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Agenda item 3

**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development****Implementation of the non-punishment principle****Report of the Special Rapporteur on trafficking in persons, especially
women and children, Siobhán Mullally****Summary*

The present report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally, was prepared pursuant to Human Rights Council resolution 44/4.

In the report, the Special Rapporteur analyses current challenges in the implementation of the principle of non-punishment. The principle of non-punishment constitutes the cornerstone of an effective protection of the rights of victims of trafficking, however, its non-implementation or deficient implementation measures that deviate the principle from its intended result are still common practice. In the present report, the Special Rapporteur takes stock of previous research conducted under the mandate, as well as submissions of examples of good practices by Member States and the expertise of practitioners. She offers an ample overview of the recognition of the principle in various legal instruments and jurisprudence. She underlines the link between the principle of non-punishment and States' obligation of due diligence and studies the challenges in its application, as well as other forms of punishment outside of criminal proceedings, such as deprivation of nationality, administrative sanctions and detention in closed shelters.

The Special Rapporteur offers States a set of recommendations aimed at supporting them in the adoption of a model of application of the non-punishment principle that is fully compliant with States' obligation to protect victims of trafficking.

* Agreement was reached to publish the present report after the standard publication date owing to circumstances beyond the submitter's control.



I. Activities of the Special Rapporteur

1. In its resolution 44/4, the Human Rights Council extended the mandate of the Special Rapporteur on trafficking in persons, especially women and children, for a period of three years. Siobhán Mullally was appointed as the Special Rapporteur at the forty-fourth session, and she assumed her mandate on 1 August 2020.
2. The following is a selection of the activities carried out by the Special Rapporteur in furtherance of her mandate between 1 August 2020 and 1 May 2021.
3. On 10 and 11 September 2020, the Special Rapporteur delivered remarks on the application of the non-punishment principle at the tenth session of the United Nations Convention against Transnational Organized Crime Working Group on Trafficking in Persons.
4. The Special Rapporteur participated in the Inter-Agency Coordination Group against Trafficking in Persons working group meeting held on 8 October 2020, and she delivered a statement at the principal level meeting of the Coordination Group, held on 15 December 2020.
5. On 19 November 2020, the Special Rapporteur delivered a statement during the stakeholder consultations for the Asia-Pacific regional review of the implementation of the Global Compact for Safe, Orderly and Regular Migration, and, on 10 March 2021, she spoke during the general debate of the Asia-Pacific regional review of the implementation of the Global Compact.
6. On 20 November 2020, the Special Rapporteur participated in a virtual meeting of the 102nd session of the Committee on the Elimination of Racial Discrimination.
7. On 23 November 2020, the Special Rapporteur participated in a closed meeting of the thirty-sixth ordinary session of the African Committee on Experts on the Rights and Welfare of the Child, which was held virtually.
8. On 26 November 2020, the Special Rapporteur took part in a meeting of the twenty-fifth annual session of the Board of Trustees of the United Nations voluntary trust fund on contemporary forms of slavery.
9. On 18 December 2020, a joint statement was issued on the occasion of International Migrants Day to champion the importance of treating all migrants with dignity and providing them with equal access to services, benefits, information and assistance.
10. On 4 and 5 February 2021, the Special Rapporteur organized an expert consultation on the application of the non-punishment principle and the obligation to protect victims of trafficking in persons. She expresses her thanks to all the participants for their assistance in the preparation of the present report.
11. On 1 and 2 March 2021, the Special Rapporteur spoke at the International Seminar on the Fight against Human Trafficking, organized by the Ministry of Foreign Affairs, European Union and Cooperation of Spain.
12. On 3 March 2021, the Special Rapporteur issued a joint statement with other special procedures, urging Nigeria to prioritize specialized rehabilitation measures for the hundreds of abducted children left deeply traumatized after their release and to strengthen protection measures for those at risk.
13. On 8 March 2021, the Special Rapporteur delivered an oral statement at the opening of the twenty-fourth session of the Committee on the Rights of Persons with Disabilities.
14. On 10 March 2021, the Special Rapporteur delivered a statement at the Global Protection Cluster Task Team on Anti-Trafficking spotlight event on the theme, “Understanding and responding to trafficking in persons in internal displacement”.
15. On 20 April 2021, the Special Rapporteur organized a virtual event on protection from trafficking, contemporary forms of slavery and enforced disappearance, including of migrants in Africa and abroad, jointly with African Commission on Human and Peoples’ Rights Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally Displaced

Persons in Africa, the Special Rapporteur on contemporary forms of slavery, including its causes and consequences, and the International Committee of the Red Cross.

16. On 27 April 2021, the Special Rapporteur opened the debate of the thematic round table addressing irregular migration, including by managing borders and combating transnational crime, of the regional review of the implementation of the Global Compact for Safe, Orderly and Regular Migration in Latin America and the Caribbean.

17. In addition, the Special Rapporteur was invited to a number of meetings and consultations, including the Global Protection Cluster Global Protection Forum, held on 16 September 2020, the official launch of the International Survivors of Trafficking Advisory Council, which took place on 25 January 2021, and the launch of a new United Nations Office on Drugs and Crime (UNODC) toolkit for mainstreaming human rights and gender perspectives into criminal justice interventions to address trafficking in persons and the smuggling of migrants, which took place on 10 February 2021. On 12 February 2021, she took part in a virtual event organized by Franciscans International to launch a publication on migration in Central America, Mexico and the United States of America addressing the new dynamics of the caravans, the coronavirus disease (COVID-19) pandemic and serious human right violations, including the smuggling of migrants.

II. Background

18. The principle of non-punishment of victims of trafficking is critical to the recognition of trafficking in persons as a serious human rights violation. Punishment of a victim marks a rupture with the commitments made by States to recognize the priority of victims' rights to assistance, protection and effective remedies. At its core, the non-punishment principle is aimed at ensuring that a victim of trafficking is not punished for unlawful acts committed as a consequence of trafficking. Given the trauma already endured and the fear of reprisals by traffickers, the added fear of prosecution and punishment can only further prevent victims from seeking protection, assistance and justice.¹ Punishment of victims also undermines the fight to combat impunity for trafficking in persons, given that it targets victims rather than perpetrators, limiting both the effectiveness of investigations and the promise of accountability. The Special Rapporteur would like to acknowledge the background research provided by Irish Research Council doctoral scholar, Noemi Magugliani, the expert inputs received at the consultation workshops held on 4 and 5 February 2021 and the written submissions from States, civil society groups and academics. In preparation of the present report, the Special Rapporteur drew on the position paper of the previous mandate holder, Maria Grazia Giammarinaro, entitled "The importance of implementing the non-punishment provision: the obligation to protect victims".

