

## Aberystwyth University

### *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*

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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

in consultation with the *Alliance against Trafficking in Persons* Expert Co-ordination Team

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# FOREWORD

Since I took office in 2010, one of my main priorities has been to identify gaps in the protection of victims of trafficking in human beings (THB) and to put forward concrete measures to address them. Evidence to date confirms that victims of THB are routinely punished (through administrative detention and the imposition of fines amongst other means) and prosecuted throughout the OSCE region for crimes which were committed as a direct consequence of their trafficking, such as for immigration offences, the use of false documents and drug cultivation. This current situation represents a very stark violation of the human rights of victims and frankly speaking, one of the most appalling injustices. It is well established that victims of THB stem from the most vulnerable sectors of society; victims are frequently discriminated against, experience socio-economic marginalization, are exploited, without social protection. That these same persons should be tried for crimes committed while in a state of exploitation only serves to lengthen their ordeal and in many cases to threaten their personal safety and liberty as well as to gravely diminish their future prospects of rehabilitation and social inclusion. The starting premise of all efforts to combat human trafficking must be the full protection of the human rights and dignity of victims. The non-punishment principle has been solemnly affirmed in OSCE commitments since 2000 and it has become a legally binding obligation for all those OSCE participating States who are parties to the Council of Europe Convention on Action against Trafficking in Human Beings and/or are members of the EU.

Because of the importance of the subject, and because it is also simultaneously challenging and new to many colleagues, I have taken the unprecedented step of issuing this guidance paper in the format of recommendations of the Special Representative. While the paper reflects in-depth consultations with partners of the *Alliance against Trafficking in Persons* as well as with expert practitioners on the subject, to whom I am very grateful, I take full responsibility for the views contained therein. I do so not only in my capacity as Special Representative, but also bearing in mind my former role as a judge of the Criminal Court in Rome. Being a judge myself, in particular a criminal court judge with experience in anti-mafia and

organized crime cases, I am all too familiar with the balance that judges must strike on a daily basis between the rules of evidence and procedure, the rights of victims as well as those of defendants, and the interests of justice in general. It is with this in mind that I came to the conclusion that without specific legislation and policy guidance on the non-punishment principle, it is very difficult to implement in practice, and thus protect the rights of victims.

Our initial discussions with partners and policy makers thus far suggest that we are only at the beginning of a very important process. In the paper you will find a selection of case studies which represent only a very small fraction of what we know to be a very substantial phenomenon across the OSCE region. These cases illustrate clearly why and how victims are punished on a regular basis. Although in certain cases the courts have not exempted the victim from criminal liability, the mere fact that we are aware of these cases means that these same countries are moving forward in their efforts to combat THB. But much remains to be done. I urge parliamentarians, policy makers and most of all, judges, to read the recommendations and begin to assess how the non-punishment principle can be effectively implemented. The next step in this important line of work will be to identify how to incorporate the non-punishment principle into all training and awareness-raising activities for THB, as well as to work with national authorities and civil society organizations to strengthen victim identification strategies –including in detention facilities- and contribute to ending impunity. Whether you are a judge, a government official, a civil society actor, or a concerned citizen, I am counting on your support and engagement on this issue.



Maria Grazia Giammarinaro  
OSCE Special Representative and Co-ordinator for  
Combating Trafficking in Human Beings



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The paper was drafted by Ryszard Piotrowicz, Professor of Law at Aberystwyth University, Member of the European Commission's Group of Experts on THB and of GRETA, the Council of Europe's Group of Experts on Action against Trafficking in Human Beings, and Liliana Sorrentino, expert on THB. The views expressed do not necessarily reflect those of the European Commission's Group of Experts nor of GRETA. In addition, the paper benefited from expert contributions by Parosha Chandran, barrister at 1 Pump Court Chambers, London and Patricia Le Cocq of the Belgian Centre for Equal Opportunities and Opposition to Racism, as well as Aimée Comrie and Georgina Vaz Cabral of the OSCE-OSR/CTHB. Claire Jessel worked on editing the final draft and preparing the layout of the paper.

The SR organized three rounds of consultations with partners in the *Alliance against Trafficking in Persons*. The SR is grateful to experts in the Alliance Expert Co-ordination Team (AECT) who reviewed the paper and the recommendations and significantly contributed to it with their knowledge and experience. The following organizations/partners in the Alliance contributed to the development of this paper: Anti-Slavery International, Council of Europe, ECPAT International, ICMPD, IFRC/RCS, ILO, IOM, ITUC, La Strada International, OHCHR, UNHCR, UNICEF, UNODC. In addition, the paper benefited from the contribution of legal practitioners and other experts with direct experience in the handling of cases of victims of trafficking. The content of this publication does not necessarily reflect the views or policies of contributory organizations, nor does it imply any endorsement.

**Maria Grazia Giammarinaro**

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for Combating Trafficking in Human Beings*



OSCE/Alberto Andreani



## 1. Introduction

[1] Trafficking in human beings is a massive phenomenon of modern-day slavery, which sees millions of individuals deprived of their liberty and freedom of choice, exploited with coercive and abusive means for a variety of purposes ranging from sexual and labour exploitation, to forced criminality and to the removal of organs or any other illicit lucrative form of exploitation.<sup>1</sup> Very few receive assistance and protection as victims of a serious crime; more often they are arrested, detained and charged with immigration offences, for soliciting prostitution or engaging in illegal work, making false statements or they are fined for violations of administrative laws and regulations. Furthermore, the increasing prevalence globally of human trafficking for enforced criminality also exposes victims of trafficking to committing a multitude of offences such as, but not limited to, theft, pick-pocketing, drug trafficking, cannabis cultivation and fraud. It is often a deliberate strategy of the traffickers to expose victims to the risk of criminalization and to manipulate and exploit them for criminal activities. It is therefore not uncommon that victims of trafficking commit criminal offences or other violations of the law directly connected with, or arising out of, their trafficking situation. In these situations they often come to the attention of the authorities primarily as offenders and they may not be easily recognized as actual victims of a serious crime. Therefore, States should be fully aware of these developments in order to enable accurate victim identification and effective investigation of the trafficking crime, as well as to ensure effective protection of victims' rights, including non-punishment of victims for offences caused or directly linked with their being trafficked.

[2] The principle of non-punishment of victims is affirmed in a number of international standards, including legally and politically-binding instruments. In the OSCE region, participating States committed to endorse a human rights-based and victim-centred approach to anti-trafficking action, an approach that respects the dignity

and human rights of trafficking victims at all times.<sup>2</sup> Such a human rights approach calls for governments and parliaments to take the lead in their national jurisdictions to ensure that legislation and policy are not negatively impacting on the protection of rights of trafficked persons.<sup>3</sup> The non-punishment of victims of trafficking for offences they have committed as a consequence, or in the course, of being trafficked is an essential element of such a human rights approach.<sup>4</sup> With a view to supporting participating States in the implementation of these commitments, the OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings (hereinafter SR), in close consultation with partners in the Alliance against Trafficking in Persons, has engaged in the development of policy guidance to assist States in the translation into practice of the commitment on the non-punishment of victims of trafficking.

[3] This paper examines the principle of non-punishment in international law, explores the scope of its application and discusses the challenges in its practical implementation. It includes a number of practical examples and court cases which were made available by national agencies, NGOs and legal professionals who have been examining these issues extensively, in particular the Belgian Centre for Equal Opportunities and Opposition to Racism, the Bureau of the Dutch National Rapporteur on Trafficking in Human Beings, as well as UK courts and lawyers. The paper concludes with the provision of practical guidance, and the formulation of policy and legislative recommendations, towards the effective implementation of the non-punishment provision with regard to victims of trafficking.

<sup>1</sup> ILO, *Global Estimate of Forced Labour* (Geneva, 2012): In 2012, the ILO estimated that 20.9 million people are victims of forced labour globally. This estimate captures the full realm of human trafficking.

<sup>2</sup> OSCE Ministerial Council, *Declaration on Trafficking in Human Beings*, MC(10).JOUR/2 (Porto, 7 December 2002), Annex 2, Section II, para. 6.

<sup>3</sup> OSCE Permanent Council, *Decision No. 557/Rev. 1 OSCE Action Plan to Combat Trafficking in Human Beings*, PC.DEC/557/Rev.1 (Vienna, 7 July 2005), Chapter IV, para. 5.2.

<sup>4</sup> OSCE Ministerial Council, *Decision No. 1 Enhancing the OSCE's Efforts to Combat Trafficking in Human Beings*, MC(8).DEC/1 (Vienna, 28 November 2000), para. 9; OSCE Ministerial Council, *Ministerial Declaration On Combating All Forms of Human Trafficking*, MC.DOC/1/11/Corr.1 (Vilnius, 7 December 2011).

## 2. The rationale for the non-punishment provision

[4] The punishment of victims of trafficking for crimes directly related to their trafficking is a violation of their fundamental dignity. It constitutes a serious denial of reality and of justice. Such punishment blames victims for the crimes of their traffickers, for crimes that, but for their status as trafficked persons, they would not have perpetrated. The criminalization of trafficked victims may be tantamount to persecution of victims by the State: not only does it fail to take into account the serious crimes committed against the victim by the traffickers, which should be investigated, it fails to recognize trafficked persons as victims and witnesses of those serious crimes and exacerbates their victimization and/or trauma by imposing on such persons State-imposed, unjust punishment. Instead of being treated as victims, they are treated as criminals. This practice furthermore promotes trafficking in human beings by failing to confront the real offenders, by dissuading trafficked victims from giving evidence against their traffickers and by enabling traffickers to exert even further control over their victims by threatening exposure to punishment by the State. Traffickers will favour the punishment of victims as it simply plays into their hands: it ensures that their victims are the ones to bear the criminal penalties while the real offenders can operate with impunity.

[5] The rationale for non-punishment of victims of trafficking is that, whilst on the face of it a victim may have committed an offence, such as irregular crossing of a State frontier or theft, the reality is that the trafficked person acts without real autonomy. They have no, or limited, free will because of the degree of control exercised over them and the methods used by traffickers, consequently they are not responsible for the commission of the offence and should not therefore be considered accountable for the unlawful act committed. The same applies where the victim has escaped from their trafficker and the crime they have committed arises as a direct consequence of their trafficked status.

[6] The principle of non-punishment derives its force not only from explicit recognition as a legally binding norm by States at the international level, in measures adopted by the Council of Europe and the European Union,<sup>5</sup> but also through the application of human rights law generally.

<sup>5</sup> Council of Europe, *Convention on Action against Trafficking in Human Beings*, CETS No. 197 (Warsaw, 2005), Article 26; European Union, *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* (5 April 2011), Article 8.

### Use of false ID by victims judged to be a confirming factor of exploitation Case

People trafficked for sexual exploitation are often forced by traffickers to buy false ID documents or forged passports to be used when there are police controls. In one judgement the Court of Appeal of Gent examined a situation in which a trafficked person was forced to declare to the immigration office a false identity and nationality and the Court considered that this was a fact confirming the exploitation of the individual.

Source: Centre for Equal Opportunities and Opposition to Racism, *Trafficking in and smuggling of human beings (Belgium) relating to judgment from the Court of Appeal of Gent (Belgium)*, 31 May 2007. Judgement is available in Dutch at: <[http://www.diversite.be/diversiteit/files/File//Rechtspraak\\_jurisdiction/mensenhandel\\_TEH/2007/h07-05-31\\_a\\_Gent.pdf](http://www.diversite.be/diversiteit/files/File//Rechtspraak_jurisdiction/mensenhandel_TEH/2007/h07-05-31_a_Gent.pdf)>, accessed 10 April 2013, and a French summary is also available at: <[http://www.diversite.be/?action=rechtspraak\\_detail&id=496&select\\_page=68](http://www.diversite.be/?action=rechtspraak_detail&id=496&select_page=68)>, accessed 10 April 2013.

[7] All legal systems impose responsibility on persons who commit crimes and offences. Responsibility, and accountability, may however be averted where the person concerned has a recognized defence, acts under coercion or lacks capacity.

[8] Trafficked persons would, but for their having been trafficked (and in the absence of some factor limiting their responsibility, such as age or diminished mental competence) normally be legally competent persons with responsibility for their own acts. Their responsibility for trafficking-related offences is however circumscribed by the fact that their freedom of action is limited by the traffickers or the trafficking: they are forced to commit offences whilst being trafficked or as a consequence of being trafficked.

[9] The vulnerable situation of the trafficked person becomes worse where the State fails to identify such a person as a victim of trafficking, as a consequence of which they may be denied their right to safety and assistance as a trafficked person and instead be treated as an ordinary criminal suspect. States have a duty to provide qualified and trained officials to identify and help victims of trafficking.<sup>6</sup> Identification is crucial because,

<sup>6</sup> For assistance and protection provisions, see: United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (15 November 2000), UN Doc. A/45/49 (Vol.1), Articles 6-8 of the Protocol and Articles 24-25 of the Convention; Council of Europe, Op. Cit., Articles 10-17; European Union, Op. Cit., Articles 11-17; OSCE ODIHR, *OSCE Human Dimension Commitments*, Vol. 1 Thematic Compilation, 3rd edition (Warsaw, 2011), section 6.2.3; See also European Court of Human Rights, *Case of Rantsev v. Cyprus and Russia*, Application no. 25965/04 (Strasbourg, 7 January 2010), <<http://www.unhcr.org/refworld/docid/4b4f0b5a2.html>>, accessed 31 January 2013, as concerns the positive obligations on States under Article 4 of the European Convention Human Rights to identify and assist victims of trafficking and to investigate their trafficking.

if it does not happen, victims are denied essential help and may be treated as suspected offenders. Accordingly, States need to have in place mechanisms and procedures for correctly identifying victims of trafficking so that they are swiftly recognized as such and are treated in full accordance with their needs and entitlements. One such entitlement is that victims of trafficking should not be punished for offences caused or directly linked to having been trafficked.

