

## Aberystwyth University

### Article 26

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*Published in:*

A Commentary to the Council of Europe Convention on Action against Trafficking in Human Beings

*DOI:*

[10.4337/9781788111560.00038](https://doi.org/10.4337/9781788111560.00038)

*Publication date:*

2020

*Citation for published version (APA):*

Piotrowicz, R. (2020). Article 26: Non-punishment Provision. In J. Planitzer, & H. Sax (Eds.), *A Commentary to the Council of Europe Convention on Action against Trafficking in Human Beings* (pp. 310-322). (Elgar Commentaries). Edward Elgar Publishing. <https://doi.org/10.4337/9781788111560.00038>

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# ARTICLE 26

## NON-PUNISHMENT PROVISION

Ryszard Piotrowicz

**Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.**

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### A. INTRODUCTION

- 26.01** The non-punishment provision requires Parties to provide for the possibility of not imposing penalties on victims of trafficking for their involvement in unlawful activities, to the extent that they have been compelled to do so. It aims to prevent victims being penalised for offences committed in the course, or as a consequence, of being trafficked. Such offences could be immigration-related (in the course of being trafficked) or they could be violations of criminal law, such as forced criminality (as a consequence of being trafficked).
- 26.02** The provision effectively acknowledges that trafficked persons are not free agents, and that they may not be in a position to resist being involved in these offences. As such, they should not be held accountable for them. This does not mean that trafficked people should have immunity from prosecution. Rather, where it is established that the trafficked person had no real choice but to commit the offence, because of their trafficking situation, it is not appropriate to punish them. As such, this is but one example of situations where legal systems acknowledge that persons may not be accountable for their acts (such as lack of capacity).
- 26.03** The provision refers to each Party ‘acting in accordance with the basic principles of its legal system’. This recognises that there may be significant disparities in how states address the issue of personal accountability in their legal systems. The objective is, given the human-rights based focus of the Council of Europe (CoE) Convention on Action against Trafficking in Human

Beings,<sup>1</sup> to ensure that it is possible for each party to apply the non-punishment provision. A similar provision is contained in Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims.<sup>2</sup>

## B. DRAFTING HISTORY

The first meeting of the CAHTEH specifically recorded that the criminal law provisions of the Convention should include a non-punishment clause for victims of Trafficking in Human Beings ‘for offences committed in the framework of the trafficking process’.<sup>3</sup> Concern was expressed about the need for care in the wording of the provision; it was ‘not a matter of eliminating offences but of determining those cases, in which there should be no criminal liability’.<sup>4</sup> **26.04**

The first draft of the non-punishment provision actually included examples of offences to which it might apply: **26.05**

Each Party shall provide in its internal law for victims a non-punishment clause for violation of immigration laws or for the illegal acts they are usually involved in as a direct consequence of their situation as victims, such as illegal border crossing, illegal stay in the territory, use of forged documents, destruction, falsification and alteration of documents, illegal employment.<sup>5</sup>

The offences included were only examples; it is clear that other offences could be covered. There was some opposition. Austria argued that the provision should not be binding; it suggested that the text should require Parties to ‘make all efforts to ensure that victims are not punished’.<sup>6</sup> The Netherlands maintained that the provision was ‘well intentioned, but goes too far’, and suggested moving it to the Preamble or adding a clause to Article 3 (Non-discrimination).<sup>7</sup> Switzerland demanded its removal altogether.<sup>8</sup> However, the provision survived unaltered in the revised draft adopted soon afterwards.<sup>9</sup> **26.06**

The situation became more complicated when a further revised draft was adopted on 17 May 2004. Draft Article 26 now contained three options: **26.07**

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1 Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 16 May 2005 (thereinafter CoE Convention against Trafficking or Convention).

2 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 (OJ L 101/1) (thereinafter Dir 2011/36/EU).

3 CAHTEH, *1st meeting (15–17 September 2003) – Meeting Report*, CAHTEH(2003)RAP1, 29 September 2003, 4 (Section III (b)).

4 *Ibid.*, para 44.

