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The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance

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Abstract

The principle of non-punishment of victims of human trafficking introduced in the recent anti-trafficking instruments has caused a lot of controversy. These strikingly cryptic provisions leave much space for various interpretations. In analysing the non-punishment principle, this article examines, first, legal instruments establishing the principle, the accompanying interpretative guides, and other material where it has been elaborated. This is followed by an examination of the UK case-law and the most recent Modern Slavery Act 2015 (MSA), which introduced a new statutory defence for victims of trafficking and slavery. This article offers a critical account of the problems and obstacles in applying this principle in practice as well as the lack of understanding of its normative and conceptual grounding. In particular, this article asks questions that need to be clarified in order to make this principle operational in each jurisdiction, which include: the type of criminal or other offences to which it applies; the necessary conditions for its application; and finally, its legal effects. In identifying and engaging with these questions, this article offers a comprehensive scholarly discussion of the role of human rights law in providing guidance for the implementation of the non-punishment principle. The article concludes that this principle represents an important instrument in victim protection, but that the role of human rights law, which is often claimed to be its rationale, is limited when it comes to providing specific guidance for its practical operation.

1. Introduction

The importance of victim protection has been emphasized in all anti-trafficking instruments adopted over the last fifteen years.[1] Nevertheless, practice reveals that their victim status is often downplayed or renounced in favour of being treated as illegal immigrants or even criminals, which effectively

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1 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) 2237 UNTS 319; Convention on Action against Trafficking in Human Beings (16 May 2005) CETS 197 (Anti-Trafficking Convention); Directive of the European Parliament and of the Council on Preventing

denies the promised protection.[2] Thus, a large number of trafficking victims end up detained, prosecuted, convicted, and summarily deported without being given due consideration to their victim status.[3] Consequently, the risk of being detained, prosecuted and deported is one of the reasons why victims of human trafficking are wary of coming forward to the authorities and is one of the main tools used by traffickers to keep them in control.[4] Not only does this represent an obstacle to their protection, but it also leaves the original offence undetected. A trafficking victim, thus, simultaneously occupies conflicting legal positions, which prompts the question of the relationship between these statuses, both on a conceptual level and in practice.

The principle of non-punishment of victims of trafficking for crimes they commit in the course, or as a consequence of being trafficked established in the recent anti-trafficking instruments is seen as a possible solution to this tension.[5] This principle is said to constitute an 'essential element of a human rights approach'.[6] This article engages critically with this claim offering a thorough analysis of different aspects of the relationship between the principle of non-punishment of trafficking victims and human rights. In addition to ex-

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and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA (5 April 2011) 2011/36/EU (Anti-Trafficking Directive); ASEAN Convention Against Trafficking in Persons, Especially Women and Children (22 November 2015).

2 Group of Experts against Trafficking in Persons (GRETA), *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by UK* (First evaluation round, GRETA (2012) 6, 12 September 2012); GRETA, *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by France* (First evaluation round, GRETA (2012) 16, 28 January 2013); GRETA, *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands* (First evaluation round, GRETA (2014) 10, 21 March 2014). See also GRETA, *Second General Report on GRETA's Activities* (GRETA (2012) 13, 4 October 2012) ('Second GRETA Report') [52]. See also Rachel Annison, *In the Dock: Examining the UK's Criminal Justice Response to Trafficking* (The Anti-Trafficking Monitoring Group, June 2013), Ch. 8.

3 A.T. Gallagher/E. Pearson, 'The High Cost of Freedom: A Legal and Policy Analysis of Shelter Detention for Victims of Trafficking, *Human Rights Quarterly* 32(1) (2010); Global Alliance against Traffic in Women (GAATW), *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007).

4 A. Farrell/J. McDevitt/S. Fahy, 'Where Are All the Victims? Understanding the Determinants of Official Identification of Human Trafficking Incidents', *Criminology and Public Policy* 9(2) (2010), 201; A. Weiss/S. Chaudary, 'Assessing Victim Status under the Council of Europe Convention on Action Against Trafficking in Human Beings: the Situation of "Historical" Victims', *Journal of Immigration Asylum and Nationality Law* (2011).

5 Anti-Trafficking Convention, Article 26; Anti-Trafficking Directive, Article 8. See A. Gallagher, *The International Law of Human Trafficking* (Cambridge University Press, 2010); A. Gallagher, 'Exploitation in Migration: Unacceptable but Inevitable', *Journal of International Affairs* 68(2) (2015), 55.

6 OSCE, 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* (22 April 2013) SEC.GAL/73/13 ('OSCE Guidance'), para. 26.

amining the rationale of the non-punishment principle, this article also engages with questions concerning its application in practice, since the instruments establishing this provision do not offer much guidance in that respect. These include: the type of criminal or other offences to which it applies; the necessary conditions for its application (the link between a victim's offence and her trafficking experience); and finally, its legal effects. In identifying and engaging with these questions, this article seeks to initiate comprehensive scholarly discussion of the role of different legal frameworks in providing guidance for the implementation of the non-punishment principle. This type of inquiry is found missing in the current discussion on human trafficking.[7]

This article concludes that this principle represents an important instrument in victim protection, but that the role of human rights law in providing specific guidance as to its practical operation is limited. Namely, whereas human rights law lays down general guidance as to goals to be achieved (victim protection), it is for national legislation (and criminal law in particular) to develop guidance on the specific questions concerning the type of offences to which the non-punishment principle applies, the necessary requirements for its application, and its legal effect.

The analysis of the non-punishment principle is approached by looking, first, at the legal instruments establishing the principle, the accompanying interpretative guides, and other material where it has been elaborated. This analysis is accompanied by an examination of the UK case-law and the most recent Modern Slavery Act 2015. The UK is chosen as a case study because its recent legislation introduces a new defence for victims of trafficking and slavery, and it provides highly relevant jurisprudence on the non-punishment principle. This sets the UK aside from most countries, which to date have not adopted a specific provision to implement this principle, and instead rely on prosecutorial discretion within general criminal law provisions.[8]

For the purpose of this analysis, the principle will be referred to as the non-punishment principle, even though it will be shown in section 4.3. that its effects are intended to be broader than simply not imposing penalties on the victims of trafficking for their involvement in criminal activities. Thus, for example, the principle has also been referred to as 'non-liability'[9] or 'non-criminalisation

7 R. Piotrowicz/L. Sorrentino, 'Human Trafficking and the Emergence of the Non- Punishment Principle', *Human Rights Law Review* 16(4) (2016). See also the special issue of *Groningen Journal of International Law* 'Human Trafficking in International Law' *GroJIL* 1(2) (2013); A. Schloenhardt/R. Markey-Towler, 'Non-Criminalisation of Victims of Trafficking in Persons – Principles, Promises, and Perspectives', *GroJIL* 4(1) (2016), 10.

8 Council of Europe, Group of Experts on Action against Trafficking in Human Beings (GRETA), *Fourth General Report on GRETA's Activities* (March 2015) GRETA (2015) 1 ('Fourth GRETA Report'), 53.

9 UNODC, Model Law against Trafficking in Persons (5 August 2009). Article 10 requires that 'A victim of trafficking in persons shall not be held criminally or administratively liable [punished] [inappropriately incarcerated, fined or otherwise penalized] for offences [unlawful acts] committed by them, to the extent that such involvement is a direct consequence of their situation

principle',[10] which may imply much broader protection that excludes any sort of law enforcement action against trafficking victims.

2. The Curious Case of the Non-Punishment Principle

In spite of vast research and enormous international attention given to human trafficking in the past decade, reliable statistics are difficult to find.[11] In comparison to the estimated figures,[12] it is striking how very few victims are formally assigned to that role, with even fewer traffickers being brought to justice.[13]

What is more, practice reveals that 'the criminalization of trafficked persons is commonplace, even in situations where it would appear obvious that the victim was an unwilling participant in the illegal act'.[14] They have been most frequently prosecuted for offences concerning their often irregular immigration status.[15] Moreover, trafficking victims are often forced to commit more serious criminal offences in the course of their exploitation that include: shoplifting, ATM theft, benefit fraud, cannabis cultivation or even recruitment of other victims.[16] Thus, for example, in the case *R v. N and Le*, currently pending before the ECtHR, a Vietnamese minor who had been arrested on a cannabis farm and sentenced to 20 months imprisonment had his conviction confirmed by the UK Court of Appeal even though a conclusive decision by the UK Border

as trafficked persons.' See also 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' (9 December 2009) CTOC/COP/WG.4/2010/4.

10 OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary* (2010) ('UN Trafficking Principles and Guidelines – Commentary)'; Schloenhardt/Markey-Towler, 'Non-Criminalisation of Victims' 2016 (n. 7).

11 UNODC, *Global Report on Trafficking in Persons 2014* (November 2014). For statistical data at EU level for the years 2010, 2011 and 2012 as gathered and submitted by national authorities see Eurostat, *Trafficking in Human Beings* (2015). For the UK statistics see www.nationalcrimeagency.gov.uk/publications/national-referral-mechanism-statistics 3 October 2015.

12 According to ILO, *Global Estimate of Forced Labour* (2012), almost 21 million people are victims of forced labour.

13 According to the UNODC, *Global Report on Trafficking in Persons 2014*, which covered 128 countries in the time period 2010-2012, the total number of reported victims was 40,177, whereas the total number of reported offenders was 13,310. These figures include officially detected offenders and victims (persons who have been in contact with an institution – the police, border control, immigration authorities, social services, shelters run by the state or by NGOs, international organizations).

14 UN Trafficking Principles and Guidelines – Commentary, Principle 7.

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

16 *Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory Study and Good Practice Examples* (Race in Europe Project, 2014).

