable response to a threat;
- the defence of sudden or extraordinary emergency may provide some protection if emergency is broadly defined so that a person is not criminally responsible for conduct constituting an offence if such conduct is committed in response to circumstances of sudden or extraordinary emergency; and
- the defence of self-defence, which provides that a person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.

Other defences, such as that of innocent agency,⁷⁴ necessity or marital coercion⁷⁵ may also be available in certain circumstances, and it is at least arguable that the ancient approach to conspiracy may allow an operation of a victim's rule that a victim of a crime cannot be a co-conspirator, but these are untested in the context of trafficking as non-punishment is not embedded as an approach to human trafficking in criminal law. In addition, these defences carry high evidential burdens of proof and prescribe specific elements for their invocation. They also lack the nuance and specialisation to effectively and comprehensively account for the specific types of ongoing harm and intimidation that victims of trafficking and modern slavery who are charged with crimes related to their exploitation have faced or are facing, and thus generally prove to be 'inadequate to prevent [trafficked persons'] prosecution or punishment'.⁷⁶

The general criminal defence of duress in **India** is narrower than that in Australia, but may be available under section 94 of the Indian Penal Code where the person acts under threat of death, it provides that:

'Except murder, and offenses against the state punishable with death, nothing is an offence which is done by a person compelled to do it under threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence, provided the person doing the act did not of his own accord, or from reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint'.

However, much like in the UK, the scope of operation of this defence is narrower than envisaged by the non-punishment principle. For instance, a trafficked person who is guilty of committing murder under circumstances of coercion will not have a defence under section 94 of the Indian Penal Code, and for a trafficked person to rely on the defence under section 94, the individual must establish

74 Under s 11.3 of the Criminal Code Act 1995 (Cth), criminal responsibility may be relocated away from a person who commits an offence to another person who has intentionally directed them to commit all or some of the elements of the crime.

75 See, eg, Crimes Act 1958 (Vic) s 336.

76 Felicity Gerry et al, 'Introducing a Modern Slavery Defence: Victim-Centred Approach' (Submission to the Legal and Social Issues Committee of the Parliament of Victoria, 31 August 2021) 7–9 www.parliament.vic.gov.au/images/stories/committees/SCLSI/Inquiry_into_Victorias_Justice_System_/Submissions/075_Gerry_Keene-McCann_Read_Pagano_Ferguson_Redacted.pdf accessed 25 August 2023.

that he or she reasonably feared instant death at the time of committing the offence. In addition, the duress alleged has to arise from coercion, or at least some form of it, which in turn should cause reasonable apprehension of death/injury. This objective test has been criticised, as recourse to the defence is not based on how the trafficked person perceives the threat he or she is facing, but rather on whether the threat can objectively be thought of as producing a reasonable apprehension of instant death. It is also not protective as it envisages harm before it operates.

2. Scope of the principle

Another area in which significant divergences were observed was in the scope of the principle as it has been adopted and applied under domestic law. The specific types of exploitation covered by statutory defences and other provisions varied, as did the specific offences covered by the various protections. Differences were also observed in the relevant threshold (eg, compulsion, consequence or otherwise) and the formulation of the causal nexus required between a trafficked person's exploitation and the offence in question.

In **Argentina**, Article 5 of Law 26.364 has been found to extend to both sexual exploitation and forced labour, as well as, arguably, forced criminality. In the context of exploitation other than sexual, it is relevant to point to the case of *Calle Calle et al* (2014), where a woman was charged with participating in a criminal organisation that recruited and transported at least 32 individuals from Bolivia to Argentina for the purpose of exploitation at various weaving workshops. The court applied the non-punishment principle, considering that she committed the crime in the framework of being a victim of serfdom, as she had been exploited since she was as a child by her father (one of the main defendants). The court explained that: 'In order to avoid an interpretation of Article 5 of the law that criminalizes human trafficking as an exculpatory circumstance that leads to impunity of the authors, the totality of the circumstances must be analysed in order to affirm that the person is a victim of the crime in analysis. In this case, textile production in conditions of labour exploitation.'

Further, there are, in principle, no restrictions on the offences to which the non-punishment principle applies under Argentinian law. This does not mean, however, that the principle has been applied in practice without obstacles. A key challenge has been the application of the principle to cases of trafficking for the purpose of forced criminality (especially so-called *mulas* cases).⁷⁷ The application of the principle in these cases is complicated by the absence of the forced criminality purpose in the current legal framework, which results in trafficked persons not being promptly (nor correctly) identified as trafficked and instead subjected to prosecution. To counter this trend, the Public Ministry of Defence recently requested an amendment to Law 23.737, to explicitly criminalise the illicit possession and trafficking of drugs, and to further include language enshrining the non-punishment principle, particularly given the overlap between participating in the drug trade and human trafficking.⁷⁸

77 There are also some recent cases where *mulas* were acquitted. Eg, in Case FCR 1687/2017, a woman was found to be transporting cocaine across borders at the airport; however, it was proven that she was in fact a victim of human trafficking for sexual exploitation and that the transportation of the drug was a direct result of her victimisation [https://jurisprudencia.mpd.gov.ar/Jurisprudencia/Gomez%20\(causa%20N%C2%B0201308\).pdf](https://jurisprudencia.mpd.gov.ar/Jurisprudencia/Gomez%20(causa%20N%C2%B0201308).pdf) accessed 25 August 2023. Hence, the prosecution requested her acquittal by application of the non-punishment principle under Art 5 of Law 26.364.

78 Ministerio Público de la Defensa, 'El MPD planteó ante el Senado la necesidad de la reforma de la Ley de drogas' (2020) www.mpd.gov.ar/index.php/noticias-feed/5175-el-mpd-planteo-ante-el-senado-la-necesidad-de-la-reforma-de-la-ley-de-drogas accessed 25 August 2023.

Another challenge in the scope and application of the non-punishment principle in Argentina has been cases involving people with ‘historical’ experiences of being subjected to trafficking and/or exploitation, who are now accused of being an exploiter or a trafficker. For example, in *CMS y Guillemet Gastón* (2018), a woman who had been trafficked for the purpose of sexual exploitation was accused of exploiting two other individuals after starting a relationship with one of her traffickers. The first instance court ruled that the applicability of the non-punishment principle was precluded because the individual was not ‘a victim of trafficking *at the moment* the crime was committed’.⁷⁹ The Cassation Court, however, ruled to apply the non-punishment clause to the woman, noting that ‘she transitioned from victim to defendant under the orders of Guillemet’ and that ‘there was no interruption of her victimization since the start of the relationship with the trafficker and the acceptance of a different role’. It concluded that ‘it would be hypocritical to punish criminally and to demand a victim of exploitation to return to his/her condition of vulnerability and reject an opportunity to safeguard from exploitation and the violation of his/her rights’.

In a very similar case, *Justino, Horacio Abel; Fernandez Castillo, Celia Aurora; Ledesma, Rubén Lino s/ Delito c/ la libertad* (2017), the first instance court convicted a woman and another defendant for the crime of trafficking. The conviction was overturned in the second instance court, where the judge applied the non-punishment principle on the basis that the woman had been trafficked and suffered sexual exploitation for a long time.⁸⁰ The reasoning of the appellate courts in the above cases was followed at first instance in *Blanco, José Constantino y otros s/ infracción art 145 bis* (2018). Here, the court applied the non-punishment principle, taking into consideration that, although the victim’s relationship with the trafficker provided her with benefits, she was still to be considered as a trafficked person, and appreciating that the trafficker used their relationship to control other women.⁸¹

By contrast, the ambit of the relevant legislative provisions in the **UK** is significantly narrower. While all forms of exploitation are covered by the defence, a significant number of offences, considered to be ‘grave offences’, are excluded from the application of section 45 of the Modern Slavery Act 2015 (the ‘MSA 2015’). These excluded offences are listed in full in Schedule 4 of the act, and include a number of serious crimes, terrorism offences, breaches of the peace, sexual offences, and slavery and trafficking. Importantly, the section 45 defence is not available to anyone who commits, attempts or conspires to commit, or aids, abets, counsels or procures one of the offences listed under Schedule 4, leaving the acts of many trafficked persons outside the scope of the defence. Restrictions are also

79 This was a key point also in *Montoya, Pedro Eduardo y otros* (2016), where the court dismissed a request for application of the non-punishment principle as there was no evidence that the defendant was exploited in the brothel where she committed the crime of trafficking and exploitation. In other words, because she had been a victim in the past but was not a victim in the context of the crime at hand, she could not benefit from the principle https://sherloc.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/arg/2016/montoya_pedro_eduardo_y_otros_.html?lng=en&tmpl=sherloc accessed 25 August 2023. Conversely, in *Dulcinea* (2014), a defendant accused of human trafficking for recruiting victims to be sexually exploited at a brothel was absolved through the application of the non-punishment principle www.mpf.gob.ar/protex/files/2014/06/R.A.A.C-y-otros.-Jurisdicci%C3%B3n-Mar-del-Plata-.pdf accessed 25 August 2023. Taking into account the fact that she was also exploited at the brothel, the tribunal affirmed she was ‘*nothing but another victim of the sinister machinery of the crime of human trafficking*’ [emphasis author’s own]. The tribunal also highlighted that the defendant was in a very vulnerable situation due to her condition as migrant in a difficult economic situation. Similarly, in Case 53200033 (2012), the defendant was also absolved through the application of the non-punishment principle [https://jurisprudencia.mpd.gov.ar/Jurisprudencia/DV%20\(Causa%20N%C2%B0%2053200033%202012\).pdf](https://jurisprudencia.mpd.gov.ar/Jurisprudencia/DV%20(Causa%20N%C2%B0%2053200033%202012).pdf) accessed 25 August 2023. The Cassation Court confirmed the decision, understanding that she was a victim herself who was also in a very vulnerable position that forced her to be exploited and to exploit other women. The Cassation Court also affirmed that the rationale behind the non-punishment principle is to avoid the re-victimisation of trafficked persons.

80 See also *Sanfilippo Jose et al* (2014) https://sherloc.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/arg/2014/sanfilippo_jose_et_al_.html?lng=en&tmpl=sherloc accessed 25 August 2023.

81 See also *Landriel Daniel, Case CFP 7677/2014/T01* (2018) https://sherloc.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/arg/2018/landriel_daniel_y_otros_.html?lng=en&tmpl=sherloc and *Figueroa Susana Antonia y otros s/ Infracción Ley 26.364* (2017) https://sherloc.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/arg/2017/figueroa_susana_antonia_y_otros_s_infraccion_ley_26.364_.html?lng=en&tmpl=sherloc accessed 25 August 2023.

placed on the application of the defence by the threshold and causal nexus set out in section 45, namely that an offence is done under ‘compulsion’ and is ‘attributable’ to the trafficked person’s exploitation. This has also been reflected in appellate decisions for persons trafficked before the MSA 2015 came into force, suggesting a reluctance to protect all trafficked persons. The appeal cases suggest that there must be a higher degree of compulsion before a conviction for a more serious offence could be quashed, meaning that people have to suffer more serious harm at the hands of their traffickers before they are not punished for crimes they were caused to commit.⁸²

In the four US states considered in the research, there also are some differences. The scope of **New York**’s legislative protections has been progressively expanded over time. In terms of the *vacatur* laws, the original version of section 440.10 only covered prostitution or loitering to solicit prostitution⁸³ and was criticised for leaving many trafficked persons out of protection. However, amendments made in 2021 through the Survivors of Trafficking Attaining Relief Together (START) Act expanded section 440.10 to allow *vacatur* of *any* crimes (violent and non-violent) committed as a result of an individual having been trafficked.⁸⁴ Even before the amendments were passed, New York courts construed the provision liberally, applying it to cover crimes beyond prostitution.⁸⁵ However, some limitations in scope apply to the affirmative defence under New York Penal Law section 230.01, which is only available to persons trafficked for the purpose of sexual exploitation and only in relation to the offence of prostitution.