19. The Security Council has repeatedly called upon States not to penalize or stigmatize victims of trafficking for their involvement in any unlawful activities.² In its general recommendation No. 38 (2020) on trafficking in women and girls in the context of international migration, the Committee on the Elimination of Discrimination against Women reiterated the importance of the non-punishment principle and the obligation of States to ensure its application to all victims without exception.³ Failure to respect the principle of non-punishment leads to further serious human rights violations, including detention, forced return and refoulement, arbitrary deprivation of citizenship, debt burdens arising from the imposition of fines, family separation and unfair trial. Ultimately, punishment hinders the possibility of recovery and is a denial of access to justice for trafficked persons. It also limits the effectiveness of prevention measures and limits the implementation of States' obligations of effective prevention. Recognizing those limits, in the Global Compact on Safe, Orderly and Regular Migration, the General Assembly called upon States to facilitate access to justice

¹ CTOC/COP/WG.4/2010/4, paras. 5–6; and CTOC/COP/WG.4/2020/2, paras. 19–22.

² See Security Council resolution 2331 (2016).

³ Committee on the Elimination of Discrimination against Women, general recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration, para. 98.

and safe reporting without fear of detention, deportation or penalty.⁴ Despite those repeated calls, however, the implementation of the non-punishment principle by States has been limited and its scope and content contested.

III. Implementation of the principle of non-punishment

A. General principle of international law

20. The non-punishment principle is a general principle of law, as defined by Article 38 (1) (c) of the Statute of the International Court of Justice.⁵ It is stated in numerous international and regional legal instruments, in domestic legislation and in case law of regional and domestic courts. As a principle, it is essential to the object and purpose of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, namely, to protect and assist victims of trafficking with full respect for their human rights.⁶ It is set out in full in the Principles and Guidelines for Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights (OHCHR):

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.⁷

21. In guideline 2.5 of the OHCHR Principles and Guidelines for Human Rights and Human Trafficking, OHCHR calls upon States and others to ensure that trafficked persons are not prosecuted for violations of immigration laws or for the activities that they are involved in as a direct consequence of their situation as trafficked persons.⁸ In 2011, the General Assembly affirmed the non-punishment principle and urged Member States to refrain from penalizing victims who had been trafficked for having entered the country illegally or for having been involved in unlawful activities that they had been forced or compelled to carry out.⁹ Specifically in the context of forced labour, the Protocol to the Forced Labour Convention, 1930 (No. 29), of the International Labour Organization (ILO) of 2014 requires States parties to take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour.¹⁰ In its resolution 10/3, the Conference of the Parties to the United

⁴ Global Compact for Safe, Orderly and Regular Migration (General Assembly resolution 73/195, annex), para. 26 (e).

⁵ Statute of the International Court of Justice, Art. 38 (1) (c).

⁶ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000; entered into force 25 December 2003), art. 2 (b). A specific reference to the non-punishment principle was proposed for inclusion in the Protocol by the United Nations High Commissioner for Human Rights at the time (A/AC.254/16, para. 17).

⁷ Office of the United Nations High Commissioner for Human Rights (OHCHR), Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1), principle 7. Guideline 5.5 of the Recommended Principles and Guidelines provides that States should guarantee that traffickers are and will remain the focus of anti-trafficking strategies and that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed as a consequence of their situation.

⁸ *Ibid.*, guideline 2.5.

⁹ Updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (General Assembly resolution 65/228, annex), para. 18 (k). See also General Assembly resolution 64/293; and Security Council resolutions 2331 (2016) and 2388 (2017).

¹⁰ International Labour Organization (ILO), Protocol to the Forced Labour Convention, 1930 (No. 29), art. 4 (2).

Nations Convention against Transnational Organized Crime reiterated the non-punishment principle and the importance of access to remedies if victims are punished or prosecuted.¹¹

22. The United Nations human rights treaty bodies have repeatedly called upon States to implement the non-punishment principle and to ensure that victims are provided with protection and remedies. In 2018, the Committee on the Elimination of Discrimination against Women expressed its concern that victims of trafficking in Saudi Arabia were reportedly sometimes arrested, detained and deported for acts committed as a consequence of having been trafficked.¹² In 2019, the Committee on the Rights of the Child urged Australia to ensure that all children subjected to any form of sexual exploitation, sale or trafficking were treated as victims and not be subject to criminal sanctions.¹³

23. Several regional legal instruments also include references to the principle of non-punishment, including the following: Association of Southeast Asian Nations (ASEAN) Convention against Trafficking in Persons, Especially Women and Children, article 14 (7); Council of Europe Convention on Action against Trafficking in Human Beings, article 26; and 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, article 8.¹⁴ Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms incorporates the non-punishment principle, as recognized recently in *V.C.L. and A.N. v. United Kingdom*.¹⁵ As early as 2006, the Organization of American States (OAS) highlighted the obligation of its member States to ensure that victims of trafficking were not prosecuted for participating in illegal activities if they were the direct results of their having been a victim of such trafficking.¹⁶ The Inter-American Principles on the Human Rights of all Migrants, Refugees, Stateless Persons and Victims of Trafficking in Persons provide that States have an obligation to protect and assist migrants who are victims of trafficking, taking into account the gender perspective, the best interests of the child and the non-criminalization of migrants who are victims of the crime of trafficking in persons.¹⁷ The non-punishment principle falls within the protections afforded to trafficked persons in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women,¹⁸ the American Convention on Human Rights¹⁹ and the American Declaration of the Rights and Duties of Man.²⁰ Article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa²¹ requires States parties to implement programmes for the rehabilitation of women who are victims of violence (art. 4 (e)) and to protect women who

¹¹ Conference of the Parties to the United Nations Convention against Transnational Organized Crime, resolution 10/3, entitled "Effective implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime", para. 13 (g).

¹² CEDAW/C/SAU/CO/3-4, para. 35. See also CEDAW/C/KOR/CO/8, para. 24; and CEDAW/C/SUR/CO/4-6, para. 29.

¹³ CRC/C/AUS/CO/5-6, para. 50 (c).

¹⁴ Association of Southeast Asian Nations (ASEAN) Convention against Trafficking in Persons, Especially Women and Children (adopted 21 November 2015; entered into force 8 March 2017); Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005; entered into force 1 February 2008); 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 (5 April 2011).

¹⁵ European Court of Human Rights, *V.C.L. and A.N. v. United Kingdom*, (applications No. 74603/12 and No. 77587/12), judgment of 16 February 2021.

¹⁶ Organization of American States (OAS), Conclusions and recommendations of the first Meeting of National Authorities on Trafficking in Persons, held in Island Margarita, Bolivarian Republic of Venezuela, held from 14 to 17 March 2006, para. 7.

¹⁷ Inter-American Commission on Human Rights resolution 4/19 of 7 December 2019, principle 20.

¹⁸ OAS, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (adopted 9 June 1994; entered into force 3 February 1995), arts. 2, 3 and 7 (g).

¹⁹ OAS, American Convention on Human Rights (adopted 22 November 1969; entered into force 18 July 1978), art. 6.

²⁰ OAS, American Declaration of the Rights and Duties of Man (adopted 2 May 1948), art. 1.