Agency (UKBA) had identified him as a victim of trafficking.[17] Also, it is not uncommon that victims have been prosecuted for being involved in prostitution where these practices are still criminalized.[18]

In order to understand how and why this occurs, it is important to note that the definition of human trafficking contains an open-ended list of different types of exploitation.[19] This is generally not a bad thing since it allows for new forms to be included as our knowledge of these emerge. However, the Palermo definition does not define the concept of exploitation itself, nor does it offer any criteria that would help determine which other practices may also fall within its ambit. In fact, the concept of exploitation has never been defined in international law,[20] leaving the entire notion of human trafficking, which is premised on it, somewhat legally and theoretically shallow.

Regardless of this conceptual ambiguity, it is important for the argument here that some of these forms of exploitation may be criminalized in national legislations. While many states have now decriminalized prostitution, a range of other practices through which one may be exploited is fast emerging – from pick-pocketing, street begging, cannabis cultivation to trafficking of other victims. The most recent anti-trafficking instrument – the EU Anti-Trafficking Directive – recognizes this trend, and in addition to the exploitative purposes from the Palermo definition, it explicitly lists forced begging and the exploitation of criminal activities in its definition.

Moreover, even if a victim is exploited in a way that does not entail engaging in criminal activities, she may still break the law simply by using false documents or by contravening immigration or labour legislation. Evidently, the boundary between one's status as a crime victim, and that as a law-breaker is fine one, and too often blurred.

The principle of non-punishment of victims of trafficking for crimes they have committed in the course, or as a consequence of being trafficked is seen as a way to overcome this tension and ensure that their status of victims of crime prevails. However, a careful analysis of the non-punishment principle enshrined in legal instruments applicable to the Council of Europe and the EU Member States, and its (lack of) application by domestic courts, reveals a number of problems in both its theoretical framing and practical implementa-

17 *R v. N and Le* [2012] EWCA Crim 189.

18 M. Madden Dempsey, 'Decriminalizing Victims of Sex Trafficking', *American Criminal Law Review* 52 (2015), 207.

19 The first universally agreed definition of human trafficking is contained in the Palermo Protocol.

20 R. Plant, 'Modern Slavery: The Concepts and Their Practical Implications' (ILO Working Paper, 5 February 2015), 3. See also UNODC, *The Concept of Exploitation in The Trafficking in Persons Protocol* (2015); B. Heide Uhl, 'Lost in implementation? Human Rights Rhetoric and Violations – a Critical Review of Current European Anti-trafficking Policies', *Security and Human Rights* 2 (2010), 125; S. Marks, 'Exploitation as an international legal concept', in S. Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press, 2008).

tion. The problem lies in both the ambiguous formulation of the principle in international instruments, and in the fact that those in charge of its application are often inclined to give way to interests other than that of victim protection, most notably immigration or crime control.[21]

3. Unpacking the Non-Punishment Principle

The Palermo Protocol, the first comprehensive international instrument devoted to the problem of human trafficking, does not contain any reference to the principle of non-punishment of trafficking victims.[22] However, the Working Group on Trafficking in Persons, a body established to make recommendations on the effective implementation of the Protocol, called on State Parties to:

'[C]onsider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts.'[23]

A provision introducing the principle of non-punishment of trafficking victims first appeared in the Council of Europe Anti-Trafficking Convention, followed by the EU Anti-Trafficking Directive. More recently, a non-punishment clause was included in the Protocol of the International Labour Organisation (ILO) supplementing the Forced Labour Convention.[24] Nonetheless, this instrument has not yet come into force and any guidance as to its interpretation is still missing. In addition, the principle of non-punishment of human trafficking

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21 The Anti-Trafficking Monitoring Group (ATMG) pointed out to 'a widespread culture of disbelief in the [UK] Home Office decision-making process and how it impacts on the successful identification and support of victims'. ATMG, *The National Referral Mechanism: A Five Year Review* (February 2014), 13. Furthermore, the first GRETA Report on the Netherlands talks of 'the reported climate of mistrust towards possible victims of human trafficking' in GRETA, *Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands* (21 March 2014) GRETA (2014) 10, para. 138.

22 According to Anne Gallagher, the Protocol drafters rejected a proposal advanced by the Inter-Agency Group and supported by NGOs, to include a provision protecting trafficked persons from prosecution for status-related offences such as illegal migration, working without proper documentation, and prostitution. A. Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis', *Human Rights Quarterly* 23 (2001), 975, 990-91.

23 Report on the meeting of the Working Group on Trafficking in Persons held in Vienna, 14-15 April 2009 (21 April 2009), CTOC/COP/WG.4/2009/2, para. 12.

24 Protocol of 2014 to the Forced Labour Convention, 1930 (Geneva, 103rd ILC session, 11 June 2014) (entry into force: 09 November 2016).

victims has been affirmed in a number of other international and regional instruments but these are of a non-binding nature.[25]

Accordingly, the legal nature and significance of the Anti-Trafficking Convention and the Anti-Trafficking Directive puts these two instruments at the centre of the analysis in this article. Still, these other, non-binding instruments may well assist in clarifying the scope of its application given the limited jurisprudence in the states where the Anti-Trafficking Convention and the Anti-Trafficking Directive apply. The Strasbourg Court is yet to decide a case regarding the application of this clause in a case against the UK.[26]

Article 26 of that Convention prescribes that:

'Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.'[27]

This provision was echoed in Article 8 of the Anti-Trafficking Directive, which stipulates that:

'Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.'[28]

It is immediately noticeable that the wording of these two provisions is substantially different. With respect to the effect of the non-punishment principle, the Anti-Trafficking Convention provides for the possibility of not imposing 'penalties' on victims, whereas the Anti-Trafficking Directive speaks of the entitlement not to 'prosecute' or 'impose penalties' on victims, taking an apparently wider approach, at least based solely on the text of the two provisions. Overall, the Anti-Trafficking Directive shifts the attention to earlier stages in the criminal law chain thereby involving different actors (such as police and public prosecutor service).

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25 UNODC, *Model Law against Trafficking in Persons* (5 August 2009); OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (2002) E/2002/68/Add.1; OSCE Guidance.

26 *R v. N and Le* [2012] EWCA Crim 189.

27 Anti-Trafficking Convention, Article 26.

28 Anti-Trafficking Directive, Article 8.

On the other hand, when it comes to the type of wrongdoing a victim might be involved in, the former provision refers to 'unlawful activities' while the latter provision is concerned with 'criminal activities', thus potentially excluding from its scope activities that may contravene legislation other than criminal law, such as administrative law or immigration law.

As to the scope of application of the principle, and especially the link between the victim's wrongdoing and her trafficking experience, the Anti-Trafficking Directive is much more explicit requiring a criminal offence to be committed as 'a direct consequence' of being subjected to human trafficking, whereas such a causal relationship has not been spelled out clearly in the Anti-Trafficking Convention definition.

Both provisions provide just for 'the possibility' of not imposing penalties on, or also not prosecuting victims of trafficking human beings, vested in the competent national authorities. It is yet to be clarified whether this results in the obligation on Member States to simply introduce the 'non-punishment' provision into their respective legislations or whether it also imposes a more concrete obligation on relevant authorities to consider its application in each particular case.

Furthermore, both provisions require a level of compulsion as a prerequisite for applying the principle. Evidently, these differences carry potential for a different interpretation and application of the principle in practice and may lead to significantly different level of protection available to victims in different jurisdictions.

3.1. The Rationale of the Non-Punishment Principle and its Relationship with Human Rights Law

The Anti-Trafficking Convention and its Explanatory Report[29] do not offer a rationale for this principle, nor do they identify its conceptual and normative grounding. On the other hand, Recital 14 of the Anti-Trafficking Directive outlines its objective stating that it aims 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'.

Human rights law has been invoked to explain why trafficking victims ought to be exempted from the operation of the criminal justice system. Thus, the recent OSCE legal and policy guidance on the effective implementation of the non-punishment provision suggests that the non-punishment principle constitutes an 'essential element of a human rights approach'.[30]

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29 *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings* (16 May 2005) CETS 197 ('Trafficking Convention Explanatory Report').

30 OSCE Guidance, para. 26.

It does not state however which right, if any, is violated by prosecution and punishment of the trafficking victims for acts which other individuals may justifiably be penalized.

It is worth recalling here the definition of human trafficking and its relationship with human rights law. The first universal definition of human trafficking was established in the Palermo Protocol to the Transnational Organised Crime Convention. According to this widely accepted definition of human trafficking,[31] the act of human trafficking consists of three components: an action; the use of certain means; and the purpose of exploitation.[32] All three elements must exist for trafficking to be established.[33] It is important to stress that exploitation, which is the purpose of trafficking, need not have taken place: it is *intended exploitation* in conjunction with certain action and the means deployed that makes up the trafficking situation.[34] Thus, unlike slavery, servitude and forced labour, which represent examples of *actual* exploitation of victims, the human trafficking *offence* defined in Article 3 of the Palermo Protocol is completed at a very early stage.

It is clear that the origins and legal articulation of human trafficking are closely tied to the law enforcement context even though the later international instruments have put more emphasis on its human rights dimension,[35] with victim protection as one of the most important goals of anti-trafficking actions.

However, human trafficking is *not* specifically mentioned in most of the general human rights instruments. Among those few international instruments that contain explicit reference to human trafficking are the Convention on the Elimination of All Forms of Discrimination against Women,[36] the Convention on the Rights of the Child[37] and the EU Charter.[38] The American Convention

31 The Palermo Protocol, Article 3.

32 For a discussion about the elements see P. Chandran, 'A Commentary on Interpreting Human Trafficking', in P. Chandran (ed.), *Human Trafficking Handbook: Recognising Trafficking and Modern-day Slavery in the UK* (LexisNexis, 2011), 5.

33 In the case of children, it is immaterial whether these means have been used.

34 UNODC *Legislative Guide for the 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* (New York, 2004), para. 33; Trafficking Convention Explanatory Report, para. 87.

35 R. Piotrowicz, 'International Focus: Trafficking and Slavery as Human rights Violations', *Australian Law Journal* 84 (2010), 812, 814; R. Piotrowicz, 'The Legal Nature of Trafficking in Human Beings', *Intercultural Human Rights Law Review* 4 (2009), 175.