### 3. The principle of non-punishment in international law

[10] States must ensure that victims are not punished for offences committed in the course, or as a consequence, of being trafficked. The principal multilateral instrument regulating trafficking is the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (hereinafter Palermo Protocol).<sup>7</sup> That instrument does not expressly provide for non-punishment of victims. Nevertheless, under Article 2(b), one of the purposes of the Protocol is to “*protect and assist the victims of such trafficking, with full respect for their human rights*”. The Working Group on Trafficking in Persons, whose function is to “*advise and assist the Conference [of the Parties to UNCTOC] in the implementation of its mandate with regard to the Trafficking in Persons Protocol*”, has in that context recommended in 2009:

*“With regard to ensuring the non-punishment and non-prosecution of trafficked persons, States parties should: (a) Establish appropriate procedures for identifying victims of trafficking in persons and for giving such victims support; (b) Consider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts [...]”*<sup>8</sup>

In 2010 the Working Group reaffirms this recommendation and goes further to request States parties to ensure:

*“that provisions for the non-punishment and non-prosecution of trafficked persons contained in domestic*

<sup>7</sup> United Nations, Op. Cit., <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en)>, accessed 10 April 2013.

<sup>8</sup> United Nations, *Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009*, CTOC/COP/WG.4/2009/2 (21 April 2009), <[http://www.unodc.org/documents/treaties/organized\\_crime/Final\\_report\\_English\\_TIP.pdf](http://www.unodc.org/documents/treaties/organized_crime/Final_report_English_TIP.pdf)>, accessed 10 April 2013.

*legislation, guidelines, regulations, preambles or other instruments are clearly stated. In doing so, States parties are encouraged to make use of technical assistance tools such as the UNODC Model Law against Trafficking in Persons and principles and guidelines such as the Recommended Principles and Guidelines on Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights, as well as any other regional standards and guidelines [...]”*<sup>9</sup>

Furthermore, the background paper for the 2010 meeting of the Working Group prepared by the Secretariat has stated in that context:

*“An essential element of protection of victims of trafficking and their rights must be that States do not prosecute or punish trafficked persons for trafficking-related offences such as holding false passports or working without authorization, even if they consented to hold false documents or to work without authorization. Similarly, it is argued that States should not prosecute or punish trafficked persons for crimes they may have committed in the course of trafficking.”*<sup>10</sup>

[11] An obligation of non-punishment has been recognized in several instruments since the adoption of the Palermo Protocol. The Council of Europe Convention on Action against Trafficking in Human Beings provides, at Article 26:

*“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.”*<sup>11</sup>

[12] The SR takes the view that the non-punishment provision should be interpreted in light of the definition of trafficking in human beings, especially with regard to compulsion. A comprehensive understanding of compulsion includes all the means of trafficking: threat/use of force, other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability. Being “compelled” to commit a crime thus includes the full array of factual circumstances in which victims of trafficking lose the possibility to act with free will; not

<sup>9</sup> United Nations, *Report on the meeting of the Working Group on Trafficking in Persons held in Vienna from 27 to 29 January 2010*, CTOC/COP/WG.4/2010/6 (17 February 2010), <[http://www.unodc.org/documents/treaties/organized\\_crime/2010\\_CTOC\\_COP\\_WG4/CTOC\\_COP\\_WG4\\_2010\\_final\\_report\\_E.pdf](http://www.unodc.org/documents/treaties/organized_crime/2010_CTOC_COP_WG4/CTOC_COP_WG4_2010_final_report_E.pdf)>, accessed 10 April 2013.

<sup>10</sup> United Nations Working Group on Trafficking in Persons, *Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking*, CTOC/COP/WG.4/2010/4 (9 December 2009), para. 10, <[http://www.unodc.org/documents/treaties/organized\\_crime/2010\\_CTOC\\_COP\\_WG4/WG4\\_2010\\_4\\_E.pdf](http://www.unodc.org/documents/treaties/organized_crime/2010_CTOC_COP_WG4/WG4_2010_4_E.pdf)>, accessed 10 April 2013.

<sup>11</sup> Council of Europe, *Convention on Action against Trafficking in Human Beings*, CETS No. 197 (Warsaw, 2005), <<http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm>>, accessed 10 April 2013.

only under the threat of physical violence or emotional abuse, but also in the devastatingly prevalent scenarios wherein traffickers exploit victims by abuse of a position of vulnerability.

[13] Article 26 of the Council of Europe Convention imposes a clear obligation on States to provide for the possibility of non-punishment. This might appear to allow some discretion to States in as much as it does not stipulate that States must not impose penalties. This is explained by the explanatory report accompanying the Convention, which provides, at para. 274:

*“Each Party can comply with the obligation established in Article 26, by providing for a substantive criminal or procedural criminal law provision, or any other measure, allowing for the possibility of not punishing victims when the [...] legal requirements are met [...]”*.<sup>12</sup>

[14] The SR takes the view that States have an obligation to keep victims immune from punishment where their crime was caused or directly linked to their having been trafficked, and States have a degree of discretion only regarding how to implement the requirement not to punish, according to their national legal systems. Moreover, the SR takes the view that the non-punishment provision includes the obligation to keep trafficking victims immune not only from the application of a penalty but, also from prosecution and detention.

### **Trafficked person forced to use false passport**

A young Nigerian woman was exploited in prostitution in Belgium; she was forced by her trafficker to use a false passport in order to receive a residence permit. Despite being recognized as a victim by a criminal court in Brussels, she was later prosecuted and convicted in her absence for the use of a false passport by another criminal court in Antwerp, which was not aware of the earlier decision. On appeal, the victim and later the prosecutor, alleged that a justification existed, i.e., that the victim was not free to act and the trafficker coerced her into using a false passport; the judge ruled that she was not liable because she was constrained by force to commit the offence.

Source: Centre for Equal Opportunities and Opposition to Racism, Providing information on cases from the Criminal Court of Antwerp (Belgium), 26 April 2006 and 2 April 2008.

[15] GRETA, the monitoring body of the Council of Europe Convention on Action against Trafficking in Human Beings, has expressly interpreted Article 26 thus:

*“Article 26 of the Council of Europe Convention, read in conjunction with the Explanatory Report, establishes a positive obligation on Parties to adopt measures that specifically deal with the non-liability of victims of trafficking. The Explanatory Report states that such legislative measures can be “a substantive criminal or procedural criminal law provision, or any other measure.” Parties do have room in the extent to which the national authorities apply such measures, but legislation specific to victims of human trafficking must first be provided for. Criminalisation of victims of trafficking not only contravenes the State’s obligation to provide services and assistance to victims, but it 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>13</sup>

[16] It follows that for protection against non-punishment to be effective, legislation to protect trafficked individuals against unlawful punishment for trafficking-related crimes should be adopted by States. The non-punishment principle creates a legal right for victims of trafficking. As such it should be safeguarded in domestic law.

[17] In 2011, the trend towards recognizing a non-punishment obligation was strengthened by the adoption of a European Union Directive on preventing and combating trafficking in human beings and protecting its victims (Directive 2011/36/EU).<sup>14</sup> The approach taken in the Directive appears to be wider than that in the Council of Europe Convention; the Directive establishes an express obligation not to prosecute. Article 8 provides:

*“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” (emphasis added).*

[18] The Recital to the Directive further clarifies the scope and aim of the non-punishment provision:

<sup>13</sup> Council of Europe, Committee of the Parties Council of Europe Convention on Action against Trafficking in Human Beings, *Meeting Report of the 7th meeting of the Committee of the Parties* (Strasbourg, 30 January 2011), THB-CP(2012)RAP7 (Strasbourg, 9 February 2012), Appendix II, para. 7.

<sup>14</sup> European Union, *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* (5 April 2011): All EU Member States except Denmark are bound by it.

<sup>12</sup> Council of Europe Committee of Ministers, *Explanatory Report to the Council of Europe Convention on action against trafficking in human beings*, CM(2005)32 Addendum 2 final (3 May 2005), <<https://wcd.coe.int/ViewDoc.jsp?id=828773&Site=CM>>, accessed 10 April 2013.

*“Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators.”<sup>15</sup>*

[19] The principle of non-punishment has been recognized in instruments adopted in other areas of international law. Again, the rationale is that the person concerned was in some way compelled by circumstances such that their own freedom of action was limited and they should therefore be free from criminal liability. Thus the UN Convention Relating to the Status of Refugees provides, at Article 31.1, that 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 certain specified ways], enter or 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>16</sup>*

### 3.1 Soft law instruments

[20] The principle of non-punishment and non-criminalization of trafficked persons is recognized in several soft law instruments adopted over the last decade or so. These instruments stress that the human rights of trafficked victims should be at the centre of efforts to prevent and combat trafficking.

[21] Principle 7 of the Recommended Principles and Guidelines on Human Rights and Human Trafficking,<sup>17</sup> adopted by the Office of the UN High Commissioner for Human Rights, states:

<sup>15</sup> European Union, Op. Cit., para. 14.

<sup>16</sup> United Nations, *Convention relating to the Status of Refugees*, 189 UNTS 150 (Geneva, 28 July 1951). Furthermore, the obligation not to impose “penalties” under Article 31 is widely recognized as requiring States to provide individuals with protection from criminal liability. In the United Kingdom High Court case of R (on the application of) Adimi v Uxbridge Magistrates Court & Anor [1999] EWHC Admin 765 (29 July 1999), the UNHCR authoritatively pronounced on the meaning of Article 31, quoted at para. 29 of the judgement: “This obliges Contracting States not to apply the relevant provisions under domestic penal law to refugees and asylum seekers. If necessary, they have to amend domestic penal law or prosecution instructions/practice in order to ensure that no person entitled to benefit from the provisions of Article 31 shall run the risk of being convicted.”, <<http://www.bailii.org/ew/cases/EWHC/Admin/1999/765.html>>, accessed 10 April 2013.

<sup>17</sup> UN Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1 (2002), <<http://www.unhcr.org/refworld/docid/3f1fc60f4.html>>, accessed 31 January 2013.

*“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.”*

That principle is repeated four times, in different contexts, in the accompanying guidelines intended to clarify how effect should be given to the principle.<sup>18</sup> The qualification that, in cases of adults,<sup>19</sup> the unlawful activities must be a “direct consequence” of having been trafficked stresses that not all acts of the trafficked person should be exempt: this is an exception to the general rule that one must accept the legal consequences of one’s actions; the unlawful act – which remains unlawful – must have been caused by the fact that the person otherwise responsible was being, or had been, trafficked.

#### Trafficked workers holding false documents

In a multidisciplinary operation in the car-wash sector, Belgian law enforcement officers detected a case of trafficking for labour exploitation. Workers had false identity documents and bogus self-employment contracts, they lived and worked in very exploitative conditions and were totally dependent on their employers. Several workers were identified as victims of trafficking and consequently not prosecuted for possession of false documentation. However, during the investigation it was established that one of the workers was implicated in the corruption of an embassy official in order to obtain a passport; this worker was not considered to be a victim. Also, in the same case, another trafficked worker saw his application for residence rejected because in the past he had received a negative response to his request for regularization; he therefore received an expulsion order to leave the country.

Source: Centre for Equal Opportunities and Opposition to Racism, *Annual Report on Trafficking in and Smuggling of Human Beings 2010: Combating social fraud to prevent trafficking in human beings* (Brussels, October 2011), pp. 59–63, <[http://www.diversiteit.be/?action=publicatie\\_detail&id=135&thema=5&setLanguage=3](http://www.diversiteit.be/?action=publicatie_detail&id=135&thema=5&setLanguage=3)>, accessed 10 April 2013.

<sup>18</sup> Ibid., Guideline 2.5 (ensuring non-prosecution for violations 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).

<sup>19</sup> Ibid., Guideline 8.3. Also see Section 6.1 below for guidance on children’s cases.

[22] OSCE participating States have undertaken to “[e]nsuring that measures adopted for the purpose of preventing and combating trafficking in persons do not have an adverse impact on the rights and dignity of persons, including their freedom of movement”.<sup>20</sup> The principle of non-punishment has been advocated at the OSCE level since the 2000 Ministerial Council committed:

“to take necessary measures, including by adopting and implementing legislation, to criminalize trafficking in human beings, including appropriate penalties, with a view to ensuring effective law enforcement response and prosecution. Such legislation should take into account a human rights approach to the problem of trafficking, and include a provision for the protection of the human rights of victims, ensuring that victims of trafficking do not face prosecution solely because they have been trafficked.”<sup>21</sup>

This commitment has been reiterated to the present day; in the Vilnius Declaration, the OSCE Ministerial Council affirms:

“10. We recognize that adequate measures should be taken to ensure that, where appropriate, identified victims of human trafficking are not penalized for their involvement in unlawful activities to the extent that they have been compelled to do so.”<sup>22</sup>

[23] The principle has furthermore been recognized in resolutions of the General Assembly of the United Nations,<sup>23</sup> the Brussels Declaration on Preventing and Combating Trafficking in Human Beings<sup>24</sup> and the

Miami Declaration of Principles of Human Trafficking.<sup>25</sup> A non-punishment provision was also included in the Commonwealth of Independent States (CIS) Model Law on Providing Assistance to the Victims of Trafficking in Human Beings.<sup>26</sup> The CIS Model Law sets out the principle at Article 5, point 3, which calls for the release from criminal liability for victims of trafficking for offences committed because they were compelled to do so as victims of THB.<sup>27</sup> The European Commission’s Group of Experts on Trafficking in Human Beings has also supported non-punishment<sup>28</sup>, as has the UN Working Group on Trafficking in Persons.<sup>29</sup> The United Nations Special Rapporteur on trafficking in persons, especially women and children, has also advocated the non-punishment and non-criminalization of trafficked people.<sup>30</sup>

[24] The picture that emerges since the adoption of the Palermo Protocol is of a principle that has received widespread support in non-binding instruments adopted by a diverse body of actors, but also significant recognition and acceptance by States that non-punishment is appropriate, even required, where the person who has committed the offence was not an independent actor.

