

## The Non-Punishment Principle

**States are under the obligation to protect victims of trafficking from prosecution and punishment for unlawful acts committed in the course, or as a consequence, of their trafficking situation.**

*The non-punishment principle is a manifestation of the victim-centred approach to combatting human trafficking, focussed on safeguarding the human rights of victims. The principle does not provide trafficking victims with a blanket immunity from prosecution. Instead, it simply aims to protect a trafficked person from wrongful prosecution and punishment when – due to the trafficking situation – the person had no realistic alternative to committing this unlawful act.*

### To which offences can the principle apply?

The principle can apply to all unlawful activities committed by a trafficking victim, irrespective of the seriousness or gravity of the offence. This includes criminal, immigration, administrative and civil offences. In practice, the principle is not always applied by the national authorities in all applicable circumstances, this exclusion of offences from the principle's scope of application has been expressly disapproved of by the UN Special Rapporteur, GRETA and the OSCE Recommendation.

#### Examples (non-exhaustive)

- Irregular migration status, absence of documentation, or holding a false identity document.
- Minor criminal offences: pickpocketing, begging.
- Serious criminal offences: drug trafficking/ production, identity/ credit card fraud, burglary.
- Trafficking of other victims: involvement in the recruitment or exploitation of other trafficking victims under pressure of the trafficker.
- Liberation offences (offences to escape the trafficking situation, incl. possession of a weapon).

### Why should the non-punishment principle be applied? (Rationale)

- A trafficking victim acts without real autonomy because of the trafficking situation, the victim is not responsible for the commission of these acts and is thus not to be held accountable.
- To safeguard the human rights of victims & avoiding further victimisation and traumatisation.
- To encourage victims to report the crime and to act as witnesses in criminal proceedings against the perpetrators – leading to more prosecutions and countering impunity among traffickers.

### Consequences of non-application

When trafficked persons come to the attention of the authorities as offenders, they are often not recognised as victims, which can lead to a **wrongful prosecution, conviction and punishment**. A failure by the authorities to apply the non-punishment principle leads to secondary victimisation and a denial of their rights as a victim of trafficking. This failure by the authorities can further lead to negative ripple effects on the possibility to apply for asylum, as well as on welfare, employment and child custody. The legitimate fear among victims for prosecution and punishment prevents them from seeking protection and discourages them to come forward and cooperate with law enforcement.

A failure to identify a victim will lead to both the victim being denied his or her rights, as well as the prosecution being denied the necessary witness in the proceedings against the trafficker. **When the non-punishment principle is not applied correctly, states thus contribute to the impunity of traffickers.**

## States' obligations based on Human Rights Law

Based on states' positive obligations under article 4 ECHR and the right to a fair trial under article 6(1) ECHR, **states have the duty to ensure the effective application of the non-punishment principle** (*V.C.L. and A.N. v. the UK*). Punishing trafficked persons for acts committed as a result of their trafficking situation contravenes with states' obligations to recognise victims' rights and provide for support, protection and effective remedies. This punishment infringes upon the state's obligation to investigate and prosecute those responsible for trafficking in human beings. **When trafficking victims rather than the perpetrators are charged, prosecuted and punished, state authorities contribute to the impunity of traffickers and undermine the fight against trafficking in human beings.**

European Court of Human Rights in the landmark case *V.C.L. and A.N. v. the UK*:

*"[i]t is axiomatic that the prosecution of victims of trafficking would be injurious to their physical, psychological and social recovery and could potentially leave them vulnerable to being re-trafficked in future".<sup>1</sup>*

## Legislation codifying the non-punishment principle in Europe

- Council of Europe Convention on Action against Trafficking in Human Beings: Article 26
- EU Trafficking Directive 2011/36/EU: Article 8
- ILO Protocol 29 to the Forced Labour Convention: Article 4(2)

These binding instruments oblige states to provide for the possibility of not prosecuting and imposing penalties on victims-defendants when the non-punishment principle applies. To act in conformity with these binding instruments, the provisions have to be interpreted in good faith, which means that states are to give them real and practical effect. This means **states must take the necessary steps to ensure the application of the non-punishment principle in the appropriate cases**. States have a discretion as to how to fulfil this obligation.

## Application of the non-punishment principle

The non-punishment principle is to be understood broadly as non-liability, and thus applies to both the prosecution and the penalty phase. It **protects victims from being charged, detained, prosecuted and punished**.<sup>2</sup> This includes unpenalized convictions and other measures which in fact constitute a punishment. Mere mitigation of the sentence does not comply with the obligation of non-punishment, as any conviction of the victim is at odds with the victim's non-liability for the specific offence.

Effects of the principle's application in different stages of the proceedings:

- Immediate discontinuation of the proceedings.
- Immediate release of the victim from (pre-trial or immigration) detention.
- Quashing the wrongful conviction or administrative/civil/immigration judgement.
- Clearance of the victims' criminal file, including expungement of all related criminal records and relief of any wrongful sanctions imposed based on administrative, civil or immigration law (fines, etc.).
- Remedies, including compensation for wrongful detainment by the state.
- The wrongful conviction or judgement may never hinder a victims' ability to apply for asylum, refugee status or a specific residence permit for victims of trafficking.

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<sup>1</sup> *V.C.L. and A.N. v. the UK*, § 159.

<sup>2</sup> EU Directive, [recital 14](#); CoE Convention, [Meeting Committee of the Parties, p. 12](#); [OSCE Recommendations, par. 14](#)).