36 (Adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) Article 6.

37 (Adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) Article 35.

38 The Charter of Fundamental Rights of the European Union (18 December 2000) 2000/C 364/01, Article 5 (3).

on Human Rights[39] refers to traffic in women (not children or men) within the provision that addresses slavery, servitude and forced labour, while the African Charter on Human and Peoples' Rights[40] prohibits all forms of exploitation and degradation of man without an explicit reference to trafficking. The European Convention of Human Rights (ECHR),[41] the International Covenant on Civil and Political Rights (ICCPR)[42] and the Universal Declaration of Human Rights (UDHR)[43] contain explicit references only to slavery, forced labour and servitude. In fact, a proposal by France during the negotiations of the ICCPR to substitute 'trade in human beings' for 'slave trade', to also cover the traffic in persons, was rejected at the time.[44] While trafficking has regularly been referred to as a form of slavery, the precise contours of that relationship are not settled.[45] Space precludes a more detailed engagement with the conceptual debates on the relationship between human trafficking and slavery in this article. Still, the recent jurisprudence of the European Court of Human Rights in Strasbourg (Strasbourg Court) established explicitly that human 'trafficking itself' engages the ECHR by infringing upon the so called 'absolute' right to free from slavery, servitude and forced labour protected by Article 4.[46] This suggests that trafficking represents an implied *self-standing* prohibition under Article 4 ECHR, which means that even when exploitation has not yet materialized, a person falls within a protective scope of this provision (because it is *intended*, not *actual* exploitation that is required under the Palermo definition). Some scholars, however, disagree with this interpretation arguing instead for reading trafficking in this provision by way of 'progressive interpretation' of the terms

39 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143 OASTS No 36. Article 6.

40 CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (27 June 1981) Article 5.

41 Article 4.

42 Article 8.

43 Universal Declaration of Human Rights (10 December 1948) 217 A (III) Article 4.

44 M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, Kehl, Strasbourg, Arlington, N.P. Engel, 2005), 200. See also UN General Assembly, Draft International Covenants on Human Rights (Tenth Session, A2929, 10 July 1955).

45 OHCHR, Trafficking Principles and Guidelines – Commentary, 20. See also J. Allain, 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery', *Human Rights Law Review* 10(3) (2010), 546; R. Piotrowicz 'International Focus: Trafficking and Slavery as Human rights Violations', *Australian Law Journal* 84 (2010), 812; J. Hathaway, 'The Human Rights Quagmire of "Human Trafficking"', *Virginia Journal of International Law* 49(1) (2008), 1; A. Gallagher, 'Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway', *Virginia Journal of International Law* 49(4) (2009), 78; N.L. McGeehan, 'Misunderstood and Neglected: The Marginalisation of Slavery in International Law', *International Journal of Human Rights* 16 (2012), 436; N. Siller, '"Modern Slavery": Does International Law Distinguish between Slavery, Enslavement and Trafficking?', *Journal of International Criminal Justice* 14(2) (2016), 405.

46 *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1 [282].

slavery, servitude and forced labour and not on its own.[47] This proposal, however, is not without problems, especially given the fact that the concept of human trafficking, unlike that of slavery, servitude and forced labour, does not require actual exploitation to have taken place. According to the proposed argument, therefore, only those victims that have already been exploited, would fall under the protective ambit of Article 4, which is problematic.

Yet, a more important aspect of the Strasbourg Court's ruling in the seminal *Rantsev* case is the pronouncement of states' positive obligations under Article 4 ECHR. These include: a general obligation to establish an adequate legal and administrative framework; a procedural obligation to conduct effective investigations into the credible allegations of human trafficking; an obligation to take operational measures to protect victims, or potential victims, of trafficking; and an obligation to cooperate with each other in cross-border cases.[48]

In framing these positive obligations, the Court made numerous references to the specialized anti-trafficking instruments that contain a much more comprehensive list of duties imposed upon states. However, even though these specific anti-trafficking instruments are undoubtedly focused on *victim protection*, it is questionable whether all victim protection measures contained in these instruments can be considered as *victims' human rights*. This is an important distinction for only the latter ones could be *enforced* against states before international *fora*.[49] The problem of conflating victim protection measures and their (enforceable) human rights is aptly illustrated by Todres who argues that it is unsubstantiated to equate the provision of assistance to victims as establishing a right to assistance:

'One only needs to look at US jurisprudence on health rights. Through programs such as Medicare and Medicaid, the US has long provided health-related services to individuals in need, but the existence of these programs has not equated to recognition of a "right to health" under federal law. In short, when a government elects to provide social services, such action does not necessarily rise to the level of establishing a fundamental right to those services.'[50]

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47 V. Stoyanova, 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case', *Netherlands Quarterly of Human Rights* 30(2) (2012), 163, 185.

48 *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1 [282]. See also Stoyanova, 'Dancing on the Borders of Article 4' 2012 (n. 47), 185; R. Pati, 'States' Positive Obligations with respect to Human Trafficking: The European Court of Human Rights Breaks New Ground in Rantsev v. Cyprus and Russia', *Boston University International Law Journal* 29 (2011), 79.

49 The problem of conflating victim protection measures and their human rights is aptly illustrated on the example of the US jurisprudence on health rights by J. Todres, 'Human Rights, Labor, and the Prevention of Human Trafficking: A Response to a Labor Paradigm for Human Trafficking', *UCLA Law Review* 60 (2013), 157.

50 *Ibid*., 150.

Thus, only those claims grounded in enforceable human rights instruments could be considered as human rights *obligations*, in the traditional sense. In that respect, the ECHR represents an important mechanism for victim protection offering a concrete tool to victims to act as agents in their own cause through its individual petition system. Importantly, such an enforcement mechanism makes states more wary of being found in breach of their obligations by the binding decision of a supranational court, as opposed to their attitude towards obligations arising out of other international instruments.[51]

In light of that, the link between the non-punishment principle contained in the trafficking-specific instruments and human rights law, and the ECHR more specifically, could be established in two possible ways. First, by considering all obligations placed on states by the specialized anti-trafficking instruments as human rights obligations under the ECHR. Some authors have tried to argue this:

'[F]ollowing the Rantsev judgment, it is now possible to argue that many if not all of the victim-protection provisions in the Convention are also covered by the positive obligations States owe victims (or possible victims) of human trafficking under Article 4.'[52]

However, this option has not yet been acknowledged explicitly in the Strasbourg jurisprudence and it is debatable whether the Court will opt to make the Anti-Trafficking Convention fully justiciable via Article 4 ECHR, not least because that would side-track the official enforcement mechanism the states have chosen for this instrument.[53]

The second possible way of grounding the non-punishment principle in the ECHR is by establishing its link with positive duties *already recognized* and firmly grounded in the ECHR jurisprudence on Article 4 and other rights. Therefore, by prosecuting trafficking victims, states would violate their *existing* human rights obligations, which would in turn be sufficient to ground the non-punishment duty into the human rights law. The question is which concrete human rights obligations would thus be violated by a violation of the non-punishment principle?

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51 This was pointed out by Durieux, who compared the attitudes of the EU Member States towards the 1951 Refugee Convention and towards the ECHR. J.-F. Durieux, 'The Vanishing Refugee', in H. Lambert/J. McAdam/M. Fullerton (eds.), *The Global Reach of European Refugee Law* (Cambridge University Press 2013), 254-255.

52 S. Chaudary, 'Trafficking in Europe: An Analysis of the Effectiveness of European Law', *Michigan Journal of International Law* 33 (2011), 94.

53 The Anti-Trafficking Convention establishes monitoring mechanism that consists of the Group of Experts on Action against Trafficking in Human Beings (GRETA) and the Committee of the Parties, the latter being linked directly to the Council of Europe's Committee of Ministers thus adding a political dimension to the evaluation process.

Following the lead from GRETA's Second General Report,[54] the OSCE Guidance suggests that:

'The obligation of non-punishment is therefore intimately tied to the State's obligations to identify, protect and assist victims of trafficking, and also 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.'[55]

The Guidance, therefore, claims that by prosecuting trafficking victims, states violate two of their obligations under human rights law. First, a duty to to identify, protect and assist victims of trafficking. This is supported by the recent publication of the UN Office of the High Commissioner for Human Rights, which strategically places this principle among the obligation to identify, protect and support victims of trafficking.[56] Secondly, by prosecuting trafficking victims, states violate an obligation to investigate a trafficking situation. In order to confirm the validity of such a claim, it is important to examine first whether these two duties are in fact obligations arising out of the ECHR.

A duty to identify victims of trafficking and to provide them with assistance and support are set out in both the Anti-Trafficking Convention[57] and the Anti-Trafficking Trafficking Directive.[58] While the Strasbourg Court echoed these instruments in the landmark *Rantsev* judgement, this was not done in a straightforward manner. Namely, the Court obliged states to ensure 'the practical and effective protection of the rights of victims of trafficking'. It further noted that the extent of positive obligations arising under Article 4 ECHR is to be considered with the reference to 'measures to prevent trafficking and protect victims' contained in the specialized anti-trafficking instruments'.[59]

This pronouncement is merely a clear and concrete statement of the states' positive obligations under Article 4 ECHR. In particular, does this mean that there is a self-standing duty under Article 4 ECHR to identify a trafficking victim even though such a victim does not need any protection? The *Rantsev* judgement refers to this obligation only in the context of the duties 'to investigate' and 'to

54 Second GRETA Report, para. 58. The Report notes that 'criminalisation of victims of trafficking not only contravenes the State's obligation to provide services and assistance to victims, but 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'.

55 OSCE Guidance, para. 27. See also Second GRETA Report, para. 58.

56 Office of the UN High Commissioner for Human Rights, *Human Rights and Human Trafficking* (Factsheet No. 36, 2014), 12.