In **Nebraska**, like New York, non-punishment is a defence to the charge of prostitution. The statutory defence under section 28-801 provides that the prostitution offence must be ‘a direct result’ of the relevant sexual (and/or other) exploitation. By contrast, the post-conviction and post-adjudication relief under section 29-3005 is available in respect of prostitution-related offences, as well as for ‘any other offence committed’ that directly resulted from or was proximately caused by the subjection to sex trafficking. Broader is the understanding of non-punishment in Wyoming and Oklahoma. In **Wyoming**, protections for trafficked persons set forth in section 6-2-708 apply to *all* forms of trafficking. As set out earlier, the provision has operation in respect of any offence that is committed ‘as a direct result of or incident to being a victim of human trafficking’. In **Oklahoma**, while the precise scope of the newly enacted affirmative defence under Oklahoma Statutes Title 21 remains largely untested, its wording is broad. The affirmative defence and procedural rights available under sections 748 and 748.2 enshrine no requirement of a causal nexus between the trafficked person’s exploitation and the offence, instead only requiring that the offence occurred ‘during the time’ of a trafficked person’s exploitation.⁸⁶ Further, section 748 does not impose an express crime limitation.⁸⁷ Under a plain reading, the affirmative defence could therefore be raised by *any* person for *any* criminal, youthful offender or delinquent offence, even a violent felony like murder.⁸⁸ By contrast, however, the state’s *vacatur* laws only cover prostitution-related offences, and therefore offer post-conviction protection to only a narrow group of people.

82 See [2023] EWCA Crim 491.

83 Ralph Ortega, ‘New Law Allows Human Trafficking Survivors to Clear Their Records’ (*NYN Media*, 17 November 2021) <https://nynmedia.com/content/new-law-allows-human-trafficking-survivors-clear-their-records> accessed 25 August 2023.

84 *Ibid.*

85 See, eg, *People v GM*, 922 NYS.2d 761 (NY Crim Ct 2011) (vacating criminal trespass and drug possession convictions with prosecutorial consent); *People v LG*, 972 NYS 2d 418 (NY Crim Ct 2013) (vacating non-prostitution charges incurred as a result of victim being forced into prostitution); and *People v PV*, 100 NYS 3d 496, 504 (NY Crim Ct 2019) (vacating non-prostitution charges incurred as a result of victim being forced into prostitution).

86 See, eg, Wyo Stat Ann s 6-2-708 (West) (requiring crime to be a ‘direct result’ of trafficking).

87 See, eg, *Ibid* (imposing crime limitation). See also ND Cent Code Ann s 12.1-41-13 (West) (imposing crime limitation); and Mass Gen Laws Ann c 265, s 57 (West) (imposing crime limitation).

88 Meghan Hilborn, ‘How Oklahoma’s Human Trafficking Victim Defense is Poised to be the Boldest Stand Against Human Trafficking in the Country’ (2019) 54 *Tulsa Law Review* 457, 472.

3. Requirements and application

Within the countries selected for the case studies, there were also significant variations in the evidential burdens and standards applicable to the invocation and application of the defences (or other statutory protections). The role played by identification as a trafficked person – whether through formal mechanisms, by competent authorities or by self-identification – also varied substantially.

In the jurisdictions where an affirmative defence reflecting the non-punishment principle or a *vacatur* provision has been legislatively enacted, the evidential standards and burdens of proof that apply to its application vary. In the **UK**, for example, the accused carries the evidential burden to raise his or her status as a trafficked person for the purposes of the invocation of the statutory defence under section 45 of the Modern Slavery Act 2015, but the burden of proof remains on the prosecution to disprove the application of the defence.⁸⁹

In the **US**, again, there are some variations in the relevant statutes. For example, in respect of both the *vacatur* provision under **New York** Criminal Procedure Law section 440.10 and the affirmative defence for prostitution offences under New York Penal Law section 230.01, the trafficked person bears the burden of proving: (1) that he or she was trafficked at the time of arrest; and (2) that the conduct leading to the arrest resulted from the defendant being trafficked.⁹⁰ The standard of proof applicable to such determinations is by a preponderance of the evidence.⁹¹ In **Oklahoma**, while an accused trafficked person must affirmatively raise the defence provided under section 748 of the Oklahoma Statutes Title 21, the burden then shifts to the state to prove beyond a reasonable doubt that the defendant was not trafficked during the time of the alleged offence.⁹² In addition, as discussed above, the defence does not require a causal connection between the alleged offence and the fact that the defendant was trafficked, instead only a temporal connection. **Wyoming**'s safe harbour law section 6-2-708, applauded as 'one of the most effective' in the US,⁹³ does not explicitly include any language detailing a requisite burden of proof.⁹⁴ Likewise, in **Nebraska**, sections 28-801 and 29-3005 are silent on the burden of proof required to establish 'victim status'.⁹⁵

What is required to discharge this evidentiary burden in each jurisdiction also varies, particularly as regard identification of the defendant as a victim of trafficking. In some jurisdictions, such as the **UK**, some weight tends to be placed upon identification determinations made by the NRM and the Single Competent Authority (SCA), although this has been recently reduced.⁹⁶ As established in *R v Joseph*,⁹⁷ 'conclusive' decisions of the SCA are not binding on prosecutors or courts, but in the absence of new or contradictory evidence, they

89 See *MK v R and Gega v R* [2018] EWCA Crim 667 and *R v DS* [2020] EWCA Crim 285.

90 *People v LG* (n 85).

91 See, eg, *People v PV*, 100 NYS 3d 496, 501 (NY Crim Ct 2019). See also *People v Gonzalez*, 927 NYS 2d 567, 570 (NY Crim Ct 2011) ('By avoiding bright-line rules and formulaic determinations, the legislature squarely gave the Courts the discretion to grant relief pursuant to CPL s 440.10(1)(i) when a defendant could show by a preponderance of the evidence that he or she was a sex trafficking victim').

92 Vernon's Okla Forms 2d, OUJI-CR 8-61.

93 Danica Baird, 'Changing the Narrative: Sex Trafficking and Its Victims' (2019) 33 Brigham Young University Journal of Public Law 321, 333.

94 Christian Coward, 'Breaking Secondary Trauma: Developing Conviction Relief Legislation in the United States for Sex-Trafficking Victims' (2021) 50 University of Baltimore Law Review 465, 480.

95 See Polaris Project, 'Criminal Record Relief for Trafficking Survivors: Nebraska' (October 2019) <https://polarisproject.org/wp-content/uploads/2019/10/2019-CriminalRecordRelief-Nebraska.pdf> accessed 25 August 2023.

96 *R v Joseph* [2017] EWCA Crim 36.

97 As well as the Immigration Enforcement Competent Authority (IECA) as of 2021.

are likely to be followed.⁹⁸ In the words of the court: ‘the decision of the competent authority as to whether a person had been trafficked for the purposes of exploitation is not binding on the court but, unless there was evidence to contradict it or significant evidence that had not been considered, it is likely that the criminal courts will abide by the decision’.⁹⁹

This effectively means that, in criminal cases, the SCA decision is not binding when deciding whether to prosecute or not, nor when deciding whether or not to quash a trafficked person’s conviction.¹⁰⁰ The cogency of the evidence relied upon by the SCA must be ‘subject to thorough forensic examination when considering whether it is in the public interest to prosecute’.¹⁰¹ In *R v D*,¹⁰² the Court of Appeal Criminal Division held that it is important that wherever possible, those who may be trafficked persons are identified before any plea is taken at court. It also held that, should the matter be raised at the first hearing, the judge will need to determine, as a matter of judgment on the facts of the individual case, whether a defendant is a potential credible trafficked person. If they so determine, the case should be adjourned for an NRM referral to be made. This should take 45 days, but, in practice, may be considerably longer.

In a submission from the CPS to the Modern Slavery Act 2015 review, it was highlighted that the ‘NRM decision is not based upon the criminal standard of proof and is not binding on the prosecution or the criminal courts’.¹⁰³ The decision in *R v AAD*¹⁰⁴ has given some further guidance on the admissibility of an SCA decision after it was revealed that those making the assessments in the Home Office were effectively carrying out an administrative ‘tick box’ exercise. In that case, it was made clear that admissibility depends on the expertise and experience of the decision-maker and is to be resolved on a case-by-case basis. The court also expressed the view that, in many situations, the question of compulsion is not a matter for expertise, although background information may be. Even where a positive SCA decision (and reasoning) *is* admitted, for example, as part of the trial process, that is, of itself, no automatic guarantee of protection. That remains a matter for the court.

There is an obvious importance for all involved in an SCA decision to ensure that the ‘conclusive decision’ comes before any actual trial of the defendant. As was pointed out by the Court of Appeal in *R v EK (Kolesnikova)*,¹⁰⁵ the decision of the SCA should inform the trial process, rather than the other way around. The decision in *R v Brecani*¹⁰⁶ has also led to increased emphasis on the need for defence expert evidence, which is now virtually being seen as a prerequisite to the consideration of the defence in many courts, but also leads to limitations on evidential support for trafficked persons. In *R v EK (Kolesnikova)*,¹⁰⁷ for example, the ground of appeal was that the prosecution ought not to have

98 See n 96 above, para 20.

99 *Ibid.*

100 CPS, ‘Modern Slavery, Human Trafficking and Smuggling’ (2022) www.cps.gov.uk/legal-guidance/modern-slavery-human-trafficking-and-smuggling accessed 25 August 2023. See also UK Home Office, ‘Modern Slavery: Statutory Guidance for England and Wales (under s 49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland’ (March 2022) [17.57] www.gov.uk/government/publications/modern-slavery-how-to-identify-and-support-victims/modern-slavery-statutory-guidance-for-england-and-wales-under-s49-of-the-modern-slavery-act-2015-and-non-statutory-guidance-for-scotland-and-northe accessed 25 August 2023.

101 See n 96 above, para 39. See also *R v Brecani* [2021] 2 Cr App R 12 and *R v AAD and others* [2022] EWCA Crim 106.

102 *R v D* [2018] EWCA Crim 2995.

103 Jennifer Bristow and Helen Lomas, ‘The Modern Slavery Act 2015 Statutory Defence: A Call for Evidence’ (October 2020) [3.4.4] www.antislaverycommissioner.co.uk/media/1478/the-modern-slavery-act-2015-statutory-defence-call-for-evidence.pdf accessed 25 August 2023.

104 *R v AAD and others* [2022] EWCA Crim 106.

105 *R v EK (Kolesnikova)* [2018] EWCA Crim 296.

106 *R v Brecani* [2021] 2 Cr App R 12.

107 See n 105 above.

proceeded, as the defendant had been trafficked. The Crown (and trial judge) accepted that she was a trafficked person, but it was submitted that the decision to prosecute remained justified because the offences were serious and the level of dominant force or compulsion required to reduce her criminality such that she should not have been prosecuted would be significant. It was also held that there was an insufficient nexus between the trafficking and the offending so as to reduce the defendant's culpability or criminality. Overall, the concern in the UK is that the discretion not to prosecute will be exercised in favour of a court hearing that may well occur without the benefit of expert evidence and where the court of appeal guidance is increasingly confined. In *AAD*, the Court of Appeal retained a narrow ground of abuse of process if prosecutorial decisions were made unreasonably, but it remains a concern that the effect of legislation (using the compulsion test and the Schedule 4 exclusions) means that many trafficked persons used in criminal networks will not be protected.

In other jurisdictions, no such requirements exist. For instance, in **Argentina**, there is no need to wait until a judgment has been reached against the traffickers or until the trafficked person is identified as such in the framework of the judicial process for the invocation of the non-punishment principle. In **New York** (as in most other US states), any guidance on what evidence is acceptable to prove that the defendant was trafficked for the purposes of the *vacatur* laws under section 440.10 is determined by case law. The statute only states that official documentation of the defendant's status as a trafficked person creates a presumption that his or her participation was a result of being trafficked, but such documentation is not necessary.¹⁰⁸ In one case, a judge noted that 'specific corroborating facts or other evidence' were not necessary as section 440.10 does not require 'bright-line rules and formulaic determinations' to grant relief.¹⁰⁹ In fact, failure of a governmental organisation to determine that a defendant is trafficked would not be a bar to relief.¹¹⁰ Thus, it is ultimately within the judge's discretion to determine whether *vacatur* is granted.¹¹¹ If the judge denies the motion, the denial can be appealed.¹¹² Appellate courts have reviewed denials of section 440.10 motions under other subsections for abuse of discretion.¹¹³

There were also significant variations between the case studies in terms of the processes and procedures involved in applying the principle. For example, in **Argentina**, the invocation of the statutory defence under Article 5 of Law 26.364 does not depend on the trafficked person (or his or her legal representatives) requesting it and should materialise as early as possible. It is common practice that a public defender requests the application of the principle,¹¹⁴ although there is case law in which a prosecutor requested the judge to absolve or acquit the trafficked person.¹¹⁵

108 NY Crim Proc Law s 440.10 (McKinney 2022).

109 *People v Gonzalez* (see n 91 above).

