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**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**

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Background paper prepared by the Secretariat

I. Introduction

1. The present background paper was prepared by the Secretariat to facilitate discussion by the Working Group on Trafficking in Persons at its tenth meeting. It provides an overview of the “non-punishment” principle, its evolution at the international level and the attention given to it by the Conference of the Parties to the United Nations Convention against Transnational Organized Crime and the Working Group. It presents trends in the implementation of the non-punishment principle at the national level and provides information on the different ways in which it can be incorporated into national criminal justice responses, having regard to the differences in domestic legal systems.

II. Issues for discussion

2. In the decade since the Working Group last considered the issue of non-punishment as a specific agenda item, awareness of the issue has grown significantly. Member States from all regions have taken steps to specifically implement the principle, and the international community has continued to develop and refine guidance in this area. Nevertheless, its implementation has been uneven.

3. With specific reference to their national experience, delegations may wish to consider the following questions in preparing for the Working Group’s deliberations. The topics broached in the questions are also intended to generate discussion in the Working Group concerning promising practices and the gaps and challenges confronted by relevant stakeholders:

* [CTOC/COP/WG.4/2020/1](#).



(a) Do States parties have examples of specific guidance or policies for police officers and prosecutors relating to the non-punishment principle?

(b) How can States parties better identify instances where domestic measures implementing the non-punishment principle have been successfully relied upon?

(c) Different thresholds have been identified as a basis for implementing the non-punishment principle. Regarding national practice, what evidence is required to establish that:

(i) Someone was compelled to commit unlawful activities?

(ii) Someone committed an unlawful activity as a direct consequence of being a victim of trafficking in persons?

(d) Is it appropriate to limit the application of the non-punishment principle to certain illegal activities, or should it apply to any illegal act?

(e) What is the basis for either imposing such limits or making the principle applicable to all illegal activities?

(f) What measures can be taken to remedy instances where victims of trafficking were unjustly punished or otherwise penalized for illegal acts committed in connection with their victimization?

4. The Working Group might consider the following possible actions by States parties in discussing how to achieve a more consistent and comprehensive implementation of the non-punishment principle at the national level:

(a) The development of clear policies and guidelines on non-punishment to guide decision makers at all stages of the justice system on appropriate responses;

(b) The enactment of specific statutory defences for victims of trafficking who were compelled to commit crimes or committed crimes as a direct consequence of their being victims of trafficking, and the provision of clear guidance on the scope and threshold of such defences;

(c) The enactment of legislative provisions to enable victims of trafficking to have any criminal records vacated with regard to information pertaining to convictions or charges for crimes that they committed or were alleged to have committed in connection with their victimization;

(d) The development and implementation of clear training and awareness-raising on applicable laws, policies and guidelines on non-punishment.

III. Background

5. Trafficking in persons is a crime that undermines the autonomy of its victims. Victims are coerced into performing labour or providing services or treated as if they were commodities to be bought and sold. The criminals behind this pernicious crime have only one intention, namely, to exploit their victims, often with the view of generating as much illicit revenue as possible.

6. Traffickers succeed when they are able to maintain control over their victims. This is frequently accomplished through violence and threats of violence, promises of a better life, deception or threats that are grounded in the victim's fears, including that they will be subjected to the State authorities and arrested, deported or charged for illegal conduct that they may have engaged in as a result of trafficking.

7. When in a trafficking situation, victims may be forced to engage in various types of illegal conduct. For example, in transnational cases, victims may be given fraudulent travel documents to facilitate their entry into another State. Illegal conduct may also include involvement in prostitution. In cases where prostitution-related activities are illegal, victims may be charged or prosecuted for solicitation, while in countries where prostitution is regulated, they may be punished for operating outside

of the regulatory requirements. Victims of trafficking may also be obliged to engage in illegal activities related to drugs, such as cannabis cultivation or drug trafficking.