57 Anti-Trafficking Convention, Articles 10 and 12.

58 Anti-Trafficking Directive, Article 11.

59 *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1 [284]-[285].

take any necessary operational measures to protect Ms Rantseva'.[60] Nevertheless, even if we take for granted that a self-standing obligation to identify victims of trafficking exists within Article 4 ECHR, this does not necessarily mean that there is a causal relation between an infringement of this duty and the non-punishment principle. Therefore, while a correct victim identification is essential for the provision of services to facilitate their recovery, it does not explain why victims should not be prosecuted or punished for offences they commit themselves.

As for the resulting obligations to provide protection and assistance to identified victims of trafficking, the Strasbourg Court refers to these in the context of taking operational measures to remove a concrete individual from the trafficking situation or a real and immediate risk of being trafficked or exploited. Thus, drawing a parallel with Articles 2 and 3 ECHR,[61] the Court stated that Article 4 too 'may, in certain circumstances, require a state to take operational measures to protect victims, or potential victims, of trafficking'.[62] The test outlined in *Rantsev* reads as follows:

'In order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that 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* within the meaning of art. 3(a) of the Palermo Protocol and art. 4(a) of the Anti-Trafficking Convention. In the case of an answer in the affirmative, there will be a violation of art. 4 of the Convention where the authorities *fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk.*'[63]

Clearly, this duty is very limited in scope ('to remove the individual from that situation or risk') and is designed to mirror a similar duty first established in the *Osman* case, with respect to the right to life guaranteed by Article 2 ECHR.[64] It is not, therefore, clear how the non-punishment of a trafficking victim would satisfy the condition of removing her from the trafficking situation to satisfy the test laid out by the Court.

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60 *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1 [296].

61 *Osman v. UK* (2000) 29 EHRR 245; *Calvelli and Ciglio v. Italy* [2002] ECHR 3 [55]; *Öneryıldız v. Turkey* (2005) 41 EHRR 20 [63]; *Opuz v. Turkey* (2010) 50 EHRR 28 [128]-[129]; *Kontrova v. Slovakia* [2007] ECHR 419 [49]-[50]; *Kilic v. Turkey* (2001) 33 EHRR 58 [62]; *Denizci and Others v. Cyprus* [2001] ECHR 351 [375]-[376]; *E v. UK* (2003) 36 EHRR 31 [88]; *Z v. UK (2002) 34 EHRR 3* [73]; *M and Others v. Italy and Bulgaria* (App 40020/03) (31 July 2012) [99].

62 *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1 [286].

63 *Ibid.* (emphasis added).

64 *Osman v. UK* (2000) 29 EHRR 245.

Regarding the second duty mentioned in the OSCE Guidance as a basis for the non-punishment principle – the obligation to investigate human trafficking – such a duty is clearly established under Article 4 ECHR.[65] However, although often *connected*, the non-investigation of a trafficking offence and prosecution of victims are *not correlative* – the full investigation of traffickers does not automatically imply that victims should be exempt from criminalization and punishment. Even presuming that a victim has been correctly identified and offered support and assistance to recover from her ordeal, and that a criminal process against traffickers has been initiated, a clear rationale for not prosecuting such a victim for a crime she has committed is still not obvious.

The point of this argument is not to suggest that trafficking victims should be criminalized and prosecuted, but that the arguments for not doing so do not clearly lead to such a conclusion. It seems that the problem lies in the fact that our instinctive response to this question is not accompanied by legal coherence. We all agree that it is *unfair* to treat trafficking victims as criminals, but to develop a framework that squares with the existing legal landscape requires more than our intuitive sense of fairness. It requires a clear set of rules that explains the situations and conditions in which the non-punishment principles applies to the victims of human trafficking. Their identification and the prosecution of traffickers are *prerequisites* for the correct operation of such a framework but these do not substitute for developing a clear guidance on the nature of this principle, its scope and application by national judiciary.

This article offers an alternative reading of how human trafficking may be linked to human rights law and the ECHR, to that offered in the OSCE Guidance. The non-punishment principle may be framed within the *Rantsev* general obligation to establish an 'adequate' legal framework that contains 'the spectrum of safeguards (...) to ensure the practical and effective protection of the rights of victims or potential victims of trafficking'.[66] This would require states 'to *adopt* and/or *implement* legislative measures providing for the possibility of not imposing penalties on victims'.[67] Accordingly, situations where a state has not provided even for a possibility of not imposing penalties on victims in its national legislation will clearly trigger responsibility under Article 4 ECHR. This demonstrates an important interplay between international obligations and national law where the former sets out general guidance and the latter puts this into practice. Accordingly, to comply with the human rights duty, states need to prove they have established an adequate and functioning legal framework in line with their international obligations assumed by ratifying the specialized anti-trafficking instruments but it is for domestic legislature and judiciary to

65 *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1 [288].
66 *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1 [285].
67 Trafficking Convention Explanatory Report, para. 272 (emphasis added).

put this into force. However, putting in place the legal framework is not sufficient to exonerate states from responsibility since governments need to demonstrate that such a framework is functional and is being applied in practice.[68]

Moreover, Article 6 ECHR may also be engaged when victims of trafficking are put on trial without due consideration being given to their trafficking experience. One of the first UK cases dealing with the question of punishment of trafficking victims was concerned with a Nigerian woman who had been detained when seeking to leave the UK on a ferry for France in possession of a false Spanish identity card.[69] She was charged with the offence of possessing a false identity card with the intention of using it as her own, and upon pleading guilty, incurred eight months' imprisonment. Notwithstanding the concerns that she might have been a victim of human trafficking raised during the trial, neither the defence, nor the prosecution paid due consideration to this possibility. Due to these reasons, the Court of Appeal found that 'there was no fair trial'.[70] Evidently, it is worth exploring the potential of using Article 6 ECHR to protect victims of human trafficking faced with criminal prosecution.

Article 6 applies to anyone charged with a criminal offence, the notion of 'criminal charge' being broadly conceived.[71] Importantly, the Strasbourg Court has repeatedly refused to act as the fourth instance court, substituting its own findings of fact or national law for the findings of domestic courts.[72] Rather, the Court is only willing to intervene where the domestic court acted in an arbitrary or unreasonable manner in establishing the facts or interpreting domestic law, thus rendering the proceedings as a whole unfair.[73] Therefore, in situations where a national authority has given due consideration to the *possibility* of applying the non-punishment principle in a concrete case and rejected it, it is unlikely that the Strasbourg Court would intervene in such a choice. This is so because, arguably, the obligation placed on states by the Anti-Trafficking Convention and the Anti-Trafficking Directive is *at best* to consider applying this principle in line with their domestic legislation. According to this reading of the non-punishment clause, in situations when responsible authorities have not even considered the application of this principle in a concrete case, or the

68 See for example *MC v. Bulgaria* (2005) 40 EHRR 20 with respect to the protection against rape.

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

70 *Ibid*. [26].

71 *Engel v. Netherlands* (1979) 1 EHRR 647; *Öztürk v. Germany* (1984) 6 EHRR 409; *Benham v. United Kingdom* (1996) 22 EHRR 293. See Andrew Ashworth/Mike Redmayne, *The Criminal Process* (4th edn, Oxford University Press, 2010) Ch 13.

72 R. Goss, *Criminal Fair Trial Rights: Article 6 of the European Convention on Human Rights* (Hart, 2014), 42-58.

73 European Court of Human Rights, *Interlaken Follow-up: Principle of Subsidiarity* (8 July 2010) paras. 33-39.

principle has not been envisaged in national legislation, the Court may well find a violation of Articles 4 and 6 ECHR. Still, as noted earlier, it may well be that the Anti-Trafficking Convention imposes the obligation of a more limited scope that would bring states into compliance only 'by providing for a substantive criminal or procedural criminal law provision, or any other measure, allowing for the possibility of not punishing victims'.[74] In other words, it is yet to be determined whether the relevant international instruments prescribe that states have to consider the possibility of applying the non-punishment clause in specific, individual cases, or only to provide for the possibility of not punishing or prosecuting victims in their legislation (i.e. a more general obligation).

In any case, while the Anti-Trafficking Convention and the Anti-Trafficking Directive establish a specific duty for Member States to transpose this provision into their national legal systems, they do not charge the Strasbourg Court with supervising its implementation or actual application and it remains to be seen how the Court will approach this problem.

The argument here is that whereas the non-punishment principle plays an important role in victim protection, criminal law and criminal legal theory too need to be considered in order to establish its rationale and articulate rules of its practical application.[75] Thus, although human rights law often underpins the basic guarantees of criminal law and may well intervene in the exercise of discretion by national authorities in order to secure adequate protection,[76] it provides only general guidance as to what aims are to be achieved, leaving criminal law to offer a more detailed guidance. Accordingly, the practical application of the non-punishment principle is principally a matter for national authorities and it should be implemented 'in accordance with the basic principles of every national legal system'[77] with human rights law providing a remedy in situations deemed manifestly unjust or arbitrary.

In sum, human rights law will be engaged in rather extreme situations where either the non-punishment principle has not been even envisaged in national legislation, or domestic authorities failed to give any consideration to the victim's status and/or to the possible application of this principle, thus rendering the trial against her manifestly unfair. However, neither of these two

74 Trafficking Convention Explanatory Report, para. 274.

75 Notably, Article 26 of the Anti-Trafficking Convention places the principle among the provisions dealing with substantive criminal law and not the provisions dealing with the victim protection, as the European Commission wrongly implies in its recent study *The EU Rights of Victims of Trafficking in Human Beings* (2013).

76 *X and Y v. Netherlands* (App 8978/80); *MC v. Bulgaria* (2005) 40 EHRR 20.

77 This approach was, however, criticized as 'unlikely to foster a harmonized implementation of the [Anti-Trafficking] Directive, and more importantly will continue to allow the prosecution of victims of trafficking in some Member States, as well as the denial of their rights' in UN High Commissioner for Refugees, *Prevent, Combat, Protect Human Trafficking: Joint UN Commentary on the EU Directive: A Human Rights Based Approach* (November 2011), 35.

situations will enable the Strasbourg Court to provide answers to a set of questions concerning the application of the non-punishment principle in practice, which are identified in the following section.

