

Human Trafficking and the Emergence of the Non-Punishment Principle

Ryszard Wilson Piotrowicz* and Liliana Sorrentino**

ABSTRACT

The article outlines the emergence of the non-punishment principle with regard to victims of human trafficking: that people who commit offences in the course, or as a consequence, of being trafficked should not be held criminally accountable because they have been compelled to do so. It is argued that this principle is grounded in recognition of the human rights of trafficked people. The article traces the emergence of the principle in human rights law as well as soft law and discusses its scope. State practice and recent British cases are considered. It is shown that, while there are difficult issues concerning the scope of the principle, it is nonetheless becoming increasingly recognized in the field of human trafficking.

KEYWORDS: human trafficking, non-punishment principle, Council of Europe Convention on Action against Trafficking in Human Beings, European Union Directive 2011/36/EU

1. INTRODUCTION

Trafficking in human beings (THB) is widely recognized as a serious criminal offence, under both international law¹ and the domestic law of many States. It has been described as a form of modern-day slavery.² The question arises: can the person who has been trafficked be legitimately regarded, and treated, as a criminal, when an offence they are alleged to have committed is linked to their situation as a victim of trafficking; that is, should a person be subject to penalties for offences they have committed in the course, or as a consequence, of being trafficked?

* Professor of Law, Department of Law and Criminology, Aberystwyth University (ryp@aber.ac.uk).

** Independent Consultant (lilianasorrentino.ls@gmail.com).

1 Most notably, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000, 2237 UNTS 319; the Council of Europe Convention on Action against Trafficking in Human Beings 2005, CETS 197; and the 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, OJ L 101/1.

2 Council of Europe Convention on Action against Trafficking in Human Beings. Explanatory Report, CM(2005)32 Addendum 2 final, at para 3.

When a person is being trafficked, they may, on the face of it, commit an offence, such as entering another country illegally. Once they have been trafficked they may commit acts which would ordinarily be considered a breach of the law, such as working without a permit or committing petty offences such as pickpocketing.

Can one really say that such people are offenders, criminals? When a person has been trafficked, they are not in control of their own destiny. They cease to be autonomous individuals because they are effectively acting under the control of others. The question then arises: to what extent, if at all, should one be personally accountable for offences he or she has committed that are clearly connected to their situation as a trafficked person? Too often, trafficked people do not receive assistance and protection as victims of a serious crime because they are not recognized as victims. It is more likely that they will be arrested, detained and charged with immigration offences, for soliciting prostitution or engaging in illegal work, making false statements; or else, they are fined for violations of administrative laws and regulations.

This article outlines and discusses the principle of non-punishment with regard to victims of THB. It argues that a person who has been trafficked is not an autonomous individual and should not be held criminally or administratively responsible for offences they have committed, to the extent that such offences were committed in the course, or as a result, of their having been trafficked. As such, the trafficked person was acting under duress sufficient to exclude responsibility.

2. TRAFFICKING IN HUMAN BEINGS

THB is not a phenomenon of the twenty-first century. People have been trafficked since time immemorial. However, the practice came increasingly to be recognized both as a challenge to the rights of victims and to the security of States during the 1990s. One major response to this was the adoption, in 2000, of the United Nations Convention against Transnational Organised Crime (UNTOC)³ and two protocols: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, in Particular Women and Children⁴ ('the Palermo Protocol') and the Protocol against the Smuggling of Migrants by Land, Sea and Air.⁵

The Palermo Protocol defines THB at Article 3(a) as follows:

'Trafficking in persons' shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

3 General Assembly Resolution 55/25, 15 November 2000.

4 Ibid.

5 Ibid.

Trafficking therefore has three elements: the act (recruitment etc), the means (threat or use of force etc) and the purpose (exploitation). THB, it can be seen, is a *process* involving potentially several actors, starting from the person who recruits the victim, and including all those who knowingly aid or abet the process of bringing the victim to the position that they can be exploited. This is important for two reasons. First, by making the commission of *any* of the acts listed sufficient to amount to THB, the definition seeks to facilitate convictions: if all of the acts were required to be committed so as to constitute THB, it would be possible for those who had done some but not all of the relevant acts to avoid conviction. The position is that if you knowingly do *any* of the acts with the purpose of exploitation, you are a trafficker. Secondly, the definition means that 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; the victim may already at the moment of recruitment, or soon afterwards, become engaged in illicit activity, and questions arise as to the extent to which they should be personally accountable for this.

The definition of THB must be read in light of the rest of Article 3. Paragraph (b) provides that the consent of a victim of THB to the exploitation is vitiated where any of the means set forth in Article 3(a) have been used: one cannot ‘consent’ to be trafficked. Furthermore, where the victim is a child (anyone under the age of eighteen years), THB will have taken place even if none of the means set out in Article 3(a) have been used (paragraph (c)).

The definition in the Palermo Protocol has been very widely accepted.⁶ However, that instrument addresses only transnational THB and THB connected to organized crime. It is no secret that THB within States is also a major problem. Moreover, people are trafficked within States prior to being trafficked abroad, and they are trafficked within destination States after having been trafficked from other countries. For this reason, many States have adopted in their national legislation the definition contained in the Palermo Protocol but have extended it to include THB within the State, as well as trafficking committed without the involvement of organized crime.

This definition of THB has been accepted at the European level. The Council of Europe Convention on Action against Trafficking in Human Beings (‘the Convention’) adopted the same definition (Article 4), except that it is not restricted to transnational or organized crime-related THB. At the European Union level, the most recent relevant instrument is Directive 2011/36/EU (‘the Directive’). Article 2.1 of that instrument is broadly the same as Article 3 of the Palermo Protocol. However, in terms of punishable acts, it adds ‘including the exchange or transfer of control over those persons’. The types of exploitation specifically listed are expanded to include forced begging and the exploitation of criminal activities (paragraph 3), although, as with the other instruments, this is not a closed list: it is the minimum, reflecting the awareness that other forms of exploitation may be taking place which have not yet been identified, or indeed may be devised in future. For instance, in some countries, it is now apparent that people are trafficked to be exploited in the production of counterfeit consumer goods.

6 The Protocol attracted 187 ratifications by 30 August 2016.

Both the Convention and the Directive take what they call a victim-centred and human rights-based approach to anti-trafficking action. Recital 4 of the Convention 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’. The Directive is emphatic in emphasizing the rights of victims. Recital 7 of the Preamble asserts that the Directive takes ‘an integrated, holistic, and human rights approach to the fight against trafficking in human beings’. Moreover, ‘[m]ore rigorous prevention, prosecution and protection of victims’ rights are major objectives’ of that instrument.

The question is whether the rhetoric of the preambles noted is just that, or whether these instruments make a real difference with regard to the non-punishment of victims of trafficking. A human-rights based approach requires, *inter alia*, that national legislation and policies do not have negative impacts on the rights of trafficked persons.⁷ 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.

In the normal scheme of things, 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.⁸ 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, we suggest, include the right not to be punished or penalized for offences one has committed because one was compelled to do so by the trafficker(s).

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 (the Council of Europe’s Group of Experts on Action against Trafficking in Human Beings, which is responsible for monitoring compliance with the Convention) has considered the extent to which States comply with the non-punishment principle. It is clear that, in the view of GRETA, a significant number of countries fail to comply fully with their obligation in relation to this principle, either because of a lack of awareness,⁹ or a failure to appreciate the rationale for, and scope of, the principle,¹⁰ or because of failure to identify people as victims of trafficking in the first place.¹¹ In some cases, national law has not been amended to comply

7 Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking (2002), E/2002/68/Add. 1. Principle 1 states: ‘The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.’

8 *Rantsev v Cyprus and Russia* Application No 25965/04, Merits and Just Satisfaction, 7 January 2010, at paras 284, 286; Opinion No 6/2010 of the Group of Experts on Trafficking in Human Beings of the European Commission on the Decision of the European Court of Human Rights in the Case of *Rantsev v Cyprus and Russia*, at paras 8–10: see (2010) 22 *International Journal of Refugee Law* 673.

9 See, for example, Report on Germany, 3 June 2015, at para 203; Report on Poland, 6 May 2013, at para 208.

10 See, for example, Report on Hungary, 29 May 2015, at para 192; Report on Italy, 22 September 2014, at para 189.

11 See, for example, Report on Lithuania, 5 June 2015, at para 157; Report on Norway, 7 May 2013, at paras 241, 243; Report on France, 26 January 2013, at para 215.

with the principle, which puts the State at risk of non-compliance with the Convention.¹²

3. THE RATIONALE OF NON-PUNISHMENT

The idea that a trafficked person should not be punished for criminal acts arising out of their situation as a trafficked person is based on the appreciation that the trafficked person is not a free agent; that they are compelled to commit unlawful acts by those who control and exploit them; that they are victims of crime rather than criminals; that they have effectively become the agent of the person(s) who exploit them because they are powerless to do anything other than the will of their exploiters. This condition has been likened by the European Court of Human Rights to a radical denial of the independence of the victim:

[T]rafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. . . It implies close surveillance of the activities of victims, whose movements are often circumscribed. . . It involves the use of violence and threats against victims, who live and work under poor conditions.¹³

The issue explored here is: to what extent is the non-punishment principle recognized by international law? And if it is indeed recognized, what is its scope? In 2010, it was suggested that ‘there is considerable and growing evidence that the *policy preference* for victims of trafficking not to be subject to criminalization is evolving into a widely accepted normative standard’.¹⁴ There is now even more evidence to that effect and this will be discussed below.

