

The Non-Punishment Principle

Introduction

Trafficked persons are often made to commit unlawful activities by their traffickers in the course of their trafficking situation. For example, when a victim is traveling with false documents provided by their trafficker, or when a victim is forced to commit thefts or other offences for the trafficker's financial gain. Victims are not to be held responsible for these unlawful activities committed in the course of their exploitation. Victims who were made to commit unlawful activities during their trafficking situation – alike all trafficked persons – are to be provided with protection, not punishment. When victims of human trafficking first come to the attention of the authorities as offenders, they are often not recognised as victims, which might lead to wrongful prosecution, conviction and punishment. Early identification of victims is of critical relevance for the correct and full application of the non-punishment principle.

The non-punishment principle aims to protect victims of trafficking from punishment for unlawful acts committed in the course, or as a consequence, of being trafficked. The principle does not confer a blanket immunity, but simply aims to protect a trafficked person when he or she had no choice but to commit an unlawful act because of the trafficking situation. The principle applies where the trafficking situation causes the victim to act without real autonomy. In these situations, the non-punishment principle protects trafficked persons from wrongful prosecution, conviction, or other forms of punishment, based on the understanding that their responsibility for unlawful acts is to be understood in the context of coercion or other forms of control. The principle thus draws on long accepted criminal defence principles such as duress and necessity. Moreover, punishing trafficked persons serves none of the 'purposes' of punishment (retribution, deterrence, incapacitation).

Rationale of the non-punishment principle:

- Safeguarding the human rights of victims
- Preventing further victimisation and traumatising
- Encouraging victims to report the crime and act as witnesses in criminal proceedings against the trafficker – leading to more prosecutions and countering impunity among traffickers.

The non-punishment principle is a manifestation of the victim-centred approach to combatting human trafficking, focussed on safeguarding the human rights of victims. Punishing trafficked persons for acts committed as a result of their trafficking situation contravenes with the obligation of states to recognise victims' rights and provide for support, protection and effective remedies. Such punishment is a denial of access to justice for trafficked persons and it hinders the possibility of any type of recovery. The legitimate fear for prosecution and punishment prevents victims from seeking protection and discourages them to come forward and cooperate with law-enforcement. This situation is used and even exacerbated by traffickers to maintain control over their victims. The punishment of trafficked persons by the state infringes upon the state's obligations to protect victims and to investigate and prosecute those responsible for trafficking in human beings, which can lead to a violation of the European Convention on Human Rights (ECHR). 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.

1. Codification of the non-punishment principle

1.2 The non-punishment principle in international & regional instruments

As stipulated by the UN Special Rapporteur on Trafficking in persons, especially women and children, the non-punishment principle is recognised as a general principle of international law ([A/HRC/47/34](#)). The principle is enshrined in multiple international documents, including in principle 7 and Guideline 4(5) of the Recommended Principles and Guidelines for Human Rights and Human Trafficking by the OHCHR (see textbox). Further, the principle has been affirmed by the [UN General Assembly](#) and the [Working Group on Trafficking in Persons](#) established to assist the implementation of the Palermo Protocol

Principle 7 of the 2002 OHCHR Recommended Principles:

“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.”

In Europe the non-punishment principle is codified in three binding instruments:

Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings (CoE Convention)

“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.”

Article 8 of the EU Trafficking Directive 2011/36/EU (EU Directive)

“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 referred to in Article 2 [their victim status].”

Article 4(2) of ILO Protocol 29 to the Forced Labour Convention

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

These instruments lay down a binding obligation to ensure that competent authorities of the state-parties are entitled not to prosecute and impose penalties on trafficking victims in cases where the non-punishment principle applies. In order to give these instruments real and practical effect, **this is to be understood as an obligation for states to protect victims from prosecution and punishment** in these particular situations. Below we will take a closer look at the codification of the principle in the CoE Convention and the EU Directive.

Article 26 of the CoE Convention is the first legally binding provision on non-punishment, enacted in 2005. This provision obliges state-parties to provide for the possibility of not punishing victims for their involvement in unlawful activities to the extent that they have been compelled to do so. The second binding provision, article 8 of the EU Directive, confirms that the wording ‘*not to prosecute or impose penalties*’ means that the non-punishment principle stands for non-liability and should enable a victim to be protected from an early stage from being charged, prosecuted and punished. The guidance to both the non-punishment provision in the EU Directive ([recital 14](#)) and the CoE Convention ([Meeting Committee of the Parties, p. 12](#); [OSCE Recommendations, par. 14](#)) clarify that the principle implies non-liability, and thus applies to both the prosecution and the penalty phase.

