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Freedom of movement for persons identified as victims of human trafficking: An analysis of law, policy and practice in the ASEAN Region

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About the authors

This Study was written by Dr Marika McAdam, International Law and Policy Adviser. The Study is based on research conducted in the ASEAN region. The author would like to thank the many officials, victim service providers and other experts from both state and non-state organisations who generously shared their experiences and insights in support of this work.

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Background and methodology

The predecessor project to the Australia-Asia Program to Combat Trafficking in Persons (AAPTIP) published a detailed study in 2008 analysing detention of victims of trafficking in shelters in the Association of South East Asian Nations (ASEAN) Region, a revised version of which was subsequently published in a peer-reviewed journal.[1] The 2008 study had some impact on the evolution of laws, policies and practices relevant to victim detention in shelters.[2] However, the issue (more broadly conceived in this Study as freedom of movement for victims or presumed victims of trafficking) has continued to be a live one: both in terms of victims' rights and in relation to their participation in the criminal justice process. The present Study seeks to build on the earlier work, clarifying the present situation; identifying continuing challenges; and offering specific recommendations to leverage the important progress that has been made.

1 Anne Gallagher and Elaine Pearson, Detention of Trafficked Persons in Shelters: A legal and policy analysis (2008); Anne Gallagher and Elaine Pearson, 'The High Cost of Freedom: A Legal and Policy Analysis of Shelter Detention for Victims of Trafficking', Human Rights Quarterly 32 (2010) 73-114. The Association of Southeast Asian Nations comprises Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam.

2 For instance, it encouraged the government of Thailand to take several remedial measures including the establishment of open shelters for men and boys and, eventually, to amend laws to enable foreign victims of trafficking to be granted legal status which enables them to work. In Cambodia, the study was instrumental in prompting the development and adoption of agreed guidelines on the management of shelters, being Guidelines for Practices and Cooperation between the Relevant Government Institutions and Victim Support Agencies in Cases of Human Trafficking that make extensive reference to shelters, detailing the conditions that are to apply in accommodating victims of trafficking.

Study methodology:

The present Study applies a methodology similar to that used in the 2008 one. Background research was conducted into laws, practices and policies in the ASEAN Region and a template was designed to gather inputs from AAPTIP regional and country-based offices. On the basis of that preparatory work, a survey instrument was developed and used in consultations with senior government officials, practitioners and representatives of relevant non-State actors in three selected ASEAN Member States: Malaysia, the Philippines and Thailand. These countries were selected on the basis of their very different experiences of the trafficking problem; the extent and diversity of their response including in relation to victim protection and support; and their capacity to provide insight and guidance on the specific subject of the study.
In addition to those country-based consultations, select experts not attached to any of these countries were also consulted. In total, 34 consultation meetings were held with 75 people (46 females and 29 males), comprising 40 State representatives and 35 non-State representatives.[3]
This paper was then drafted on the basis of both desk-based and field-based research, with relevant insights additionally drawn from national laws, policies and practices both within and outside the ASEAN Region.

[3] Thirty-one of those interviews were carried out in person; three were carried out via Skype or phone.

Study limitations:

The Study seeks to provide insight into the current situation and, on the basis of that information, to make some recommendations for the future. It does not purport to be a comprehensive analysis of ASEAN laws, policies and practices in relation to the issue of freedom of movement for victims of trafficking — an important limitation related to the range and breadth of sources. While efforts were made to ensure that persons interviewed were able to represent an appropriate spectrum of experience and perspectives, it was not possible to consult all counter-trafficking actors in the Study countries. Further, for ethical considerations and reasons relating to their wellbeing, the decision was made to not interview any victims of trafficking, meaning that this important perspective has not been captured.

Where field-missions were conducted, most interviews took place at the capital level, with missions outside of capital cities occurring only in Thailand and the Philippines. Discussions took different formats: some were held in group settings involving representatives from multiple agencies and entities, meaning that insights may not have been as candid as they would have been had it been possible to hold individual meetings. Interpretation was used for some, but not all meetings, which may have affected the quality of information collected, including due to the additional time required for interviews. Finally, it is important to note potential response bias owing to the high sensitivity of this issue; a potential defensiveness in relation to national responses; and concerns about how shelter practices in the country could be perceived externally.

Executive Summary

Sheltering victims of trafficking requires a complex balance to be achieved between the rights of victims (including to freedom of movement and liberty), and the sometimes competing interests of other stakeholders. This Study offers insights into the restrictions that are placed on the freedom of movement of victims of trafficking in the ASEAN Region that may result as States responsible for protecting victims and prosecuting traffickers weigh their own interests more heavily than the rights of victims. The Study does not offer a country-by- country analysis; rather, it considers the arguments generally raised in favour of imposing restrictions on victims' freedom of movement, in light of relevant laws, policies and practices. Limitations in both the scope and depth of the research undertaken mean that the Study does not represent a comprehensive assessment, and instead provides insight into the current situation with the aim of improving understanding of why certain measures are applied and what actions could be taken to address negative outcomes.

There can be no doubt that the issue of freedom of movement for trafficked persons — most particularly foreign victims — is a complex issue for some States. All countries are under pressure to increase prosecutions of traffickers and it is well established that prosecutions rely heavily on the cooperation of victim-witnesses. Permitting freedom of movement to such persons is seen as risking their participation in the prosecution of their exploiters, thereby costing the State an opportunity to bring traffickers to justice. In respect of foreign victims, permitting freedom of movement of those who have been identified as trafficked may be seen as undermining State capacity to effectively manage migration. States restrict trafficked persons' liberty in pursuit of different purposes and in the service of different interests.

Whether those purposes are valid or not, and how those interests are to be balanced when they come into conflict with those of victims, are questions at the heart of this Study.

The Study is divided into four parts. The first offers a brief overview of the ways in which movement of victims of trafficking may be restricted in practice, and touches on some alternatives to detention that have been applied. The second part offers an overview of the relevant international, regional, sub-regional, bilateral and national legal frameworks relevant to sheltering victims of trafficking and protecting their rights and freedoms, including to movement and liberty. The third part of the Study examines the inter-related policy arguments that are put forward in defending restrictions on the movement of victims and considers whether, and if so, under what circumstances such restrictions can ever be justified. The fourth and final part of the Study, offers some overarching conclusions and recommendations in respect to laws, policies and practices for consideration towards strengthening freedom of movement of trafficked persons.

1. Introduction to the issue of detention of trafficked persons

Immigration detention:

> Victims may be placed in immigration detention on the basis of their migration status and immigration laws permitting, or requiring, detention of unauthorized migrants. Such detention can result where victims are misidentified as undocumented migrants, or are accurately identified as (presumed) victims of trafficking, but are detained anyway pending deportation, because they are unwilling to cooperate in criminal investigations, and are not given the option to remain in a shelter pending their repatriation. The risk that foreign victims are placed in immigration detention in countries of destination is acute where counter-trafficking efforts intersect with migration governance, and where concepts such as human trafficking and migrant smuggling are conflated. On the other hand, good faith efforts to avoid detaining victims of trafficking on immigration grounds can result in undocumented migrants who are not victims of trafficking being referred to trafficking shelters, straining already limited resources. Such outcomes point to the need to delink criminal justice agendas from protection obligations and to strengthen identification capacity.

Punitive detention:

> Trafficked persons can experience punitive forms of detention because they are not correctly identified as victims, or when they are correctly identified, but not protected from punishment for offences they have committed as a result of being trafficked. The type of exploitation a victim has been subject to becomes relevant here where victims are prosecuted for sex work, or criminal activities they have engaged in the course of being trafficked. The Study found that there may also be an overlap between punitive detention and immigration detention, whether because acts associated with irregular migration are treated as criminal offences resulting in imprisonment on that basis, or because victims are detained in immigration facilities pending deportation without being charged for offences, and the conditions of those facilities are punitive in fact, if not in law.

Shelter detention:

> The form of detention that is the focus of this Study is that which takes place in shelters in countries of destination to where victims have been trafficked, or countries of origin victims are returned to. Whether shelters specifically cater for trafficked persons or are mixed, the conditions of closed shelters can make them de facto detention facilities. It was found that victims accommodated in shelters may also be of the impression that there is a punitive agenda to their sheltering, whether because the facilities have been converted from or designed on the basis of incarceration facilities, or because of the nature and conditions of their shelter stay. Beyond interfering with victims' freedom of movement, the imposition of restrictions on liberty was also found to place heavy burdens on case managers and shelter staff responsible for victim wellbeing, who are additionally charged with the sometimes-contradictory responsibility of ensuring that victims remain in shelters. Across the Study countries, it was found that there is currently unprecedented cooperation between State and non-State actors in providing shelter services to victims of trafficking. Yet it is not a given that increased involvement of NGOs in the provision of shelter or services in shelters will necessarily increase the free movement of victims. Indeed, many NGO shelters are just as restrictive as State shelters, and may even be preferred as the more 'secure' alternative to them. Accreditation programs for non-State shelters do not consider freedom of movement of victims, nor require it as a condition for accreditation.

Alternatives to detention:

> Alternatives to detention that Study participants raised, included allowing victims of trafficking to 'opt in' to a freedom of movement program, and accommodating victims in rented houses or apartments. While these are promising practices from which States stand to learn much in their efforts to secure free movement of victims, the Study found that such alternatives are currently often available only to a relatively low number, rather than all victims, and that these alternatives may be put in place in exceptional situations rather than as the result of concerted efforts to ensure that free movement of victims of trafficking is the norm.

2. Overview of relevant legal frameworks

> As was dealt with in detail in the 2008 study, while routine detention is always unlawful, individual cases of detention can be defended with case-by-case reference to necessity, legality and proportionality.[4] Legal and policy developments in the region show the significant progress made in recent years towards building a strong foundation for implementing victim-centred and rights-based principles in practice. Notably, strong statements against detention and criminalization of victims of trafficking made at the ASEAN regional level offer an impetus to counter the persistent attitude among some practitioners that victims are not the subjects of the offences of others, but are wrong-doers in their own right whose poor choices or values have resulted in their own misfortune.

[4] Anne Gallagher and Elaine Pearson, Detention of Trafficked Persons in Shelters: A legal and policy analysis (2008). In all cases of child detention, special justifications and protections are required. Human Rights and Human Trafficking, Fact Sheet No. 36 (OHCHR, 2014) 18-20.

3. Rationale for restricting movement in policy and practice

> In considering the protection, assistance and prosecutorial arguments that were raised by practitioners, the Study found that interference with victims' free movement is rarely justified on the basis of narrow and specific exceptions applied to individual cases, but rather rationalized on the basis of broader arguments that are generally applied.

Protection rationale:

> Firstly, confinement in shelters and restricted movement to, from or even within them is seen as a means of protecting victims from threats that may arise from their free movement. The threat most often pointed to, is that posed by traffickers, potentially including family members or others with whom the victim may have close connections. Closer investigation of the argument about victim protection reveals that the profile of the victim plays a role in how protection threats are construed. Of key relevance here is the extent to which victims are approached as agents of their own situations; victims who do not fit within idealized profiles of victims may be perceived as having transgressed from social standards, and in need of protection both for their own good and the good of society. Such views are heavily gendered, with attitudes towards males and females and the expectations placed upon them on that basis influencing how victims are perceived and treated. Similarly, foreign victims who have been willing participants in irregular migration processes may also be viewed as potential threats that society needs to be protected from. Accordingly, whether a country is one of origin or destination for human trafficking (or a combination of both), influences shelter policies in general and decisions made about individual victims and their freedom of movement specifically.

Assistance rationale:

> Secondly, the Study found that arguments in favour of confinement in shelters are offered on the basis that victims have a right to shelter, recovery, repatriation and reintegration or integration assistance, and that shelters are the means by which relevant services are provided to them, in the most economic and the least resource intensive way. Closer consideration of assistance approaches raises questions about whether the victim has consented to receiving those services, and indeed whether she or he actually benefits from them. Detaining victims against their will can compromise their health and safety and that of family members who depend on them. On the other hand, allowing victims to enjoy free movement may be detrimental their recovery where the infrastructure to provide necessary services outside of shelter settings is deficient. The role that gender norms and expectations play in underpinning this rationale was again found to be significant; women and girls who have engaged in sex work are often provided with services that aim to reinforce traditional gender roles as a means of 'rehabilitating' them from behaviour considered subversive. Far from challenging the power structures that made people vulnerable to exploitation in the first place, the result can be that shelters simply replicate those inequities and entrench vulnerability to exploitation.

Prosecution rationale:

> The third rationale offered in defence of restriction of movement, is that victims are crucial components of investigations and prosecutions of traffickers without whom effective criminal justice responses to the serious crime of human trafficking fall apart. Here the Study finds that while protection of the rights of victims is now generally understood as a cornerstone of an effective criminal justice response to trafficking, their specific right to freedom of movement continues to be considered, if at all, as secondary to the State's prosecutorial objectives. The immigration status of foreign victims is again found to play a determinative role in decisions to restrict movement, with concerns that victims who are granted freedom of movement will be lost to investigators and prosecutors whether in the country of destination or upon their return to their country of origin. However, far from increasing and strengthening the role of victims in criminal proceedings against traffickers, this Study finds that depriving victims of their liberty can make criminal justice practitioners complacent in their duty to complete their work efficiently and can deter victims from participating. The quality of their testimonies may deteriorate as their shelter stay is prolonged.

While partially persuasive, the Study finds these three policy arguments to be flawed when the underlying assumptions on which they are based are interrogated. Furthermore, closer scrutiny reveals that the purposes for which restrictions on movement are imposed are very often not achieved. In some cases, the opposite effect to the one intended may even result: rather than being protected, confined victims may be rendered more vulnerable to harm; rather than being assisted, closed shelters may conversely deny them opportunities to recover and reintegrate or integrate into society; and far from making for effective testimonies, the deprivation of their liberty may make for non-cooperative witnesses.

4. Conclusions and Recommendations

The issue of freedom of movement for trafficked persons remains a complex issue for some States. Sheltering victims requires a careful balance to be achieved between the rights of victims and the sometimes-competing interests of other stakeholders to both bring traffickers to justice and to effectively manage migration. The legal and policy framework surrounding trafficking in persons has notably strengthened in recent years, to provide ASEAN Member States a strong foundation for securing victims' freedom of movement in practice. Yet across the study countries, the concept of 'freedom of movement' continues to be misunderstood, with 'detention' not acknowledged as taking place in shelters.

The protection, assistance and prosecution rationales offered in defence of imposing restrictions on free movement, are compelling in some respects but flawed in others. The underlying assumptions that inform these justifications are questionable, and it cannot be demonstrated that the objectives these policies pursue are in fact achieved. Further, routine detention of trafficked persons cannot be justified on policy grounds, no matter how well meaning those policies are. Protection, assistance and prosecutorial rationales for curtailing victims' freedoms and liberties—regardless of whether or not those purposes are served—are incidental to whether interference with freedom of movement is justified in law.

The efforts that have been made in the ASEAN Region to develop new approaches to victim care, should be built upon innovating and piloting new approaches for broader adaptation and application. In doing so, it should not be presupposed that models that work somewhere, will work elsewhere. Rather, laws, policies and practices must take into consideration a raft of factors, including, but not limited to: whether the country concerned is one of origin or destination or both; the victim protection infrastructure available to victims outside of shelter settings; and the susceptibility of models to corruption and exploitation by State and non-State actors.

While maintaining flexibility and adaptability, approaches must be tethered to the common goal of ensuring that practices are victim-centred and rights-based. Victim-centeredness means that criminal justice goals may sometimes have to give way to protection objectives when the two come into conflict. Rights-based approaches require that shelter models be embedded into wider protection and assistance frameworks.[5] Sheltering of victims is not a protection or assistance end in itself, but must be understood and approached as the beginning of a victim's recovery and their successful reintegration or integration into society, whether in countries of origin or destination, or in third countries elsewhere. Protecting, respecting and fulfilling the rights of victims should not be approached as hindrances to those goals, but as instrumental to achieving them.

In order to support efforts to increase freedom of movement, recommendations are offered to States that shelter victims of trafficking, whether in trafficking-specific or mixed shelters; States whose citizens are sheltered; States that fund counter-trafficking work; and non-State actors that provide shelter to victims of trafficking, or otherwise provide services to sheltered victims. Five recommendations are offered in relation to law, seeking to ensure that national legislation adheres to regional and international legal frameworks surrounding victims' rights, so that freedom of movement becomes the norm, and restrictions to it the exception. Fifteen policy recommendations aim to increase the ethics of shelter services, so that any restrictions on victims' movement that result from balancing their interests against those of the State, are arrived at and imposed in accordance with international norms and standards. Finally, thirteen recommendations are offered in relation to shelter practice to ensure that shelters are managed and operated in a way that is the least restrictive and most supportive of victims' enjoyment of rights, including their freedom of movement.

[5] Throughout this study, protection and assistance frameworks are understood broadly to refer to all relevant legal and regulatory provisions, State public policy, State and non-State schemes and services delivered by the formal and informal sectors, and any other arrangements that impact directly or indirectly on the identification, protection, support and rehabilitation of victims of trafficking.

Photographer: Alice Young / Unsplash

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Introduction to the issue of detention of trafficked persons

At the international level, detention is defined as the condition of "any person deprived of personal liberty except as a result of conviction for an offence."[6] The term can therefore include situations in which individuals are held in prisons, police lock-ups, immigration detention facilities, shelters, child welfare facilities, and hospitals.[7] This broad understanding is sometimes more narrowly construed at regional and national levels, where the prohibited form of detention is that which occurs only in designated detention facilities or prisons, but not in other restrictive forms of custody that may happen elsewhere.

Across the ASEAN Region, victims of trafficking may be deprived of liberty following their trafficking experience, whether for their involvement in illegal activities (including illegal work such as prostitution, undocumented work or immigration related offences); because they are misidentified as irregular migrants and placed in immigration detention pending deportation; are correctly identified but unwilling to participate in criminal justice processes and placed in immigration detention prior to deportation; or are correctly identified and held in custody as a matter of protection policy.[8] This section summarises the different forms of detention victims of trafficking may be subject to.

1.1. Immigration detention

Detention of migrants in vulnerable situations—including victims of trafficking—should not take place.[9] Yet across every region of the world, trafficked persons—including children[10]— are placed in immigration detention facilities on the basis of their migration status and immigration laws permitting or requiring detention of unauthorized migrants, or where they are unwilling or unable to cooperate in criminal investigations and are transferred to such facilities pending deportation.[11] The latter situation speaks to the need to uncouple criminal justice agendas from victim protection obligations. Currently, rather than being given the option of placement in a shelter before repatriation, a victim who is unwilling to cooperate, may simply be placed in immigration detention pending deportation. This happens as the result of a flawed approach that requires a trafficking investigation to take place in order for a trafficked victim to be identified. Where there is no such investigation, a victim may not be acknowledged and protected as such.

Photographer: Stephen Leonardi / Unsplash

6 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by GA Res 43/173 of 9 December 1988.

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

8 Human Rights and Human Trafficking, Fact Sheet No. 36 (OHCHR, 2014) 18. A report issued by the ASEAN Commission on Women and Children (ACWC) documented cases of all these circumstances in the ASEAN Region. See Regional Review on Laws, Policies and Practices within ASEAN relating to identification, management and treatment of victims of trafficking, especially women and children (ASEAN Secretariat, October 2016) 107.

9 See: Principles and Guidelines, supported by practical guidance on the human rights protection of migrants in vulnerable situations (OHCHR/Global Migration Group, 2018), 37-39; Revised Deliberation No. 5 on deprivation of liberty of migrants, Advance Edited Version (Working Group of Arbitrary Detention, 7 February 2018) [41].

10 Children should not be deprived of liberty except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary concern, and should be segregated from adult detainees who are not their family members. See: Human Rights Committee, Concluding Observations on the second periodic report of Thailand, UN Doc CCPR/C/THA/CO/2 [30].

11 See for instance: Human Rights Committee, Concluding Observations on the second periodic report of Thailand, UN Doc CCPR/C/THA/CO/2 (25 April 2017) [23] and Trafficking in Persons Report 2017 (US State Department, 2017) raising particular concern in relation to Rohingya men and children. In September 2016, the Thai Prime Minister pledged to develop a screening system to reduce the risk of migrants and refugees falling victim to trafficking. Press Release: Thailand pledged additional assistance to alleviate the plights of displaced persons, 20 September 2016, Ministry of Foreign Affairs of the Kingdom of Thailand.

It is in the context of immigration detention, that a given country's situation as one of origin, destination or internal trafficking is most relevant.[12] The intersection between efforts to combat human trafficking and to address irregular migration, has increased challenges for migrant-receiving countries. Detention of victims can be the by-product of States working to balance political will and legal obligations to identify and protect victims of trafficking on the one hand, with immigration control agendas on the other.[13] At a policy level, counter-trafficking justifications should not be asserted to serve migration control goals, but in practical terms, this conflation of agendas creates a tension for the law enforcement officer who is required to act in two different ways on the basis of the same set of facts: a person being in the country irregularly and engaged in an illegal activity is both a trigger for law enforcement action against that person, and an indicator of trafficking requiring referral for protection.