A defence of duress is recognized under international criminal law, where the perpetrator has been compelled to commit a crime because of a threat to life or limb coming from another person.¹⁵ However, the defence in these cases only applies to war crimes, crimes against humanity and genocide—the three offences with regard to which the International Criminal Court currently has jurisdiction. Trafficked people are far more likely to be victims than perpetrators of the offences covered by the Statute.

Trafficked people will not have normally killed unarmed civilians or tortured prisoners of war (at least not while being trafficked). Their offences are usually more prosaic: irregular border-crossing, working without a permit, growing cannabis, petty theft, benefit fraud, (in some countries) sex work. While it might even seem obvious that someone should not be blamed for an act they have committed under threat or

12 Such States may point to provisions in their own criminal laws relating to general defences or mitigation of penalties which may not be adequate to comply with the Convention: see, for example, Report on Montenegro, 13 September 2012, at para 185; Report on Switzerland, 14 October 2015, at para 184.

13 *Rantsev v Cyprus and Russia*, supra n 9 at para 281.

14 Gallagher, *The International Law of Human Trafficking* (2010) at 285.

15 Article 31(1)(d) Rome Statute of the International Criminal Court 1998,A/CONF.183/9. See also Werle, *Principles of International Criminal Law* 3rd edn (2014), at paras 632–640.

duress of some kind, it is nevertheless useful to identify just how far international law supports this concept with regard to trafficked people.

Trafficked persons are bound by the law just as much as any other victim of crime or indeed any other individual. They enjoy no immunities from prosecution because they have been trafficked; nor should they. However, their culpability may be significantly diminished or extinguished because of their personal circumstances, in particular their situation of being under the control of the traffickers.

In reality, if the State punishes a trafficked person for offences related to their trafficking, it is punishing them for being trafficked. Such punishment

is a violation of their fundamental dignity. It 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 status as trafficked persons, they would not have perpetrated. The criminalisation of trafficked victims may be tantamount to persecution of victims by the State: not only does it fail to take into account the serious crimes committed against the victim by the traffickers, and which should be investigated, it fails to recognise trafficked persons as being victims and witnesses of those serious crimes and exacerbates their victimisation and trauma by imposing on such persons State-sanctioned, unjust punishment. Instead of being treated as victims, they are treated as criminals. This practice furthermore promotes trafficking in human beings by failing to confront the real offenders, by dissuading 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.¹⁶

The imperative not to punish victims of THB emanates from recognition of their human rights as well as acceptance that their actions may be covered by defences recognized in the criminal laws of many, if not all, States.

4. THE PRINCIPLE OF NON-PUNISHMENT IN INTERNATIONAL LAW

A. Treaty Law

The Palermo Protocol does not expressly provide for the non-punishment of victims of THB. However, one of the purposes of that instrument is to ‘protect and assist the victims of such trafficking, with full respect for their human rights’.¹⁷ The Working Group on Trafficking in Persons, whose function is to ‘advise and assist the Conference [of the Parties to UNCTOC] in the implementation of its mandate with regard to the Trafficking in Persons Protocol’, recommended, in that context, in 2009:

With regard to ensuring the non-punishment and non-prosecution of trafficked persons, States parties should: (a) Establish appropriate procedures for

16 OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (2013) at para 4.

17 Article 2(b) Palermo Protocol.

identifying victims of trafficking in persons and for giving such victims support;
(b) 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 acts¹⁸

In 2010, the Working Group reaffirmed this recommendation and went further, requesting States parties to ensure

that provisions for the non-punishment and non-prosecution of trafficked persons contained in domestic legislation, guidelines, regulations, preambles or other instruments are clearly stated. In doing so, States parties are encouraged to make use of technical assistance tools such as the UNODC Model Law against Trafficking in Persons and principles and guidelines such as the Recommended Principles and Guidelines on Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights, as well as any other regional standards and guidelines¹⁹

Explicit recognition of the non-punishment principle in the European context has come in the last few years, first through the Council of Europe then through the European Union, both of which have adopted instruments that recognize the non-punishment principle as part of their general focus on the rights of victims of THB. At Article 26 the Council of Europe Convention provides, in wording that appears somewhat timid:

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.

The use of the word ‘possibility’ suggests a discretion on the part of States: that they might follow the non-punishment route or they might choose not to do so. However, this would be a misinterpretation. The term ‘possibility’ is making it clear that the non-punishment provision must be, it is suggested, effectively implemented in appropriate cases but it is up to individual States—which have very diverse legal

18 United Nations, Report on the meeting of the Working Group on Trafficking in Persons, CTOC/COP/WG.4/2009/2, 21 April 2009.

19 United Nations, Report on the meeting of the Working Group on Trafficking in Persons, CTOC/COP/WG.4/2010/6, 17 February 2010. The background paper for the 2010 meeting of the Working Group supported this: ‘An essential element of protection of victims of trafficking and their rights must be that States do not prosecute or punish trafficked persons for trafficking-related offences Similarly, it is argued that States should not prosecute or punish trafficked persons for crimes they have committed in the course of trafficking’: see United Nations Working Group on Trafficking in Persons, Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking, CTOC/COP/WG.4/2010/4, 9 December 2009.

systems—to decide how precisely they achieve this.²⁰ It is here argued that, given the fact that trafficked people are victims of a crime that denies them the ability to act independently, it would contradict the human rights based approach of the Convention if victims could be punished for offences they were compelled to commit. GRETA has made clear its view that parties have a duty

to adopt measures that specifically deal with the non-liability of victims of trafficking Criminalisation of victims of trafficking not only contravenes the State's obligation to provide services and assistance to victims, but it also discourages victims from coming forward and co-operating with law enforcement agencies, thereby also interfering with the State's obligation to investigate and prosecute those responsible for trafficking in human beings.²¹

The notion of non-punishment is recognized elsewhere and indeed has been for decades, the rationale being that the individual has no real choice. For instance, the UN Convention Relating to the Status of Refugees (1951) provides that States

shall not impose penalties, on account of their illegal entry or presence, on refugees coming directly from a territory where their life or freedom was threatened [in certain specified ways], enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.²²

That provision recognized that people fleeing persecution might sometimes have no alternative but to enter another country without the necessary permission or visa. It could be a matter of life or death. The refugee is not given complete immunity: allowance is made for the emergency situation but the refugee then has a duty to notify the authorities as soon as reasonably possible. As for victims of THB, the obligation is not to bring their deeds to the attention of the authorities like a refugee; there is no such obligation on the victim, but full co-operation by the victim may help the prosecution of traffickers and that is more likely to be forthcoming where the victim of THB does not fear prosecution or punishment.

More recently, and most pertinently for THB, the International Labour Organization has recognized the non-punishment principle. The Protocol to Convention 29²³ ('the Forced Labour Convention 1930'²⁴) was adopted by the International Labour Conference on 11 June 2014. The Protocol explicitly notes the links between forced labour and THB in the preamble, and Article 4(2) brings in the non-punishment rule:

20 The Explanatory Report accompanying the Convention provides at para 274: 'Each Party can comply with the obligation established in Article 26, by providing for a substantive criminal or procedural criminal law provision, or any other measure, allowing for the possibility of not punishing victims'.

21 Meeting Report of the 7th meeting of the Committee of the Parties, 30 January 2011, THB-CP (2012)RAP7, Appendix II, at para 7.

22 189 UNTS 150.

23 Protocol to the Forced Labour Convention 1930 (No 29).

24 Convention No 29 concerning Forced or Compulsory Labour 1930, 39 UNTS 55.

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.

The duty of non-punishment should be interpreted in light of the definition of THB, especially with regard to compulsion. A comprehensive understanding of compulsion should include all of the means of trafficking: the threat or use of force, other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability.²⁵ Where the victim is compelled to commit an offence one must take into account all of the circumstances which have resulted in the victim losing their free will and having no option but to act as they did: not only physical or psychological abuse, or the threat of these, but also where the vulnerability of the victims is abused by the traffickers.