5 CAHTEH, *Revised Preliminary Draft European Convention on Action against Trafficking in Human Beings*, CAHTEH(2003)9, 27 November 2003, Art 26.

6 CAHTEH, *Draft European Convention on Action against Trafficking in Human Beings: Contribution by the delegation of Austria, Netherlands and by the observer of UNICEF*, CAHTEH(2004)1, 26 January 2004, 5.

7 *Ibid.*, 11.

8 CAHTEH, *Projet de Convention du Conseil de l'Europe sur la lutte contre la traite des êtres humains: Contribution de la délégation de la Suisse*, CAHTEH(2004)1 Addendum II, 29 January 2004, 9.

9 CAHTEH, *Revised draft Europe Convention on Action against Trafficking in Human Beings: Following the 3rd meeting of the CAHTEH (3–5 February 2004)*, CAHTEH(2004)8, 12 February 2004.

OPTION 1: Each Party shall provide in its internal law for the possibility of not punishing victims for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as victims.

OPTION 2: Each Party shall ensure in its internal law that victims are not punished for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as victims.

OPTION 3: Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.<sup>10</sup>

The notable feature of these options is that each emphasises that any offences must have been committed as a 'direct consequence' of their situation. Option 2 clearly went further than some states wanted.

**26.08** While the CAHTEH accepted in the report on its 4th meeting that the non-punishment provision should be applicable to victims irrespective of whether or not they co-operated with state authorities,<sup>11</sup> divisions on other aspects of the issue were noted, including with regard to the extent of Parties' obligations, which conduct should not be punished, and whether or not the provision should be obligatory.<sup>12</sup> It was noted that the inclusion of the provision would limit traffickers' ability to put pressure on victims – although that presupposed a significant awareness of the law on the part of victims. Some states also argued that the non-punishment clause was necessary on grounds of equity, and as an incentive for victims to denounce traffickers.<sup>13</sup> These divisions led to the adoption of the three options set out above. These options remained in the revised draft of the Convention published following the 5th CAHTEH meeting.<sup>14</sup>

**26.09** Opinions remained divided about whether to have a non-punishment provision at all, and, if so, how it should be framed. The issue was discussed at the 6th CAHTEH meeting. Some countries argued that victims' individual circumstances varied too much for a compulsory

10 CAHTEH, *Revised draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Following the 4th meeting of the CAHTEH (11–14 May 2004)*, CAHTEH(2004)12, 17 May 2004, 14.

11 CAHTEH, *4th meeting (11–14 May 2004) – Meeting Report*, CAHTEH(2004)RAP4, 23 June 2004, para 16.

12 *Ibid.*, para 17.

13 *Ibid.*, para 20.

14 CAHTEH, *Revised draft Council of Europe Convention on Action against Trafficking in Human Beings: Following the 5th meeting of the CAHTEH (29 June–2 July 2004)*, CAHTEH(2004)INFO4, 5 July 2004, 13. Amnesty International and Anti-Slavery International then intervened, urging states to adopt Option 3, arguing that this would be in accordance with previously adopted measures of the Council of Europe, the UN, OSCE and the EU: CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Contribution by the delegation of the Commission of the European Communities*, CAHTEH(2004)17, Addendum IV, 30 August 2004, 12. Poland also declared for Option 3, on the ground that it created 'the widest procedural warrants for the victims, which could lead to increase of number of reports concerning trafficking in human beings made by the victims and help prosecution and judicial authorities in fighting against such crimes': CAHTEH, *Draft Council of Europe Convention on action against trafficking in human beings: Contribution by the delegation of Poland*, CAHTEH(2004)17, Addendum VI, 2 September 2004, 3.

non-punishment clause to be acceptable, and that the decision whether to punish or not should be made on a case-by-case basis. Others argued for the removal of the provision altogether.<sup>15</sup>

It was further noted that, for the measure to be effective and to rule out the risk of arbitrary treatment, it should not be left to the discretion of state authorities.<sup>16</sup> It was also noted that adoption of an optional provision would lead to discrepancies between countries and therefore inequality of victims. **26.10**

As agreement could not be reached on a single text, two options were agreed upon, and battle delayed to another day. These were variations of the first two options previously adopted. Option 3 was dropped: **26.11**

OPTION 1: Each Party shall, in accordance with the basic principles of its national legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so, as a direct consequence of their situation as victim.

