

Non-criminalization / non-punishment of victims of trafficking

A WARNATH GROUP PRACTICE GUIDE



The WARNATH GROUP

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PRACTICE GUIDE by The Warnath Group

“If you truly understand what human trafficking is – what the daily experience is for those who are ensnared in it and subjected to the traffickers’ deliberate and dedicated purpose to manipulate and compromise their agency -- then you know why international law, policy and best practices call for countries to protect victims of trafficking from being punished for actions that they engaged in connected to the trafficking scheme that targeted them.”

-Stephen Warnath, CEO & President, the Warnath Group

AT A GLANCE

Intended audience:

- Counter-trafficking law and policy makers, criminal justice practitioners and service providers

Takeaway: Victims of trafficking should not be criminalized or otherwise punished for acts they commit as a direct result of being trafficked.

Law and policy makers can take steps to uphold the principle in counter-trafficking law, policy and practice, to ensure a balance is struck between protecting victims from further harm and bringing offenders to justice.

Criminal justice practitioners should familiarize themselves with legislative opportunities to avoid victims being criminalized and punished for acts they committed during their trafficking experience.

Criminal justice practitioners and service providers should understand how the provision of assistance services can manifest as punishment, contrary to the principle of non-punishment.

In this Practice Guide:

- An introduction to the issue of punishment of victims of trafficking and its consequences for victims and for counter-trafficking response.
- An introduction to the principle of non-punishment of victims of trafficking for crimes they have committed as a direct consequence of being trafficked.
- Practical guidance on how to uphold the non-punishment principle in
 - law and policy;
 - investigations and prosecutions;
 - and, sentencing.



The issue: victims of trafficking are often punished for acts they commit as a direct result of being trafficked

Victims of human trafficking may commit illegal acts in the course of being trafficked as a result of “means” such as force, deception, fraud and coercion used by traffickers. Examples of possible offenses include committing crimes relating to illegal work or other illicit activities. In places where prostitution is illegal, victims of trafficking for the purposes of sexual exploitation may be charged and convicted for prostitution-related offenses such as solicitation, rather than being identified and protected as victims of trafficking. Not infrequently, victims may commit violations in the course of being trafficked tied to document or immigration-related offenses if they began their journeys leading to trafficking exploitation as smuggled migrants or, subsequently, overstayed a visa.

Sometimes the trafficking exploitation is to engage in criminal activities. These trafficking victims are at particular risk of being punished. Trafficking into criminal activities is a global concern, with victims exploited in cannabis cultivation, illegal methamphetamine production, illegal cigarette production, drug trafficking, pickpocketing, theft, sale of counterfeit goods, sham marriage, benefit fraud and illegal charity collection.

Compounding the risk of injustice, victims - including children among them - may even be charged with and punished for criminal offenses in lieu of those who trafficked them. The risk of victims being treated as perpetrators, is exacerbated where authorities fail to recognize indicators of trafficking, and fail to understand how traffickers use ‘means’ (i.e. coercion, force, fraud or deceit) to manipulate people into exploitative situations and the irrelevance of victims’ consent to exploitation.¹

¹ See *The Consent Defense in Trafficking in Persons Cases: A Warnath Group Practice Guide* (Warnath Group, 2020)

Consequences of punishment on victims: Victims may experience further harm and stigmatization as a result of being arrested, detained, prosecuted and even incarcerated. Long after sentences have been served, criminal records can impede victims' recovery and reintegration, curtail their ability to migrate and travel, pose barriers to accessing employment, housing, benefits, and even custody of children. Convictions of victims may be held against victims in asylum claims.

Consequences for countries' counter-trafficking responses: From the perspective of a country's counter-trafficking response, criminalization of victims plays into the hands of traffickers. Where authorities approach victims as potential perpetrators and fail to recognize their victimization, victims may be discouraged from participating in criminal justice processes against traffickers. This diversion of criminal justice attention away from themselves sometimes occurs as a deliberate tactic of traffickers to shift the risk of investigation, prosecution and conviction onto victims. Meanwhile, the risk is that traffickers continue their criminal activities uninterrupted and continue to commit crimes without deterrence or accountability.