3.2. Practical operation of the Non-Punishment Principle

Moving the discussion from the theoretical and normative groundings of the non-punishment principle to its practical implementation, this article argued that this requires answering three questions, mainly concerned with various aspects of the relationship between the trafficking act and a resulting criminal offence of a victim.

First, it ought to be determined which *crimes* the non-punishment principle applies to. Does it apply only to criminal offences or to any unlawful activities? With regard to the former, does it apply to any criminal offence or only specific crimes that are known to be related to human trafficking situations, such as illegally crossing a border, prostitution (where criminalized) or street begging? What about more serious crimes including human trafficking itself?

Secondly, what kind of *causal relation* between the trafficking experience and victim involvement in unlawful activities triggers the application of this provision? Furthermore, who bears the burden of proving the link between the trafficking act and the related criminal offence committed by its victim?

Finally, the third question deals with the *effects* of the principle. Does it entirely exclude or just diminish culpability? Is it only relevant at the sentencing stage or does it also require not initiating the criminal proceedings in the first place? Does it apply automatically and who is responsible for its application?

These questions will be examined with reference to the UK legal context. As noted in the introduction, the UK is chosen as a case study because of its jurisprudence available for analysis, and because its recent legislation introduces a new statutory defence for victims of 'modern slavery',[78] which represents a novel approach in Europe, where most of the countries rely on prosecutorial or judicial discretion within general criminal law provisions. This approach is problematic: establishing a specific principle directed at victims of human trafficking would be pointless if they were to be subject to the same protective mechanisms that apply to anyone.

Moreover, by placing the non-punishment principle in the context of existing protective mechanisms (i.e. prosecutorial discretion or a criminal defence such as duress) two sets of criteria begin to play a role. Thus, the criteria that apply to the existing general protective mechanisms are supplemented by the specific criteria that apply to the non-punishment principle alone, which makes the threshold for protection very high.

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78 Modern Slavery Act 2015, Part 5, Section 45.

The Court of Appeal of England and Wales took the serious challenge of engaging with some of the three questions identified at the beginning of this section in *L & Ors* and the following section takes a closer look into its reasoning.[79] Since the judgement was delivered before the adoption of the Modern Slavery Act 2015 (MSA), the analysis of the case will also reflect upon the provisions of the MSA relevant for the questions discussed.

Before the MSA, there were three mechanisms for complying with Article 26 of the Anti-Trafficking Convention (and Article 8 of the Anti-Trafficking Directive) in the UK. These included: the common law defence of duress and necessity; prosecutorial discretion in deciding whether charges should be brought; and the ultimate sanction of the court to stay the prosecution for the 'abuse of process'.[80]

When it comes to the new statutory defence for slavery or trafficking victims in the MSA, three distinctive features characterize the new provision. First, the statutory defence distinguishes between the test that applies to persons aged 18 or over and those under the age of 18. Secondly, the statutory defence does not apply to offences listed in Schedule 4. Thirdly, even though the relevant section of the MSA is entitled 'defence for slavery or trafficking victims who commit an offence', the defence applies only to those victims already subject to exploitation (both adults and minors), which include victims of slavery, servitude and forced or compulsory labour, and victims of 'relevant exploitation' resulting from human trafficking.[81] This is one of the major flaws in the new instrument since clearly victims of trafficking are in need of protection even before the intended exploitation started.

In sum, when it comes to adult victims of human trafficking, three cumulative conditions need to be fulfilled to be able to use the defence. First, the person has to be compelled to commit an offence.[82] Secondly, such compulsion needs to be attributable to slavery or to relevant exploitation.[83] Thirdly, a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.[84]

To satisfy the first condition, compulsion may originate from another person or from the person's circumstances.[85] The Act however does not specify which personal circumstances would qualify as compulsory. As for the second condition, compulsion has to result from either the conduct that constitutes an offence of slavery, servitude or forced labour, or the conduct that constitutes 'relevant

79 *L & Ors v. The Children's Commissioner for England & Anor* [2013] EWCA Crim 991.
80 *LM and Others v. R* [2010] EWCA Crim 2327 [7]-[11].
81 MSA, Section 45 (1) (c).
82 MSA, Section 45 (1) (b).
83 MSA, Section 45 (1) (c).
84 MSA, Section 45 (1) (d).
85 MSA, Section 45 (2).

exploitation', resulting from an act of human trafficking.[86] In both cases, it is clear that the MSA requires that a person has already been already subject to exploitation, either in the form of slavery servitude or forced labour, or in other forms of 'relevant exploitation' listed in section 3.[87] This is a serious oversight of the MSA because, on its face, it prevents the application of the defence to victims who have been trafficked but not yet exploited. Finally, the statute clarifies the meaning of the 'relevant characteristics' from the third criterion that includes: age, sex and any physical or mental illness or disability.[88]

As for the victims of human trafficking who are under the age of 18 when they commit an offence, the element of compulsion is excluded from the set of requirements,[89] but the law still requires that a person has already been subject to exploitation. It remains to be seen how the courts will interpret and apply Section 45 of the new statute.

Importantly, the new statutory defence under the MSA applies equally to victims of slavery, forced labour and servitude, if they are suspected of committing a criminal offence, regardless of whether they have been trafficked or not. This is a welcome development for it shows that the protection afforded by trafficking-specific instruments has been extended to victims of not-trafficked exploitative practices.[90] Consequently, contrary to a fear that the newfound commitment to the fight against human trafficking is doing so at the expense of concentrating on the exploitation as such,[91] the human trafficking framework has proved beneficial even to those who suffered non-trafficked exploitation.

4. The Application of the Non-punishment Principle – the Key Questions

The UK case of *L & Ors v. The Children's Commissioner for England & Anor* will be used as a reference point for discussing three questions identified in section 3.2. as crucial for the application of the non-punishment principle. This judgement dealt with issues raised by four otherwise unconnected cases in which three children and one adult were trafficked to the UK, and were subsequently prosecuted and convicted for drug-related offences (the first three

86 MSA, Section 45 (3).
87 In addition to slavery, servitude and forced labour, these include: sexual exploitation; removal of organs etc; securing services etc. by force, threats or deception; securing services etc. from children and vulnerable persons.
88 MSA, Section 45 (5).
89 MSA, Section 45 (4) (b) and (c).
90 See also Protocol of 2014 to the Forced Labour Convention, 1930 (Geneva, 103rd ILC session, 11 June 2014) (Entry into force: 09 November 2016), Article 4 (2).
91 Hathaway, 'The Human Rights Quagmire' 2008 (n. 45).

applicants), and for possession of a false identity document (the fourth applicant). None of their traffickers have been identified or brought to justice.

The facts of the first three cases are very similar. The appellants were trafficked from Vietnam as minors and were subsequently involved in a sophisticated cannabis growing operation in the UK. In the criminal proceedings before the Crown Court, in none of the three cases was proper consideration given to the question of whether a defendant had been a victim of trafficking. In fact, in spite of serious indications to the contrary,[92] conclusive decisions as to the trafficking status of the first two appellants were only made after they had been convicted, and even after they had served a significant portion of their sentences. In the case of the third appellant, there had been a decision of the UKBA[93] recognizing his status as a victim of human trafficking before he pleaded guilty and the case came up for sentence, but no one in court appeared to have been aware of it.

The fourth case was of a very different nature. The appellant was a native of Uganda, a woman in her mid-30s who, after several years of forced prostitution, had been released by her female trafficker, and given a false passport, which she believed was genuine. She was arrested when she tried to apply for a national insurance number using this forged document and was sentenced to six months imprisonment for possession of a false identity document. Only after she had been released was an attempt made to use the national referral mechanism to assess whether she might have been a victim of trafficking, and the UKBA found that she had indeed been trafficked. One of the questions raised in the appeal was a possible absence of any link between her offence and any compulsion arising out of the fact that she was a victim of trafficking.

The Court outlined the main purpose of its judgement in the very beginning, setting itself to:

'[O]ffer guidance to courts (...) about how the interests of those who are or may be victims of human trafficking, and in particular child victims, who become enmeshed in criminal activities in consequence, should be approached *after criminal proceedings against them have begun*.'[94]

This statement could be read as narrowing down the application of the principle to the cases when criminal proceedings against trafficking victims

92 The first appellant told the arresting officers that he had been relieved to see them and that he had been brought into England in a freezer container after the deeds to his parents' home had been taken as collateral to settle the debt in Vietnam. The third appellant was found by the police barefoot and frightened after the neighbours had alerted the police that they had seen him being removed from the house by a group of men with his hands bound.

93 One of the two UK's competent authorities to make a decision on one's victim status. See text with note 104.

94 *L & Ors v. The Children's Commissioner for England & Anor* [2013] EWCA Crim 991 [3].

have already begun. However, the reason why the Court limited itself to this moment is given in the preceding part of the same paragraph. The judges noted that 'the court cannot become involved either in the investigation of the case or the prosecutorial decision whether it is in the public interest for the prosecution to proceed'.[95] They made it clear that they did not intend to engage with how the Director of Public Prosecutions would exercise its discretion in deciding whether it was in the public interest for the prosecution to proceed. Importantly, the judgement emphasizes that the Court reviews the decision to prosecute through the exercise of the jurisdiction to stay proceedings:

'The court protects the rights of a victim of trafficking by overseeing the decision of the prosecutor and refusing to countenance any prosecution, which fails to acknowledge and address the victim's subservient situation, and the international obligations to which the United Kingdom is a party.'[96]

Hence, it is clear that the principle is applicable both to the decision to prosecute as well as during the criminal trial, contrary to the somewhat misleading labelling of it as the 'non-punishment' principle.