[25] The duty not to punish, grounded in international law, must be implemented by States in their domestic practice. All States are obliged to ensure that their domestic law is in conformity with their international obligations, irrespective of the requirements or complexities of their own legal systems. The 1969 Vienna Convention on the Law of Treaties provides, at Article 27 (in part):

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.<sup>31</sup>

20 OSCE Permanent Council, *Decision No. 557/Rev.1 OSCE Action Plan to Combat Trafficking in Human Beings*, PC.Dec/557/Rev.1 (Vienna, 7 July 2005), Chapter IV, para. 5.2.

21 OSCE Ministerial Council, *Decision No. 1 Enhancing the OSCE’s Efforts to Combat Trafficking in Human Beings*, MC(8).DEC/1 (Vienna, 28 November 2000), para. 9.

22 OSCE Ministerial Council, *Ministerial Declaration on Combating All Forms of Human Trafficking*, MC.DOC/1/11/Corr.1 (7 December 2011); OSCE, *Annotated Agenda of the 2012 OSCE Human Dimension Seminar*, CIO.GAL/51/12/Rev.1 (10 May 2012): “A rule of law and human rights-based approach to trafficking in human beings and an essential element of the obligation to protect the rights of victims is also that victims of trafficking do not face prosecution solely because they have been trafficked and are not penalized for their involvement in unlawful activities to the extent that they have been compelled to do so. In other words, victims of trafficking should not be prosecuted or punished, including for criminal or administrative offences they committed as a consequence or as a cause of being trafficked. OSCE participating States committed themselves to ensure that the requirement of non-prosecution and non-punishment of victims of trafficking is implemented on the national level”.

23 United Nations, *Resolution on Traffic in women and girls / adopted by the General Assembly*, A/RES/55/67 (31 January 2001), para. 6; also United Nations, *Resolution Global Plan of Action to Combat Trafficking in Persons: resolution / adopted by the General Assembly*, A/RES/64/293 (12 August 2010): it requires States to “Ensure that victims of trafficking in persons are treated as victims of crime and that national legislation effectively criminalizes all forms of trafficking” and urges “Governments to take all appropriate measures to ensure that identified victims of trafficking in persons are not penalized for having been trafficked and that they do not suffer from victimization as a result of actions taken by Government authorities”.

24 European Union (EU), *Brussels Declaration on Preventing and Combating Trafficking in Human Beings*, 14981/02 (29 November 2002), para. 7, <<http://www.unhcr.org/refworld/docid/4693ac22.html>>, accessed 10 April 2013: “Trafficked victims must be recognised as victims of serious crime. Therefore they should not be re-victimised, further stigmatised, criminalised, prosecuted or held in detention centres for offences that may have been committed by the victim as part of the trafficking process”.

25 *The Miami Declaration of Principles on Human Trafficking* (10 February 2005), para. 28: “The trafficked person must be recognized as the victim of the crime of trafficking. States must not criminalize the status of the trafficked person and should not penalize the victim for illegal acts, such as illegal immigration or prostitution, incident or related to the trafficking act”.

26 Commonwealth of Independent States (CIS), *Model Law on Providing Assistance to the Victims of Trafficking* (2008).

27 *Ibid.*

28 European Commission, *Opinion No. 1/2008 of the Experts Group on Trafficking in Human Beings on the Revision of the Council Framework decision of 19 July 2002 on Combating Trafficking in Human Beings* (17 October 2008), p. 4.

29 United Nations, *Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009*, CTOC/COP/WG.4/2009/2 (21 April 2009), <[http://www.unodc.org/documents/treaties/organized\\_crime/Final\\_report\\_English\\_TIP.pdf](http://www.unodc.org/documents/treaties/organized_crime/Final_report_English_TIP.pdf)>, accessed 10 April 2013, para. 12: “States Parties should [...] consider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons, or where they were compelled to commit such unlawful acts”.

30 UN Human Rights Council, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, Joy Ngozi Ezeilo, A/HRC/20/18 (6 June 2012), paras. 23-30.

31 United Nations, *Vienna Convention on the Law of Treaties* (1969), Treaty Series, vol. 1155, p. 331, Article 27.

In the event of a conflict between its domestic law and an international obligation, the latter remains binding upon the State. Therefore, those States which are parties<sup>32</sup> to the Council of Europe Convention on Action against Trafficking in Human Beings should, in order to act in conformity with that instrument, if necessary, take steps to ensure that the non-punishment principle is given real and practical effect, as required by Article 26.

## 4. The non-punishment principle: essential element of a human rights approach

[26] Trafficked persons have been the victims of one or more serious criminal offences. States have obligations to assist such persons, and not to treat them as criminals. The UN Recommended Principles and Guidelines on Human Rights and Human Trafficking state that “[t]he human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims”.<sup>33</sup> The 2005 Council of Europe Convention on Action against Trafficking in Human Beings provides clearly, in the Preamble: “Considering that respect for victims’ rights, protection of victims and action to combat trafficking in human beings must be the paramount objectives”.<sup>34</sup> In the Porto Ministerial Council Declaration, the OSCE participating States also affirmed: “The dignity and human rights of victims must be respected at all times”<sup>35</sup>. The penalization of a person for acts that they have committed as a cause or direct consequence of being trafficked must be seen in that context: not only does it unjustly punish and stigmatise victims of serious crime; it would also violate these human rights objectives.

[27] The principle of non-punishment, in addition to requiring that States refrain from certain acts against trafficked persons, also imposes positive obligations on them. In the case of *Rantsev v. Cyprus and Russia*, the European Court of Human Rights held with regard to Article 4 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the

prohibition of slavery, servitude and forced labour) that the State’s human rights obligation includes having in place legislation “[...] adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking”.<sup>36</sup> This emphasis on the protection of victims’ rights in reality indicates that the obligation extends to include ensuring that such persons are not punished for offences that were caused or directly linked to their having been trafficked: few acts could constitute a more flagrant violation of a victim’s rights than for the State to prosecute or otherwise punish a person for acts they were compelled by their trafficker or trafficking to do. The obligation of non-punishment is therefore intimately tied to the State’s obligations to identify, protect and assist victims of trafficking<sup>37</sup> and also to the State’s duty to investigate a trafficking situation with a view to identifying the trafficker and seeking to bring the true perpetrator to justice.<sup>38</sup>

[28] The principle of non-punishment may be infringed both indirectly and directly. Indirect violation results from a failure of the State authorities to identify a person as a victim of trafficking, which, consequently, leads to an incomplete picture of the circumstances of a committed offence and criminal accountability. The direct violation of the non-punishment principle arises from situations where State authorities dealing with an offence committed by the victim of trafficking “ought to have been aware”<sup>39</sup> of her/his status as a victim of trafficking but fail to attach appropriate significance to this fact when deciding upon her/his responsibility.

## 5. Identification and assistance: prerequisites for the application of the non-punishment principle

[29] For the non-punishment principle to function effectively, it is necessary that either no prosecution be initiated or other measures be taken, or that, having been initiated, such prosecution be discontinued or measures

32 OSCE Ministerial Council, *Decision No. 15/05 Preventing and Combating Violence against Women* (Ljubljana, 6 December 2005), para. 3: calls on participating States to consider signing and ratifying, where appropriate the Council of Europe Convention on Action against Trafficking in Human Beings.

33 UN Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1 (20 May 2002), <<http://www.unhcr.org/refworld/docid/3f1fc60f4.html>>, accessed 31 January 2013.

34 Council of Europe, *Convention on Action against Trafficking in Human Beings*, CETS No. 197 (Warsaw, 2005), Article 26.

35 OSCE Ministerial Council, *Declaration on Trafficking in Human Beings*, MC(10).JOUR/2 (Porto, 7 December 2002), Annex 2, Section II, para. 6.

36 European Court of Human Rights, *Case of Rantsev v. Cyprus and Russia*, wApplication no. 25965/04 (Strasbourg, 7 January 2010), <<http://www.unhcr.org/refworld/docid/4b4f0b5a2.html>>, accessed 31 January 2013, para. 284.

37 *Ibid.*, para. 285: “[...] member States are required to put in place a legislative and administrative framework to prohibit and punish trafficking. The Court observes that the Palermo Protocol and the Anti-Trafficking Convention refer to the need for a comprehensive approach to combat trafficking which includes measures to prevent trafficking and to protect victims [...] The extent of the positive obligations arising under Article 4 must be considered within this broader context”.

38 *Ibid.*, para. 286: States’ positive obligations towards trafficking victims begin when “the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited [...]”.

39 *Ibid.*



cancelled once it is evident that the relevant offence was committed in the course, or as a consequence, of being trafficked. The earlier a person is identified as a victim of trafficking, the sooner steps can be taken to avert or discontinue such penal or administrative measures in relation to any alleged offences. It is therefore essential that effective mechanisms and procedures be in place so that victims of trafficking can be identified as quickly as is reasonably possible. Failure to do this is likely to result in the victim being treated as a “normal” offender, that is one who would normally be required to take full legal responsibility, including being sanctioned for their acts. Therefore, early identification is crucial and States should ensure that public servants who are likely to come into contact with trafficked persons, such as police officers, border guards, social services and labour inspectors, are trained to do this and to co-operate together.<sup>40</sup> Furthermore, State authorities are required to act proactively in order to uncover potential situations of human trafficking: the prosecutor needs to take the initiative in ensuring that enquiries are made regarding the circumstances of the suspect and the circumstances in which they were apprehended.<sup>41</sup> The SR is of the view that full, prompt and effective use must also be made of a State’s National Referral Mechanism for victim identification. It is also vital that the judiciary is able to identify cases that bear the hallmarks of trafficking and exploitation in order to prompt relevant enquiries to be made by the prosecutor concerning victim identification and perpetrator investigation. In such cases it may be ultimately necessary for the court to divert the case away from the criminal justice system and for the victim to be directed to assistance and recovery procedures.

[30] In order to ensure that victims of trafficking are not penalized or punished for acts caused or directly linked to their having been trafficked, as soon as there is a reasonable suspicion that they might have been trafficked, there must be a careful assessment of the circumstances of their case. Furthermore, any order of removal from the country should be suspended<sup>42</sup> and they should receive essential assistance and support in accordance with their needs and entitlements, including access to independent legal advice regarding their situation. Article 12.1 of the Council of Europe Convention stipulates:

40 OSCE Ministerial Council, *Decision No. 8/07 Combating Trafficking in Human Beings for Labour Exploitation* (Madrid, 30 November 2007), para. 4; OSCE Permanent Council, *Decision No.557/Rev. 1 OSCE Action Plan to Combat Trafficking in Human Beings* (Vienna, 7 July 2005), Chap. III para. 5, Chap. V para. 3, Addendum para. 5.

41 England and Wales Court of Appeals, *Case of Regina v O*, EWCA Crim 2835 (2008), <<http://www.bailii.org/ew/cases/EWCA/Crim/2008/2835.html>>, accessed 10 April 2013.

42 Council of Europe, Op. Cit., Article 10, para. 10. 3: “When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age”.

“Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least: [...]

*d counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand”.*

A similar obligation exists at the EU level.<sup>43</sup> OSCE anti-trafficking commitments also call on States to ensure the provision of assistance to victims, and in particular access to legal assistance and counselling in a language known by the victim.<sup>44</sup>

### **Girl trafficked for sexual exploitation returned as irregular migrant with false documents**

R travelled to Switzerland from Eastern Europe with the help of an acquaintance. She was given a forged passport indicating that she was over 18 years old. She was forced to become a street prostitute; she had to hand over 1000 Swiss francs a day to her exploiters. They threatened to kill her if she disobeyed them. During a police operation, the police found out that her passport was forged and indicated a false age; she was interviewed but did not tell her story and was detained pending deportation; detention itself could be considered a punishment in this context. The NGO FIZ heard about her case and managed to be granted a 40 minute visit to meet her. She was very afraid and reluctant to speak but when she realized that the counselor was familiar with her situation, she opened up and asked for help. She was afraid of the pimp who lived in her country of origin in the neighbourhood of her family. The NGO tried, without success, to delay her deportation. Three days later she was returned to her home country.<sup>45</sup>

Source: FIZ, *Trafficking in girls*, Newsletter 12 (2012), p. 3.

43 European Union, *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* (5 April 2011), Article 11.5.

44 OSCE Ministerial Council, *Decision No. 8/07 Combating Trafficking in Human Beings for Labour Exploitation* (Madrid, 30 November 2007), para. 3; OSCE Ministerial Council, *Decision No. 5/08 Enhancing Criminal Justice Responses to Trafficking in Human Beings through a Comprehensive Approach* (Helsinki, 5 December 2008), para. 10; OSCE Permanent Council, *Decision No.557/Rev. 1 OSCE Action Plan to Combat Trafficking in Human Beings* (Vienna, 7 July 2005), Chap. IV, para. 6.1.

45 The Swiss National Action Plan to fight human trafficking 2012-2014 points to a number of important existing provisions regarding victim identification and protection including through training and by prioritizing victim protection over enforcing measures against foreigners staying in Switzerland illegally. An amendment to the Swiss Criminal Code in 2007 introduced a provision regarding the “exemption of trafficking victims from penalty”. It is unclear in the case above whether an application for residence permit was submitted, and why the non-punishment provision was not applied in this instance.