While the developments described above have been confined mostly but not exclusively to Europe, there is clear evidence of wider acceptance. The ASEAN Convention against Trafficking in Persons, Especially Women and Children, provides at Article 14(7):

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.²⁶

The wide range of instruments addressing the issue of non-punishment suggests clearly that the principle is gaining increasing acceptance. This is a duty to which states must give effect so as to ensure that their domestic law conforms to that duty, irrespective of the requirements or complexities of their own legal systems.²⁷ Accordingly, all States should, where necessary, adopt measures and take steps to bring their laws into conformity with the principle.

B. European Union Law

Article 8 of the Directive provides:

Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that the competent 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

25 The need for a wide interpretation of compulsion has been noted elsewhere: see Scarpa, *Trafficking in Human Beings: Modern Slavery* (2008) at 155–6.

26 Adopted 21 November 2015, see: asean.org/asean-convention-against-trafficking-in-persons-especially-women-and-children/ [last accessed 18 August 2016].

27 The Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331 provides at Article 27, in part: 'A party may not invoke the provisions of its internal law as justification for its failure to perform, a treaty'.

commit as a direct consequence of being subjected to any of the acts [i.e., offences concerning trafficking in human beings] referred to in Article 2.

In this case, States are required to make sure that the relevant authorities are ‘entitled’ not to prosecute. This suggests that a discretion remains. Again, it is suggested here that any apparent discretion on the part of States (being *entitled* rather than *required* not to prosecute) is actually with regard to how they go about not prosecuting or punishing the victims of THB. Furthermore, there needs to be some discretion on the part of the prosecutor: he/she must make a judgment as to whether a trafficked person committed the offence because they had no choice. If the assessment is that the offence was indeed so closely linked to the trafficked person’s situation that they had in reality no choice but to commit the offence, then it is suggested that there should be no prosecution or punishment, and where prosecution is mandatory, it must be discontinued as soon as possible. Any ‘discretion’ would have to be exercised so that the victim of THB is not punished.

Recital (14) of the Directive clarifies the scope and purpose of the non-punishment provision:

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.

The reference to the human rights of the victims is significant: it draws attention to the fact that States have obligations of protection and assistance towards victims of trafficking; that failure to comply with these obligations may violate the victim’s rights. At this stage in the trafficking process—where the victim is in the hands of the authorities—we are no longer dealing with exploitation by the traffickers but rather unjustified punishment by the authorities.

C. Guidelines and Recommendations

The principle of non-punishment of trafficked persons has been acknowledged in a variety of soft law instruments adopted in recent years. These instruments are striking for the emphasis they place on the human rights of victims being at the centre of efforts to prevent and combat trafficking.

This can be seen particularly clearly in the Recommended Principles and Guidelines on Human Rights and Human Trafficking,²⁸ adopted by the Office of the UN High Commissioner for Human Rights. Principle 7 states:

28 United Nations Office of the High Commissioner for Human Rights, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 20 May 2002, E/2002/68/Add.1.

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.

That principle is repeated no less than four times, in various contexts, in the accompanying guidelines intended to clarify what effect should be given to the principle.²⁹ In the case of adults,³⁰ the unlawful activities must be a 'direct consequence' of having been trafficked. This merely shows that not all acts may be exempt: it is an exception to the general rule that one must accept the legal consequences of one's actions. In order to benefit from the non-punishment principle, the unlawful act must have been caused by the fact that the person otherwise responsible was being, or had been, trafficked. The unlawful act does not become lawful just because the perpetrator was trafficked. However, the blame should lie with the trafficker who compelled the victim to act illegally.

In the European context, the principle of non-punishment has also been recognized in OSCE commitments, first in the 2000 Ministerial Council Decision, and more recently in the 2013 Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings, which recommends that States take

adequate measures to ensure that, where appropriate, identified victims of THB are not penalised for their involvement in unlawful activities to the extent that they have been compelled to do so.³¹

Furthermore, the principle has been recognized to a greater or lesser extent in several further fora during the first decade of the twenty-first century, including resolutions of the General Assembly of the United Nations,³² the Brussels Declaration on

29 Guideline 2.5 (ensuring non-prosecution for violations of immigration laws or for involvement in activities as a direct consequence of being trafficked); Guideline 4.5 (ensuring that legislation prevents prosecution, detention or punishment for the same reasons); Guideline 5.5 (ensuring that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed because of their situation); Guideline 8.3 (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).

30 In cases involving children the scope is broader and the test is arguably lighter, requiring only that the offence was 'related' to the child's trafficked situation, rather than a 'direct consequence of the child trafficked situation: see Guideline 8.3.

31 OSCE, Ministerial Council Decision No 1, *Enhancing the OSCE's Efforts to Combat Trafficking in Human Beings*, MC(8).DEC/1, 28 November 2000, at para 9; OSCE Permanent Council, Decision No 1107 Addendum to the OSCE Action Plan To Combat Trafficking in Human Beings: One Decade Later, PC.DEC/1107/Corr.1 6 December 2013, Annex, at chapter IV para 2.6.

32 General Assembly Resolution 55/67, *Traffic in Women and Girls*, 31 January 2001, A/RES/55/67 at para 6 'Calls' on 'all Governments to criminalize trafficking in women and children, in particular girls, in all its forms, to condemn and penalize all those offenders involved, including intermediaries, whether their offence was committed in their own or in a foreign country, **while ensuring that the victims of those practices are not penalized**, and to penalize persons in authority found guilty of sexually assaulting victims of trafficking in their custody' (emphasis added). While para 13 of the Resolution 'invites' States to 'consider' the prevention of prosecutions of trafficked persons for illegal entry or residence, para 6 is a wider provision and clearly calls upon States to ensure non-penalization. The Resolution was approved without a vote.

Preventing and Combating Trafficking in Human Beings³³ and the Miami Declaration of Principles of Human Trafficking.³⁴ The European Commission's Group of Experts on Trafficking in Human Beings has also supported non-punishment.³⁵ The United Nations Special Rapporteur on trafficking in persons, especially women and children, has also advocated the non-punishment and non-criminalization of trafficked people.³⁶

5. NON-PUNISHMENT AND HUMAN RIGHTS

Since 2010, it has been specifically recognized that at least European States have human rights obligations towards trafficked people, as well as those at risk of THB, as part of the prohibition of slavery, forced labour and servitude. These duties are not based on the State's involvement in THB itself but rather because of the State's failure to prevent THB, or to provide adequate assistance and protection to the victims.³⁷

The human rights of trafficked people must be at the core of States' response.³⁸ The penalization of a person for acts that they have committed in the course, or as a consequence, of being trafficked must be seen in this context: not only does it unjustly punish and stigmatize victims of serious crime; it also violates States' obligations towards trafficked people.

The principle of non-punishment does not only require that States refrain from penalizing trafficked persons; it also imposes positive obligations on them. In *Rantsev v Cyprus and Russia*, the European Court of Human Rights held with regard to Article 4 of the European Convention on Human Rights (the prohibition of slavery, servitude and forced labour) that the State's obligation includes having in force legislation 'adequate to ensure the practical and effective protection of the rights of

33 18 September 2002, at para 7, which states, in part: 'Trafficked victims must be recognised as victims of serious crime. Therefore they should not be re-victimised, further stigmatised, criminalised, prosecuted or held in detention centres for offences that may have been committed by the victim as part of the trafficking process'.

34 10 February 2005, at para 28: 'The trafficked person must be recognized as the victim of the crime of trafficking. States must not criminalize the status of the trafficked person and should not penalize the victim for illegal acts, such as illegal immigration or prostitution, incident or related to the trafficking act'.

35 Opinion No 1/2008 of the Group of Experts on Trafficking in Human Beings of the European Commission, On the Revision of the Council Framework decision of 19 July 2002 on Combating Trafficking in Human Beings, 17 October 2008, at 4.

36 UN, First decade of the mandate of the Special Rapporteur on trafficking in persons, especially women and children, 2014, at 15; Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, 6 June 2012, A/HRC/20/18, at paras 23–30.

37 *Rantsev v Cyprus and Russia*, supra n 9; Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations' (2012) 24 *International Journal of Refugee Law* 181. There is also recognition of this by the Court of the Economic Community of West African States: see *Hadijatou Mani Koraou v The Republic of Niger*, ECW/CCJ/JUD/06/08, Judgment, 28 October 2008, at para 85.