The principle: non-punishment of victims of trafficking

The non-punishment principle sets out that trafficked victims should not be punished for unlawful activities they commit as a consequence of being trafficked. The principle is anchored to the understanding that criminal liability should not be attributed to people for acts they do not freely commit. From a victim-centered perspective, the principle must be understood broadly to guard against victims being arrested, detained, charged, prosecuted, penalized or otherwise punished. Furthermore, victims should be regarded as victims irrespective of whether the perpetrator is apprehended, prosecuted or convicted and irrespective of any familial relationship between the victim and the perpetrator.²

Purpose: The primary purpose of the principle is to protect the rights of victims and mitigate the risk of their further victimization. A second purpose, critical to law enforcement and criminal justice objectives, is to encourage victims to report crimes committed against them and act as witnesses in criminal proceedings against traffickers.

Sources: There are several sources of this principle in international and regional instruments, including the United Nations *Recommended Principles and Guidelines for Human Rights and Human Trafficking* that sets out that:

Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and

² UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Resolution 60/147 of 21 March 2006, paragraph 9.

destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.³

The first Working Group on Trafficking in Persons to the Conference of Parties also recommended that States Parties to the Trafficking in Persons Protocol 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.^{4,5}

The non-punishment principle is also explicitly upheld in regional laws, including:

- The 2005 Council of Europe Convention on Action against Trafficking in Human Beings (Article 26)
- Conclusions and Recommendations of the Meeting of National Authorities on Trafficking in Persons (Organization of American States, 2006)
- European Union (EU) Anti-Trafficking Directive 2011/36/EU (Article 8 and Recital 14)
- Association of Southeast Asian Nations (ASEAN) Convention against Trafficking in Persons, especially Women and Children (2015) Article 14(7)

In specific relation to forced labor, the 2014 Protocol to the Forced Labour Convention (article 4(2)) is also relevant.

³ United Nations Office for the High Commissioner of Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (OHCHR, Geneva, 2002) Principle 7. Guideline 8 further recommends that States consider ensuring that child victims are not subject to criminal procedures or sanctions for offenses related to their situation as trafficked persons.

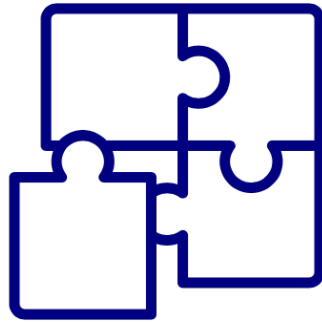
⁴ Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009, UN Doc. CTOC/COP/WG.4/2009/2, paragraph 12(b).

⁵ The non-punishment principle has been discussed and subsequently reaffirmed at Working Group meetings, including at its tenth session in September 2020. Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/4.

Caveat: the non-punishment principle does not confer wholesale immunity for crimes committed

Where it is captured in law the non-punishment principle has generally been drafted to emphasize that measures taken must be subject to domestic laws, rules, regulations and policies. It is not to be interpreted as allowing for blanket immunity for crimes that a person has voluntarily committed, but nor should it exclude serious crimes in all cases automatically. However, understanding and applying this caveat in a way that balances rights of rights-holders, requires practitioners to understand how traffickers use “means” (such as threat or use of force, coercion, deceit, or abuse of power or a position of vulnerability) to damage victim consent to commit or participate in a crime, or otherwise subjugate them in the course of trafficking them. Where “means” have been used, the victim’s consent to either the exploitation or the commission of a crime should not pose a barrier to the application of the non-punishment principle for offenses committed as a direct consequence of a person being trafficked. Accordingly, the non-punishment principle must be understood in accordance with the definition of trafficking in persons, that provides for the irrelevance of victim consent to exploitation where listed means have been used, including subtle means such as abuse of vulnerability.⁶

