



## ISSUE BRIEF

# NON-PUNISHMENT OF VICTIMS OF TRAFFICKING

## INTRODUCTION

Victims of trafficking are subjected to exploitation in various ways. Sometimes, as a result of their victimization, they engage in illegal conduct. Common examples include involvement in the sex trade,<sup>1</sup> involvement in drug production or trafficking, petty crime, possession or the use of fraudulent documents or entering another country in a manner that does not comply with its immigration laws.<sup>2</sup> In many cases, victims are forced or otherwise compelled<sup>3</sup> by traffickers to commit these crimes or other illegal conduct. This fact is then used by traffickers as a means of maintaining further control over their victims. In some cases, a victim may be unaware that they have broken the law.

Over many years, anti-trafficking, human rights and criminal justice practitioners have raised concerns that arresting, charging, detaining, prosecuting or punishing<sup>4</sup> trafficking victims who commit crimes in connection with their victimization would be unjust. They have also noted that there are insufficient measures in place to protect victims and guide decision makers on how to address such cases. As a result, the non-punishment principle has emerged. It can be generally stated as:

Trafficked persons should not be subject to arrest, charge, detention, prosecution, or be penalized or otherwise punished for illegal conduct that they committed as a direct consequence of being trafficked.

This issue brief explores the non-punishment principle and identifies key considerations to inform the development of measures to better support its implementation.

## UNDERLYING RATIONALE FOR THE NON-PUNISHMENT PRINCIPLE

Different reasons underpin this principle, including:

- Maintaining the interests of justice by ensuring that victims are not punished for conduct that they would not have otherwise committed but for their victimization
- Safeguarding the rights of victims, to ensure they are provided immediate access to necessary support and services and avoid subjecting them to further trauma or victimization
- Encouraging victims to report crimes committed against them and participate as witnesses in trials against traffickers without fear of being censured themselves
- Ensuring that victims are not punished for the conduct of traffickers

<sup>1</sup> Activities related to the sex trade are treated differently in different countries. In those countries where prostitution-related activities are illegal, victims of trafficking may face charges for crimes such as solicitation. In countries where prostitution is regulated, victims of trafficking may face sanctions for not complying with the necessary regulatory requirements.

<sup>2</sup> Other examples can include administrative offences (e.g., violating begging ordinances) or fraud-based crimes (e.g., benefits fraud).

<sup>3</sup> The means used to compel someone to commit a crime are broad and can encompass physical and psychological pressure, force, abuse or threat thereof.

<sup>4</sup> Practitioners have understood “punishment” broadly to include matters such as immigration removal or denial of access to benefits.



The development of the non-punishment principle at the international level has generated national action, albeit intermittent. Many States have not specifically implemented the principle. Even where the principle has been specifically implemented, there may be operational impediments that undermine its effectiveness. For instance, trafficked persons may be arrested, charged, detained, prosecuted or punished for various reasons: insufficient awareness of the realities faced by victims of trafficking; failure to inquire about the circumstances surrounding the commission of a crime; ineffective training or capacity-building for those implementing the non-punishment principle; or inadequate victim identification.

At the same time, even with the proper framework, training and policies, decisions on whether or not to charge and prosecute crimes that have allegedly been committed by trafficked persons can be difficult in certain circumstances. Nevertheless, comprehensive national anti-trafficking responses<sup>5</sup> must address these difficult issues. A failure to do so adversely impacts victims, undermines their rights, discourages reporting and cooperation with investigations and prosecutions, and negatively affects the justice system at large.

## THE ELABORATION OF THE NON-PUNISHMENT PRINCIPLE

The elaboration of the non-punishment principle has occurred over many years and can be traced back to the negotiations of the United Nations Trafficking in Persons Protocol itself,<sup>6</sup> even though the Protocol does not explicitly contain provisions on this point. In 1999, at the fourth session of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, the United Nations High Commissioner for Human Rights submitted an informal note in which she noted that “States parties should be directed to refrain from detaining or prosecuting trafficked persons for such status-related offences”.<sup>7</sup> Examples of status-related offences provided included immigration

and prostitution-related offences. Despite the principle not being explicitly referenced in the Trafficking Protocol, one of its purposes is “to protect and assist victims of trafficking, with full respect for their human rights”. The non-punishment principle supports this purpose and is rooted in a human rights-based approach that recognizes the liberty and dignity of trafficked persons.