OPTION 2: Each Party shall, under the conditions provided by its internal law, ensure that no penalty is imposed on victims for their involvement in unlawful activities when they have been compelled to do so by their situation as victims.<sup>17</sup>

At this stage, those states supporting Option 1 were close to winning the argument, because that text is very close to the one which made it into the Convention. Soon afterwards, an attempt was made to break the deadlock, with a new proposal: **26.12**

Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities, whatever their nature, to the extent that such involvement is a direct consequence of their situation as trafficked persons.<sup>18</sup>

There does not appear to have been any significant support for the text proposed above, but some states did nail their colours to the mast. Germany argued in favour of Option 1, arguing that it would need to keep open the possibility of scrutinising each case individually where the crime was serious. It specifically gave the example of a trafficked person who might have committed manslaughter in the trafficking process.<sup>19</sup> Latvia also argued for Option 1, noting **26.13**

15 CAHTEH, *6th meeting (28 September–1 October 2004) – Meeting Report*, CAHTEH(2004)RAP6, 11 October 2004, para 68.

16 But this argument pre-supposed that there should actually be a non-punishment provision. If there was no such provision in the Convention, it could not be applied arbitrarily.

17 CAHTEH, *Revised draft Council of Europe Convention on Action against Trafficking in Human Beings: Following the 6th meeting of the CAHTEH (28 September–1 October 2004)*, CAHTEH(2004)INFO 6, 11 October 2004, 12.

18 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Comments by the Parliamentary Assembly of the Council of Europe Committee on Equal Opportunities for Women and Men*, CAHTEH(2004)23, 24 November 2004, 9.

19 CAHTEH, *Council of Europe Draft Convention on Action against Trafficking in Human Beings: Comments by the delegations of Croatia, Denmark, Finland, Germany, Hungary, Latvia, Netherlands, Sweden and the UNHCR, UNICEF and UNODC observers*, CAHTEH(2004)24, 19 November 2004, 11.

that the decision to prosecute or not should be taken on a case-by-case basis.<sup>20</sup> Sweden, on the other hand, stated simply: ‘Delete the article in its entirety.’ No explanation was offered.<sup>21</sup> UNHCR advocated Option 2 on the ground that it offered greater protection to victims of trafficking.<sup>22</sup>

- 26.14** Amnesty International and Anti-Slavery International then proposed an amended version of Option 1, which replaced the requirement that states provide for the possibility of not prosecuting with a flat prohibition:

Each Party shall, in accordance with the basic principles of its national legal system, prohibit the possibility of the detention, prosecution or punishment or imposing penalties on victims for the illegality of their entry or residence in a country or their involvement in unlawful activities, unless it is demonstrated that such unlawful activity was not a consequence of their situation as a victim.<sup>23</sup>

- 26.15** This was a significant change in emphasis and was clearly a bridge too far for most states, requiring, as it would, that states have the onus of demonstrating that the crime was *not* connected to the trafficking status. So, at this stage, the disagreement remained as to which option to adopt, with Sweden advocating the zero-option. But the deadlock was broken as the Christmas holidays beckoned. By mid-December, a revised draft contained only one option, and that was the text eventually adopted in the Convention.<sup>24</sup>

### C. ARTICLE IN CONTEXT

#### 1. Binding measures

- 26.16** The notion that a person should not be penalised or punished for the commission of an offence is well recognised in all legal systems. Typically, this may be because the person lacked mental capacity or was too young. As mentioned earlier, the influence of duress may restrict or even deny culpability in extreme cases,<sup>25</sup> as may the need to act in self-defence.
- 26.17** The principle is recognised in the migration context. Article 31(1) of the 1951 Convention relating to the Status of Refugees provides that the parties:

shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or

<sup>20</sup> Ibid., 17.

<sup>21</sup> Ibid., 21.