These binding instruments oblige states to provide for the possibility of not prosecuting and/or imposing penalties on a victim-defendant when the non-punishment principle applies. To act in conformity with these binding provisions, states are to give these provisions real and practical effect and must take the necessary steps to ensure the application of the non-punishment principle in the appropriate cases. This duty is also recognised by the European Court of Human Rights (ECtHR) as a positive obligation based on *the prohibition of slavery and forced labour* (see section 5). The non-punishment principle is to be interpreted broadly, including all unlawful activities, whether these are criminal, immigration, administrative or civil offences.

States are thus under the obligation to avoid prosecution and punishment in the appropriate cases, and solely have a discretion as to how they fulfil this obligation. As explained in the [CoE Convention's Explanatory Report \(par. 274\)](#), state-parties can comply with this duty by providing for a substantive criminal or procedural law provision or by any other measure which enables non-punishment of victim-defendants. Both GRETA ([4th General report, p. 54](#)) and the UN Special Rapporteur on Trafficking in persons, especially women and children ([A/HRC/47/34, par. 54](#)) have advocated for states to introduce specific legislation codifying non-punishment to ensure its effective application. It is crucial that specific legislation is enacted regarding the different relevant fields of law, including criminal, civil, administrative and immigration law.

2. Types of offences to which the non-punishment principle is applicable

Trafficked persons can become involved in unlawful activities in the course, or as a direct consequence of their trafficking situation. The non-punishment principle applies to criminal, civil, administrative and immigration offences. Any trafficking-related unlawful activity carried out by a victim of trafficking must be covered by a guarantee of non-punishment, regardless of the gravity or seriousness of the offence committed ([UNSR 2020 Report, par. 41](#)). Regrettably, not all countries follow this international recommendation, and some do exclude certain crimes in their national legislation. For the non-punishment principle to be applicable in a specific case, the necessary link between this offence and the trafficking situation needs to be established (see section 3). This means the principle can be applicable to all sorts of unlawful acts and no type of offences should thus be *a priori* excluded from the principle's application. To clarify the scope, we distinguish between three categories of offences to which the non-punishment principle applies: status offences, purpose offences (criminal exploitation) and other offences.

2.1 Status offences

Status offences primarily include immigration, administrative and civil offences. Trafficking victims are often unknowingly made to commit status offences in the course, or as a direct consequence of their trafficking situation. For example, when the victim carries an identity document given to him or her by the trafficker, which turns out to be forged. In many instances the victim is not aware of this unlawful act, as they are made to believe these documents are valid. Status offences are often instrumental for the trafficking to take place or directly facilitate the commission of the trafficking offence.

Examples of status offences (non-exhaustive):

- Irregular migration status: irregular entry or stay
- Absence of documentation
- Holding a false identity document
- Irregular labour status: working without authorisation/ work permit
- Violations of administrative laws, incl. norms related to public order or prostitution (incl. soliciting)

Case example 1: *False Identity document: R v L and Others* (UK case)

A Ugandan victim of sexual exploitation in the United Kingdom was convicted for the use of a false identity document which had been given to her by her trafficker. On appeal the conviction was quashed based on the non-punishment principle. (For further information, see [Annex 1.1](#))

Case example 2: 'Violating' Covid legislation when exploited in prostitution (Swiss case)

During the pandemic an Eastern European victim exploited for prostitution in Switzerland was fined under Covid legislation for offering sexual services. Although the woman was subsequently identified by the authorities as a victim of trafficking, the non-punishment principle was not applied to revoke the fines and to clear her criminal file, as a result of which she may be refused entry to Switzerland in the future. (For further information, see [Annex 1.1](#))

Case example 3: *Criminally charged for 'working' in forced prostitution & detained for not accepting voluntary return* (Danish case)

A Nigerian victim who was forced into street prostitution in Denmark was charged and imprisoned for offering sexual services on the street. In prison she was officially recognised as a trafficking victim with the support of the NGO Hope Now. After being transferred to a shelter she had to accept a 'voluntary return' to Nigeria or leave Denmark within a month. Subsequently, the Danish authorities detained the victim in immigration detention for a year for the sole reason of not accepting a 'voluntary return' and prepared to forcibly deport the victim to Nigeria. By virtue of the NGO's support and her lawyer's appeal to CEDAW, the deportation could be stopped on the day she was due to be deported. In this case the Danish authorities repeatedly failed to apply the non-punishment principle. (For further information, see [Annex 1.1](#))

2.2 Purpose offences (Criminal exploitation)

When a human trafficking victim is exploited for the purpose of criminal exploitation, the unlawful acts he or she is made to commit by the trafficker can be called purpose offences, because the victim is exploited for the sole purpose of committing these offences for the trafficker's financial gain. Often, mixed forms of exploitation are used, such as a combination of sexual exploitation and criminal exploitation. The exploitation of criminal activities is explicitly included as a form of human trafficking in the definition of trafficking in the EU Directive, article 2(3). Recital 11 of this Directive further clarifies that exploitation of criminal activities "should be understood as the exploitation of a person to commit, inter alia, pickpocketing, shoplifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain".