While immigration detention may be permissible where it is legal, necessary, proportionate, in pursuit of legitimate grounds and with appropriate procedural safeguards in place, it should never be used for victims of trafficking. Yet, immigration detention of victims of trafficking happens not only within the ASEAN Region, but elsewhere as well. The Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA), has raised concern in recent years that victims of trafficking may be detained in police or immigration detention centres pending deportation, without being identified,[14] or even that identified victims may be instead accommodated at detention centres for want of appropriate facilities.[15] In the UK for instance, some victims have reportedly been sent to Home Office immigration detention, or wrongly convicted of offences related to their exploitation, rather than being referred through the National Referral Mechanism, even after indicators of trafficking arise.[16] Similarly, concerns have been raised in the United States, that victims of trafficking have been misidentified and arrested for crimes committed as a direct consequence of being trafficked and placed in immigration detention by Immigration and Customs Enforcement (ICE), or border patrol agents.[17] Authorities were directed to use discretion to avoid detaining migrants who cooperate with authorities in human trafficking cases.[18] New directives issued in February 2017 by the Department of Homeland Security, did not include this same discretion, raising concern that victims of trafficking who are in irregular situations may be detained and deported.[19]

[12] While immigration detention is an issue that particularly affects foreign victims, it is important to recall that not all detained victims of trafficking are migrants; victims who are trafficked within their own country are also found in situations of detention, as are victims who have been returned home from the country they were trafficked.

[13] Trafficked into Detention: How victims of trafficking are missed in detention (Detention Action, November 2017) 1, 9.

[14] See: Austria, GRETA (2011)10 [84]; Albania, GRETA (2016)6 [98]; Spain, GRETA (2013)16 [157]; Italy, GRETA (2014)18 [131]; Germany, GRETA (2015)10 [136], United Kingdom, GRETA (2016)21 [153].

[15] See: Hungary, GRETA (2015)11 [144]; Romania, GRETA (2016)20 [119]; Belarus, GRETA (2017)16 [178- 179].

[16] GRETA report, GRETA (2016)21, [153]. Trafficked into Detention: How victims of trafficking are missed in detention (Detention Action, November 2017); Amelia Gentleman, 'Trafficking victims 'being wrongly sent to immigration detention centres", The Guardian 15 November 2017. Also see the case of XYL v Secretary of State for the Home Office [2017] EWHC 733 (Admin) in which a Chinese national claimed she was unlawfully detained between 31 August 2016 and 15 September 2016. The Judge found that she was unlawfully detained from the 8th to the 15th of September, from the point when a positive reasonable grounds decision ought to have been made. http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2017/773.html&query=(xyl)

[17] Letter to the US Department of State on 2010 Trafficking in Persons report, Human Rights Watch (19 April 2010) https://www.hrw.org/news/2010/04/19/us-victims-trafficking-held-ice-detention. More recently in 2017, a woman found to be a victim of trafficking by the Department of Labor was nonetheless kept in detention in the custody of Immigration and Customs Enforcement, who considered her a flight risk owing to a pending theft accusation, filed by the family being investigated for exploiting her. See Brenda Medina 'This immigrant was certified as a victim of trafficking. But she could still be deported' Miami Herald (26 October 2017) http://www.miamiherald.com/news/local/immigration/article181143796.html#1

[18] See letter from US Department of Homeland Security on Prosecutorial Discretion https://www.ice.gov/doclib/foia/prosecutorial-discretion/certain-victims-witnesses-plaintiffs.pdf

[19] See: https://www.whitehouse.gov/presidential-actions/executive-order-border-security-immigration- enforcement-improvements/ and https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border- Security-Immigration-Enforcement-Improvement-Policies.pdf

The consultations that took place in 2017 in the lead up to the 2018 negotiations to elaborate the Global Combat on Safe, Orderly and Regulation Migration, raised the concern that once in detention, there are often inadequate or no procedural safeguards in place to make sure that victims in detention can be identified.[20] This finding was borne out in the consultation process conducted for this Study, which confirmed victims in migration detention facilities are unlikely to be identified. Of relevance here is GRETA's recommendation that specialized non-governmental organizations (NGOs) be allowed to access immigration detention centres for the purpose of identifying potential victims of trafficking,[21] and importantly, that the capacity of staff at immigration detention facilities be strengthened to screen irregular migrants and asylum seekers for indicators of trafficking.[22]

While significant progress has been made in ASEAN Member States with respect to laws and policies prohibiting the placement of victims of trafficking in immigration detention, in practice there may be instances where this occurs. In addition, where immigration laws do not distinguish between adults and minors, the result is that children may be subject to the same arrest and detention as adults.[23] Where immigration detention centres are overcrowded, have poor sanitation and hygiene, do not provide adequate health care, food and water, and stigmatize certain detainees, the reality is that far from being protected and assisted, victims of trafficking in such centres may be further harmed.[24]

In some countries, immigration detention may even be justified on the grounds of protecting vulnerable migrants from trafficking.[25] Yet people can become more vulnerable to trafficking as a result of being detained, or become victims as a direct result of it. Some respondents expressed frustration at migration and labour policies not being appropriately calibrated to protect migrant workers from trafficking and other forms of exploitation, pointing to the fact that restrictive policies can instead exacerbate vulnerability. Immigration detention centres themselves can be instruments of exploitation, whether because occupants are removed from immigration detention and placed directly into trafficking or other exploitative situations, or are exploited while in places of detention, being subject to forced labour as a means of paying for their release, or even sexually exploited.

[20] Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro: Mission to Malaysia, UN Doc A/HRC/29/38/Add.1 (15 June 2015) [55]; Regional Review on Laws, Policies and Practices within ASEAN relating to identification, management and treatment of victims of trafficking, especially women and children, (ASEAN Secretariat, October 2016) 108; Trafficked into Detention: How victims of trafficking are missed in detention (Detention Action, November 2017) 1, 12.

[21] See: Austria, GRETA (2011)10 [85, 92]; Denmark, GRETA (2016)7 [80, 89].

[22] See: Austria, GRETA (2011)10 [90-91]; Luxembourg, GRETA (2013)18 [95]; Azerbaijan, GRETA(2014)9 [127]; Germany, GRETA (2015)10 [138]; Switzerland, GRETA (2015)18 [66, 125, 173]; Slovak Republic, GRETA (2015)21 [82, 95]; Bulgaria, GRETA (2015)32 [128]; Albania, GRETA (2016)6 [99]; Denmark, GRETA (2016)7 [38]; Georgia, GRETA (2016)8 [107]; Latvia, GRETA (2017)2 [112; 133]; Malta, GRETA (2017)3 [39]; Belarus, GRETA (2017)16 [17, 127]; France, GRETA (2017)7 [64]; Norway, GRETA (2017)18 [81]; Greece, GRETA (2017)17 [71, 148]; Ireland, GRETA (2017)17 [126]; Poland, GRETA (2017)29 [109].

[23] e.g. Malaysia. GRETA has also expressed concern that trafficked children may also be among children detained in migration or deportation centers. See: Italy, GRETA (2014)18 [131]; Italy, GRETA (2014)18 [133]; Ukraine GRETA (2014)20 [140]; Latvia, GRETA (2017)2 [131]; Norway, GRETA (2017)18 [117]; Greece, GRETA (2017)17 [70]; former Yugoslav Republic of Macedonia, GRETA (2017)39 [120].

[24] See for instance, Human Rights Committee, Concluding Observations on the second periodic report of Thailand, UN Doc CCPR/C/THA/CO/2 [29, 33].

[25] Malaysia, Thailand and Indonesia. Unlocking Childhood: Current immigration detention practices and alternatives for child asylum seekers and refugees in Asia and the Pacific (Save the Children / Asia Pacific Refugee Rights Network, May 2017) 10.

These concerns speak to the complex linkages between migration governance and counter- trafficking. Where issues of irregular migration, migrant smuggling and trafficking in persons are conflated, the use of migration detention as an arm of migration management can have serious repercussions.[26] Among the raft of issues raised, two in particular stand out: on the one hand, victims of trafficking may be denied essential rights on the basis of their irregular migration status. On the other, is a risk that application of the good faith presumption that a person who shows signs of trafficking is a victim of trafficking, can result in significant numbers of migrants in irregular situations being identified as victims and referred to shelters, contributing to overcrowding in shelters and diluting services available there.[27]

The result may be that freedom of movement is denied, or conversely that status is regularized and freedom granted. The implications of these outcomes for the country concerned depend significantly on the numbers of people who could fall into this situation and the resources that the country has at its disposal. Whether shelter models (open, closed or something between), can effectively balance care for victims of trafficking without undermining effective migration governance, depends on how well the shelter model is adapted to the realities of the given country context—including its migration context—and integrated into wider protection frameworks. Regardless of these considerations, an objective test of victim status needs to be applied to individuals to ensure that victims are not placed in immigration detention and that any decisions relating to their status as victims, are uncoupled from their willingness to cooperate with authorities.

26 Michael Flynn, 'Kidnapped, Trafficked, Detained? The Implications of Non-State actor involvement in immigration detention' in 5 Journal on Migration and Human Security 593 (2017).

27 This emerged as a frustration in the consultations, with representatives of both State and non-State shelters expressing the view that many people who had been referred to them were not victims of trafficking.

1.2. Punitive detention

Detention may be punitive because victims are not correctly identified, because they are identified but not protected from punishment for offences they have committed in the course of being trafficked, or because the purpose of shelter stays has punitive elements to it.

Punitive detention of victims of trafficking largely occurs as a result of victims not being accurately identified. Inadequate identification processes have been flagged as needing significant improvement across the ASEAN Region, and are often done in a clumsy 'check box' style, that may lack the nuance required to identify victims. A host of factors compound this challenge, from lack of adequate training to screen potential victims, through to language barriers and corruption. As a result, rather than being identified and referred for protection as victims of trafficking, trafficked persons may instead be detained in police stations and prisons for engaging in activities such as illegal entry, presentation of false documentation, or unauthorized work.[28] Those victims who do end up in detention, whether at a police or immigration detention centre, may not be adequately screened in those locations to be subsequently identified.

In some cases, victims who have been correctly identified, may end up in punitive detention, owing to a lack of appropriate shelter to accommodate them (particularly in the case of foreign adult males), or on the legislative basis on which they are sheltered,[29] or a lack of protection against criminalization of victims of trafficking. Victims of trafficking may be criminalized for offences relating to their trafficking, including irregular migration, sex work or criminal activities that they have engaged in as a direct result of having been trafficked. Victims of trafficking into criminal activities, such as cannabis cultivation or pickpocketing, are particularly vulnerable to being punished, notwithstanding that their criminal activities were perpetrated as a direct result of being trafficked.

Criminalization and detention of victims is increasingly understood to be the antithesis of a victim-centred approach, because it effectively denies victims the rights to which they are entitled under international law.[30] Laws at the regional and the domestic level largely adhere to this standard, often providing explicit non-criminalization provisions. Indeed, significant progress has been made at legislative and policy levels in recent years. The ASEAN Convention on Trafficking in Persons, Especially Women and Children exceeds the standards set by the United Nations Trafficking in Persons Protocol to explicitly prohibit criminalization and detention of victims of trafficking, and other regional guidelines emphasize the principle of non-criminalization of victims for crimes committed as a result of their trafficking.[31] However, such provisions are lacking in some countries and/or their implementation remains insufficient.[32] In practice, male victims of trafficking have been found to be at greater risk of being penalized or fined for offences, including immigration offences, or facing charges or even being imprisoned for offences committed as a result of being trafficked.[33]

In some instances, stays at trafficking shelters may themselves be punitive in purpose.[34] Punitive detention may be the manifestation of approaches to sheltering that do not offer recovery support and the beginnings of effective (re)integration, but are in effect, punishments meted out on the basis of actions and choices made by the victim of trafficking.[35] As a result of this approach, trafficked persons are not treated as victims of a serious crime, but rather as agents of their own downfall, who need to be 'rehabilitated' from the conduct that resulted in their situation. Accordingly, in many parts of the world including the ASEAN Region, the reality is that while traffickers very often enjoy impunity, it is trafficked persons who are 'punished.'[36] One respondent noted that residents at the shelter she works at, sometimes ask her why it is they, the victims, who must suffer and cannot go home to their families, and not the perpetrators.

[28] In one instance a victim reported being jailed for an immigration violation for two months, because the address on her ID card differed to the location of the factory where she was exploited, notwithstanding that the error was made by her exploiter. Ismira Lutfia Tisnadibrata, Indonesia Struggles with Human Trafficking Networks (Bangkok Post, 8 January 2018).

[29] For instance, in Thailand some victims of trafficking are placed in shelters not on the basis of anti-trafficking legislation but on the basis of the Prevention and Suppression of Prostitution Act (BE 2539, 1996) that considers persons as offenders of prostitution rather than victims of trafficking.

[30] Anne T. Gallagher, The International Law of Human Trafficking (Cambridge, 2010) 283.

[31] Article 14(7) of the ASEAN Convention states 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." Further, the ASEAN Gender Sensitive Guidelines (3.6.1) stating that "Victims should not be detained, charged or prosecuted for any crime they may have committed as a direct and immediate result of their being trafficked" and the ASEAN Practitioner Guidelines (Part 1, C2) stating that "To the extent possible, victims of trafficking should not be charged or prosecuted in relation to crimes committed by them that are a direct consequence of their status as victims of trafficking."

[32] Section 47 of the Anti-Trafficking in Persons Order of Brunei Darussalam (2019); Article 39(7) of the Law on Trafficking in Persons (2015) and Article 25(6) of the Law on Development and Protection of Women (2004, as amended in 2016) in Lao PDR; Section 25 of Malaysia's Anti-Trafficking in Persons and Smuggling of Migrants Act; Section 41 of Thailand's Anti-Trafficking in Persons Act BE 2551 (2008) and Section 17 of the Republic Act 9208 (26 May 2003) in the Philippines. The laws of Cambodia, Singapore and Viet Nam do not provide non-criminalization provisions to protect victims of trafficking from prosecution for status offences, though in practice victims may not be prosecuted for status offences such as illegal work or entry.

[33] Trafficking in Persons Report 2017 (US Department of State), Topics of Special Interest, https://www.state.gov/j/tip/rls/tiprpt/2017/271110.htm

[34] For instance, section 55 of Malaysia's Anti-Trafficking in Persons and Smuggling of Migrants Act (ATIPSOM) authorizes taking into custody a "person who escapes or is removed" without lawful authority, and their placement back into the refuge for a period of time "equal to the period during which he was unlawfully at large." Article 56 includes as an offence, helping a person to 'escape' from a place of refuge. Section 56(b) (i) and (ii) of the Child Act of 2011 takes the same approach. Section 42 of Brunei Darussalam's Anti-Trafficking in Persons Order of 2019, makes unauthorized removal of or helping a person to escape from a shelter, an offence punishable with imprisonment and/or fine. In Thailand, section 38 of the Prevention and Suppression of Prostitution Act B.E. 2539 (1996), those who 'escape' may be pursued and returned by an authorized person. The same is true of Section 42(2) of Brunei Darussalam's Anti-Trafficking in Persons Order, 2019.

[35] In her 2015 report on her mission to Malaysia, the Special Rapporteur on Trafficking in Persons, particularly women and girls, reported that victims are kept in closed shelters, deprived of their liberty and punished for escaping, making shelters effectively detention centres where trafficked persons are treated as criminals in custody rather than victims in a refuge. Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro: Mission to Malaysia, UN Doc A/HRC/29/38/Add.1 (15 June 2015) [60], [90].

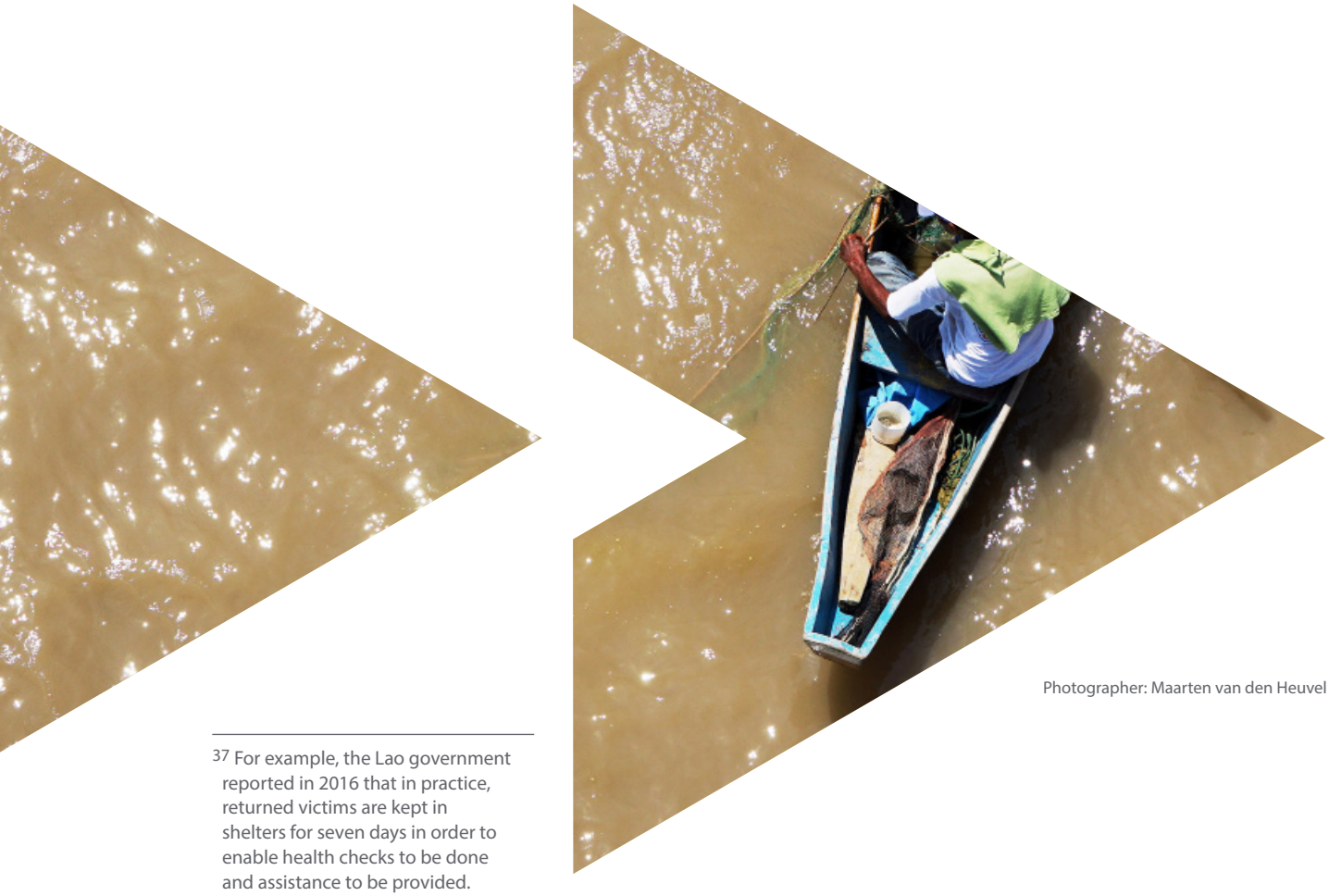
[36] Ryszard Piotrowicz and Liliana Sorrentino, 'The non-punishment provision with regard to victims of trafficking: a human rights approach' in Ryszard Piotrowicz, Conny Rijken, Baerbel Heide Uhl (eds.), Routledge Handbook of Human Trafficking (Routledge, 2018) 171.

1.3. Shelter detention

Detention of victims can occur when trafficked victims are placed in shelters or other welfare facilities, from which they are unable to leave. Such shelters may exist in destination countries where victims have been trafficked, or in countries of origin, where victims are returned after being trafficked elsewhere.[37]

This type of detention occurs in many places, including some ASEAN Member States.[38] The conditions of closed shelters that limit residents' freedom of movement can make them de facto detention facilities.[39] Such restrictions also place burdens on case managers and shelter staff, who are in the difficult situation of being responsible for the welfare of victims, and also for making sure that victims are available to authorities. As a result, they risk being legally (or even physically) challenged by victims, their families or employers/exploiters for illegally detaining them on the one hand, while risking criticism for not doing so by law enforcers who require victims for criminal justice purposes on the other.[40] One respondent explained that fear of 'losing' victims discourages innovative approaches to recovery and (re)integration.

Many ASEAN Members States are experiencing unprecedented cooperation at the multi-agency and multidisciplinary level, with both State and non-State representatives reporting greater collaboration in the provision of protection and assistance to victims of trafficking, in shelters. Increased collaboration between State and non-State actors in providing shelter to victims of trafficking, is a positive stride forward towards increasing the quality of protection and assistance, and a possible means by which detention can be avoided and free movement and liberty enhanced. Yet, it is not a given that NGOs provide more freedom of movement to victims in their care.[41] Many NGOs are in practice just as restrictive as State shelter providers, and may even be preferred as the more 'secure' alternative to State shelters, given their greater capacity to ensure that victims cannot leave or be accessed.



Photographer: Maarten van den Heuvel

37 For example, the Lao government reported in 2016 that in practice, returned victims are kept in shelters for seven days in order to enable health checks to be done and assistance to be provided. See Regional Review on Laws, Policies and Practices within ASEAN relating to identification, management and treatment of victims of trafficking, especially women and children, (ASEAN Secretariat, October 2016) 114. In Myanmar, victims returning from abroad tend to stay in shelters while family tracing and assessment is conducted. However, US State Department Trafficking in Persons reports have raised concern about the non-consensual stay at State shelters while family tracing was conducted, which could take several months. The time that they are kept in shelters depends on where they have been returned from; bilateral arrangements with destination countries have meant that those processes may already have begun in countries of destination (e.g. Thailand), potentially reducing the time of confinement in shelters in Myanmar.