## 6. The scope of the principle

[31] The principle of non-punishment extends beyond a restriction on prosecutions. There are other ways in which victims of trafficking may be punished or penalized for acts they have committed in the process, or as a consequence, of being trafficked. Not all such acts will be crimes, although they may breach the law. Victims of trafficking may breach immigration laws or other laws by crossing the border illegally or by using false documentation. Even if they have entered the country legally, they may breach the conditions of entry by overstaying or working or by violating labour regulations. They may, on the face of it, violate laws prohibiting or regulating prostitution. However, the reality is different: the reality is that victims of trafficking are in this situation because they have been trafficked in violation of the law, such that their autonomy has been taken away from them. Adult trafficked persons have, in the words of Article 3(a) of the Palermo Protocol, been subjected to “the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability”, or else someone having control over them has been given benefits to consent to control being achieved over them.<sup>46</sup>

### Judicial interpretation of non-punishment

In a recent case, the UK Court of Appeal commented on Article 26 of the Council of Europe Convention, which appears to adopt a wider interpretation of compulsion under the Convention than would normally be understood under English common law:

- “[...] Article 26 [...] uses the word “compelled” in a general sense appropriate to an international instrument, and is not limited to circumstances in which the English common law defences would be established”;  
 - “[...] the obligation under Article 26 is [...] one which extends to any offence where it may have been committed by a trafficked victim who has been compelled to commit it”.

Source: England and Wales Court of Appeals, *Case of LM, MB, DG, Betti Tabot and Yutunde Tijani –and- The Queen*, EWCA Crim 2327 (2010), paras. 11-12.

<sup>46</sup> For recent guidance on the meaning and scope of ‘abuse of a position of vulnerability’ see: UNODC, *Issue Paper on Abuse of a Position of Vulnerability and Other “Means” within the Definition of Trafficking in Persons* (2012), <[http://www.unodc.org/documents/human-trafficking/2012/UNODC\\_2012\\_Issue\\_Paper\\_-\\_Abuse\\_of\\_a\\_Position\\_of\\_Vulnerability.pdf](http://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf)>, accessed 10 April 2013; and UNODC, *Guidance Note on ‘abuse of a position of vulnerability’ as a means of trafficking in persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (2012), <[http://www.unodc.org/documents/human-trafficking/2012/UNODC\\_2012\\_Guidance\\_Note\\_-\\_Abuse\\_of\\_a\\_Position\\_of\\_Vulnerability\\_E.pdf](http://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Guidance_Note_-_Abuse_of_a_Position_of_Vulnerability_E.pdf)>, accessed 10 April 2013. For a discussion on the scope of the principle in cases involving children, see Section 6.1 below.

[32] Trafficked persons are not only at risk of being subjected to unjustified prosecutions, which may lead to fines being imposed on them or even to imprisonment. They are also at risk of being penalized by being placed in administrative detention or being subjected to other limitations on their freedom of movement such as “detention in closed shelters”.<sup>47</sup> Such detention may violate States’ obligations under human rights law. Article 5 of the European Convention on Human Rights provides, in part:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...]  
 (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; [...]  
 (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

Article 5 prohibits arbitrary detention – detention not otherwise justified by law. It upholds the fundamental freedom of all to move when and where they wish unless there is a reasonable justification to prevent this. In light of this, it is crucial that States have in place appropriate mechanisms for efficiently and accurately identifying and assisting victims of trafficking: on the face of it, a trafficked person may well appear to have committed an offence which would justify their detention; alternatively they may be identified as someone who has entered the destination country without appropriate authorization. Therefore, it becomes particularly important to train personnel of detention centres for irregular migrants and to encourage their co-operation with NGOs with a view to identifying undocumented trafficked persons who all too often end up in these facilities and may be very afraid to come forward and denounce their exploiters due to threats, debt bondage, trauma or lack of trust in the authorities.

<sup>47</sup> This practice has been identified as a major shortcoming in the treatment of trafficked people: Global Alliance against Traffic in Women, *Collateral Damage. The Impact of Anti-Trafficking Measures on Human Rights around the World* (Bangkok, 2007), p. 22; A. Gallagher and E. Pearson, “The High Cost of Freedom: A Legal and Policy Analysis of Shelter Detention for Victims of Trafficking” in *Human Rights Quarterly*, Vol. 32, p. 73 (2010).

### Girl trafficked for sexual exploitation identified in detention through cross-border co-operation

Nigerian women were recruited under false promises and brought to Belgium to be sexually exploited. Traffickers used violence and voodoo rituals to keep the women subjugated, and forced them into prostitution to repay their travel costs. During an investigation into Internet prostitution involving African women, Belgian police detected this case; through phone tapping the police discovered that one of the victims had been intercepted in the Netherlands in possession of false documents and had been placed in a detention centre for irregular migrants. Belgian judicial authorities sent a rogatory letter to their counterparts in the Netherlands in order to interview the victim. As a consequence of effective cross-border co-operation, they managed to arrange for the victim to be contacted by a professional from a specialized reception centre for victims of trafficking. She was informed about the possibility of co-operating with the Belgian police and being granted victim status in the country. Thanks to the effective multi-disciplinary cross-border co-operation amongst prosecutors, immigration authorities and NGOs in and between the two countries, the trafficked woman was transferred to Belgium and assisted by a specialized reception centre for victims of trafficking.

Source: Centre for Equal Opportunities and Opposition to Racism, *2011 Annual Report on Trafficking in and Smuggling of Human Beings. The money that matters* (Brussels, October 2012), pp.98-101, <[http://www.diversiteit.be/?action=publicatie\\_detail&id=153&thema=5&select\\_page=216&setLanguage=3](http://www.diversiteit.be/?action=publicatie_detail&id=153&thema=5&select_page=216&setLanguage=3)>, accessed 10 April 2013.

[33] The UN Recommended Principles and Guidelines on Human Rights and Human Trafficking<sup>48</sup> directly address detention and freedom of movement. Principle no. 7, referred to above (paragraph 21) provides that trafficked persons “shall not be detained” for the illegality of their entry or presence in another country, nor for their involvement in unlawful activities to the extent that this is a “direct consequence” of their being trafficked persons.

The Guidelines address this further:

- Guideline 1.5 provides that States should consider “[p]rotecting the right of all persons to freedom of movement and ensuring that anti-trafficking measures do not infringe upon this right”.

<sup>48</sup> UN Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1 (20 May 2002), <<http://www.unhcr.org/refworld/docid/3f1fc60f4.html>>, accessed 31 January 2013.

- Guideline 2.6 provides that States should consider “[e]nsuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody”.
- Guideline 4.5 provides that States should consider “[e]nsuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons”.
- Guideline 6.1 provides that “[t]rafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses”.

These guidelines clearly demonstrate recognition that people who have been trafficked should be treated in a way that recognizes their vulnerability and that they are victims of crime, not criminals. This has been given legal form and effect in the non-punishment provisions of the Council of Europe Convention and the EU Directive on trafficking.

[34] Furthermore, medical research on the consequences of the trafficking experience on victims indicates that detention and imprisonment contribute to exacerbating their trauma and vulnerability, and can lead to cumulative trauma, suicidal behaviour and post-traumatic stress disease. Therefore consideration and understanding of a victim’s trafficking ordeal and health consequences reinforce the importance of ensuring that victims are not detained for offences, which are caused or directly linked to their having been trafficked.<sup>49</sup>

[35] Victims of trafficking are vulnerable to other sanctions and punishments, including prohibition of re-entry to the State or even forced repatriation. Forced repatriation may breach the prohibition of non-refoulement because of international protection obligations owed to the trafficked person, either because the trafficked person is a refugee<sup>50</sup> or else because they qualify for complementary, or subsidiary, protection.<sup>51</sup>

<sup>49</sup> OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings in partnership with the Ludwig Boltzmann Institute of Human Rights and the Helen Bamber Foundation, *Trafficking in Human Beings Amounting to Torture and Other Forms of Ill-treatment*, Occasional Paper Series no. 5 (June 2013).

<sup>50</sup> UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, HCR/GIP/06/07 (7 April 2006).

<sup>51</sup> Under European Union law, this is regulated by Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection. This instrument does not apply to European Union citizens but such persons are nevertheless protected by human rights law generally in this respect. The Directive has been recast: European Union, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection*

[36] Trafficked persons may be penalized because they are unable or unwilling to co-operate with the authorities in investigation and prosecution of trafficking offences. In some cases trafficked persons may be repeatedly penalized because of their prior criminal or administrative records, even if they co-operated with the authorities in the investigation. Such instances include cases where trafficked persons receive an expulsion order as irregular migrants, or when they are convicted of offences related to their trafficking. As a result of these penalties, victims of trafficking may have administrative and/or criminal records with lasting negative repercussions. For example, these administrative and/or criminal records may become an impediment for victims to receiving or extending a residence permit or they may affect a victim's ability to travel<sup>52</sup>. Furthermore, criminal records may lead to serious consequences when the trafficked persons are returned to their countries of origin, for example when such criminal records relate to drug offences which in some countries of origin carry even death penalties.

### Woman exploited for shoplifting

"A young Mongolian woman (D) was arrested in the Netherlands for shoplifting. During questioning, D declared that she was forced to commit the theft. However, she provided so little accurate information about the person she claimed had coerced her that the police were unable to do anything with the information and D had to pay a fine for the theft. Because D was living illegally in the Netherlands, preparations were made for her repatriation. During the interview with D, the Return and Departure Service (DT&V) found indications of human trafficking. When DT&V persisted with the questioning, it emerged that a gang had forced D to work as a prostitute and commit thefts in the Netherlands. D ultimately reported the human trafficking. She was admitted to the B9 scheme [temporary residence permit regulation for victims of trafficking]. Because of her conviction for shoplifting, however, there is a good chance that D will not be granted continued residence, according to her social worker. The case against the human traffickers was still proceeding at the time of writing."

Source: Dutch National Rapporteur on Trafficking in Human Beings, Trafficking in human beings, *Seventh Report of the Dutch National Rapporteur* (2010), pp. 233-234.

granted (recast).

52 For a discussion of this issue, see: Dutch National Rapporteur on Trafficking in Human Beings, *Trafficking in human beings, Seventh Report of the Dutch National Rapporteur* (2010), pp. 233-235.

## 6.1 The scope of the principle in cases involving trafficked children

[37] Children are widely recognized as being particularly vulnerable to abuse and exploitation, including trafficking.<sup>53</sup> By virtue of their age alone they are also particularly vulnerable when they come into contact with the State. They have particular needs and rights, including protection from others, care requirements and education. Whilst the age of criminal responsibility can vary significantly from country to country, States nevertheless have special responsibilities under international law with regard to all persons under the age of 18. The UN Recommended Principles and Guidelines on Human Rights and Human Trafficking provide, in Principle 10:

*"Children who are victims of trafficking shall be identified as such. Their best interests shall be considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs."*

Guideline 8.2 recommends that there be procedures in place for the rapid identification of child victims. Guideline 8.3 repeats – specifically with regard to children – the general injunction not to subject victims of trafficking to criminal procedures or sanctions.

[38] The UNICEF Guidelines on the Protection of the Rights of Child Victims of Trafficking also provide for a duty on States not to prosecute any children put in a situation where they were compelled to commit an offence related to their trafficking:

*"The judicial authorities shall ensure that child victims are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons including violations of migration laws".<sup>54</sup>*

[39] The UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime define child victims and witnesses as *"children and adolescents, under the age of 18, who are victims of crime or witnesses to crime regardless of their role in the offence or in the prosecution*

53 European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016*, COM (2012) 286 final (Brussels, 19 June 2012); European Union, *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* (5 April 2011), Preamble, Recital 8, 12. The special vulnerability, and particular needs, of children are addressed at length in UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe* (Geneva, 2006).

54 UN Children's Fund (UNICEF), *Guidelines on the Protection of Child Victims of Trafficking* (September 2006), <[http://www.unicef.org/ceecis/0610-Unicef\\_Victims\\_Guidelines\\_en.pdf](http://www.unicef.org/ceecis/0610-Unicef_Victims_Guidelines_en.pdf)>, accessed 30 January 2013, p. 20.

of the alleged offender or groups of offenders”.<sup>55</sup> The UN Guidelines further recognize that “children who are victims and witnesses may suffer additional hardship if mistakenly viewed as offenders when they are in fact victims and witnesses”.<sup>56</sup> The Guidelines emphasize the need to ensure that child victims and witnesses be treated in a caring and child-sensitive manner, with dignity and compassion and be afforded appropriate protection according to international standards. Building on the guidelines, UNICEF further highlights that children who have been exploited and/or trafficked, are entitled to protection including protection from “sanctions and prosecution for offences that they committed as a consequence of their situation. This principle should apply regardless of their role in the offence and where the offence was committed, and irrespective of the initiation or outcomes of criminal proceedings, or the charges brought forward against the perpetrators.”<sup>57</sup>

[40] The special vulnerabilities and status of children are recognized in the Palermo Protocol and Council of Europe Convention on Action against Trafficking in Human Beings definitions of human trafficking, which restrict the requirement for any of the means used to traffic to be established in cases of adults only. Hence, the crime of child trafficking takes place under the Palermo Protocol and the Council of Europe Convention definitions, where the act of recruitment, transportation, transfer, harbouring or receipt of a person is done for the purpose of exploitation and the person is aged under 18, irrespective of whether any of the means required for trafficking of adults have been used.<sup>58</sup>

[41] In the case of children, therefore, no means at all, including coercion, deception or threat, are required to establish the victim status of the child. Children cannot in law consent to being trafficked nor can trafficked persons validly consent to their exploitation. “Even if a child is not threatened, no force is used against him or her, or he or she is not coerced, abducted or deceived, the child cannot give consent to the act of trafficking for the purpose of exploitation.”<sup>59</sup> The EU Directive on trafficking

also reiterates the prime importance of this: “when a child is concerned, no possible consent should ever be considered valid”.<sup>60</sup> Hence, when non-punishment provisions are being applied to the case of a child, States should adopt a broad, not literal, interpretation of the word “compelled” which appears in both Article 26 of the Council of Europe Convention and Article 8 of the EU Directive on trafficking. This would involve a consideration of whether the offence committed by the child was related to the trafficking. In cases where this link is present, the prosecution should not be brought or it should be discontinued at an early stage or an appeal against conviction should be allowed.