These 'purpose offences' in which the victim is involved are thus simply the reason why the victim is being trafficked in the first place. Criminal exploitation is often based on a deliberate strategy by traffickers to expose victims to the risk of criminalisation, thereby preventing victims from seeking help and reporting to the police. These victims have a higher chance to be caught as 'offenders' by the authorities, than to be recognised as trafficking victims. Exploiting victims for criminal activities is a very gainful activity, and the victims, not the traffickers, risk prosecution and punishment. This is exacerbated by the fact that traffickers often use victims to commit those unlawful acts which entail the largest risk of detection by law enforcement. Traffickers thus use victims to shield themselves from prosecution in order to enjoy impunity for their criminal activities.

Examples of purpose offences (non-exhaustive):

- Pickpocketing, shoplifting, burglary
- Forced begging (where this is criminalised)
- Drug trafficking, selling of drugs, drug production or cultivation (e.g., in indoor 'cannabis farms' or 'meth labs')
- Selling of counterfeit products
- Fraud: identify fraud or benefit/credit card fraud (e.g., through scams such as illegal call centres)
- Trafficking of other victims: involvement in the recruitment or exploitation of other trafficking victims under pressure of the trafficker. Often, these victim-defendants continue to be exploited themselves, while being used to take part in the exploitation of others.¹

¹ Victims who are forced to take part in the exploitation of other victims are often used by traffickers for low-ranking roles with a high risk of exposure to law enforcement, including recruiting new victims and collecting proceeds. It was found by the [UNODC](#) in 2020 that in most cases these victim-defendants continued to be exploited themselves and that economic gain only played a role as a motive in very few cases – which were all connected with economic survival (single mothers) or escaping extreme poverty.

Case example 4: Drug production: VCL & AN v. UK (ECtHR case)

Case by the European Court of Human Rights (ECtHR) on the convictions of two Vietnamese minors for forced drug production by the United Kingdom. Based on the non-punishment principle, the ECtHR found the United Kingdom violated the human rights enshrined in the European Convention on Human Rights (ECHR) by convicting these minors who were victims of trafficking. (For further information, see [Annex 1.2](#))

Case example 5: Forced drug trafficking from South America (Spanish case)

A Peruvian single mom in dire need accepts a job offer to transport medicine components to Europe. Within 48 hours she receives a passport, a plane ticket, and is taken to a hotel where drugs are put inside her. Upon arrival in Barcelona, she is imprisoned for drug trafficking. While the police fail to formally detect her as a victim of trafficking, her lawyer detects the signs of trafficking and contacts the NGO SICARcat which assesses the case and finds the woman is a victim of trafficking. In court the lawyer presents the NGO's report, and the judges apply the non-punishment principle to acquit the victim. On appeal the judgement is confirmed by the High Court of Justice of Catalonia. (For further information, see [Annex 1.2](#))

Case example 6: Robberies committed under coercion (Serbian case)

In Belgrade, the Serbian Aleksandar who is struggling with financial problems is recruited by a gang and forced to commit robberies. He is not allowed to leave the house by himself, endures months of psychological violence, and when he refuses to commit a robbery, they threaten to kill his family. When he and his exploiter are arrested for a robbery, he tells his story to the police and is identified as a victim of human trafficking. However, the non-punishment principle is not applied, and he is convicted to a 1-year sentence. (For further information, see [Annex 1.2](#))

2.3 Other offences

This last category of 'other offences' include all unlawful acts committed by trafficked persons which do not fall under the categories of status offences or purpose offences (criminal exploitation). This can include (grave) offences committed by victims to escape their trafficking situation. At first sight, these offences may seem further detached from the original trafficking situation, therefore the necessary link with the trafficking situation (see section 3) needs to be most evident for the principle to be applicable in these cases.

Examples of 'other offences' (non-exhaustive):

- Liberation offences: offences to escape the trafficking situation (e.g. attacking the trafficker, causing damage during the escape, or the possession of a weapon)
- Survival offences during or subsequent to the trafficking situation (e.g. stealing to obtain food or medicines)
- Other offences the victim is made to commit during, or as a result of the exploitation

Case law example 7: Causing fatal bodily injury during the exploitation: Mehak case (Dutch case)

A minor girl from India who suffered domestic exploitation in an Indian household in the Netherlands was forced by her traffickers to maltreat a baby. The non-punishment principle was not applied in this case and the girl was convicted for her role in the death of this baby. Both traffickers fled the Netherlands prior to their conviction and never served their sentence. (For further information, see [Annex 1.3](#))

3. 'Necessary link' required for the application the non-punishment principle

For the non-punishment principle to be applicable in a specific case, it needs to be established that:

- 1) The person is a victim of trafficking,²
- 2) He or she committed an unlawful activity, and
- 3) The necessary link between this offence and the trafficking situation can be established.