²¹ African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July 2003; entered into force 25 November 2005).

are most at risk of trafficking (art. 4 (g)), thereby incorporating the non-punishment principle. The African Committee of Experts on the Rights and Welfare of the Child has repeatedly called upon States to ensure that children trafficked for the purposes of forced criminality are treated as victims and not criminalized.²² The non-punishment principle is essential to the protections provided for in article 5 of the African Charter on Human and Peoples' Rights.²³

24. The non-punishment principle is found in domestic legislation in several jurisdictions, including Albania, Belgium, Cyprus, Ecuador, Egypt, Germany, Greece, Indonesia, the Lao People's Democratic Republic, Kenya, Malawi, Mexico, North Macedonia, Spain, Thailand and Uruguay.²⁴

B. Non-punishment: related legal obligations to trafficked persons

25. The principle of non-punishment is linked to several other legal obligations of States, including that of due diligence and specifically due diligence in the exercise of prosecutorial discretion. Early identification and prompt assessment by trained and qualified individuals is essential to ensuring the effective implementation of States' obligations of non-punishment.²⁵ Those obligations, and that of a human rights-based response to trafficking, are not met when the principle of non-punishment is applied as a mitigating factor in sentencing only.²⁶ As highlighted in the Organization for Security and Cooperation in Europe (OSCE) policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking, mere allowance for mitigation would not amount to compliance with the obligation of non-punishment, because it fails to take account of the victim's true condition.²⁷

26. The obligation of non-discrimination in international human rights law is critical to the principle of non-punishment and to its application across all anti-trafficking measures, including in the exercise of prosecutorial discretion. Trafficked persons who are at greatest risk of punishment are also those at heightened risk of trafficking and re-trafficking. The intersections of gender, race and ethnicity, migration status and poverty are visible in failures to implement the principle of non-punishment and in the contestation by States with regard to its status and scope of application. The obligations arising in international human rights law to eliminate direct, indirect and structural racial discrimination are particularly relevant to the application of the non-punishment principle.²⁸ The OHCHR Recommended Principles and Guidelines on Human Rights at International Borders provide that measures taken to address irregular migration or to counter terrorism, human trafficking or migrant smuggling

²² See, e.g., the concluding observations and recommendations of the African Committee of Experts on the Rights and Welfare of the Child on the initial report of Angola on the status of the implementation of the African Charter on the Rights and Welfare of the Child.

²³ Organization of African Unity, African Charter on Human and Peoples' Rights (adopted 28 June 1981; entered into force 21 October 1986), art. 5.

²⁴ The following list, which is not exhaustive, comprises a sample of State legislation, some of which were shared with the Special Rapporteur following the call for submissions: Albania, Criminal Code, arts. 52 and 52 (a); Belgium, Penal Code, art. 433 *quinquies* (1) (5); Cyprus, Anti-trafficking Law 60(I)/2014, art. 29; Ecuador, Ley Orgánica de Movilidad Humana, art. 119, and Código Orgánico Integral Penal, art. 93; Egypt, Law No. 64 of 2010 on combating human trafficking, art. 21; Germany, Code of Criminal Procedure, art. 154 (c) (2); Greece, Penal Code, art. 323A; Indonesia, Law No. 21 of 2007 on the eradication of the criminal act of trafficking in persons, art. 18; Lao People's Democratic Republic, Law on anti-trafficking in persons of 2015, art. 39; Kenya, Counter Trafficking in Persons Act, sect. 14; Malawi, Trafficking in Persons Act of 2015, sect. 42; Mexico, Ley General para Prevenir, Sancionar y Erradicar los Delitos en Materia de Trata de Personas, art. 37; North Macedonia, Criminal Code, art. 418; Spain, Criminal Code, sect. 177bis, para. 11; Thailand, Anti-Trafficking Act, sect. 41; and Uruguay, Ley Integral de Prevención y Combate a la Trata de Personas No. 19,643 of 2018, art. 40.

²⁵ European Court of Human Rights, *V.C.L. and A.N. v. United Kingdom*, para. 160.

²⁶ A/70/260, para. 32.

²⁷ Organization for Security and Cooperation in Europe, "Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking" (Vienna, OSCE, 2013), para. 76.

²⁸ A/75/590, paras. 55–56.

should not be discriminatory in purpose or effect, including by subjecting migrants to profiling on the basis of prohibited grounds.²⁹ As noted by UNODC in its commentary to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, foreign nationals are overrepresented in the criminal justice systems of many countries: “Trafficked women find themselves behind bars, having been convicted of crimes against public morality, prostitution or breaking immigration rules, although they themselves are the victims of poverty, false promises, coercion and exploitation.”³⁰ Detention, forced return, arbitrary deprivation of citizenship and the imposition of sanctions for immigration offences or engagement in sex work or prostitution violate both the principle of non-punishment and the principle of non-discrimination.

27. The intersection of disability and human trafficking is an area that has been neglected in law, policy and practice. The Committee on the Rights of Persons with Disabilities has highlighted the impact of harmful stereotypes, discrimination and lack of procedural and reasonable accommodations on access to justice and to remedies for persons with disabilities.³¹ States are required to ensure non-discrimination and disability inclusion in all anti-trafficking measures, including in ensuring the non-punishment of trafficked persons with disabilities. That requirement is particularly urgent where persons with disabilities may be at heightened risk of exploitation, including for the purpose of forced criminality.

28. Effective implementation of the non-punishment principle is essential to ensuring that States’ duties to take protective operational measures of assistance and protection, including of non-refoulement, are met. In its decision in *V.C.L. and A.N. v. United Kingdom*, the European Court of Human Rights recognized that prosecution may conflict with the State’s duty to take operational measures to protect a victim, or potential victim, “where they are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual has been trafficked”.³² Highlighting a core purpose of the non-punishment principle, the Court held that it was “axiomatic” that prosecution would be injurious to a victim’s “physical, psychological and social recovery and could potentially leave them vulnerable to being re-trafficked in future”.³³

29. The European Court of Human Rights also highlighted the relevance of the non-punishment principle to the right to a fair trial, protected by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. In *V.C.L. and A.N. v. United Kingdom*, as a consequence of the State’s failures of identification, protection and non-punishment, the applicants were prevented from securing evidence critical to their defence. Given the State’s positive obligation to identify victims of trafficking, it could not be argued that it was the defendants – especially given that they were minors – who were at fault in not informing the police or legal representative that they were victims of trafficking.³⁴ The non-punishment principle is therefore essential to the right to a fair trial. Of particular importance to victims of trafficking are the related rights to equality before the law and to equal protection of the law.³⁵

30. The non-punishment principle is closely linked to the protection of victims of crime and of serious violations of international human rights law and international humanitarian

²⁹ OHCHR, Recommended Principles and Guidelines on Human Rights at International Borders (Geneva, OHCHR, 2014). See also the comments by Special Rapporteur on the Committee on the Elimination of Racial Discrimination draft general recommendation on preventing and combating racial profiling by law enforcement bodies.

³⁰ United Nations Office on Drugs and Crime (UNODC), “Commentary to the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules)” (UNODC, 16 March 2011); see also General Assembly resolution 65/229, rule 66.