8. In some cases, as noted in the *Global Report on Trafficking in Persons 2016* published by the United Nations Office on Drugs and Crime (UNODC), victims may become involved in trafficking in persons themselves, for example, by helping to recruit new victims or by performing supervisory functions over other victims. Such involvement may be done in exchange for differential or less harsh treatment at the hands of traffickers with more power.

9. The particular realities of trafficking in persons and the impact of this crime on victims require responses that are sensitive to the needs and circumstances of those bearing that impact. Victim-centred and gender-transformative responses are critical. A victim-centred approach prioritizes the needs and priorities of victims, and a gender-specific approach takes into account the specificities of each gender in experiencing such realities.

10. The non-punishment principle for victims of trafficking in persons provides a focus, on how the circumstances of victims of trafficking should be considered and, when implemented, helps to guide appropriate justice system responses, with the most fundamental and practical consequences. It is an important component of effective anti-trafficking responses.

11. The principle can be described in various ways. Broadly speaking, however, it encapsulates the notion that trafficked persons should not be subject to arrest, charge, detention or prosecution, or be penalized or otherwise punished for illegal conduct that they engaged in as a direct consequence of being trafficked.¹

A. Evolution of the principle

12. The origins of the principle can be traced back to more than 20 years ago, when it was first specifically referenced by the United Nations High Commissioner for Human Rights in an informal note submitted at the fourth session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime (A/AC.254/16).² In her submission, the High Commissioner stated the following in relation to the draft text of what would become the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime:

[I]t should be noted that trafficked persons are often subject to detention and prosecution for offences related to their status (including violation of immigration laws, prostitution, etc.). States parties should be directed to refrain from detaining or prosecuting trafficked persons for such status-related offences.

13. While the High Commissioner's recommendation did not find its way into the final text of the Trafficking in Persons Protocol, it is reflected in its purposes, specifically that of protecting and assisting the victims of trafficking in persons, with full respect for their human rights (art. 2 (b)).

14. Following the adoption of the Trafficking in Persons Protocol, the High Commissioner continued to advocate the non-punishment principle. In 2002, her

¹ See, for example, Inter-Agency Coordination Group against Trafficking in Persons, "Non-punishment of victims of trafficking", issue brief No. 8 (2020).

² The Committee was established pursuant to General Assembly resolution 53/111 for the purpose of elaborating a comprehensive international convention against transnational organized crime and of discussing the elaboration, as appropriate, of international instruments addressing trafficking in women and children, combating the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, and illegal trafficking in and transporting of migrants, including by sea.

Office issued the Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1). Principle 7 provides the following:

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.

15. The non-punishment principle continued to receive the attention of the international community, as shown by the inclusion of the first explicit reference to it in an international treaty in 2005, in the Council of Europe Convention on Action against Trafficking in Human Beings.³ Specifically, article 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.

16. A similar provision is included in article 14, paragraph 7, of the Association of Southeast Asian Nations (ASEAN) Convention Against Trafficking in Persons, Especially Women and Children, namely:

Each Party shall, subject to its domestic law, 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.

17. Beyond these references, the non-punishment principle has also been given effect to in other regional instruments and documents.⁴

18. Calls for Member States to take action to implement the non-punishment principle can also be found in General Assembly resolution 64/293 and Security Council resolutions 2331 (2016) and 2388 (2017).

B. Justification for the principle

19. A number of reasons for supporting the non-punishment principle have been identified.

20. One reason offered is that the punishment of victims of trafficking for crimes that they committed in direct connection with their trafficking is a denial of justice and that such punishment blames victims for crimes that, but for their status as trafficked persons, they would not have committed.⁵ Underlying this justification is the notion of free choice and, specifically, that trafficked persons who commit crimes in connection with their trafficking are not acting freely. To punish someone in such circumstances would be a departure from a long-established criminal law principle, common to legal systems around the world, that only those who engage in criminal behaviour of their own free choice should be subject to punishment by the State.⁶

21. Under this approach, it is not merely the status of the person (i.e., victim of trafficking) that anchors the principle. This would amount to providing blanket immunity to victims of trafficking, which was not intended when the principle was

³ In Europe, see also Directive 2011/36/EU of the European Parliament and of the Council of the European Union, which provides in its article 8 for measures concerning the non-prosecution or the non-application of penalties to victims of trafficking in persons.