What is needed to establish this 'necessary link' between the unlawful act and the victim's trafficking situation? As discussed above, the non-punishment principle can *a priori* be applicable to all types of unlawful activities related to the trafficking situation – regardless of their gravity. Logically, the more serious the offence, and the further it is detached (in time or causally) from the trafficking situation, the stricter the enquiry whether the necessary link between the unlawful activity and the trafficking situation is fulfilled. For example, it will often be relatively simple to establish the necessary link for status offences where these were instrumental to the sexual and/or labour exploitation of the victim. Similarly, for purpose offences – where the purpose of the exploitation is forcing the victim to commit criminal acts for the traffickers' financial gain – it should not be overly complicated to establish the link between these offences and the trafficking situation. However, for the category of 'other offences' (section 2.3) such as survival offences committed by a victim after escaping the trafficking situation, it might be harder to establish this link.

To sum up, the non-punishment principle does not provide trafficking victims with a blanket immunity from prosecution for any unlawful act that is committed, but instead functions as a safeguard to protect trafficking victims from wrongful prosecution and punishment for unlawful activities they were made to commit in the course of, or as a direct result of their trafficking situation. In legal documents codifying the non-punishment principle, two different models to establish the 'necessary link' between the unlawful act and the victim's trafficking situation can be distinguished: the causation model and the duress model.

3.1 Causation model

To establish the necessary link, the causation model requires that the offence was either 'directly related to' or committed as a 'direct consequence of' the victim's situation as a trafficked person. Although the word 'direct' seems to imply a very close proximity, the requirement should be interpreted broadly, taking into account the complex impact of the trauma endured by trafficking victims. This model is used in the OHCHR principles and the ASEAN Convention against trafficking in persons (art. 14(7)). The causation model is the preferred model based on a human rights-based approach; it is easier to employ in practice than the duress model and clearly shows the unlawful activities were committed by the trafficked person as a result of their lack of autonomy caused by the trafficking situation ([A/HRC/47/34, par. 46](#)).

3.2 Duress model

To establish the necessary link, the duress model requires that the victim was 'compelled to' commit the offence due to the situation as a victim of trafficking. This model is used in the CoE Convention. As clarified by the UN Special Rapporteur on trafficking in persons, especially women and children ([UNSR 2020 Report, par. 24](#)), this 'compulsion test' should be directly recognised as being fulfilled in any situation where the victim was subjected to any of the illicit means at the time of the commission of the unlawful act. This includes any of the illicit means as referred to in the trafficking definition, including the threat or use of force, as well as less visible means such as deception, abuse of power and abuse of a position of vulnerability. This 'compulsion test' is thus broader than the 'general' defence of duress in national legislation – which is often strictly limited. For this 'compulsion test' the full array of factual circumstances in which trafficking victims lose the possibility to act with free will are to be taken into account ([OSCE Recommendations, par. 12](#)). If a country lacks a specific codification of the

² As laid down in recital 18 of the EU Directive, "A person should be provided with assistance and support as soon as there is a reasonable-grounds indication for believing that he or she might have been trafficked and irrespective of his or her willingness to act as a witness." In line with this, the non-punishment principle should be applicable when there is a reasonable-grounds indication that the person might have been trafficked.

non-punishment principle in national legislation and wishes to comply with the obligation of the non-punishment principle through the application of the general defence of duress, this obligation can only be complied with if the defence of duress is interpreted in this comprehensive manner in relation to non-punishment cases.

Note that the EU Directive and the ILO Protocol to the Forced Labour Convention (no. 29) did not adopt the wording of the CoE Convention (*“to the extent that they have been compelled to do so”*) and instead adopt a combination of the causation and the duress model: *“compelled to commit as a direct consequence”*.

3.3 Establishing the ‘necessary link’ for child victims

The definition for child trafficking does not require any of the means (threat, deception, etc.) to apply for a child to be trafficked, and a child’s consent to the exploitation is always irrelevant ([OHCHR, Guideline 8](#)). The UN Special Rapporteur on trafficking in persons, especially women and children ([UNSR 2020 Report, par. 43](#)) and the OSCE Recommendations ([par. 41](#)) clarified the specific manner to establish the ‘necessary link’ in relation to child-victims. In order to apply the non-punishment principle to child-victims, the relation between the offence and the child’s status as a presumed or identified trafficking victim is sufficient to establish the required link. Therefore, the non-punishment principle is to be applied to children when the offence committed by the child was related to the trafficking. No further test is needed to establish the ‘necessary link’, and no test of compulsion can be applied since no ‘means’ are required for child trafficking. Therefore, the traditional defence of duress in national legislation – strictly requiring compulsion – is not adequate to protect children from wrongful prosecution and punishment. National provisions on non-punishment therefore tend to include a special provision for children which does not include a test of compulsion ([UK MSA sec. 45\(4\)](#)).