As a general point, the Court has emphasized that the non-punishment principle could not be interpreted to imply that 'a trafficked individual should be given some kind of immunity from prosecution, *just because* he or she was or has been trafficked, nor for that reason *alone*, that a substantive defence to a criminal charge is available to a victim of trafficking'.[97] Evidently, an automatic exemption from prosecution and/or conviction *just* on the basis of one's victim status is too wide an interpretation of the principle, which courts are by no means ready to accept. What then, according to the Court, are these additional conditions attached to this provision? The remaining part of this section will examine more closely how the UK courts engaged with this question and whether they succeeded in answering it. In particular, further analysis will focus on the way the courts engaged with the three questions identified in the section 3.2. First, which *crimes* does the non-punishment principle apply to (section 4.1)? Secondly, what kind of *causal relation* between one's trafficking experience and victim involvement in unlawful activities triggers the application of this provision (section 4.2)? Thirdly, what are the legal *effects* of the principle (section 4.3)?

The application of the non-punishment principle is, nevertheless, conditional upon correct victim identification. Most problems in applying this principle, as demonstrated by the present judgement, arise because relevant authorities

95 *Ibid.*
96 *Ibid.* [16].
97 *Ibid.* [13] (emphasis added).

have failed to identify defendants as victims of human trafficking.[98] In fact, the identification of trafficked persons continues to be 'one of the main challenges in anti-trafficking work'[99] in general, not just with respect to the application of the non-punishment principle. It is a prerequisite for any further action required by anti-trafficking legislation, regardless of whether the non-punishment provision may be applicable in the given circumstances. Hence, a failure to identify a trafficking victim would mean that his or her fundamental rights will continuously be denied and the prosecution will be denied the necessary witness in criminal proceedings.[100]

On this matter, the UK Court stated that:

'Enough is known about people who are trafficked into and within the United Kingdom for *all those involved in the criminal justice process* to recognize the need to consider at an early stage whether the defendant (child or adult) is in fact a victim of trafficking.'[101]

It is, therefore, clear that before pursuing any further action, the acting official should assess whether an individual might have been a victim of trafficking if sufficient indicators are present.[102]

The Court then moves on to describe a victim identification process in the UK set up by the National Referral Mechanism on 1 April 2009. According to this scheme, a conclusive decision as to a victim's status can only be made by competent authorities.[103] The judges noted that 'although the court is not bound by the decision [of competent authorities], unless there is evidence to contradict

98 The European Commission has explained how victims should be identified by publishing the *Guidelines for the Identification of Victims of Trafficking in Human Beings* (2013).

99 Global Alliance Against Traffic in Women (GAATW), *More 'Trafficking' Less 'Trafficked': Trafficking for Exploitation Outside the Sex Sector in Europe* (Working Paper Series 2011), 18.

100 Trafficking Convention Explanatory Report, para. 127.

101 *L & Ors v. The Children's Commissioner for England & Anor* [2013] EWCA Crim 991 [26].

102 The European Commission currently funds a project under the ISEC Programme ('Development of Common Guidelines and Procedures on Identification of Victims of Trafficking in Human Beings', EuroTrafGuID), which aims to develop guidelines to better identify victims of trafficking in human beings, taking into account the International Labour Organization and the European Commission, *Operational Indicators of Trafficking in Human Beings* (Results from a Delphi Survey, September 2009).

103 These authorities are the UK Human Trafficking Centre, which is part of the Organised Crime Command in the National Crime Agency and deals with referrals from the police, local authorities, and NGOs, and the Home Office Immigration and Visas (UKBA), which deals with referrals identified as part of the immigration process, for example where trafficking may be an issue as part of an asylum claim. For an overview of a national referral mechanism see www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism, 4 October 2015.

it, or significant evidence that was not considered, it is likely that the criminal courts will abide by it'.[104] Importantly, the appellate judges held that:

'[T]he court may adjourn as appropriate, for further information on the subject, and indeed may require the assistance of various authorities, such as UKBA, which deal in these issues. However that may be, the ultimate responsibility cannot be abdicated by the court."[105]

This effectively means that judges are *allowed* to pursue further investigation and seek evidence regardless, and in spite of the decision of the competent authorities. However, even though the Court did not use the mandatory language to ascribe the responsibility for judges to make further inquiries, the *Rantsev* test speaks clearly of the obligation on the part of all state authorities to 'take appropriate measures within the scope of their powers'.[106] Hence, it appears peculiar that the appellate judges arrived at a conclusion that there was no scope for criticizing the first instance judge who 'throughout the trial, had suspected that the appellant may have been the victim of trafficking, but as the issue was not raised, she had not voiced her suspicions'.[107]

Another question bears particular relevance in the context of the victim identification and the application of the non-punishment principle. Namely, there may well be situations where a victim was no longer subject to the control of traffickers when she becomes known to authorities, as was the case with the fourth appellant. Such individuals are referred to as 'historical victims' – the term used to describe those trafficked persons who are no longer in a situation of exploitation (or at risk of it) at the time when they come to the attention of the authorities.[108] Thus, the question arises as to whether they retain their victim status and whether the victim's status, in general, is linked to their protection needs. Whereas the UK courts initially held that victim status is essentially linked to their protection needs, which is 'is not absolute or never-ending',[109] they changed the approach and considered that a victim status extends 'even [to] a person who was trafficked to the United Kingdom 30 years ago and thereafter managed to create a new life for himself'.[110]

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104 *L & Ors v. The Children's Commissioner for England & Anor* [2013] EWCA Crim 991 [28].
105 *Ibid*. [29].
106 *Rantsev v. Cyprus and Russia* (2010) 51 EHRR 1 [286].
107 *Ibid*. [53].
108 A. Weiss/S. Chaudary, 'Assessing Victim Status' 2001 (n. 4).
109 *R (Y) v. Secretary of State for the Home Department* [2012] EWHC 1075 (Admin).
110 *Nguyen (Anti-Trafficking Convention: respondent's duties)* [2015] UKUT 170 (IAC) (25 March 2015) [46]. See also *R (Atamewan) v. Secretary of State for the Home Department* [2014] 1 WLR 1959.

Evidently, victim identification is a prerequisite for any further action of state authorities, regardless of whether or not the non-punishment principle applies in a particular case.

4.1. Types of Offences

Victims of human trafficking may become involved in a range of unlawful activities at various stages of the trafficking process. Thus, the latest US Trafficking in Persons Report identifies theft, illicit drug production and transport, prostitution, terrorism, and murder as crimes that adults and children are forced to commit in the course of their victimization.[111]

The *LM* case explicitly established that 'the obligation under Article 26 [Anti-Trafficking Convention] is one which extends to *any offence* where it may have been committed by a trafficked victim who has been compelled to commit it',[112] although its application is said to be fact-sensitive in any case.

However, the MSA explicitly lists a vast number of offences in Schedule 4 to which a defence contained in Section 45 does *not* apply.[113] These include common law offences,[114] as well as a range of offences prohibited by specific statutes. It is evident that the intention of the UK legislator is to prevent the application of the defence to the most serious crimes. Moreover, the MSA gives broad powers of the Secretary of State to amend Schedule 4 by regulation.[115] This approach is problematic because some of the excluded offences may well be committed in the course or as a consequence of a person being trafficked and/or exploited as documented in the US report. In particular, Schedule 4 excludes the offences of human trafficking, even though it has been well-documented that former victims of trafficking often get involved in the recruitment and abuse of new victims in the process known as the 'cycle of abuse'.[116] In these situations, the courts are left only with the possibility of mitigating the sentence, although the defence of necessity may well be advanced in some of these situations. Accordingly, the fact-sensitive approach established in the *L* case offers a far better solution.

While the MSA identifies offences to which the new defence does *not* apply, when it comes to the remaining broad range of offences where the defence does apply, further clarifications are necessary. In particular, this article argues that the application of the non-punishment principle to different types of offences requires different rules since the compulsion and a causal relationship

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111 US Department of State, *The 2014 Trafficking in Persons Report* (June 2014) 14.
112 *LM and Others v. R* [2010] EWCA Crim 2327 [12].
113 Modern Slavery Act 2015, Section 45 (7).
114 Kidnapping, manslaughter, murder, perverting the course of justice, and piracy.
115 Modern Slavery Act 2015, Section 45 (8).
116 *LM and Others v. R* [2010] EWCA Crim 2327 [14].

between a victim's criminal behaviour and her trafficking experience or exploitation are inherently different. Thus, it is necessary to establish broader categories of the criminal offences to which the non-punishment principle applies, and accordingly, set the rules applicable to each category. Three categories are proposed as follows.

The first category includes 'status offences'[117] that are often instrumental for a trafficking offence to take place. Those offences are related to violations of immigration laws, including using false documents, which facilitate the commission of the trafficking offence, as demonstrated by the fourth applicant's case. This resembles protection from criminal liability offered to refugees and asylum seekers under Article 31 of the 1951 Refugee Convention.[118] Moreover, even if a trafficking victim entered the country legally, she may breach the conditions of entry by overstaying or by violating labour regulations. Therefore, the scope of required protection in such cases is broader than that guaranteed by the Refugee Convention.

The second group of offences are 'purpose offences' – offences that represent the reason why a victim has been trafficked in the first place. These include various exploitative practices, such as shoplifting, street-begging, cannabis cultivation, or prostitution, the commission of which was the sole purpose of the trafficking act. These are, in fact, offences that fall under the concept of 'exploitation of criminal activities' as one of the purposes of human trafficking expressly listed in the Anti-Trafficking Directive's definition. According to the Directive, the term 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'.[119] Consequently, this group of offences is limited to those that produce some form of financial gain, which could not be attributed to an alleged offender. Therefore, it should not be confused with a situation where a victim commits a lucrative offence with a view to escaping from her situation.

The third group of offences are 'secondary offences' – those seemingly detached from the original trafficking situation. Hence, a victim may commit an offence in an attempt to escape from traffickers, or to sustain her living following the escape. This is a group of offences where a temporal and causal link between trafficking and an offence need to be the most evident for the application of the principle. This group also includes situations where victims of trafficking be-

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117 Inter-Agency Coordination Group against Trafficking in Persons (ICAT), *The International Legal Frameworks concerning Trafficking in Persons* (Vienna, October 2012), para. 3.6.