<sup>22</sup> Ibid., 24.

<sup>23</sup> CAHTEH, *Draft Council of Europe Convention on Action against Trafficking in Human Beings: amendments to preamble and articles 25, 35§1 and 36 to 46 proposed by national delegations, observers and non-governmental organisations*, CAHTEH(2004)25, 23 November 2004, 7.

<sup>24</sup> CAHTEH, *Revised draft Council of Europe Convention on Action against Trafficking in Human Beings: Following the 7th meeting of the CAHTEH (7–10 December 2004)*, CAHTEH(2004)INFO7, 10 December 2004, 12.

<sup>25</sup> Rome Statute of the International Criminal Court, 2187 UNTS 3, 17 July 1998, entered into force 1 July 2002, Art 31(d).

are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.<sup>26</sup>

While the non-punishment principle is not specifically mentioned in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,<sup>27</sup> Article 2(b) of that instrument specifies that one of the purposes of the Palermo Protocol is to ‘protect and assist the victims of trafficking, with full respect for their human rights’. As long ago as 2009, the Working Group on Trafficking in Persons which was established to assist implementation of the protocol recommended that Parties should: **26.18**

[c]onsider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts.<sup>28</sup>

The principle has been recognised in other regional instruments. The EU included it in Dir 2011/36/EU, Article 8 of which provides: **26.19**

Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts [i.e., offences concerning trafficking in human beings] referred to in Article 2.

In 2015, the principle was included, it would appear from the wording somewhat grudgingly, in the ASEAN Convention against Trafficking in Persons, Especially Women and Children.<sup>29</sup> Article 14(7) provides: **26.20**

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

The year before, the ILO adopted the Protocol to its Convention Concerning Forced or Compulsory Labour, (No. 29).<sup>30</sup> The Preamble noted the connection between trafficking in human beings and forced labour, explicitly stating that ‘trafficking in persons for the purposes of forced or compulsory labour’ takes place. Article 4(2) contains a provision very similar to its equivalent in the EU Directive: **26.21**

26 Convention Relating to the Status of Refugees, 189 UNTS 137, July 28, 1951, entered into force April 22, 1954 as amended by the Protocol Relating to the Status of Refugees, 606 UNTS 267, done 31 January 1967, entered into force 4 October 1967.

27 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2237 UNTS 319, 15 November 2000 (hereinafter Palermo Protocol).

28 Conference of the Parties to the UNTOC, Report on the meeting of the Working Group on Trafficking in Persons (14–15 April 2009), CTOC/COP/WG.4/2009/2, 21 April 2009, para 12.

29 ASEAN Convention against Trafficking in Persons, Especially Women and Children, 21 November 2015, entered into force 8 March 2017 (hereinafter ASEAN Convention against Trafficking in Persons).

30 See Protocol of 2014 to the Forced Labour Convention, 1930 (ILO P029), 11 June 2014, entered into force 9 November 2016.

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

## 2. Non-binding measures

**26.22** There has been a proliferation of non-binding instruments relating to the non-punishment provision, many of which preceded the binding measures and may well have contributed to their eventual adoption.<sup>31</sup> Perhaps most notable are the Recommended Principles and Guidelines on Human Rights and Human Trafficking, adopted by the Office of the UN High Commissioner for Human Rights in 2002,<sup>32</sup> and the first significant attempt to put the non-punishment provision on the international stage as a core element of anti-trafficking efforts. Principle 7 states:

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

That principle is repeated no less than four times, in various contexts, in the accompanying guidelines, which were intended to clarify and elaborate on how the principle should be given effect.<sup>33</sup>

## D. ISSUES OF INTERPRETATION

**26.23** The essence of the non-punishment provision is that it aims to avoid trafficked persons being penalised for their involvement in criminal activities because in reality they had no choice, having been compelled to do so by their traffickers. Article 26 of the CoE Convention against Trafficking makes it clear that states have a duty to ‘provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so’. The Explanatory Report, which is rather brief on the issue, specifies that states can comply with this duty either by ‘providing for a substantive criminal or procedural criminal law provision, or any other measure’ which enables non-punishment.<sup>34</sup>

31 Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (OSCE 2013) 11–13. This document does itself contain ‘Recommendations on non-punishment for legislators and prosecutors’, see *ibid.*, 28–31. Ryszard Piotrowicz and Liliana Sorrentino, ‘Human Trafficking and the Emergence of the Non-Punishment Principle’ (2016) 16 *Human Rights Law Review* 669, 678–80.