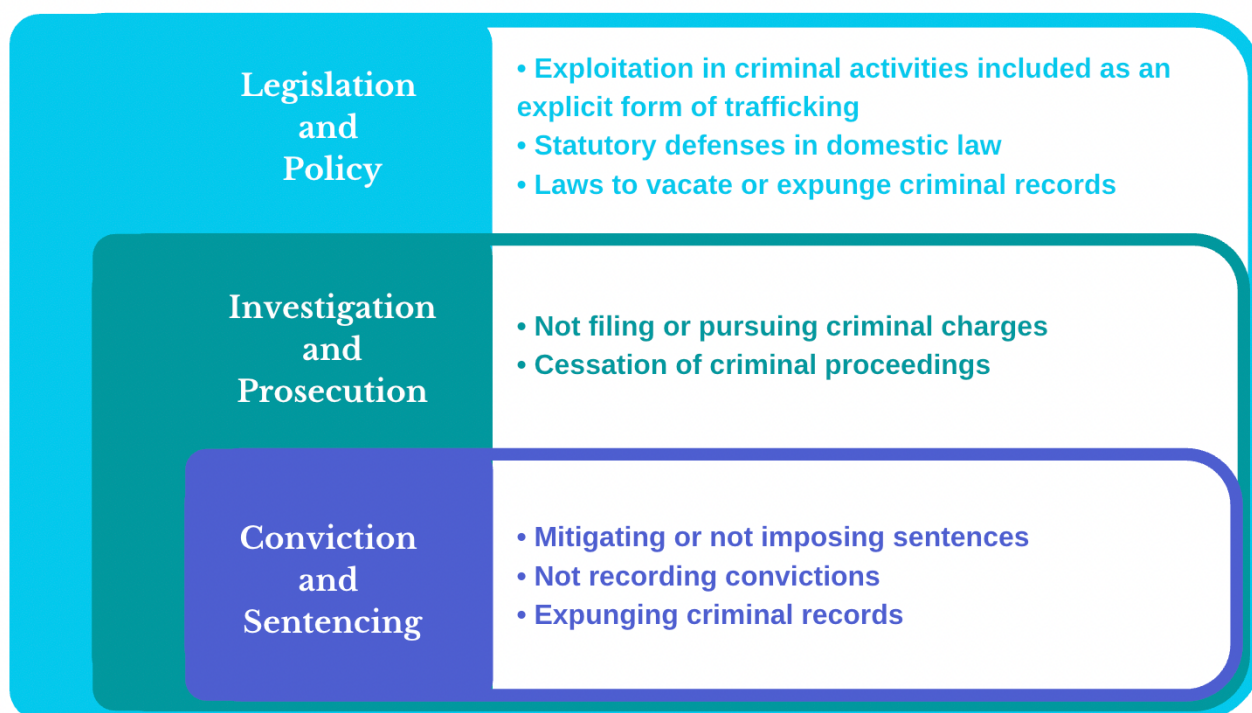
⁶ Trafficking in persons is defined by article 3 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, as a tripartite offense comprised of an ‘act’ (recruitment, transportation, transfer, harbouring or receipt of persons) perpetrated by ‘means’ (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 of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person) for the purpose of exploitation. The offense of child trafficking does not require that means be used, and is fully constituted by an act perpetrated for the purpose of exploitation.



Upholding the non-punishment principle in practice

The non-punishment principle can be protected through a range of options in law, policy and practice. Ideally, victims will be protected from punishment by the effective application of non-criminalization provisions in law. Many countries' human trafficking laws will include explicit non-punishment protections. Practitioners should first check the applicable national law(s) to determine if there are specific provisions protecting trafficking victims from criminalization. But even where clear protections are not present in a country's human trafficking law, criminal justice practitioners may still have other options at their disposal to protect victims from punishment.

Diagram 1: Options for upholding the non-punishment principle in practice



In Legislation and Policy

To increase the likelihood that victims of trafficking into criminal activities will be recognized as such, some countries have opted to explicitly include ‘criminal activities’ or ‘forced criminal activity’ into counter-trafficking legislation. At the regional level, European Union Trafficking Directive 2011/36/EU explicitly includes ‘exploitation of criminal activities’ described as including pickpocketing, shoplifting, drug trafficking and similar activities that imply financial gain.⁷ In countries where ‘criminal activities’ are not explicitly captured as a stand-alone form of exploitation it is recognized that the concept of ‘forced labor or services’ captures activities that take place in non-regulated settings, including criminal activities such as drug cultivation and trafficking.

Beyond ensuring that the legislative definition of trafficking captures exploitation in criminal activities, a recognized good practice is to enact specific non-punishment provisions in anti-trafficking legislation. Both the United Nations and the Council of Europe’s Group of Experts on Action against Trafficking in Human Beings (GRETA) have recognized that legislation on non-punishment can take the form of a general statement capturing the non-punishment principle, as well as statutory defenses included in law.