⁴ See, for example, Organization of American States (OAS), Conclusions and Recommendations of the Meeting of National Authorities on Trafficking in Persons (RTP/doc.16/06 rev. 1 corr. 1, topic IV, para. 7), and Organization for Security and Cooperation in Europe (OSCE), *Policy and Legislative Recommendations towards the Effective Implementation of the Non-Punishment Provision with Regard to Victims of Trafficking*.

⁵ OSCE, *Policy and Legislative Recommendations*, p. 10.

⁶ See, for example, *Commentary: Recommended Principles and Guidelines on Human Rights and Human Trafficking* (United Nations publication, Sales No. E.10.XIV.1), pp. 132–133.

first articulated.⁷ Rather, it is the fact that trafficked persons may commit crimes as a result of force or other types of coercion at the hands of traffickers, which shows that they have acted in an involuntary manner.

22. It has also been stated that the non-punishment principle helps to safeguard the rights of victims, including by ensuring that victims will have access to the necessary support and assistance.⁸

C. Previous consideration by the Conference of the Parties and the Working Group on Trafficking in Persons

23. The Conference of the Parties and its Working Group have considered the non-punishment principle on various occasions in the past.

24. At its fifth session, in 2010, the Conference of the Parties adopted resolution 5/2 on the implementation of the Trafficking in Persons Protocol, in which it specifically encouraged States to consider ensuring, in line with their domestic legislation, that trafficked persons were not punished or prosecuted for acts that they had committed as a direct result of being trafficking and that domestic laws, guidelines and policies clearly espoused that principle.

25. The non-punishment principle has been discussed at five of the nine previous meetings of the Working Group.

26. At its first meeting, in 2009, the Working Group recommended that States parties:

Consider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts.

27. The non-punishment principle was an agenda item of the second meeting, in 2010. As reflected in the report of that meeting (CTOC/COP/WG.4/2010/6), the Working Group appreciated that the non-punishment principle was part of a victim-centred response to trafficking in persons and discussed practical issues relating to its implementation. This included victim identification and support in the criminal justice system. The Working Group also noted the importance of having flexibility in the justice system when implementing the principle. The report further records that the Working Group could not agree on additional concrete recommendations, owing to wide-ranging and strongly differing viewpoints on the principle and on how to support its implementation.

28. The Working Group, accordingly, affirmed its support for its previous recommendations on non-punishment and noted that States parties should ensure that provisions for the non-punishment and non-prosecution of trafficked persons contained in domestic legislation, guidelines, regulations, preambles or other instruments were clearly stated, and that use be made of available technical assistance tools, such as the UNODC *Model Law against Trafficking in Persons*.⁹ The Working Group also requested that the Secretariat compile and disseminate good practices in that area.

29. At its seventh meeting, in 2017, the Working Group reiterated its previous recommendation on non-punishment, but with an additional reference to the concept of “prosecutorial discretion” as being relevant when considering the application of the non-punishment principle. The Working Group restated that recommendation at its eighth meeting, in 2018.

⁷ Ibid., p. 133.

⁸ Inter-Agency Coordination Group against Trafficking in Persons, “Non-punishment of victims of trafficking”.

⁹ United Nations publication, Sales No. E.09.V.11.

30. Most recently, in 2019, the Working Group identified “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” as a possible topic for a future meeting.

IV. Implementation at the national level

A. Available sources of information

31. There is no comprehensive report showing how many Member States have implemented the non-punishment principle through laws, programmes, policies or guidelines, or on the manner in which it has been implemented. Nevertheless, some sources of information shed light on State practice.