32 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002.

33 *Ibid.*, Guideline 2.5 (ensuring non-prosecution for violation of immigration laws or for involvement in activities as a direct consequence of being trafficked); Guideline 4.5 (ensuring that legislation prevents prosecution, detention or punishment for the same reasons); Guideline 5.5 (ensuring that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed because of their situation); Guideline 8.3 (ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons).

34 Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings*, CETS No. 197, 16 May 2005, para 274.



Thus, a significant amount of discretion is left to states as to how they give effect to this; it does not even have to be by legal means. It could be achieved, for instance, through guidelines for prosecutors, so long as in reality there is the possibility that trafficked persons are not prosecuted.

The Explanatory Report contains a particularly nebulous explanation of the scope of the provision: **26.24**

(...) the requirement that victims have been compelled to be involved in unlawful activities shall be understood as comprising, at a minimum, victims that have been subject to any of the illicit means referred to in Article 4, when such involvement results from compulsion.<sup>35</sup>

This means that states must take account of all the possible means of trafficking a person that might be used. It includes not only the use of physical coercion or emotional abuse, but also abuse of a position of vulnerability – abuse of any situation, in which the person involved has no real and acceptable alternative to submitting to the abuse.<sup>36</sup> **26.25**

It must be acknowledged that Article 26 refers only to ‘the possibility’ of not imposing penalties. This might suggest a discretion on the part of states. However, this would not be a correct interpretation of the duty. Rather, the non-punishment provision must be implemented in appropriate cases, but it is for individual states to achieve this in accordance with the requirements and constraints of their own legal systems. It would arguably contradict the human rights-based ethos of the Convention if victims were punished for offences they had been forced to commit. The obligation is to avoid punishment; the discretion lies in how the state fulfils that obligation. **26.26**

GRETA has addressed the issue of non-punishment both in principle and in its country reports. In 2012, it stated: **26.27**

To comply with the obligation under Article 26 (...), Parties could incorporate in their internal law a substantive criminal or procedural criminal law provision or adopt any other measure resulting in the possibility of non-punishment of victims of trafficking in human beings. Criminalisation of victims of trafficking not only contravenes the State’s obligation to provide services and assistance to victims, but also discourages victims from coming forward and co-operating with law enforcement agencies, thereby also interfering with the State’s obligation to investigate and prosecute those responsible for trafficking in human beings.<sup>37</sup>

Of course, the assertion that criminalisation of victims may discourage them from coming forward and co-operating with law enforcement agencies is another good reason not to criminalise them, but it is only a pragmatic reason (aimed at promoting prosecutions); it is not based on the principle that victims should not be punished because they are *not to blame*, which is the core justification. **26.28**