38 The UN Recommended Principles and Guidelines on Human Rights and Human Trafficking state that '[t]he human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims'. The Council of Europe Convention provides in the Preamble: 'Considering that respect for victims' rights, protection of victims and action to combat trafficking in human beings must be the paramount objectives'. In 2002, an OSCE Ministerial Council Declaration affirmed: 'The dignity and human rights of victims must be respected at all times'.

victims or potential victims of trafficking'.³⁹ That obligation, it is suggested, includes ensuring that such persons are not punished for offences relating to their having been trafficked or as a consequence of having been trafficked. To penalize a trafficked person where they have been compelled to break the law actually denies their right to protection from the State. The obligation of non-punishment is intimately tied to the State's obligations to identify, protect and assist victims of trafficking⁴⁰ as well as to the State's duty to investigate a trafficking situation with a view to identifying the trafficker and seeking to bring the true perpetrator to justice.⁴¹

6. THE SIGNIFICANCE OF IDENTIFICATION AND ASSISTANCE

The duty of non-punishment can be breached both indirectly and directly. Indirect violation results from a failure to identify a person as a victim of trafficking; this can result in the full circumstances of the trafficked person not being taken into account with the consequence that they are penalized when they should not be. Direct violation occurs where the State authorities dealing with an offence committed by the trafficked person are, or ought to be, aware of her/his status as a victim of trafficking but fail to attach appropriate significance to this fact when assessing her/his responsibility.

Full application of the non-punishment principle means that, ideally, no prosecution should be initiated or other punitive measures should be taken. If a prosecution has commenced, it should be discontinued as soon as possible; other measures and/or penalties should be cancelled once it is evident that the offence was committed in the course, or as a consequence, of being trafficked.

It is essential that effective mechanisms and procedures be in place for the soonest possible identification of victims of trafficking. If this is not done there is a real risk that the victim will be treated as a 'normal' offender and therefore required to take full responsibility, including penalties, for their acts. It is the duty of the State to ensure that public servants likely to come into contact with trafficked persons, such as police officers, border guards, social services and labour inspectors, are trained to identify trafficked people and to co-operate.⁴² State authorities should act proactively in order to uncover potential situations of human trafficking. This means that

39 *Supra* n 9 at para 284.

40 *Ibid.* at para 285 ('member States are required to put in place a legislative and administrative framework to prohibit and punish trafficking. The Court observes that the Palermo Protocol and the Anti-Trafficking Convention refer to the need for a comprehensive approach to combat trafficking which includes measures to prevent trafficking and to protect victims. . . . The extent of the positive obligations arising under Article 4 must be considered within this broader context').

41 The Court in *Rantsev v Cyprus and Russia*, *ibid.* at para 286, found that States' positive obligations towards trafficking victims begin when 'the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited'.

42 OSCE Ministerial Council, Decision No 8/07 Combating Trafficking in Human Beings for Labour Exploitation, 30 November 2007, at para 4; OSCE Permanent Council, Decision No 557/Rev 1 OSCE Action Plan to Combat Trafficking in Human Beings, 7 July 2005, at Chapter III para 5, Chapter V para 3, Addendum para 5; Article 10 Palermo Protocol; Articles 10(1) and 29(3) Council of Europe Convention; Preamble, recital 25 and Article 9(3) Directive 2011/36/EU.

prosecutors must take the initiative in ensuring that enquiries are made regarding the circumstances of the suspect and of their apprehension.⁴³

In furtherance of the non-punishment principle, as soon as there is a reasonable suspicion that a person might have been trafficked, any order to remove that person from the country should be suspended⁴⁴ and that person should receive essential assistance and support in accordance with their needs and entitlements, including access to independent legal advice regarding their situation. Article 12.1 of the Council of Europe Convention provides:

Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least: . . . (d) counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand.

The ILO Protocol to the Forced Labour Convention (2014) includes specific action against trafficking in persons⁴⁵ and affirms that Member States

shall take effective measures for the identification, release, protection, recovery and rehabilitation of all victims of forced or compulsory labour, as well as the provision of other forms of assistance and support.⁴⁶

A similar obligation exists under EU law⁴⁷ and several soft law standards also reiterate this provision.⁴⁸

43 *R v O* [2008] EWCA Crim 2835.

44 Article 10 Council of Europe Convention on Action against Trafficking in Human Beings 2005, at para 3 specifies that '[w]hen the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age'.

45 Article 1.3 ILO Protocol to the Forced Labour Convention No 29 provides: 'The definition of forced or compulsory labour contained in the Convention is reaffirmed, and therefore the measures referred to in this Protocol shall include specific action against trafficking in persons for the purposes of forced or compulsory labour'.

46 Article 3 ILO Protocol to the Forced Labour Convention No 29.

47 Article 11.5 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. See also, more generally, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

48 Guidelines 2, 5 and 6 UN Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking, 20 May 2002, E/2002/68/Add.1; OSCE Ministerial Council, Decision No 8/07 Combating Trafficking in Human Beings for Labour Exploitation, 30 November 2007, at para 3; OSCE Ministerial Council, Decision No 5/08 Enhancing Criminal Justice Responses to Trafficking in Human Beings through a Comprehensive Approach, 5 December 2008, at para 10; OSCE Permanent Council, Decision No 557/Rev 1 OSCE Action Plan to Combat Trafficking in Human Beings, 7 July 2005, at Chapter IV para 6.1.

7. THE SCOPE OF THE NON-PUNISHMENT PRINCIPLE⁴⁹

The scope of the non-punishment principle should be assessed from two perspectives: which types of punishment/penalty are covered; and which crimes/offences are covered?

A. Penalties

The principle of non-punishment is not just about non-prosecution, which may result in fines or imprisonment as well as leaving the trafficked person with a criminal record. Other possible penalties include administrative detention or limitations on freedom of movement, such as ‘detention in closed shelters’.⁵⁰ Such detention may violate human rights law. Article 9 of the International Covenant on Civil and Political Rights provides, in part:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law. . .

Article 9 prohibits arbitrary detention—detention not otherwise justified by law. Failure by the State to identify and assist a trafficked person may lead to violation of the prohibition of arbitrary detention where they are detained in relation to the commission of an offence, because it is both inappropriate and unjust.⁵¹ Mechanisms for the prompt and effective recognition of victims reduce the chances of a State violating this duty.

The issue is also addressed in the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking.⁵² Principle No 7 provides that trafficked persons ‘shall not be detained’ for the illegality of their entry or presence in another country, nor for their involvement in unlawful activities to the extent that this is a ‘direct consequence’ of their being trafficked persons. The Guidelines go further:

- Guideline 1.5 provides that States should ‘consider . . . [p]rotecting the right of all persons to freedom of movement and ensuring that anti-trafficking measures do not infringe upon that right’.

49 Children are particularly vulnerable to abuse and exploitation, including trafficking. They are also particularly vulnerable when they come into contact with the State. They have special rights of care and protection, including education and the ‘best interests’ principle, which is required to be applied to all decisions affecting children. The application of the non-punishment principle with regard to children therefore raises particular and special issues, which are not addressed in this article.

50 This practice has been identified as a major shortcoming in the treatment of trafficked people: see Global Alliance against Traffic in Women, *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007) at 22; Gallagher and Pearson, ‘The High Cost of Freedom: A Legal and Policy Analysis of Shelter Detention for Victims of Trafficking’ (2010) 32 *Human Rights Quarterly* 73.

51 United Nations Human Rights Committee, General Comment 35: Liberty and Security of Person (art. 9), 16 December 2014, at para 12: ‘An arrest or detention may be authorized by domestic law and nonetheless be arbitrary. The notion of “arbitrariness” is not to be equated with “against the law”, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law, as well as elements of reasonableness, necessity and proportionality’ (footnote omitted).

52 E/2002/68/Add.1.

- Guideline 2.6 provides that States should 'consider . . . [e]nsuring that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody'.
- Guideline 4.5 provides that States should 'consider . . . [e]nsuring 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'.
- Guideline 6.1 provides that 'Trafficked persons should not be held in immigration detention centres, other detention facilities or vagrant houses'.

These Guidelines are clearly seeking to promote an environment in which trafficked people are recognized as victims of crime who are vulnerable, rather than treated as criminals. While the Guidelines are non-binding, these provisions have been given legal form in the non-punishment provisions of the Council of Europe Convention and the EU Directive of 2011.

Other sanctions and punishments include prohibition of re-entry to the State or even forced repatriation. Where the trafficked person is a non-citizen, then he/she has no automatic right to remain in the destination State, in the absence of some other permissive rule (such as residence entitlements under European Union law). However the trafficked person may well be at risk of being the victim of a serious violation of their human rights in their home country (for instance because of the inability of their State to protect them from traffickers). In such a situation, forced repatriation may breach the prohibition of *refoulement* because of international protection obligations owed to the trafficked person, either because the trafficked person is a refugee⁵³ or else because they qualify for complementary, or subsidiary, protection.⁵⁴

Trafficked persons may also be penalized because they are unable or unwilling to cooperate with the authorities in investigation and prosecution of trafficking offences. In some cases they may be repeatedly penalized because of their prior criminal or administrative records, even if they co-operated with the authorities in the investigation. Such instances include cases where trafficked persons receive an expulsion order as irregular migrants, or when they are convicted of offences related to

53 UNHCR, Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, HCR/GIP/06/07, 7 April 2006; Piotrowicz, 'The UNHCR's Guidelines on Human Trafficking' (2008) 20 *International Journal of Refugee Law* 242 at 245–51; Dorevitch and Foster, 'Obstacles on the Road to Protection: Assessing the Treatment of Sex-Trafficking Victims under Australia's Migration and Refugee Law' (2008) 9 *Melbourne Journal of International Law* 1.