32. For example, the database of legislation and the case law database of the Human Trafficking Knowledge Portal available on the UNODC Sharing Electronic Resources and Laws on Crime (SHERLOC) portal include anti-trafficking laws from 142 countries and the analyses of more than 1,500 cases, respectively.

33. In addition, the revised *Model Legislative Provisions against Trafficking in Persons*, to be issued in 2020, will include more than 30 examples of domestic laws that give effect to the non-punishment principle.

34. The Group of Experts on Action against Trafficking in Human Beings is the body responsible for monitoring the implementation of the Convention on Action against Trafficking in Human Beings. As part of its work, it produces general reports on its activities. The Group noted in its ninth and most recent general report, for example, that, by the end of 2019, 42 of the 47 States parties to that Convention had completed a second evaluation. Of those 42 States parties, 17 had adopted specific legal provisions concerning the non-punishment of victims of trafficking. This means that less than half of the States parties had enacted specific provisions concerning non-punishment. In States parties that had not, existing statutory defences could nevertheless be relied upon. In addition, a number of countries had developed specific guidance on non-punishment for prosecutors and law enforcement agencies.

35. The forthcoming Mechanism for the Review of the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto may provide an opportunity for collecting further information on how States parties address this issue.

B. Context: differences in legal systems

36. A review of available information shows that national approaches to this issue vary widely. This is likely due to a number of reasons, including:

- *Different legal systems.* Differences among national legal systems, including in respect of the duties, powers and obligations of the police, prosecutors and the courts can have an impact on how the non-punishment principle may be implemented in practice. For example, in some countries, police officers have broad discretion at the investigation stage, while in other jurisdictions, they may be obligated to report all allegations of crime to prosecuting authorities.
- *Scope of existing laws.* Implementing the non-punishment principle at the national level will be informed by the existing national legal, including constitutional, framework. For example, the elements of existing statutory defences may inform the development of new defences that give effect to the non-punishment principle.
- *Philosophical and normative perspectives.* The legal system of a country reflects its values and traditions and the international obligations by which it has agreed to be bound, and is based on principles and processes derived from its history. For example, some criminal justice systems give priority to

rehabilitation and addressing the harm caused by crime, while others give priority to punishment and denunciation. How certain principles are prioritized can have an impact on the means by which non-punishment is implemented.

C. Trends in implementation

37. The fact that the non-punishment principle can be implemented through laws, policies and guidelines, or a combination thereof, means that a robust overview of the trends in implementation can be difficult to carry out. The identification of statutory defences, for example, or policies or guidelines on the implementation of the non-punishment principle is relatively easy and can allow for a straightforward analysis of the frameworks. What is more challenging, however, is assessing how decisions may be taken in particular cases.

38. For example, in jurisdictions where police officers have the discretion to lay a charge, an accurate and comprehensive collection of data on the number of times that discretion has been exercised in respect of victims of trafficking who were forced to commit crimes may not be possible. Similarly, in cases where a prosecutor has withdrawn charges or decided not to proceed with a prosecution, or in cases where courts have stayed the proceedings, accurate data may be difficult to obtain.

39. Nevertheless, it is clear that the non-punishment principle can be implemented in various ways and at different stages of the criminal justice system, beginning with the investigation and laying of charges stage and continuing through beyond sentencing.

D. Investigation, detention and laying of charges

40. In some legal systems, police officers responding to alleged offending may have discretion as to the appropriate course of conduct. This means that they may, for example, decide not to proceed with laying charges or recommending that charges be laid, even in cases where evidence suggests that an illegal act has been committed. The exercise of such discretion can be informed by a number of principles, policies and the applicable law. Relevant principles can include the question of whether it is in the public's interest that a charge be initiated. Similarly, policies may provide guidance on appropriate responses by the police in certain situations that involve important questions of public concern. The availability of legal defences and evidence that substantiates such defences may also have an impact on police decision-making.