110 *Ibid.*

111 *People v LG* (see n 85 above) 426.

112 Claudia Trupp, 'Collateral State Proceedings Under CPL s 440.10 and 440.20' (2019) (noting that it is best to bring a s 440.10 motion prior to appeal so that if the motion is denied, appeal of the denial can be consolidated with the direct appeal) www.ils.ny.gov/files/440%20Motions%20Outline.pdf accessed 25 August 2023.

113 See *People v Jones*, 26 NE 3d 754, 758 (NY 2014).

114 Eg. *Justino Horacio Abel*, Case FGR 81000828/2012/CFC1 (2017) <https://jurisprudencia.mpd.gov.ar/Jurisprudencia/JHA%20y%20otra%20%28Causa%20N%C2%B0%2081000828%29.pdf> accessed 25 August 2023. There is a summary of the case available on the UNODC Sherloc database https://sherloc.unodc.org/cld/case-law-doc/traffickingpersonscrimetype/arg/2017/justino_horacio_abel_fernandez_castillo_celia_aurora_ledesma_ruben_lino_s_delito_c_la_libertad.html?lng=en&tmpl=sherloc accessed 25 August 2023.

115 Federal Court of Necochea, *Blanco José Constantino*, Case 72000674/2013 (2014) (a summary of which is available on the UNODC's Sherloc database) https://sherloc.unodc.org/cld/en/case-law-doc/traffickingpersonscrimetype/arg/2018/blanco_jose_constantino_y_otros_s_infraccion_art_145_bis.html accessed 25 August 2023; Oral Federal Tribunal, *Landriel Daniel*, Case CFP 7677/2014/T01 (see n 81 above).

In terms of application, the US presents a mixed picture. In the four states considered for the purposes of the study, it is possible for an application to be made post-trial, and (if effective) it has the effect of vacating a conviction against a trafficked person (see, eg, **New York's** *vacatur* laws under section 440.10, which allow a trafficked person to make a post-trial motion to vacate a conviction at any time after the judgment).¹¹⁶ Likewise, **Wyoming's** affirmative defence and *vacatur* statute can be applied pre-trial, during trial or post-trial by a range of actors. At the earliest stage, law enforcement officers may use their discretion not to execute an arrest or bring a case against a person for prostitution if they suspect that the offence resulted from the individual's status as a trafficked person.¹¹⁷ Bearing in mind that, in every state, prosecutors have discretion, if the prosecutor does pursue the case, the trafficked person may raise his or her trafficking experience as an affirmative defence at trial, pursuant to section 6-2-708(a).¹¹⁸ The decision to vacate a trafficked person's prior conviction(s), however, is at the sole discretion of the judge before whom a motion is brought under section 6-2-708(c).¹¹⁹ There is no time limit as to when post-conviction relief is available. Judicial discretion to provide relief to victims also changes from the trial stage to the post-conviction stage. At the trial stage, a trafficked person 'is not criminally liable' for offences resulting from his or her trafficking status.¹²⁰ At the post-conviction relief stage, however, judges 'may' vacate a conviction for an offence that resulted from a person's trafficking status.¹²¹ However, the state's statutes do not address whether the judicial review at the post-conviction stage is available in either circumstance and there are currently no cases available on the issue. Similarly, protection based on the non-punishment principle is available for trafficked persons at various stages of a proceeding in **Oklahoma**. While affirmative defences are typically raised at trial, the inclusion of ex ante procedural rights in section 748.2 of the Oklahoma Statutes Title 21 suggests that the non-punishment principle must be honoured as soon as the trafficked person¹²² is identified.¹²³ For example, section 748.2 requires that victims not be jailed or fined. If, however, a victim is charged with a crime, the affirmative defence under section 748 may ultimately shield him or her from liability by allowing for an application to be made prior to or during trial. In addition, the *vacatur* provisions of Oklahoma Criminal Procedure section 22-19c offer post-conviction relief by allowing for '[t]he court, upon its own motion or upon petition by the defendant and for good cause shown' to enter an order for expungement of a charge or conviction for a prostitution-related offence committed as a result of the defendant having been a victim of human trafficking'.¹²⁴

116 See n 112 above.

117 Wyo Stat Ann s 6-2-708(a) (2013).

118 *Ibid.*

119 *Ibid.*

120 *Ibid.*

121 *Ibid.*

122 S 748.2 provides even stronger protections for minors who are victims of human trafficking. Minors 'shall not be subject to juvenile delinquency proceedings or child-in-need-of-supervision proceedings for prostitution offences or misdemeanor or nonviolent felony offences committed as a result of being a victim of human trafficking': Crimes and Punishments, 2022 Okla Sess Law Serv c 20 (HB 4224) (formerly Okla Stat Ann Tit 21, s 748 (West)). While s 748 provides an affirmative defence against prosecution, this provision appears to prohibit prosecution of minors in the first instance. Unlike the affirmative defence under s 748, this blanket prohibition against prosecution is tempered by both a crime limitation and nexus requirement. Historically, a related provision also established a presumption that minors engaged in prostitution were victims of human trafficking (Okla Stat Ann Tit 21, s 1029(C) (West) but recent amendments removed this presumption: Crimes and Punishments, 2022 Okla Sess Law Serv c 20 (HB 4224). Therefore, minors engaged in prostitution will not be protected under s 748 unless it is established that they are victims of human trafficking. Minors are only immune from prosecution for prostitution, misdemeanour or nonviolent felony offences. Furthermore, the offence must be the 'result' of the victim's human trafficking.

123 See, eg, Okla Stat Tit 21, s748.2 ('Human trafficking victims shall: 1. Be housed in an appropriate shelter as soon as practicable; 2. Not be detained in facilities inappropriate to their status as crime victims; 3. Not be failed, fined, or otherwise penalized due to having been trafficked; 4. Receive prompt medical care, mental health care, food, and other assistance as necessary').

124 Okla Stat Tit 22-19c (2019).

4. Discretion

Another key consideration is the degree of prosecutorial discretion afforded within the various jurisdictions considered, and any prosecution (or non-prosecution) policies that are in place. For instance, prosecutors in the **US** (at both the federal and state level) generally have discretion in deciding whether to charge a person for a crime and which charges to bring.

A dedicated prosecution policy has been adopted in **Argentina**, which informs the approach of prosecutors to crimes committed by trafficked persons and the exercise of prosecutorial discretion. In 2021, PROTEX adopted its *Thematic Document for the Practical Application of the Non-Punishment Principle to Victims of Human Trafficking and/or Exploitation*, providing guidance and jurisprudential references to ensure the correct application of the non-punishment principle.¹²⁵ The thematic document assists with the interpretation of the conditions set in Law 26.364 for the non-punishment principle to be applied: (1) the person that committed a crime has been trafficked; and (2) the crime has a ‘direct causal relationship’ with the condition of victimhood. With respect to the ‘direct causal relationship’ element, PROTEX has emphasised that ample interpretation should prevail¹²⁶ and that particular attention should be paid to whether the offence was committed in the context of the trafficked person being subjected to any of the means of the definition of human trafficking (including the abuse of a situation of vulnerability and deception).¹²⁷

Likewise, guidance is provided to prosecutors in the **UK** through specialised policy documents relating to the prosecution of trafficked persons. Importantly, as section 45 of the Modern Slavery Act 2015 is not retrospective,¹²⁸ for offences committed before section 45 came into force, protection is still intended to be provided for through non-prosecution guidance on ‘suspects in a criminal case who might be victims of trafficking or slavery’.¹²⁹ Likewise, although many ‘grave offences’ are excluded from the scope of the section 45 defence, this does not prevent representations being made to the CPS that it is not in the public interest to prosecute an individual, even if the alleged crime is an offence to which section 45 is not applicable. This may be useful for those who play a minor role in serious offending, such as accessories.

Generally speaking, the current approach of the CPS is that non-prosecution is not automatic and that it may still be in the public interest to prosecute, despite the person (be they adult or child)

125 Fiscales, ‘*La PROTEX presentó un nuevo documento temático sobre criterios para la aplicación del principio de no criminalización de víctimas de trata*’ (2021) www.fiscales.gob.ar/trata/la-protex-presento-un-nuevo-documento-tematico-sobre-criterios-para-la-aplicacion-del-principio-de-no-criminalizacion-de-victimas-de-trata accessed 25 August 2023.

126 PROTEX, ‘Thematic Document for the Practical Application of the Non-Punishment Principle to Victims of Human Trafficking and/or Exploitation’ (2021) 18 www.fiscales.gob.ar/wp-content/uploads/2021/06/Protex-informe_PNP_Anexo-I_v3.pdf accessed 25 August 2023.

127 Eg, in Case FCR 1687/2017 a foreign woman who had illegally trafficked drugs was acquitted under the application of Art 5 of Law 26.364 [https://jurisprudencia.mpd.gov.ar/Jurisprudencia/Gomez%20\(causa%20N%C2%B0%201308\).pdf](https://jurisprudencia.mpd.gov.ar/Jurisprudencia/Gomez%20(causa%20N%C2%B0%201308).pdf) accessed 25 August 2023. The tribunal took into consideration the fact that she was also sexually exploited in a brothel, that it was the traffickers who requested her to traffic the drugs, and that she was in a situation of vulnerability. Specifically, the tribunal said that, for the non-punishment principle to be applicable, there has to be:
‘(...) a close link between what was done by the agent and his/her status as a victim of human trafficking (not being allowed to excuse him or her from any criminal offence that has been committed); in such a way that it is possible to establish that the person acted in a sense contrary to the norm as a direct consequence or as a continuation of the state of vulnerability to which he or she has been subjected as an object of exploitation. Therefore, there has to be a causal relationship that puts on an equal footing both the conditions inherent to the original victimizing situation and those that made it possible to commit the crime itself.’

128 *R v CS and Le* [2021] EWCA Crim 1341.

129 *R v AAD and others* (n 104); *R v DS* (n 89); and *R v A* [2020] EWCA Crim 1408.

having been trafficked.¹³⁰ Indeed, it is still possible for the CPS to prosecute an individual, even if he or she has been identified as having been trafficked, if the prosecution is considered to be in the public interest. The CPS policy involves a four-step process when determining whether to prosecute a potentially trafficked person:¹³¹

1. Has the person been trafficked?
2. Is there clear evidence of duress?
3. Is there clear evidence of the Modern Slavery Act 2015, section 45 defence?
4. Is it in the public interest to prosecute?

In terms of the first of these questions, the UK Home Office published statutory guidance in April 2020 that stated that prosecutors should be scrutinising the decision made by the SCA: ‘The decision should be scrutinised by the prosecutor to see the evidence that was available to the SCA, to what extent the evidence has been analysed, weighed and tested by the SCA and to assess the quality of any expert evidence relied upon’.¹³²

In 2020, the CPS issued updated guidance to prosecutors on the non-prosecution of suspects who might be trafficked, according to which:

‘in considering whether a trafficking/slavery victim has been compelled to commit a crime, prosecutors should consider whether a suspect’s criminality or culpability has been effectively extinguished or diminished to a point where it is not in the public interest to prosecute. A suspect’s criminality or culpability should be considered in light of the seriousness of the offence. The more serious the offence, the greater the dominant force needed to reduce the criminality or culpability to the point where it is not in the public interest to prosecute.’¹³³

The policy is thus broader than the statutory defence under section 45 of the Modern Slavery Act 2015. However, the Group of Experts on Action against Trafficking in Human Beings (‘GRETA’) responsible for monitoring the implementation of Council of Europe Convention on Action Against Trafficking in Human Beings has nevertheless expressed concern at this interpretation, which may significantly reduce the scope of application of the non-punishment provision. It also seems to run counter to the foundational notion that any consent given to exploitation in the context of trafficking is rendered irrelevant where any of the means set out in the trafficking definition are applied.