38 See for instance, Human Rights and Return of Trafficked Persons (OSCE, 2014) 78, noting that victims are often placed in shelter programs in OSCE participating States and other countries that afford little or no freedom of movement and are tantamount to detention.

39 In Gulf States, women who flee abusive employers have been held in facilities called 'shelters' that are akin to detention centres. See: Immigration Detention in the Gulf: Global Detention Project Special Report (Geneva, Global Detention Project, 2015).

40 Respondents in two countries cited examples of habeas corpus cases being brought against them by victims of trafficking, instigated by victims' families or exploiters.

41 A 2014 study of shelter practices in Asia asserts that whether involvement of NGOs in governing shelters "could bring about more robust oversight mechanisms and substantive constraints on the use of protective custody in Asia is debatable." Maggy Lee, 'Gendered discipline and protective custody of trafficking victims in Asia' Punishment and Society 2014, Vol. 16(2) 206-222, 212.

While shelter staff may question what powers they actually have to physically prevent victims from leaving shelters, they do not question that part of the role expected of them is to keep victims from running away. However, across many, if not most countries in the region, NGOs are far better resourced than State shelters to provide a higher standard of specialized care, and offer fertile ground for piloting less restrictive shelter models that could have relevance for general application.[42]

Currently, systems of accreditation to certify the standards and authorize establishments to operate as trafficking shelters are in place in Malaysia, with two NGOs shelters accredited to shelter victims of trafficking.[43] Similarly, a system is being developed in the Philippines for NGO accreditation to establish social welfare and development programmes.[44] In Thailand, in late 2017, the government introduced new regulations allowing NGOs to register their shelters for trafficked persons.[45] These requirements are all silent as to whether accredited shelters may or must be open or closed. Questions can be raised about who is accountable for any human rights interferences—including with freedom of movement—that result from private actors providing shelters to victims of trafficking.[46] This consideration points to the need to ensure that NGO involvement in providing shelter or providing services in non-State shelters, in no way detracts from full accountability of States for the rights of victims, including their rights of free movement and liberty.

Formal monitoring systems for shelters are not yet in place in any of the Study countries, though have been flagged in policy frameworks.[47] The only concrete examples of informal monitoring mechanisms that were encountered, include ad hoc visits to private shelters as a part of State accreditation processes, case worker visits (including in the framework of bilateral visits of case workers from Myanmar coming to shelters in Thailand) and NGO visits to State shelters. In order for a viable monitoring system to be implemented, the standards being monitored first need to be determined in the context of the wider protection and assistance framework for victims of trafficking. Human rights criteria, including those concerning freedom of movement and liberty, need to be reflected within that framework.

Photographer: Rio Lecatompessy

42 In Azerbaijan for instance, it has been found that victims prefer to stay in NGO shelters that afford more freedom of movement, rather than in better-equipped and significantly less crowded State-run shelters facilities that are more isolated and where victims are generally not able to leave unaccompanied, Marika McAdam. Needs Assessment: Counter-Trafficking Response in the Republic of Azerbaijan (IOM, 2017) 18-20.

43 Article 42(1) of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act, allows the Minister of internal security (by notification in the Gazette) to declare any house, building or place, or part thereof, a refuge for the care and protection of trafficked persons.

44 Section 16(b) of the Anti-Trafficking Persons Law (Republic Act 9208) states that the DSWD is to develop a system of NGO accreditation for the purposes of establishing centres and programs. Administrative Order No. 16 of 2012 revises administrative order No. 17 series of 2008 (Rules and Regulations on the Registration and Licensing of social welfare and development agencies and accreditation of social welfare and development programs and services). DSDW Memorandum Circular No. 20 (2015) offers Guidelines in the Implementation of the Recovery and Reintegration Program for Trafficked Persons. A provision therein concerns repair and maintenance of existing DSWD residential care facilities to accommodate victim-survivors in need of temporary shelter and protective custody and details the care victims are entitled to, but is silent on issues of movement.

45 See: Ministerial Regulation (MSDHS) for Establishing Private Shelter for VOTs, B.E. 2560 (2017) and Ministerial Regulation (MSDHS) Temporary Protection to Presumed VOTs B.E. 2552 (2009) allowing NGOs to register their shelters for trafficked persons. Ministerial Regulation (MSDHS) for Establishing Private Shelter for VOTs, B.E. 2560 (2017) is silent as to whether shelters are to be closed or open.

46 Similar questions have been asked about the role of non-State actors in managing immigration detention centres whether private (for profit) security companies, NGOs, international organisations, or militia groups. See Michael Flynn, 'Kidnapped, Trafficked, Detained? The Implications of non-State actor involvement in immigration detention' in 5 Journal on Migration and Human Security 593 (2017) 601-604.

47 For example: in the Philippines, the National Action Plan 2017 - 2021 'Service Providers and Duty Bearers Provide High Quality of Care to Persons at Risk, Victims, and Survivors of Human Trafficking From Rescue to Reintegration' mentions monitoring compliance with care program standards based on registration, licencing, and accreditation requirements and performing regular and thorough performance evaluation of shelter-based intervention service providers. In Lao PDR, the National Committee on Anti-Trafficking in Persons' National Plan on Preventing and Combating Human Trafficking (2017-2020) updated in March 2017 refers to the establishment of a system to monitor and evaluate protection and assistance

1.4. Alternatives to detention

The 2008 study emphasized that detention of victims is not universally practiced. In many countries, freedom of movement is the norm and protection and assistance—including in shelters—is provided on the basis of consent, rather than coercion.

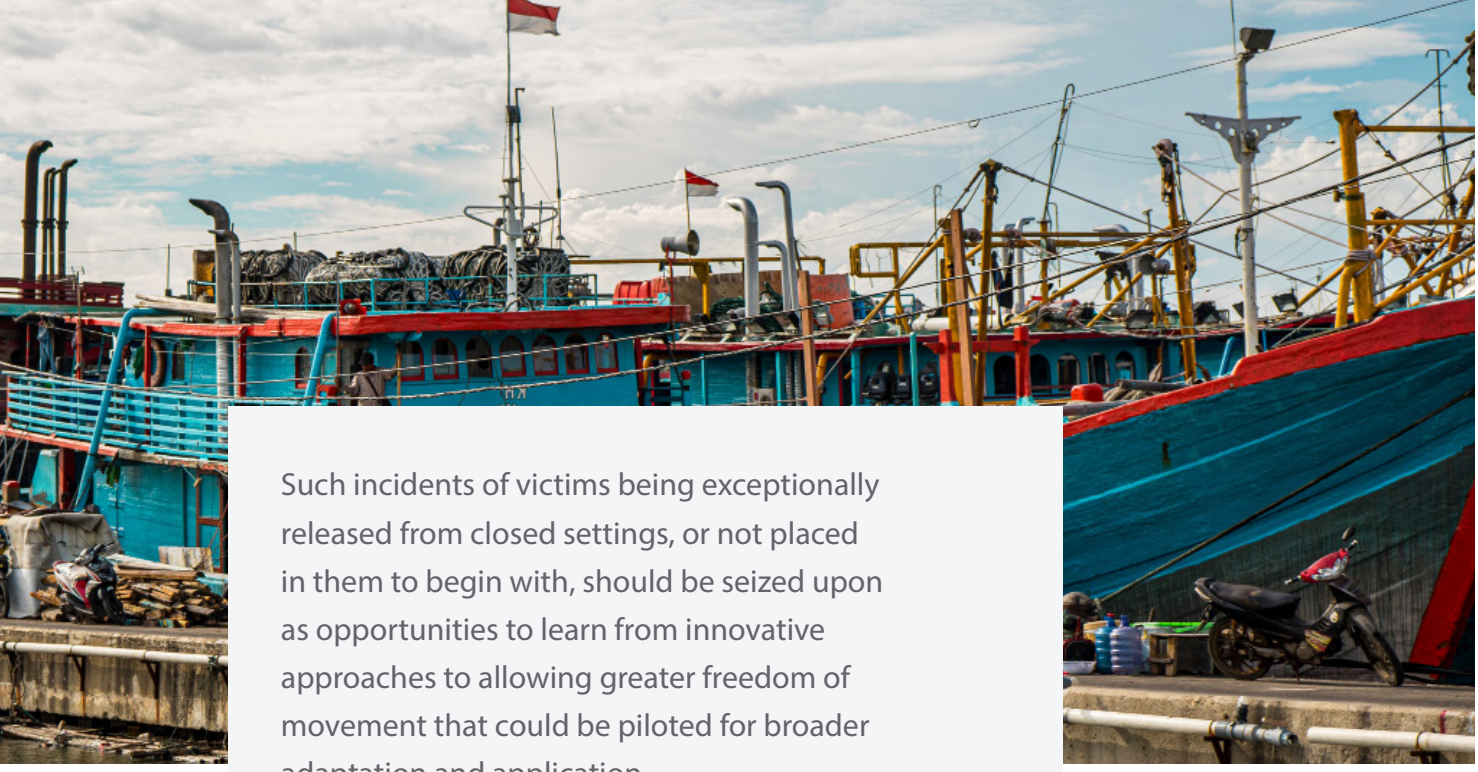
One significant regime that has been put in place to address protection, assistance and prosecution challenges vis-à-vis foreign victims, is the provision of a 'reflection period', to decide whether they wish to be involved in criminal justice processes, with residence permits granted to those who choose to stay and participate.[48] The effectiveness of this approach (which is conditional due to linkages between cooperation with criminal justice and immigration status) depends heavily on how well that system is integrated into wider protection mechanisms and social welfare and assistance frameworks available to victims outside the shelter setting. Thus far this is not a system that has been attempted in the ASEAN Region.

The Study revealed other efforts to trial less restrictive shelter models. As at the time this research was conducted, more than 90 people had been granted freedom of movement since Malaysia introduced regulations allowing for this possibility.[49] While a positive step (and an improvement on the years before), the number falls far short of the total number of victims identified in Malaysia, as victims must 'opt in' to the system, rather than being afforded the right as a matter of course. In practice, only victims of trafficking for forced labour have benefited from this mechanism; victims of trafficking for sexual exploitation generally do not pass the security component of the screening process, owing to concerns that they will return to traffickers. Another example in Malaysia is found in an NGO shelter trialling a more open shelter with the support of the Malaysian government.[50]

In Northern Thailand, the Chiang Mai provincial police have provided shelter to victims of trafficking (teenaged Thai girls) in a rented house, from which they were free to come and go until their 10pm curfew. They were protected by CCTV and supported by a police officer serving as a welfare officer, who victims maintained regular contact with.[51] In the Philippines, some consideration is being given to how transitional homes for independent living can be used as an alternative to closed shelters for some adult victims. Increased attention is also being given to the need to strengthen foster care frameworks in general, for potential application to trafficked children in particular, as a future alternative avenue for care, though practitioners in two countries mentioned that foster frameworks are not equipped to serve this purpose as of yet.

Alternatives to detention in shelters that have been put into practice in the Study countries have sometimes happened as the result of necessity rather than by design. State facilities have been largely established to cater for one group of victims (women or girls from the ASEAN region) leaving other groups (e.g. men, and people from other regions) not catered for. In such cases, victims have been exceptionally released from State shelters not well suited to them and creative responses have been applied. An example is found in the situation of adult Ugandan women, who were not appropriately catered for in a Thai State shelter and were referred to an NGO that accommodated them in apartments from which they were free to come and go. In effect, this solution has resulted in a choice for them that Asian victims largely do not have, between closed State shelters and open non-State accommodation.

The insufficiency of shelter for male victims of trafficking across the region has also been instructive towards designing alterative models.[52] The alternative to shelter accommodation for many men has been their placement in facilities that do not adequately address their needs, including immigration detention centres, homeless shelters, or even prisons, or simply their release from any care, essentially leaving them to their own devices.[53] While the absence of shelter services can mean that some men are denied access to vital support services, in some cases, it has proven advantageous to their freedom of movement, when they were provided with alternative accommodation, including in rented apartments.[54]



Photographer: Tim Sheperd

Such incidents of victims being exceptionally released from closed settings, or not placed in them to begin with, should be seized upon as opportunities to learn from innovative approaches to allowing greater freedom of movement that could be piloted for broader adaptation and application.

48 Article 13 of the Council of Europe Convention on Action Against Trafficking in Human Beings (Council of Europe Treaty Series No. 197) provides that each State party shall provide a recovery and reflection period of at least 30 days. For more on this model as it is applied elsewhere, see Anette Brunovskis, Balancing protection and prosecution in anti-trafficking policies: A comparative analysis of reflection periods and related temporary residence permits for victims of trafficking in the Nordic countries, Belgium and Italy (Nordic Council of Ministers, 2012).

49 The Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Permission to Move Freely and Work) (Foreign National) Regulations 2016 made pursuant to paragraph 66(2)(aa) of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 [Act 670] came into effect in May 2016. The regulations allow Special Passes to be used under Regulation 14 of the Immigration Regulations 1963 allowing foreign victims of trafficking to whom a Protection Order has been granted to move freely.

50 Good Shepherd Services.

51 In the Philippines, Outcome 3(9)(f) National Action Plan 2017 - 2021 concerns independent living, transnational sheltering and community-level support systems, but no implementation examples were offered during fieldwork discussions.

52 There are no shelters specifically dedicated to male victims of trafficking in Brunei Darussalam, Cambodia or Viet Nam. On Cambodia, see: Jarrett Davis, James Harvey, Lim Vanntheary, Nhahn Channtha and Sreang Phaly, The Forgotten Cohort: An Exploration of Themes and Patterns Among Male Survivors of Sexual Exploitation and Trafficking, The Butterfly Longitudinal Research Project: A Chab Dai study on (Re-) integration: Researching the lifecycle of sexual exploitation and trafficking in Cambodia (Phnom Penh: Chab Dai, 2016) 10.

53 See for instance: Report of the Special Rapporteur on trafficking in persons, especially women and children, Mission to the Philippines, UN Doc A/HRC/23/48/Add.3 (19 April 2013) 61; Trafficking in Persons Report 2017 (US Department of State) Topics of Special Interest https://www.state.gov/j/tip/rls/tiprpt/2017/271110.htm

54 For instance, in the absence of shelters for male victims of trafficking in Georgia, the State provides accommodation in government-rented apartments. See Marika McAdam, Needs Assessment: Counter- Trafficking Response in Georgia (IOM, 2017) 21.

Photographer: Hakan Nural

02.

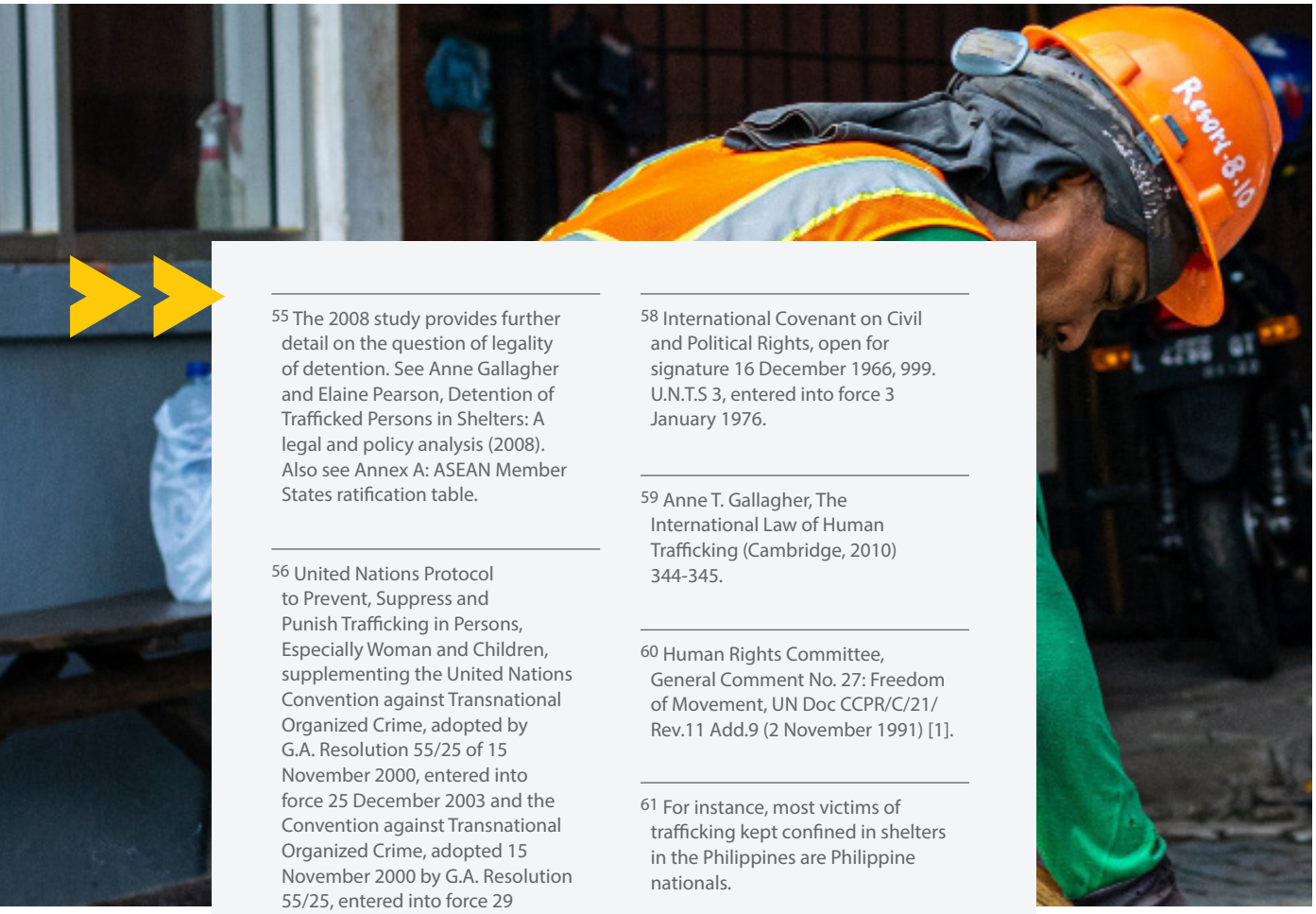
Overview of relevant legal frameworks

This section provides an outline of the international, regional, sub-regional, bilateral and national legal frameworks relevant to sheltering victims of trafficking and protecting their rights and freedoms, including to movement and liberty.[55] This section does not reflect on the extent to which those laws are implemented in practice.

2.1. International framework

The primary international treaty addressing trafficking in persons, is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking in Persons Protocol) supplementing the United Nations Convention against Transnational Organized Crime (UNTOC).[56] Both instruments, while silent on the specific issue of detention of victims of organized crime including trafficking, provide a clear framework for States to protect and assist them.

International human rights law, is a core component of the legal framework surrounding trafficking, with several rights—including the right to non-discrimination—relevant to protection and assistance of trafficked persons.[57] The most pertinent right to non-detention of victims is the right to freedom of movement captured by Article 12 of the International Convention on Civil and Political Rights (ICCPR). That freedom entails liberty of movement; freedom to choose residence; freedom to leave any country, including one's own; and the right not to be arbitrarily deprived of the right to enter one's own country.[58] The right to return to one's country—a corollary of the right to leave and part of a broader right of freedom of movement—is also protected in international law. Accordingly, restricting movement of victims of trafficking who wish to return to their countries may interfere with their right to return.[59] Any interference with freedom of movement must be: provided by law, necessary, proportionate to the stated objective, and consistent with other rights.[60] Freedom of movement in ICCPR article 12(1) is only guaranteed to those lawfully within the territory of the State, meaning that victims of trafficking who are in irregular situations may not benefit from the protections of this right. Prima facie detention of victims of trafficking who are lawfully in the country—for instance, citizens of the country in which they are sheltered—clearly violates their freedom of movement.[61]



[55] The 2008 study provides further detail on the question of legality of detention. See Anne Gallagher and Elaine Pearson, Detention of Trafficked Persons in Shelters: A legal and policy analysis (2008). Also see Annex A: ASEAN Member States ratification table.

[56] United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Woman and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted by G.A. Resolution 55/25 of 15 November 2000, entered into force 25 December 2003 and the Convention against Transnational Organized Crime, adopted 15 November 2000 by G.A. Resolution 55/25, entered into force 29 September 2003. The Trafficking in Persons Protocol was concluded in 2000 and entered into force in 2003, and as of April 2018 has 117 signatories and 173 States parties.

[57] International Covenant on Civil and Political Rights, open for signature 16 December 1966, 999. U.N.T.S 3, entered into force 3 January 1976. Article 26 protects against discrimination 'on any grounds' including as examples race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Also see Article 1 of CEDAW.

[58] International Covenant on Civil and Political Rights, open for signature 16 December 1966, 999. U.N.T.S 3, entered into force 3 January 1976.

[59] Anne T. Gallagher, The International Law of Human Trafficking (Cambridge, 2010) 344-345.

[60] Human Rights Committee, General Comment No. 27: Freedom of Movement, UN Doc CCPR/C/21/ Rev.11 Add.9 (2 November 1991) [1].