41. In other legal systems, police officers may have more limited discretion and a positive obligation to detain, arrest and lay or recommend charges for alleged crimes, in the absence of a specific legal provision giving them the discretion to do otherwise. In such cases, the obligation to assess whether or not to proceed with a prosecution may fall on the prosecutor or the courts.

42. Regardless of the legal system, it will be important for police officers to collect all available evidence relating to alleged offending. This includes the circumstances surrounding the alleged offence, including any evidence that may substantiate possible defences. It should also include an investigation into whether the alleged offender is a victim of trafficking and whether the alleged crime was committed in connection with his or her victimization.

43. As noted above, a number of jurisdictions have developed guidance for police and prosecutors concerning the non-punishment principle.¹⁰ The goal of any such guidance is to provide the police with the information necessary to prevent the

¹⁰ Examples include the authorized professional practice e-module on the Modern Slavery Act developed by the College of Policing of the United Kingdom of Great Britain and Northern Ireland, and the legal guidance note on human trafficking, smuggling and slavery developed by the Crown Prosecution Service of the United Kingdom.

inappropriate arrest and detention of and laying of charges against victims of trafficking for crimes committed in connection with their victimization.

E. Prosecutions

44. In the same way as police officers may be granted discretionary powers, prosecutors are also given discretion in some jurisdictions with respect to the laying of charges or the continuation of proceedings, in cases where police officers have the ability to lay charges directly. The same types of considerations that govern police discretion can also influence the exercise of prosecutorial discretion.

45. Prosecutors also provide a screening function and can assess whether or not they believe that there is sufficient evidence to warrant prosecution, including consideration of the availability of any defences or whether there are public interest grounds that warrant not proceeding (in cases where prosecutors have such discretion). In cases where prosecutions have already commenced and evidence comes to light, a discontinuance may also be possible.

F. Sentencing and liability

46. The non-punishment principle seeks to prevent the laying of charges against and prosecution and punishment of victims of trafficking for crimes committed in connection with their victimization. Nevertheless, it may be the case that, in some instances, victims of trafficking who are alleged to have committed an offence will be subject to prosecution. Where this occurs, it will frequently be the case because the initiation of a prosecution is mandatory in many jurisdictions. Some jurisdictions have measures to address this situation, either through specific statutory rules or through general rules of sentencing. For example, the Criminal Code of Belgium provides that victims of trafficking in persons who commit crimes as a direct consequence of their exploitation shall not be subject to punishment for such crimes. In other cases, general rules of sentencing may be relied upon, including that by which sentences should properly reflect the blameworthiness of the offender. Sentencing mitigation may be particularly important in cases where no specific principles governing non-punishment exist. It may also be important in cases where a non-punishment principle exists but is found not to apply.

G. Addressing criminal records

47. Criminal records include information concerning an individual's criminal history. This may include information on previous convictions, as well as information involving cases where an individual was charged but not convicted of a crime. The reasons for the absence of a conviction may also be included, for example, where charges were withdrawn or where a finding of not guilty was made by a court.

48. Criminal records can have long-term adverse consequences on an individual. These may include: (a) limiting future opportunities for employment or volunteer work; (b) making immigration or travel to another country difficult or impossible; (c) affecting child custody orders negatively; (d) restricting access to housing; and (e) preventing access to certain benefits.

49. Victims of trafficking who have been charged or convicted of crimes that they committed in connection with their victimization may, therefore, face significant barriers to reintegration into society, which can perpetuate vulnerability, leading to risks of further victimization.