⁷ European Union Trafficking Directive 2011/36/EU, article 2(3) and preambular paragraph (11).

Broadly, States have taken two approaches to capturing the non-punishment principle as a statutory defense in their domestic legislation:

- The compulsion model (duress), whereby a trafficked person is not criminalized for offenses to the extent that he was compelled to commit them, and
- The causation model (nexus), whereby a trafficked person is not criminalized where there is direct connection between the offense and her trafficking.

Many States have implemented non-punishment provisions which reflect one or the other approach, or aspects of both. Some States apply the non-criminalization/non-punishment principle, but only partially, to a proscribed scope of offenses and violations (e.g. prostitution and/or immigration-related). In some cases, even where the level of compulsion or causation does not give rise to a statutory defense, public interest considerations may still result in the conclusion that the culpability of a victim of trafficking has been diminished to the point that it is not in the public interest to prosecute him or her.

Compulsion model (duress)

The compulsion model (also called the duress model) is grounded in the belief that a person should not be held criminally responsible for an offense he or she did not voluntarily commit. According to this model, a trafficked person is not criminalized for offenses to the extent that he or she was compelled to commit them in the course of being trafficked.

Where victims have been compelled to commit an offense, they should not be held liable where the compulsion is attributable to the exploitation and a reasonable person in the same situation as the accused person would have no realistic alternative to performing the criminal act.

Importantly, for this model to make sense in the context of trafficking, compulsion must be understood broadly. Compulsion does not require physical force or constraint, but can result from the application of any of the 'means' set out in the international definition of trafficking in persons (threats, use of force, fraud and deception, inducement, abuse of power or of a position of vulnerability, or use of debt bondage) and that are often part of national criminal laws on human trafficking. Accordingly, the evidentiary threshold is not the same as that often required for the traditional defense of duress but is more broadly

construed to include even the more subtle ‘means’ that traffickers may have used. The threshold of evidence is lower in the case of child victims, for whom ‘means’ are not required in establishing that they have been trafficked.

As in all cases, ultimately the application of evidentiary laws and rules in practice will require referring to the applicable jurisdiction.

Examples of duress-based provision ⁸	Source
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 26, Council of Europe Convention on Action against Trafficking in Human Beings
(14) 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. This safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in.	Directive 2011/36/EU of the European Parliament and of the Council, paragraph (14)
A victim who commits a crime under coercion by an offender of the criminal act of trafficking in persons shall not be liable to criminal charges.	Article 2(1), Law Number 21 on The Eradication of the Criminal Act of Trafficking in Persons, 2007, Indonesia
A victim who proves that he was compelled to commit acts that are punishable by law or that he was compelled to violate the terms of [his] residency or work [permit] shall be given amnesty from punishment.	Article 586.8, Penal Code, Lebanon
Victims of trafficking are not criminally liable for the commission of trafficking-related acts included in this law or any others they are coerced into, their consent being irrelevant.	Article 20(3), Law No 6/2008, Mozambique

⁸ Other countries that adopt substantive (prevailing) elements of compulsion model in their anti-trafficking legislation include: Albania, Austria, Bulgaria, Croatia, Denmark, Haiti, Mexico, Slovakia, United Kingdom, and Trinidad and Tobago.

<p>Victims of trafficking shall be exempted from all prosecution for illicit acts related to trafficking, committed while they were under the duress of the actual perpetrators of the offenses referred to in the present law.</p> <p>Victims of trafficking in persons who allegedly committed a homicide under the same conditions as stipulated in the previous paragraph may be eligible for extenuating circumstances.</p>	<p>Article 22.2 and 22.3, Anti-trafficking law, Barbados</p>
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Causation model (nexus)

According to the causation model, a trafficked person is not held liable where there is a direct connection between the offense he or she committed and the trafficking. The nexus between the offense and the trafficking does not require use of force, coercion or duress or compulsion, but requires that the offense is a direct consequence of the trafficking. There is a clear nexus between the offense and the trafficking, for instance, where the crime itself is a manifestation of the exploitative purpose of trafficking.