4. Legal effects of the non-punishment principle

When the non-punishment principle is applicable to a case, this means the trafficking victim may not be punished for the acts he or she committed in the course or as a direct consequence of the trafficking situation. Non-punishment is to be understood broadly as non-liability of the victim-defendant for these specific acts, and thus applies to both the prosecution and the penalty phase. This is to include protection from prosecution, detention, punishment and other measures which in fact constitute a punishment. Importantly, this includes unpenalized convictions, as in these situations the victim is held liable and this in fact constitutes punishment. Further examples of forms of punishment to which the principle applies include the exclusion from a refugee status, restrictions of movement amounting to deprivation of liberty (incl. immigration detention), confiscation of travel documents, refusal of access to welfare services, and the refusal of entry into, or transit through, countries.

4.1 Moment of application and legal effects

The obligation of non-punishment is intimately tied to the state’s obligation to identify, protect and assist trafficked persons. Due to preconceived notions of what the ‘ideal victim’ looks like, trafficked persons who are made to commit unlawful acts, especially when they are men, are less likely to be recognised and identified as victims. This impacts the application of the non-punishment principle. The principle should be applied from the very first detection of a (potential) victim by the authorities, as only in this manner it can be applied fully and effectively. Early identification of the victim is thus crucial for the correct application of the principle from the very start of the investigation.

In case of a criminal offence, if the victim is identified before he or she is charged, the victim can be protected from prosecution and punishment and be provided with the support to which he or she is entitled. In a similar vein, this also applies in case of a civil, administrative or immigration offence. Where victims are identified early and well-supported and protected, this may enable them to act as witnesses in the criminal proceedings against their trafficker. If the victim is not identified at the very first contact with the authorities, this means the proceedings might have already resulted in secondary victimisation and further traumatising. For the full and effective application of the non-punishment principle it is therefore paramount that proactive steps are taken throughout the justice system to

identify circumstances and evidence that a defendant might in fact be a victim of trafficking. A failure to identify a victim will lead to both the victim being denied his or her rights as well as the prosecution to be denied the necessary witness in the proceedings against the trafficker.

In situations where the prosecution has already commenced at the time of identification, the application of the principle should lead to the immediate discontinuation of the proceedings, as well as the immediate release of the victim from pre-trial detention in case the victim was detained. Where the victim is only identified when the proceedings have already reached the trial stage, the prosecution should ask for the case to be dismissed. In this situation also the judiciary has the responsibility to uphold the non-liability of the victim and prevent conviction and punishment. It is crucial to note that 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.

If the victim is only identified after the conviction – for example by an NGO doing outreach work in prison – and the non-punishment principle was wrongfully not applied in their case, this wrongful conviction is to be quashed, the victim is to be released and his or her criminal file is to be cleared. The same counts for any civil, administrative or immigration offence for which the victim has been wrongfully sanctioned. The effective implementation of the principle in these situations of wrongful conviction requires access to remedies. This should be supported through the provision of legal aid and is to include the provision for the expungement of all related criminal records; relief of any sanctions imposed (fines, administrative sanctions, etc.), as well as compensation for the wrongful detainment by the state. Moreover, a wrongful conviction or sanctioning may never hinder a victims' ability to apply for asylum or for a specific residence permit for victims of trafficking, nor may it have any ripple effect on employment, welfare or child custody.

5. States' positive obligations under the European Convention on Human Rights

The European Court of Human Rights (ECtHR) clarified through its caselaw that human trafficking, as defined in the Palermo Protocol and the CoE Convention, falls within the scope of the *prohibition of slavery and forced labour* of article 4 ECHR (*Rantsev v. Cyprus and Russia*, § 282). When a state prosecutes and punishes a trafficked person without prior assessment of the extent to which their culpability was affected by the trafficking situation, this may frequently impede the state's ability to protect the victim, as required by article 4 ECHR. The non-application of the non-punishment principle can lead to violations of both the *prohibition of slavery and forced labour* under article 4 ECHR, and the *right to fair trial* under article 6(1) ECHR (*V.C.L. and A.N. v. the UK*, § 181-183, 205-210).