[61] For instance, most victims of trafficking kept confined in shelters in the Philippines are Philippine nationals.

Photographer: Hobi industri

The right to personal liberty is also protected by the ICCPR, and is a right that complements freedom of movement.[62] Article 9(1) states: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."[63] As a right of 'everyone' the right to liberty includes non-citizens. Accordingly, States must take measures to ensure that they do not deprive persons of liberty, and to ensure that others do not do so, meaning that when private individuals or entities are authorised by the State to shelter persons (as may be the case when NGOs provide shelter services) the State remains responsible for ensuring that no deprivation of liberty occurs.[64]

While States are able to deprive people of their liberty in some circumstances, interference with the right is not justified when the deprivation of liberty is arbitrary or unlawful. Arbitrariness has been described as referring to elements of 'injustice, unpredictability, unreasonableness, capriciousness, and lack of proportionality, as well as the common law principle of due process in law'.[65] There are several situations in which sheltering of a victim can amount to or become arbitrary detention.[66]

The International Covenant on Economic Social and Cultural Rights (ICESCR) also contains provisions relevant to non-detention of victims, including the right to work that may be infringed by detention.[67] The right to work is captured by article 6(1), recognised to include "the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."[68] As a right 'of everyone', non-citizens also enjoy the right to work. The UN Committee on Economic, Social, and Cultural Rights (CESCR) provides detailed guidance to States on their obligations to respect, protect and fulfil the right to work, through its General Comment No. 18 which notes that the labour market must be open to all persons within the jurisdiction of a given State, describing measures to ensure accessibility of that market.[69]

[62] Detention is a particularly severe form of restriction of liberty of movement; but both articles may come into play in some circumstances. General Comment No. 35 Article 9 (liberty and security of person), UN Doc CCPR/C/GC/35 (14 December 2014) [60].

[63] Deprivation of liberty is defined by the Optional Protocol to the UN Torture Convention as "any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority." See Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 2375 U.N.T.S 237, 18 December 2002, Article 4(2).

[64] General Comment No. 35 Article 9 (liberty and security of person), UN Doc CCPR/C/GC/35 (14 December 2014) [3, 7-8].

[65] See references in Anne T. Gallagher, The International Law of Human Trafficking (Cambridge, 2010).

[66] The 2008 study noted such situations as being where the detention is not provided for in law or is contrary to law, is imposed in a discriminatory manner, is for a prolonged, unspecified or indefinite time, is unjust, unpredictable and/or disproportionate to the goal pursued and is not subject to judicial or administrative review, with the possibility for release and compensation. See Anne Gallagher and Elaine Pearson, Detention of Trafficked Persons in Shelters: A legal and policy analysis (2008) 15.

[67] International Convention on Economic, Social and Cultural Rights, open for signature, 16 December 1966, 993 U.N.T.S. 3, entered into force 3 January 1976.

[68] The right to work is further protected by article 8, paragraph 3(a), of the International Covenant on Civil and Political Civil Rights (ICCPR); in article 5, paragraph (e) (i), of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); in article 11, paragraph 1 (a), of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); in article 32 of the Convention on the Rights of the Child (CRC); and in articles 11, 25, 26, 40, 52 and 54 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW).

[69] Committee on Economic, Social and Cultural Rights, General Comment No. 18: The Right to Work, UN Doc E/C.12/GC/18 (6 February 2006) [12b].

Relevant international instruments prohibiting the detention of children specifically are the Convention on the Rights of the Child (CRC) and its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography (CRC Optional Protocol).[70] Detention of children is only justifiable where it is determined on the basis of an individual, case-by- case assessment to be in the best interests of the child, and as a measure of last resort where there is no reasonable alternative available. Routine detention of trafficked children is therefore contrary to international law and cannot be justified on any grounds.[71]

A body of soft law has also bolstered the legal framework surrounding trafficking. Of crucial importance is the Recommended Principles and Guidelines on Human Rights and Human Trafficking of 2002, a non-binding international instrument that builds on treaty law and rules including the prohibition on arbitrary detention.[72] International instruments relevant to treatment of victims of crime are also relevant to non-detention of victims of trafficking.[73]

2.2. Regional frameworks

At the regional level, a more robust framework for protection than that outlined in the Trafficking in Persons Protocol, is offered by the 2005 Council of Europe Convention on Action against Trafficking in Human Beings[74] and Directive 2011/36/EU of the European Parliament and of the Council.[75] Article 8 of the EU Directive, refers explicitly to detention as a measure that should not apply to victims, and emphasizes that States may wish to consider including provisions to ensure that victims or potential victims of trafficking "are not detained in closed shelters or other welfare institutions beyond the requirements of necessity, legality and proportionality, and if detention is administered as a last resort, that the required legal safeguards are upheld."[76]

Photographer: Alice Young / Unsplash

70 CRC and Optional Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography, adopted by GA Res 54/263 of 25 May 2000, entered into force 18 January 2002.

71 See inter alia, CRC, Article 37(c) and (d), Article 29; Beijing Rules [29]; CRC General Comment No. 6 [63]; CRC Optional Protocol, Article 8; UNICEF Guidelines 4.2; 7.1; 7.2; 9.2.1; 10.1; 10.2.

72 Recommended Principles and Guidelines on Human Rights and Human Trafficking, Addendum, Report of the High Commissioner for Human Rights to the Economic and Social Council, UN Doc. E/2002/68/Add.1 (20 May 2002).

73 United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Beijing Rules), adopted by G.A. Res 45/113 of 14 December 1990; Declaration of Basic Principles for Victims of Crime and Abuse of Power, adopted by G.A. Resolution 40/34 of 29 November 1985; Basic principles and guidelines on the right to a remedy and repatriation for victims of gross violations of international human rights law and serious violations of international humanitarian law, adopted by G.A. Resolution 60/147 of 16 December 2005; Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, adopted by ECOSOC Resolution 2005/20 of 22 July 2005.

74 Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 97 entered into force 1 February 2008.

75 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

76 Human Trafficking: Joint UN Commentary on the EU Directive - A Human-Rights Based Approach (OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO, 2011) 11.

In the ASEAN Region, the ASEAN Convention on Trafficking in Persons, Especially Women and Children (ACTIP) adopted in 2015 and entered into force on 8 March 2017, mirrors and in some respects, exceeds the provisions of the Trafficking in Persons Protocol, including with a specific provision on detention stating in Article 14(8) that:

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

However, of relevance here is the interpretative distinction that may be made in practice between detention in immigration detention or prison, which identified victims may be protected from, and their 'custody' in shelter facilities, which may not be prohibited. This latter interpretation has been taken by some ASEAN Member States to mean that holding of victims of trafficking against their will in shelters or other welfare facilities is not considered a prohibited form of detention under the Convention. Other soft law instruments are relevant to protection of victims of trafficking specifically in the ASEAN framework.[77]

[77] ASEAN Plan of Action against Trafficking in Persons, Especially Women and Children (2015); Gender Sensitive Guidelines for Handling of Women Victims of Trafficking in Persons (2016); Guidelines for the protection of the Rights of Trafficked Children in Southeast Asia (2007); ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases (2010); ASEAN Practitioner Guidelines on an Effective Criminal Justice Response to Trafficking in Persons (2007); ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007); ASEAN Declaration against Trafficking in Persons Particularly Women and Children (2004).

2.3. Sub-regional and bilateral frameworks

There are several sub-regional counter-trafficking frameworks.[78] In the ASEAN Region, the six countries of the Greater Mekong Sub-Region adopted the Memorandum of Understanding on cooperation against Trafficking in Persons in the Greater Mekong Sub-Region, on 29 October 2004 (COMMIT MOU).[79] Those countries commit at Article 16 to "ensuring that persons identified as victims of trafficking are not held in detention by law enforcement authorities." The fact that law enforcement authorities are specifically mentioned, may make their detention by non-law enforcement permissible. Article 7 specifies that victims should stay in safe shelters administered by social welfare ministries in each country.[80]

The COMMIT MOU has been further given effect by bilateral agreements including those listed in the table at Annex C. As with the sub-regional MOU, where bilateral MOUs explicitly refer to detention, it is in the context of prohibiting immigration detention pending repatriation, effectively allowing for shelter in accordance with the laws and policies of each Party to the agreement.[81] Some more recent MOUs, including that agreed between the government of Lao PDR and the government of Thailand in July of 2017, are silent on detention, providing only that victims are to be provided with temporary shelter.[82] The 2008 study concluded that "It is reasonable to assume that the omission of any reference to shelter detention is deliberate: seeking to preserve a presumed entitlement on the part of the State to detain victims in social welfare facilities."That same assumption holds today; many practitioners continue to hold the view that deprivation of liberty and confinement in welfare shelters does not amount to 'detention' per se.

2.4. National frameworks

Comprehensive national counter-trafficking legislation across the region, reflects strong political will to combat trafficking and protect its victims. Relevant laws of ASEAN Member States rarely mention 'detention' of victims of trafficking explicitly. Rather, the legislative basis for placing victims of trafficking in shelters and limiting their movement may not be trafficking law, but laws concerning protection of women and children, leaving a lacuna with regard to male victims.

Brunei Darussalam: The Trafficking and Smuggling of Persons Order (2004) does not explicitly address protection of trafficked persons, but some measure of protection is legislatively provided for women and child victims.[83] The Women and Girls Protection Act, under the Community Development Department of the Ministry of Culture, Youth and Sports, refers to a 'place of safety' for women and girls who are in 'moral danger' or are believed to be in need of protection.

Cambodia: The Law on Suppression of Human Trafficking and Sexual Exploitation (2008) is primarily an instrument to criminalize trafficking rather than protect its victims. At the policy level, the 2014-2018 National Plan of Action of the National Committee for Counter Trafficking includes victim protection as one of four strategies, including through implementation of community-based care to reduce the number of victims in long-term shelters and establishing shelters and transit shelters for male victims.[84] Policies also make explicit that victims must consent to shelter stays, and have the right to leave.[85] According to article 4 of the Minimum Standards on Residential Care for Victims of Trafficking and Sexual Exploitation (2014) victims have the "right to refuse services at any time, especially for adult trafficked persons, including before and after entrance into the facility" and to participate in their reintegration.

[78] E.g. Economic Community of West African States (ECOWAS) Declaration on the Fight against Trafficking in Persons, 2001; Economic Community of Central African States (ECCAS) Joint ECOWAS/ECCAS Regional Plan of Action to Combat Trafficking in Persons, especially Women and Children (2006-2008); Arab Framework Act on Combating Trafficking in Persons (2008); Southern African Development Community (SADC); Regional Plan of Action on Trafficking in Persons, 2009-2019; South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002

[79] COMMIT Member States are Cambodia, China, Lao PDR, Myanmar, Thailand and Viet Nam.

[80] Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub- Region, adopted on 29 October 2004.

[81] The MOU between Cambodia and Thailand on bilateral cooperation for Eliminating Trafficking in Persons and Protecting Victims of Trafficking (2014) (which superseded an earlier MOU of 2013) states at Article 6(b) that "trafficked persons shall not be detained at an immigration detention centre during the times awaiting repatriation process" but put under the care of the relevant agencies, and shelter protection provided in accordance with the policies of each State. This same provision appears in many other bilateral MOUs concluded between ASEAN member states, including between Myanmar and Thailand (2009) at Article 8(b). Cambodia's 2014 MOU with Thailand and its 2005 MOU with Vietnam confirm that trafficked persons are to be treated as victims and not violators and accordingly shall not be detained in an immigration detention center (article 6 and article 5 respectively), though the latter prohibition is limited only to women and children.

[82] Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of the Lao People's Democratic Republic on Cooperation to Combat Trafficking in Persons (12 July 2017), superseding the MOU signed between the two governments in 2005. Also, the Standard Operating Procedures developed on the Identification and Return of Victims of Human Trafficking between Vietnam and Thailand agreed in 2013, are silent on issues of shelter and detention.

[83] There is no protection framework for men, although boys can receive protection under Chapter 219 of the Children and Young Persons Act. Section 17 of that Act, allows 'any protector or police officer' to place a child into protection, without warrant, unless doing so would not be in the child's best interests.

[84] Outcome 4.1.13 and 4.1.15.

[85] Agreement on Guidelines for Practices and Cooperation between the Relevant Government Institutions and Victim Support Agencies in Cases of Human Trafficking (2007), article 63, article 66.

Indonesia: Article 52 of the Law of the Republic of Indonesia No. 21 on Eradication of the Criminal Act of Human Trafficking (2007) requires the National and Provincial governments to establish shelters and trauma centres and allows community or social organizations to also do so. According to article 87 of Immigration Law UU6-2011, victims of trafficking (and smuggled migrants) who are placed in immigration detention or elsewhere get special treatment that is different to general detention. Several regulations provide guidance on what such treatment entails, including obtaining their consent to receive services.[86] There are no guidelines outlining whether shelters are to be open or closed.[87]

Lao PDR: The Anti-Trafficking in Persons Law (2015, amended 2016) includes provision of a safe temporary shelter as a right of victims, for which the Labour and Social Welfare Sector and the Lao Women's Union are responsible.[88] The Law on the Protection of the Rights and Interests of Children (2006), provides for children to be placed in shelters and gives attention to alternative care, emphasizing the best interest of the child taking into consideration the views of the child and specifying that "placement of the child in a residential care institution, such as an orphanage, boarding-school or other institutional establishment shall be a measure of last resort."[89] The Law on Development and Protection of Women (2004) refers to the right to receive assistance including for shelter and refers to the need for police to cooperate with doctors, social workers and others to send victims to shelters.[90]

Malaysia: The Anti-Trafficking in Persons Act 670 of 2007 was amended in 2010 and renamed the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (ATIPSOM), merging trafficking and smuggling into the same legislation. ATIPSOM empowers authorities to take any person reasonably suspected to be trafficked into temporary custody and produce him or her before a Magistrate within 24 hours for the purpose of obtaining an Interim Protection Order, under which they are placed in a shelter for 21 days (a period extended in 2015 from 2 weeks which was deemed too short). That order allows the person to be detained at a government shelter for the purpose of carrying out an investigation and enquiry.[91] Confirmed victims may then be placed in a refuge for up to three months (a period reduced in 2015 from two years).

The 2015 amendments to ATIPSOM, also expand protection to provide for freedom of movement and the right to work.[92] In May 2016, new regulations came into effect allowing Special Passes to be used under regulation 14 of the Immigration Regulations 1963 so that foreign victims of trafficking to whom a Protection Order has been granted, may move freely.
Permission to work (for a period not exceeding three years) may also be granted to any person who has been granted permission to move freely.[93]

The Federal Constitution of Malaysia protects several fundamental liberties, including the liberty of the person (at section 5) and prohibits slavery and forced labour (section 6).

Myanmar: The Anti-Trafficking in Persons Law (2005) provides for protection of vulnerable victims including children and youth, but does not prescribe measures to achieve this. According to article 19 of that law, the Central Body for Suppression of Trafficking in Persons (CBTIP) is to coordinate with relevant government and NGOs to arrange for temporary shelter at a safe place or appropriate housing for trafficked victims. National Guidelines on Return/Repatriation and Reintegration of Trafficked Victims', developed by the Department of Social Welfare (DSW) in 2012, emphasize that the rights of victims are to be at the centre of all efforts to prevent and combat trafficking and that all actions taken in relation to them are to be rights-based and victim-centred, and with the victim's full and informed consent.[94]

Philippines: The Anti-Trafficking in Persons Act (Republic Act 9208) adopted in 2003 and the Expanded Anti-Trafficking in Persons Act of 2012 (Republic Act 10364, expanding RA 9208) do not make explicit reference to detention of victims but Section 16(d) requires that the Department of Social Welfare and Development provide temporary shelter and Section 17A instructs law enforcement officers to immediately place a person reasonably suspected of being a victim of trafficking into the temporary custody of the local social welfare and development officer or any accredited or licenced shelter instrument. Section 23 includes 'emergency shelter or appropriate housing' as a mandatory service.

Photographer: En ji / Unsplash

86 Regulation of State for Women's Empowerment and Child Protection of the Republic of Indonesia Number 22 Year 2010 concerning Standard Operational Procedure for Integrated Services for Witness and or victim of trafficking in persons.

87 See: Ministry of Social Services of the Directorate of Social Rehabilitation Guideline for Handling Women as Victims of Trafficking in Persons at Social Protection Home for Women; Regulation Number 9 Year 2008 on Procedure and Mechanism of Integrated Services for Witnesses and/or Victims of Trafficking in Persons; Decree of Minister of Women Empowerment and Children Protection concerning Minimum Service Standards of Integrated Services for Witnesses and or Victims of Criminal Act of Human Trafficking in Regent/ Municipality.

88 Anti-Trafficking in Persons Law, articles 39, 63 and 64.

89 Law on the Protection of the Rights and Interests of Children (2006), article 25(8), 28, 38, 42(4).

90 Law on Development and Protection of Women (2004), articles 25 and 28.

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

92 ATIPSOM Section 51A

93 Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Permission to Move Freely and Work) (Foreign National) Regulations 2016, 4 May 2016. The employer of the person must apply for a Visit Pass (Temporary Employment) from the Immigration Department. When that pass is issued, the Interim Protection Order is revoked.

94 Principle 11(a). The best interests of the child are also explicitly mentioned at Principle 11(b).

The Guidelines on the Protection of the Rights of Trafficked Women (Inter-Agency Council against Trafficking, 2013), appear to only proscribe detention in particular facilities or at particular stages. Prior to identification, "trafficked women should not be detained or held in immigration detention facility or other forms of custody depriving them of their liberty."[95]

The guidelines further provide that "[t]rafficked women should not be detained or deprived of their liberty at all times"[96] and should not be held in immigration or police detention centres, military camps or in the private custody of law enforcers, health or social welfare personnel before transfer to an authorized shelter.

The Constitution of the Republic of the Philippines contains a bill of rights in Article III that states at section 1 that "No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws."

Singapore: The Prevention of Human Trafficking Act (2014) provides for temporary shelter for victims of trafficking (article 19). A committee can review that decision after six months. The Children and Young Persons Act provides the possibility of trafficked children to be sheltered in a place or safety or of temporary care and protection, or be committed to the care of an appropriate person. Also of relevance is the Women's Charter under which a woman or girl may apply to be received into a 'place of safety' for urgent refuge, or be detained there on the decision of the Director of Social Welfare if a woman or girl is in need of protection, considered to be in mortal danger, or if there are other extenuating circumstances to detain her until an inquiry has been made. Such detention may only be for the purpose of an inquiry and after necessary welfare arrangements have been made or after she attains the age of 21 or marries, and can be subject to appeal. A committee reviews all detention cases after six months and may recommend discharge or release on license. A woman or girl who breaches that license, can be brought back before the Director and may be detained for a further period.[97]

Thailand: The Anti-Trafficking in Persons Act (BE 2551, 2008) and the Amendments (No. 2) (2015) allow authorities to take persons reasonably suspected of being trafficked into temporary custody for a period of 24 hours (section 29) that may exceptionally be extended for seven days. Section 33 concerns placement of victims in the care of a primary government or private shelter on the basis of the Prevention and Suppression of Prostitution Act BE 2539 (1996) or the Child Protection Act BE 2536 (2003). Under the former, the 'offender' can be transferred within six months to a 'Protection and Occupational Development Centre' to receive protection and occupational development, for a period not exceeding two years.[98] Under the latter, children (including boys) can be kept in primary shelters for not longer than seven days, with the possibility of extending this period to no more than 30 days.[99]

Article 37 of the Anti-Trafficking in Persons Act refers to assistance for the victim to obtain permission to stay and work in Thailand while taking part in legal proceedings. In December 2016, a Cabinet Resolution extended the stay permit for victims and witnesses of trafficking to two years, and allowed victims and witnesses to work in all sectors (rather than only labour-intensive sectors including domestic work).

Section 25 and 26 of the 2016 draft Constitution of Thailand protect the right to liberty and clarify that any restrictions on the rights or liberties of a person that are not constitutionally based, must not be contrary to law, unduly restrictive, and shall not affect the human dignity of a person, and shall specify the purpose and necessity for imposing such restrictions on rights and liberties. These conditions are qualified as being of general application and not intended to apply to any particular case or person. Section 27 underlines that all persons enjoy equal protection under the law, in accordance with the principle of non-discrimination.

Viet Nam: The Law on Prevention and Suppression against Human Trafficking (2011) states that Social Welfare and Victim Support Institutions are to provide 'temporary shelter in case of life or health of victims or their relatives is likely to be threatened' (Article 30 and 40). The Decree Providing on the Grounds Defining Trafficking Victims and Safety Protection for Victims and their Relatives specifies that victims have the right to refuse protection measures but are responsible for their own safety when they refuse or fail to fully abide by protection measures.[100] Article 7 sets out measures to protect victims and their relatives including through temporary shelter or safety arrangements made at their place of residence, work or study and allows for closed trials.[101]

The above sweep of national legislation, reveals the range of legislative grounds that shelter may be provided or custody may be imposed on victims of trafficking. What happens in practice is the subject of the following section.

95 Guidelines on the Protection of the Rights of Trafficked Women (Philippine Commission on Women in coordination with the Inter-Agency Council Against Trafficking, IACAT, 2013) 5.1.2.4, 11.

96 Guidelines on the Protection of the Rights of Trafficked Women (Philippine Commission on Women in coordination with the Inter-Agency Council Against Trafficking, IACAT, 2013) 5.3.1.1 paragraph (g), 14.