35 Ibid., para 273.

36 Ibid., para 83.

37 GRETA, *2nd General Report of GRETA’s Activities*, 4 October 2012, para 58.

- 26.29** In its 4th General Report, GRETA summarised the then-varying practice of the Parties regarding non-punishment.<sup>38</sup> Of the 35 countries that had been evaluated, eight had adopted specific provisions on non-punishment, either in their criminal code or in anti-trafficking legislation. In four countries, the non-punishment provision applied to any trafficking-related offences. Its application was limited in three countries. Conversely, 27 countries did not have such measures in place. They relied rather on general provisions relating to duress, or else to exonerating or mitigating circumstances that were not specific to trafficked persons. In nine countries, the prosecution service had a discretion on whether to initiate a prosecution. Several countries had adopted guidelines on the application of the provision.
- 26.30** GRETA noted a persistent problem of a lack of awareness amongst certain key officials (including police, prosecutors and defence lawyers) of the non-punishment provision, as well as the reasons for its existence. This was in part at least due to deficiencies in training, not only about the provision itself, but also regarding the identification of victims – if people are not identified as victims of trafficking, then they are more likely to be prosecuted for alleged offences.<sup>39</sup> The need for guidance for relevant officials, including police officers and prosecutors, continued to be an issue.<sup>40</sup>
- 26.31** GRETA argued that the lack of a ‘specific provision on the non-punishment of victims of trafficking entails a risk of treating them differently depending on the prosecutor in charge of the case’.<sup>41</sup> Accordingly, GRETA recommended the adoption of specific legislation on non-punishment in 16 countries, in addition to the adoption of guidelines for prosecutors in six of these countries. The lack of a specific legal provision in non-punishment in many states continued to vex GRETA throughout the second evaluation round. While Albania was praised for having introduced such a measure since the first evaluation round,<sup>42</sup> some countries continued to resist the move and risked incurring the further wrath of GRETA.<sup>43</sup> GRETA also noted again the need for effective identification of victims of trafficking amongst irregular migrants, so that potential victims would not be punished for immigration-related offences.

#### 1. Article 26 of the CoE Convention against Trafficking in the context of human rights

- 26.32** The Convention stipulates in the Preamble that ‘respect for victims’ rights, protection of victims and action to combat trafficking in human beings must be the paramount objectives’. The penalisation of a person for acts they have been compelled to commit because they have been trafficked should be seen in this context. It treats victims as criminals, and violates states’ human rights obligations towards trafficked people: these include having in place legislation ‘adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking’.<sup>44</sup> The rights of trafficked people are rights that the state must uphold

38 GRETA, *4th General Report on GRETA's Activities*, March 2015, 52–4.

39 For instance, GRETA, *Report on Azerbaijan*, II GRETA(2018)17, para 166.

40 For instance, GRETA, *Report on Poland*, II GRETA(2017)29, para 176 and GRETA, *Report on Montenegro*, II GRETA(2016)19, para 145.

41 GRETA, *4th General Report*, March 2015, 54.

42 GRETA, *Report on Albania*, II GRETA(2016)6, para 159.

43 For instance, GRETA, *Report on Austria*, II GRETA(2015)19, para 175.

44 *Rantsev v. Cyprus and Russia* App no 25965/04 (ECtHR, 7 January 2010), para 284.

and it would amount to a serious violation of such rights to hold them accountable for offences that they have not chosen to commit.

GRETA's report on Italy, in the context of non-punishment, states: 'Public prosecutors should be encouraged to be proactive in establishing if an accused person is a potential victim of trafficking and to consider trafficking in human beings as a serious violation of human rights'.<sup>45</sup> This is an error, although one that admittedly repeats the error in the Preamble to the Convention, which also refers to trafficking in human beings as a 'violation of human rights'. This is a common error; trafficking in human beings is, in the absence of state involvement or complicity, a private criminal enterprise. As the ECtHR makes clear in *Rantsev v. Cyprus and Russia*, it is the failure of the state to protect people from being trafficked, or to provide them with support and protection, that violates human rights, not the trafficking. This analysis is supported by a relatively recent decision of the Court of Appeal of England and Wales, which addressed the nature and scope of states' obligations under the European Convention on Human Rights.<sup>46</sup> Giving the only judgment, with which his two co-judges concurred, Lord Justice Laws stated (with regard to Art 3 ECHR):

The rights which the Convention guarantees are enjoyed against the State, and only the State. It is important to recognise that ill-treatment by a non-State agent, however grave, does not of itself constitute a breach of Article 3. This is sometimes glossed over in the language of the cases ... Likewise a killing does not of itself violate Article 2, nor an act of enslavement Article 4, if it is not perpetrated by an agent of the State. But it is surely inherent in the Convention's purpose that the State is to protect persons within its jurisdiction *against such brutalities, whoever inflicts them* (...).<sup>47</sup>