Under article 4 ECHR, states have three positive obligations (*Siliadin v. France*, § 89):

- The substantive obligation to put in place a legislative and administrative framework to prohibit and punish trafficking and to protect victims. (*Rantsev v. Cyprus and Russia*, § 284-287; *V.C.L. and A.N. v. the UK*, § 151; *Chowdery and Others v. Greece* §86-89, 103-104)
- **The substantive obligation to take operational measures to protect (potential) victims of trafficking.** (*Rantsev v. Cyprus and Russia*, § 286-287; *C.N. v. the United Kingdom*, § 67-68; *V.C.L. and A.N. v. the UK*, § 151-152, 158-162; *Chowdery and Others v. Greece* § 111-115)
- The procedural obligation to investigate situations of potential trafficking. This must be an effective investigation capable of identifying and punishing those responsible for trafficking. (*Rantsev v. Cyprus and Russia*, § 288-289; *S.M. v. Croatia [GC]* §307-320; *Zoletic and Others v. Azerbaijan*, § 161-164, 191, 200)

The latter two – taking operational measures and investigating the situation – only apply in situations where a state knew or ought to have known of circumstances giving rise to a credible suspicion of a situation of trafficking (*Rantsev v. Cyprus and Russia*, § 285-286). Prosecuting and punishing a trafficking victim would naturally be at odds with these positive obligations. **Non-application of the non-punishment principle can lead to a violation of article 4 ECHR** either directly, where the state is aware of the trafficking and yet fails to attribute sufficient weight to this fact in its decision whether

to prosecute (and punish), or indirectly when the state fails to identify a person who should have been identified and punishes him or her for the offence. It is thus not the trafficking (by non-state actors) itself, but the state's failure to protect persons from being trafficked, or to provide them with support and protection, which violates human rights law. The duty of states to ensure the effective application of the non-punishment principle arises from the positive obligation under article 4 ECHR to ensure the protective operational measures of identification and protection.

5.1 The positive obligation to take operational measures to protect (potential) victims of trafficking

The positive obligation under article 4 ECHR to take operational measures is especially important for the correct application of the non-punishment principle. As held by the ECtHR in the landmark case *V.C.L. and A.N. v. the UK*, **the prosecution of (potential) trafficking victims may “be at odds with the State’s duty to take operational measures to protect them** where they are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual has been trafficked” (*V.C.L. and A.N. v. the UK*, §159). If this is the case, and the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk, the state will be in violation of article 4 ECHR (*V.C.L. and A.N. v. the UK*, §152). The decision to prosecute a (potential) trafficking victims is thus not in itself prohibited by international law, but it can undermine the states duty to take protective operational measures where they were (or ought to have been) aware of the situation (*V.C.L. and A.N. v. the UK*, §158-159).

These operational measures include both preventative measures to prevent trafficking and protection measures to protect victims’ rights. These protective measures include facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery (*V.C.L. and A.N. v. the UK*, § 153). The duty to take operational measures under article 4 ECHR has two main aims according to the court: protecting the trafficking victim from further harm and facilitating his or her recovery. The court states that “[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” (*V.C.L. and A.N. v. the UK*, § 159).

Early identification of trafficking victims by a competent authority is of paramount importance and any decision to prosecute should be taken insofar as possible after this assessment. In the landmark case *V.C.L. and A.N. v. the UK*, the ECtHR clarified that where authorities are – or ought to have been – aware of circumstances giving rise to a credible suspicion that an individual suspected of having committed an offence may have been trafficked, the individual should be assessed promptly by persons trained and qualified to deal with trafficking victims. Importantly, once a trafficking assessment has been made by a competent authority, this has to be taken into account in any subsequent prosecutorial decision. Deviating from such an assessment is only allowed if the prosecutor has clear reasons which are consistent with the definition of trafficking as contained in the Palermo Protocol and CoE Convention (*V.C.L. and A.N. v. the UK*, § 160-162). If there is no competent authority to make this timely assessment on identification, a state risks violating the positive obligation to take operational measures to protect victims based on inadequate identification.

5.2 *V.C.L. and A.N. v. the UK*: Violation of articles 4 and 6(1) ECHR

In the landmark case *V.C.L. and A.N. v. the UK*, the ECtHR unanimously found that the UK had failed in its duty under **article 4 ECHR** to take operational measures to protect the applicants who were minors from Vietnam who had been forced to work in cannabis factories in the UK. Despite the circumstances which clearly indicated that the applicants had been victims of trafficking, they had been charged with drug related offences without their status as trafficking victims having been first assessed by the competent authority. The ECtHR noted that while the applicants were subsequently identified by the competent authority as victims of trafficking, this assessment was disregarded by both the prosecution service and the court of appeal – which found the initial decision to prosecute justified without providing adequate reasons for their decision (*V.C.L. and A.N. v. the UK*, § 172-173, 181-182). Both minors were convicted and sentenced to detention in a young offender’s institution.