50. In recognition of this fact, a number of jurisdictions have enacted legislative provisions that enable victims of trafficking to apply to have their criminal records cleared. Such provisions are sometimes known as "vacatur" laws or, in other cases, as "expungement" laws. In some jurisdictions, a distinction may be made between

vacatur and expungement laws, while in others, they may be considered as synonyms. The objective of such measures, however, should be to enable victims of trafficking in persons to initiate a process that, once completed, results in a situation whereby they can state that they have never been charged or found guilty of a crime that they had committed as a result of their victimization.

51. In the United States of America, for example, a number of states have passed such laws. Some states limit the scope of their legislation to prostitution-related offences, while others include a broader range of offences from which a victim of trafficking in persons can seek relief.¹¹

H. Enactment of statutory Provisions on non-punishment

52. As noted above, the existence of specific statutory provisions that give effect to the non-punishment principle provides a clear way for determining whether a State has taken action in this area. Evaluating the effectiveness of such provisions, however, requires a more detailed analysis. In general, statutory provisions are more likely to achieve their intended objectives when their implementation is supported through regular training and awareness-raising activities and when they are otherwise integrated into relevant guidance and policy documents, including those directed at law enforcement and prosecutors.

53. A review of statutory provisions at the national level provides some insights into how Member States are addressing this issue, as well as the elements that should be considered when developing such provisions.

54. The majority of enacted statutory provisions amount to statutory defences, while others appear to have a broader application, including, for example, action to be taken in respect of detention and arrest. For example, article 49 of the Trafficking in Persons Act of Gambia provides that, “where the circumstances so justify, a victim of trafficking shall not be detained, imprisoned or prosecuted for offences related to being a victim of trafficking”. In Qatar, article 4 of Law No. 15 on Combating Trafficking in Human Beings provides that “the victim shall not be subject to criminal or civil liability of any trafficking in human beings crimes when such a crime is initiated or directly associated with such person as being a victim”.

55. Statutory defences have been enacted in all regions of the world in respect of crimes committed by victims of trafficking in persons in connection with their victimization.

1. Availability of defence

56. When considering statutory defences, a first aspect to consider is who are the persons able to avail themselves of the defence, that is, persons who were victims of trafficking at the time when the offence was alleged to have occurred. It is important to recall that the Trafficking in Persons Protocol makes it clear that establishing whether a child is a victim of trafficking requires proof of only a prohibited act that is committed with the intention of exploiting the child. In the case of adults, it is also necessary to establish that the prohibited act was accomplished through the use of specific illicit means. Statutory defences should be available to both children and adults.

2. Scope

57. National laws show some variation in the scope of statutory defences. Some countries make it clear that the defence may be invoked for any offence that was allegedly committed. For example, section 14 of the Counter-Trafficking in Persons

¹¹ For more information, see, for example, the Restoration of Rights Project of the Collateral Consequences Resource Center.

Act of Kenya provides that “a victim of trafficking in persons shall not be criminally liable for any criminal act that was a direct result of being trafficked”.

58. Other countries take a more circumscribed approach and limit the application of the defence to a subset of offences. Section 8 of the Trafficking in Persons (Prevention, Suppression and Punishment) Act of Jamaica, for example, provides a defence for offences relating to immigration or prostitution that are a direct result of being a victim of trafficking in persons.

3. Threshold

59. Two primary thresholds have been identified as providing the basis for the development of measures relating to non-punishment. One approach has been described as “duress-based” and requires evidence that the offence was committed as a result of compulsion. Article 26 of the Convention on Action against Trafficking in Human Beings follows this approach as a result of its reference to unlawful activities that the victim has been compelled to commit.

60. The exact meaning of compulsion will ultimately depend on the jurisdiction in question.¹² As a general rule, however, compulsion should be understood broadly, and the various methods employed by traffickers to compel their victims to engage in illegal activity, including force, threats, psychological pressure and other forms of coercion, should be taken into consideration. Importantly, statutory defences based on compulsion should not require the same type of evidence as the traditional criminal law defence of duress. Were that to be the case, the non-punishment principle would be redundant and fail to provide any specific additional protection to victims of trafficking.¹³

61. The second common threshold has been described as “causation-based”.¹⁴ The Organization for Security and Cooperation in Europe (OSCE) has described this approach as applying to offences committed “in the process of being trafficked”.¹⁵ This threshold would also relate to offences committed as a consequence of being a victim of trafficking. Article 14, paragraph 7, of the ASEAN Convention against Trafficking in Persons proposes such an approach, for example.