54 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection. The Directive has been recast: see Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast); Piotrowicz, 'Victims of People Trafficking and Entitlement to International Protection' (2005) 24 *Australian Year Book of International Law* 159 at 174–9; Edwards, 'Traffic in Human Beings: At the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labour' (2007) 36 *Denver Journal of International Law and Policy* 9 at 36–8.

their trafficking. As a result of these penalties, trafficked persons may have administrative and/or criminal records with lasting negative consequences, such as being an impediment to them receiving or extending a residence permit, or affecting their ability to travel.⁵⁵ Furthermore, having a criminal record may have adverse consequences for a trafficked person should they return to their home country.

B. The Crimes/Offences Covered

The non-punishment principle covers offences committed in the process of being trafficked (causation-based offences), as well as offences not connected with the act of trafficking but which the victim has been compelled to commit, as lacking autonomy in their acts (duress-based offences).⁵⁶ In fulfilling the duty of non-punishment, national legislation and guidelines for prosecutors and judges should include both types of offence.

It is not possible to establish a comprehensive list of offences that victims may commit in the course, or as a consequence, of being trafficked. People are trafficked to be exploited and the offences they may commit are usually linked to this. Nevertheless, certain offences are more common. These include the violation of immigration law, giving false information to obtain travel documents, work permits and residence permits, illegal crossing of state frontiers and overstaying beyond the period of the visa, as well as violating labour and social security legislation.

Offences committed as a consequence of being trafficked include those committed in the course of being trafficked, where the traffickers were already coercing the victim. Such offences include those related to the type of exploitation for which the victim has been trafficked. Thus, victims forced into prostitution may have no authorization (where this is required) to do this work, or they may be working in violation of the State's laws on prostitution. Agricultural and construction workers may have no work permit. Children may be committing thefts. Beggars may be acting in violation of local laws. Victims may be engaged in the illicit production of counterfeit goods or drugs, as well as in violent crime.

Where the connection between the offences listed above and the trafficked person's situation seems clear enough, the non-punishment principle should apply. However, we suggest that the principle should go further. A trafficked person may be involved in prohibited conduct that is not a direct consequence of coercion exerted by traffickers but is, nevertheless, linked to the trafficking experience. This may happen in situations when a victim escapes the influence of a trafficker, in which case recourse to offending may well be a result of the perceived absence of meaningful alternatives to escape exploitation; in such cases, the non-punishment principle should also apply.⁵⁷ This will not always be an easy judgment. If a trafficked person

55 For a discussion of this issue, see Bureau of the Dutch National Rapporteur on THB, Seventh Report of the Dutch National Rapporteur (2010) at 233–5.

56 Working Group in Trafficking in Persons, Non-punishment and non-prosecution of victims of trafficking in persons: Administrative and judicial approaches to offences committed in the process of such trafficking. Background paper prepared by the Secretariat, Vienna, 27–29 January 2010, CTOC/COP/WG.4/2010/4, at para 4.

57 This appears to have been the situation in the British case of *L, HVN, THN and T v R* [2013] EWCA Crim 991.

escapes their situation but has no money, should they be accountable for stealing food to eat? What if they steal alcohol?

There is yet another problematic scenario. Perhaps the most difficult situation is where a former victim of trafficking has himself/herself been involved in trafficking or exploitation of another individual, a phenomenon described as ‘a cycle of abuse’.⁵⁸ The traffickers manipulate their victims to make them assist in the exploitation of others, a deliberate strategy to retain control over victims and to make them even more afraid to seek help. There may not always be evidence that the victims were compelled to participate as a consequence of having been trafficked and having no real option but to submit to the trafficker.

The State has a legitimate interest in preventing such offences and apprehending offenders. However, where a trafficked person has committed an offence as a direct consequence, or as a result, of being trafficked, consideration should be given to the extent to which the offence is connected with the trafficking of the victim and their lack of autonomy. Where such a connection exists, the State, it is suggested, should acknowledge this through the non-punishment principle: it must keep them immune from prosecution, detention and the application of a penalty.

It has been argued that as there is no exhaustive list of offences that might be committed by victims of trafficking in the course, or as a consequence, of being trafficked, and since new forms of exploitation may, and do, emerge, States should consider adopting an open-ended list of offences typically related to trafficking in human beings, with regard to the commission of which trafficked persons shall be immune from punishment. Such a list, it has been suggested, should not be exclusive, and the duty of non-punishment should apply to any offence so long as the necessary link with trafficking is established.⁵⁹

This raises the important question: should the principle apply to the most serious offences of violence, such as murder or rape? How far does it go? What if the trafficked person is told that she must pull the trigger, and kill another trafficked person, or else face death herself? In international criminal law, the position is not so clear: depending on where one looks for precedent, a person who has committed an offence under perhaps extreme duress may benefit only from mitigation of sentence, or may walk free.

The Statute of the International Criminal Court allows complete exoneration in certain circumstances. Article 31.1 provides, in part:

[A] person shall not be criminally responsible if, at the time of the person’s conduct: . . .

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this

58 *LM, DG, Betti Tabot and Yutunde Tijani v The Queen* [2010] EWCA Crim 2327, at para 13, approved in *R v N; R v Le* [2012] EWCA Crim 189 at para 14.

59 OSCE, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (2013) at para 57.

threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.

Such a threat may either be:

- i. Made by another person; or
- ii. Constituted by other circumstances beyond that person's control.

This provision clearly allows for exoneration if the conditions, admittedly strict, are met. However, the International Criminal Tribunal for the Former Yugoslavia (ICTY) took a different stance. In *Erdemovic*, the Tribunal held (by a majority):

[D]uress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings.⁶⁰

This is also the position of the UK Ministry of Defence:

[T]he more serious the crime, or the accused's part in it, the greater and more irresistible must be the duress before it can be regarded as affording a defence. It is a general principle of law that an individual is not permitted to avoid suffering or even to save his own life at the expense of the life of another. If duress does not amount to a defence it may be considered in mitigation of punishment.⁶¹

In situations where the perpetrator has no real choice, we have a difficult choice: to follow the ICC and many civil law jurisdictions, which would recognize that there might be no criminal responsibility even for pulling the trigger; or to follow the position in many common law jurisdictions, and allow only mitigation of punishment. The human rights and victim-centred approach to non-punishment in the context of THB suggests complete exoneration based on the lack of free will of the victim; however, this may be challenged by a really hard case: where the victim of THB has been forced to commit a very serious crime, such as murder.

It is indeed challenging to suggest that a person should be exonerated for taking the life of another. But national and international laws allow this in certain situations. In some countries, the death penalty remains in force; and human rights law does not say that the exercise of the death penalty violates the right to life, so long as the necessary legal tests have been satisfied. In armed conflicts, combatants may legitimately kill one another; that is what they are there for. And of course, all legal systems acknowledge the right to use reasonable force in self-defence where there is no realistic alternative; and such force may even involve taking the life of another where the threat is great enough.

60 *Prosecutor v Erdemovic* ICTY (Appeals Chamber), Judgment, 7 October 1997, at para 19.

61 UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004) at para 16.42.2.

The real test for a court will be the very hard case where the accused person is able to provide convincing evidence that they killed another because they were acting under extreme duress—for instance because their own life was threatened, or because they had been subjected to an extended period of serious violent abuse which over time caused them to become increasingly fearful. It may indeed be a very difficult conclusion for a court to reach—that a person who has killed another should be exonerated because they were not a free agent—but perhaps it is better that this should be a matter of evidence, that the onus be on the trafficked person to demonstrate that their act was justified because of the extreme danger to them—rather than to say that, on principle, an accused victim of trafficking can never in such circumstances avoid punishment.

One such extreme case occurred in the Netherlands in the *Mehak* case, in which a couple exploited three adults for domestic servitude, and one of the traffickers (the mistress of the house) and the three victims were involved in the abuse of an 18-month-old infant, causing his death. Two of the victims of trafficking were parents to the child and the third was a cousin. The Court found it to be a case of human trafficking and also recognized that ‘the situation of exploitation underlying the proven human trafficking must also be deemed to have created a breeding ground for the ultimate violence towards [the child].’⁶² While recognizing the link between the offences committed by the three victims and their situation as victims of trafficking, the Court found that one of them—the mother—had played a substantial role in the neglect and escalating violence against the child. She was sentenced to eight years’ imprisonment; the other two were convicted, inter alia, of being accessories to premeditated assault causing the death of the child, and sentenced respectively to six and three years’ imprisonment. The Court of first instance recognized that the three victims were dependent on and controlled by the traffickers, and that they felt they had no other option but to submit to them. They played different roles in the mistreatment of the child (one of them had a lesser role). The Court took into account their trafficking situation as mitigating circumstances, but made no reference in the judgment to the non-punishment provision.⁶³ It would seem that the gravity of the offence against an infant was deemed by the Court to justify the prosecution and sentencing of the victims.