118 Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 150, Article 31. See Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection* (A paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations, October 2001).

119 Anti-Trafficking Directive, Recital 11.

come involved in trafficking and exploitation of other victims, in order to avoid abuse.

The rules that apply to each of the identified categories depend on a compulsion element and the causal relationship between the victim's criminal offence and her trafficking/exploitation. The next section examines these relationships.

4.2. The Link between Human Trafficking and the Victim's Offence

The non-punishment principle is said to apply to crimes that were 'consequent on or integral to the exploitation of which he was a victim'.[120] In other words, a victim may resort to these offences while still under the influence of the traffickers, or as a means to break free from them.

The correlation between the victim's criminal offence and her trafficking experience requires engaging with the problems of causation, coercion and the lack of agency. Namely, the Anti-Trafficking Directive refers to criminal activities which victims 'have been compelled to commit as a *direct consequence* of being subjected to (trafficking)',[121] implying the requirement of a *causal and temporal relationship* between the trafficking and the related crime. While the principle clearly excludes the protection from prosecution or punishment for offences that a person has *voluntarily* committed or participated in,[122] the Anti-Trafficking Directive does not specify the exact nature and intensity of compulsion necessary to trigger the protection.

The Explanatory report to the Anti-Trafficking Convention, on the other hand, notes that:

'[T]he 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 Article 4, when such involvement results from compulsion.'[123]

This statement sounds ambiguous and circular, since the 'illicit means' correspond to those listed as one of the three elements necessary for establishing the trafficking offence in the first place. Hence, the first part of the sentence

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120 *L & Ors v. The Children's Commissioner for England & Anor* [2013] EWCA Crim 991 [20]. The OSCE Guidance uses the following terms throughout the report: 'violations of the law directly connected with, or arising out of, [the] trafficking situation'; 'offences caused or directly linked with their being trafficked', and 'offences committed in the course, or as a consequence, of being trafficked'.

121 Anti-Trafficking Directive, Article 8. The corresponding provision of the Anti-Trafficking Convention does not contain this qualification.

122 Anti-Trafficking Directive, Recital 14.

123 Trafficking Convention Explanatory Report, para. 273.

seems to imply that once it was established that a person had been trafficked, which includes proving that specific means listed in the trafficking definition were deployed, the immunity from punishment should apply automatically, since the proof of means necessary for establishing the former represents the compulsion required for the latter. This is rather confusing as it would be much simpler not to have included the notion of compulsion as an additional element at all, if it were to be interpreted as one of the necessary elements of a trafficking definition. Still, the statement uses the term 'at a minimum', which implies that other means may well be used to compel a victim to commit an offence, but it does not give any further clue as to what these may be.

Strangely enough, the second part of the sentence, then, contains another reference to compulsion, thus making the whole statement somewhat bizarre. It effectively states that a person is compelled to commit a crime when she was subject to some of the means listed in the trafficking definition, when such involvement results from compulsion.

In order to make sense of this rather unhelpful interpretation of Article 26 Anti-Trafficking Convention, this article makes the following proposition. It argues that distinguishing between the three groups of offences identified in the previous section helps understanding the compulsion requirement and the potential for the non-punishment principle to apply differently in these situations.

Thus, it is useful to refer to the previously explained distinction between criminality that facilitates the execution of the trafficking offence ('status offences'), and the offences that are the purpose of trafficking a person in the first place. The commission of the latter offences is the original reason for trafficking and it represents the form of exploitation. In addition, victims may commit other offences, more or less connected with their trafficking experience ('secondary offences'). This would be the case, for example, when victims escape from the influence of traffickers but appear to have no other choice but to commit further offences. It is also not excluded that victims resort to a criminal lifestyle that is entirely unconnected to their previous trafficking experience.

Distinguishing between these groups of offences helps understanding the compulsion requirement and the potential for the non-punishment principle to apply differently in these situations. Namely, in 'status offences', the means used to commit the trafficking offence also represents an element of compulsion required for the application of the non-punishment principle. In other words, if a victim was deceived by traffickers that she would be given a job in a destination state, and her immigration status would be regular, such deception automatically extends to any criminal offence committed in order to facilitate her arrival at the given destination. Once it is established that a person was trafficked, which also requires establishing that a specific means was used, there is no reason to require additional evidence of compulsion for offences that are effectively contingent upon the trafficking process. Hence, the application of the non-punishment principle should be automatic in such cases.

However, if upon arrival, the same victim is required to engage in unlawful activities, the compulsion requirement may well change. Namely, whether or not a victim was aware that performing these activities is illegal, she might have opposed them because they did not conform to what she had originally been promised she would do, in terms of the type of work or its conditions. In such circumstances, a different form of compulsion may play a role in the assessment. The court or other relevant authority will need to examine the extent to which her will was circumscribed by this new situation. The presumption in favour of her lack of autonomy should be applied in situations where it is clear that the involvement in unlawful activities was the exploitative purpose of trafficking. In such cases, it may well be reasonable to impose the reversed burden of proof, asking a public prosecutor to prove the absence of compulsion. The situation of the first three appellants falls neatly within this category.

Finally, if a victim was found to have been involved in unlawful activities that had no obvious connection with the original trafficking offence, such as those committed when a victim has already escaped the influence of traffickers, the required analysis will be different. It may well be that committing an offence was a means to break free from the traffickers, or once out of their reach, the involvement in criminal activities is due to the perceived absence of meaningful alternatives. The analysis of compulsion in these broadly diverse circumstances ought to be different. Arguably, the more distant the offence is from the experience of trafficking, the requirement of compulsion will be stricter, reaching close to the standards required for the defences of duress or necessity.

Support for the proposed solution may be found in the soft law instruments. Thus, the Parliamentary Assembly of the Council of Europe (PACE) urged the Committee of Ministers to incorporate key amendments into the Draft Anti-Trafficking Convention before opening it for signature, including the recommendation to ensure that each party to the Convention:

'[R]efrains from detaining, charging or prosecuting victims of trafficking in human beings on the grounds that they have unlawfully entered or are illegally resident in countries of transit and destination, or for their involvement in unlawful activities of any kind, when such involvement is a direct consequence of their situation as victims of trafficking (Article 26).'[124]

An almost identical provision is contained in the OHCHR Commentary on the Recommended Principles and Guidelines on Human Rights and Human Trafficking.[125] Both instruments seem to recognize the distinction between different types of crimes and the impact of such a distinction on the operation

[124] Council of Europe, Parliamentary Assembly, Recommendation 1695 (2005).
[125] UN Trafficking Principles and Guidelines – Commentary, 132.

of the non-punishment principle, especially when it comes to the compulsion element.

Therefore, it appears that this provision contains two different rules for different situations. The first is concerned with 'the illegality of their entry into or residence in countries of transit and destination', whereas the second refers to 'unlawful activities' in general. Thus, the former case appears to require states to establish blanket immunity from criminal prosecution whereas the second situation only 'to the extent that such involvement is a direct consequence of their situation as trafficked persons'. Support for such a conclusion may also be found in the OHCHR Commentary, which notes that:

'[T]he non-criminalization principle (...) is not intended to confer blanket immunity on trafficked victims who may commit other non-status-related crimes with the requisite level of criminal intent. For example, if a trafficked person engages in a criminal act such as robbery, unlawful violence, or even trafficking, then she or he should be subject to the normal criminal procedure with due attention to available lawful defences.'[126]

Thus, *a contrario*, blanket immunity would apply to 'status offences'. However, the conclusions in the Commentary with respect to the 'non-status-related crimes' are undesirable, since these crimes too should be exempt from criminal prosecution to the extent that such involvement is a 'direct consequence of their situation as trafficked persons' as noted by PACE. For, otherwise, the sentence 'or for their involvement in unlawful activities' would be entirely unnecessary.

Therefore, while the non-punishment principle should automatically apply on the status offences,[127] when it comes to other unlawful activities, it needs to be established that these were a direct consequence of a trafficking situation, as explained above.

In the UK, the decision in the *LM & Ors* case refers to a 'reasonable nexus of compulsion',[128] specifying that the word 'compelled' in Article 26 of the Anti-Trafficking Convention is clearly not limited to circumstances in which the English common law defences would be established.

Furthermore, the Court in *L* noted that:

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126 *Ibid.*

127 Aliverti argues that the criminalization of immigration breaches is in stark contrast with a number of criminal law principles and that the normative justification of criminal law in immigration matters is weak and it should have no role to play in the enforcement of immigration rules. A. Aliverti, 'Making People Criminal: The Role of the Criminal Law in Immigration Enforcement', *Theoretical Criminology* 16(4) (2012), 426.

128 *LM and Others v. R* [2010] EWCA Crim 2327 [14].

'The culpability, of any victim of trafficking may be significantly diminished, and in some cases effectively extinguished, (...) because *no realistic alternative was available* to the exploited victim but to comply with the dominant force of another individual, or group of individuals.'[129]

Still, the Court does not elaborate further the appropriate criteria for determining whether a victim had 'no realistic alternative' but to commit an offence. It does not explain whether this should be judged from a victim's standpoint or is an objective assessment.

It remains to be seen how the courts will interpret and apply Section 45 of the Modern Slavery Act 2015, which establishes the new defence outlined in section 3.2.

4.3. The Legal Effect of the Non-Punishment Principle – Non-Punishment or Non-Prosecution?

Clarifying the legal effect of the non-punishment principle calls for answers to the following vital questions. Does the principle only exclude imposing penalties on human trafficking victims following the trial? Or, does it call for non-prosecution of victims of trafficking too, once the link between the original trafficking offence and the resulting crime is established? Is there a difference in how different state authorities should apply this principle?

As already noted, there are discrepancies between the provisions of Anti-Trafficking Convention and the Anti-Trafficking Directive when it comes to the legal effect of the non-punishment principle. Whereas the former refers only to non-punishment of trafficking victims, the latter clearly calls for their non-prosecution too, thus seemingly being broader in scope.