³¹ Committee on the Rights of Persons with Disabilities, general comment No. 3 (2016) on women and girls with disabilities; and statement made by the Special Rapporteur on trafficking in persons, especially women and children, to the twenty-fourth session of the Committee, on 8 March 2021.

³² European Court of Human Rights, *V.C.L. and A.N. v. United Kingdom*, para. 159.

³³ *Ibid.*

³⁴ *Ibid.*, para. 200. See also England and Wales Court of Appeal, *R v. O*, case No. EWCA Crim 2385, 2 September 2008.

³⁵ Human Rights Committee, general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, para. 13.

law. States are required to ensure that the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law are applied consistently with international human rights law and international humanitarian law, and without discrimination of any kind or on any grounds, without exception.³⁶

31. Of particular relevance is the requirement under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, to take into account the age, gender and special needs of victims of trafficking in persons, in particular the rights of the child, including in the context of forced criminality. That includes the obligations of States parties to ensure the right of the child to be heard and that the best interests of the child are taken as a primary consideration, also taking into consideration the fact that, in the context of international migration, children may be in particularly disadvantaged and vulnerable situations.³⁷

C. Scope and application of the non-punishment principle: unlawful acts

32. Ensuring a comprehensive response to human trafficking requires that the non-punishment principle is applied to unlawful acts, which are understood broadly to include criminal, immigration, administrative or civil offences, and not “status-related” offences only. Limiting the application of the non-punishment principle only to status-related offences, which directly facilitate the commission of the trafficking offence, does not fulfil the object and purpose of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, or the requirements under international human rights law to ensure the human rights of trafficked persons. In its general recommendation No. 38 (2020), the Committee on the Elimination of Discrimination against Women called upon States to ensure the non-punishment of victims for irregular entry or stay in countries of transit and destination, absence of documentation or for their involvement in unlawful activities to the extent that such involvement was a direct consequence of their situation as victims of trafficking.³⁸ The use of the term “unlawful activities recognizes its application beyond involvement in criminal activities.³⁹ The Conference of the Parties to the United Nations Convention against Transnational Organized Crime highlighted that an essential element of the protection of the rights of trafficked persons is that States do not prosecute or punish trafficked persons for trafficking-related offences, such as holding false passports or working without authorization, even if they consented to hold false documents or to work without authorization.⁴⁰ In its recommendations, the OSCE recognized that trafficked persons were often prosecuted and convicted for civil, administrative or immigration offences, including for their possession of false documents or their illegal entry or stay in a country, and noted that, even an unpenalized conviction was in fact a punishment.⁴¹ In Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011, it is explicitly recognized that: “the expression ‘exploitation of criminal activities’ should be understood as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain”.⁴² That list is not exhaustive, and it indicates the application of the non-punishment

³⁶ General Assembly resolution 60/147, para. 25.

³⁷ Joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 22 of the Committee on the Rights of the Child (2017) on the general principles regarding the human rights of children in the context of international migration, para. 23.

³⁸ Committee on the Elimination of Discrimination against Women, general recommendation No. 38 (2020), para. 98.

³⁹ Council of Europe Convention on Action against Trafficking in Human Beings, art. 26; ASEAN Convention against Trafficking in Persons, Especially Women and Children, art. 14 (7); and OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking.

⁴⁰ CTOC/COP/WG.4/2010/4, para. 10.

⁴¹ OSCE, “Policy and legislative recommendations”, para. 77.

⁴² Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011, recital 11.

principle to forced criminality and as purpose of exploitation and to a range of unlawful acts, including but not limited to status-related offences.

33. The General Assembly has invited Governments to consider preventing, within the legal framework and in accordance with national policies, victims of trafficking, in particular women and girls, from being prosecuted for their illegal entry or residence, taking into account the fact that they are victims of exploitation.⁴³ The Committee on the Elimination of Discrimination against Women and other treaty bodies have repeatedly called upon States parties to ensure the application of the non-punishment principle, in particular in relation to immigration offences, highlighting States' obligations to ensure the identification of victims and effective access to remedies for victims.⁴⁴ The Human Rights Committee, in its concluding observations on the third periodic report of Kuwait, expressed its concern that the anti-trafficking legislation of 2013 did not provide protection from prosecution for victims who fled an abusive employer's residence without permission and who were at risk of arrest, detention and deportation.⁴⁵ The Committee called upon Poland to introduce into its Penal Code a provision to ensure that victims of trafficking were exempt from prosecution, detention or punishment for activities that they had been involved in as a direct consequence of their situation as trafficked persons,⁴⁶ and called upon Kazakhstan to refrain from charging victims of trafficking brought into the country with having violated immigration rules and forcibly repatriating them.⁴⁷ The Committee has also noted that, for trafficked women who are likely to be penalized for their illegal presence by deportation, apprehension effectively prevents those women from pursuing a remedy for the violation of their rights under article 8 of the International Covenant on Civil and Political Rights.⁴⁸

34. Where restrictions on movement that amount to a deprivation of liberty are imposed on victims of trafficking, the obligation of non-punishment is engaged. Rule 66 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders calls upon States to provide the maximum protection to victims of trafficking in order to avoid secondary victimization, in particular of women who are foreign nationals in the State concerned. That is relevant, in particular, in those jurisdictions where a form of "protective custody" is imposed.⁴⁹ According to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, a detained person is defined as any person deprived of personal liberty except as a result of conviction for an offence.⁵⁰ In closed shelters, victims of trafficking are often required to surrender their personal belongings, including money, documents and telephones, and submit to a wide range of rules governing their conduct, with punishments imposed for non-compliance. Such restrictions and deprivation of liberty may be considered forms of punishment and therefore engage the non-punishment principle.⁵¹

35. A principle of non-punishment is also found in the specific protection afforded under article 31 of the Convention relating to the Status of Refugees of 1951, which protects refugees from being penalized for illegal entry and presence and is applicable to trafficked persons who may be entitled to refugee status or other forms of international protection.⁵²

⁴³ General Assembly resolution 55/67, para. 13.

⁴⁴ CEDAW/C/MYS/CO/3-5, paras. 25–26; CEDAW/C/AUS/CO/8, para. 31; and CEDAW/C/KHM/CO/6, para. 29.

⁴⁵ CCPR/C/KWT/CO/3, para. 34 (b).

⁴⁶ CCPR/C/POL/CO/7, para. 28.

⁴⁷ CCPR/C/KAZ/CO/2, para. 34.

⁴⁸ CCPR/C/79/Add.93, para. 16.

⁴⁹ Anne T. Gallagher and Marika McAdam, "Freedom of movement for victims of trafficking: law, policy and practice in the ASEAN region" (ASEAN-Australia Counter-Trafficking, 2020), pp. 3–4. See also Marika McAdam, "Freedom of movement for persons identified as victims of human trafficking: an analysis of law, policy and practice in the ASEAN region" (ASEAN-Australia Counter-Trafficking, 2021), pp. 27–30.