Where the prosecutorial decision to prosecute a person assessed as trafficked was (or is) arguably impeachable on public law grounds, it can be challenged in a magistrates’ court or the Crown Court through an application for a stay of the proceedings based on a species of abuse of process that gives power to review the prosecutorial decision to the Crown Court and could give rise to a conviction being unsafe.¹³⁴

Although no legislative measures have been adopted in **Australia**, it appears that a general policy of non-punishment in respect of trafficked persons is available to state and federal prosecutors.

130 CPS, (see n 100 above).

131 *Ibid.*

132 UK Home Office, see n 100 above [17.56].

133 CPS (see n 100 above).

134 See n 104 above, overruling *R v DS* (see n 89 above) and *R v A* (see n 129 above).

In this regard, it has been recognised in the NAP that: ‘the [Australian Federal Police] and [Commonwealth Director of Public Prosecutions] give effect to the principle of non-punishment of victims and survivors, including through the Prosecution Policy of the Commonwealth which requires close consideration of the interests of the victim and survivor and that prosecutions are to be in the public interest’.¹³⁵

However, there is no specific mention of the unique needs and circumstances of people with lived experiences of modern slavery and trafficking in the relevant policies. Moreover, these policies do not provide an explicit guarantee of non-punishment, and there is no empirical evidence that policies of non-prosecution are being widely applied by authorities at the state or federal level. Indeed, in reality, these policies may amount to little more than paper promises. There appears to be only one criminal case, *Re Boo* [2020] VSC 882, that mentions the potential for modern slavery in a bail application, but the judge described it as not persuasive on a question of exceptionality. The process for assessing trafficked persons in Australia is through the Australian Federal Police, not the state police nor a competent authority, which may militate against protection as accused persons are unlikely to wish to be further investigated by a second police force.

Likewise, in **India**, although there has not been any commentary specifically on non-punishment, in January 2020, the Bureau of Police Research and Development under the Ministry of Home Affairs published *Investigating Sex Trafficking: A Handbook*, which specifically highlights how people trafficked for the purpose of sexual exploitation ought to be treated and assisted by law enforcement and prosecutors. The following points and examples mentioned in the handbook are useful:

1. Consent has no relevance in the offence of trafficking, irrespective of the age of the victim. Therefore, even if there is consent, the person is a victim of trafficking. This is also in line with explanation 2 to section 370 of the Indian Penal Code.
2. When adult women are picked up on charges of soliciting, from brothels or otherwise, it cannot be presumed that they are guilty of soliciting until and unless *mens rea* (ie, intention) is investigated. A woman trafficked for commercial sexual exploitation, irrespective of age, is a victim and not an accused. Such a woman is not a prostitute, but is a prostituted woman and is accordingly a victim of trafficking.
3. Prosecuting a trafficked woman under section 8 of the Immoral Traffic (Prevention) Act 1956 (seducing or soliciting for the purpose of prostitution) or ‘any other section of any other law’ is cautioned against. When an investigation establishes that a woman has been sexually exploited against her informed consent, she becomes a victim. Consent obtained under lure, deceit, duress, coercion, compulsion or force is not informed consent and therefore is not consent in the legal sense.
4. Child victims of trafficking are to be treated as ‘children in need of care and protection’ and not as ‘children in conflict with law’ under the Juvenile Justice (Care and Protection of Children) Act 2015.¹³⁶

135 Australian Government Attorney-General’s Department, ‘Targeted Review of Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth)’ (2022) www.ag.gov.au/sites/default/files/2022-09/Targeted-review-of-divisions-270-and-271-of-the-criminal-code.PDF accessed 25 August 2023.

136 The two judgments quoted are: *Prerana v State of Maharashtra*, 2003(2) MhLJ105 (Bombay High Court); and *Delhi High Court Legal Services Committee v UOI*, CrI/ Rev No 443/2009 (Delhi High Court).

However, the handbook is not legally binding and would only have persuasive value before the courts.

5. Barriers

Various barriers to the invocation and application of the non-punishment principle and its statutory embodiments were identified in the case studies, many of which were common across several or all jurisdictions. A lack of awareness and training on the part of law enforcement, prosecutors, defence solicitors and judicial officers on invoking and applying the non-punishment principle was common in many jurisdictions. Specifically, in the **UK**, it was noted that a recent report by the United Nations Children's Fund (UNICEF) found that there is a very low level of awareness among prosecutors, police and defence solicitors of the non-punishment provision for children, as well as little monitoring of the use of the presumption against prosecution or the statutory defence.¹³⁷ Likewise, in **India**, a lack of awareness among police, prosecutors and judicial officers of the principle of non-punishment, and the various soft law guidelines in which it is presently embodied, was identified as a key challenge. Additionally, in the **US**, it has been noted in all of the relevant states that trafficked persons may not know what relief is available to them and may be unable to find a lawyer who can help them receive such relief.¹³⁸

Lack of identification has been identified as a challenge across all the case studies, alongside the presence of procedural requirements and processes that act as barriers to non-punishment. In the **UK**, an independent review of the Modern Slavery Act 2015 conducted in 2019 examined the extent to which the statutory defence is being used. It found failures to consider the possibility of criminal exploitation at the start of an investigation were risking victims being wrongly prosecuted. Conversely, it also found an over-reliance on the trafficking decisions made by the SCA and failure to consider properly the legal components of the defence.¹³⁹

In addition, the various thresholds and limitations placed on statutory protections in several of the jurisdictions selected as case studies continue to act as a barrier to protection. As discussed in greater detail above, certain statutory protections (eg, the affirmative defences in **New York** and **Nebraska**, and the *vacatur* law in **Oklahoma**) are only available to individuals trafficked for the purpose of sexual exploitation and in respect of offences of prostitution, thus excluding other forms of trafficking and other offences from their scope. Excluded from the scope of the statutory defence under section 45 of the **UK's** Modern Slavery Act 2015, on the other hand, is a long list of 'grave offences', as well as various bases of liability in respect of such offences.

Finally, and most obviously, a key barrier to non-punishment in **Australia**, **Canada** and **India** is the absence of any statutory protections for trafficked persons accused of criminal or other offences. Trafficked persons in these jurisdictions are thus at the mercy of prosecutorial discretion, or left to rely on general criminal defences, which are often not fit for purpose, and fail to reflect the nuances and realities of the cycles of abuse that trafficked persons often find themselves in.

137 UNICEF, 'Victim, Not Criminal: Trafficked Children and the Non-punishment Principle in the UK' (May 2017) https://downloads.unicef.org.uk/wp-content/uploads/2017/05/Unicef-UK-Briefing_Victim-Not-Criminal_2017.pdf accessed 25 August 2023.

138 See n 51 above, 1484–1485. See also Jean-Pierre Gauci, Noemi Magugliani and John Trajer, 'Impacts of a Lack of Legal Advice on Adults with Lived Experience of Modern Slavery' (2023) www.biicl.org/documents/158_legal_advice_full_report.pdf accessed 25 August 2023.

139 The decision in *R v Brečani* (see n 106 above) does seem to have gone some way to addressing this, by requiring expert evidence at trial while the SCA findings are more likely limited to influencing policy decisions. However, the concern is that the pendulum will swing too far in favour of the prosecution.

6. Training and awareness

Overall, the case studies show that there remains much to be desired in terms of training and awareness-raising activities on the invocation and application of the non-punishment principle. It appears that training opportunities for law enforcement, prosecutors and judicial officers in practice remain limited or non-existent in **Argentina, Australia, Canada, India** and the **UK**, which in turn contributes to a general lack of awareness in respect of the non-punishment principle. While most of the case studies were silent on the issue of training and awareness, the research conducted in the US provided some remarkable insights.

The **US** appears to be placing some emphasis on the importance of training at both a state and federal level. In a federal context, for example, various priority actions related to ongoing training and education are included in the National Plan.¹⁴⁰ This emphasis on training as a means to avoid inappropriate arrest and prosecution is similarly adopted in the Department of Justice's 2022 National Strategy to Combat Human Trafficking, which calls for additional research and development of training and policies on the topic.¹⁴¹ To give effect to these calls, the US Department of Justice provides no-cost, online and classroom human trafficking training for law enforcement, prosecutors, tribal leaders and law enforcement.¹⁴² However, such training is optional rather than mandatory (which is often how federal guidelines are expressed vis-à-vis the states) and there is no data available as to its uptake or impact. At state level, the paragraph below offers some insights into training in some of the jurisdictions covered in the US case study.

Nebraska, on the other hand, has implemented mandatory training regarding issues of human trafficking for law enforcement agencies, prosecutors, public defenders, judges, juvenile detention staff and other relevant officials. In 2017, the Nebraska Human Trafficking Task Force expanded training access to service providers and the Lincoln Public School system, one of the state's largest school systems.¹⁴³ More recently, the Nebraska legislature also signed a bill into law that requires training on recognising human trafficking for foster parents.¹⁴⁴ Certain groups, such as the Women's Fund of Omaha, are working to raise awareness of non-punishment principle laws in Nebraska by educating attorneys. In their Nebraska Trafficking Legal Guide, the Women's Fund of Omaha explains that most of Nebraska's sex trafficking laws are new, and that, as such, it is critical for lawyers to 'educate the court about sex trafficking' and about how trafficked persons' cases should be handled, especially as it pertains to immunities and set asides.¹⁴⁵ Likewise, **Oklahoma** has also made substantial efforts as far as training and awareness are concerned. In its most recent

140 Eg, the National Plan directs that '[f]ederal training and policies should be reviewed with consideration for the principle that victims should not be inappropriately penalized or prosecuted for the unlawful acts their trafficker compelled them to commit' and '[f]ederal law enforcement agencies will provide information to state, local, tribal and territorial governments on policies that would prevent the inappropriate arrest of human trafficking victims for unlawful conduct resulting directly from victimization and offer victim services instead'.

141 US Department of Justice, 'National Strategy to Combat Human Trafficking' (January 2022) 22-4 www.justice.gov/d9/press-releases/attachments/2022/01/31/doj_ht_strategy.pdf accessed 25 August 2023.

142 US Department of Justice Office for Victims of Crime, 'Human Trafficking Training and Technical Assistance' (2022) <https://ovc.ojp.gov/program/human-trafficking/training-and-technical-assistance> accessed 25 August 2023; Office for Victims of Crime Training and Technical Assistance Center, 'Human Trafficking' (2022) www.ovcttac.gov/views/HowWeCanHelp/dspHumanTrafficking.cfm?nm=sfa&ns=ht accessed 25 August 2023.

143 Nebraska Attorney General's Office, 'Task Force Review 2019: Combating Human Trafficking in Nebraska' (2019) https://ago.nebraska.gov/sites/ago.nebraska.gov/files/doc/Task%20Force%20Review%202019%20FINAL_1.pdf accessed 25 August 2023.