The ‘causation’ model is based on the understanding that the nexus between the offending and the person having been trafficked diminishes a victim’s culpability. In some cases, the link between the offending and the trafficking may be insufficient to absolve them, for instance, where there is a significant lapse of time between the trafficking and the offending or other circumstances sever the causal link between them. In such cases, the court may opt to pursue a conviction where it is in the public interest to do so. But where victims committed the act in the course of being trafficking as a direct consequence of being, the Court should act to ensure they are not prosecuted. The office of the United Nations Special Rapporteur on trafficking in persons, especially women and children, has expressed a preference for the causation model finding the direct relation between the offending and the trafficking to be “undoubtedly easier to prove and to employ in practice than the duress defense model.”⁹ However, neither model is without its challenges in practice.

⁹ *Trafficking in persons, especially women and children, Report of the Special Rapporteur on trafficking in persons, especially women and children*, UN Doc. A/HRC/44/45 (6 April 2020) [23]

Examples of causation-based provisions ¹⁰	Source
"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" (Principle 7) "...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" (Guideline 8)	The Recommended Principles and Guidelines on Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights (E/2002/68/Add.1)
Each Party shall, subject to its domestic laws, rules, regulations and policies, and in appropriate cases, consider not holding victims of trafficking in persons criminally or administratively liable, for unlawful acts committed by them, if such acts are directly related to the acts of trafficking. (Article 14(7))	ASEAN Convention against Trafficking in Persons, especially Women and Children
Notwithstanding the provisions of any other law, a victim of trafficking in persons shall not be criminally liable for any offence related to being in Botswana illegally or for any criminal act that was a direct result of being trafficked.	Section 23, Anti-Human Trafficking Act 2014, Botswana
The victim shall not be criminally or civilly liable for any of the crimes of human trafficking as long as the crime occurred or was directly related to being a victim.	Article 21, Law No. (64) of 2010 regarding Combating Human Trafficking, Egypt
A victim of trafficking shall be legally recognized as such and shall not be penalized for any crime committed as a direct result of his or her trafficking.	Section 12(1), Prevention of Trafficking in Persons Act, 2009, Uganda

Clearing criminal records

As a last line of protection, many States have enacted laws to relieve criminal records of trafficked victims for crimes committed as a result of being trafficked. Where successfully applied, these laws - called 'vacatur' or 'expungement' laws - allow victims to claim that they have not been charged or convicted of a crime. In some jurisdictions, the application of vacatur laws is limited to an exhaustive list of offenses. It is good practice to achieve broader protection by allowing their application to convictions for any offenses committed in the course of being trafficked. In some jurisdictions it will also be possible to both clear criminal records and refund any fines victims have had to pay. Ideally such laws should not

¹⁰ Other countries that adopt substantive (prevailing) elements a causation model include: Argentina, Belize, Costa Rica, Djibouti, El Salvador, Ethiopia, the Gambia, Guyana, Jamaica, Kenya, Malaysia, Malawi, Marshall Islands, Paraguay, Philippines, Qatar, Sierra Leone, Tunisia, and the United States.

pose unduly burdensome evidentiary requirements or other conditions on victims, such as requiring them to cooperate with authorities.

Example: record expungement legislation	Source
If a person was arrested or convicted for an offence committed as a direct consequence of being a victim of trafficking in persons, the person may apply to the court for relief of his or her convictions and arrests.	<i>Model Legislative Provisions against Trafficking in Persons</i> (UNODC, 2020) p.45

PRACTICE POINTS FOR LEGISLATION AND POLICY/LEGISLATORS AND POLICY MAKERS:

- * Include clear statements of the non-criminalization / non-punishment principle in domestic legislation and / or policy.
- * Consider the scope of application of the non-punishment principle in domestic legislation to ensure that any statutory defenses are drafted broadly enough to capture all offenses that victims may be compelled to commit.
- * Clarify in domestic legislation who is to invoke the defense (burden of proof) and the level of evidence required to establish it (the standard of proof).
- * Ensure that duress / compulsion is understood broadly to capture even subtle means included in the trafficking protocol.
- * Enact legislation to allow criminal records of trafficked victims to be vacated or expunged for any crime they committed as a result of being trafficked.
- * Do not make legislation to vacate or expunge criminal records conditional on victim cooperation.
- * Include reimbursement for any fines paid in criminal record relief.