⁵⁰ United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (General Assembly resolution 43/173), p. 1.

⁵¹ ASEAN Convention against Trafficking in Persons, Especially Women and Children, art. 14 (8).

⁵² Convention relating to the Status of Refugees (adopted 28 July 1951; entered into force 22 April 1954), art. 31. See also Cathryn Costello and Yulia Ioffe, "Chapter 51: Non-penalization and non-

The Council of Europe monitoring body, the Group of Experts on Action against Trafficking in Human Beings (GRETA), has repeatedly criticized the application of Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation) to trafficked persons, “contrary to the obligation to assist and protect such victims”.⁵³

36. Limited provision for the non-prosecution of migrants is provided under the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime.⁵⁴ Further references to the non-punishment of migrants of relevance to trafficked persons are found in the practice of United Nations and regional human rights bodies.⁵⁵

D. Application of the non-punishment principle to serious criminal offences

37. The non-punishment principle applies to criminal, civil, administrative and immigration offences, regardless of the gravity or seriousness of the offence committed.⁵⁶ Its effectiveness is undermined when application is limited to minor offences only. GRETA has repeatedly recommended that the non-punishment principle be applied to all offences that victims of trafficking were compelled to commit and has recommended the removal of exceptions.⁵⁷ According to the OSCE recommendations, “the duty of non-punishment applies to any offence so long as the necessary link with trafficking is established”.⁵⁸ Any list of

criminalization”, in *Oxford Handbook of International Refugee Law* Cathryn Costello, Michelle Foster and Jane McAdam, eds. (Oxford, Oxford University Press, 2021), pp. 920–925.

⁵³ Group of Experts on Action against Trafficking in Human Beings (GRETA), “Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Switzerland” (Strasbourg, GRETA, 2019), para. 136; GRETA, “Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Czech Republic” (Strasbourg, GRETA, 2020), para. 161; GRETA, “Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Sweden” (Strasbourg, GRETA, 2018), para. 154.

⁵⁴ Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000; entered into force 28 January 2004), art. 5. See also art. 6 (4).

⁵⁵ Inter-American Court of Human Rights, *Vélez Loor v. Panama* (case No. 12.581) judgment of 23 November 2010, para. 169; A/HRC/20/24, para. 13; A/HRC/13/30, para. 58; New York Declaration for Refugees and Migrants (General Assembly resolution 71/1), paras. 33 and 56; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, general comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families, para. 24; and joint general comment No. 4 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 23 of the Committee on the Rights of the Child (2017) on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return, para. 7.

⁵⁶ Special Rapporteur on trafficking in persons, especially women and children, “The importance of implementing the non-punishment provision: the obligation to protect victims” (2020), para. 41.

⁵⁷ GRETA, “Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom” (Strasbourg, GRETA, 2016), para. 291; GRETA, “Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Denmark” (Strasbourg, GRETA, 2016), paras. 164–165; GRETA, “Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Armenia” (Strasbourg, GRETA, 2017), para. 158; GRETA, “Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Finland” (Strasbourg, GRETA, 2019), para. 202; GRETA, “Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Germany” (Strasbourg, GRETA, 2019), para. 246; GRETA, “Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Romania” (Strasbourg, GRETA, 2016), para. 177.

⁵⁸ OSCE, “Policy and legislative recommendations”, para. 57.

offences relevant to the non-punishment principle in domestic legislation or guidelines therefore must be clearly stated as being non-exhaustive.

38. The failure to explicitly recognize forced criminality as a purpose of exploitation in some jurisdictions may hinder the application of the non-punishment principle. That concern is also relevant to victims/defendants in the context of trafficking for the purpose of sexual exploitation, despite increasing recognition that forced criminality constitutes an entrenched element of trafficking for the purpose of sexual exploitation.⁵⁹ The Special Representative of the Secretary-General on Violence against Children has highlighted the specific vulnerability of children in the context of armed violence in communities, including gang-related violence, noting that children as young as 9 or 10 years of age participate in human trafficking, acting as guides, lookouts or informants. Thereafter they may be required to guard safe houses and prevent escapes; and later, they may be armed to become involved in more dangerous assignments, such as kidnapping and murder.⁶⁰

E. Children's rights, armed conflict and post-conflict situations

39. The Special Representative of the Secretary-General on Children and Armed Conflict has highlighted States' legal obligations not to "doubly victimize" children who have been abducted, recruited, used and exposed to violence at an early age and to ensure that all children associated with parties to conflict and encountered in security operations should be treated primarily as victims, rather than as security threats.⁶¹ Addressing trafficking in situations of armed conflict and in post-conflict situations, in its resolution 2388 (2017), the Security Council urged Member States to refrain from the use of administrative detention of children, especially those who were victims of trafficking in persons, for violations of immigration laws and regulations. In its resolution 2427 (2018), applicable to the treatment of children associated or allegedly associated with all non-State armed groups, including those who commit acts of terrorism, the Security Council called for the establishment of standard operating procedures to ensure their timely handover to civilian child protection actors. Reiterating the focus on child protection, the Council called upon Member States to consider non-judicial measures that were focused on the rehabilitation and reintegration of children as alternatives to prosecution and detention and called for the application of due process for all children detained for association with armed forces and armed groups.⁶² Due process requires the effective implementation of the non-punishment principle.

40. The African Committee of Experts on the Rights and Welfare of the Child has repeatedly called upon States to prioritize the reintegration and rehabilitation of children who are victims of trafficking. Child trafficking is closely linked to the six grave violations affecting children in situations of armed conflict. In such situations, the recruitment and use of children nearly always constitutes trafficking, in the light of the presence of the two required elements, namely, the action (e.g., recruitment or abduction) and the purpose (exploitation). Articles 38 and 39 of the Convention on the Rights of the Child are of particular relevance to children affected by armed conflict and to children who are victims of any form of exploitation, as is the Optional Protocol to the Convention on the involvement of children in armed conflict.⁶³ Children detained for association with armed groups,

⁵⁹ UNODC, "Female victims of trafficking for sexual exploitation as defendants: a case law analysis" (2020), in which Federal Court of Criminal Appeal of Argentina, *Bar California v. Argentina* 40066/2013/T01/CFC2 is cited. In that case, the Court called for increased attention to the role of victims as a gear in criminal organizations.

⁶⁰ Office of the Special Representative of the Secretary-General on Violence against Children, "Protecting children affected by armed violence in the community" (New York, United Nations, 2016), p. 19.

⁶¹ *Ibid.*

⁶² Of relevance also is the restorative justice focus of article 7 of the Statute of the Special Court for Sierra Leone.