The state may violate the non-punishment provision directly or indirectly. Where the state fails to identify a person as having been trafficked and punishes or penalises them for an offence, this could be indirect violation, where it can be shown that the state should have identified the person as a trafficking victim. Direct violation occurs where the state knows that the person has been trafficked yet fails to attribute sufficient weight to this fact in deciding whether to prosecute or punish. This means that public servants likely to come into contact with trafficked persons, such as police officers, labour inspectors, border guards and social services, need to be trained to spot them. Identification of trafficked persons is not stated to be part of the duty under Article 26, but it needs to happen to enable the state to give full effect to Article 26. Furthermore, the obligation to identify is found in Article 7(1) of the CoE Convention against Trafficking including the duty to strengthen border controls in order to detect trafficking as well as, most importantly in Article 10 of the CoE Convention against Trafficking, the duty to have personnel appropriately trained to identify trafficked victims, and to adopt measures to identify such victims. **26.34**

## 2. Scope of Article 26 of the CoE Convention against Trafficking

The principle of non-punishment goes beyond prosecution, which may lead to criminal fines or imprisonment. The reference in Article 26 to the non-imposition of 'penalties' encompasses **26.35**

<sup>45</sup> GRETA, *Report on Italy*, II GRETA(2018)18, para 239.

<sup>46</sup> *The Commissioner of Police of the Metropolis v. DSD and NBV; Alio Koraou v. The Chief Constable of Greater Manchester Police*, [2015] EWCA Civ 646. Case No: B2/2014/1643, A2/2014/2662 & A2/2014/2731

<sup>47</sup> *Ibid.*, para 43 (emphasis added).

other measures, such as administrative fines, detention or a prohibition on re-entry to the national territory for a period of time after the trafficked person leaves. States are entitled to detain in certain circumstances, such as prior to deportation. The point is that the detention should not be a measure of penalisation for a trafficking-related offence.<sup>48</sup> None of these measures amounts to a fine or a term of imprisonment, but they clearly penalise the trafficked person, and as such would amount to a violation of Article 26. Moreover, where a trafficked person is to be removed from its territory, the state must ensure that to do so does not violate its duty under Article 16(2), to ensure that ‘such return shall be with due regard for the rights, safety and dignity of that person’. Additionally, the state that proposes to return a trafficked person must ensure that, in so doing, it would not violate the principle of *non-refoulement*.<sup>49</sup>

- 26.36** The non-punishment duty covers both offences committed in the course of being trafficked (causation-based offences), and those committed as a consequence of being trafficked (e.g., growing cannabis). The issue, which remains undecided, is how far the provision goes: would it include what might otherwise be very serious offences? For instance, a trafficked person might be compelled to commit an act of serious violence against another trafficked person.
- 26.37** There may be problems in connecting the offence to the person’s trafficked status. A trafficked person might steal food from a shop because they are very hungry, yet it might be difficult to establish whether that hunger is because of the conditions the person is subjected to by the trafficker. A person who was originally trafficked may themselves go on to participate in the trafficking of others, yet questions may arise about the extent to which the perpetrator did this as a consequence of their own experience; in other words, whether their own past experience as a victim of trafficking played a role in them becoming involved in trafficking themselves.
- 26.38** There is no reason in principle why the obligation not to punish should not apply to most offences. If the essence of the duty is based upon the fact that the trafficked person was not a free agent and had no real choice but to commit the offence, then arguably they should not be criminally accountable, just as individuals may not be held accountable because they lacked the capacity to take full responsibility for their actions.
- 26.39** Should the non-punishment provision exonerate or mitigate?<sup>50</sup> It is difficult to imagine a court accepting that a trafficked person could avoid being punished entirely for a serious offence on the basis that they had no real alternative but to commit the offence. And yet one can readily envisage a scenario, where a trafficked person might kill a trafficker by stabbing them in a struggle to escape. But in that scenario, the trafficked person might in any case have a defence of self-defence.

48 See OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary* (United Nations 2010) 133–6. GRETA has also noted with concern the detention of possible trafficking victims in administrative holding centres, for example in France, see GRETA, *Report on France*, II GRETA(2017)17, paras 247, 250. If this is because of a failure to identify the person as having been trafficked, then the breach is of the duty to identify. If they are detained for illegal entry when the authorities know that they have been trafficked, then this would probably violate the non-punishment principle.