In Investigation and Prosecution

Victims should not be put on trial for crimes they were compelled to commit or committed as a direct result of being trafficked. However, in reality, there may be situations where there is no non-punishment provision in domestic legislation to avoid this outcome, or the

law exists but is not applied, or the law only applies to a narrow group of criminal offenses. In such cases, practitioners may have other options at their disposal to uphold the non-punishment principle in practice.

The role of frontline law enforcers in identifying victims of trafficking among

potential offenders: Before the non-punishment principle can be applied, victims of trafficking must be first identified as such. Where law enforcement authorities first encounter victims of trafficking as potential offenders, significant expertise is required to look beyond the immediate offense to see the circumstances and the actors behind it. The challenge of recognizing victims of trafficking among potential offenders is exacerbated when victims have previously been in trouble with the law, have drug abuse and addiction issues, or otherwise do not present as the ‘ideal’ victim. Very often, traffickers deliberately target such people to distract and frustrate the law enforcement response.

Understanding the use of subtle means of coercion or control by traffickers in the commission of crimes by victims:

Where victims are physically or otherwise overtly forced to commit crimes, protecting them from punishment may be straightforward. However, where more subtle means are used, such as coercion or abuse of a position of vulnerability, and where the victim seems to consent to the exploitation, it can be challenging to recognize the victim as a victim rather than a perpetrator. In many cases, victims do not want to be identified as victims. Guidance documents are useful to support practitioners to understand trafficking in persons, the subtle means of control that may be involved, the irrelevance of victim consent and the reasons why victims may not self-identify. Such guidance can support stakeholders regardless of the State’s approach to non-punishment in domestic legislation and is essential to support determinations as to whether victims have voluntarily committed crimes, have been compelled to commit them, or are committing them as a direct consequence of being trafficked.

The role of investigative discretion in upholding the non-punishment principle: In some jurisdictions, law enforcers may exercise discretion in determining whether or not to bring charges against an alleged offender. To support them in decisions to not lay charges against victims of trafficking, frontline officers need to be able to identify indicators of trafficking in the situations they encounter. They also must be empowered with sufficient understanding of key principles - including the non-punishment principle - to make effective decisions in the charges that they do or do not bring. Whether they bring charges or not, the role of law enforcers is to collect available evidence about the alleged offending. This role is critical to the effective investigation of the alleged offense committed by the

victim and may yield insights into defenses available. It also critical to uncovering circumstances that may suggest a person has been subjected to crimes, including human trafficking.

The role of prosecutorial discretion in upholding the non-punishment principle in practice: Prosecutors may have a degree of discretion to determine a person's culpability. In exercising that discretion, prosecutors should consider grounds for not prosecuting a person who has committed a crime. Such legal technical grounds may include considerations of self-defense (which may be explicitly included in legislation), duress, or necessity. There may also be policy grounds for applying the non-punishment principle, for instance, where the offense is so minor or insignificant that it does not serve the public interest to prosecute it.

The scope of appropriate use of prosecutorial discretion that is available or not will be different in different jurisdictions. Where it is limited, this is an argument for the country or jurisdiction adopting non-criminalization measures in law, policy and procedures.



CASE STUDY:

Considerations in determining whether to prosecute a suspect who may be victim of trafficking

The United Kingdom Crown Prosecution Service (CPS) Guidance sets out a four-stage process to determine whether to prosecute a suspect who may be a victim of human trafficking. Prosecutors are encouraged to consider all the circumstances of the case, including the seriousness of the offense and direct or indirect compulsion arising from the situation. In doing so, prosecutors must consider:

1. Is there is reason to believe a person is the victim of trafficking? If so:
2. Is there is clear evidence of a credible common law offense of duress?
 - If there is clear evidence of duress, the case should not be charged or should be discontinued on evidential grounds.
 - If there is not clear evidence of duress, the prosecutor must ask:
3. Is there is clear evidence of a statutory defense under Section 45 of the Modern Slavery Act 2015?
 - If there is evidence of such a statutory defense, the case should not be charged or should be discontinued on evidential grounds.
 - If there is no evidence of a statutory defense, then it should be asked:
4. Is it in the public interest to prosecute? Importantly, this public interest consideration must still apply even if there is no clear evidence of duress, and no clear evidence of a statutory defense under section 45 of the Modern Slavery Act (or where that section does not apply), the question of whether prosecution is in the public interest must still be considered.