[42] The Special Representative takes the view that in cases involving children, the need for a broad application of compulsion needs to be understood in light of the child’s vulnerability on account of their age alone, and of the irrelevance of consent in the legal definition of child trafficking. More specifically, where there is evidence of abuse and/or exploitation and/or trafficking of a child, from a legal perspective it should be understood that in such circumstances a child has no autonomy, is not free to make clear or informed choices such as regarding opportunities for escape and may have access to very limited, if any, alternative options. Thus, where a child is exploited and/or trafficked, and is used by a trafficker for an illegal purpose, or the child commits a criminal act related to their trafficked status, the application of the non-punishment provision is crucial, not only from a child safeguarding perspective but also to prevent the risk of secondary traumatization to the child at the hands of the State.

[43] Since the consent of the child is not relevant for legal purposes, law enforcement authorities should not query the child’s consent to the exploitation. Therefore, the information gathered during the investigation phase - that authorities may use to confront children during trial or at a hearing of the child victim - can under no circumstances be used against the child for purposes of establishing their criminal liability. The child’s consent to an illegal activity in a trafficking situation cannot override the victim status of the child.<sup>61</sup>

[44] Children are trafficked for a variety of forms of exploitation, some of which, but for the child’s trafficked status, could render the child liable to criminal prosecution, depending on the age of criminal

55 United Nations Economic and Social Council, *UN Economic and Social Council 2005/20: Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, E/RES/2005/20 (22 July 2005), para. 9(a), <[http://www.un.org/en/pseataaskforce/docs/guidelines\\_on\\_justice\\_in\\_matters\\_involving\\_child\\_victims\\_and.pdf](http://www.un.org/en/pseataaskforce/docs/guidelines_on_justice_in_matters_involving_child_victims_and.pdf)>, accessed 10 April 2013.

56 *Ibid.*, para 7(e).

57 UNICEF Innocenti Research Centre, *Child Trafficking in the Nordic Countries: Rethinking strategies and national responses. Technical report* (May 2012), p. 99, <<http://www.unicef-irc.org/publications/643>>, accessed 10 April 2013.

58 United Nations, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, UN Doc. A/45/49 Vol.1 (15 November 2000), Article 3; Council of Europe, *Convention on Action against Trafficking in Human Beings*, CETS No. 197 (Warsaw, 2005), Article 4.

59 United Nations Office on Drugs and Crime (UNODC), *Trafficking in Persons* (Vienna, 2009), <<http://www.unodc.org/documents/human-trafficking/HTleafletA5EnglishupdatedAugust09.pdf>>, accessed 10 April 2013.

60 European Union, *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* (5 April 2011), Preamble, Recital 11.

61 UN Children’s Fund (UNICEF), *Guidelines on the Protection of Child Victims of Trafficking* (September 2006), <<http://www.unhcr.org/refworld/docid/49997af727.html>>, accessed 30 January 2013, p.20.

responsibility in the particular State. Where a child is trafficked, and is used by a trafficker for an illegal purpose, or the child otherwise commits a criminal act which is related to their situation as a trafficked child, non-punishment should be applied also in order to prevent the further victimization of that child. Where the circumstances are unclear and there are doubts regarding the relationship between the offence and the child trafficking situation, law enforcement officials and prosecutors should prioritize actions that promote the well-being of the children, avoid harm to them and are in their best interests.<sup>62</sup>

[45] In line with international standards<sup>63</sup> and jurisprudence of the European Court of Human Rights, “it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings.”<sup>64</sup> Furthermore, “[i]n all proceedings involving children, the urgency principle should be applied to provide a speedy response and protect the best interests of the child, while respecting the rule of law.”<sup>65</sup> In the context of child trafficking, it becomes particularly important to ensure that the process of identification of the child as a victim of crime be also conducted without undue delay. International standards further provide that when there are reasons to believe that a victim is a child, they should be presumed to be a child until their age is verified.<sup>66</sup>

[46] Regarding detention, children should not be placed in police cells or other detention facilities connected with law enforcement. It may be necessary to keep children in some appropriate special location for their own safety

in the context of the child welfare/protection system. UNICEF maintains that “[u]nder no circumstances should a child be placed in any type of detention facility, including police cells, prisons or even special detention centres for children”.<sup>67</sup>

### Girl using false identity document to flee abroad from her trafficker

A 16-year-old Nigerian girl agreed to be taken to the UK to avoid an arranged marriage in her home country with a 63 year-old man. Upon arrival she was threatened, raped and forced into prostitution to a debt of EUR 60,000 for her travel that had been arranged for her. After some time she managed to escape and was caught by police with a false identity document on board a coach going to France. She pleaded guilty to an offence of possessing a false identity card with the intention of using it as her own and was sentenced as an adult to 8 months’ imprisonment. Her conviction was appealed. In its judgement the Court of Criminal Appeal drew attention to the obligations under the Council of Europe Convention on Action against Trafficking in Human Beings and under the European Convention on Human Rights (art. 6). In the appeal proceedings it emerged that the girl was only 16 or 17 years old; in addition, that social workers of the Poppy Project who had recently assessed her to be a credible victim of trafficking for sexual exploitation, had asked the girl’s defence lawyers for the original trial to be adjourned so they could properly assess her yet, this request had been ignored and the case had continued without any further investigation by her lawyers into the possibility that she might have been a victim of trafficking. The Court of Appeal further found that the prosecutor had not addressed the question of whether it was in the public interest to prosecute her, that the defence lawyers had not considered whether she might have had a defence of duress, that nobody had considered the State’s duty to protect her as a child and indeed even the Judge had given no thought to her age despite the fact that as a child (i.e., under 18 years of age), she should not have been dealt with in the Crown Court at all. The Court of Appeal found that the circumstances of her conviction were “shameful” and quashed the conviction on the basis that a fair trial had not taken place.

Source: England and Wales Court of Appeals, *Case of Regina v O, EWCA Crim 2835* (2008), <<http://www.bailii.org/ew/cases/EWCA/Crim/2008/2835.html>>, accessed 10 April 2013.

62 UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe* (Geneva, 2006), pp.104-105, <[http://www.unicef.org/ceecis/UNICEF\\_Child\\_Trafficking\\_low.pdf](http://www.unicef.org/ceecis/UNICEF_Child_Trafficking_low.pdf)>, accessed 10 April 2013; see also United Nations, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”): resolution / adopted by the General Assembly, A/RES/40/33* (29 November 1985), <<http://www.un.org/documents/ga/res/40/a40r33.htm>>, accessed 30 January 2013, para. 10.3.

63 United Nations Economic and Social Council, Op. Cit., Arts. V, VI, VII, <[http://www.un.org/en/pseataaskforce/docs/guidelines\\_on\\_justice\\_in\\_matters\\_involving\\_child\\_victims\\_and.pdf](http://www.un.org/en/pseataaskforce/docs/guidelines_on_justice_in_matters_involving_child_victims_and.pdf)>, accessed 10 April 2013.

64 European Court of Human Rights, *Case of V. v. The United Kingdom*, Application no. 24888/94 (Strasbourg, 16 December 1999), para. 86; European Court of Human Rights, *Case of T. v. The United Kingdom*, Application no. 24724/94 (Strasbourg, 16 December 1999), para. 84.

65 Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice* (17 November 2010), Section IV, para. D.4.50, <[http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%20\\_4\\_.pdf](http://www.coe.int/t/dghl/standardsetting/childjustice/Guidelines%20on%20child-friendly%20justice%20and%20their%20explanatory%20memorandum%20_4_.pdf)>, accessed 10 April 2013. See also United Nations Economic and Social Council, Op. Cit., Art. XI, para. 30(c).

66 Council of Europe, Op. Cit., Art. 10.3; UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol Thereto* (New York, 2004), p. 289, para. 65, <[http://www.unodc.org/pdf/crime/legislative\\_guides/Legislative%20guides\\_Full%20version.pdf](http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf)>, accessed 10 April 2013; UN OHCHR, *Commentary to the Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2010), p. 163, <[http://www.ohchr.org/Documents/Publications/Commentary\\_Human\\_Trafficking\\_en.pdf](http://www.ohchr.org/Documents/Publications/Commentary_Human_Trafficking_en.pdf)>, accessed 10 April 2013.

67 UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe* (Geneva, 2006), p. 65. <[http://www.unicef.org/ceecis/UNICEF\\_Child\\_Trafficking\\_low.pdf](http://www.unicef.org/ceecis/UNICEF_Child_Trafficking_low.pdf)>, accessed 10 April 2013.

[47] The Convention on the Rights of the Child states that “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier” (Article 1).<sup>68</sup> The best interests of the child are to be “a primary consideration” in all matters involving the State (Article 3.1). In fact the vulnerability of children to exploitation is a theme that permeates the Convention; this is even more the case in the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000).<sup>69</sup> Each of these instruments contains provisions stressing the need to act on the child’s welfare and best interests. In particular, Article 37 (b) of the Convention on the Rights of the Child provides:

*“No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”.*

[48] The UN Committee on the Rights of the Child, in its General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin, recommends that “[m]ore generally, in developing policies on unaccompanied or separated children, including those who are victims of trafficking and exploitation, States should ensure that such children are not criminalized solely for reasons of illegal entry or presence in the country”.<sup>70</sup> The Committee further addressed the issue of the detention of children in the context of international migration, stating that “[t]he detention of a child because of their or their parent’s migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child”.<sup>71</sup>

[49] Children are often even less able than adults to resist the demands of traffickers. It is imperative that the non-punishment obligation should be respected with special care in the case of children, including the non-application of administrative sanctions.

## 6.2 Trafficking-related offences

[50] The principle that a person who has been trafficked should not be penalized operates in two ways:

- for offences they have committed in the process of being trafficked (causation-based offences);
- for offences not connected with the act of trafficking but which they have been compelled to commit, as trafficked persons lacking autonomy in their acts (duress-based offences).<sup>72</sup>

In fulfilling the duty of non-punishment with regard to victims of trafficking, national legislation and guidelines for prosecutors and other relevant criminal justice actors should include both types of offence.

[51] It is not possible to establish a comprehensive list of offences that victims may commit in the course, or as a consequence, of being trafficked. People are trafficked for many reasons and the offences in which they are involved are usually linked to these. Nevertheless there are certain offences which are frequently committed in the context of human trafficking.<sup>73</sup>

[52] Offences that may be committed by victims in the course of being trafficked include, but are not limited to, the violation of immigration law, giving of false information to obtain travel documents, work permits and residence permits, illegal crossing of state frontiers and overstaying beyond the period of the visa.

[53] Offences that may be committed as a consequence of being trafficked include those committed in the course of being trafficked, where the victim was already being controlled by the traffickers. Such offences also include, but are not limited to, those related to the type of exploitation for which the victim has been trafficked. For example, victims who are forced into prostitution may have no authorization (where one is required) or they may be working in violation of the State’s laws on

68 United Nations, *Convention on the Rights of the Child* (1989), <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>>, accessed 10 April 2013.

69 United Nations, *Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography*, A/RES/54/263 (2000).

70 United Nations Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of unaccompanied and separated children outside their country of origin*, CRC/GC/2005/6 (2005), para. 62.

71 United Nations Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: the Rights of All Children in the Context of International Migration*, para. 78, <<http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/ReportDGDChildrenAndMigration2012.pdf>>, accessed 10 April 2013.

72 United Nations Working Group on Trafficking in Persons, *Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking*, CTOC/COP/WG.4/2010/4 (9 December 2009), para. 4, <[http://www.unodc.org/documents/treaties/organized\\_crime/2010\\_CTOC\\_COP\\_WG4/WG4\\_2010\\_4\\_E.pdf](http://www.unodc.org/documents/treaties/organized_crime/2010_CTOC_COP_WG4/WG4_2010_4_E.pdf)>, accessed 10 April 2013.

73 UN Office on Drugs and Crime (UNODC), *Model Law against Trafficking in Persons* (5 August 2009), <[http://www.unodc.org/documents/human-trafficking/UNODC\\_Model\\_Law\\_on\\_Trafficking\\_in\\_Persons.pdf](http://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf)>, accessed 29 January 2013, p. 40: The “Model Law against Trafficking in Persons” in its commentary on Article 10 provides sample provisions for guidelines for prosecutors concerning legal systems that have prosecutorial discretion: “A victim of trafficking should not be detained, imprisoned or held liable for criminal prosecution or administrative sanctions for offences committed by him or her as a direct result of the crime of trafficking in persons, including: “(a) The person’s illegal entry into, exit out of or stay in [State]; “(b) The person’s procurement or possession of any fraudulent travel or identity documents that he or she obtained, or with which he or she was supplied, for the purpose of entering or leaving the country in connection with the act of trafficking in persons; “(c) The person’s involvement in unlawful activities to the extent that he or she was compelled to do so.”

prostitution. Agricultural workers may have no work permit. Children may be committing thefts. Beggars may be acting in violation of local laws. Traffickers may require their victims to be engaged in the illicit production of drugs, as well as in violent crime. In other types of cases, traffickers may deliberately expose their victims to committing a crime after releasing them from their trafficking and exploitation, such as by providing them with identity documents which are believed by victim to be genuine but which are in fact false.

[54] Nevertheless, a victim may also be involved in prohibited conduct that is not a direct consequence of control exerted by traffickers, but is, still linked to the trafficking experience. This may happen in situations when a victim escapes the influence of a trafficker, in which case recourse to offending may well be a result of the perceived absence of meaningful alternatives to escape exploitation; hence in such cases the non-punishment principle should apply.