The main defendant appealed the case, invoking psychological force beyond her control and the non-punishment principle. The Hague Court of Appeal recognized the situation of exploitation of the defendant, but rejected the defence of psychological forces beyond control on the grounds that the suspect ‘could reasonably have been expected to look for ways of sparing the health and life of the victim.’⁶⁴ The Hague Court also found that the non-punishment principle was not applicable in view of the seriousness of the offence and of the fact that the assaults and

62 Dutch National Rapporteur on Trafficking in Human Beings, *Trafficking in human beings: Seventh Report of the Dutch National Rapporteur* (2010), see the *Mehak* case, The Hague District Court, 14 December 2007, LJN: BC1195 at 229.

63 *Ibid.* at 229–31, 509–11. At the time of the judgment, The Netherlands had signed the Council of Europe Convention but had not ratified it.

64 National Rapporteur on Trafficking in Human Beings, *Trafficking in Human Beings: Case law on trafficking in human beings 2009-2012: An analysis* (2012) at 133.

manslaughter of the victim were not sufficiently directly connected ‘with the work that the suspect had to perform during the exploitation’.⁶⁵

It is worth noting that the The Hague Court of Appeal seemingly did not examine the connection between the offence and the lack of autonomy of the victim because of the control exerted by the trafficker. In presenting this case, the Dutch National Rapporteur interestingly notes that the The Hague Court of Appeal

reviewed the non-punishment-principle defence in relation to the work that the suspect had to perform and not in relation to the degree of control the human traffickers exercised over the suspect and the degree to which they could influence her freedom to make her own choices. This does not appear to correspond with the intention of the non-punishment principle.⁶⁶

The case was further referred to the Supreme Court, which rejected the appeal argument that The Hague Court of Appeal should have applied the non-punishment principle.

8. THE NON-PUNISHMENT PRINCIPLE IN EUROPEAN NATIONAL LAW

As part of its mandate to monitor compliance with the Council of Europe Convention, GRETA has assessed the application of the non-punishment principle in States party to the Convention. A questionnaire was sent to each country monitored in the first evaluation round, which ran between 2010 and 2014.⁶⁷ Question 52 states:

Please describe how your internal law provides for the possibility of not imposing penalties on victims of THB for their involvement in unlawful activities, to the extent that they were compelled to do so, as provided for in Article 26 of the Convention.

Altogether, 42 countries were monitored by GRETA.⁶⁸ The overall picture is varied. Some countries have measures in force that specifically address the non-punishment provision with regard to victims of trafficking, or else introduced such a measure after the evaluation by GRETA.⁶⁹ That is not to say that all such measures fully recognize the non-punishment principle or that it is fully respected in practice. All other countries that were monitored reported that their criminal law recognized the possibility that a person might have committed an offence under duress, fear or some other extreme pressure, and that, such circumstances might be taken into account at some stage or another in proceedings. However, in some cases, that is clearly not enough

65 Ibid.

66 Ibid.

67 GRETA, Questionnaire for the evaluation of the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Parties, (2010)1 rev 4.

68 The evaluation reports are available at: www.coe.int/t/dghl/monitoring/trafficking/Docs/Publications/Evaluations_en.asp [last accessed 17 August 2016].

69 Albania, Armenia, Azerbaijan, Belgium, Bulgaria, Cyprus, Georgia, Luxembourg, Moldova and Romania.

to bring the State into compliance with the Convention (nor, for that matter, with the EU Directive).

A significant number of countries reported that they had no case law on non-punishment because, in recognition of the non-punishment principle, no prosecutions had been brought. Others reported that they had not encountered any cases where victims of trafficking had been forced to commit offences. That, of course, does not mean that such cases do not exist. There is no doubt that some victims of trafficking are being penalized for trafficking-related offences either because the relevant authorities are unaware of the principle's applicability, or because they fail to apply it appropriately.

Case law in some European countries shows that prosecutors and judges have recognized and applied the non-punishment provision in specific trafficking cases, and that much depends on the accurate identification of a victim of trafficking, on when such identification occurs, as well as on a careful examination of the circumstances of the individual case.⁷⁰ National legislation on non-punishment and available case law also confirm diverse and often restrictive interpretations of the scope of application of the non-punishment principle.⁷¹

By way of example, a 2007 criminal policy directive from the Belgian Board of Public Prosecutors states that

even if persons exploited within the framework of trafficking in human beings are in breach of social legislation or legislation governing access to, stay in and settlement on the territory, they should be considered above all as victims of forms of crime that must be combated as a priority.⁷²

In 2012, the Belgian National Rapporteur on THB examined the application of the non-punishment principle in a number of trafficking cases, such as those where victims were compelled to use false documents, or in which victims were coerced into participating in the sexual exploitation of other victims. Building on this analysis, the

70 See, for example, the case law reported in Centre for Equal Opportunities and Racism, *Trafficking and Smuggling in Human Beings (Belgium)*, *Building Trust 2012 Annual Report of the Independent Rapporteur on Human Trafficking Belgium* (2013) at 14–22. For example, see Criminal Court of Liège, 26 September 2012, confirmed by the Court of Appeal of Liège, 23 April 2013, and Criminal Court of Antwerp, 2 April 2008, on the application of the non-punishment provision in cases related to victims of trafficking for sexual exploitation forced to use false passports. See also the application of the non-punishment provision in a case of trafficking for forced criminality Criminal Court of Turnhout, 17 October 2012, confirmed by Court of Appeal of Antwerp, 24 January 2013.

71 See, for example, the non-punishment provisions in national anti-trafficking legislation of Georgia (*Law of Georgia on Combating Human Trafficking*), adopted on 28 April 2006, entered into force on 16 June 2006, Article 15—Exemption of Victims of Human Trafficking from Liability, which refers to specific offences under the Criminal Code and the Administrative Code such as illegal border crossing and use of forged documents etc); Spain (Article 177(11) of the Criminal Code provides for victim's exemption from liability for offences committed as a direct consequence of their trafficking situation and subject to a proportionality test between their situation and the criminal act perpetrated: see Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Spain, 27 September 2013, GRETA (2013) 16 at paras 250–254). See also England and Wales Court of Appeals, *R v HTB*, EWCA Crim 211 (2012).

72 Centre for Equal Opportunities and Racism, *Trafficking and Smuggling in Human Beings (Belgium)*, supra n 70 at 12.

Rapporteur recommended, inter alia, a revision of the 2007 policy directive to enable its application also in cases in which victims committed other offences linked to their situation as victims of trafficking, and to better respond to the growing number of trafficking cases for forced criminality, such as theft or selling drugs.⁷³

The Netherlands also do not have a specific non-punishment provision for victims of trafficking; however, in 2013, there were discussions about including the fact of being a victim of trafficking in the prosecutorial instructions on the use of grounds for deciding not to prosecute.⁷⁴ The case law examined by the Dutch Rapporteur on THB highlights the challenges of dealing with cases of forced criminality (for example, exploitation in theft or in drug-related offences), where victims may more often be seen as offenders rather than victims. However, there were also cases in which victims of trafficking for sexual exploitation were compelled to perform certain tasks (eg instructing other victims, collecting money from other victims) to assist their traffickers, and, where evidence of such compulsion was produced, victims were not prosecuted.⁷⁵

In some cases, victims committed an offence not under coercion but to escape from their trafficking situation; in these cases, the recognition of their victimhood and of the fact that they had no alternative may be difficult for prosecutors and judges.⁷⁶ The existing general provisions on defences do not easily allow an effective and full application of the non-punishment provision, as the notion of compulsion in a trafficking case is broader than that foreseen in those general provisions and is not entirely appreciated. Prosecutors and judges may fail to appreciate the full array of circumstances in which a victim acts without autonomy and commits an offence because of their trafficking situation. In addition, producing evidence that the offence was committed under compulsion linked with the trafficking situation may prove difficult.

There has been a string of decisions emanating from the UK in the last few years, in which the non-punishment principle has been recognized and applied. In all jurisdictions (England and Wales, Scotland, Northern Ireland), guidance for prosecutors indicates the need to take account of the fact that an accused person or suspect may have been trafficked, but implementation has not been ideal.⁷⁷ This in part explains the important case law that has emerged.