144 Neb Rev Stat s 43-4707 (2017).

145 *Ibid* 7.

report, the Oklahoma Commission on the Status of Women published a list of recommendations to improve the state’s response to its human trafficking crisis. Educational opportunities for the general public – as well as the business, industrial, educational and professional sectors – to better ‘identify and assist’ trafficked persons¹⁴⁶ topped the list, with the commission specifying that educational programmes should increase understanding of ‘force, fraud, and coercion’, as many ‘survivors of human trafficking do not self-identify when seeking services’ and many people have ‘preconceived ideas’ of what constitutes trafficking.¹⁴⁷ In accordance with the commission’s recommendations, the Oklahoma District Attorneys Council has programmed professional training for prosecutors.¹⁴⁸ A recent training programme outlined prosecutors’ ‘wide powers of discretion’ and unique role in ‘guid[ing] policies and practices, including how victims and survivors are treated when they interact with the criminal justice system’.¹⁴⁹ The presentation emphasised prosecutors’ ‘duty to achieve justice over convictions and to proactively remedy wrongful convictions’.¹⁵⁰ Advocates are hopeful that these educational efforts may help to increase the number of victims who are afforded Oklahoma’s statutory enactments of the non-punishment principle. While **Wyoming** does not currently mandate human trafficking or non-punishment principle training for any state employees or elected officials,¹⁵¹ a few non-profit organisations offer training to raise awareness of human trafficking. In 2020, a new advocacy organisation set out to raise awareness about human trafficking in Wyoming.¹⁵² In the two years since its founding, Uprising has trained more than 550 professionals, and over 700 parents and caregivers in an effort to aid trafficked persons.¹⁵³

7. Advocacy, campaigns and new developments

In each jurisdiction considered within the case studies, civil society organisations continue to play a key role in advocacy efforts geared towards securing greater protection for trafficked persons accused of crimes or other offences. While not exhaustive, this section provides examples of campaigns and problematic developments related to the non-punishment principle. For example, while the amendments to the scope of section 440.10 introduced in 2021 have been supported by many organisations in **New York**,¹⁵⁴ they continue to advocate for further improvements in the law,

146 Oklahoma Commission on the Status of Women, ‘Growing Epidemic of Human Trafficking in Oklahoma’ (2021) 6 www.ok.gov/ocsw/documents/HT%20White%20Paper%20202132021.pdf accessed 25 August 2023.

147 *Ibid* 4, 6.

148 See Oklahoma District Attorneys Council, ‘Training Schedule’ (2021) www.ok.gov/dac/Training/Victims_Assistance_and_Allied_Professional_Training/index.html accessed 25 August 2023.

149 Oklahoma District Attorneys Council, ‘Maximizing Justice, Minimizing Harm: The Prosecutors’ Role in Achieving Survivor-Centered Justice in Human Trafficking Cases’ (2022) https://us02web.zoom.us/webinar/register/WN_C1yT6cHYTJSwbRUf2ivhVw accessed 25 August 2023.

150 *Ibid*.

151 Shared Hope International, ‘National State Law Survey: Law Enforcement Officer Training on Human Trafficking’ (2017) http://sharedhope.org/wp-content/uploads/2016/03/NSL_Survey_Law-Enforcement-Officer-Human-Trafficking-Training.pdf accessed 25 August 2023.

152 See Uprising, ‘Awareness’ (2022) <https://uprisingwyo.org/awareness> accessed 25 August 2023.

153 See Uprising, ‘Education’ (2022) <https://uprisingwyo.org/education> accessed 25 August 2023.

154 This includes Safe Horizon, International Institute of Buffalo, Empowerment Collaborative of Long Island, Urban Justice Center Sex Workers Project, Brooklyn Defenders, Legal Aid Society, SOAR Institute, New York Civil Liberties Union, and Sanctuary for Families. Members of the judiciary have also called for legal reform that recognises the harm of criminalisation to victims of human trafficking. See, eg, Toko Serita, ‘In Our Own Backyards: The Need For a Coordinated Judicial Response to Human Trafficking’ (2012) 36 *NYU Review of Law and Social Change* 635, 656 (‘There needs to be holistic reform of the criminal justice system’s treatment and criminalization of prostitutes and consideration of the consequences of its failure to identify trafficking victims among this population’); Fernando Camacho, ‘Sexually Exploited Youth: A View from the Bench’ (2015) 31 *Touro Law Review* 377, 383 (‘the justice system’s treatment of [minor victims of sexual trafficking accused of prostitution] needs to change. Let’s not punish them, let’s get them help.’).

highlighting that not *all* weaknesses of an older version of section 440.10 have been addressed.¹⁵⁵ Likewise, advocates in **Nebraska** have celebrated current statutory protections as a starting point for people who have been trafficked for the purpose of sexual exploitation, but have noted that more work is needed to ensure their implementation in practice.¹⁵⁶ In the **UK**, the introduction of the 2023 Illegal Migration Bill has sparked debates around the compliance of the Bill with the Council of Europe Convention on Action against Trafficking in Human Beings and the ECHR, but also, on a domestic level, with the Human Rights Act 1998.¹⁵⁷ Significantly for the purpose of this research on non-punishment, the bill provides for the automatic exclusion from protection of potentially trafficked persons who have entered into the UK irregularly. Under clause 21 of the bill, even those individuals with a ‘positive reasonable grounds decision’, that is, persons who have been recognised within the national anti-trafficking system as being in a situation giving rise to reasonable grounds to believe that they have been trafficked, will be covered by the automatic removal provisions (subject to a very narrowly defined exception), with removal to be completed before the identification process has been concluded. Removal on account of ‘irregular’ entry can be understood as a form of punishment, in defiance of the UK’s international obligations, and represents a significant step backwards in the application of the non-punishment principle and the protection of trafficked persons.

8. Other provisions with impacts on non-punishment

A further point to note is the existence, in most surveyed countries, of the possibility for state authorities to issue residence permits for trafficked persons. This opens the discussion as to whether such schemes, which are often (but not always) conditional on forms of cooperation, can be considered as examples of non-punishment measures given that they often result in the non-deportation of trafficked persons despite violations of immigration rules. However, given the connection between these residence permits and cooperation in law enforcement processes, they are, in the view of the authors, primarily measures to support investigations and prosecutions and not measures for the protection of victims. Such residence permits can, however, be part of the implementation of the non-punishment principle where they are part of broader efforts implemented and provide opportunities for trafficked persons to establish long term, unconditional residence in the country in question. Such residence permits are a reality in the US (T Visa), Canada and the UK, among others.

155 Eg, see n 51 above, 1493–1500; and Waichman (see n 50 above) 486–490.

156 In addition to these legislative actions, the Nebraska Governor’s office also has expressed its commitment to ‘supporting survivors’ who have experienced human trafficking.

157 See, eg, the oral evidence sessions before the UK Parliament’s Human Rights Joint Committee <https://committees.parliament.uk/work/7389/legislative-scrutiny-illegal-migration-bill/> accessed 25 August 2023.

Part IV – Conclusion, recommendations and the way forward

The non-punishment principle is increasingly recognised as a core component of a victim-centred approach to combating human trafficking as it ensures that trafficked persons are protected and puts the target of criminal and other punishment on the traffickers rather than the trafficked.¹⁵⁸ Yet, its scarce and inconsistent application remains a systemic issue for criminal justice and broader legal systems around the world as justice systems are generally geared towards the prosecution, punishment and deportation of *offenders*, all too often without considerations of the nexus between the offence(s) committed and the exploitation. A commitment to international anti-trafficking instruments, as well as international human rights law more broadly, inevitably requires a different approach grounded in the paradigm of protection.¹⁵⁹ That change in approach is yet to be seen, although there is increasing consensus around the need to enshrine the non-punishment principle domestically, including in the form of legislative provisions and/or specialised guidelines.

Global harmonisation in the adoption and application of the principle is, however, hindered by several factors, some of which are intrinsic in the international anti-trafficking structure. Indeed, arguably, while the non-punishment principle is a principle of international law – as stated by the UN Special Rapporteur in one of her latest reports to the Human Rights Council – there are still significant variations in its formulation between international instruments and among regional instruments (as outlined in Part I). These differences not only concern the nature of the principle, namely whether states are recommended or mandated to adopt it in their domestic legal framework, but also its meaning and scope. While, in recent years, there has been a convergence in soft law instruments towards a common understanding of non-punishment, critical differences still emerge both regionally and domestically.

The global survey and our case studies paint a complex picture in terms of the adoption and application of the non-punishment principle, but also in terms of awareness of it. Some countries (Argentina, the UK and the US states selected for review in this report) have enshrined the principle in their domestic legal system, though with varying degrees of comprehensiveness, either limiting its application to specific forms of trafficking or excluding ‘grave’ offences; some have adopted specialised guidance in addition to, or without, amending their legislation (Argentina, India – though only partly, and the UK); and others are still discussing whether and how to domesticate it (Australia and Canada). In some instances, courts have been instrumental in the development and application of the principle; in others, ‘traditional’ defences continue to be used in lieu of the non-punishment principle. There are then stark differences in countries’ approaches to the nexus between the offence and exploitation:¹⁶⁰ ‘compulsion’ and ‘direct consequence’ appear to be the most common approaches adopted, but there is a lack of consistency and harmonisation, as well as

158 At common law, concepts of innocent agency are insufficiently developed to achieve such an outcome – although the rule in *Tyrell’s Case* might arguably apply in conspiracy. It is reproduced in the Australian Criminal Code Act 1995 (Cth).

159 See, eg, OHCHR, ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’ UN Doc E/2002/68/Add.1 (2003) www.ohchr.org/Documents/Publications/Traffickingen.pdf; ILO, Protocol of 2014 to the Forced Labour Convention 1930 (P029) www.ilo.org/dyn/normlex/en/F?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029; ASEAN Convention Against Trafficking in Persons, Especially Women and Children (2015) Art 14(7) www.asean.org/wp-content/uploads/2015/12/ACTIP.pdf; and Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims (2011) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0036&from=en> accessed 25 August 2023.

160 Muraszkiwicz (see n 29 above).

of interpretation of the meaning(s) of ‘compulsion’ and ‘direct consequence’ domestically.

There are then significant differences between states on if and how the non-punishment principle is applied after a conviction has already been issued against the persons suspected of being trafficked. In particular, there are differences in terms of whether the conviction can be vacated and/or records expunged. The ex post facto application of the non-punishment principle is of paramount importance for trafficked persons’ wellbeing as a (wrongful) conviction can have detrimental impacts across a wide range of legal and recovery processes, including access to employment and social welfare, family law proceedings and risks of deportation. Indeed, the range of complex legal issues that ought to be covered by the principle of non-punishment needs to be re-considered, broadening the scope of interest beyond the criminal and immigration law contexts.

It was also suggested in some case studies that there is often a failure to acknowledge the distinction between identification processes and non-prosecution, with the word *impunity* often used to critique the principle (India and the UK). This could, at least partly, explain the reticence in some countries to enshrining the non-punishment principle and, in countries that have enshrined it, to formally identifying trafficked persons that have committed offences. Police and prosecutors – but also the executive and legislative powers – appear fearful of identifying a ‘suspect’ as trafficked as it is (mis) understood that this will lead to impunity for offences committed. Instead, the approach ought to be to proceed with the identification and then proactively conduct a proper consideration of the evidential burden against each of the limbs of the non-punishment principle defence.

Identification and burden of proof are closely intertwined areas when it comes to the application of the non-punishment principle (or other available defences). While, generally speaking, the onus of identification falls on the state, the responsibility to identify trafficked persons vests in a range of actors across the justice and social support systems. There is, once again, no uniformity globally with regard to identification processes, which remain informal in several countries, including among the case studies, India. Ensuring transparency, coherence and coordination is critical in this context. If a formal process does not exist, and thus, responsibility is most likely to fall on the justice and law enforcement systems, officials must be trained with regard to both identification *and* non-punishment. If and when a formal identification process exists, it ought to be ensured that identification is performed in a manner that can support the trafficked person throughout legal processes, that is, identification processes and outcomes should be *qualitatively* sound and the available information taken into account in the course of criminal proceedings, bearing in mind that different standards of proof may be required, and new information may emerge between the identification decision and the criminal proceedings. Building the capacities of all actors involved in legal processes to identify situations of trafficking and to raise the non-punishment principle at the right time is key. This also clearly links to the need to improve access to, and the quality of, legal advice for trafficked persons.¹⁶¹

Ultimately, for non-punishment to be a success, the move needs to be beyond non-punishment or non-prosecution as a policy, to non-liability as a matter of law recognising the loss of autonomy that comes with slavery, slavery-like practices and the other forms of human trafficking. There is a need for much greater awareness of the non-punishment principle and how it ought to be applied in practice. All stakeholders involved must be aware of the centrality of non-liability to the protection of trafficked persons and a human rights-based response to trafficking.