In 2002, the United Nations High Commissioner for Human Rights issued the Recommended Principles and Guidelines on Human Rights and Human Trafficking.<sup>8</sup> Principle 7 provides that:

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.

Similarly, Guideline 4.5 provides that States should consider:

Ensuring 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.

In 2005, for the first time, an explicit reference to these ideas was included in a treaty.<sup>9</sup> Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings provides that:

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.

Similar text can be found in United Nations resolutions,<sup>10</sup> other regional instruments and documents,<sup>11</sup> recommendations from international intergovernmental bodies<sup>12</sup> and policy briefs from international organizations.<sup>13</sup>

<sup>5</sup> Including, for example, through national referral mechanisms.

<sup>6</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, General Assembly resolution 55/25 (2000).

<sup>7</sup> A/AC.254/16.

<sup>8</sup> E/2002/68/Add.1.

<sup>9</sup> [www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008371d](http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008371d).

<sup>10</sup> See, for example, Security Council resolution 2331 (2016); Security Council resolution 2388 (2017); General Assembly resolution 64/293; resolution 5/2 of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime.

<sup>11</sup> Article 14 (7) of the ASEAN Convention Against Trafficking in Persons, Especially Women and Children; article 5 of the Model Law on Providing Assistance to the Victims of Trafficking, Commonwealth of Independent States.

<sup>12</sup> See, for example, 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); Recommendation 7 of the Conclusions and Recommendations of the Meeting of National Authorities on Trafficking in Persons (Organization of American States, 2006).

<sup>13</sup> See, for example, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*, OSCE Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings (2013).



## PARAMETERS OF THE NON-PUNISHMENT PRINCIPLE

The table below provides a non-exhaustive list of examples of how the non-punishment principle has been described in relevant international/regional instruments and guidance notes. It demonstrates the following:

- The non-punishment principle applies to victims of trafficking.<sup>14</sup>
- The non-punishment principle can cover a broad range of unlawful acts.<sup>15</sup>
- The threshold for the principle's application has not been consistently stated or defined.
- The non-punishment principle applies to all stages of the criminal justice system, and can also apply in non-criminal proceedings (e.g., immigration or administrative proceedings).

INSTRUMENT/GUIDELINES	CONDUCT	THRESHOLD FOR APPLYING THE PRINCIPLE	OUTCOME
<i>Council of Europe Convention on Action against Trafficking in Human Beings</i>	Unlawful activities	The victim was compelled	Not impose penalties on victim
<i>ASEAN Convention against Trafficking in Persons, Especially Women and Children</i>	Unlawful acts	Acts are directly related to acts of trafficking	Victim is not criminally or administratively liable
<i>Directive 2011/36/EU of the European Parliament and of the Council</i>	Criminal activities	The victim was compelled	Not prosecute or impose penalties on victim
<i>Conference of the Parties to the Convention against Transnational Organized Crime</i>	Unlawful acts	Direct result of being a trafficked person	Not punish or prosecute victim
<i>United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking</i>	Illegal activities or entry/residence	Direct consequence of their situation as a trafficking person	Victim should not be prosecuted, detained or punished
<i>OSCE Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking</i>	Acts	Caused or directly linked to their having been trafficked	Not punish or prosecute victim
<i>Conclusions and Recommendations of the Meeting of National Authorities on Trafficking in Persons, OAS</i>	Illegal activities	Direct result of their being a victim of trafficking	Not prosecute victim

<sup>14</sup> Though not explicitly referenced in the table, all provisions articulating the non-punishment principle reference “trafficking victims” as the subject to whom the principle applies. Such determinations should be made quickly by qualified and trained individuals based on clear criteria. A failure to do so can undermine the effectiveness of the non-punishment principle and cause considerable harm to victims.

<sup>15</sup> Although the initial description of the principle was linked to status offences, other statements of the principle have expanded it to be applicable more broadly (e.g., victims who are compelled to produce or traffic drugs).