These cases demonstrate an increasing readiness on the part of the UK courts to accept that trafficking-related offences may not have been committed by free, autonomous agents and that, accordingly, consideration must be given to reflecting this in the assessment of responsibility.

73 Ibid. at 122.

74 Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children (2013), Trafficking in Human Beings: Ninth Report of the Dutch National Rapporteur, 2013 (at 121).

75 Bureau of the Dutch National Rapporteur on THB, supra n at 218–26.

76 See, for example, the discussion on the application of Article 26 in England and Wales Court of Appeal, *Case of LM, MB, DG, Betti Tabot and Yutunde Tijani v The Queen* [2010] EWCA Crim 2327.

77 GRETA, Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom, 12 September 2012, GRETA(2012)6, at paras 324–335, available at: www.coe.int/en/web/anti-human-trafficking/united-kingdom [last accessed 17 August 2016].

The first case, *R v O*,⁷⁸ was decided by the Court of Appeal for England and Wales before the UK had ratified the Council of Europe Convention (although it had signed it). The appellant had been imprisoned after pleading guilty to possession of a false identity card with intent to use it as her own. It became clear that the appellant had been trafficked into the UK, and that she had been attempting to escape from the traffickers by leaving the UK using the false documentation. Her dilemma was not entirely because of the accusations against her; she was also afflicted by incompetent defence lawyers at trial. The appeal was successful, partly because of the link between the offence and the appellant's status as a trafficked person. The Court of Appeal found, *inter alia*:

No consideration was given by the defence as to whether she might have a defence of duress. The possibility that she might have been trafficked was ignored. There is nothing in the transcript to suggest that any thought had been given to the State's possible duty to protect her as a young victim.⁷⁹

This case is, to the best of our knowledge, the first reported British decision in which the victim's status as a trafficked person played a substantive role in the outcome as far as non-punishment is concerned.

The principle had a cameo appearance in a decision of the UK's Upper Tribunal (Immigration and Asylum Chamber) in a case involving the status of former victims of trafficking from Thailand.⁸⁰ In that case, the appellant had been prosecuted and imprisoned for using a false passport. The Tribunal's brief assessment of this fact suggests that it accepted that the UK was now bound by the Council of Europe Convention to apply the non-punishment principle:

Although there is a non-punishment provision in the Convention, the appellant was prosecuted for using a false passport and sentenced to nine months in prison. We accept, however, that this was not a breach of the Convention by the respondent as he was not aware at the time of the prosecution that the appellant was a victim of trafficking as she did not disclose this fact until after her sentence was completed.⁸¹

Clearly, had the authorities been aware that the accused had been trafficked, they would have been obliged to take this into account. Furthermore, it should be noted that authorities cannot simply depend on self-identification by victims in order to fulfil their obligations; they may have to take positive steps themselves.⁸²

Later, in 2010, the application of Article 26 of the Council of Europe Convention finally received closer scrutiny from the Court of Appeal for England and Wales. *R v LM and Others*⁸³ involved five cases in each of which the defendants were, or had

78 [2008] EWCA Crim 2835.

79 *Ibid.* at para 25.

80 *AZ V Secretary of State for the Home Department* [2010] UKUT 118 (IAC).

81 *Ibid.* at para 170.

82 Article 10 Council of Europe Convention on Action against Trafficking in Human Beings.

83 [2010] EWCA Crim 2327.

been, victims of trafficking. The implementation of Article 26 was said to be achieved through three mechanisms: first, the common law defences of duress and necessity; secondly, specific guidance for prosecutors in considering whether to bring charges against victims of trafficking; thirdly, in the event that the prosecution should make a misjudgement in prosecuting a case (for instance through failure to apply the non-punishment principle correctly), the power of the court to stay the prosecution for abuse of process.⁸⁴

The construction of Article 26 by the Court requires some consideration. It said:

It is necessary to focus upon what Article 26 does and does not say. It does not say that no trafficked victim should be prosecuted, whatever offence has been committed. It does not say that no trafficked person should be prosecuted when the offence is in some way connected with or arises out of trafficking. It does not provide a defence which may be advanced before a jury. What it says is no more, but no less, than that careful consideration must be given to whether public policy calls for a prosecution and punishment when the defendant is a trafficked victim and the crime has been committed when he or she was in some manner compelled (in the broad sense) to commit it. Article 26 does not require a blanket immunity from prosecution for trafficked victims.⁸⁵

It is certainly the case that trafficked people do not enjoy a blanket immunity from prosecution. As has already been stated, they should be just as accountable as anyone else for crimes for which they are responsible. But that is just the point—where a person has been trafficked, there is a good likelihood that they are not responsible because they are not acting with free will. The Court stated that careful consideration must be given to whether public policy calls for prosecution and punishment. But surely, if the offence is clearly linked to the trafficking situation, and the trafficked person really had no choice, then public policy would have to require that there should be no prosecution or punishment. This calls for a very careful scrutiny of all the relevant evidence. It certainly does not mean that all proceedings must automatically be stopped just because it emerges that the accused has been trafficked. However, it is suggested that they should at least be suspended to allow a full investigation into the circumstances. It will also require that an assessment be made about the extent of control being exercised by the traffickers. In making this assessment, account must be taken of the vulnerability of the victim,⁸⁶ which may be extreme, and not only in the case of children (who may in any case be below the age of criminal responsibility). Where it is clear that the trafficked person in all the circumstances had no real choice but to commit the offence, there should be no punishment.

The Court of Appeal also allowed for the situation where a prosecution might have been initiated in neglect of the fact that the defendant had acted because of

84 Ibid. at para 7.

85 Ibid. at para 13.

86 See United Nations Office on Drugs and Crime, Guidance Note on 'abuse of a position of vulnerability' as a means of trafficking in persons in 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 (2012).

their situation as a trafficked person. The Court may stay (halt) the proceedings on grounds of abuse, that is, where a legal process to which a person is entitled, or to which he or she has a legitimate expectation, has been neglected to their disadvantage.⁸⁷ In the view of the Court,

[t]he treaty obligation . . . under Article 26 is not an obligation to grant immunity, but rather an obligation to put in place a means by which active consideration is given to whether it is in the public interest to prosecute. We accept that the power to stay for ‘abuse’ exists as a safety net to ensure that this obligation is not wrongly neglected in an individual case to the disadvantage of the defendant.⁸⁸

Of course, such options may not be available in all legal systems, or where available may be applied in a quite restrictive manner. However, what is of wider significance is the willingness of the Court to apply existing procedures for the benefit of the trafficked person, where appropriate, and this is something positive that should be noted. While it is quite positive that the Court in this case was willing to apply existing procedures for the benefit of the trafficked person, one should also recognize that without a specific non-punishment provision for trafficked persons, the application of this principle may not always be effective. There is a real need for a specific non-punishment provision because (and we are not referring to any particular country) the defence of duress appears to be used only rarely in trafficking cases; moreover, the defence may sometimes be too general to ensure effective implementation of the non-punishment principle.

In *R v N, R v Le*,⁸⁹ also before the Court of Appeal for England and Wales (Criminal Division), an important aspect of Article 26 was stressed. Referring to the wording of the provision—where the trafficked person has been ‘compelled’ to commit an offence—the Court stated that the notion of compulsion is wider than that of duress under English law; in other words, ‘. . . the possibility of not imposing penalties is related to criminal activities in which the victims of trafficking have been compelled to participate in circumstances in which the defence of duress is not available’.⁹⁰ This means that the circumstances of the trafficked person may leave them no real option but to commit an offence, even if they are not forced to do so under duress of the trafficker.

In 2013, the issue came up again before the Court of Appeal for England and Wales (Criminal Division),⁹¹ which considered the appeals of three children and one adult who had been trafficked into the UK and subsequently prosecuted for offences and convicted. They appealed on the ground that they should not have been convicted because of the close links between their offences and their status as trafficked persons.

87 Ibid. at para 15.

88 Ibid. at para 18.

89 [2012] EWCA Crim 189.

90 Ibid. at para 13.

91 *L, HVN, THN v R* [2013] EWCA Crim 991.

This case also took into account the EU anti-trafficking Directive, which had to be implemented by April 2013, and which also contained a provision on non-punishment (Article 8). The Court stated:

[W]hen 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.⁹²

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'.⁹³ This decision recognized the reality of trafficking and what it does to the victims; how it may even overcome completely their autonomy and capacity for independent action. However, the Court also considered that the culpability of the trafficked person might be diminished but not extinguished:

[C]ulpability may be diminished but nevertheless be significant. For these individuals, prosecution may well be appropriate, with due allowance to be made in the sentencing decision for their diminished culpability.⁹⁴

At least at first sight, this seems reasonable. Prosecutors have to make an assessment of the whole circumstances of the trafficked person and the offence of which they are accused. Is it really possible to say that there are only two options: either that the trafficked person was not at all a free agent, that they had no choice at all, or else that they were acting autonomously and therefore should be held entirely responsible? On the other hand, if indeed prosecutors and courts are to make such assessments, they must do so in full awareness of what it means to be a victim of trafficking, of the levels of intimidation, fear and helplessness that exist. It is difficult to envisage a situation where the trafficked person was partly responsible (which might attract a smaller penalty) rather than not responsible at all.