⁶³ Convention on the Rights of the Child (adopted 20 November 1989; entered into force 2 September 1990), arts. 38–39. The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (adopted 25 May 2000; entered into force 12 February 2002) is aimed at protecting children from recruitment and use in hostilities.

including designated terrorist groups, should be recognized as victims of grave violations of human rights and humanitarian law. Recovery, reintegration and family reunification should be prioritized, not punishment. As provided under article 35 of the Convention, the detention of a child should always be a measure of last resort only and be for the shortest duration possible. Concerns in relation to the separation of children from parents have been raised by the Special Rapporteur, in the context of ongoing conflict and the limited repatriation of citizens from camps in the north-east of the Syrian Arab Republic. Where punishment includes the separation of a child from his or her parent or guardian, the child's right to family life is engaged, which includes the right to not be arbitrarily separated from his or her parent or guardian and to maintain contact, if separation occurs.

F. Forms of punishment

41. The Security Council has repeatedly called upon States not to penalize or stigmatize victims of trafficking for their involvement in any unlawful activities.⁶⁴ A range of punishments applied to victims or potential victims of trafficking linked to United Nations designated terrorist groups have been highlighted in recent communications to States by several special procedures of the Human Rights Council.⁶⁵ The imposition of such punishments engage States' obligations under the non-punishment principle.⁶⁶ The range of forms of punishment covered by the non-punishment principle include the following: exclusion from refugee status or denial of other immigration relief; arbitrary deprivation of nationality; termination of social welfare benefits or denial of social security payments;⁶⁷ restrictions on movement, detention or other undue restrictions on liberty, including non-repatriation; and administrative measures, including travel bans, confiscation of travel documents and refusal of entry into, or transit through, countries.

42. The prohibition of arbitrary deprivation of nationality is a norm of customary international law.⁶⁸ As the Inter-American Commission on Human Rights has held, nationality is an "inherent attribute of every person and should never be withdrawn as a punishment or reprisal".⁶⁹ The troubled history of arbitrary deprivation of nationality is rooted in histories of racism, positioned at the very heart of attempts to exclude and limit the application of human rights law on discriminatory grounds. Deprivation of nationality is in itself a form of punishment, an administrative sanction that not only violates the non-punishment principle, but also increases risks of trafficking or re-trafficking. The links between statelessness and heightened risks of trafficking are well documented. Exposing victims and potential victims, including children, to such risks is a failure of States' to uphold their legal obligations of due diligence and an egregious failure of protection.

43. The application of the non-punishment principle may also be defeated through refusals to provide consular assistance to victims or potential victims, or to repatriate victims

⁶⁴ Security Council resolution 2388 (2017), para. 16.

⁶⁵ See www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26730&LangID=E.

⁶⁶ Jayne Huckerby, "When terrorists traffic their recruits", *Just Security*, 15 March 2021.

⁶⁷ See Social Security Appeals Tribunal of the United Kingdom of Great Britain and Northern Ireland, *Social Security, Child Support and Pensions Appeal Commissioners Scotland*, case No. CIS/4439/98, 3 June 1998, cited in Cathryn Costello, Yulia Ioffe and Teresa Büchsel, "Article 31 of the 1951 Convention relating to the Status of Refugees" (UNHCR, 2017), para. 4.6.3.

⁶⁸ Universal Declaration of Human Rights (adopted 10 December 1948), art. 15 (2); American Convention on Human Rights, art. 20 (3); Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (adopted 26 May 1995; entered into force 11 August 1998), art. 24 (2); European Convention on Nationality (adopted 6 November 1997; entered into force 1 March 2000), art. 4 (c); Arab Charter on Human Rights (adopted 22 May 2004; entered into force 15 March 2008), art. 29 (1); and ASEAN Human Rights Declaration (adopted 18 November 2012), art. 18. See also African Commission on Human and Peoples' Rights, resolution 234 (LIII) of 23 April 2013 on the right to nationality.

⁶⁹ Inter-American Commission on Human Rights, "Third report on the situation of human rights in Chile" (11 February 1977), chap. 9, para. 10.

to their countries of origin from conflict-affected regions.⁷⁰ Separating families, through repatriation of a child but not the parent who may be a victim of trafficking, is a form of punishment and a failure to comply with the international legal obligation to ensure that the best interests of the child are taken as a primary consideration.⁷¹ The Committee on the Rights of the Child has repeatedly applied the non-punishment principle, and States parties' to the Convention on the Rights of the Child are obligated to ensure that children who are victims are not treated as offenders or subject to forms of punishment such as detention and deportation. In 2019, the Committee recommended that the Republic of Korea ensure that children who have been sold or trafficked not be treated as offenders or subject to criminal sanctions and deportation and that they never be held in closed institutions.⁷²

G. Extraterritorial application

44. It is important to note that the obligation of non-punishment applies extraterritorially to identified or presumed victims of trafficking. Consequently, States are required to fulfil positive obligations to take protective operational measures to ensure non-punishment, including by ending detention or other restrictions on liberty or other forms of punishment such as denial of consular assistance and repatriation.⁷³ In the joint general comment No. 3 of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families/No. 22 of the Committee on the Rights of the Child (2017) on the general principles regarding the human rights of children in the context of international migration, the Committees highlighted that the obligations of States parties under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Convention on the Rights of the Child applied to each child within their jurisdictions, including the jurisdiction arising from a State exercising effective control outside its borders.⁷⁴

H. Requirements for the application of the non-punishment principle

45. A fundamental element of the non-punishment principle relates to the standard and criterion linking the commission of the offence to the trafficked person's subjection to trafficking – whether it is understood as a causal link or a duress defence. The OHCHR Principles and Guidelines for Human Rights and Human Trafficking and the ASEAN Convention against Trafficking in Persons, Especially Women and Children, refer to an offence being committed as a “direct consequence” of the trafficked persons' subjection to

⁷⁰ *L.H. et al v. France* (CRC/C/85/D/79/2019-CRC/C/85/D/109/2019 and CRC/C/85/D/79/2019/Corr.1-CRC/C/85/D/109/2019/Corr.1). The Committee held that States should take extraterritorial responsibility for the protection of children who were their nationals outside their territory through child-sensitive, rights-based consular protection (para. 9.6). Trafficking in persons was not addressed in the Committee's decision of admissibility, although reference was made to a risk of forced marriage of the child *L.A.*, indicating a risk of trafficking (para. 2.3).

⁷¹ See www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26730&LangID=E.

⁷² CRC/C/KOR/CO/5-6, para. 45 (d).

⁷³ Submission by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the Special Rapporteur on arbitrary, summary or extrajudicial executions in the case of *H.F. and M.F. v. France* (application No. 24384/19) before the European Court of Human Rights, para. 7, noting the relevant positionality of France to assist women and children associated with foreign fighters who may be victims of terrorism or trafficking and citing A/HRC/40/52/Add.4, para. 47.

