



*Written submission to the
**Report of the United Nations Special Rapporteur on trafficking
in persons, especially women and children.***

In Belgrade, February 14, 2021

Republic of Serbia has ratified the **Protocol to prevent, suppress and punish trafficking in persons, especially women and children**, supplementing the United Nations **Convention Against Transnational Organized Crime (Palermo Protocol)**, as well as **Convention of Council of Europe Convention on Action against Human Trafficking** ("Official Gazette of RS - International Agreements", No. 19/2009). Although Serbia has ratified this convention into our legislation, there are issues in application of certain provisions, including the ones relating to non - punishment for victims of human trafficking.

The principle of non - punishment as such is not explicitly stated in Serbian legislation, however a non-punishment principle can be drawn from list of acts in Criminal Law and Code for Criminal Procedure.

Article 388 of Criminal Law, recognizes trafficking in human beings as one of the forms of exploitation for the purpose of committing criminal offenses.

When the procedure is initiated against persons who are victims of human trafficking, the procedure must be suspended because there are grounds for excluding the criminal offense, which is also provided by Serbian Criminal Code.

Also, there is no criminal offense if wrongfulness or guilt is excluded, although there are all the features of a criminal offense determined by law, criminal offence Article 14, paragraph 2., An Offence of Minor Significance Article 18, paragraph 1, an offence shall not be considered a criminal offence, if despite having elements of a criminal offence it represents an offence of minor significance, Self-Defence Article 19, paragraph 1, an act committed in self-defence is not a criminal offence; Force and threat, Article 21, paragraph 1 determines that a criminal offense is not an offense committed under the influence of force majeure; Extreme Necessity Article 20, paragraph 1, an act committed in extreme necessity shall not constitute a criminal offence. All these circumstances are measures prescribed by domestic law that can be applied to victims of trafficking and the principle of non – punishment.

We find a similar situation in the Law on misdemeanours ("Official Gazette of RS", No. 65/2013, 13/2016, 98/2016 - CC decision, 91/2019 and 91/2019 - other law)¹

The Instructions on the Conditions for Granting Temporary Residence to Foreign Citizens Victims of Human Trafficking² should also be mentioned here.

Situation in which a victim of trafficking entered the Republic of Serbia illegally or does not have a valid residence permit, the competent authority must establish all facts and circumstances that may exclude or reduce the criminal or misdemeanour liability of victims of trafficking.

All the above-mentioned measures and circumstances must also be reconsidered when it comes to foreigners who are victims of human trafficking.

What we find in the Criminal Code in Article 388, paragraph 1, are certain forms of human trafficking, such as begging and exploitation through the commission of a crime, which tells us that in the Serbian criminal legislation itself we find provisions that support non - punishment for victims.

Important: Although it seems that there are more than a few solid sources from which the non-punishment principle can be drawn and implemented – we believe that this is far from enough. Explanations and instructions for the implementation of the non-punishment principle in Serbia are quite complex and can be confusing. When we add conservative approach, as well as prejudice and misconceptions in large number of judges and prosecutors, the non-punishment principle is left without solid systemic base, resulting in victims not being recognised as such, and furthermore, being sentenced for the deeds committed while being in a trafficking chain.

For the past 11 years, ASTRA has been conducting analysis of the verdicts on crime of trafficking in human beings and similar acts. This is a unique analysis, where we collect verdicts from accountable court in Serbia and, by calling upon the right to access on information of importance to public, we receive an (anonymised) copy of each verdict in the reference year, related to crime in trafficking in human beings, force adoption, mediation in prostitution, etc. The latest report can be found [here](#). Currently we are in the process of collecting verdicts from 2020.

Unfortunately, the findings of our analysis confirms our assumption that there are cases of trafficking in human beings that appear to be qualified as a crime of mediation in prostitution. In such cases a plea bargain is set between the prosecutor and the defendant. The defendant walks free or with a minimum sentence. Consequently, the probable victim of the trafficking in human beings is being labelled as prostitute, and can even be fined for engaging in prostitution. One of the reasons for such a practice is that it is more difficult, time and resource consuming to conduct a trial for trafficking in human being than for the mediation in prostitution. So, the prosecutors choose the act that could be easily proved, concludes a bargain with the defendant and, from their point of view – at least manage to convict the defendant, even if it's for the less "serious" crime. By art. 16

¹ https://www.paragraf.rs/propisi/zakon_o_prekrhajima.html

² <https://www.astra.rs/wp-content/uploads/2017/11/Instrukcija-za-odobrenje-privremenog-boravka-stranim-drzavljanima-zrtvama-trgovine-ljudima-sa-komentarom.pdf>

of *Law on public order* the prostitution is forbidden, and the prostitutes can be fined or imprisoned for this act., regardless of the recommendation no. 26 of CEDAW Committee³.

The criminal offence where minors appear as injured parties in practice is almost non-existent. Helping and incitement coincide with the term "recruiting", in this case, and it is always a qualified form of the crime of trafficking in human beings under Article 388 paragraph 6 in conjunction with paragraphs 1 and 3 of the CC, and we cannot talk about the crime under Article 184 of the CC. ASTRA strongly advocates the abolition of the second paragraph of the criminal offence of mediation in prostitution. Unfortunately, practice shows us that the crime of human trafficking is often not recognized. Instead, the criminal offence of mediation in prostitution is recognized, but the victims are also accused of committing violations of Article 16 of the Law on Public Order and Peace for engaging in prostitution.

Important: Although the most obvious breach of non-punishment principle happens in the cases of prostitution, we must underline that, from our exchange with key actors in judiciary and law enforcement, a large portion of cases where minors, potential victims of THB, are forced to commit some sort of criminal act (robbery, begging). This is an area that ASTRA is exploring much more in detail, by collecting verdicts and decisions from the relevant courts, consulting with stakeholders, and exploring good practices in other countries.