Source: Human Trafficking, Smuggling and Slavery, Crown Prosecution Service, Updated 30 April 2020.
Available at: <https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>

PRACTICE POINTS FOR INVESTIGATION AND PROSECUTION / INVESTIGATORS AND PROSECUTORS:

- * Stay abreast of modus operandi of traffickers, including their use of victims to commit criminal acts to mask their own offending.
- * Familiarize law enforcers with the elements of human trafficking and the means by which traffickers may have compelled victims to commit crimes.
- * Equip law enforcers with indicators to identify potential victims of trafficking among persons they encounter as suspects in other crimes.
- * Develop and disseminate clear guidance for investigators to avoid arresting, detaining and charging victims for crimes committed as a direct result of being trafficked.
- * Integrate the non-punishment principle into existing guidance for prosecutors and judges, to support them to practically interpret and apply the principle.
- * Conduct regular training and sensitization activities targeting criminal justice and other practitioners, to support their understanding of the non-punishment principle and any relevant statutory provisions that give effect to it.



In Conviction and Sentencing

Ideally, criminal proceedings should not be brought against victims of trafficking or should be ceased as soon as indicators of trafficking have been identified. However, where defenses are not available or are not applicable, there may be options to avoid or reduce sentences, and vacate or expunge criminal records of victims of trafficking.

Court decisions to not impose punishments notwithstanding a guilty conviction:

Courts may have the option of making allowance for mitigating factors at the sentencing stage or not imposing penalties at all. In some countries, criminal codes, prosecutorial or sentencing guidelines may offer opportunities to not impose punishments, and to not register the conviction in a person's criminal record.

Following convictions, eliminate criminal records to mitigate or avoid further harm:

Criminal records can pose significant barriers to victim recovery and reintegration into society, presenting obstacles to accessing employment, housing, custody of children, welfare benefits, and curtailing their ability to migrate or travel. Where victims have been prosecuted for crimes, options to clear criminal records should be explored in the post-conviction phase. The successful application of expungement or vacatur laws (discussed above under legislation and policy) can reduce or remove the negative and often long-term consequences convicted persons may experience. Such laws should be interpreted broadly to afford the widest possible application of the non-punishment principle. Courts should also explore opportunities to exercise judicial discretion to take appropriate actions to provide convicted victims with remedy.

PRACTICE POINTS FOR CONVICTION AND SENTENCING:

- * Provide clear guidance to prosecutors and judges to support the application of the non-punishment principle.
- * Ensure that judges are aware of sentencing laws, rules and guidelines to support them in passing sentences that reflect criminal culpability and to consider mitigating factors in any sentencing decisions.
- * Judges should familiarize themselves with legislation in place to allow criminal records to be cleared of crimes committed as a direct result of being trafficked.

The legal elements required to prove TIP (as contained in the Palermo Protocol¹¹) are the act, the means, and the purpose. Clearly, to lead to a successful prosecution, the investigation must produce evidence sufficient to prove each of these elements (or the elements of TIP crime in your jurisdiction). However, when planning and conducting the TIP investigation, it is perhaps easier to visualize the TIP crime by breaking it down into practical criminal conduct often seen in TIP cases. These are addressed here individually but it is important to remain cognizant of the overall synergy between them, and with a focus on the overarching exploitative purpose and activities of the criminals that are at the core of the trafficking crime.

¹¹ United Nations (2000) *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.



Summary

Victims of trafficking should not be criminalized or punished for offenses that were committed by them as a direct consequence of being trafficked. Beyond protecting rights of victims, this principle of non-punishment also serves criminal justice objectives, by empowering victims to participate in criminal justice processes against traffickers and ensuring that traffickers do not escape justice by deflecting risks of prosecution onto their victims. The non-punishment principle is one that therefore must be construed broadly beyond non-criminalization, as a critical component of human rights-based and victim-centred approaches to trafficking in persons.