97 Regional Review on Laws, Policies and Practices within ASEAN relating to identification, management and treatment of victims of trafficking, especially women and children (ASEAN Secretariat, October 2016) 114-115.
98 Prevention and Suppression of Prostitution Act (BE 2539, 1996), sections 33 to 37.

99 Other laws/regulations that are of relevance include the Immigration Act 1979; Ministerial Regulation (MSDHS) Temporary Protection to Presumed Victim of Trafficking B.E. 2552 (2009); Regulation of the Ministry of Social Development and Human Security on Arrangement for Persons Likely to Become Trafficked Victims to be in Temporary Protection B.E. 2552 (2009) (Article 3 allows for persons to be temporarily placed in a Preliminary Admittance Centre, Remand Home or other government or private shelter (or other place that is not a detention cell or detention place) where there is reasonable cause to believe that he may be trafficked, for the purpose of searching for facts and providing protection); Ministerial Regulation (MSDHS) Assistance and Services for VOTs in Thai Shelter, October 2009; Ministerial Regulation (MSDHS) for Establishing Private Shelter for VOTs, B.E. 2560 (2017).

100 Decree Providing on the Grounds Defining Trafficking Victims and Safety Protection for Victims and their Relatives (13 August 2012), section 3(1)(b) and 3(2)(b).

101 The Decree Stipulating in detail a number of articles of the anti-trafficking law (11 January 2013) provides a framework for creating victim support establishments and its licencing and their incentives, responsibilities and entitlements in supporting victims of trafficking.

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03.

Rationale for restricting movement in policy and practice

Survey discussions across all three countries revealed that the understanding of 'freedom of movement' of many State and non-State actors does not correlate with the concept as it is understood in international law. Accompanied excursions and activities outside of the shelter (such as to the beach, the movies, bowling alleys or shopping malls) and allowing them to go unaccompanied to nearby shops, were offered as examples of freedom of movement. The absence of standardized rules and regulations for shelters and how such liberties are dispensed was explained to be on an ad hoc basis at the discretion, of shelter directors. This can result in markedly different approaches to victims' liberty. By way of example, while some shelters confiscate phones and only allow rare and sometimes monitored or even recorded phone calls, others discuss risks with residents and request that they not use their mobile phones to post photos of other residents on the Internet.

Notwithstanding the clear principle of non-discrimination in international law, certain biases may impact how restrictions are applied and to whom, with nationality or ethnicity of victims sometimes playing a role. One respondent offered an example of an entire group of people being denied freedom of movement, so that the State's interests in confining an ethnic sub-set of that group would not be viewed as discriminatory. Another respondent in the same country offered a good practice counter-example, whereby all categories of shelter residents were granted freedom of movement, with the local community sensitized to mitigate risks of stigmatization and ostracization of that sub-group.

Discriminatory practices are very often evident on the basis of sex, with restrictions of movement often highly gendered, whether in the custodial detention of certain victims over others (e.g. females more than males), or in the access they have to opportunities (e.g. work opportunities only available to men), or the services made available to them (e.g. psychological counselling only available to women, and the type of vocational skills training provided determined by gender). Facilities to provide shelter to male victims of trafficking often fall short of those available to women.[102]

As understanding of non-sexual forms of exploitation and sexual exploitation of men and boys increases, there are increased efforts to address the dearth of care available for males. The creation of new shelters to accommodate male victims in Thailand and Malaysia can be pointed to here. Moving forward, consideration also must be given to how to adequately cater for those who do not neatly fit into gender binary shelter models. In one country, it was reported that a young transgender girl initially placed in a female shelter was subsequently moved to a shelter for males, where she was kept isolated from other residents. In another country, an LGBTI victim was simply released from care in the absence of an appropriate shelter facility.

As noted above, any interference with freedom of movement and the right to liberty must be provided by law, necessary, proportionate to the stated objective, and be consistent with other rights,[103] and any detention must not be 'arbitrary'. Yet, policies and practices that interfere with the rights of trafficked persons are generally not justified on the basis of narrow exceptions applied to specific cases, but on the basis of broader arguments put forward to justify restricting their movement more generally. This section considers the protection, assistance and prosecutorial arguments put forward to justify such interference.

3.1. Protection rationale

According to Article 4(5) of the ASEAN Convention on Trafficking in Persons, States parties are required to "endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory."[104] While many of the restrictive approaches to sheltering victims—by both State actors and NGOs—are well intentioned efforts to protect them, it is less certain that this purpose is served by restrictions placed on their movement.

One of the objectives of the ASEAN Convention as stated in Article 1(b) is to "protect and assist victims of trafficking in persons, with full respect for their human rights." In order for protection and assistance to fully respect their rights, victims must consent to any protective measures taken.[105] At the national level, legislation authorizing victims to be placed into protective custody is often silent on consent, placing the decision about their welfare with law enforcement or welfare officers.[106] Cambodia's Guidelines for Practices and Cooperation between the Relevant Government Institutions and Victim Support Agencies in Cases of Human Trafficking affirm that: "a victim who stays at the shelter shall have given his/her prior consent or that of his/her guardian to remain at the shelter as well as having obtained the prior approval of the shelter." Viet Nam's Decree on the Identification and Protection of Trafficked Victims states that victims may refuse protection, but victims who refuse protection are then responsible for their own safety.[107] In Thailand, the Multi- Disciplinary Teams (MDT) Operational Guidelines for Protection of Victims of Trafficking outlines procedures for admitting victims of trafficking into shelters, including an information form that allows consent or refusal to be placed under protection.[108]

Even where a framework for consent exists on paper, it is not necessarily implemented in practice; or when an information and/or consent process does take place, the quality of the process may be insufficient to make the consent meaningful.[109] Several promising practices to strengthen that process were raised during discussions. These included Thailand's work to train and certify interpreters across the country in response to identified challenges of communicating with foreign victims, the use of video animations to explain shelter-related services in Thailand and Malaysia, and an NGO showing children photos of shelters before bringing them to the shelter.

Notwithstanding these good practices, respondents across study countries noted incidents of victims being improperly informed about their protection entitlements, the reasons for and the duration of their stay. Examples were offered of victims who had been told their stay would be for a few days, being subsequently held for many months without being updated as to their situation during this period.[110] Some comments made during consultations imply that not fully informing victims of their rights may be deliberate. One respondent said that if victims were given too much information they might wish to flee. Respondents in two other countries explained that it can be problematic when victims become aware of their rights (for instance, when they are informed of them by NGOs) as they realise that they do not have to stay in shelters and may make complaints. It was also noted that after being admitted into shelters, some victims are even unclear as to whether they are there because they are victims or perpetrators.

Concerns about consent are acute in the case of foreign victims. Adult victims who are citizens, may be able to refuse admission to a shelter and have recourse instead to welfare systems and family networks. For those in irregular migration situations, where the alternative is to be placed in immigration detention, the choice to enter a shelter or not, is not a meaningful one. Furthermore, for all victims, regardless of their status, even where an initial consent procedure does take place, no evidence could be found that informed consent processes are undertaken on a continuing basis, and mechanisms to practically respond to the retraction of consent are lacking.[111] In the case of children, laws allowing authorities to take children into custody, mean that minors effectively have no meaningful choice about being placed in shelters. Across all countries where fieldwork was carried out, the response to queries about what steps are taken when a victim declares that they do not wish to remain in a shelter and/or participate in cases against traffickers, was that they are persuaded to stay.

Photographer: Kristen Sturdivant / Unsplash

102 This discrepancy is often a legacy of the fact that counter-trafficking models have been derived on the basis of frameworks used to address sexual exploitation of women.

103 Human Rights Committee, General Comment No. 27: Freedom of Movement, UN Doc CCPR/C/21/Rev.11 Add.9 (2 November 1991) [1].

104 Article 6(5) of the Trafficking in Persons Protocol.

105 See: OHCHR Principles and Guidelines; Explanatory Report to the European Trafficking Convention.

106 See for instance, Section 29 of the Thai Anti-Trafficking in Persons Act (2008); Section 17-A of the Republic Act 9208 of the Philippines (as amended by Republic Act 10364 of 2012).

107 Regional Review on Laws, Policies and Practices within ASEAN relating to identification, management and treatment of victims of trafficking, especially women and children (ASEAN Secretariat, October 2016) 116.

108 MDT Operational Guidelines for the Protection of Victims of Human Trafficking (Bureau of Anti-Trafficking in Women and Children/ Japan International Cooperation Agency, 2013) 30. There is no description of how consent is withdrawn or renewed.

109 Thailand uses an information form to inform the victim of his or her right to be protected. The victim is required to sign the Thai version and it is not clear whether the form is available in relevant languages or whether the content of the form is always explained in a language the victim understands.

110 However, one respondent noted improvements in this respect, with authorities reportedly getting better at not misrepresenting the duration of stay to victims they screen.

111 Policy exceptions can be found in the Bilateral Standard Operating Procedures between the Government of the Republic of the Union of Myanmar and the Royal Government of the Kingdom of Thailand: Management of Cases and the Repatriation and Reintegration of Victims of Trafficking. Where a victim from Myanmar refuses to remain in a shelter, Thai authorities are to inform the victim of the risk of deportation, require the victim to sign a declaration of voluntariness to leave the shelter, and refer the victim to an immigration detention centre and follow procedures for special needs cases in cooperation with authorities in Myanmar. In Cambodia, Minimum Standards on Residential Care for Victims of Trafficking and Sexual Exploitation (2014) victims have the "right to refuse services at any time, especially for adult trafficked persons, including before and after entrance into the facility." Article 4 of Minimum Standards on Residential Care for Victims of Trafficking and Sexual Exploitation (2014) 11. Article 5 of that document explicitly refers to 'freedom of movement'.

Table 1: Summary of perceived protection barriers to free movement of victims

Perceived barrier	Assumptions behind barrier	Factors fuelling assumptions	What is needed to overcome perceived barrier
"Traffickers will harm or threaten victims."	> Victims who can move freely will be injured, killed or dissuaded from testifying against traffickers. > Victims are safe from traffickers/ influence in shelters.	> Actual and hypothetical incidents of traffickers harming victims outside of shelters. > Actual and hypothetical incidents of sheltered victims being influenced by traffickers or their associates.	> Routine and ongoing risk assessments conducted by law enforcement with involvement of individual victims, to identify and mitigate credible and specific risks. > Law enforcement capacitated in risk assessment and mitigation. > Law enforcement capacitated in victim-centred, rights-based and trauma-informed approaches to engaging with victims.
"Victims need to be protected from themselves."	> Victims who can move freely will make poor decisions, run away and return to traffickers and/ or exploitative forms or conditions of work.	> Actual and hypothetical incidents of victims running away from closed shelters or attempting to. > Heavy focus on sexual forms of exploitation and female victims. > Paternalistic and patriarchal gender norms and expectations about what is in victim's best interest.	> Strong understanding of human trafficking and its root causes, including gender dimensions. > Strong understanding of victim-centred and gender-sensitive approaches. > Strong understanding of the irrelevance of consent in identifying and investigating trafficking in persons. > Implementation of policies on non-criminalization and non-punishment of victims of trafficking.

Table 1: Summary of perceived protection barriers to free movement of victims

Perceived barrier	Assumptions behind barrier	Factors fuelling assumptions	What is needed to overcome perceived barrier
"Society needs to be protected from victims of trafficking."	> Victims who can move freely will disappear into the community and potentially engage in criminal and/or amoral activities.	> Subjective value judgements, particularly about gender norms and expectations. > Conflation of migration control agenda with trafficking response. > Misidentification and sheltering of undocumented migrants as victims of trafficking.	> Reflection periods and temporary protection visas available for foreign victims of trafficking. > Case management systems for individual victims, supported by adequate number of social workers capacitated and incentivized to work with victims of trafficking. > Strong understanding of transnational trafficking and linkages with migration routes. > Strong understanding of root causes of trafficking, including vulnerability of migrants. > Strong understanding of victim- centred and gender-sensitive approaches.

Protection from traffickers

Across the study countries, the most commonly encountered policy argument in favour of restricting movement of victims was that it is necessary for their protection from traffickers and others who may have been involved in their trafficking, including brokers or family members.[112] Threats posed by traffickers to shelter residents (and staff) have been reported anecdotally in several countries, both within the region and beyond. These have included incidents of traffickers lurking around shelters, or throwing mobile phones into compounds in a bid to access victims. A recently published example involved people from a brothel trying to gain access to a victim of forced prostitution, who were prevented from doing so by shelter staff.[113] Examples such as these point to the serious threats to the physical safety that may exist both for victims and shelter staff.

Incidents that happen somewhere cannot be taken as license to apply general restrictions on movement of all victims everywhere, but in practice, restriction of movement is not exceptional but general.[114] Alternatives to restricting movement, such as explaining security risks and equipping victims with phones and emergency numbers, are often not considered or ruled out before more severe restrictions are imposed. Where 'protection from traffickers' is asserted as rationale for restricting movement, it is not offered on the basis of individual risk assessments that point to credible threats posed by specific traffickers to specific victims.[115] Indeed, the general or even hypothetical nature of the threat is confirmed by the fact that police often play no role in identifying credible threats or mitigating them, leaving victim protection exclusively in the domain of shelter staff.[116]

Protection from themselves

Concern that victims will run away and return to their trafficker is a commonly used argument for restricting their movement. Such rationale is particularly applied in the case of victims of trafficking for the purpose sexual exploitation; similar concern about victims of trafficking for the purpose of forced labour in factories returning to that work was not expressed. This discrepancy between forms of exploitation victims were subject to may be context specific and relate to the illegality of and stigma surrounding sex work; other forms of exploitation may raise similar concerns in other contexts, for instance where victims are exploited in criminal activities.[117] This rationale that 'victims need protection from themselves' is not only found within the ASEAN Region, but elsewhere too. In the United States, some proponents of placing victims in secure detention facilities, cite these as the only way of keeping minor victims of domestic sex trafficking—who may be defiant and opposed to treatment—from running away and returning to the pimps they are often attached to.[118]

Aside from the type of exploitation playing a role, there is also a gendered dimension to this argument.[119] Discussions with State and non-State actors revealed an attitude that female victims are more in need of protection than males, and less competent to make decisions about their own safety. This has been expressed as a form of infantilization of the victim and her choices, such that restrictions are placed on women or girls to correct their 'deviant' behaviour,[120] with 'unruly' women and girls considered 'in need of reform', with "detention as a mechanism to 'correct' wayward women and to produce docile bodies."[121] Such attitudes emerged in the survey discussions for this Study, in the language of victims being able to be 'trusted', the need for 'attitude adjustment' and 're-education', and in distinctions drawn between 'real' victims who did not want to do sex work, and 'artificial' victims who did such work willingly and tried to run away.

One NGO representative explained that victims of sexual exploitation who do not see themselves as victims, may need their 'values' to be aligned with what is right. Another stated that there was a need to be stricter with females, who have a higher tendency to run away to look after their children. These comments highlight both the role that gender plays in judging a victim's behaviour, and the ongoing confusion surrounding the concept of consent in understanding trafficking in persons.[122]

Confining victims does not necessarily achieve its purpose of preventing them from return to their previous situation. Restrictions may rather incentivize them to escape situations that may mirror the control they experienced before, or conversely, the relative freedom they had before being placed in a shelter may urge them to escape. Some victims experience shelters to be like 'prisons' or detention centres.[123] The fact that victims may prefer to return to their exploitative situation rather than remain in a shelter, points to the significant scope for shelters to improve, to become places that victims want to be.

Punishments meted out on residents for transgressions of rules and regulations that have been justified as protective measures, may instead reinforce the feeling that detention is punitive.[124] Physical measures take a variety of forms, from gates and guards, to high walls and fences, locked doors and barbed wire. More subtle means of controlling victims and deterring them from running away include banning privileges such as watching TV or participating in parties.[125] Isolation, both in terms of geography and by limiting contact with the outside world by restricting and monitoring access to phone calls and visitors were also cited. The victim's lack of familiarity with the surrounding environment is also considered a means by which they are deterred from leaving.

112 In relation to the threat posed to family members, one NGO shelter respondent commented that sometimes parents are purposefully not informed that their child is in a shelter as they may influence them to attempt to leave.

113 Rebecca Surtees, Reintegration in the Greater-Mekong Sub-region (NEXUS Institute, 2017) 78.

114 For instance, in Singapore, authorities permitted freedom of movement outside the shelter for most residents, but restricted movement for any residents deemed to be under physical threat or in need of psychological care. US State Department, Trafficking in Persons Report 2017.

115 Also see Why Shelters? Considering residential approaches to assistance (NEXUS Institute, 2008) 19-20 referring to security being used to justify closed shelters in Europe, notwithstanding that such concerns may not be in relation to specific threat assessments conducted for individual victims.

116 In one country, police confirmed that protection is the responsibility of the shelter director, and that police neither inform the director of threats nor expect to be consulted in decisions about the victim's movement.

117 A Vietnamese victim of trafficking for exploitation into cannabis cultivation in the UK said that he was not released from detention "because they say if I go out, I will make cannabis again. Every judge say [sic] this." Trafficked into Detention: How victims of trafficking are missed in detention (Detention Action, November 2017) 11.

118 Krystle M. Fernandez, 'Victims or criminals? The intricacies of dealing with juvenile victims of sex trafficking and why the distinction matters' Arizona State Law Journal, 859-890, 883.

119 An ethnography in Bangladesh concluded that gender-based discourses subjectively determine what an 'ideal' victim is and seek to regulate, direct and rehabilitate the desires of females to break patriarchal norms. See Diya Bose, "'There are no Victims Here": Ethnography of a reintegration shelter for survivors of trafficking in Bangladesh', Anti-Trafficking Review, Issue 10, 2018, 139–154. A study in Israel found that even in open shelters, movement of women and men was differentiated; there were more liberal rules relating to the men's freedom of movement than in the women's shelter, who were allowed out at more restrictive times. Daphna Hacker, Yaara Levine-Fraiman and Idan Halili, Ungendering and regendering shelters for survivors of human trafficking, Social Inclusion, 2015, Volume 3, Issue 1, 35-51.

120 Anette Brunovskis and Rebecca Surtees, 'Agency or Illness — The Conceptualization of Trafficking Victims' Choices and Behaviours in the Assistance System, Gender Technology and Development, Vol 12, Issue 1, 2008, 53-78.

121 Maggy Lee, 'Gendered discipline and protective custody of trafficking victims in Asia' Punishment and Society 2014, Vol. 16(2) 206-222, 213.

122 Siddharth Kara, Modern Slavery: A Global Perspective (UNODC, 2014).

123 For instance, a 2014 study in Malaysia found that victims felt their confinement to shelters and their 24-hour supervision made the government shelter prison-like; one victim described the experience to being similar to being locked up by traffickers. This feeling was exacerbated by the fact that victims were not allowed to leave the premises and earn and income and had restricted visits. Wan Nur Ibtisam Wan Ismail, Raja Noriza Raja Ariffin, and Kee Cheok Cheong, 'Human Trafficking in Malaysia: Bureaucratic Challenges in Policy Implementation, Administration and Society (1 May 2014) 1-20, 12-13.

124 Maggy Lee, 'Gendered discipline and protective custody of trafficking victims in Asia' Punishment and Society 2014, Vol. 16(2) 206-222, 213.

125 Similarly, an Israeli study found that contracts signed by residents included sanctions for violations including temporary revocation of the right to leave the shelter and to pocket money. Daphna Hacker, Yaara Levine- Fraiman and Idan Halili, Ungendering and regendering shelters for survivors of human trafficking, Social Inclusion, 2015, Volume 3, Issue 1, 35-51.

Others noted financial control by withholding victims' money, documents and other possessions. Uniforms may also impact on how free a person psychologically feels him or herself to be (and it was noted at one shelter, can assist in quickly identifying victims who leave without permission). Also, commented upon was the general fear instilled within them about what might happen if they leave, not only at the hand of traffickers, but also by robbers and other hostile predators.

The extent to which some victims have felt themselves to be confined against their will in prison-like conditions, is most acutely borne out in examples provided of victims who have attempted to escape by drugging or running at shelter staff; setting fire to shelter property in an attempt to be cast out of shelters; drinking shampoo or otherwise self-harming in order to be transferred to hospital; trying to slip or throw notes to passing members of the public asking for help to escape; resorting to help from traffickers or smugglers to escape to whom they become indebted or are abused by; breaking bones after jumping from high fences, or even dying attempting to escape the confines of shelters. One shelter worker noted a spike in escape attempts around birthdays, anniversaries or significant cultural events, revealing the desire of victims to leave the confinement of shelters to carry on with their lives.

Photographer: Boudewijn Huysmans / Unsplash

Protection of society

Another protection risk raised as an argument in favour of restricting victims' movement and depriving them of their liberty, relates to the risks posed to society. In one respect, this argument connects to the risk highlighted above of victims returning to work that is considered damaging not just to themselves, but to society more broadly. This concern has particular relevance in cases of victims exploited in prostitution, where negative attitudes about sex work result in perceptions of victims of trafficking for sexual exploitation (particularly those who have consented to it) as having perpetrated a moral transgression that harms societal values.