161 Gauci, Magugliani and Trajer (see n 138 above).

Recommendations

FOR LEGAL PRACTITIONERS

1. Build capacity and awareness of the non-punishment principle among all legal practitioners including lawyers, prosecutors and judges. This should include pre and in service capacity-building activities.
2. Contribute to ongoing debates in countries regarding the implementation and application of the non-punishment principle and share information about promising and worrying practices on an international basis, supporting the building of a knowledge base in the area.

FOR STATES

1. Ensure that the legal and policy framework provides for the non-liability of trafficked persons and requires proactive application of the principle by prosecutors, judges and others key actors in the respective jurisdictions.
2. Build the capacity of justice system actors (judges, prosecutors and lawyers) on the non-punishment principle, its practical implications and application, including the need for timely and trauma-informed communication with suspected trafficked persons.
3. Ensure that trafficked persons in criminal networks are equally protected, even if involved in serious crime and especially when acting as accessories.
4. The application of the principle to areas beyond criminal and immigration systems must also be revisited in order to ensure that all actions/repercussions of a nature that punishes the individual are captured by the application of the non-punishment principle. This includes, but is certainly not limited to, issues around immigration and status, family law matters (including custody of children) and access to welfare services (including where the abuse of such systems was a form of exploitation experienced by the individual).

FOR INTERNATIONAL ORGANISATIONS AND CIVIL SOCIETY

1. Advocate for a non-liability framing of the issue of non-punishment and monitor the application of the principle as a core component of the response to trafficking.
2. Advocate for the adoption of the non-punishment principle in domestic legislations in line with international standards, that is, in a comprehensive and inclusive manner, without discrimination on the basis of, for example, type of exploitation or type of offence.
3. Support states by providing legislative drafting support on non-punishment to ensure legal and policy provisions that reflect international best practice.

FOR FURTHER RESEARCH

1. Conduct research that addresses the impacts of a lack of quality legal advice on the application of the non-punishment principle, including on the recovery and wellbeing of trafficked persons, and on the judicial and administrative systems impacted.
2. Conduct research that explores the role of the private sector in increasing the awareness of the non-punishment principle and in protecting trafficked persons identified in global value chains.
3. Conduct research on the overlap between modern slavery in corporate supply chains and human trafficking in organised crime to maximise the leverage of corporate reporting alongside criminal justice.
4. Conduct research on prison audits to locate trafficked persons who have slipped through the criminal justice process without being identified, and proactively ensure their cases are taken on appeal and convictions quashed.

Annexes

Questionnaire

1. Country about which you are answering:

2. Name (optional):

3. Area of employment:

a. Prosecutor

b. Judge

c. Lawyer (barrister/solicitor)/advocate)

d. Other (incl non-governmental organisations, civil society organisations and trade unions)
(please specify)

4. How familiar are you with the non-punishment principle, understood as the principle according to which trafficked persons should not be subject to arrest, charge, detention, prosecution, or be penalised or otherwise punished for unlawful activities they committed as a consequence of their trafficking?

Scale 1 to 10

For prosecutors:

1. Is the non-punishment principle, understood as the principle according to which a trafficked person shall not be punished for unlawful acts committed as a result of their trafficking experience, enshrined in domestic law?

a. Yes

b. No

c. Comment box: Please provide details (eg, definition)

IF YES	IF NO
2. Is the principle enshrined in other instruments (eg, prosecutorial guidelines)? a. Yes b. No c. Comment box: Please provide details (eg, where is it enshrined)	2. Is the principle enshrined in other instruments (eg, prosecutorial guidelines)? a. Yes b. No c. Comment box: Please provide details (eg, where is it enshrined)
3. [If yes] Can you please provide details regarding how the principle is defined in these national instruments?	[If no, continue below]

<p>4. How does the principle interact with other defences under national law (eg, the common law defence of duress)?</p> <p>Comment box: [open text]</p>	<p>3. Can trafficked individuals raise other defences under national law (eg, the common law defence of duress)?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please specify</p>
<p>5. Do prosecutors have discretion in the application of the non-punishment principle?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Do not know</p> <p>d. Comment box: Please provide details (eg, at what stage, what is the procedure)</p>	<p>4. Do prosecutors have discretion in the application of the available defences?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Do not know</p> <p>d. Comment box: Please provide details (eg, at what stage, what is the procedure)</p>
<p>6. Do prosecutors receive training on the application of the non-punishment principle?</p> <p>a. Yes – Compulsory training</p> <p>b. Yes – Optional training</p> <p>c. No</p> <p>d. Comment box: Please provide details</p>	<p>5. Do prosecutors receive training on the application of the available defences to cases of human trafficking?</p> <p>a. Yes – Compulsory training</p> <p>b. Yes – Optional training</p> <p>c. No</p> <p>d. Comment box: Please provide details</p>
<p>7. Is the application of the non-punishment principle dependent on the previous identification of the person as trafficked in the course of criminal proceedings and/or through a national referral mechanism?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please provide details (on what type of identification is the application of the principle dependent? Is the collaboration of the individual with the prosecution a factor in this determination?)</p>	<p>6. Is the application of the available defences dependent on the previous identification of the person as trafficked in the course of criminal proceedings and/or through a national referral mechanism?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please provide details (on what type of identification is the application of the defence dependent? Is the collaboration of the individual with the prosecution a factor in this determination?)</p>
<p>8. To what unlawful acts does the principle apply? (Please tick all that apply)</p> <p>a. Immigration offences</p> <p>b. Administrative offences</p> <p>c. Minor criminal offences</p> <p>d. Serious crimes</p> <p>e. All unlawful acts</p> <p>f. Other</p> <p>g. Comment box: If only to some, what is the criterion?</p>	<p>7. To what unlawful acts can the available defence(s) apply? (Please tick all that apply)</p> <p>a. Immigration offences</p> <p>b. Administrative offences</p> <p>c. Minor criminal offences</p> <p>d. Serious crimes</p> <p>e. All unlawful acts</p> <p>f. Other</p> <p>g. Comment box: If only to some, what is the criterion?</p>
<p>9. What is the scope of exploitative situations that the principle applies to – are the following purposes of exploitation covered? (Please tick all that applies)</p> <p>a. Sexual exploitation</p> <p>b. Labour exploitation</p> <p>c. Forced criminality</p> <p>d. Other</p> <p>e. Comment box: Please specify</p>	<p>8. What is the scope of exploitative situations that the available defence(s) applies to – are the following purposes of exploitation covered? (Please tick all that applies)</p> <p>a. Sexual exploitation</p> <p>b. Labour exploitation</p> <p>c. Forced criminality</p> <p>d. Other</p> <p>e. Comment box: Please specify</p>

<p>10. What does the application of the principle entail? Please tick all that applies?</p> <p>a. Exemption from prosecution related to breaches of criminal law</p> <p>b. Exemption from prosecution related to breaches of civil law</p> <p>c. Exemption from prosecution related to breaches of administrative law</p> <p>d. Exemption from prosecution related to breaches of immigration law</p> <p>e. Release from detention</p> <p>f. Guarantees against deprivation of citizenship and/or restoration of citizenship</p> <p>g. Guarantees against deprivation of social welfare and/or restoration of social welfare</p> <p>h. Guarantees against exclusion from refugee status (and other forms of protection including humanitarian forms of protection) and other forms of protection and/or restoration of refugee status and other forms protection</p> <p>i. Guarantees against deportation and/or withdrawal of deportation order</p> <p>j. Other (please specify)</p> <p>k. Comment box: [open text]</p>	<p>9. What does the application of the principle (or, when absent, other available defences) entail? Please tick all that applies?</p> <p>a. Exemption from prosecution related to breaches of criminal law</p> <p>b. Exemption from prosecution related to breaches of civil law</p> <p>c. Exemption from prosecution related to breaches of administrative law</p> <p>d. Exemption from prosecution related to breaches of immigration law</p> <p>e. Release from detention</p> <p>f. Guarantees against deprivation of citizenship and/or restoration of citizenship</p> <p>g. Guarantees against deprivation of social welfare and/or restoration of social welfare</p> <p>h. Guarantees against exclusion from refugee status (and other forms of protection including humanitarian forms of protection) and other forms of protection and/or restoration of refugee status and other forms protection</p> <p>i. Guarantees against deportation and/or withdrawal of deportation order</p> <p>j. Other (please specify)</p> <p>k. Comment box: [open text]</p>
<p>11. What level of connection is required between the trafficking situation and the committed unlawful act for the non-punishment principle to be applied?</p> <p>Comment box: [open text]</p>	<p>11. What level of connection is required between the trafficking situation and the committed unlawful act for the available defence(s) to be applied?</p> <p>Comment box: [open text]</p>
<p>12. Who carries the burden of proof for the application of the principle?</p> <p>Comment box: [open text]</p>	<p>13. Who carries the burden of proof for the application of available defence(s)?</p> <p>Comment box: [open text]</p>
<p>13. What is the threshold of proof required?</p> <p>a. Reasonable ground</p> <p>b. Balance of probabilities</p> <p>c. Other (please specify)</p> <p>d. Comment box: [open text]</p>	<p>14. What is the threshold of proof required?</p> <p>a. Reasonable ground</p> <p>b. Balance of probabilities</p> <p>c. Other (please specify)</p> <p>d. Comment box: [open text]</p>
<p>14. When state authorities fail to apply the non-punishment principle in particular in the context of criminal proceedings, are there provisions enabling the application of the principle post-conviction?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please provide details (eg, what do these entail?)</p>	<p>15. When state authorities fail to apply the available defence(s), in particular in the context of criminal proceedings, are there provisions enabling the application of the defence(s) post-conviction?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please provide details (eg, what do these entail?)</p>
<p>16. Could you point to landmark decisions where the principle has been applied?</p> <p>Comment box: [open text]</p>	<p>16. Could you point to landmark decisions where the available defence(s) has been applied?</p> <p>Comment box: [open text]</p>

<p>17. What are the practical barriers that might prevent trafficked persons from accessing the non-punishment principle?</p> <p>a. Lack of referral to the national referral mechanism (or relevant mechanism)</p> <p>b. Lack of decision of a national referral mechanism (or competent authority)</p> <p>c. Lack of legal representation</p> <p>d. Lack of trained legal representatives</p> <p>e. Linguistic barriers</p> <p>f. Existing criminal conviction (or other conviction) related to the trafficking experience</p> <p>g. Existing criminal conviction (or other conviction) un-related to the trafficking experience</p> <p>h. Existing deportation or removal order</p> <p>i. Lack of cooperation in criminal (or other) proceedings</p> <p>j. Other (please specify)</p> <p>k. Comment box: [open text]</p>	<p>17. What are the practical barriers that might prevent trafficked persons from accessing the available defence(s)?</p> <p>a. Lack of referral to the national referral mechanism (or relevant mechanism)</p> <p>b. Lack of decision of a national referral mechanism (or competent authority)</p> <p>c. Lack of legal representation</p> <p>d. Lack of trained legal representatives</p> <p>e. Linguistic barriers</p> <p>f. Existing criminal conviction (or other conviction) related to the trafficking experience</p> <p>g. Existing criminal conviction (or other conviction) un-related to the trafficking experience</p> <p>h. Existing deportation or removal order</p> <p>i. Lack of cooperation in criminal (or other) proceedings</p> <p>j. Other (please specify)</p> <p>k. Comment box: [open text]</p>
<p>18. How can law, policies, institutional frameworks, and practice be improved to ensure a 'better' application of the non-punishment principle in practice?</p> <p>Comment box: [open text]</p>	<p>18. How can law, policies, institutional frameworks, and practice be improved to ensure a 'better' application of the available defence(s) in practice?</p> <p>Comment box: [open text]</p>

For judges:

1. Is the non-punishment principle, understood as the principle according to which a trafficked person shall not be punished for unlawful acts committed as a result of their trafficking experience, enshrined in domestic law?

a. Yes

b. No

c. Comment box: Please provide details (eg, definition)

IF YES	IF NO
<p>2. Is the principle enshrined in other instruments (eg, prosecutorial guidelines)?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please provide details (eg, where is it enshrined)</p>	<p>2. Is the principle enshrined in other instruments (eg, prosecutorial guidelines)?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please provide details (eg, where is it enshrined)</p>
<p>3. [If yes] Can you please provide details regarding how the principle is defined in these national instruments?</p>	<p>[If no, continue below]</p>