[55] Finally, the most difficult situations are those in which a former victim of trafficking has himself/herself been involved in trafficking or exploitation of another individual, a phenomenon described as “a cycle of abuse”.<sup>74</sup> In such situations, traffickers manipulate their victims to turn them into their assistants in the exploitation of others, this is a deliberate strategy to retain control over the remaining victims by placing a former victim in charge and to render them even more afraid of seeking help. In such cases there may not always be evidence that victims were compelled into becoming offenders because of their being trafficked, i.e., that they were coerced into committing the offence or had no other option but to submit to the trafficker by reason of the existence of one or other of the means under the trafficking definition.

[56] These offences pose a threat to public safety and order. The State has a legitimate interest in preventing them and apprehending offenders. However, where a victim of trafficking has committed an offence as a direct cause or consequence, of being trafficked, the prosecutor or judge must consider in each case the extent to which the offence is connected with the trafficking of the victim and their lack of autonomy. Where the offence is linked to the accused’s or suspect’s situation as a trafficked person, the State must keep them immune from prosecution, detention and the application of a penalty. If instead the trafficked person acted independently of their trafficking and voluntarily committed the offence, free from the operation of one or more of the means

foreseen in the trafficking definition on them, then they should be fully accountable. It should also be taken into account that the victim may not be aware of their rights and obligations and may also not be aware that a penalty, such as an administrative penalty, has been imposed. States should take this fact into account in dealing with victims of trafficking, and ensure that victims have access to legal information and counseling, both orally and in print, in a language that they understand and is appropriate.

[57] As there is no exhaustive list of offences that might be committed by victims of trafficking in the course of, or as a consequence of, being trafficked, and since new forms of exploitation may, and do, emerge, States should consider adopting an open-ended list of offences typically related to trafficking in human beings, with regard to the commission of which victims of trafficking shall be immune from punishment. It should be clearly stated that the list is not exclusive, and that the duty of non-punishment applies to any offence so long as the necessary link with trafficking is established. Such a list should be widely disseminated amongst prosecutorial, judicial and law enforcement services, including those not dealing directly with trafficking cases.

## 7. Current practice and challenges

[58] The legislation in OSCE participating States regarding non-punishment is very diverse. Some States do not address it at all; others have done so to varying degrees. It is very desirable that there be recognition at State level of the obligation of non-punishment, as well as consistency in its implementation and in that of related OSCE commitments.

[59] Some countries have introduced specific provisions on non-punishment and some have followed the UNODC Model Law against Trafficking in Persons, which proposes the following text as a basis for domestic legislation:

*“1. A victim of trafficking in persons shall not be held criminally or administratively liable [punished] [inappropriately incarcerated, fined or otherwise penalized] for offences [unlawful acts] committed by them, to the extent that such involvement is a direct consequence of their situation as trafficked persons.*

*2. A victim of trafficking in persons shall not be held criminally or administratively liable for immigration offences established under national law.*

*3. The provisions of this article shall be without prejudice to general defences available at law to the victim”.*<sup>75</sup>

<sup>74</sup> England and Wales Court of Appeals, *Case of LM, MB, DG, Betti Tabot and Yutunde Tijani –and- The Queen*, EWCA Crim 2327 (2010), para. 13; England and Wales Court of Appeals, *Case of R v N, R v LE*, EWCA Crim 189 (2012), para. 14.

<sup>75</sup> UNODC, Op. Cit., Article 10: This provision also says that it “shall not apply where



[60] GRETA, the Council of Europe's Group of Experts on Action against Trafficking in Human Beings, has systematically examined the implementation of the obligation of non-punishment under Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings. Whilst the obligation of non-punishment is the same for all parties to the Convention, State practice is far from consistent. Evaluation reports compiled and published by GRETA demonstrate that very few countries have adopted specific non-punishment provisions for victims of trafficking, and such provisions are often rather limited in their scope (i.e., they apply exclusively to a few specific offences, such as immigration offences). In several countries evaluated by GRETA, either there is evidence of failures or else there are shortcomings in effectively protecting victims of trafficking against punishment for trafficking-related offences. The causes range from failure to identify victims to inadequate domestic laws, or else failure to implement domestic law that conforms to Article 26.<sup>76</sup>

[61] Indeed, given the diversity of legal systems, the implementation of this principle on a national level leads to varying State practice and reveals a number of challenges in its practical application. For example, in some instances the application of the principle results in automatic discontinuation of proceedings against trafficking victims as soon as they are recognized as such. In other, and more frequent, cases its application requires a decision to be made based on the circumstances of every individual case by the police, the prosecutor or by a judge. There appear to be varying interpretations and practices as to whether the principle imposes only an obligation not to punish trafficking victims or, additionally, not to prosecute them.

[62] The application of the non-punishment provision also varies depending on when a credible suspicion of trafficking emerges, and how that suspicion is treated. If evidence that someone is a victim of trafficking emerges in the course of proceedings with respect to offences allegedly committed by that person, the problem may arise as to how such an allegation should be treated: in other words, whether the proceedings should be stayed

for the period until the official identification process has taken place or whether it is left to the discretion of the acting authority (public prosecutor, judge) to decide upon that question. The SR takes the view that, while such an identification process is ongoing, any deportation orders should be suspended and the person should immediately receive legal counselling and assistance in compliance with international standards. Moreover, the public prosecutor and/or judge should provisionally suspend the proceedings on their own initiative to take into account the outcome of the victim identification process.

[63] Even when it becomes evident that the alleged offender is a victim of trafficking, the application of the non-punishment clause may be complicated by the challenges of dealing with a traumatized victim, whose story might change frequently and may not be assessed as credible by the prosecution. An additional challenging aspect is that sometimes the victim is also acting as a witness and their credibility may be challenged precisely because they are suspected of having committed an offence.

### Victim of trafficking committing theft and acting as victim-witness

"R, from Albania, was a minor when she was sold by her parents to C. R lived under slave-like conditions with C and was exploited by him in the household. C also forced her to commit several thefts.

R testified regarding human trafficking at C's trial. C countered with the argument that R's testimony was not credible because she had committed thefts. He submitted a love letter as an exhibit. The love letter, written by R, said that she had committed the thefts voluntarily.

The judge did not believe C and found that the letter had been written by R under coercion by C. C had forced R to commit the thefts in order to undermine the credibility of her future testimony against him because of her criminal antecedents. C was convicted of human trafficking. R was not prosecuted because a *stato di necessità* was assumed to exist.

C appealed right up to the Supreme Court. Both the appeal court and the Supreme Court upheld the earlier judgment."

Source: Dutch National Rapporteur on Trafficking in Human Beings, Trafficking in human beings, *Seventh Report of the Dutch National Rapporteur* (2010), p. 248.

*the crime is of a particularly serious nature as defined under national law".*

<sup>76</sup> Council of Europe, Group of Experts on Action against Trafficking in Human Beings (GRETA), *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by: Cyprus* (12 September 2011), paras. 178-181; *Austria* (15 September 2011), paras. 156-158; *Slovakia* (19 November 2011), paras. 136-139; *Croatia* (30 November 2011), paras. 125-127; *Albania* (2 December 2011), paras. 162-165; *Bulgaria* (14 December 2011), paras. 206-208; *Denmark* (20 December 2011), paras. 196-202; *Georgia* (7 February 2012), paras. 205-209; *Moldova* (22 February 2012), paras. 148-149; *Romania* (31 May 2012), paras. 187-190; *United Kingdom* (12 September 2012), paras. 324-336; *Montenegro* (13 September 2012), paras. 184-186; *Armenia* (21 September 2012), paras. 154-155; *Malta* (24 January 2013), paras. 174-179; *France* (28 January 2013), paras. 213-216; *Latvia* (31 January 2013), paras. 173-175; *Portugal* (12 February 2013), paras. 166-170.

[64] Victims of trafficking may also commit offences under duress (and/or out of necessity), that is because of threats of death or grievous bodily harm such that

a reasonable person would have acted that way, and there was no reasonable alternative such as escape.<sup>77</sup> Again, full account will have to be taken of the particular circumstances of each case.

### Trafficked persons forced to smuggle drugs

Two young women from Uzbekistan (N and T) were recruited in their home country under false promises of work as waitresses in Thailand. On their arrival in Bangkok, the women were forced into prostitution for six months. Later N and T were sold to a Chinese gang which promised to free them if they carried “goods” in their suitcases across the Thai border. Both victims accepted the proposal and were transported from Pakistan to Thailand smuggling drugs. In 2000, N and T were arrested at Bangkok airport, prosecuted, convicted and sentenced to 32 and 25 years’ imprisonment respectively for drug trafficking. In 2012 T was given amnesty and repatriated with the help of an international NGO. Despite a petition written to the King of Thailand in 2005 and a constant advocacy campaign, the second young woman remains in prison.

Source: Interview with the NGO “Istiqbolli Avlod” in February 2013.

[65] There are very challenging cases in which there is a thin line between victim and perpetrator, for example when victims are involved in the recruitment or exploitation of others. While this may well be a deliberate strategy by traffickers, there may not always be clear evidence that they acted under coercion or that they had no other choice but to submit to the requests of the perpetrators (i.e., the trafficker exerted control over the victim by means of abuse of a position of vulnerability). In other instances, where victims may have committed an offence to escape the influence of the trafficker, there may not always be evidence that the person acted under compulsion directly arising from their trafficking, for example when they escaped and tried to make a living by themselves using false documentation.<sup>78</sup>

<sup>77</sup> This defence was considered in some detail in: England and Wales Court of Appeals, *Case of LM, MB, DG, Betti Tabot and Yutunde Tijani –and- The Queen*, EWCA Crim 2327 (2010).

<sup>78</sup> For example in: England and Wales Court of Appeals, *Op. Cit.*, para. 45: the Court found in one of the cases, Tijani’s case, that: “[...] there are no small difficulties in the way of the detail of the defendant’s account, but it remains possible that the underlying assertion of trafficking is true, even if embellished. What however is clearly fatal to any reliance upon the convention is the fact that for some months before the offences were committed the defendant had been entirely free of any exploitation which she may have suffered and had been living a wholly independent life”. Although the Court declined to quash the conviction it did however, decide to reduce the defendant’s sentence on the basis that she might have been trafficked in the past.

### Trafficking for forced criminality (theft)

Victims were recruited in Romania with promises of a good job in Belgium. Travel was arranged, and once in Belgium the victims were given accommodation and forced to steal clothes in shops in order to repay their travel and living expenses. The stolen goods were then taken to Romania and sold there. One of the victims was forced into prostitution. The Belgian police started an investigation after receiving information regarding thefts in several shops across the country with the same modus operandi. The police investigation revealed that there was a structured criminal organization behind the thefts, in which people were coerced into committing theft and even trained on what to say to the police in case of arrest. The investigation required surveillance (phone tapping) and international co-operation and resulted in the conviction of 15 perpetrators, all of whom were convicted of organized crime, while six of them were convicted additionally of theft and six of them were convicted of trafficking for sexual exploitation. As a consequence of effective co-operation amongst the various sections of the police dealing with theft and THB, approximately 20 persons were considered to be victims of forced criminality and therefore were not prosecuted. Three of the defendants appealed their convictions but the Court of Appeal of Antwerp upheld the trial decision in its judgment of 24 January 2013.

Source: Centre for Equal Opportunities and Opposition to Racism, Presentation of Alliance Expert Co-ordination Team Meeting in December 2012, including discussion of judgment from the Criminal Court of Turnhout (Belgium)(17 October 2012).

[66] Available practice concerning the implementation of the non-punishment principle reveals the challenges in ensuring its effective and consistent application in cases of trafficking for forced criminality, and in particular in drug trafficking cases. Identification of victims of trafficking for forced criminality (i.e., people exploited for committing thefts or drugs-related offences) is often more challenging than in cases in which victims are charged with possession and/or use of false documents. The reasons for this include the fact that often police and prosecutors dealing with theft and drug crimes are not the same as those investigating trafficking cases, and are not familiar with the specific features of trafficking and the frequent use of subtle means of coercion to exert control over victims, (e.g., by use of emotional coercion, or by means of abuse of a position of vulnerability). Moreover, the investigation of such cases often demands the collection of evidence through phone tapping and surveillance to prove that the victims were compelled into the commission of crimes. Therefore, such cases

require good collaboration and communication between the various prosecutorial and police services, as well as with NGOs, so that the specific features of trafficking are taken into account and the vulnerability of victims is understood. Since children are often exploited for forced criminality, these cases demand also careful and immediate consideration of their age, status, vulnerability and rights from the outset of any proceedings.

### Conviction of a trafficked girl for involvement in cannabis cultivation

A young Vietnamese girl was trafficked to the UK and exploited for cannabis cultivation. She was prosecuted, convicted of drug offences and sentenced to 20 months' imprisonment. The original sentencing judge found: *"I understand the predicament you were in that led to you being trafficked into the United Kingdom and I understand the consequences for you and your family in being caught because you must understand that when you came to this country, trafficked as you were, you knew that you would be under an obligation to pay off the debt to the traffickers and you must have known that that would probably involve illegal activity within the United Kingdom. As it was, when you found yourself at this address it must have been as clear as a pikestaff that what you were doing was cultivating an illegal crop. The court is bound to have some sympathy for you given the predicament you were in, but I must tell you that this is not an unusual case. The court is facing these days many instances of Vietnamese girls being trafficked into the United Kingdom to work on cannabis farms. Counsel has made it clear to me that the sentencing guidelines suggest a starting point in the region of three years after trial. You have pleaded guilty and I give you full credit for your plea of guilty. The shortest sentence I can pass on all the circumstances on you is of 20 months."*

On appeal the Court of Appeal decided she was a child aged 17 years of age who might even have been as young as 14 years of age during her trafficking and quashed the custodial sentence and replaced it with a non-custodial sentence. By the time of her appeal the victim had already served six months of the original sentence. It is understood that the drug conviction stands.