Where the victims at issue are not citizens of the countries they are sheltered in, the situation becomes more complex. Lack of valid immigration status was commonly raised during consultation discussions, as a reason to keep victims in shelters.[126] In destination countries for transnational trafficking, adult victims who are citizens may not be made to stay in shelters in the way foreign victims are. The complex concerns that may fuel this societal protection argument, can range from fear and xenophobia against particular victims, perceptions about the relationship between irregular migration and criminality, the confusion between migrant smuggling and human trafficking, the conflation of migration governance and counter-trafficking response, and a host of other complex reasons.

126 Another study found that victims staying in shelters in destination countries in the Greater-Mekong Sub-region were typically not provided with legal status or documents (such as temporary residents permits) to formalize their stay. As a consequence, their movement was restricted such that some were not permitted to leave shelters for months or even years, and not able to work. Rebecca Surtees, Reintegration in the Greater-Mekong Sub-region (NEXUS Institute, 2017) 59.

Even where a victim's foreignness is not a conscious or overt factor in restrictions imposed on them, it may still play a role in decisions pertaining to them. The freedom of movement initiative for foreign victims in Malaysia is conditional on a three-part assessment of their physical health, psychological health and security. More often than not, the assessment fails on the basis of security concerns, though the precise criteria of what constitutes a security concern—whether to the victim him or herself or to society at large—is not clear. Elsewhere, where concern is expressed that undocumented victims will fall foul of the law if they are allowed to move freely outside shelters, it is not clear whether the concern is for the welfare of the victim or of society, but it is perhaps indicative that their confinement rather than their regularization is proffered as the solution.

It becomes apparent that restrictions placed on movement of victims of trafficking depend significantly on the different interests that come into play, which are influenced by whether the country is one of origin or destination for trafficking, and its migration situation and agenda.

3.2. Assistance rationale

Article 14(10) of ACTIP provides that State parties (in cooperation with other actors, where appropriate) are to provide care and support to victims, including appropriate housing, counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand; medical, psychological and material assistance; and employment, educational and training opportunities.[127] The same requirements are very often mirrored in national law.[128]

The assertion that victims have the, right, to be sheltered in order to receive services, is a common response to the question as to why they are placed in and confined to shelters. The assumption underpinning this rationale (combined with the protection arguments presented above) is that shelters are the most appropriate venue for such services to be provided, not to mention the most economic and resource-efficient. In some contexts, this may be true, particularly where social welfare services outside of the shelter care system are inadequate to meet the needs of vulnerable groups or are inaccessible to some, including victims in irregular situations. However, this argument does not support confining victims in shelters, but rather speaks to the need to remove barriers vulnerable people face in accessing services outside of them, including psychological support, educational and employment opportunities.[129]

The dearth of specialized services available to victims was noted across all countries. Social work and psychology are relatively new fields of study across the region, raising concerns that many social workers and psychologists are underqualified and overburdened, and are too few in number to effectively meet the needs of victims. Increasing the number and strengthening the capacity of specialists is imperative for shelter care, particularly to reduce the additional burdens on staff by shelter models requiring them to restrict the movement and liberty of people they are mandated to assist.

127 This provision closely mirrors article 6(3) of the Trafficking in Persons Protocol. Legislative provisions providing for victims of trafficking to be informed about their rights are not yet in place in Brunei Darussalam, Malaysia or Singapore. Regional Review on Laws, Policies and Practices within ASEAN relating to identification, management and treatment of victims of trafficking, especially women and children (ASEAN Secretariat, October 2016) 81.

128 For instance, in the Philippines, article 23 of the Anti-Trafficking in Persons Act (Republic Act 9208) includes 'emergency shelter or appropriate housing' as a mandatory service to be provided to victims of trafficking to ensure recovery, rehabilitation and reintegration.

129 Rebecca Surtees, Reintegration in the Greater-Mekong Sub-region (NEXUS Institute, 2017) 39, 46.

Photographer: Nguyen Dang Hoang Nhu / Unsplash

Table 2: Summary of perceived assistance barriers to free movement of victims

Perceived barrier	Assumptions behind barrier	Factors fuelling assumptions	What is needed to overcome perceived barrier
"Victims need time in shelters to recover."	> Closed shelters are the best place for victims to receive assistance. > All victims recover in the same way.	> Inadequate accommodation options outside of closed shelter settings. > Inadequate or inaccessible support outside of closed shelters, particularly for foreign victims, and more costly.	> Open shelter accommodation available for victims of trafficking. > Social welfare and support services available to victims of trafficking (including foreign victims) outside of closed shelter settings. > Individual case management plans tailored to individual victims of trafficking, developed by multidisciplinary teams with involvement of victim in design and implementation. > Recovery services offered on the basis of full, meaningful and ongoing consent.
"Shelters support victim repatriation and (re) integration."	> Closed shelters are the best place for victims to await repatriation processes. > Effective (re)integration support can be provided in closed settings.	> Not all victims want to be repatriated but may prefer to remain in the destination country. > Inadequate understanding that successful reintegration in countries of origin or integration in destination countries or elsewhere is part of long-term, comprehensive support.	> Repatriation and (re)integration plans tailored to individual victims, with group repatriation avoided to guard against arbitrary and indefinite detention of individuals. > Bilateral cooperation to reduce delays in repatriation, including through bilateral case management systems. > Reflection periods and temporary protection visas available for foreign victims of trafficking. > Sheltered victims of trafficking (including foreign victims) provided with opportunities to work and study outside of shelters, on a non-discriminatory basis.

Recovery

Recovery of victims is represented as a key function of trafficking shelters. This can take many forms, including psychological and psychosocial care and treatment, or therapeutic activities that are provided in shelters, such as art or music therapy, or in the case of one NGO shelter visited, 'primal' therapy.[130] Depending on the shelter, its mission and how it understands recovery and 'rehabilitation', religious studies may also be offered as a part of the package of services victims are provided and influence how shelter care is approached and even how successful recovery is measured.[131]

Whether shelters and the restrictions on movement imposed therein aid or hinder victim recovery is a question that cannot be answered in general terms. Some practitioners assert that requiring victims to adapt to regimented rules is useful to their post-trafficking recovery. Others hold an alternative view that shelters need to adapt more to victims themselves, for instance by letting children and teenagers live and act in accordance with their age. One practitioner stated that shelters need to adapt to victims, for instance, by not imposing abrupt and regimented changes in lifestyle on victims who may for instance be used to sleeping during the day and being awake at night.

A major focus of recovery services for victims is on vocational and skills training, with a range of examples offered including accounting, farming, gardening, jewellery making, housekeeping, motherhood skills, motorbike repair, sewing, typing and weaving. In relation to activities that can generate profit for victims, no interviewees represented these as providing a viable income, but rather as 'giving victims something to do.' In the Philippines it was noted that sheltered victims are not allowed to work, but on an ad hoc basis, can make basic things (baked goods, dishwashing liquid and shampoo were examples offered) that they could sell to shelter staff or visitors for extra pocket money.

130 See http://www.preda.org/media/research-documents/emotional-release-therapy/

131 Some non-governmental shelters have overt religious agendas or affiliations and some State shelters provide religious services. The fieldwork conducted for this study did not specifically address the question of the impact of closed and other shelters on victims' right to freedom of religion and belief (ICCPR article 18).

A widely known program of income generation is that provided by Baan Kredtrakarn in Thailand, where victims make various products (including baskets, embroidered cushions and the like), which are sold both at the shelter and in other locations in Bangkok. Victims reportedly receive 75% of the sale price of products they make,[132] which is given to them when they leave or upon their request at the discretion of shelter staff. Malaysian State and non-State service providers have also tried a range of innovations. One shelter tried introducing an assembly line for condiments for a fast-food chain, and another for deboning anchovies. These programs have proven largely unsuccessful, owing to challenges associated with establishing and maintaining them.

In relation to these challenges, respondents from different countries noted that sustainability is difficult to achieve with companies and consumers unable to rely on delivery of a product given that there may not be enough victims for assembly lines to sustain output or to meet demand for handmade or assembled products. Questions were also raised about the legality of such work where victims lack migration status and work permits, and about the ethics of their yielding less than minimum wage, and about how to fairly distribute income generated. One respondent raised the concern that where not set up correctly with appropriate safeguards in place, income generation activities may even have elements of forced labour.[133] Particularly in shelters that are closed and where coercion and intimidation may be commonplace, there is indeed a risk that participants may not be fully and meaningfully consenting, but may be coerced into participation. Not having direct access to the income generated from their work (where profits are kept by the shelter until the victim is released), is also an indicator of concern.

132 The Special Rapporteur on Trafficking in Persons reported that residents receive only $6.40 upon their departure from the shelter. Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, Mission to Thailand, UN Doc A/HRC/20/18/Add.2 (2 May 2012) [48-49]. Shelter staff presented the percentage as 70%.

133 Forced or compulsory labour is defined by Article 2 of the ILO Forced Labour Convention (No. 29) as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." ILO explains that this may include situations in which persons are coerced to work through the use of violence or intimidation, or by more subtle means such as accumulated debt, retention of identity papers or threats of denunciation to immigration authorities. See: http://www.ilo.org/global/topics/forced-labour/news/WCMS_237569/lang--en/index.htm

Some skills training programmes have proven effective. For instance, a Laotian man trafficked to Thailand for labour was trained as an electrician while receiving shelter assistance in Thailand. He subsequently praised that training for offering him a skill he could transfer to his home village to find work as an electrician.[134] However, very often, such programs are not designed on the basis of the economic and market realities of the communities that victims are returning to. This was a commonly raised concern across the study countries; examples offered included a girl whose foot spa training was not marketable in her farming community, a man who was provided with livestock but not trained to care for it, and other victims being returned to small, poor villages that offer no market for selling accessories or pastries or providing motorbike repairs.

Furthermore, the training provided is not always adapted to individual interests and aptitudes of the individuals.[135] One respondent noted that activities are very often not suited to the age of the beneficiaries; in listing sewing, praying, and other activities offered to teenage victims in shelters, she commented: "you have to be over 60 to want to do this." In contrast to this, was the 'KFC therapy' mentioned by another respondent, who emphasised that letting teenagers be teenagers is fundamental to their recovery.

Another concern raised was that activities available for residents in shelters are heavily gendered.[136] While respondents noted that effort is made to tailor activities to individuals this was often within gendered parameters; women are offered vocational training in skills traditionally associated with women, such as weaving, massage, sewing, cooking and handicrafts that may not correspond with their individual ambitions or abilities. When combined with discussions above of girls perceived as 'wayward', activities may even have a gender-oriented 'rehabilitative' agenda.[137]

134 Rebecca Surtees, Reintegration in the Greater-Mekong Sub-region (NEXUS Institute, 2017) 24, 53.

135 Examples offered in a recent study include that of a Laotian girl learning cooking, weaving and beauty skills while in a shelter in Thailand, even though she wanted instead to study; and a victim from Myanmar who reported that "I learned sewing with a sewing machine. I didn't do well as I was unenthusiastic..." and upon returning to Myanmar considered her training to be useless in equipping her with skills to find a job or run a business. Rebecca Surtees, Reintegration in the Greater-Mekong Sub-region (NEXUS Institute, 2017) 57.

136 Author's own observations, and Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro: Mission to Malaysia, UN Doc A/HRC/29/38/Add.1 (15 June 2015) [59]; Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, Mission to Thailand, UN Doc A/HRC/20/18/Add.2 (2 May 2012) [48]. Also see Daphna Hacker, Yaara Levine-Fraiman and Idan Halili, Ungendering and regendering shelters for survivors of human trafficking, Social Inclusion, 2015, Volume 3, Issue 1, 35-51, 43, in which it is discussed that vocational courses on beauty and sewing were replaced by courses in computer skills.

137 See for instance, Diya Bose, "'There are no Victims Here": Ethnography of a reintegration shelter for survivors of trafficking in Bangladesh', Anti-Trafficking Review, Issue 10, 2018, 139–154 and Elena Shih 'The anti-trafficking rehabilitation complex: commodity activism and slave-free goods' (19 August 2015) https://www.opendemocracy.net/beyondslavery/elena-shih/antitrafficking-rehabilitation-complex-commodity- activism-and-slavefree-goo

Fieldwork discussions confirmed this possibility; one NGO worker spoke of rehabilitation programs as a means of restoring 'feminine dignity.' Sport was noted as an activity for boys by some shelter staff, yet the lack of options to play sport was flagged as one reason adult African women were unhappy to be accommodated in a shelter catering for Asian teenaged girls.

Another side of the gendered approach taken to recovery programs in shelters, is that males may not have access to the same or equivalent services that females do, whether because they are not placed in shelters in the first place, or because the shelters they are in do not provide such services. Two respondents noted the particular interest that donors have in shelters for female victims of sexual exploitation, that can result in inadequate services for men. However, as will be discussed below, reintegration of men including through their placement in the workforce is very often given more attention, with comparatively less attention given to finding employment opportunities outside shelters for women.[138]

There is much commendable work being undertaken by State and non-State service providers to innovate activities so that victims' time in shelters is not wasted, but is productively spent. Yet none of these activities—whether effective in their recovery or not—provide justification for restricting freedom of movement to victims of trafficking. Indeed, in some cases, shelter stays are detrimental to their recovery.[139] These findings speak to the need for victims to participate in designing programs for their recovery, and to ensure that any services offered to them are provided on the basis of full and meaningful consent.

138 A recent study in Israel showed that residents of the shelter for men do not receive the therapeutic support that residents of the women's shelter received, but that significant effort is placed on reintegrating men into the labour force with less attention given to doing likewise for women. Daphna Hacker, Yaara Levine-Fraiman and Idan Halili, Ungendering and regendering shelters for survivors of human trafficking, Social Inclusion, 2015, Volume 3, Issue 1, 35-51.

139 For example, a girl from Myanmar who had been trafficked into prostitution in Thailand explained her distress at being kept for a long time in a shelter to researchers conducting a study on reintegration and rehabilitation in the Greater-Mekong Sub-region: "It was very disappointing because we wanted to go home and we were not even allowed to call home. My friends and I yelled at the teachers 'Why do you keep us here? Why don't you send us home?'" Rebecca Surtees, Reintegration in the Greater-Mekong Sub-region (NEXUS Institute, 2017) 36

Repatriation and (Re)integration

Shelter programs in destination countries often make little distinction between the immediate short-term care that a person may need in a shelter to recover, and the longer-term care needed for successful reintegration or integration. The type of shelter that may be critical in the short-term, may be ineffective or even detrimental in the long-term. Sustainable reintegration or integration requires that victims be returned home to their family or community—whether in the country of origin, the country of destination, or elsewhere—or that sustainable alternatives be identified.[140]

The practical challenges associated with achieving effective repatriation of foreign victims and their reintegration can further prolong shelter stays, as authorities in countries of origin conduct nationality confirmation, family tracing and assessment prior to their repatriation. Further delays can result when the goal is to return victims in groups rather than individually, meaning that some victims who are ready to be released from shelters and repatriated home, are instead kept in shelters as procedures are completed for other victims.

A promising practice to address procedural delays can be seen in the bilateral arrangements reached between Myanmar and Thailand under their bilateral MOU, to put in place operating procedures to facilitate the return of victims from Thailand to Myanmar.[141] In response to challenges identified by both countries, the procedures put in place mechanisms through which government counterparts can collaborate to address delays and expedite return through visits of case workers from Myanmar to victims in Thai shelters, as well as at an official level through case management meetings.

140 Alternative options may include subsidized housing options, housing allowances, accommodation with extended families/kinship care, foster care, small group homes or semi-independent living Rebecca Surtees, Reintegration in the Greater-Mekong Sub-region (NEXUS Institute, 2017) 23

141 Bilateral Standard Operating Procedures between the Government of the Republic of the Union of Myanmar and the Royal Government of the Kingdom of Thailand on Management of Cases and the Repatriation and Reintegration of Victims of Trafficking. Also see: https://www.mmtimes.com/news/guide-fighting-human- trafficking-unveiled.html

For the Philippines, the presence of Filipino diplomatic missions and other services for Filipinos in situations of distress abroad can provide an avenue for shelter (at least for female victims) prior to repatriation that does not result in their staying in trafficking shelters or other facilities managed by authorities in destination countries. While such support can expedite their repatriation, their movement in such facilities may nonetheless be restricted, and they may be denied entitlements as victims of trafficking, where they are encouraged to simply be deported as undocumented migrants rather than pursue lengthy trials against traffickers.

In recent years, increased consideration has been given to (re)integration, including through efforts to enable victims to work. Several respondents emphasized the importance of work for both recovery and reintegration; victims have little incentive to remain in a shelter if they cannot work where they have dependent children or parents and where some will be vulnerable to re-trafficking if they are repatriated without money to pay off debts. In the Philippines, where there is no dedicated State program to provide work opportunities for sheltered victims, victims are able to apply for a grant of 10,000 pesos (approximately USD$190) intended as capital for livelihood development after they leave shelters. The number of people who have received this grant was said to be 'high' but could not be confirmed. Respondents noted that in the absence of mentoring and capacity building the grant is unlikely to be invested in a way that evolves into a sustainable livelihood. An example was offered of a victim who used her capital to purchase foot spa equipment, which was quickly ruined after treating farmers who work barefoot. Respondents did not consider this grant to be effective in making victims amenable to waiting for court processes, while their families struggle to survive in their absence, and underlined the importance of providing them with employment opportunities while they support criminal justice processes.[142]

142 Some examples of foreign adult women being allowed out of State shelters for occasional work opportunities were noted, though these women were generally not trafficked persons but in other difficult situations, including recognised refugees whose shelter stay has become indefinite.

There are several promising practices in the ASEAN region to promote work opportunities for victims, including those who are foreign.[143] In Thailand, victims may access temporary residence cards with the right to work outside the shelter for the duration of their legal proceedings.[144] While the right is not granted uniformly, there have been positive experiences of this right being exercised in practice. A Cambodian man was reportedly in a shelter for three months and able to legally work while court proceedings were ongoing, enabling him to earn money before being repatriated to Cambodia, thereby easing his economic concerns and aiding his reintegration. At the time field work was conducted in Thailand, some 32 residents (approximately half) of Prathumthani shelter were working outside of the shelter, with shelter staff and employers facilitating their transport to and from their various places of work in the vicinity, mainly construction sites. In 2012, the Special Rapporteur on Trafficking in Persons noted that the Songkhla Centre for trafficked men allows residents to work in construction outside the Centre if they wish not to take vocational training.[145] In 2016, 196 victims (of the 561 in government shelters) were working outside shelters,[146] a marked increased from the 58 work permits granted in 2015 (during which time 497 victims were housed in government shelters, 345 of whom were non-Thai).[147]

Concerted efforts have also been undertaken in Malaysia to place foreign victims of trafficking into employment. However, of those victims who have been granted the right to free movement (more than 90 people as at the time fieldwork was being conducted) and are therefore eligible to work, only two were granted work permits in the first quarter of 2018.[148] Malaysian experiences have revealed that well-meaning efforts may be hampered by practical limitations, including bureaucratic barriers,[149] third party failure to provide documents required to enable work permits to be issued, and the lack of interest that victims may have to remain in the country, and/or to do legitimate jobs for less money than they were making on the informal market, or to work only for a short period of time while awaiting repatriation, or to do jobs that they may not wish to do.[150]

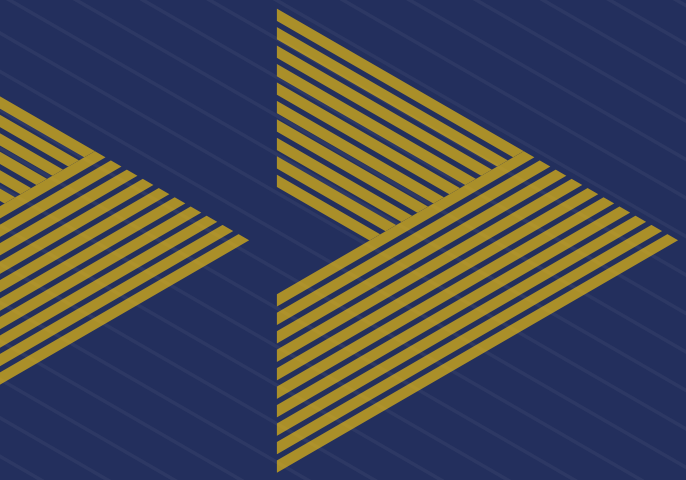
Other challenges encountered include the mismatch of skills and interests with opportunities, language barriers, health and disability issues. Further, some work programs depend on companies to provide opportunities as part of their corporate social responsibility rather than in the interests of profit, as are not served when employees fail to come to work, which has happened. Protection and enforcement concerns are also raised if people disappear, as has also happened. Valuable lessons learnt from these experiences need to be captured and shared.

A notable discrepancy in the application of the right to work in practice is evident between men and women victims. In Thailand, one reason offered for why female victims are not exercising the right to work to the same extent as their male counterparts are, included the fact that they are lazy and do not want to work and have not requested to do so. Yet, in contrast, others in the same country reported that the lack of enjoyment of the right to work resulted in desperation of women and girls to leave shelters to find gainful employment with which to support their families.[151] Another reason relates directly to the protection considerations raised above, being the concern that a woman who has been exploited in prostitution will simply return to that work. There is less concern about men returning to forms of labour in sectors that they were previously exploited in.