<p>4. How does the principle interact with other defences under national law (eg, the common law defence of duress)?</p> <p>Comment box: [open text]</p>	<p>3. Can trafficked individuals raise other defences under national law (eg, the common law defence of duress)?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please specify</p>
<p>5. Do judges receive training on the application of the non-punishment principle?</p> <p>a. Yes – Compulsory training</p> <p>b. Yes – Optional training</p> <p>c. No</p> <p>d. Comment box: Please provide details</p>	<p>4. Do judges receive training on the application of the non-punishment principle?</p> <p>a. Yes – Compulsory training</p> <p>b. Yes – Optional training</p> <p>c. No</p> <p>d. Comment box: Please provide details</p>
<p>5. Is the application of the non-punishment principle dependent on the previous identification of the person as trafficked in the course of criminal proceedings and/or through a national referral mechanism?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please provide details (on what type of identification is the application of the principle dependent? Is the collaboration of the individual with the prosecution a factor in this determination?)</p>	<p>4. Is the application of the available defences dependent on the previous identification of the person as trafficked in the course of criminal proceedings and/or through a national referral mechanism?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please provide details (on what type of identification is the application of the defence dependent? Is the collaboration of the individual with the prosecution a factor in this determination?)</p>
<p>6. To what unlawful acts does the principle apply? (Please tick all that apply)</p> <p>a. Immigration offences</p> <p>b. Administrative offences</p> <p>c. Minor criminal offences</p> <p>d. Serious crimes</p> <p>e. All unlawful acts</p> <p>f. Other</p> <p>g. Comment box: If only to some, what is the criterion?</p>	<p>5. To what unlawful acts can the available defence(s) apply? (Please tick all that apply)</p> <p>a. Immigration offences</p> <p>b. Administrative offences</p> <p>c. Minor criminal offences</p> <p>d. Serious crimes</p> <p>e. All unlawful acts</p> <p>f. Other</p> <p>g. Comment box: If only to some, what is the criterion?</p>
<p>7. What is the scope of exploitative situations that the principle applies to – are the following purposes of exploitation covered? (Please tick all that applies)</p> <p>a. Sexual exploitation</p> <p>b. Labour exploitation</p> <p>c. Forced criminality</p> <p>d. Other</p> <p>e. Comment box: Please specify</p>	<p>6. What is the scope of exploitative situations that the available defence(s) applies to – are the following purposes of exploitation covered? (Please tick all that applies)</p> <p>a. Sexual exploitation</p> <p>b. Labour exploitation</p> <p>c. Forced criminality</p> <p>d. Other</p> <p>e. Comment box: Please specify</p>

<p>8. What does the application of the principle entail? Please tick all that applies?</p> <p>a. Exemption from prosecution related to breaches of criminal law</p> <p>b. Exemption from prosecution related to breaches of civil law</p> <p>c. Exemption from prosecution related to breaches of administrative law</p> <p>d. Exemption from prosecution related to breaches of immigration law</p> <p>e. Release from detention</p> <p>f. Guarantees against deprivation of citizenship and/or restoration of citizenship</p> <p>g. Guarantees against deprivation of social welfare and/or restoration of social welfare</p> <p>h. Guarantees against exclusion from refugee status (and other forms of protection including humanitarian forms of protection) and other forms of protection and/or restoration of refugee status and other forms protection</p> <p>i. Guarantees against deportation and/or withdrawal of deportation order</p> <p>j. Other (please specify)</p> <p>k. Comment box: [open text]</p>	<p>7. What does the application of the principle (or, when absent, other available defences) entail? Please tick all that applies?</p> <p>a. Exemption from prosecution related to breaches of criminal law</p> <p>b. Exemption from prosecution related to breaches of civil law</p> <p>c. Exemption from prosecution related to breaches of administrative law</p> <p>d. Exemption from prosecution related to breaches of immigration law</p> <p>e. Release from detention</p> <p>f. Guarantees against deprivation of citizenship and/or restoration of citizenship</p> <p>g. Guarantees against deprivation of social welfare and/or restoration of social welfare</p> <p>h. Guarantees against exclusion from refugee status (and other forms of protection including humanitarian forms of protection) and other forms of protection and/or restoration of refugee status and other forms protection</p> <p>i. Guarantees against deportation and/or withdrawal of deportation order</p> <p>j. Other (please specify)</p> <p>k. Comment box: [open text]</p>
<p>9. What level of connection is required between the trafficking situation and the committed unlawful act for the non-punishment principle to be applied?</p> <p>Comment box: [open text]</p>	<p>8. What level of connection is required between the trafficking situation and the committed unlawful act for the available defence(s) to be applied?</p> <p>Comment box: [open text]</p>
<p>10. Who carries the burden of proof for the application of the principle?</p> <p>Comment box: [open text]</p>	<p>9. Who carries the burden of proof for the application of available defence(s)?</p> <p>Comment box: [open text]</p>
<p>11. What is the threshold of proof required?</p> <p>a. Reasonable ground</p> <p>b. Balance of probabilities</p> <p>c. Other (please specify)</p> <p>d. Comment box: [open text]</p>	<p>10. What is the threshold of proof required?</p> <p>a. Reasonable ground</p> <p>b. Balance of probabilities</p> <p>c. Other (please specify)</p> <p>d. Comment box: [open text]</p>
<p>12. When state authorities fail to apply the non-punishment principle in particular in the context of criminal proceedings, are there provisions enabling the application of the principle post-conviction?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please provide details (eg, what do these entail?)</p>	<p>11. When state authorities fail to apply the available defence(s), in particular in the context of criminal proceedings, are there provisions enabling the application of the defence(s) post-conviction?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please provide details (eg, what do these entail?)</p>
<p>13. Could you point to landmark decisions where the principle has been applied?</p> <p>Comment box: [open text]</p>	<p>12. Could you point to landmark decisions where the available defence(s) has been applied?</p> <p>Comment box: [open text]</p>

<p>14. What are the practical barriers that might prevent trafficked persons from accessing the non-punishment principle?</p> <p>a. Lack of referral to the national referral mechanism (or relevant mechanism)</p> <p>b. Lack of decision of a national referral mechanism (or competent authority)</p> <p>c. Lack of legal representation</p> <p>d. Lack of trained legal representatives</p> <p>e. Linguistic barriers</p> <p>f. Existing criminal conviction (or other conviction) related to the trafficking experience</p> <p>g. Existing criminal conviction (or other conviction) un-related to the trafficking experience</p> <p>h. Existing deportation or removal order</p> <p>i. Lack of cooperation in criminal (or other) proceedings</p> <p>j. Other (please specify)</p> <p>k. Comment box: [open text]</p>	<p>13. What are the practical barriers that might prevent trafficked persons from accessing the available defence(s)?</p> <p>a. Lack of referral to the national referral mechanism (or relevant mechanism)</p> <p>b. Lack of decision of a national referral mechanism (or competent authority)</p> <p>c. Lack of legal representation</p> <p>d. Lack of trained legal representatives</p> <p>e. Linguistic barriers</p> <p>f. Existing criminal conviction (or other conviction) related to the trafficking experience</p> <p>g. Existing criminal conviction (or other conviction) un-related to the trafficking experience</p> <p>h. Existing deportation or removal order</p> <p>i. Lack of cooperation in criminal (or other) proceedings</p> <p>j. Other (please specify)</p> <p>k. Comment box: [open text]</p>
<p>15. How can law, policies, institutional frameworks, and practice be improved to ensure a 'better' application of the non-punishment principle in practice?</p> <p>Comment box: [open text]</p>	<p>14. How can law, policies, institutional frameworks, and practice be improved to ensure a 'better' application of the available defence(s) in practice?</p> <p>Comment box: [open text]</p>

For lawyers:

1. Is the non-punishment principle, understood as the principle according to which a trafficked person shall not be punished for unlawful acts committed as a result of their trafficking experience, enshrined in domestic law?

- a. Yes
- b. No
- c. Comment box: Please provide details (eg, definition)

IF YES	IF NO
<p>2. Is the principle enshrined in other instruments (eg, prosecutorial guidelines)?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please provide details (eg, where is it enshrined)</p>	<p>2. Is the principle enshrined in other instruments (eg, prosecutorial guidelines)?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please provide details (eg, where is it enshrined)</p>
<p>3. [If yes] Can you please provide details regarding how the principle is defined in these national instruments?</p>	<p>[If no, continue below]</p>

<p>4. How does the principle interact with other defences under national law (eg, the common law defence of duress)?</p> <p>Comment box: [open text]</p>	<p>3. Can trafficked individuals raise other defences under national law (eg, the common law defence of duress)?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please specify</p>
<p>5. Do lawyers receive training on the application of the non-punishment principle?</p> <p>a. Yes – Compulsory training</p> <p>b. Yes – Optional training</p> <p>c. No</p> <p>d. Comment box: Please provide details</p>	<p>4. Do lawyers receive training on the application of the non-punishment principle?</p> <p>a. Yes – Compulsory training</p> <p>b. Yes – Optional training</p> <p>c. No</p> <p>d. Comment box: Please provide details</p>
<p>6. Is the application of the non-punishment principle dependent on the previous identification of the person as trafficked in the course of criminal proceedings and/or through a national referral mechanism?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please provide details (on what type of identification is the application of the principle dependent? Is the collaboration of the individual with the prosecution a factor in this determination?)</p>	<p>5. Is the application of the available defences dependent on the previous identification of the person as trafficked in the course of criminal proceedings and/or through a national referral mechanism?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please provide details (on what type of identification is the application of the defence dependent? Is the collaboration of the individual with the prosecution a factor in this determination?)</p>
<p>7. To what unlawful acts does the principle apply? (Please tick all that apply)</p> <p>a. Immigration offences</p> <p>b. Administrative offences</p> <p>c. Minor criminal offences</p> <p>d. Serious crimes</p> <p>e. All unlawful acts</p> <p>f. Other</p> <p>g. Comment box: If only to some, what is the criterion?</p>	<p>6. To what unlawful acts can the available defence(s) apply? (Please tick all that apply)</p> <p>a. Immigration offences</p> <p>b. Administrative offences</p> <p>c. Minor criminal offences</p> <p>d. Serious crimes</p> <p>e. All unlawful acts</p> <p>f. Other</p> <p>g. Comment box: If only to some, what is the criterion?</p>
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<p>9. What does the application of the principle entail? Please tick all that applies?</p> <p>a. Exemption from prosecution related to breaches of criminal law</p> <p>b. Exemption from prosecution related to breaches of civil law</p> <p>c. Exemption from prosecution related to breaches of administrative law</p> <p>d. Exemption from prosecution related to breaches of immigration law</p> <p>e. Release from detention</p> <p>f. Guarantees against deprivation of citizenship and/or restoration of citizenship</p> <p>g. Guarantees against deprivation of social welfare and/or restoration of social welfare</p> <p>h. Guarantees against exclusion from refugee status (and other forms of protection including humanitarian forms of protection) and other forms of protection and/or restoration of refugee status and other forms protection</p> <p>i. Guarantees against deportation and/or withdrawal of deportation order</p> <p>j. Other (please specify)</p> <p>k. Comment box: [open text]</p>	<p>8. What does the application of the principle (or, when absent, other available defences) entail? Please tick all that applies?</p> <p>a. Exemption from prosecution related to breaches of criminal law</p> <p>b. Exemption from prosecution related to breaches of civil law</p> <p>c. Exemption from prosecution related to breaches of administrative law</p> <p>d. Exemption from prosecution related to breaches of immigration law</p> <p>e. Release from detention</p> <p>f. Guarantees against deprivation of citizenship and/or restoration of citizenship</p> <p>g. Guarantees against deprivation of social welfare and/or restoration of social welfare</p> <p>h. Guarantees against exclusion from refugee status (and other forms of protection including humanitarian forms of protection) and other forms of protection and/or restoration of refugee status and other forms protection</p> <p>i. Guarantees against deportation and/or withdrawal of deportation order</p> <p>j. Other (please specify)</p> <p>k. Comment box: [open text]</p>
<p>10. What level of connection is required between the trafficking situation and the committed unlawful act for the non-punishment principle to be applied?</p> <p>Comment box: [open text]</p>	<p>9. What level of connection is required between the trafficking situation and the committed unlawful act for the available defence(s) to be applied?</p> <p>Comment box: [open text]</p>
<p>11. Who carries the burden of proof for the application of the principle?</p> <p>Comment box: [open text]</p>	<p>10. Who carries the burden of proof for the application of available defence(s)?</p> <p>Comment box: [open text]</p>
<p>12. What is the threshold of proof required?</p> <p>a. Reasonable ground</p> <p>b. Balance of probabilities</p> <p>c. Other (please specify)</p> <p>d. Comment box: [open text]</p>	<p>11. What is the threshold of proof required?</p> <p>a. Reasonable ground</p> <p>b. Balance of probabilities</p> <p>c. Other (please specify)</p> <p>d. Comment box: [open text]</p>
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For other:

Is the non-punishment principle, understood as the principle according to which a trafficked person shall not be punished for unlawful acts committed as a result of their trafficking experience, enshrined in domestic law?