⁷⁴ See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the Convention on the Rights of the Child; and joint general comment No. 3/No. 23 (2017), para. 12. See also *L.H. et al v. France*, para. 9, in which the Committee on the Rights of the Child noted that the State party, as the State of the children's nationality, had the capability and the power to protect the rights of the children in question by taking action to repatriate them or provide other consular responses.

trafficking or to an offence “directly related” to the trafficking situation.⁷⁵ In contrast, the Council of Europe Convention on Action against Trafficking in Human Beings, Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 and the ILO Protocol to the Forced Labour Convention, 1930 (No. 29), specifically refer to a victim of trafficking being “compelled to” commit an offence.⁷⁶ In the Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, the Council indicates that: “the requirement that victims have been compelled to be involved in unlawful activities shall be understood as comprising, at a minimum, victims that have been subject to any of the illicit means referred to in [the definition of trafficking] when such involvement results from compulsion”.⁷⁷ In its recommendations, OSCE provides that: “being ‘compelled’ to commit a crime ... includes the full array of factual circumstances in which victims of trafficking act without autonomy because traffickers exercise control over them”.⁷⁸ In paragraph 26 (g) of its resolution 10/3, the Conference of the Parties to the United Nations Convention against Transnational Organized Crime applies the test of whether it is a direct consequence of being trafficked.

46. To ensure that trafficking in persons is recognized in practice as a serious human rights violation and a serious crime, it is important to ensure that the non-punishment principle may be applied wherever any of the means in the trafficking definition exist. The causation criterion has the merit of highlighting that the offence committed by a trafficked person may arise as a result of their lack of independence or ability to exercise free will.⁷⁹ Given the risk of continuing psychological and physical abuse, which may not give rise to an immediate risk of harm, a causation requirement should be interpreted broadly and the complex impact of the trauma endured taken into account.⁸⁰ It is also important to note that inconsistencies in a trafficked person’s testimony, in particular the testimony of a child victim, should not determine the outcome of an assessment of status (as a victim) or age or a decision whether to prosecute. It is essential that the nature of child trafficking, and the seriousness of the human rights violation, is recognized.⁸¹

47. In the OHCHR Principles and Guidelines for Human Rights and Human Trafficking, OHCHR recommends that States consider ensuring that children who are victims of trafficking are not subject to criminal procedures or sanctions for offences related to their situation as trafficked persons.⁸² Similarly, in its recommendations, OSCE provides that the non-punishment principle applies when the offence committed by the child was “related to the trafficking”, with no other compulsion test required.⁸³ Once the relation between the offence committed and a child’s status as presumed or identified trafficking victim is established, that is a “necessary and sufficient ground to discontinue the proceedings or to

⁷⁵ OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking, guidelines 2.5 and 4.5; and ASEAN Convention against Trafficking in Persons, Especially Women and Children, art. 14 (7).

⁷⁶ Council of Europe Convention on Action against Trafficking in Human Beings, art. 26; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011, art. 8; and ILO Protocol to the Forced Labour Convention, 1930 (No. 29), art. 4 (2).

⁷⁷ Council of Europe, “Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings” (2005), para. 273.

⁷⁸ OSCE, “Policy and legislative recommendations”, para. 12.

⁷⁹ On the causation criterion, see, inter alia: Argentina, Law No 26.364, art. 5, *Dulcinea*, case No. 91017032, 20 May 2014, *Dezorzi, Valeria Soledad s/ recurso de casación*, case No. FCB 53200033/2012/T01/CFC1, 13 February 2017, and *CMS y Otros*, case No. NG CFP 230/2011/T01/CFC1, 1 November 2018; Canada, *R. v. Robitaille*, case No. O.N.C.J. 768, 16 November 2017; Netherlands, First Instance Court of The Hague, case No. 09/754126-08, 18 December 2009; and United States of America, *U.S. v. Bell*, case No. WL 12086759, 15 September 2014.

⁸⁰ England and Wales Court of Appeal, *R v. L and others*, case No. EWCA Crim 991, 21 June 2013, para. 74. The Court took note of the suffering endured, including complex post-traumatic stress disorder with severe trauma, “prolonged exposure to involuntary prostitution and enforced control”.

⁸¹ *Ibid.*, para. 55.

⁸² OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking, guideline 8. See also CRC/C/MHL/CO/3-4, para. 39; and CRC/C/HUN/CO/6, para. 42.

⁸³ OSCE, “Policy and legislative recommendations”, para. 41. See also England and Wales Court of Appeal, *R v. M.K./R v. Persida Gega (aka Anna Maione)*, case No. EWCA Crim 667, 28 March 2018.

expunge an already issued conviction, as well as to immediately release the child from detention facilities”.⁸⁴

48. The application of the non-punishment principle should follow a full assessment of the individual situation of the victim of trafficking. As was noted by the European Court of Human Rights: “an individual’s status as a victim of trafficking may affect whether there is sufficient evidence to prosecute and whether it is in the public interest to do so”.⁸⁵ Any decision should be taken only following a trafficking assessment by a trained and qualified person, and the assessment must be trauma-informed, given the important public interest in combatting trafficking and protecting its victims.⁸⁶

49. It is important to note again that the obligation to ensure the effective application of the non-punishment principle rests on the State, arising from its positive obligation to take protective operational measures of identification, protection and effective investigation. Where criminal proceedings have already commenced, the burden of vacating a guilty plea or initiating an abuse of process or judicial review does not rest with the victim of trafficking; it rests with the State, as a positive obligation to ensure non-punishment and an essential requirement of States’ obligation of due diligence.⁸⁷

50. Ensuring the full and effective implementation of the non-punishment principle requires provision for the expungement or sealing of all related criminal records and relief of any sanctions imposed, including fines or other administrative sanctions. Such relief should be provided in legislative and other necessary measures and be supported through the provision of legal aid, to avoid an undue burden being placed on a trafficked person and to enable full recovery.

51. In the recent judgment of the International Criminal Court in *Prosecutor v. Dominic Ongwen*, the Trial Chamber held that: “A merely abstract danger or simply an elevated probability that a dangerous situation might occur – even if continuously present – does not suffice”,⁸⁸ to satisfy the requirements for the defence of duress. The Rome Statute of the Court provides specific and limited grounds for the defence of duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person.⁸⁹ That is a strictly limited defence, provided for within the legal framework of the Rome Statute, and it differs from the wider non-punishment principle relevant to trafficking in persons.

IV. Conclusions and recommendations

A. Conclusions

52. The implementation of the principle of non-punishment is key to ensuring the effective protection of victims of trafficking. However, despite its recognition in international instruments and supporting jurisprudence, its application is still irregular across jurisdictions. For the effective implementation of the principle, its application must be ensured at the onset of any investigation where evidence of trafficking exists. In fact, non-punishment should be understood as a compulsory tool that is required to be applied by all domestic authorities and investigative, prosecutorial and judicial authorities – including the police, immigration and border officials, labour inspectorates and any other law enforcement agency or officials – when a situation triggering the application of non-punishment is first identified. As such, the

⁸⁴ Special Rapporteur on trafficking in persons, especially women and children, “The importance of implementing”, para. 43.

⁸⁵ European Court of Human Rights, *V.C.L. and A.N. v. United Kingdom*, para. 161.

⁸⁶ *Ibid.*, para. 202. On the requirement of training, see also OSCE, “Policy and legislative recommendations”, para. 29.

⁸⁷ European Court of Human Rights, *V.C.L. and A.N. v. United Kingdom*, paras. 181 and 199–200.