## THE THRESHOLD

Although the threshold is described differently in various documents, as discussed in the Organization for Security and Cooperation in Europe (OSCE) publication *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*, two specific approaches are contemplated.<sup>16</sup> These two approaches have been described as: (a) causation-based and (b) duress-based.<sup>17</sup> As described in the OSCE paper, a causation-based approach provides that trafficked persons should not be penalized for offences committed in the “process of trafficking”. It is also described as applying to offences committed “in the course of trafficking”. Examples of such offences include the use of fraudulent documents or violations of immigration laws. A duress-based approach focuses on crimes that victims were compelled to commit. Establishing whether an offence fits within one approach or the other will require different evidence and, in practice, may overlap. In some cases, a causation-based approach may be easier to establish and otherwise apply to a broader range of conduct.

## THE NON-PUNISHMENT PRINCIPLE AND NATIONAL PRACTICE<sup>18</sup>

The text below identifies different points where the non-punishment principle could be implemented at the national level, recognizing that the ability to do so will ultimately depend on the realities of the system in question.

- **Charging/prosecution policies.** Where law enforcement officers and/or prosecutors have discretion with respect to arresting, charging, detaining, initiating or continuing prosecutions, clear policies can be used to guide decisions in cases where victims of trafficking have committed offences as a direct result of their being trafficked. The goal should be to prevent arrest, detention, charges and prosecutions from commencing in the first place. In some States, law enforcement or prosecutors have a positive obligation to inquire whether an individual

alleged to have committed a crime is a victim of trafficking, where indicators are present, and if the alleged crime is a consequence of their victimization. The application of the non-punishment principle should not be conditional upon any decision to prosecute an alleged trafficker, or a successful prosecution of a trafficker.

- **Discontinuation of proceedings.** If a person has been charged and/or a prosecution initiated and it becomes clear that the accused is a trafficking victim and the crime alleged was connected to their victimization, a discontinuance of the proceedings should be considered and done so expeditiously. It is recognized, however, that in some jurisdictions this will not be possible, without specific legal authority.
- **Statutory defences.** States have developed specific legal defences (discussed further below) that relate to the situation of trafficked persons who have allegedly committed crimes; such defences are also used to inform charging and prosecution policies. In the absence of specific statutory defences, some States rely upon using pre-existing criminal defences, in appropriate cases (e.g., the defences of duress or necessity, or self-defence).
- **Sentencing.** A sentence imposed should always reflect the degree of responsibility of the offender and the seriousness of the crime committed. Some states may allow for no sentence to be imposed, even though liability has been established, in cases where the offender committed the crime in connection with their trafficking. Sentencing guidelines can also provide guidance on these issues.
- **Post-conviction.** A criminal record can have long-term detrimental consequences.<sup>19</sup> Guilty convictions should be vacated or criminal records eliminated in cases where there is clear evidence that the crime committed was a direct consequence of being a victim of trafficking. Requests should be processed in an expeditious manner. A number of States have enacted legislation to facilitate this process.

<sup>16</sup> See OSCE, *supra* note 13 at page 22.

<sup>17</sup> Despite being referred to as “duress-based”, the approach that applies to crimes that victims were compelled to commit should not be understood as requiring the same evidence as duress. In addition to being redundant of the defence of duress, such an approach runs the risk of being too restrictive in that it would fail to reflect the realities faced by victims and the specific means employed by traffickers to cause them to commit crimes.

<sup>18</sup> A review of national examples from Africa, Asia, Europe, North America and South America was conducted and these different examples have informed this section.

<sup>19</sup> Criminal records can make employment or volunteering difficult, can impact one's ability to find housing and, for non-citizens, can have impacts on immigration admissibility.



## CONSENT AND ITS IMPACT ON THE APPLICATION OF THE NON-PUNISHMENT PRINCIPLE

Consent is legally irrelevant in trafficking in persons cases. Nevertheless, the fact that a victim “consented” to some activity in connection with trafficking is frequently pointed to as a means of undermining the credibility of the victim or as a way of distracting from the actions of the trafficker. The purported consent or agreement of a victim, either to the intended exploitation or to committing a crime, should not be used to prevent application of the non-punishment principle.