This gender dimension to restrictions of freedom of movement is evident not just in ASEAN but also elsewhere. A study in trafficking shelters in Bangladesh found that aspects of sheltering equate to 'disciplining' 'deviant' women, with shelter staff viewing particularly 'lower class' women as more vulnerable to 'moral' dangers and frame the type of work they are able to pursue accordingly.[152] Similarly, in a 2015 study conducted in shelters in Israel, shelter staff justified the restrictions on freedom of movement on the basis that a stable routine is crucial for the process of recovery.

While the men were perceived as already possessing life-skills of order, self-organization and self-discipline, women were perceived as needing to be socialized with these skills, justifying the more severe restrictions placed on their movements to and from the open shelter.[153] While some people interviewed the present Study pointed to the heightened pressure on men to return home with money, examples were also given of women who are depended on by their families. The point to emerge is that needs must be determined and opportunities offered on the basis of individual and non-discriminatory assessments conducted in consultation with the person concerned.

In respect of opportunities to study, several good practices are evident. Thailand does not deny education to children on the basis of migration status meaning that some children in NGO shelters are attending school on a regular basis. Similarly, in the Philippines, about half of the girls at one NGO shelter visited are attending schools, with social workers present to ensure their well-being. Examples in the Philippines were also provided of post-shelter study support for trafficking victims. An NGO in the Philippines explained how it provides victims with a bank card and deposits money into accounts on a monthly basis while they are attending school, to give them some independence. A victim of trafficking for online sexual exploitation is reportedly a beneficiary of such support, and has become an outspoken advocate against exploitation while attending college.



143 In Brunei Darussalam, foreign victims may be eligible for temporary work passes, but it is unclear how many victims have received these. Trafficking in Persons Report 2017 (US Department of State), Brunei country report. In Singapore, a Temporary Job Scheme (TJS) allows for 'special pass' holders (migrant workers or foreign nationals involved in a police investigation or with a legal case, and whose work passes have been cancelled by employers) to work in certain sectors such as factory or domestic work. The conditions under the TJS are aligned to the main work pass framework and subject to the employer's willingness to hire them.

144 Section 37 of the Trafficking in Persons Act (BE 2551, 2008).

145 Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, Mission to Thailand, UN Doc A/HRC/20/18/Add.2 (2 May 2012) [44].

146 Trafficking in Persons Report 2017 (US State Department, 2017) Thailand country narrative.

147 See: Trafficking in Persons Report 2016 (US State Department, 2016) Thailand country narrative; Anti- Trafficking in Thailand: A Stakeholder Analysis of Government Efforts, the US TIP Report and Rankings, and Recommendations for Action (Johns Hopkins Bloomberg School of Public Health, 30 June 2016) 86.

148 State respondent interview with author.

149 See: Concluding observations on the combined third to fifth periodic reports of Malaysia, UN Doc CEDAW/C/MYS/CO/3-5 (9 March 2018) [25].

150 AAPTIP was informed of one victim feeling uncomfortable accepting a job in an environment that reminded her of her trafficking experience.

151 The urgency of work has resulted in victims seeking ways to leave shelters or opting to be repatriated as quickly as possible, sometimes resulting in their detention in an Immigration Detention Centre to await repatriation. See: Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, Mission to Thailand, UN Doc A/HRC/20/18/Add.2 (2 May 2012) [48-49].

152 Diya Bose, "'There are no Victims Here": Ethnography of a reintegration shelter for survivors of trafficking in Bangladesh', Anti-Trafficking Review, Issue 10, 2018, 139–154.

153 Daphna Hacker, Yaara Levine-Fraiman and Idan Halili, Ungendering and regendering shelters for survivors of human trafficking, Social Inclusion, 2015, Volume 3, Issue 1, 35-51, 39.

Other victims (in both countries) participate in alternative learning systems within shelters, attending schools outside of the shelter occasionally as required. Respondents spoke of some of the challenges encountered in integrating children into schools: foreign children may face language barriers, and social workers offered incidents of behavioural issues at school where girls who had been exploited in prostitution would boast of their experiences to other students. Security issues were also flagged. In one incident, a girl's classmates posted a group photo on Facebook, raising concerns about her safety. While the majority of victims in Filipino shelters are Filipinas, there have been incidents of identified foreign victims (respondents mentioned China, Ethiopia, Indonesia and Russia) being placed into shelter care. Where repatriation to origin countries is not possible or is delayed, they may have to remain in shelters indefinitely. While the right to schooling is the same for non-citizens, practical language and cultural barriers may result in children being educated in shelters.

The positive examples of victims who are participating in society through school and work can be leveraged towards adapting models for general, rather than exceptional application. The rationale that reintegration can be supported by restrictions of movement and confinement of victims to shelters is fundamentally flawed. Educational and work opportunities that are confined within shelters deny several facets of reintegration to victims of trafficking.[154] As one survey respondent said: "I struggle to see how we can reintegrate people into society while keeping them away from society."[155]

154 Studies of reintegration of victims of trafficking in Europe found that empowerment is a key component of supporting victims of trafficking "to fully recover and aspire to their full human capability, including living a meaningful and dignified existence and manifesting their true potential in communities." R.L. Curran, MA, J.R. Naidoo, PhD, G. Mchunu, PhD, 'A theory for aftercare of human trafficking survivors for nursing practice in low resource settings' Applied Nursing Research 35 (2017) 82-85, 84.

155 Respondent interview with author.

3.3. Prosecution rationale

Interviewees across the three countries where fieldwork was carried out, emphasized the crucial role of victims in criminal justice processes. Indeed, victims are almost always the most important or even the sole evidence in investigations and prosecutions of human trafficking, without whom there would be no case against traffickers.[156] The essential role that shelters play in prosecutions is borne out in the fact that almost all respondents mentioned the duration of cases against traffickers as the factor determining the duration of a victim's stay in a shelter, rather than the victim's protection and assistance needs.

According to this rationale, restrictions on movement serve the dual purpose of firstly, ensuring their availability to participate as witnesses, and secondly, protecting their testimonies from interference by those against whom they are testifying. In the case of foreign victims, this argument may also be linked with their lack of legal status as victims.[157] Indeed, the application of witness protection frameworks—as in the good practice noted in Northern Thailand of victims being accommodated in secure, but open locations in rented accommodation—become more complicated when victims are in irregular situations, and would require the use of residence permits.

156 Evidential Issues in Trafficking in Persons Cases: Case Digest (UNODC, 2017).

157 There have been cases for instance, of victims of trafficking being arrested for overstaying and subsequently having no choice but to participate in the criminal justice system. Trafficking Victims Experience Report, Malaysia (December 2015) 25-26. The study also revealed that there is a risk of foreign victims being misclassified as witnesses and placed in detention for the purpose of their participation in criminal justice procedures. For instance, when adult victims are picked up in a raid and appear to be willing workers.

Table 3: Summary of perceived prosecutorial barriers to free movement of victims

Perceived barrier	Assumptions behind barrier	Factors fuelling assumptions	What is needed to overcome perceived barrier
"Victims must be available for investigations and prosecutions."	> The purpose of shelters is to protect evidence that will be lost if victims run away. > Keeping victims on hand will strengthen investigation and prosecutions.	> Victims often not willing to testify against traffickers but prefer to receive informal compensation from traffickers. > Little benefit for victims of trafficking to participate in justice process. > Victims unable to work and earn income when in shelters and so have little incentive to remain.	> Sheltered victims incentivized to participate in criminal justice proceedings by ensuring freedom of movement and right to work. > Time limits for bringing cases of human trafficking in the first instance. > Witness protection frameworks used as an alternative to closed shelter settings. > Investigators capacitated to gather corroborative evidence in proactive, intelligence-led investigations to reduce reliance on victim testimony. > Investigators and prosecutors capacitated in victim-centred, rights-based and trauma-informed approaches to engaging with victims.
"Victims will give bad testimony or no testimony unless they are in closed shelters."	> Victim testimony is the only or best evidence available. > Victims will change their testimony or withdraw altogether if they are influenced outside shelters.	> Heavy reliance on victim testimony and inadequate capacity to gather alternative evidence. > Inadequate understanding of questionable value of testimony from an unwilling witness.	> Investigators capacitated to gather corroborative evidence in proactive, intelligence-led investigations to reduce reliance on victim testimony. > Law enforcement capacitated in victim-centred, rights-based and trauma-informed approaches to engaging with victims as a means of empowering victims to testify. > Investigators, prosecutors and judges capacitated to use pre-trial testimony and video evidence.

Availability of victim/witnesses

The reality in many countries in the ASEAN Region is that cases are not treated with urgency, notwithstanding that victims are languishing in custody. The fact that victims are kept in closed settings so investigators and prosecutors have 'evidence' on hand, has not been shown to motivate them to work harder and faster to resolve cases so that victims may carry on with their lives. Rather, the cases given priority are those that attract attention, whether from international or local media, or from advocates that victims may have among shelter staff, NGO service providers, friends or family members, who persistently follow up with authorities.

In many jurisdictions around the world, time limits are put in place for criminal justice trials, to reduce delays in adjudication, and widely accepted guidelines provide case management recommendations. In the United States for example, the National Centre for State Courts and the State Justice Initiative model standard for offences punishable by incarceration for a year or more, is for 75% of cases to be adjudicated within 90 days, 90% within 180 days and 98% within 365 days.[158] In some jurisdictions, preferential treatment is given to cases where accused persons are kept in custody.[159] That same reasoning could be applied to trafficking cases, where victims are in held in shelters.

There are positive signs that concerns about delays in criminal justice processes against accused traffickers are being recognized and addressed in the ASEAN Region. In Malaysia, a Case Management Committee of relevant agencies chaired by the Council for Anti- Trafficking in Persons and Anti-Smuggling of Migrants (MAPO) has been established to discuss cases that have not been called within the first month of a victim being issued a Protection Order to identify and address causes for delays. Malaysia also opened a specialized human trafficking court in April of 2018, with a dedicated judge appointed, with a view to have first instance cases being heard within 6 to 9 months.

There is a view to also open similar such courts throughout the country.[160] The Philippines is also experimenting with expedited trial procedures through a special court, and a circular has been issued requiring that trafficking cases be heard within 180 days.[161] In Thailand, the Anti-Trafficking Procedural Act of 2016 has reduced trial times and there have even been incidents of repatriated victims returning to Thailand to testify.[162] Bilateral cooperation arrangements between Thailand and Myanmar allow for victims to receive compensation after being returned home, sparing them from having to wait for prolonged periods in shelters for the outcome of their trials.[163] Particularly promising, is the use of the witness protection framework to accommodate victims in rented houses or apartments for the duration of investigations and prosecutions, rather than confining them in shelters.[164]

There are several opportunities to confront ongoing challenges in bringing traffickers to account. There is a clear need to strengthen investigative capacity to promote proactive, intelligence-led investigations that may reduce reliance on victim-witness testimonies. Additionally, the use of depositions so that victim-witness testimonies can be heard and recorded at an earlier stage in proceedings are also being tried in some ASEAN Member States.[165] The flipside to this possibility is that testimonies may be collected from victims who are then prematurely returned without their protection needs being appropriately screened.[165]

Video testimony, while a relatively new approach that is not yet widely used, is not legislatively prohibited, suggesting a potential avenue that can be explored as an alternative to confining victims. Malaysian law permits victims to testify remotely, though in practice, they are generally expected to remain in-country pending trial proceedings. In Cambodia, a flexible approach is taken to how and when victim-witnesses give statements, including by video-link, video recording, testifying in advance of the trial, or having a statement read by someone else. In Brunei Darussalam, the Criminal Procedure Code (2007) as amended in 2016 allows evidence by live

video or live television link for persons other than the accused whether within or outside the country where the Court is satisfied that it is in the interests of justice to do so.[167]

In the meantime and in the absence of alternative evidence, the reality is that where shelter stays are tied to court processes, the result can be that the victim-centred approach is lost, as victims are instead treated as criminal justice resources.[168] Victims are very often not given a choice about their involvement and the resulting shelter stay, notwithstanding increasing acceptance that victims should not be required to cooperate in investigations and prosecutions, but should do so on a consensual basis.[169] Even when a victim initially consents to participate, there is no mechanism by which consent can be retracted, even when criminal justice proceedings are delayed, sometimes by years. Once in shelters, victims are often not informed about the status of their case, as shelter staff themselves are also not kept up to date.[170]

Again, the purpose pursued is not necessarily served by the policy. Victims are often reluctant to provide witness testimony, owing to concerns about lengthy shelter stays and the inability to work, and wish to return home quickly and avoid bribes and intimidation from traffickers.[171] While this system of keeping 'evidence' available may reduce pressure on law enforcers, it places a heavy burden on shelter staff. While their primary responsibility should be serving the best interests of victims, they are pressured to act against those interests, by restricting movement on grounds that may or may not be legal, and risk censure if they are unable to present victims upon the request of law enforcement authorities.

158 See: Richard Van Duizend, David C. Steelman and Lee Suskin, Model Time Standards for State Trial Courts (National Centre for State Courts/State Justice Institute, 2011) 4.

159 For instance, the 6th amendment of the US Constitution, requires speedy trials for accused persons. In the state of Oregon, cases involving in-custody defendants are required to proceed to trial within 60 days. O.R.S.136.290 (2017).

160 SUKAHAM Press Statement No. 1 of 2018, Establishment of Special Court on Human Rights, 13 January 2018; Beh Lih Yi, 'Malaysia plans special court on human trafficking as cases soar' Reuters, 15 January 2018; Legal Gap Analysis of Anti-Trafficking Legislation in Malaysia (Liberty Asia, 2018) 29.

161 Memorandum Circular 151-2010. Respondents report that the duration of cases has reduced from five years to two over the past two years.

162 An example was offered of a Lao victim returning to Thailand to testify in early 2018.

163 Bilateral Standard Operating Procedures between the Government of the Republic of the Union of Myanmar and the Royal Government of the Kingdom of Thailand on Management of Cases and the Repatriation and Reintegration of Victims of Trafficking, Article 2.5.

164 However, some respondents expressed the concern that such open options may decrease victims' access to government services and enable them to return to the illicit labour market.

165 In the Philippines, Rules on Examination of a Child Witness provides for child-witnesses to be deposed as well as adults under certain circumstances set out in Section 15, Rule 119 of the Criminal Procedure Code; article 237 of the Thai Criminal Procedure Code (1995) allows for pre-trial depositions from witnesses in certain circumstances, and Section 52 of the Anti-Trafficking in Persons Act (Act 670) (2007) allows for depositions. Section 295 of Singapore's Criminal Procedure Code allows for depositions to be taken.

166 The Human Rights Committee has expressed concern about the premature collection of testimonies from victims of trafficking in Thailand, to facilitate prompt deportation without effectively screening them for protection needs. Human Rights Committee, Concluding Observations on the second periodic report of Thailand, UN Doc CCPR/C/THA/CO/2 [23].

167 See Section 236B(1) of the Criminal Procedure Code (2007) as amended in 2016.

168 Wan Nur Ibtisam Wan Ismail, Raja Noriza Raja Ariffin, and Kee Cheok Cheong, 'Human Trafficking in Malaysia: Bureaucratic Challenges in Policy Implementation' Administration and Society (1 May 2014) 1-20, 16.

169 The ASEAN Plan of Action that has been developed to implement ACTIP, allows "their views and concerns to be presented and considered" in relation to proceedings against offenders. ASEAN Plan of Action against Trafficking in Persons, especially Women and Children, section B(g).

170 Rebecca Surtees, Reintegration in the Greater-Mekong Sub-region (NEXUS Institute, 2017) 66-68; Wan Nur Ibtisam Wan Ismail, Raja Noriza Raja Ariffin, and Kee Cheok Cheong, 'Human Trafficking in Malaysia: Bureaucratic Challenges in Policy Implementation, Administration and Society (1 May 2014) 1-20, 10.

171 Trafficking in Persons Report 2017 (US State Department, 2017) 266.

As a result, their core work of assisting victims becomes more challenging as their role shifts from that of service providers to 'guards', meaning trust of victims is lost and their recovery is compromised. One practitioner gave the example of a shelter resident who wanted to attend classes at a reputed university, who was instead made to attend a more remote technical college where she could be more closely monitored. Concerns about the university's proximity to a shopping mall, the victim's potential sexual activity, as well as the risk that the case manager would face administrative charges for failing to present a witness at court influenced this decision. The practitioner expressed the view that more creative risks should be taken in the interests of victims, but the system does not allow it.

Quality of victim testimony

Heavy reliance on victim testimonies for prosecutions of suspected traffickers poses significant challenges for other aspects of the trafficking response. As victim's testimony may be the primary or even the sole evidence on which prosecutors rely; the stakes of the testimony they give are high from a prosecutorial point of view. The rationale then, for restricting the movement of victims (in addition to ensuring their availability), is to protect them from influence that may result in them changing their story or withdrawing from testifying altogether.

Some of the protectionist arguments discussed above at 3.1, are echoed here: a component of protecting victims from traffickers does not solely relate to the harm that traffickers may cause, but also the influence they may exercise. Examples were given of traffickers trying to bribe victims or their families to drop cases and gain access to victims in shelters or other facilities and as discussed above, the threat posed in some instances was offered as justification for imposing restrictions in others.

Some State actors expressed concern that victims' testimonies can change when they have access to outsiders, such as NGO workers who come to shelters and who may influence their testimony and be more trusted by victims than State actors. For this reason, shelter staff report being vigilant about unsupervised access of NGO workers to victims, or in some cases carefully monitoring them or even denying them access.

The quality of the testimony provided has another relationship with restrictions on movement in the context of protecting victims from re-traumatisation. Some social workers noted the trauma that victims might experience from having to face their exploiter, or even pass the place they were exploited on the way to the court. To mitigate this risk, a good practice pointed to is the possibility of victims providing video testimony, or being able to meet with investigators and prosecutors at the shelter. Some shelters (both State and non-State) are equipped with interview rooms for this purpose. While this step may indeed make for better testimony and be less disruptive to victims, the flip side is that victims are yet again denied opportunities to leave the shelter. Opportunities for victims to provide pre-trial testimony, while not prohibited in law are not particularly favoured in practice by prosecutors and particularly by judges. Concerns seem to attach to the veracity of testimonies, and the defendant's right to confront witnesses.

Again, the purpose pursued is not necessarily served by restricting movement. The number of victims confined for lengthy periods in shelters, has not resulted in a commensurate number of convictions of traffickers. And notwithstanding strong measures to isolate victims from being accessed by the outside world, there are reports of traffickers accessing and intimidating victims even in government-run shelters.[172]

172 See for instance: Thailand: Traffickers Access Government-run 'Shelter', Human Rights Watch, 27 June 2013, https://www.hrw.org/news/2013/06/27/thailand-traffickers-access-government-run-shelter

Far from strengthening the quality of testimonies, restrictions of movement and confinement in shelters, may discourage victim cooperation.[173] The constant availability of victims who can be re-interviewed at any time, may mean that interview processes are not conducted well. Multiple interviews do not necessarily lead to stronger evidence, but can have a detrimental effect both on the victim and his or her testimony. Victims may change their statements as they forget information, become confused or lose their initial interest in supporting authorities.[174] One NGO respondent, who advocates for shelter in apartments, stated that where victims have no choice but to testify, they very often give bad testimony. If they know that cooperation is tantamount to losing their liberty, many opt instead to not be identified as victims in the first place, and prefer to receive some compensation for unpaid wages through an informal mediation process. The result, then—contrary to the prosecutorial purpose asserted—is that testimony is lost and traffickers remains at large.

Investigating officers interviewed for the purpose of this Study were widely in support of confining victims in shelters for the duration of criminal processes, but others made compelling prosecutorial arguments against restrictions of movement. One prosecutor emphatically stated that the longer victims are detained, the more time perpetrators have to influence the victims' families and the worse their testimonies get. Where shelters are well known and their locations easily discoverable, traffickers may even be more readily able to access victims than they would if victims were living semi-independently elsewhere. A police officer spoke to the value of open shelter models that make victims feel safe and protected by police (whose protection does not reach into shelters), hastening their recovery and making them more effective witnesses. An example of the trust that this approach instils was offered: a victim was contacted by a trafficker via her phone at the secure house she was living in with other victims. She recorded the phone call and provided it to police as evidence.

The nature and conditions of shelter care then, is of relevance to the quality of victim testimonies. The considerations addressed above under 3.2 concerning recovery become relevant, particularly as relates to how victims are perceived. An NGO respondent pointed out that shelter care may contradict the purpose of prosecution: recovery programs aim to help victims forget their trafficking ordeal, while prosecutors want them to remember it in detail. Some police were indifferent to the relationship between victim recovery and their cooperation, expressing the view that their participation should simply be legally required. However, most practitioners and service providers explained that well-supported and empowered victims make for better witnesses who can speak up and give strong testimonies against their traffickers.

In short, while measures taken to restrict movement may cause victims to distrust shelter staff and authorities, measures that make them feel comfortable, safe and supported are more likely to yield strong testimonies. The crucial point is that a victim-centred approach elevates the victim's interests above those of police and prosecutors. Criminal justice objectives do not justify arbitrary interferences with freedom of movement and liberty in the absence of clearly reasoned grounds of necessity, legality and proportionality.

174 In a 2014 study in Malaysia, a law enforcer noted that victims did not want to cooperate upon learning that they would be required to remain in the shelter for three months. Wan Nur Ibtisam Wan Ismail, Raja Noriza Raja Ariffin, and Kee Cheok Cheong, 'Human Trafficking in Malaysia: Bureaucratic Challenges in Policy Implementation, Administration and Society (1 May 2014) 1-20, 11.