Source: England and Wales Court of Appeals, *Case of R v HTB*, EWCA Crim 211 (2012).

[67] The cases above demonstrate how challenging it can be to ensure systematic and consistent respect by States for the right of victims of trafficking, including child victims where no means are in fact or law required to establish trafficked victim status, to receive protection, not punishment. They also illustrate a tendency to narrow the interpretation of the non-punishment obligation to sentencing considerations, rather than to protection against the conviction of a trafficked person for offences which are caused or directly linked to their having been trafficked.<sup>79</sup> Furthermore, they also demonstrate the necessity to adopt specific non-punishment-related domestic legislation, with a view also to ensuring equal treatment before the law for all trafficked persons.

[68] In conclusion, it appears that the application of the principle depends on the extent to which States prioritize the fight against trafficking in human beings over the punishment of victims.<sup>80</sup> More broadly, the application of the principle clearly correlates to the extent to which States put the protection of the rights of trafficked persons at the centre of their anti-trafficking efforts. The SR takes the view that this narrower interpretation of the principle, in other words that the non-punishment obligation be limited to sentencing considerations, may lead States to violate their obligations towards victims of trafficking.

## 8. Guidance towards an effective implementation of the non-punishment obligation

[69] States are obliged to ensure the protection of rights of victims of trafficking, including the right not to be punished for offences committed because of their situation as trafficked persons. States are therefore to secure an effective implementation of the non-punishment principle in their criminal justice systems and practices.

[70] Where it is established that an individual has been trafficked, based on their lack of autonomy, they should not be prosecuted for offences committed which are

<sup>79</sup> See for example England and Wales Court of Appeals, *Case of R v N, R v LE*, EWCA Crim 189 (2012), paras. 13, 91 and 113.

<sup>80</sup> For example, it is not uncommon when inspections are carried out in sectors prone to exploitation, that many irregular workers may be intercepted and placed in detention centres for irregular migrants. Amongst these workers there are often trafficked persons unwilling to report their exploitation due to fear of their exploiters or debt bondage. It becomes then crucial to have trained public officials able to proactively identify potential victims of trafficking and to dismiss charges and/or discontinue prosecution on the grounds that they are victims.

## Child trafficking for labour exploitation in cannabis production

In 2012 the English Court of Criminal Appeal examined two cases of child trafficking for labour exploitation in cannabis production.

N entered the UK illegally; he was offered a job and brought to a disused commercial factory, converted in a cannabis farm, where he was told he must cook and clean. He was not paid. The house was guarded, the windows were bricked up and N was locked in together with others. On one occasion he managed to leave the farm, and then telephoned his controller to say that he did not want to go back any more; but he was told that an investment had been made in him and they would find him and kill him if he ran away, whether in the UK or Vietnam. He therefore agreed to return and was collected by a driver who took him back to the cannabis farm. One day the police discovered the cannabis farm and he was arrested. He was 16 when he worked on the farm and turned 17 on the day of his arrest. He was convicted of cannabis production offences and sentenced to a detention and training order (DTO) for 18 months. His case was submitted to the National Referral Mechanism (NRM) after he was convicted and sentenced, and only long after he had completed his sentence was he recognized to be a victim of child trafficking by the UK Border Agency.

LE was smuggled to the UK by his adoptive father but once in the UK he lost contact with him and was offered help by two Vietnamese. He was taken to a private house which had been converted into a cannabis farm, and there he lived and worked as a gardener. When the police discovered the farm he was arrested. He said he was 15 years old and that he had not realized that the activity was illegal. An age assessment established that he was at least 17 years old. The social services indicated that he was a potential victim of trafficking but the prosecution did not consider the evidence credible, as he had been found with GBP 100 in cash and a mobile phone with credit, and there were no bars on the windows of the house where he lived and worked. The NRM examined his case and he was recognized as a child victim of trafficking, yet the prosecution continued and he was sentenced to 20 months detention in a young offenders institution.

In *R v N; R v LE* [2012] EWCA Crim 189, the Court of Criminal Appeal dismissed the two appeals against conviction submitted in light of obligations under Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings. In dismissing the appeals, the Court asked itself whether the circumstances in which appellant N was working at the time of his arrest “represented a level of coercion and compulsion which should have led to the decision that he should not be prosecuted” (para. 90). The Court further held that: “[t]he language of Article 26 is directed at the sentencing decision rather than the decision to prosecute”. Their sentences were reduced on appeal respectively to 4 months’ DTO and 12 months’ custodial detention (paras. 13, 91, 113). The Court refused to quash their convictions.

In November 2012 N and Le lodged applications to have their cases considered by the European Court of Human Rights.

Source: England and Wales Court of Appeals, Case of *R v N, R v LE*, EWCA Crim 189 (2012).

directly linked to the process of being trafficked or as a result of being trafficked. The SR takes the view that the non-punishment provision should be interpreted in light of the definition of trafficking in human beings, especially with regard to a comprehensive understanding of compulsion i.e. inclusive of all means foreseen in the international definition of trafficking in human beings. Being “compelled” to commit a crime thus includes the full array of factual circumstances in which victims of trafficking act without autonomy because traffickers exercise control over them through abusive, coercive and

illicit means, including abuse of power or of a position of vulnerability. Such circumstances are typical of a trafficking situation: victims may act under compulsion and may be compelled to commit offences. Thus the non-punishment provision applies to all of these factual scenarios which are linked to the trafficking of victims.

[71] The State must make a judgment as to whether an offence was in fact linked to trafficking. If the offence is not linked, then the trafficked person may be liable to a penalty, like anyone else. Where there is a link, there is

an obligation to fully and effectively implement the non-punishment principle. The SR takes the view that the non-punishment provision includes the obligation to keep trafficking victims immune not only from the application of a penalty but, as far as possible, also from prosecution and detention.

[72] In legal systems of mandatory prosecution there is an obligation to prosecute where the facts indicating the commission of an offence are present. It is of paramount importance that in such systems, legal measures are adopted (or amended) in order to prevent prosecution of victims. The failure to do so can have very serious ramifications for trafficked persons, who may on the face of it have committed an offence, although they were not acting with free will.

[73] In such legal systems of mandatory prosecution, where it is difficult, if not impossible, not to commence a prosecution or an investigation once there is prima facie evidence that an offence has been committed, it is necessary that such prosecutions or investigations be terminated as soon as possible after it has been determined that the suspect is in fact a victim of trafficking and the offence was connected with their status of victim. Where the initiation of a prosecution or investigation is required by law, and where that requirement cannot be amended, prosecutors (or the equivalent) must discontinue such proceedings as soon as possible so as to satisfy the duty of non-punishment. Should a prosecution proceed, it should be possible for the court to uphold the non-liability of a person because a justification existed.

[74] In every legal system there are various defences, such as self-defence, duress (or coercion) or necessity that, once established, excuse the defendant from liability. In legal systems of mandatory prosecution, when a prosecutor and/or judge recognizes the existence of such a justification, the prosecution should be discontinued at an early stage in the pre-trial phase. Duress and necessity justifications could in principle be used to excuse trafficking victims from liability for crimes they have committed in connection with, or as a consequence of, their being trafficked. However, such general provisions are narrowly interpreted by courts and hitherto have been rarely used in trafficking cases. Therefore, the SR takes the view that a specific non-punishment provision applying to victims of trafficking - and to victims of other related crimes such as forced labour - must be introduced in national criminal legislation to comply with the legal obligations stemming from the Council of Europe Convention and EU Directive 36/2011, without prejudice to the full implementation

of general defences recognized by domestic law. Such a specific provision is necessary especially in systems of mandatory prosecution to ensure that prosecution be discontinued at an early stage, and thus victims be immune not only from punishment but also from prosecution and detention, or at least that prosecution and eventually detention be immediately terminated as soon as the existence of the justification is ascertained. In any case the decision regarding the applicability of the justification must be made by the competent judicial authority without delay.

[75] In some jurisdictions the prosecutor may have a degree of discretion as to whether or not to initiate a prosecution with regard to the commission of a particular offence. The fact that an offence has been committed is not always in itself enough. It should be decided that it is not in the public interest to mount a prosecution, for instance where the suspect is a victim of trafficking and the offence is caused or directly linked with their having been trafficked. In such systems, where there is evidence of duress or coercion, the public prosecutor also has the discretion to decide to discontinue a prosecution on evidential grounds.<sup>81</sup> Should a prosecution proceed, it should be possible for the court to sanction a stay of proceedings on grounds of abuse of process,<sup>82</sup> or stay the proceedings on grounds that the prosecution violates Articles 4 and 6 of the ECHR.<sup>83</sup> If this does not occur, the prosecution and resulting conviction may be unlawful.

[76] It is not appropriate that the fact of having been trafficked should be treated only as a factor mitigating a punishment or penalty. Mere allowance for mitigation of the penalty would not amount to compliance with the obligation of non-punishment because it fails to take account of the victim's true condition. The autonomy and free will of the victim is actually taken away and they cannot be held responsible for unlawful acts which they have committed, where it can be shown that these acts were actually committed without any choice owing to the control exerted by the traffickers. Where it is concluded that a person has been trafficked, their criminal file should be cleared so that that person has no criminal record with regard to offences committed in the course, or as a result, of having been trafficked.

<sup>81</sup> See, for instance, Crown Prosecution Service (England and Wales), *Legal Guidance, Human Trafficking and Smuggling*, <[http://www.cps.gov.uk/legal/h\\_to\\_k/human\\_trafficking\\_and\\_smuggling/#a30](http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a30)>, accessed 20 June 2012.

<sup>82</sup> England and Wales Court of Appeals, *Case of LM, MB, DG, Betti Tabot and Yutunde Tijani –and- The Queen*, EWCA Crim 2327 (2010), para. 15; approved in England and Wales Court of Appeals, *Case of R v N, R v LE*, EWCA Crim 189 (2012), para. 19.

<sup>83</sup> Compare with the UK Supreme Court Decision in *R. v. Waya* [2012] UKSC 51, a case concerning confiscation orders, where it was held that the power of a court to stay a prosecution as an abuse of process was not the appropriate procedure for giving respect to human rights under the ECHR and that the protection of ECHR rights must not be limited to the existence of a discretion by a prosecutor whether to prosecute, see *Waya*, at paras. 18, 19 and 24.

### Trafficking in human beings for forced criminality (drug dealing)

Between 2006 and 2008, the police noticed that several hundred drug dealers were residing illegally in a region of Belgium. They had been recruited in Morocco with offers of working abroad. Although many of them knew that the job consisted of dealing drugs, some of them were promised legal jobs in the construction sector in Belgium. Between 2006 and 2008 several hundred drug dealers residing illegally in Belgium were reported in a region of Belgium. They had been recruited in Morocco with offers of working abroad. Although many of them knew that the job consisted of dealing drugs, some of them were promised legal jobs in the construction sector in Belgium. The workers were illegally brought to Belgium through a Moroccan network in Spain. Once in the country, the criminal organization confiscated their documents and forced them (via threats of the use of force, with armed weapons) to work as drug dealers to repay debts for their travel and living costs in the country.

In 2008 the Criminal Court of Charleroi (Belgium) examined one such case and convicted 15 persons of drug offences. In addition, based on the evidence of the victims, two of the perpetrators were convicted of trafficking in human beings for forced criminality with the aggravating circumstances of abuse of the victims' position of vulnerability, use of threats and fraud. The workers were recognized as victims, co-operated with the authorities and were not convicted of drug offences.

A few months later the same court examined a similar case. The criminal organization at stake was recruiting Moroccans and Algerians in Morocco, Algeria and Spain. The workers were then brought to Belgium. The perpetrators sometimes arranged training for the workers to perform the illegal activities. The Public Prosecutor, in co-operation with the NGO providing assistance to the victim, struggled to have one of the victims recognized as such and not a perpetrator, even though that person endured pressures and threats from the criminal organization and denounced them. The perpetrators were convicted of drug offences but not of trafficking.

Source: Centre for Equal Opportunities and Opposition to Racism, *2008 Annual Report on Trafficking in and Smuggling of Human Beings*. Enlisting people and resources to combat the phenomenon (Brussels, 2009), <[http://www.diversiteit.be/?action=publicatie\\_detail&id=108&thema=5&select\\_page=216](http://www.diversiteit.be/?action=publicatie_detail&id=108&thema=5&select_page=216)>, accessed 10 April 2013, pp. 24-25 and 60-61, relating to Judgment from the Criminal Court of Charleroi (Belgium), 3 June 2008, available in French at <[http://www.diversiteit.be/index.php?action=rechtspraak\\_detail&id=590&select\\_page=68](http://www.diversiteit.be/index.php?action=rechtspraak_detail&id=590&select_page=68)>, accessed 10 April 2013.

### Application of non-punishment principle to trafficked woman suspected of involvement in the trafficking of others

The Bureau of the Dutch National Rapporteur on trafficking in human beings reports a case of application of the non-punishment clause to A, a woman recognized as a victim of trafficking and suspected of being involved in the exploitation of others. In a case before the District Court in The Hague,<sup>84</sup> the public prosecutor decided not to prosecute the victim on the basis of Article 26 (of the Council of Europe Convention) because:

- “- A also worked as a prostitute herself and handed her money over to the suspect.*
- She watched over the other women, but did not coerce them.*
- The other women regarded her as a victim, not as a suspect.*
- She was under the influence of the suspect because he had promised her a future with him and she still loved him.*
- She controlled the other women to avoid being abused or threatened by the suspect. She was afraid of the suspect.”*

Source: Dutch National Rapporteur on Trafficking in Human Beings, *Trafficking in human beings - Ten years of independent monitoring*, Eighth Report of the Dutch National Rapporteur (2010), p. 82.