49 CoE Convention against Trafficking, Art 40(4).

50 See the different approaches of the International Criminal Court, Art 31.1 of the Rome Statute of the International Criminal Court, which provides for complete exoneration subject to strict conditions, whereas the International Criminal Tribunal for the former Yugoslavia went for mitigation: *Prosecutor v. Erdemovic* Case No. IT-96-22-A (Appeals Chamber), (ICTY, 7 October 1997) para 19.

There are obvious risks for any criminal justice system that states, unambiguously, that a trafficked person cannot be punished for trafficking-related offences under any circumstances. It creates a kind of immunity based upon the fact that the person had absolutely no agency of their own. This is one of the remaining challenges for the non-punishment provision: first, to reach the stage, where all Parties to the Convention have measures in place that enable the effective application of the provision; but secondly, and this remains controversial, how far it should go. **26.40**

Article 26 was discussed by the Court of Appeal of England and Wales in *R v. LM and Others*.<sup>51</sup> **26.41**

It is necessary to focus upon what Article 26 does and does not say. It does not say that no trafficked victim should be prosecuted, whatever offence has been committed. It does not say that no trafficked person should be prosecuted when the offence is in some way connected with or arises out of trafficking. It does not provide a defence which may be advanced before a jury. What it says is no more, but no less, than that careful consideration must be given to whether public policy calls for a prosecution and punishment when the defendant is a trafficked victim and the crime has been committed when he or she was in some manner compelled (in the broad sense) to commit it. Article 26 does not require a blanket immunity from prosecution for trafficked victims.<sup>52</sup>

A later case before the same court elicited the observation that the notion of ‘compulsion’ in Article 26 is wider than that of duress under the law of England and Wales. This is important, because some countries do argue that the defence of duress is available to trafficked victims. If they interpret duress similarly to English law, then there is a chance that Article 26 is being construed too narrowly, to the detriment of trafficked persons. The court said that ‘the possibility of not imposing penalties is related to criminal activities in which the victims of trafficking have been compelled to participate in circumstances in which the defence of duress is not available’.<sup>53</sup> This is a significant point, and careful scrutiny should be given to any claims that a defence of duress will meet the requirements of Article 26; the veracity of such claims will depend upon how the defence is interpreted in practice. But the courts have recognised that a clear connection between the fact of having been trafficked and having committed an offence should allow for the quashing of convictions.<sup>54</sup> **26.42**

It has also been argued that culpability may be diminished but not extinguished by the fact that a person was trafficked.<sup>55</sup> This reflects the difficulty of defining the precise scope of the non-punishment provision. It does not lend itself to mechanical application; the complexities are much more nuanced than that. **26.43**

51 *R v LM and Others* [2010] EWCA Crim 2327, 30 October 2010.

52 *Ibid.*, para 13.

53 *R v. N and R v. L.E.* [2012] EWCA Crim 189, 20 February 2012 January 2016, para 13.

54 *R v. Verna Sermanfire Joseph, Alexandra Dorina Craciunescu, VCL, NTN, Dong Nguyen and AA*, [2017] EWCA Crim 326, 9 February 2017, para 136.

55 *L, HVN, THN and T v. R.*, [2013] EWCA Crim 991, 21 June 2013, para 33.

## E. CONCLUSIONS

- 26.44** The non-punishment provision has been widely recognised, not only in the CoE Convention against Trafficking, but also in other regional instruments. In many countries, it is specifically included in domestic law, but in others it does not have such status. No state claims not to apply the provision but it is sometimes difficult to find cases where it has been applied. This can be because a state asserts that, when it identifies such cases, prosecutions or proceedings are discontinued. It is impossible to verify such claims.
- 26.45** It is clear that Article 26, taken in the context of the CoE Convention against Trafficking as a whole, which requires a human rights-based approach, obliges states – however they achieve this – not to allow trafficked persons to be penalised or punished for offences they were compelled to commit; but there is uncertainty about the precise scope of the duty.