## STATUTORY DEFENCES IN NATIONAL LAW

The parameters of statutory defences enacted at the national level vary. What follows are the key issues that should be addressed when developing statutory defences:

- *Who is entitled to invoke the defence?* Children (who have reached the age of criminal responsibility in the jurisdiction) and adult victims of trafficking should be equally entitled to rely upon the defence, bearing in mind that the evidence required to establish a child is a victim of trafficking is different to that of an adult. Some national examples define their defences differently depending upon the age of the person (at the time the crime was alleged) who is seeking to invoke it.
- *Scope.* States should be clear as to whether the defence is applicable for any offence charged or applies to a limited set of crimes. Some national examples limit such defences to certain types of crime, while others place no restrictions.
- *Threshold.* States should provide clear guidance as to the basis upon which the defence can be invoked. Some national examples require evidence that the accused committed the crime at a moment in time that coincided temporally with their status as a victim of trafficking and was otherwise connected to their victimization. Others rely upon a different approach and require evidence that the crime was committed as a result of compulsion. Compulsion can be understood broadly and encompasses physical and psychological pressure, force, abuse or

threat thereof directed at the victim or someone known to them. Whatever approach is taken, States should ensure that the threshold provided offers clear and understandable guidance to those who might seek to invoke it and those responsible for administering the criminal justice system. This is particularly important if States are seeking to incorporate language such as a “direct consequence” or a “direct result” of trafficking or the crime committed was “related to” their status as a victim of trafficking.<sup>20</sup>

- *Additional aspects.* Some national examples include additional requirements, such as whether the accused’s actions were reasonable in light of his or her situation. In some States, an assessment of what is reasonable requires consideration of the particular circumstances of the victim.<sup>21</sup> Other national examples do not require proof that the conduct was reasonable.
- *Burden and standard of proof.* Guidance on who bears the onus of raising the defence should be clear, as should the level of evidence required to do so. For instance, national law could make clear that the relevant court has the responsibility to ensure that the defence is considered if there is evidence to show it may be applicable, even where the defence has not otherwise been raised by the prosecution or defence. Some national laws place the burden on the defence to point to some evidence that puts the defence in issue and then the burden shifts to the prosecutor to prove beyond a reasonable doubt that the defence does not apply.

## KEY MESSAGES AND RECOMMENDATIONS

- Training to support early victim identification is critical to successfully implementing the non-punishment principle and referring victims to services that are appropriate for their specific needs to support their physical, psychological and social recovery.
- The non-punishment principle is grounded in a rights-based framework and must, therefore, be applied in a non-discriminatory fashion and in a manner that is gender and age responsive<sup>22</sup> and that recognizes the particular circumstances and needs of the specific victim.

<sup>20</sup> The terms “direct consequence”, “direct result” and “related to” do not have clearly defined legal meaning; accordingly, legislators should ensure that their meaning is clear to ensure the defence operates as intended.

<sup>21</sup> Such an approach is likely to be based on comparable defences of general application, most notably the defence of duress. A similar requirement is imposed, in international law, in article 31 (1) (d) of the Statute of the International Criminal Court.

<sup>22</sup> For example, consideration should be given to whether national charging practices or decisions to prosecute impact men, women, children or other identifiable groups differently.



- Comprehensive anti-trafficking frameworks must include law and policy measures that implement the non-punishment principle.
- States should develop clear and understandable policies, practices and laws to support the effective implementation of the non-punishment principle at all stages of the criminal justice system, as well as in non-criminal processes that expose the victim to possible punishment (e.g., immigration matters, or administrative and public-order related offences).
- States should extend the non-punishment principle to enable criminal records to be vacated or expunged for individuals who were convicted of crimes committed as a direct result of trafficking.
- Any indication that a victim of trafficking in persons purportedly consented (either to the intended exploitation or to committing the alleged offence) must not be used to deny access to measures that implement the non-punishment principle at the national level.

## ADDITIONAL READING

Recommended Principles and Guidelines on Human Rights and Human Trafficking, Office of the United Nations High Commissioner for Human Rights (E/2002/68/Add.1).

*Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*, OSCE Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings (2013).

*Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking*, Working Group on Trafficking in Persons (CTOC/COP/WG.4/2010/4).

*Report of the Special Rapporteur on trafficking in persons, especially women and children (A/HRC/20/18).*

*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.*

*Model Law against Trafficking in Persons*, United Nations Office on Drugs and Crime (2009).

## WHAT IS ICAT?

The Inter-Agency Coordination Group against Trafficking of Persons (ICAT) is a policy forum mandated by the General Assembly to improve coordination among United Nations agencies and other relevant international organisations to facilitate a holistic and comprehensive approach to preventing and combating trafficking of persons. ICAT was formally established in March 2007, pursuant to General Assembly resolution 61/180. ICAT consists of 25 organizations and entities.

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