- a. Yes
- b. No
- c. Comment box: Please provide details (eg, definition)

IF YES	IF NO
<p>2. Is the principle enshrined in other instruments (eg, prosecutorial guidelines)?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please provide details (eg, where is it enshrined)</p>	<p>2. Is the principle enshrined in other instruments (eg, prosecutorial guidelines)?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please provide details (eg, where is it enshrined)</p>
<p>3. [If yes] Can you please provide details regarding how the principle is defined in these national instruments?</p>	<p>[If no, continue below]</p>

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<p>10. Who carries the burden of proof for the application of the principle?</p> <p>a. Comment box: [open text]</p>	<p>9. Who carries the burden of proof for the application of available defence(s)?</p> <p>a. Comment box: [open text]</p>
<p>11. What is the threshold of proof required?</p> <p>a. Reasonable ground</p> <p>b. Balance of probabilities</p> <p>c. Other (please specify)</p> <p>d. Comment box: [open text]</p>	<p>10. What is the threshold of proof required?</p> <p>a. Reasonable ground</p> <p>b. Balance of probabilities</p> <p>c. Other (please specify)</p> <p>d. Comment box: [open text]</p>
<p>12. When state authorities fail to apply the non-punishment principle in particular in the context of criminal proceedings, are there provisions enabling the application of the principle post-conviction?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please provide details (eg, what do these entail?)</p>	<p>11. When state authorities fail to apply the available defence(s), in particular in the context of criminal proceedings, are there provisions enabling the application of the defence(s) post-conviction?</p> <p>a. Yes</p> <p>b. No</p> <p>c. Comment box: Please provide details (eg, what do these entail?)</p>
<p>13. Could you point to landmark decisions where the principle has been applied?</p> <p>Comment box: [open text]</p>	<p>12. Could you point to landmark decisions where the available defence(s) has been applied?</p> <p>Comment box: [open text]</p>

<p>14. What are the practical barriers that might prevent trafficked persons from accessing the non-punishment principle?</p> <ul style="list-style-type: none"> a. Lack of referral to the national referral mechanism (or relevant mechanism) b. Lack of decision of a national referral mechanism (or competent authority) c. Lack of legal representation d. Lack of trained legal representatives e. Linguistic barriers f. Existing criminal conviction (or other conviction) related to the trafficking experience g. Existing criminal conviction (or other conviction) un-related to the trafficking experience h. Existing deportation or removal order i. Lack of cooperation in criminal (or other) proceedings j. Other (please specify) k. Comment box: [open text] 	<p>13. What are the practical barriers that might prevent trafficked persons from accessing the available defence(s)?</p> <ul style="list-style-type: none"> a. Lack of referral to the national referral mechanism (or relevant mechanism) b. Lack of decision of a national referral mechanism (or competent authority) c. Lack of legal representation d. Lack of trained legal representatives e. Linguistic barriers f. Existing criminal conviction (or other conviction) related to the trafficking experience g. Existing criminal conviction (or other conviction) un-related to the trafficking experience h. Existing deportation or removal order i. Lack of cooperation in criminal (or other) proceedings j. Other (please specify) k. Comment box: [open text]
<p>15. How can law, policies, institutional frameworks, and practice be improved to ensure a 'better' application of the non-punishment principle in practice?</p> <p>Comment box: [open text]</p>	<p>14. How can law, policies, institutional frameworks, and practice be improved to ensure a 'better' application of the available defence(s) in practice?</p> <p>Comment box: [open text]</p>

Case study template

1. Executive summary

2. Introduction

- Overview of applicable international legal frameworks (eg, ratification of international legal instruments; membership to regional organisations and regional anti-trafficking conventions)
- Literature review/overview of specific monitoring bodies' remarks on the application of the non-punishment principle in the jurisdiction (if applicable, eg, Group of Experts on Action against Trafficking in Human Beings (GRETA) reports, ombudsman reports and non-governmental organisation reports).

3. The legal bases of the non-punishment principle (NPP)

- How is the principle of non-punishment defined in national legislation, if at all?
- Is the principle enshrined in hard law (eg, criminal code provisions?) or procedural standards (eg, prosecutor guidelines) or other measures?
- Which other defences under national law can have similar effects to the NPP (eg, the common law defence of duress)? How does the NPP interact with such other defences?

4. The application of the non-punishment principle in law and practice

It is recommended that, in this section, both law and practice are discussed and that references are made to jurisprudence (if existing), or to specific cases (eg, where principle was not implemented)

- How is the principle applied in law and practice (is it applied as a principle of non-punishment, non-prosecution or non-investigation?)
- Who makes the decision that a particular individual or situation should not be investigated/prosecuted/punished as a result of the 'perpetrator' having been trafficked?
- At which point(s) is the principle applied (charging/prosecution policies; discontinuation of proceedings; statutory defences; sentencing; post-conviction)?
- What is the scope of the principle in terms of individuals that it applies to: is it only individuals who are formally identified by the national referral mechanism (or equivalent process) who are exempted from punishment or are the decision makers able to rely on their own identification of whether and individual has been trafficked? Is the collaboration of the individual with the prosecution a factor in this determination?
- What is the scope of exploitative situations that the principle applies to: is it only situations that fulfil the three-pronged definition of trafficking or are other forms of exploitation, such as labour exploitation that do not meet the threshold of trafficking, also subject to the principle?
- What level of connection is required between the trafficking situation and the committed crime for the non-punishment principle to be applied? Is it a requirement that the person was compelled to commit the offence by his or her trafficker; was under the influence of the trafficker; or was in a situation of trafficking? What definitions and elaborations of each of these are adopted?
- How is the means element of the trafficking definition, especially 'abuse of a position of vulnerability', considered in understanding the connection between the offence and the trafficking situation?
- What role does 'time' play in the application of the principle? What time connection must be established between trafficking and the crime committed for the principle to be applied?
- Which areas of law are covered by the principle? Is it only criminal punishment that is exempted or other forms of 'punishment' (even if not considered as such under domestic law) (eg, immigration related measures) also covered?
- To which offences is the principle applied? Are there offences that are excluded from the application of the principle? Is a proportionality and/or reasonableness test applied?
- Who carries the burden of proof for the application of the principle? What is the threshold of proof required?
- What are the practical barriers that exist for trafficked persons (or their legal representatives) in accessing/invoking the non-punishment principle?

5. Actors involved

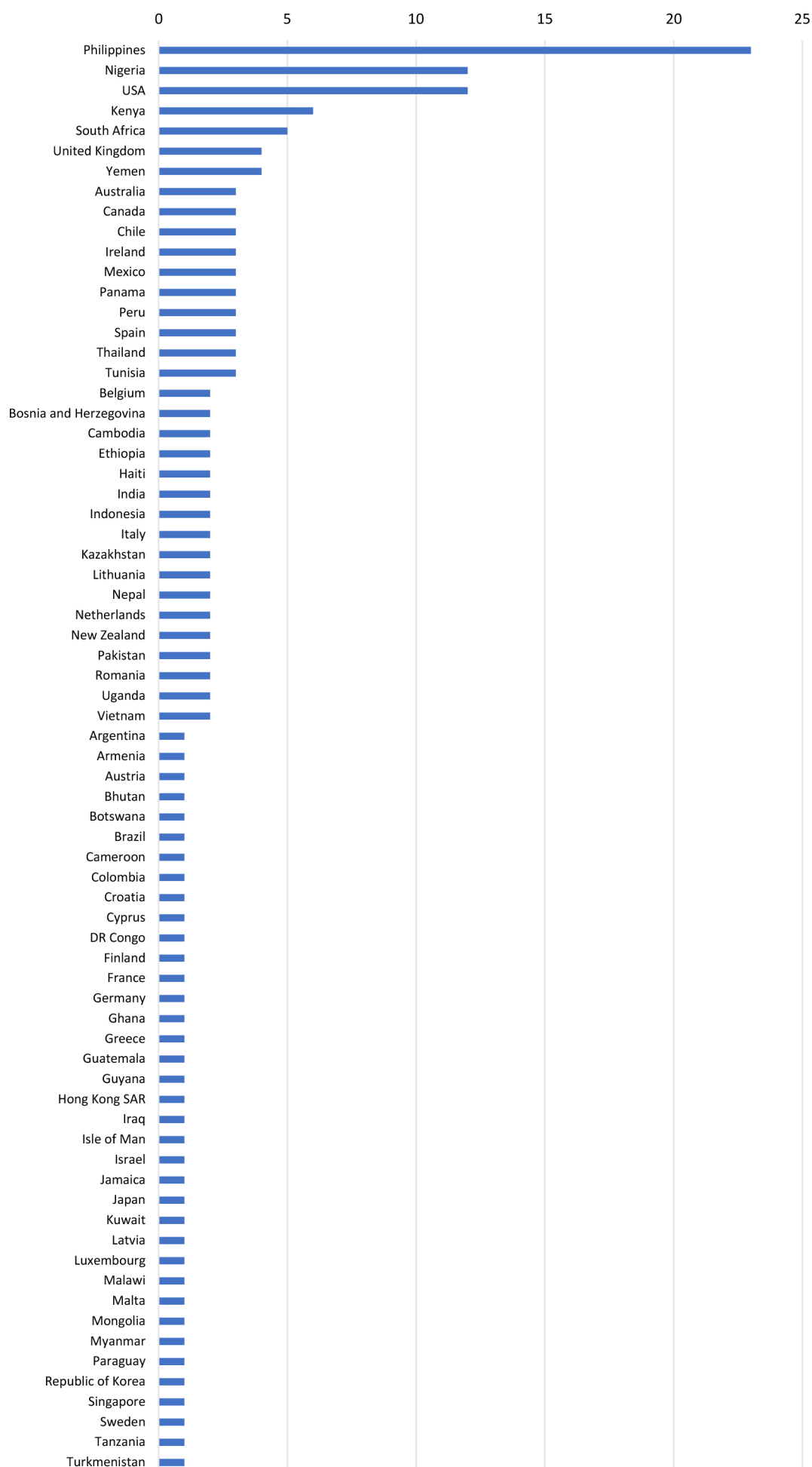
- What roles do and can different actors take? This includes lawyers, judges, law enforcement bodies, labour inspectors, immigration control officers, social workers and civil society organisations.

6. Landmark national jurisprudence

- Have there been landmark cases where the non-punishment principle has been applied? If yes, how has it been applied? What are the points of concern in the application of the principle?
- Have there been landmark cases where the non-punishment principle was not applied? If yes, what was the rationale for not applying the principle? What are the points of concern in the non-application of the principle?

7. Conclusion

List of responses: countries



Acknowledgments

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US: Chavi Nana, Professor of Michigan Law; Cynthia D Vreeland, Partner at WilmerHale; Hyun-Soo Lee, Senior Associate at WilmerHale; Jeff Habenicht, Counsel at WilmerHale; Michael Dawson, Partner at WilmerHale (To read the US case study, please visit [here](#))

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