62. As with compulsion, the exact parameters of a “causation-based” threshold will ultimately depend on the jurisdiction in question.¹⁶ A defence based on this approach may, in practice, be broader in application than one based on a “duress-based” approach, owing to the fact that it does not require specific evidence that, but for the compulsion on the part of the trafficker, the crime would not have been committed.

63. National laws should provide clear guidance on the threshold used and the evidence required to establish it. Doing so increases the likelihood that the defences will operate as intended, reduces the possibility of mistakes and promotes clarity and greater understanding of the law, which, in turn, can promote greater confidence in it.

4. Burden of proof

64. In developing and applying statutory defences, it is important that those responsible for administering the law understand who is responsible for raising the defence. While, in general, an accused person has the responsibility to raise a defence, a good practice could be to require the court to consider the availability of the defence, even in cases where such defence has not been raised by the defendant (or the

¹² Jurisdictions that have been researched and found to follow the “duress-based” approach include those of Barbados, Lebanon, Trinidad and Tobago, various states in the United States and, in the case of adults, the United Kingdom.

¹³ Inter-Agency Coordination Group against Trafficking in Persons, “Non-punishment of victims of trafficking”.

¹⁴ OSCE, *Policy and Legislative Recommendations*.

¹⁵ *Ibid.*, p. 21.

¹⁶ Jurisdictions that have been researched and found to follow the “causation-based” approach include those of Botswana, Egypt, Malawi and the Marshall Islands.

prosecutor), where the evidence suggests that it might apply. Doing so can protect against unjust convictions in cases where the defence could apply and has not been raised by the parties.

5. Standard of proof

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

V. Key tools and recommended resources

A. Issue brief on the non-punishment of victims of trafficking of the Inter-Agency Coordination Group against Trafficking in Persons

66. In 2020, the Inter-Agency Coordination Group against Trafficking in Persons released an issue brief on the non-punishment of victims of trafficking. The issue traces the history of the non-punishment principle and how it can be implemented in practice. It also identifies key messages and recommendations on how to support the implementation of the principle at the national level.

B. *Model Legislative Provisions against Trafficking in Persons*

67. In the course of 2020, UNODC will release the *Model Legislative Provisions against Trafficking in Persons*, which will replace the *Model Law against Trafficking in Persons* issued in 2009. The *Model Legislative Provisions* will provide detailed information on how to implement effective anti-trafficking responses through legislation, with detailed information on non-punishment featuring in its article 13 and a related annex containing more than 30 examples of national legislation on non-punishment.

C. Legislative guide for the implementation of the Trafficking in Persons Protocol

68. Revised and reissued in 2020, the UNODC *Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* provides detailed information on the elaboration of the Trafficking in Persons Protocol. It also includes a brief discussion on the non-punishment principle.

D. *Policy and Legislative Recommendations towards the Effective Implementation of the Non-Punishment Provision with Regard to Victims of Trafficking*

69. OSCE published the *Policy and Legislative Recommendations towards the Effective Implementation of the Non-Punishment Provision with Regard to Victims of Trafficking* in 2013. This publication provides a detailed discussion of, and guidance on, the non-punishment principle. It concludes with 29 specific recommendations for legislators and prosecutors on how to support the implementation of the principle at the national level.

E. Recommended Principles and Guidelines on Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights

70. Released in 2002, the Recommended Principles include specific guidance on the non-punishment principle, including the recommendation that legislation should prevent trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities that they are involved in as a direct consequence of their situation as trafficked persons.