Prosecution of victims should be guarded against by legislative provisions that uphold the principle of non-punishment of victims of trafficking. Where no such provision is yet in place, or where other safeguards including statutory defenses fail to prevent prosecution of victims, practitioners should explore other options available to avoid re-victimizing and otherwise harming victims. Options may include the exercise of prosecutorial discretion to avoid prosecution on public interest grounds, as well as judicial considerations in sentencing.

The non-punishment principle is widely recognized but unevenly applied in practice. In line with their domestic law and regulations as well as their international obligations, law and policy makers should take steps to ensure that the principle of non-punishment is broadly and explicitly incorporated in each country's law and policy. To realize this principle in practice, it is incumbent on counter-trafficking stakeholders to familiarize themselves and their colleagues with the options that exist to balance the objectives of protecting victims from punishment, with the goal of bringing criminal offenders to justice.



Useful References

Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (United Nations, Vienna, 15 June 2020).

Grazia Giammarinaro, Maria. *The Importance of implementing the non-punishment provision: the obligation to protect victims*, Special Rapporteur on trafficking in persons, especially women and children (United Nations, Geneva, 30 July 2020).

Human Trafficking Legal Centre, *Prosecution at any cost? The Impact of Non-Material Witness Warrants in Federal Human Trafficking Cases* (Human Trafficking Legal Centre, April 2020).

International Women's Human Rights Clinic (IWHRC) at the City University of New York School of Law, *Clearing the Slate: seeking effective remedies for criminalized trafficking victims* (City University of New York School of Law, New York, May 2015).

McAdam, M., *Continuing to pay the price for freedom: the ongoing detention of victims after their trafficking experience*, (ASEAN-Australia Counter Trafficking, 2021).

Organization for Security and Cooperation in Europe, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (OSCE, Vienna, 2013).

United Nations, *Non-punishment of victims of trafficking*, Issue Brief 8, 2020 (Inter-Agency Coordination Group Against Trafficking in Persons, United Nations, Vienna, 2020).

United Nations, *Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking*, UN Doc. CTOC/COP/WG.4/2010/4 (United Nations, Geneva, 9 December 2009).

United Nations, *Trafficking in persons, especially women and children, Report of the Special Rapporteur on trafficking in persons, especially women and children*, UN Doc. A/HRC/44/45 (United Nations, Geneva, 6 April 2020).

United Nations Office of the High Commissioner for Human Rights, *Commentary to Recommended Principles and Guidelines on Human Rights and Human Trafficking* (United Nations, Geneva, 2010).

United Nations Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (United Nations, Geneva, 2002).

United Nations Office on Drugs and Crime, *Countering Trafficking in Persons in Conflict Situations: Thematic Paper* (UNODC, 2018).

United Nations Office on Drugs and Crime, *Female Victims of Trafficking for Sexual Exploitation as Defendants: A Case Law Analysis* (United Nations, Vienna, 2020).

United Nations Office on Drugs and Crime, *Model Legislative Provisions against Trafficking in Persons*, (United Nations, Vienna, 2020).

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“In criminal law the relationship between criminal responsibility and the presence or absence of agency, self-determination or competency to make decisions is a key tenet. At its core, the perpetrators of human trafficking aim to effectively overcome another human being’s agency, snuff out the light of self-determination and deny the individual the opportunity or ability to make decisions. This criminal purpose of subjugation may be produced by threatened or actual physical force and violence and/or sophisticated psychological coercion and manipulation. Application of the non-punishment principle in human trafficking cases is meant to recognize and address this and to keep the focus and onus of criminal accountability on the traffickers where it belongs rather than to threaten victims of human trafficking with a post-trafficking life of imprisonment.

This Practice Guide is authored by Marika McAdam. She is a distinguished analyst, author and advisor on human trafficking, human rights and migrant smuggling issues, often focusing on the interpretation and application of international law and policy. She has worked with intergovernmental bodies such as the United Nations and the International Organization for Migration. We are fortunate to have Dr. McAdam’s expertise contributing to the Warnath Group’s work, especially on critical issues such as this review of the legal and policy framework of the non-punishment and non-criminalization principle for victims of human trafficking. I also wish to express my appreciation and gratitude to Joanna Nicoletti, the Warnath Group’s Director, Technology and Digital Education for her invaluable work on the production of our Practice Guides.”

-Stephen Warnath, CEO & President, the Warnath Group

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