[77] The SR furthermore takes the view that the obligation of non-punishment is not restricted to penalties imposed as a consequence of criminal prosecutions. In the situation where a person has been trafficked and is therefore unable to act with free will, even an unpenalized conviction is in fact a punishment. The mere existence of a conviction is in itself a punishment and may have negative consequences for the victim in future because they would have a criminal record, and as a result might be restricted from certain activities, including limitations to their freedom of movement (e.g., not permitted to travel to another country) or to access certain employment.

[78] Clear and specific legislation and policy guidance is therefore necessary to support full and effective implementation of the non-punishment principle. Depending on the institutional and legal system of the country, the Parliament, the Ministry of Justice and/or the Prosecution Service may be leading the development of guidance, including the identification of criteria for

<sup>84</sup> The Hague District Court, 18 December 2009, LJN: BK8237, quoted in: Dutch National Rapporteur on Trafficking in Human Beings, *Trafficking in human beings - Ten years of independent monitoring*, Eighth Report of the Dutch National Rapporteur (2010), p. 82.

the application of the non-punishment principle.<sup>85</sup> It is essential that such legislation and/or guidance prioritizes the protection of the rights of victims of trafficking, as victims of serious crimes.

[79] Policy and legislative guidance is necessary also to ensure that victims of trafficking are not further penalized when they apply for a residence and/or work permit. It is particularly important that such guidance is directed to immigration authorities to ensure that protection of victims' rights and prosecution of trafficking prevail over immigration control considerations. When deciding whether to grant a temporary or permanent residence permit to a victim of trafficking who has a criminal record for a trafficking-dependent offence, or who had previously received an order of expulsion having been mistakenly identified as an irregular migrant, immigration authorities should take into due account the circumstances of the case. More specifically, since the victim was compelled to commit the offence because of their trafficking situation, the immigration authorities must ensure that such circumstances do not constitute a reason to deny permission to stay in the country or to declare an individual to be an undesirable alien.

[80] Once developed, policy and legislative guidance on the implementation of the non-punishment principle should be widely disseminated and accompanied by training reaching out to law enforcement authorities, immigration authorities, prosecutors and the judiciary, as well as victims' lawyers and NGO advocates. It is particularly important that guidance and training reach out to those prosecutorial and law enforcement services which are not specialized in human trafficking and which may be dealing with crimes such as theft or drug offences committed by victims of trafficking under compulsion.

## 9. Conclusion

[81] Victims of trafficking are victims of serious crimes and human rights violations. Under international law, States are obliged to ensure the protection of the rights of victims, including the right to be accurately identified as trafficked adults or children, and it is this identification that is the gateway to their protection. Not only is non-punishment a principle that respects and protects a victim's rights, including the right to be free from detention and unfair proceedings, to be protected against re-victimization and re-traumatization and to be offered safety and assistance in recovery, respect for this legal principle also helps to fulfill the State's obligations towards trafficked persons in line with the European Court of Human Rights' finding in the *Rantsev* case. In that judgment the Court held that human trafficking falls within the protective scope of the non-derogable rights of Article 4 of the European Convention of Human Rights and that a positive obligation on States to investigate human trafficking arises where circumstances give rise to, or ought to give rise to, a credible suspicion that the person had been trafficked. In such cases, where no investigation of the trafficker takes place but the criminalization of the victim proceeds, this will give rise to an extremely serious violation of that person's human rights and also the State's obligations under human rights and EU law.

[82] Victims of trafficking are also witnesses of serious crime. The non-punishment provision will, if applied correctly, equally and fairly, enable States to improve their prosecution rates whilst ensuring critical respect for the dignity and safety of all victims of trafficking who, but for their trafficked status, would not have committed the offence at all.

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<sup>85</sup> See, for instance, Crown Prosecution Service (England and Wales), *Legal Guidance, Human Trafficking and Smuggling*, <[http://www.cps.gov.uk/legal/h\\_to\\_k/human\\_trafficking\\_and\\_smuggling/#a30](http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a30)>, accessed 20 June 2012. See also the guidance provided by the Ministry of Justice of Belgium which encourages prosecutors to consider trafficked persons firstly as victims of a serious crime even if they committed offences in violation of immigration or work regulations, in 'Policy on investigation and prosecution of human trafficking', Ministry of Justice directive, Letter no. COL 10/2004, entered into force on 1 May 2004.

## 10. Recommendations on non-punishment for legislators and prosecutors

1. The protection of victims of trafficking is a paramount objective and obligation for all States.
2. The punishment of victims of trafficking (for crimes that are caused or directly linked to their having been trafficked) constitutes a serious denial of justice. States are obliged not to impose penalties for crimes committed by trafficked persons as a consequence, or in the course, of their having been trafficked.
3. The obligation not to punish victims of trafficking, grounded in international law, must be effectively implemented by States in their criminal justice systems and practices.
4. States' criminal justice policies and practices should adopt a human rights and victim-centred approach to trafficking in human beings. States should encourage police, prosecutors and judges to consider victims of trafficking as victims of a serious crime and of human rights violations, crimes and violations which should be tackled as priorities.
5. States must establish effective mechanisms to identify victims of trafficking promptly, so that victims are not punished for offences committed by them whilst being trafficked or as a consequence of having been trafficked. Such mechanisms should foresee the prompt collection of objective elements of proof in order to help to determine whether the suspect is in fact a victim.
6. Early identification is crucial and States should ensure that public officials who are likely to come into contact with trafficked persons, such as police officers, border guards, labour inspectors, medical personnel as well as personnel in detention centres for irregular migrants are trained to do this. Such training should include addressing the challenges of identifying victims who might on the face of it appear to be suspects, as well as guidance on the application of the non-punishment provision.
7. Effective identification systems must be established to ensure that victims of trafficking receive essential support and assistance in full accordance with their needs and entitlements. To this end, multidisciplinary co-operation between public officials and NGOs should be encouraged and national referral mechanisms should be established, thus formally recognizing NGOs' contribution to, and role

in, victim identification and assistance.

8. A victim's right to non-punishment is linked to a victim's right to have the trafficking offences of which they are victims investigated with a view to a criminal prosecution being commenced against their trafficker(s). From the moment their circumstances raise a reasonable suspicion that the criminal suspect is a possible victim of trafficking, States are under a duty to enquire further into the matter and, once a reasonable grounds indication has been reached that the suspect is a victim of trafficking, the victim should be treated as a victim and witness of serious crimes, and any prosecution against them for a crime caused or directly linked to their having been trafficked should be discontinued as soon as possible.
9. As soon as law enforcement authorities have a suspicion that a suspected offender might be a victim of trafficking, they should immediately include such suspicion and the related circumstances in their official reports on the investigation of the offence, and collect evidence about the possible victim status of the alleged offender.
10. While the process of verification of the person's status as a victim of trafficking is ongoing, any deportation order against that person should be suspended and they should immediately receive legal counselling and assistance in compliance with international standards. Moreover, the public prosecutor and/or judge should provisionally suspend (or should consider the possibility of suspending) the proceedings on their own initiative to take into account the outcome of the victim identification process.
11. Child victims of trafficking are particularly vulnerable. They must be rapidly identified as trafficked children and their best interests considered paramount at all times. Child victims of trafficking shall be provided with appropriate assistance and protection. Full account shall be taken of their special vulnerabilities, rights and needs.
12. Where the age of the victim who was involved in the illegal activity is uncertain and there are reasons to believe that the victim is a child, the presumption should be that the victim is a child and is treated accordingly.
13. If the commission of the offence was related to, or is a consequence of, their having been trafficked, child victims should be granted immunity from any prosecution and conviction. Where there are doubts regarding the connection of the offence to the child trafficking situation, law enforcement officials and prosecutors should prioritize actions that promote the well-being of the child,



avoid harm to the child and that are in their best interests, with due regard to the circumstances of the case.

14. The child's consent to an illegal activity in a trafficking situation cannot override the victim status of that child. During investigations, law enforcement agencies should not question children about their consent to exploitation. Information gathered during the investigation phase can under no circumstances be used against the child for purposes of establishing criminal liability during trial or at a hearing of the child victim.

15. Child victims of trafficking should not be placed in police cells or other detention facilities connected with law enforcement.

16. States must adopt legislation adequate for ensuring the practical and effective protection of the rights of victims or potential victims of trafficking. This obligation includes ensuring that such persons are not detained, prosecuted or punished for offences relating to their having been trafficked or as a consequence of having been trafficked. The non-punishment provision is a right, the objective of which is to protect and benefit trafficked victims and as such it must be safeguarded in law.

17. States should consider adopting an open-ended list of offences typically related to trafficking in human beings, with regard to the commission of which victims of trafficking will not be punished or penalized, in accordance with the duty of non-punishment. It should be clearly stated that the list is not exclusive, and that the duty of non-punishment applies to any offence so long as the necessary link with trafficking is established. Such lists should be widely disseminated amongst prosecutors and law enforcement services, and not restricted to those services specialized in THB investigations. Such guidance should also be disseminated amongst victims' advocates, pro-bono lawyers and NGOs. It should also be included in trainings and in guidance to law enforcement and prosecutors.

18. The obligation not to punish victims of trafficking, grounded in international law, applies both to cases of international and internal trafficking.

19. Given that some countries have criminalized the distinct components of the crime of trafficking, and in particular forced labour, it is important to extend the application of the non-punishment obligation also to cases in which victims of forced labour were compelled to commit offences because of their situation as victims of forced labour.

20. The obligation of non-punishment is not restricted to penalties imposed as a consequence of criminal prosecutions.

21. The scope of application of the non-punishment provision is not limited to providing for immunity of trafficked persons from conviction. An unpenalized conviction may still amount to a punishment if the victim is left with a criminal record. Other measures which amount to penalties are also prohibited. Such measures include, but are not limited to, compulsory detention of trafficked persons in closed shelters or in administrative detention.

22. Where an offence is recognized to have been committed by a person in the course of being trafficked or as a consequence of having been trafficked, the State should take measures to ensure that the trafficked person will not have a criminal record as a consequence of having committed such an offence.

23. States should ensure full and effective implementation of the non-punishment principle. States must make a judgement as to whether an offence committed by a trafficked person was linked to trafficking. If the offence is not linked, then the trafficked person may be liable to prosecution and to a penalty, like anyone else. Where there is a link, however, the non-punishment clause must be implemented unless the offence is so clearly unrelated to the status of a trafficked person that the prosecution must proceed.

24. In States with systems of non-mandatory prosecution, where such a link exists, the competent authorities should not initiate the relevant prosecution. Where the link is found during the prosecution, the case against the trafficked victim should be discontinued. Where there is no clear link between the trafficking and the offence, the case may proceed or be discontinued like any other. Alternatively, where a prosecution has been initiated and has not been discontinued, the court may retain the power to stay a prosecution on the grounds of abuse of process. In the event, however, that the prosecutor and court do not halt the prosecution, where there is a clear link between the commission of the offence and the person's trafficked status, that prosecution may be unlawful.

25. States with systems of mandatory prosecution must amend their laws and introduce a specific non-punishment provision to enable the non-prosecution of victims, or the termination of prosecution at an early stage. In this case, when a prosecutor and/or a judge recognizes the existence of justifications that would

excuse the defendant from liability, prosecution must be discontinued without delay in the pre-trial phase. Should a prosecution continue, it should be possible for the court to uphold the non-liability of a person when the existence of a justification is established during the trial.

26. The right to non-punishment must also be protected in bringing an appeal. Fresh evidence which supports a finding that the victim was trafficked and that the crime was committed in the course of their being trafficked or as a consequence of their having been trafficked should be admissible on appeal, subject to national rules of evidence and procedure.

27. Victims of trafficking who have been suspected or convicted of trafficking-related offences should not be restricted in their access to residence rights nor, where appropriate, to labour rights, to which they may be entitled to as victims. A conviction of a victim of trafficking for a trafficking-related offence should not be considered a reason not to grant or extend a residence permit, nor to declare the person an undesirable alien.

28. States should encourage judicial training institutes to establish regular training for prosecutors and judges on THB so that they will be aware of pertinent matters relating to THB, such as: the current features of modern-day slavery; the circumstances and control methods of traffickers under which victims may commit offences; and the obligation of non-punishment of victims for trafficking-dependent offences.

29. States should encourage National Rapporteurs or equivalent mechanisms to regularly review the practical implementation of the non-punishment principle with regard to victims of trafficking, especially women and children.





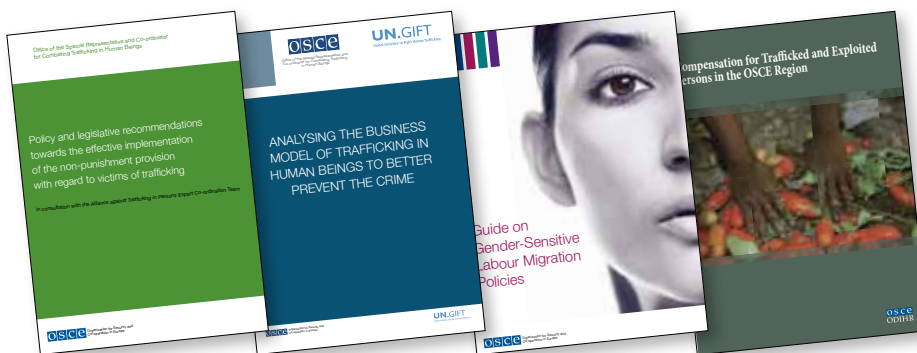
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## Other Publications:

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- 2010: Analysing the Business Model of Trafficking in Human Beings to Better Prevent the Crime, OSR / UN.GIFT (EN/RU)
- 2009: Guide on Gender-Sensitive Labour Migration Policies, Gender Section / OCEEA / OSR
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