⁸⁸ International Criminal Court, *Prosecutor v. Dominic Ongwen* (case No. ICC-02/04-01/15), Trial Judgment, Trial Chamber IX, decision of 4 February 2021, para. 2582.

⁸⁹ Rome Statute of the International Criminal Court (adopted 17 July 1998; entered into force 1 July 2002), art. 31 (1) (d).

application of the principle of non-punishment is intimately related to the obligation of States to identify and protect victims of trafficking, and resources must be committed to that end in order to effectively identify victims and afford an array of protection measures based on a multidisciplinary approach and tailored to each victim. To facilitate its application and avoid issues of interpretation that may lead to legal uncertainty and leave victims unprotected, a specific non-punishment provision should be incorporated into domestic legislation, favouring a causation link over a duress model and covering all types of unlawful acts.

B. Recommendations

53. **States should ratify and implement all relevant international instruments prohibiting trafficking in persons and providing for the right to non-punishment, including the ILO Protocol to the Forced Labour Convention, 1930 (No. 29).**

54. **States should adopt all appropriate legislative, policy, administrative and other measures to ensure the effective implementation of the principle of non-punishment of victims of trafficking and should:**

(a) **Introduce a specific provision into domestic legislation to provide for the non-punishment of victims of trafficking;**

(b) **Adopt prosecutorial guidelines in order to facilitate the consistent and systematic application of the non-punishment principle in all trafficking cases;**

(c) **Adopt an open-ended and non-exhaustive list of offences frequently related to trafficking in persons, which should be disseminated to and included in training and in published guidance for all law enforcement authorities and all persons likely to come into contact with trafficked persons.**

55. **The principle of non-punishment should be applied:**

(a) **By all relevant domestic authorities, including the police, immigration and border officials, labour inspectorates and any other law enforcement agency or official, and they should be trained and qualified to identify potential victims of trafficking;**

(b) **As soon as there are reasonable grounds to believe that a person has been trafficked or as soon as the trafficked person, or their legal representatives, raises a trafficking defence, in order to afford the trafficked person effective and full protection.**

56. **States are required to ensure the prompt and effective identification of victims of trafficking. Legal assistance should be provided throughout the identification process, to ensure the early identification of victims, referral for assistance and protection and effective implementation of the non-punishment principle.**

57. **States are required to ensure that the principle of non-punishment is applied to:**

(a) **All forms of trafficking, including for the purpose of sexual exploitation, labour exploitation and forced criminality, as well as to both cases of international trafficking and cases of internal trafficking;**

(b) **Any unlawful activity carried out by a trafficked person as a direct consequence of their trafficking situation, regardless of the gravity or seriousness of the offence committed;**

(c) **Criminal, civil, administrative and immigration offences, as well as other forms of punishment, such as arbitrary deprivation of nationality, denial of consular assistance or repatriation, exclusion from refugee status or other forms of international protection and family separation;**

(d) **Any situation of deprivation of liberty, including immigration detention and detention pending removal, transfer or return proceedings.**

58. **Recognizing that trafficking in persons is a serious human rights violation, the application of the non-punishment principle should not be conditional on the formal identification of a victim or on the prosecution of an alleged trafficker. Application of**

the non-punishment principle must not be conditional on the cooperation of the victim in criminal proceedings.

59. To ensure compliance with the principle of non-punishment, all presumed or identified trafficked persons must be promptly removed from detention or any situation of deprivation of liberty and provided with assistance and protection.

60. The principle of non-punishment must be applied without discrimination to all trafficked persons, including to trafficked persons seeking asylum or other forms of international protection.

61. States must ensure equal protection of the law and equality before the law in all anti-trafficking measures, including in ensuring the effective implementation of the non-punishment principle for trafficked persons with disabilities. States must take all appropriate steps to ensure non-discrimination on the basis of disability and to ensure that reasonable accommodation is provided, including the provision of procedural and age-appropriate accommodations, in order to facilitate effective access to justice and the participation of trafficked persons with disabilities in all legal proceedings, including identification procedures and at the investigative and other preliminary stages.

62. States must ensure that a child victim is not punished for unlawful acts that are related to their being trafficked. Where the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she must be presumed to be a child and be accorded special protection measures pending the verification of his or her age. Once the relation between the offence committed and a child's status as presumed or identified trafficking victim is established, that relation must be accepted as necessary and sufficient grounds to discontinue the proceedings or to expunge an already issued conviction, as well as to immediately release the child from detention facilities.⁹⁰ With respect to children, given that no means are required in order to establish their status as victims of trafficking, no test of compulsion can be applied.

63. Children detained for association with armed groups, including designated terrorist groups, should be recognized as victims of grave violations of human rights and humanitarian law. Recovery, reintegration and family reunification should be prioritized, not punishment. Recalling Security Council resolution 2388 (2017), all States should refrain from the use of administrative detention of children who are victims of trafficking, including children associated or allegedly associated with all non-State armed groups, including those who commit acts of terrorism. Standard operating procedures should be adopted to ensure the timely handover of children associated with armed conflict or armed groups to civilian child protection actors.

64. To ensure compliance with the principle of non-punishment in prosecutorial decisions, States must ensure that:

(a) Prosecutors are under a duty to discontinue proceedings against trafficked persons for all offences committed as a direct consequence of their situation as trafficked persons. If the prosecuting authorities fail to do so, domestic courts should have the authority to order a discontinuance on the grounds of abuse of process or on the grounds that the prosecution would be in breach of the non-punishment obligation;

(b) All law enforcement authorities and prosecutors are fully trained to identify potential victims of trafficking and trafficking-related offences and to order, or request, the discontinuance of proceedings at as early a stage as possible.

65. When domestic authorities fail to apply the non-punishment principle and a conviction or sentence is issued against a trafficked person, the due diligence principle requires States to remedy such a failure. Ensuring the full and effective implementation of the non-punishment principle requires provision for expungement or sealing of all related criminal records and relief of any sanctions imposed, including fines or other

⁹⁰ Special Rapporteur on trafficking in persons, especially women and children, "The importance of implementing", para. 43.

administrative sanctions. Such relief should be provided for in legislative and other necessary measures and be supported through the provision of legal aid, to avoid an undue burden being placed on a trafficked person and to enable full recovery.

66. States should ensure that a conviction of a trafficked person resulting from a failure to apply the non-punishment principle or from the suspicion that a trafficked person has been involved in trafficking-related offences will not result in refusal of a residence permit or of a recovery and reflection period, denial of social security or other benefits, restrictions on access to employment or education or restrictions on access to compensation.

67. Pending the implementation of a specific legal provision on non-punishment, States should comply with their non-punishment obligation by interpreting existing domestic legal norms, including defences of duress or a state of necessity, as general clauses of exemption of liability. States should ensure that those defences are adapted to the trafficking context, recognizing the many subtle forms of coercion experienced by victims of trafficking, including abuse of a position of vulnerability and all the means set out in the definition of trafficking.