174 A caution must be issued in measures in suggesting that the number of interviews should be reduced: one NGO representative provided an example of a well-meaning police officer trying to reduce the number of times he interviewed a traumatized victim, instead interviewing her only once, but for 9 hours. The better approach suggested was for investigators to initially build rapport and then return at a later time to conduct a more detailed interview.

Photographer: Paolo Nicolello / Unsplash

04.

Conclusions and recommendations

The issue of freedom of movement for trafficked persons—most particularly foreign victims—remains a complex issue. Sheltering victims requires a careful balance to be achieved between the rights of victims (including to freedom of movement and liberty), and the sometimes-competing interests of other stakeholders. Movement of victims may be restricted for a range of reasons. Permitting their freedom of movement is seen as risking their participation in the prosecution of their exploiters, thereby costing the State an opportunity to bring traffickers to justice. In respect of foreign victims, permitting freedom of movement of those who identified as trafficked may be seen as undermining State capacity to effectively manage migration.

Legal and policy developments in the region show the significant progress made in recent years towards building a strong foundation for implementing victim-centred and rights-based principles in practice. The ASEAN Convention on Trafficking in Persons, Especially Women and Children (ACTIP) in some respects exceeds the standards set by the UN Trafficking in Persons Protocol, notably by explicitly prohibiting detention of victims of trafficking. Yet, across the three study countries, it is evident that implementation of protection in practice falls short of the standards required in law. Misunderstanding of the concept of 'freedom of movement' persists. 'Detention' is often not understood as occurring within shelters, as it does in immigration and other facilities, but instead, the confinement of victims in closed shelters, may be rationalized on protection and assistance grounds or in pursuit of prosecutorial objectives.

While compelling in some respects, the rationale offered in defence of policies that restrict movement, are flawed. The underlying assumptions that underpin these policies are open to discussion, and it cannot be demonstrated that the objectives such policies are said to serve, are in fact achieved. Far from enhancing protection and assistance outcomes, restrictions of movement may even undermine victim recovery and delay their integration or reintegration. Leveraging shelters as instruments of criminal justice or even migration management can prejudice the rights and freedoms of trafficked persons and place an undue burden on shelter staff, as prosecutorial objectives are shifted onto actors whose primary objective should be victim protection. And in the final analysis, regardless of whether or not the purposes are served by restrictions of movement, the routine detention of trafficked persons cannot be justified on policy grounds, no matter how well-meaning those policies are. Protection, assistance and prosecutorial rationales for curtailing victims' freedoms and liberties are incidental to whether interference with an individual's freedom of movement and liberty is justified in law.

The efforts made in the ASEAN Region to develop new approaches are commendable, and offer valuable lessons for future innovations to protect and assist victims and prosecute traffickers with minimal interference with victims' freedom of movement. Designing protection and assistance systems for trafficked persons is an ongoing endeavour that will never be 'finished'. What was effective in the past may not be in the future, as victim profiles change, as criminality evolves, and as more is learnt about best practices in victim care and support. There is no 'one size fits all' model for shelter protection and other services: what may work in one particular context for one individual may be ineffective or even harmful in another. Accordingly, efforts to support ASEAN Member States to provide effective post-trafficking care, must take into consideration a raft of factors, including (but not limited to) whether the country concerned is one of origin or destination or both; the victim protection infrastructure available to victims outside of shelter settings; and the susceptibility of models to corruption and exploitation by State and non-State actors; and crucially, those models must be flexible enough to adapt to and cater for the specific needs and preferences of individual victims.

The common anchor shared by diverse approaches should be that they are victim-centred and rights-based. A victim-centred approach demands that in balancing the interests of victims against criminal justice and other objectives at issue, the balance must be tipped in favour of the victim. A rights-based approach means that the human rights of victims should be respected, protected and fulfilled in all laws, policies and practices surrounding sheltering of victims. While there may be legitimate reasons to exceptionally restrict movement of some specific victims of trafficking, defaulting to the lowest rights denominator by restricting movement in general is not a legitimate way of achieving these ends.

Assistance provision for victims of trafficking must be comprehensive, continuous and adapted to the age, gender and cultural background of the assisted person, without discriminating against that person on the basis of these or any other grounds. For some victims, shelter stay may not be necessary, but for others the opportunity to temporarily stay at a shelter may be an integral aspect of their recovery. In both cases, distinctions need to be made between provision of basic needs (such as accommodation, food, clothing, document processing and emergency medical care) and more comprehensive and longer-term assistance (such as psychological support, legal assistance, long-term medical care, vocational training, job placement, housing assistance and family mediation) that an individual may need. In all cases, the provision of such services must be on the basis of informed consent.

Sheltering victims—whether in trafficking or other shelters, transition homes, semi- independent living situations or otherwise —is not a protection or assistance end in itself. When done well, by being embedded within wider protection and assistance frameworks, shelter services may be a valuable component of a victim's recovery. When done poorly, the opposite may be true, as victims are re-traumatized and simply sent back into situations where they are vulnerable to re-trafficking. Accordingly, the effectiveness of sheltering must be measured by the extent to which it contributes to recovery and sustainable reintegration of an individual into his country of origin, or his or her integration into a community elsewhere. Protecting, respecting and fulfilling the right of freedom of movement should not be approached as hindrances to those goals, but as instrumental to achieving them.

The following recommendations are offered towards reducing restrictions placed on the movement of victims of trafficking. They are not intended to replace the recommendations offered in the 2008 Study, but to complement them. While States bear the primary responsibility for ensuring that shelter practices do not interfere with the rights of victims of trafficking, other actors including non-State actors have a role to play in supporting States to fulfil their obligations. Accordingly, these recommendations are offered to States sheltering victims of trafficking whether in trafficking-specific or mixed shelters, States whose citizens are sheltered, States that fund counter-trafficking work, and non-State actors that provide shelter to victims of trafficking, or otherwise provide services to sheltered victims.

4.1. In relation to laws

1. Reverse the presumption of closed shelter care, so that freedom of movement and the right to liberty to victims of trafficking are automatically provided, with restrictions to those rights only imposed in exceptional situations that satisfy international legal requirements of necessity, legality and proportionality;

2. Review national legal and procedural frameworks in light of the requirements of ACTIP, to ensure that victims of trafficking are protected from all forms of detention, including in shelters or other facilities where victims are accommodated;

3. Ensure that victims of trafficking are informed of their rights pertaining to any restrictions on their liberty, including constitutionally-based rights to challenge the legality of their detention;

4. Strengthen criminal procedure laws to allow for pre-trial testimonies and video recordings of testimonies by victims or witnesses of trafficking offences to be accepted as evidence to reduce the duration of shelter stays for victims;

5. Provide foreign victims of trafficking with temporary residence permits to ensure that counter-trafficking is not used as a justification for migration-related detention, and that migration-related agendas are not used as justification for detaining trafficked persons.

4.2. In relation to policies

6. Ensure that all shelter services are offered on the basis of ethical principles, including informed consent and voluntariness (including the right to decline shelter assistance), protection of anonymity, confidentiality and privacy, that they do no harm and where the victim is a child, are determined to be in his or her best interests;

7. Ensure that any interference with freedom of movement or liberty for security reasons is only on the basis of individual risk assessments conducted by police in close collaboration with the individual victim, and that any restrictions imposed are the minimum required to mitigate credible threats to the victim's safety and security;

8. Ensure that for those victims for whom the risk assessment has resulted in closed shelter stay, the risk assessment is conducted on a continuous basis and updated frequently in response to the victim's evolving situation, to review the necessity of ongoing shelter stay;

9. Ensure that shelter stays are voluntary and based on informed consent processes, both upon entry and at regular intervals during their stay, in a language and a manner that the victim can understand, and that mechanisms to enable victims to effectively withdraw their consent are put in place;

10. Ensure that victims' participation in criminal justice processes against alleged traffickers is voluntary and based on informed consent, including by developing clear procedures to explicitly inform victims about risks of their participation, including restrictions on movement or deprivation of liberty or other interference with their rights that may result from their participation;

11. Ensure that victims' unwillingness to participate in criminal justice processes against alleged traffickers is delinked from the protection and assistance support, including the shelter care that victims are entitled to receive;

12. Develop clear parameters for determining when legal proceedings should not be pursued against traffickers on account of the unwillingness of victims to participate in proceedings or because of risks posed to the life and safety of victims or others cannot be effectively mitigated;

13. Continue to develop and strengthen options for victims to participate in criminal justice processes without remaining in shelters, including through advance testimony, video testimony, or by repatriated victims returning to testify in court proceedings;

14. Strengthen proactive, intelligence-led investigation capacity and the use of corroborative evidence to reduce reliance on victim testimony so that investigation, prosecution and adjudication is not dependent on victim participation;

15. Continue to develop and strengthen efforts to reduce the duration of legal proceedings in trafficking cases, particularly in cases where victims' movement is restricted, including by use of special courts, specially trained judges and prosecutors and by sensitizing judges and prosecutors to the detrimental impact that delays have on trafficked persons;

16. Develop or enhance minimum standards for State and non-State shelters in accordance with international understandings of recovery and (re)integration, as a basis for developing rights-based criteria to monitor shelter facilities including criteria concerning freedom of movement and liberty;

17. Ensure that standards required for NGOs to be accredited as providers of shelter to victims, are realistically achievable, victim-centered and rights-based, and are contingent on minimal interference with freedom of movement and liberty of victims;

18. In funding or accepting funding from and partnering with non-State actors for the provision of protection and care of victims of trafficking, give priority consideration to community-based and open shelter models;

19. Scrutinize any work and vocational skills training opportunities offered to victims of trafficking against ILO indicators of forced labour, and ensure that such opportunities do not incentivise or prolong sheltering of victims;

20. Make services available in shelters on a non-discriminatory basis, to ensure that recovery and (re)integration services and opportunities to move freely and work are not provided or denied on the basis of sex, gender, sexual orientation, religion or belief, nationality, ethnicity or any other grounds, and are developed in consideration of the specific trafficking experience, harm suffered by an individual and the family, community and societal factors that may affect his or her ability to successfully and sustainability (re)integrate.

4.3. In relation to practice

21. Approach shelter stays not as an obligation of victims but as an entitlement available to victims in need of shelter-based assistance (whether formally identified as such or not), subject to continuously updated risk assessments on the basis of their individual situation, needs, preferences, safety and family situation;

22. Ensure that victims of trafficking are actively involved in any discussions and decisions relating to being sheltered, the conditions of their sheltering, and the protection and assistance services they are to receive at those shelters, and that they provide meaningful and informed consent to receive them;

23. Keep accurate and detailed records for each individual victim sheltered to accurately record: any retraction of the victim's consent to remain in shelters; the reasons why he or she continues to be in kept in the shelter; how and when those reasons were decided and by who, and how, when and how often those decisions where explained to the victims and by who;

24. Ensure that all shelters have a code of conduct for staff and residents, that is understood by all shelter staff and residents, that contains specific instructions on what staff should do and who should be notified in the event an actual or potential threat to the security of victims and or staff arises, or when a victim requests or otherwise expresses a wish to leave;

25. Ensure that any possessions of victims (including phones, allowances or wages) are not confiscated or withheld from victims but remain in the victim's possession, except in exceptional circumstances which the victim understands, or where victims request that shelter staff hold their possessions;

26. Strengthen capacity of shelter staff to effectively inform and empower victims to make decisions about their protection, assistance, recovery and (re)integration, specifically to ensure that staff do not coerce victims to consent to accept services;

27. Strengthen capacity of staff to protect victims' right to privacy and confidentiality, including by ensuring that staff understand that sensitive information should be shared with criminal justice actors only upon the victim's request, where lives or safety are at risk, when disclosing information is required by law, or when the victim provides informed and voluntary consent for such information to be shared;

28. Establish a mechanism by which victims are kept up-to-date of the progress and status of their case, and have a means by which they can request information about its progress and status at any time;

29. Establish and continually strengthen rosters of qualified, certified and security- screened interpreters for priority languages who can be called upon by shelter staff and others as needed to communicate with victims;

30. Invest in social work as a profession including by incentivizing social workers to be trained and to work with victims of trafficking, towards strengthening rights-based, victim-centred and trauma-informed care and to increase victim cooperation;

31. Identify and remove barriers that victims of trafficking face in accessing protection and assistance services outside the shelter system, as a basis for developing more open shelters and community-based protection and assistance models;

32. Ensure that victims are not released from shelters, repatriated and (re)integrated or returned in groups but through individual procedures, so that the release of individual victims from shelters is not delayed because of outstanding procedures relating to other victims.

33. In the event that victims leave shelters contrary to regulations, assess whether the conditions of the shelter or the restrictions imposed on the victim's movement and liberty may have contributed to his or her wish not to remain in the facility, as a basis for improving shelter care.

Annex A: ASEAN Member States ratification table

	Brunei Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
United Nations Transnational Organized Crime Convention (UNTOC)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Trafficking in Persons Protocol	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Smuggling of Migrants Protocol		✓	✓	✓		✓	✓		✓	
International Convention on Civil and Political Rights (ICCPR)		✓	✓	✓			✓		✓	✓
International Convention on Economic, Social and Cultural Rights (ICESCR)		✓	✓	✓		✓	✓		✓	✓
Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	✓	✓	✓	✓			✓		✓	✓
International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)		✓	✓	✓			✓	✓	✓	✓
Convention on the Protection of the Rights of Migrant Workers and Members of their Families (ICRMW)		✓	✓				✓			
Convention on the Elimination of Dis-crimination against Women (CEDAW)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Convention on the Rights of the Child (CRC)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Convention on the Rights of Persons with Disabilities (CRPD)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓

Annex A: ASEAN Member States ratification table

	Brunei Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Vietnam
ILO Forced Labour Convention 1930 (No. 29)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
ILO Protocol on Forced Labour (2014)									✓	
ILO Worst Forms of Child Labour Convention 1999 (No. 182)	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Convention on the Status of Refugees (1951)		✓					✓			
Protocol to the Convention on the Status of Refugees (1967)		✓					✓			
Convention relating to the Status of Stateless Persons (1954)							✓			
Convention on the Reduction of Statelessness (1961)										
Rome Statute of the International Criminal Court (1998)		✓					✓		✓	

Annex B: National Anti-Trafficking Law in ASEAN

Brunei Darussalam	Trafficking and Smuggling of Persons Order (2004); Anti-Trafficking in Persons Order (2019)
Cambodia	Law on Suppression of Human Trafficking and Sexual Exploitation (2008)
Indonesia	Law of the Republic of Indonesia No. 21 on Eradication of the Criminal Act of Human Trafficking (2007)
Lao PDR	Lao PDR Penal Code (2006 revision) Law on Development and Protection of Women (2004) Law on Protection of the Rights and Interests of Children (2006) Anti-Human Trafficking Law (2015)
Malaysia	Anti-Trafficking in Persons and Anti-Smuggling of Migrants (2007) Anti-Trafficking in Persons and Anti-Smuggling of Migrants (Amendment) Act (2015)
Myanmar	Anti-Trafficking in Persons Law (2005)
Philippines	Republic Act 9208 Expanded Anti-Trafficking in Persons Act (2012)
Singapore	Prevention of Human Trafficking Act (2014)
Thailand	The Anti-Trafficking in Persons Act (2008) and the Amendments (No. 2) (2015)
Viet Nam	Law on Prevention and Suppression Against Human Trafficking (2011)

Annex C: Counter-trafficking bilateral cooperation MOUs in ASEAN

	Trafficking-specific bilateral agreements in place[175]
Brunei	
Cambodia	• Cambodia and Thailand MOU on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking (2003), superseded by the 2014 MoU (below) • Cambodia and Vietnam Agreement on Bilateral Cooperation for Eliminating Trafficking in Women and Children and Assisting Victims of Trafficking (2005) • Viet Nam-Cambodia Cooperation Agreement on Standard Operating Procedures (SOPs) for the Identification and Repatriation of Trafficked Victims (2009) • Agreement between the Royal Government of Cambodia and the Government of the Socialist Republic of Viet Nam on Bilateral Cooperation for Counter-Trafficking in Persons, and Protecting Victims of Trafficking (Amendment) (2012) • Cambodia and Thailand MOU on Bilateral Cooperation for Eliminating Trafficking in Persons and Protecting Victims of Trafficking (Updated) (2014)
Indonesia	
Lao	• Thailand and Lao MOU on Cooperation to Combat Trafficking in Persons, Especially Women and Children (2005), superseded by the MOU in 2017 • Vietnam and Lao Agreement on Cooperation in Preventing and Combating Trafficking in Persons and Protection of Victims of Trafficking (2010) • Vietnam and Lao Agreement on Cooperation in Prevention of Trafficking in Persons (2014) • Thailand and Lao MOU on Cooperation to Combat Trafficking in Persons (2017)
Malaysia	Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of Malaysia to share information to combat human trafficking[176]
Myanmar	• Thailand and Myanmar MOU on Cooperation to Combat Trafficking in Persons, Especially Women and Children (2009)

Philippines	
Singapore	
Thailand	• Thailand and Cambodia MOU on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking (2003), superseded by the MoU signed in 2014 • Thailand and Lao PDR MOU on Cooperation to Combat Trafficking in Persons, Especially Women and Children (2005), superseded by the MOU in 2017 • Viet Nam and Thailand Agreement on Bilateral Cooperation for Eliminating Trafficking in Persons, Especially Women and Children, and Assisting Victims of Trafficking (2008) • Thailand and Myanmar MOU on Cooperation to Combat Trafficking in Persons, Especially Women and Children (2009) • Thailand and Cambodia MOU on Bilateral Cooperation for Eliminating Trafficking in Persons and Protecting Victims of Trafficking (Updated) (2014) • Thailand and Lao MOU on Cooperation to Combat Trafficking in Persons (2017) • Memorandum of Understanding between the Government of the Kingdom of Thailand and the Government of Malaysia to share information to combat human trafficking[177]
Viet Nam	• Cambodia and Viet Nam Agreement on Bilateral Cooperation for Eliminating Trafficking in Women and Children and Assisting Victims of Trafficking (2005) • Viet Nam and Thailand Agreement on Bilateral Cooperation for Eliminating Trafficking in Persons, Especially Women and Children, and Assisting Victims of Trafficking (2008) • Viet Nam-Cambodia Cooperation Agreement on Standard Operating Procedures (SOPs) for the Identification and Repatriation of Trafficked Victims (2009) • Viet Nam and Lao PDR Agreement on Cooperation in Preventing and Combating Trafficking in Persons and Protection of Victims of Trafficking (2010) • Agreement between the Royal Government of Cambodia and the Government of the Socialist Republic of Viet Nam on Bilateral Cooperation for Counter-Trafficking in Persons, and Protecting Victims of Trafficking (Amendment) (2012) • Viet Nam and Lao PDR Agreement on Cooperation in Prevention of Trafficking in Persons (2014).

175 Non-trafficking specific MOUs (such as those relating to transnational crime or migrant workers) have not been included in this table.

176 This MoU was finalized in 2013 but it is unclear whether the governments have signed it. See: Legal Gap Analysis of Anti-Trafficking Legislation in Malaysia (Liberty Asia, 2018) 41.

177 This MoU was finalized in 2013 but it is unclear whether the governments have signed it. See: Legal Gap Analysis of Anti-Trafficking Legislation in Malaysia (Liberty Asia, 2018) 41.

Annex D: Consultation list

General

International Organization for Migration (IOM)

International Labour Organization (ILO)

NEXUS Institute

United Nations Action for Cooperation against Trafficking (UN.ACT)

Malaysia

Anti-Trafficking in Persons & Anti-Smuggling of Migrants Task Force Embassy of the United States

Embassy of the Philippines

Department of Immigration Department of Social Welfare Department of Women's Development

Good Shepherd Services

Men's Shelter Home

Ministry of Women, Family and Community Development National Commission of Human Rights (SUHAKAM)

National Strategic Office Council for Anti-Trafficking in Persons & Anti-Smuggling of Migrants (NSO MAPO)

Royal Malaysia Police

Tenaganita

Women's Shelter Home

Philippines

Australia-Asia Program to Combat Trafficking in Persons (AAPTIP) Blas F. Ople Policy Center and Training Institute

Department of Justice

Department of Justice Inter-Agency Council Against Trafficking Operation Center Department of Social Welfare and Development (DSDW)

Development Action for Women Network

Haven for Women

Inter-Agency Council Against Trafficking (IACAT)

International Justice Mission (IJM)

Philippines Overseas Employment Administration (POEA)

Philippines against Trafficking Coordinator

PREDA Foundation

PREDA Victoria Children Home

PREDA New Dawn Boys' Home Public Prosecutor

Religious of the Good Shepherd

Thailand

Asian Research Centre for Migration

Anti-Trafficking in Persons Division, Royal Thai Police

Alliance Anti-Traffic

Chiang Mai Provincial Police

Chiang Mai Shelter for Children and Families

Division of Human Trafficking Crime, Department of Special Investigations

Focus Foundation

Human Rights and Development Foundation (HRDF)

Immigration Detention Centre

International Justice Mission (IJM)

Baan Kredtrakarn shelter

Labour Rights Promotion Network (LPN)

Night Light

Prathumthani shelter

Public Prosecutor

Stella Maris Seafarers' Centre

Zoe International