PACE expressed concerns about the 'excessively vague' wording of the provision on non-punishment of victims in the Draft Anti-Trafficking Convention, which 'raises doubts as to the genuineness of the will to protect victims who have been forced to commit offences'.[130] It suggested amending the text of Article 26 of the Draft Convention to guarantee that victims of trafficking 'shall not be detained, charged, prosecuted or submitted to any sanction'.[131] Unfortunately, the Anti-Trafficking Convention eventually entered into force without

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129 *L & Ors v. The Children's Commissioner for England & Anor* [2013] EWCA Crim 991. [13] (emphasis added). In *LM and Others v. R* [2010] EWCA Crim 2327 [14] the court refers to the 'reasonable nexus of compulsion'.

130 Council of Europe, Parliamentary Assembly, Draft Council of Europe Convention on Action Against Trafficking in Human Beings, (26 January 2005) Opinion 253 (2005), para. 9.

131 *Ibid*., para. 14. xv. See also Council of Europe, Parliamentary Assembly, Recommendation 1695 (2005). The problem of victim detention, regardless of their being charged with a criminal offence, was given particular and detailed consideration in the UN Trafficking Principles and Guidelines – Commentary, 134.

significant changes, which, according to PACE, reflected the Member States' desire to protect themselves from illegal migration rather than accepting that trafficking in human beings is a crime and that its victims must be protected.

The analysis so far shows that the non-punishment principle does not apply automatically. Furthermore, the questions of responsibility for its application and how it should be applied in practice are left for states to decide for two main reasons. First, the provisions of the anti-trafficking instruments establishing this principle clearly refer to such a conclusion, due to differences in the basic principles of different national legal systems. Secondly, the analysis of the ECHR and the Strasbourg jurisprudence demonstrates that this instrument provides a limited aid to answering the questions concerning the practical application of the principle.

When it comes to the legal effect of the non-punishment principle in the UK, the *L* case seems to propose a sliding-scale approach:

'In some cases the facts will indeed show that he was under levels of compulsion which mean that in reality culpability was extinguished. If so when such cases are prosecuted, an abuse of process submission is likely to succeed. (...) In other cases, (...) culpability 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. In yet other cases, the fact that the defendant was a victim of trafficking will provide no more than a colourable excuse for criminality which is unconnected to and does not arise from their victimisation. In such cases an abuse of process submission would fail.'[132]

While the UK courts are responsible for upholding this principle at the trial stage, when it comes to exercising prosecutorial discretion whether or not to initiate the proceedings, the Crown Prosecution Service issued legal guidance on human trafficking that outlines this procedure. The guidance lays out steps to be taken by a public prosecutor when considering whether to proceed with prosecuting a suspect who might be a victim of trafficking.[133] Thus, a decision to prosecute is to be based on a three-stage assessment. First, is there a reason to believe that the person has been trafficked? Secondly, if there is clear evidence of a credible common law defence of duress, the case should be discontinued on evidential grounds. Thirdly, even where there is no clear evidence of duress, but the offence may have been committed as a result of compulsion arising from trafficking, prosecutors should consider whether the public interest lies

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132 *L & Ors v. The Children's Commissioner for England & Anor* [2013] EWCA Crim 991 [33].

133 Crown Prosecution Service, 'Legal Guidance: Human Trafficking and Smuggling', www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/, 30 August 2015.

in proceeding to prosecute or not. It remains to be seen how the new statutory defence will shape practice in the coming period.

The solutions found in other Member States to the Anti-Trafficking Convention are far from uniform. According to the latest GRETA General Report, of 35 countries evaluated, 27 did not have specific legislation on the non-punishment provision and relied on general duress provisions or exonerating or mitigating circumstances not specific to trafficking victims.[134] The Report notes that eight countries had adopted specific legal provisions concerning the non-punishment of victims of trafficking, either in their criminal code or in dedicated anti-trafficking legislation.[135] In four of these countries, the non-punishment provision applies to *any offences* related to the fact that the person had been trafficked.[136] In three countries, the application of this provision was limited: in Armenia, to offences of minor or medium gravity; in Georgia, to a list of offences under the Criminal Code and the Code of Administrative Violations; and in Romania, to the offences of prostitution, begging, crossing the border illegally or giving organs, tissues or cells of human origin. In Spain, a proportionality test was applied between the criminal act perpetrated and the means to which the victim was subjected.[137]

However, the legal effect of these diverse provisions establishing the non-punishment principle on a national level is hard to assess because, in reality, the number of victims who benefit from this principle is negligible. Thus, the implementation of the non-punishment principle was identified as one of the ten main areas where GRETA has urged parties to take corrective action.[138] This demonstrates an obvious need to explain its normative grounds and provide specific guidance on its practical operation.

5. Conclusion

This article has demonstrated that the non-punishment principle established in recent regional anti-trafficking instruments is a well-intentioned but only partially elaborated provision that requires further clarification and guidance as to both its rationale and practical implementation. These international anti-trafficking instruments give considerable latitude to Member

134 Fourth GRETA Report, 53.
135 *Ibid*.
136 Azerbaijan, Cyprus, Luxembourg and the Republic of Moldova.
137 Fourth GRETA Report, 53.
138 *Ibid*. 31-33. In the first evaluation round of the Convention, GRETA evaluated states' measures using verbs 'urge', 'consider' and 'invite', which correspond to different levels of urgency of the recommendation for bringing the party's legislation and/or practice into compliance with the Convention.

States when implementing the principle in national legal systems. Therefore, there is an obvious need for national legislatures and judiciary to establish its clear boundaries.

On the other hand, the global scale of the trafficking problem, and the required internationally coordinated response to it, emphasized in all anti-trafficking instruments and initiatives until now, calls for a certain level of uniformity that would provide a comparable level of protection to victims worldwide. This equally applies to the non-punishment principle.

To achieve this goal of having a certain level of uniformity in applying the non-punishment principle while allowing national legislations to shape its domestic application according to their respective legal traditions, this article argues for establishing a set of internationally agreed benchmarks that identify relevant questions to be addressed by the national institutions. These should include the following questions proposed in this article: the categories of offences in which the principle applies and whether it applies in the same manner; the causal relationship between the victim's offence and her trafficking experience; and the legal effect of the non-punishment principle. Accordingly, states should be instructed to address these questions on a domestic level, through appropriate legal, policy and practical measures, in order to fulfil their international obligations in this field.

This article discussed the role of human rights law in providing the rationale for this principle and for offering guidance for answering the practical questions concerning its implementation. The analysis demonstrated that the relevance of human rights law is far more modest than has been suggested.

Thus, in light of positive obligations established in the ECtHR's jurisprudence, when a state does not provide for the possibility of non-punishment of trafficking victims in its national legislation, or it cannot prove that such provisions are operational, the Court may be able to find a breach of Article 4 ECHR based on the *Rantsev* obligation to establish an adequate legal and administrative framework. In addition, when a state conducts criminal proceedings against a victim without any consideration being given to her victim status, such a state may also be in breach of Article 6 ECHR and fair trial standards. However, both scenarios deal with rather extreme violations of the non-punishment principle – either by a state not even legislating upon it, or by completely failing to consider it during a criminal trial against a victim of trafficking. Neither of these two situations addresses the substantive questions associated with the application of the principle by national authorities identified in this article.

Furthermore, the non-punishment principle may also be infringed upon *indirectly* by violating a positive obligation to identify a person for whom there are reasonable grounds to believe they are a victim of human trafficking, or by violating a procedural obligation to investigate the crime of human trafficking. However, these are separate obligations and the infringement of the non-punishment principle remains ancillary, albeit no less serious. Also, it has been shown that even if a victim has been identified and an offence investigated

properly, that still does not automatically justify the application of the non-punishment provision.

Evidently, human rights law can only go so far in providing the rationale and guidance as to the practical implementation of this important principle, and the established general human rights obligations need to be 'perfected' and further clarified by reference to domestic and transnational *criminal law*.

Therefore, instead of grounding the non-punishment principle *solely* in human rights law, it should also be seen in light of criminal law principles, which aim to secure law enforcement goals. Accordingly, as noted in the discussed OSCE Guidance '[v]ictims of trafficking are also witnesses of serious crime. The non-punishment provision will, if applied correctly, equally and fairly, enable States to improve their prosecution rates.'[139] Similarly, one of the three objectives of the Anti-Trafficking Directive outlined in Recital 14 explicitly refers to the aim of encouraging victims 'to act as witnesses in criminal proceedings against the perpetrators'. Hence, it would be counterintuitive to prosecute human trafficking victims since this may diminish their willingness to participate in subsequent criminal proceedings.[140] This approach embodies instrumental reasoning, similar to the strategy of granting immunity from prosecution to a person who provides substantial cooperation in the investigation of serious crimes.[141] While human rights language seems far more appealing, it is necessary to recognize the importance of different legal frameworks at play when discussing this novel principle.

In addition to clarifying the question of the foundation of the non-punishment principle, the interaction between human rights law and criminal law is even more important when it comes to answering practical questions concerning its application on a domestic level. Accordingly, while human rights law lays down general guidance as to the goal to be achieved (i.e. victim protection), it is for criminal law to develop specific guidance on the questions identified in this article concerning the practical implementation of this principle. For example, the discussion of the correlation between the victim's criminal offence and her trafficking experience required to establish the 'nexus of compulsion' calls for engaging with the problems of causation, coercion and the lack of agency, all of which are distinctly matters of criminal law. Unfortunately, there has been a limited engagement with these problems by national legislatures and judiciary and an academic consideration of this question has been scarce. While questions of criminal responsibility, causation and sentencing are complex and the legal scholarship in this field is rich, a detailed elaboration on these problems exceeds the scope of this article, which sought to map out critical

139 OSCE Guidance, para. 82.

140 Annison, *In the Dock* 2013 (n. 2), 93.

141 United Nations Convention against Transnational Organized Crime (15 November 2000) UNTS vol. 2225, Article 26 (3).

questions and point to inconsistencies in the current approaches in order to provoke a further debate on this important but under-theorized principle.