The ECtHR further unanimously found a violation of **article 6(1) ECHR** (fair trial). At the outset, the Court noted an accused's status as a victim of trafficking is a "fundamental aspect" of the defence, as this affects whether there is sufficient evidence to prosecute, and whether it is in the public interest to do so. The authorities' failure to investigate whether the applicants were the victims of trafficking before they were charged and convicted thus raises an issue under article 6, as it prevented them from securing evidence which may have constituted a fundamental aspect of their defence. The applicants did not waive their rights under article 6(1) through their guilty pleas, as in the absence of such an assessment, those pleas were not made in "full awareness of the facts". The Court considers that "in the absence of any such assessment any waiver of rights by the applicants would have run counter to the important public interest in combating trafficking and protecting its victims" (*V.C.L. and A.N. v. the UK*, §196-204). The proceedings as a whole could not be considered fair, because the police and prosecution neglected to consider whether this was a situation of victimhood of trafficking, and the lack of such an assessment deprived the victims of the possibility to bring forward evidence against the trafficker, thereby frustrating the effective prosecution of trafficking and the defence of the victims (*V.C.L. and A.N. v. the UK*, § 205-210). The ECtHR awarded 25.000 EUR in non-pecuniary damages and 20.000 EUR for costs and expenses of the trial to each applicant, to be paid by the United Kingdom.

Annex 1: Case examples

Anex 1.1: Status offences

Case law example 1: *False Identity document: R v L and Others* (UK case)

A Ugandan woman named L was prosecuted and convicted for the possession of a false passport which had been given to her by her trafficker. The women had previously travelled to the UK to work as a nanny but had been held captive and was forced into prostitution for a period of years. The forged passport – which she was made to believe was genuine – was placed in her hands by the trafficker when she was released from captivity, precisely in order for her to be prosecuted thereafter. When she went to the job centre to search employment in the formal economy and showed the document which she believed to be genuine, she was arrested, convicted and imprisoned. The case was quashed on appeal as “the offence she actually committed appears to us [the court] to have arisen as a result of her being a victim of trafficking who was provided with a forged passport for her to use as if it were genuine, and the use of it represented a step in a process by which she would escape”.

(Source: *R v L and Others* [2013] EWCA Crim 991, §68-74)

Case example 2: *‘Violating’ Covid legislation when exploited in prostitution* (Swiss case)

A victim from Eastern Europe exploited in prostitution in Switzerland was fined several times during the pandemic for illegal activity under Covid legislation. Despite the fact that this victim was forced into prostitution, she was fined for offering services in a time when prostitution was temporarily forbidden due to the Covid-19 regulations as well as for offering services in zones of the city where this was forbidden. The fines were consistently paid by the exploiter with money earned through this exploitation. The collection of fines from victims of human trafficking by the authorities raises the ethical question of the state directly profiting from the offence of human trafficking. Although the woman was subsequently identified by the police and criminal prosecution authorities as a victim of trafficking, the non-punishment principle was not applied to cancel the fines and clear her criminal file. As a result, the victim may be refused entry to Switzerland in the future.

(Source: *Specialised anti-trafficking NGO FIZ supporting the victim*)

Case example 3: *Criminally charged for ‘working’ in forced prostitution & detained for not accepting voluntary return* (Danish case)

In Denmark, a Nigerian victim of forced prostitution was arrested, charged and imprisoned for ‘working’ in street prostitution. After being officially identified as a victim of trafficking in prison with the help of the NGO HopeNow, she was transferred to a shelter. There she had the ‘choice’ to sign for a ‘voluntary return’ to Nigeria or leave Denmark within 30 days. As she did not want to cooperate with a ‘voluntary return’, she fled Denmark after 30 days in the shelter. The victim did not have any place to go and was scared to be attacked by her trafficker’s gang. The previous year she was (severely) injured by these men, and HopeNow had taken her to a hospital. After this attack her family convinced her not to go forward with a case against the attackers, as the family – who were under pressure by her Madame in Nigeria – would otherwise be punished.

After fleeing the Danish shelter in 2020, she was arrested in Austria without papers. The Austrian police were informed of her victim status, and the Austrian NGO LEFÖ supported the women in their shelter. However, after a few months she was returned to Denmark under a ‘Dublin return’, directly

to the Ellebæk immigration detention centre, where she was confined for one year – until 2023.³ As she continued to refuse a ‘voluntary return’, the Danish Return Agency arranged with the Nigerian Embassy for a laissez faire document in order to forcibly deport the victim to Nigeria. During her imprisonment in immigration detention, her lawyer appealed to CEDAW to stop the deportation. The documents to stop the deportation (decision by CEDAW) arrived the same day she was due to be deported. Through criminally charging and imprisoning the victim, and subsequently detaining her in immigration detention as well as planning to deport her, the Danish authorities have repeatedly failed to apply the non-punishment principle to this case.

