

# **Not for Sale – Joining Forces against Trafficking in Human Beings**

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## **Human Trafficking and the Non-Punishment Principle**

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### **Human Trafficking and the Non-Punishment Principle<sup>1</sup>**

**[1]** Trafficking in human beings (THB) is widely recognised as a serious criminal offence, both under international law and in the domestic law of most States. It has even been described as a form of modern-day slavery. The question arises: what if the trafficked person commits an offence? For instance, what if they appear to have violated a country's immigration laws through irregular entry or overstay, or perhaps breached labour laws by working without the right permission? Maybe they have been growing cannabis or begging in the streets.

**[2]** Can the person who has been trafficked be a criminal, when an offence they are alleged to have committed is linked to their situation as a victim of trafficking? The answer is clear: neither in law nor in practice. A person who has been trafficked is not a free agent and should not be punished for such offences, which are committed under duress.

**[3]** When a person is being trafficked he or she may, on the face of it, commit an offence. Once they have been trafficked they may do acts which would ordinarily be considered to break the law. To what extent, if at all, should a person be personally accountable for offences they appear to have committed in the course, or as a consequence, of being trafficked? Too often, trafficked people do not receive assistance and protection as victims of a serious crime. It is more likely that they will themselves be arrested, detained and charged with immigration offences, for soliciting prostitution or engaging in illegal work, making false statements or fined for violations of administrative laws and regulations. They may not even be identified as victims of trafficking.

**[4]** THB has three elements: the act (recruitment, transport etc) , the means of doing it (deception, force etc) and the purpose (exploitation). It is a *process*, and anyone knowingly

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<sup>1</sup> This paper is in part based upon the document published in 2013 by the Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings of the Organization for Security and Co-operation in Europe: *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (<https://www.osce.org/cthb/101002>), which was in part drafted by the speaker. This paper offers the personal views of the speaker and does not necessarily reflect the views of the OSCE's Special Representative nor of GRETA, nor of the European Commission..

engaged in that process is a trafficker. The trafficked person becomes a victim of THB from the moment of recruitment, even if they do not know that they are being trafficked at that stage. This has ramifications for the application of the non-punishment principle because the victim may already at the moment of recruitment, or soon afterwards, become engaged in illicit activity.

[5] The Council of Europe Convention on Action against Trafficking in Human Beings takes what is called a victim-centred and human rights-based approach to anti-trafficking action. Recital 4 of the convention's Preamble states that "respect for victims' rights, protection of victims and action to combat trafficking in human beings must be the paramount objectives", while Article 1(b) provides that one of the purposes of the convention is "to protect the human rights of the victims of trafficking". More specifically, Article 26 provides:

"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."

[6] What does this mean for the treatment of victims of trafficking? A human-rights based approach requires that national legislation and policies do not have negative impacts on the rights of trafficked persons. 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.

[7] The principal threats to victims of trafficking come from the traffickers, who commit serious criminal offences against them. The State is not responsible for that although it may become responsible if it fails to address the threat of trafficking. However, the State is directly responsible for ensuring that those within its jurisdiction are able to enjoy all the rights to which they are entitled. These, I suggest, include the right not to be punished or penalised for offences one has committed because one was forced to do so by the trafficker.

[8] That is not to say that trafficked people can flout the law. Trafficked persons are bound by the law just as much as any other individual. They enjoy no immunities from prosecution just because they have been trafficked; nor should they. However their culpability may be significantly diminished or extinguished entirely because of their personal circumstances, as was stated in an English judgment in June 2013:

"... when there is evidence that victims of trafficking have been involved in criminal activities, the investigation and the decision whether there should be a prosecution, and, if so, any subsequent proceedings require to be approached with the greatest sensitivity. The criminality, or putting it another way, the culpability, of any victim of trafficking may be significantly diminished, and in some cases effectively extinguished, not merely because of age (always a relevant factor in the case of a child defendant) but because no realistic alternative was available to the exploited victim but to comply with the dominant force of another individual, or group of individuals".<sup>2</sup>

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<sup>2</sup> *L, HVN, THN and T v R*, [2013] EWCA Crim 991, para 13.

[9] Further, “[w]hat ... is required in the context of the prosecutorial decision to proceed is a level of protection from prosecution or punishment for trafficked persons who have been compelled to commit criminal offences”.<sup>3</sup>

[10] That decision recognised the reality of THB and what it does to the victims; how it denies completely their autonomy and capacity for independent action.

[11] The punishment of victims of trafficking for crimes directly related to their trafficking 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 situation as trafficked persons, they would not have perpetrated. Such treatment also reduces the likelihood of States mounting successful prosecutions of traffickers because it makes victims – crucial witnesses – less likely to co-operate in such prosecutions.

[12] The criminalisation of trafficked people may be tantamount to persecution by the State: not only does it fail to take into account the serious crimes committed against the victim by the traffickers, it fails to recognise trafficked persons as being victims and witnesses of those serious crimes and exacerbates their trauma by imposing on them State-sanctioned, unjust punishment for being the victims of crime.

[13] Criminalisation furthermore promotes trafficking in human beings by failing to confront the real offenders, by discouraging 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.

[14] In its evaluation of compliance by States parties with their obligations under the Council of Europe Convention on Action against Trafficking in Human Beings, GRETA has considered the extent to which States comply with the non-punishment principle. It is clear that a significant number of countries fail to apply it, either because of a lack of awareness of it, or a failure to appreciate the rationale for the principle, or because of failure to identify people as victims of trafficking in the first place. In some cases, national law has not been amended to comply with the principle, a clear violation of the States’ duty to ensure that domestic law complies with their international obligations. Trafficked people will not enjoy the protection of the law that they are entitled to until this changes.

## **Conclusion**

[15] Respect for the non-punishment principle is a core element of the duty to assist and protect victims of THB. This must be provided for in national law and it must be applied in practice. Failure to do so is not only a violation of the law; it results in the trafficked person being victimised once again: first by the trafficker then by the State.

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<sup>3</sup> *L, HVN, THN and T v R*, [2013] EWCA Crim 991, para 14