In 2014, the issue of non-punishment finally reached the UK Supreme Court, in *Hounga v Allen and Another*.⁹⁵ In that case, the appellant had brought an action against a former employer, alleging that the employer had discriminated against her by dismissing her on racial grounds, namely on the ground of nationality, contrary to the Race Relations Act 1976. The employer's defence, upheld by the Court of

92 Ibid. at para 13.

93 Ibid. at para 14.

94 Ibid. at para 33.

95 [2014] UKSC 47.

Appeal, was that the appellant was working illegally in the UK, that the employment contract was illegal, and that accordingly the claim should be dismissed as to uphold it would be to condone the illegality.⁹⁶

In considering the appeal, the Supreme Court concluded that Miss Hounga had probably been trafficked by the respondent into the UK. Lord Wilson, with whom Lady Hale and Lord Kerr agreed, stated, after consideration of the circumstances of Miss Hounga's treatment in the UK by the respondent:

[I]f Miss Hounga's case was not one of trafficking on the part of Mrs Allen and her family, it was so close to it that the distinction will not matter for the purposes of what follows.⁹⁷

There then followed the discussion of the UK's obligations towards victims of trafficking, including their protection.

The Supreme Court unanimously allowed the appeal. It decided that the illegality defence could not apply in this case because to allow it would be to defeat a prominent strain of public policy—that trafficked people should be protected. Lord Wilson stated:

[T]he decision of the Court of Appeal to uphold Mrs Allen's defence of illegality to her complaint runs strikingly counter to the prominent strain of current public policy against trafficking and in favour of the protection of its victims. The public policy in support of the application of that defence, to the extent that it exists at all, should give way to the public policy to which its application is an affront.⁹⁸

This ruling did not explicitly apply the non-punishment principle. It said, more generally, that the public policy of protecting victims of trafficking, founded upon human rights law and in particular the Council of Europe Convention and relevant decisions of the European Court of Human Rights, should take precedence over the policy, reflected in the defence of illegality, of not allowing an offender to succeed in their action before the courts. To the extent that the non-punishment principle is an integral part of the regime for the protection of victims of trafficking, it has been indirectly recognized by the decision.

Lord Hughes (with whom Lord Carnath agreed) allowed the appeal on different grounds. The principle was considered explicitly by Lord Hughes, who stated:

None of the international instruments [the Palermo Protocol, the Council of Europe Convention and the EU Directive], nor any rule of English criminal law, provides any automatic defence to a trafficked person who commits a criminal offence. . . . The mechanism of the instruments is different. The

96 Ibid. at para 4.

97 Ibid. at para 49.

98 Ibid. at para 52.

second and third of them (although not the first) stipulate that signatory States must have a system which allows for the discretionary non-punishment of those who have committed offences which they were compelled by their trafficking to commit. This is particularly necessary in the several European countries where it is a general principle of the criminal law that prosecution must follow the commission of any offence . . . but it also applies in England and Wales where the Crown always has an *ex post facto* discretion to decide against prosecution if it is not judged to be in the public interest.⁹⁹

Lord Hughes then quoted the non-punishment provisions of the Council of Europe Convention and the EU Directive, and concluded:

Thus, the internationally recognised rule is clear, as in English criminal law. The trafficked victim . . . is not relieved of criminal liability for an offence which she has committed. If, however, she was compelled to commit it as a direct consequence of being trafficked, careful consideration ought to be given to whether it is in the public interest to prosecute her.¹⁰⁰

These provisions clearly give some kind of discretion to the relevant authorities as to whether to prosecute; in England and Wales the decision will be based on whether or not it would be in the public interest. The potential problem with regard to this is that, conceivably, even if a person has clearly been trafficked, a decision might still be taken that it is *nevertheless* in the public interest (because of other considerations) to prosecute. In our view, such a decision would run the risk of violating the non-punishment principle, which is founded on the lack of responsibility of the trafficking victim for their actions because of the control exerted on them by the traffickers. One might construe the principle thus: 'States have an obligation to keep victims immune from punishment where their crime was caused or directly linked to their having been trafficked, and States have a degree of discretion only regarding how to implement the requirement not to punish, according to their national legal systems'.¹⁰¹

In the context of England and Wales, this would in our view mean that the prosecution service would be obliged to not prosecute, or to discontinue a prosecution, where the offence was shown to be linked to the person's situation of having been trafficked; this would be in the public interest. Referring specifically to Miss Houna, Lord Hughes added:

99 Ibid. at para 63.

100 Ibid. at para 64. In *Win Lin v Governor of Cloverhill Prison and Others* [2014] IEHC 214 at para 55, Hogan J of the High Court of Ireland also took the view that Article 8 of the EU Directive conferred no obligation not to prosecute, but rather ensured that prosecutors are 'entitled to stipulate that no prosecution will take place where a trafficked person has been compelled to commit crimes which are as a direct result of having been trafficked'.

101 OSCE, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the implementation of the non-punishment provision with regard to victims of trafficking* (2013) at para 14.

‘[W]hat her trafficking, if that is what it was, does not do is take away the illegality of what she knowingly did’.¹⁰²

In concluding, Lord Hughes found that Miss Hounga should succeed in her appeal, not because of the priority to be given to the public policy of protection victims of trafficking, but rather because there was insufficient connection between the immigration offences she had committed and her claim for the statutory tort of discrimination. But then came the sting in the tail. In his final sentence, Lord Hughes took the view that the non-punishment principle should not apply because the appellant ‘[did] not appear to have been compelled to commit the immigration offences which she certainly did commit’.¹⁰³

What is the impact of this decision? It recognizes the existence of the principle of non-punishment for victims of trafficking. But in any case that is not controversial. The real issue is the extent to which there is a duty upon States to apply it. We would argue that there is, in effect, under international law a duty not to punish, which means that the trafficked person is not liable. The duty is based on recognition of the human rights of the victims of trafficking and acknowledgement of their lack of responsibility for their actions.¹⁰⁴

This view appears to be supported by GRETA, which has argued that ‘[c]riminalization of victims . . . contravenes the State’s obligation to provide services and assistance to victims’.¹⁰⁵ That said, a more restrictive approach has been taken in England and Wales. The Modern Slavery Act received royal assent in March 2015. When it comes into force, Section 45 of the Act will create a statutory defence for persons who are compelled to commit offences and that ‘the compulsion is attributable to slavery or to relevant exploitation’. Schedule 4 of the Act however includes a lengthy list of offences, including some very serious ones, such as murder, manslaughter, false imprisonment and kidnapping, with regard to which the defence will not be available. This may limit the discretion of prosecutors even where they believe that the person was not acting of their own free will, although general defences will of course remain available.

9. CONCLUSION

The principle of non-punishment for trafficking related offences is now firmly established under European law, although there may remain uncertainties regarding its scope. Both the EU Directive and the Council of Europe Convention place it firmly in the sphere of victim protection. It has been recognized outside Europe, in the ASEAN Convention against Trafficking in Persons, Especially Women and Children, adopted in 2015. While the principle is expressed as a discretionary one, that discretion, it is argued, exists to accommodate the particular requirements of national legal systems. It is a discretion about *how to apply* the principle, not a discretion about

102 *Supra* n 95 at para 64.

103 *Ibid.* at 67.

104 Recital 14 EU Anti-Trafficking Directive.

105 Meeting Report of the 70th meeting of the Committee of Parties, 30 January 2011; THB-CP(2012) RAP7, 9 February 2012, at Appendix II, at para 7.

whether to apply it or not. States which fail to use that discretion in the appropriate manner will be in violation of their international obligation to ensure that victims of trafficking are not punished for offences they were compelled to commit.

It is the problem of States, and should not be the problem of victims of trafficking, how precisely they conform to their obligations. The complexities of any particular national legal system are no excuse for a State's failure to do its duty. Trafficked people should not be punished because of a State's failure to find a way to apply the principle.

In order fully to address the dilemma of trafficked people being punished for offences they committed in the course, or as a consequence of, being trafficked, it is not necessarily enough for States to rely on more general defences such as duress or necessity as there is a real risk of them being applied too narrowly with the effect that victims of trafficking end up being penalized. A specific non-punishment provision applying to victims of trafficking should be introduced by every State in its legislation with the aim of promoting full compliance with the duty. That is precisely the rationale for the inclusion of a specific non-punishment provision in the Council of Europe Convention and the EU Directive.