(Source: Specialised anti-trafficking NGO HopeNow supporting the victim)

Anex 1.2: Purpose offences (criminal exploitation)

Case law example 4: Drug production: VCL & AN v. UK (ECtHR case)

Two Vietnamese minors who had been held captive and forced to work in so called ‘cannabis farms’ have been charged, prosecuted and punished for drug related offences by the UK authorities, in spite of clear signs of criminal exploitation. Years after the two victims has served their sentence, the case was brought to the ECtHR, and the UK was found to have violated articles 4 and 6(1) ECHR because of the non-application of the non-punishment principle in this situation, where the authorities were aware of the victimhood of trafficking of these two minors. The ECtHR awarded compensation to be paid to the victims by the UK. (See para. 5 for more information)

(Source: [VCL & AN v. UK](#))

Case example 5: Forced drug trafficking from South America (Spanish case)

In Peru, a single mom living in poverty with a seriously ill family member and a premature baby is in dire need for a job when she is approached by an alleged pharmaceutical company producing medicines for Europe. As she is in desperate need, she accepts the job offer to transport medicine components to Europe, in exchange for 4000 EUR. Within 48H she receives a passport and a plane ticket, is taken to a hotel where drugs are put inside her and is then brought to the airport. Upon arrival in Barcelona the woman is arrested by the police and imprisoned for drug trafficking. Her lawyer detects signs of human trafficking and contacts the NGO SICARcat, which assesses the case and draws up a report with the evidence that the suspect is a victim of trafficking. Despite the signs of trafficking, the police fail to formally identify the victim. In court the lawyer presents the report drawn up by the NGO and the judges apply the non-punishment principle expressly provided in art. 177 bis section 11 of the Spanish Criminal Code to acquit the woman. Subsequently, the Public Prosecutor’s Office appealed the sentence on the grounds that identification based on mere circumstantial evidence cannot be considered sufficient proof to exonerate the suspect from criminal responsibility for crimes as serious as drug trafficking. The High Court of Justice of Catalonia rejected the appeal and confirmed the court’s judgement acquitting the women based on the non-punishment principle. However, as this decision has once again been appealed by the Public Prosecutor’s Office, the judgement is not yet final.

(Source: Court judgement ([ECLI:ES:APB:2020:9057](#)); Appeal ([ECLI:ES:TSJCAT:2021:7584](#)); specialised anti-trafficking NGO SICARcat supporting the victim)

Case example 6: Robberies committed under coercion (Serbian case)

In Belgrade, Aleksandar struggled with financial problems due to an insecure work situation when he was approached by a group of men offering to help him. After moving into a flat with one of them along with several others, he was only given one meal a day, was not allowed to leave the house by himself and endured months of psychological violence. At first, he had to join the rest of the ‘gang’ to rob petrol stations and banks, in order to ‘learn’. When he was pressured to commit theft by himself, he resisted. At some moment they threatening to kill his family and forced him to rob a betting house by himself. Several months later both Aleksandar and his exploiter were arrested, and Aleksander told his story to the police and the Public Prosecutor. Despite the fact that he was subsequently officially identified

³ When victims of trafficking do not cooperate with a voluntary return, they can be detained for long periods of time under the Danish Aliens Act.

as a victim of human trafficking, the non-punishment principle was not applied, and he was convicted to a 1-year sentence for the crime of robbery. After the verdict Aleksandar contacted the NGO ASTRA, who hired a lawyer to appeal the verdict and refer the case to the Higher Public Prosecutor's Office in Belgrade where the proceedings against his trafficker were held, in which Aleksandar was the victim. Although Aleksandar's conviction was not quashed, ASTRA's lawyer achieved that his prison sentence could be served under house arrest.

(Source: specialised anti-trafficking NGO ASTRA supporting the victim; see further: [Human Trafficking in Serbia – Overview of the Situation in The Context Of The 21st Century \(ASTRA, 2022\)](#), p. 79-80)

Anex 1.3: 'Other offences'

Case law example 7: *Causing fatal bodily injury during the exploitation: Mehak case (Dutch case)*

In this case a minor girl from India, who was trafficked and exploited for labour by an Indian couple in the Netherlands, was prosecuted for her role in the death of a baby. This baby – the child of two adults who were also exploited in the same household – died as a result of the way the traffickers forced the two adults and the girl to treat the baby. The non-punishment principle was not applied, and the girl was prosecuted and sentenced to 5 years of imprisonment on appeal. The two traffickers fled from the Netherlands prior to their conviction and never served their sentence.

(For further information, see: [journal article on this case](#))

Further Reading:

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Author: Merel Brouwer
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