Confirming so far that, there are certain provisions that are allowing the implementation of the non-punishment principle, we would once more draw attention to many examples of not so successful practice – some of those listed in the OSCE *Manual - Legal framework and recommendations for the application of the principle of impunity for victims of trafficking in human beings in the Republic of Serbia*⁴.

It is important that the victim is identified by the competent institution as a victim of trafficking as soon as possible. The only institution in charge of formal victim identification is the Center for the Protection of Victims of Trafficking. What seems to be a problem in practice is the fact that there are still no indicators for the formal identification of victims, but, according to the Centre, other existing indicators, such as the indicators of the UN Office on Drugs and Crime (UNODC) and the International Labor Organization (ILO) indicators are used. Also, the finding and opinion issued by the Center for the Protection of Victims of Human Trafficking is not a legally recognized act. In a number of cases, this opinion was not accepted in court proceedings.

Finally, the issue with the state shelter for victims should be mentioned. The shelter started working in 2019, seven years after the establishment of the Center. The only state shelter for victims has a small capacity (only six victims) as well as the fact that it is intended only for female victims, over 16 years of age. All relevant actors should work to address this issue.

³ https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/SRB/CO/4&La

⁴ <https://www.osce.org/files/f/documents/f/7/469509.pdf>

To conclude, we must state that in most cases, the Center does not function proactively, they mainly act on the basis of initiative from some other institution (law enforcement, centres for social welfare, NGOs...), therefore, the opportunity for early identification is often missed.

The reason for the early identification of a victim of trafficking will prevent problems that may arise later in practice, related to the initiation of criminal proceedings against the victim. Ultimately, there may be a conviction against a victim of trafficking, which is completely contrary to international standards and domestic legislation. ASTRA have already has clients where the identification came late, and there were consequences for the victim because of this.

It is clear that there are challenges that must be overcome; one of them is that the relevant actors do not deal enough with the very principle of non-punishment for victims.

The practice of initiating proceedings must be changed, i.e. the termination of proceedings as soon as possible if they are initiated against a victim who has not been formally identified, as well as the immediate termination of detention.

Examples of good practice

Case no. 1.

In the case of the High Court, the person was convicted of the criminal offence of Human Trafficking, Article 388 paragraph 2, in conjunction with paragraph 1. The criminal offence was committed against a minor, aged 13 years. The defendant threatened the juvenile that he would physically attack him, so the juvenile was forced to commit two criminal acts of aggravated theft. The defendant denied committing the crime of human trafficking, while he said he committed the crime of aggravated theft. During the procedure the situation was determined on the basis of the statements of the injured parties, who stated that the juvenile committed the criminal offense of aggravated theft, and not the defendant. In the second-instance procedure, the court found unfounded the appellate allegations of the defendant's defence counsel that it did not follow from the pronounced rebutted verdict whether and to what extent the defendant's threat was serious in relation to the juvenile because the threats made to the juvenile by the defendant are described in the verdict (aggravated theft). The reason for this action of the court is that the criminal offense for which the defendant was found guilty (trafficking in human beings) exists regardless of whether the accused used the threat as one of the possible forms of the act of committing this criminal offense if that action was taken against a juvenile. In that way, paragraph 2 of Article 388 of the Criminal Code is **directly applied**.⁵

Case no. 2.

In another example, also an example of good court practice, we again have a juvenile who has committed certain crimes. It is an indisputable fact that the injured party committed a criminal

⁵ <https://drive.google.com/file/d/1-YNyyPxEJnJ5MySblnjLr4u8G7RruJ7J/view>

offence, but it is essential to emphasize that the acts were committed under duress. Although the injured party committed the criminal offence of his own free will, it is not and cannot be an influence on the course of the proceedings in the sense that this person can be convicted for those acts he committed. He/she is protected by a provision of non - punishment, Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings.

Examples of bad practice

Case no 1.

One of Astra's clients was a young man who committed the criminal offense of robbery. A criminal proceeding for the criminal act of robbery was initiated against him and he was sentenced to prison. The traffickers threatened to kill him and his family. He was sentenced to a year in prison, even though it was evident he was a victim of human trafficking and he committed the crime under coercion. After that procedure, the procedure for trafficking in human beings (art. 388) has been initiated against the traffickers, where the same young man was called to testify as a witness/victim!! The procedure is still ongoing. In total, this young man has been participating in different court procedures, for 7 years now.

Case no 2.

Also, from 2013 ASTRA has been providing of legal assistance and other forms of support to a victim who was brutally violated and exploited for almost ten years, by a man who had committed a murder in front of her and forced her to confess the crime.

This case of trafficking was never prosecuted as such because her exploitation started in 1995, years before trafficking in human beings was introduced into Serbian legislation.

Although the client was officially identified as a victim by the Centre for human trafficking victims' protection in 2012, both courts (the Higher Court and Court of Appeal) explicitly refused to establish the fact that she was the victim of human trafficking, and consequently did not apply non-punishment provision (Article 26) of the CoE Convention on Action against Trafficking in Human Beings.

The murder she was convicted for, happened during the period of her exploitation and the entire context of the investigation and later the trial, did not allow her the full protection she would otherwise be entitled to as a victim of human trafficking.

Together with refusal of the courts to recognize her as a victim it created the situation of violation of her rights as victim of human trafficking. The only option left is to appeal to the President of Serbia to be pardoned, and this is something that the victim and ASTRA are doing each year, so far without the result.

Conclusion/recommendation – ASTRA believes that the only solution to an adequate implementation of the non-punishment principle is to explicitly introduce the principle into the relevant legal framework of Serbia.

