



La Strada International submission - Upcoming Report on the implementation of the non-punishment provision by the UN Special Rapporteur on Trafficking in Persons, especially women and children.

La Strada International - European NGO Platform against trafficking in human beings uniting 29¹ European counter trafficking NGOs in 23 European countries - strongly welcomes the upcoming report by Ms. Siobhán Mullally, UN Special Rapporteur on Trafficking in Persons, especially women and children. The Platform acknowledges the urgent need to identify trends, gaps and good practices related with the implementation of the non-punishment provision in the context of trafficking. In this submission, we outline legal and practical challenges, faced by member NGOs in the European context and recommendations for change. Serious failures, to protect victims from unjust punishment for acts they have been compelled to commit, occur daily.

Despite international and European legally binding standards on non-punishment, and the adoption of specific legislation in several countries, trafficked persons in Europe are often still wrongly detained, prosecuted and punished for offences, they have been compelled to commit in the course, or as a result, of having been trafficked. This is a serious human rights violation and a denial of justice and reinforces distrust towards the criminal justice system by victims and others.

Diverse scope of legislation

All European countries have ratified the UN Palermo Protocol of 2002², the CoE Convention on Action against Trafficking in Human Beings³ and EU MS are further bound by the EU Directive on Trafficking in Human Beings (Directive 2011/36/EU). However these international instruments provide quite some flexibility on how countries implement the non-punishment provision. In a growing number of European countries - at least 18 – there are specific legal provisions on the non-punishment of victims of trafficking for status offences⁴. In some countries⁵ guidance on the application of the non-punishment provision has been developed for prosecutors and law enforcement agencies. Existing

¹ La Strada International comprises 26 member organisation and 3 associate members. www.lastradainternational.org

² While this Protocol does not mention the non-punishment provision explicitly, article 2b talks about due to protect victims of trafficking 'with full respects of their human rights This already stresses that states must take full account of the human rights of people; recognizing that persons should not be blamed for offences they have been compelled to commit. Statement by Ryszard Piotrowicz, LSI webinar on non-punishment 29 Oct 20 https://drive.google.com/file/d/18wbc41SVXpN_G1aNxppIn_QKdRv36paQ/view?usp=sharing

³ Except for Russia

⁴ GRETA mentions the following 17 countries: Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Cyprus, Finland, Germany, Georgia, Latvia, Lithuania, Luxembourg, Malta, Romania, Slovak Republic, Spain, United Kingdom. See paragraph 179 of the 9th General Report on GRETA's Activities covering the period from 1 January to 31 December 2019 published by the Council of Europe. <https://rm.coe.int/9th-general-report-on-the-activities-of-greta-covering-the-period-from/16809e169e>. Since April 2019 Belgium also has a specific provision in its penal code, stating that victims of trafficking cannot be penalised if they commit a crime, if this is a direct consequence of human trafficking.

⁵ According to GRETA including Belgium, Croatia, Denmark, Netherlands, Norway, Serbia, Spain, United Kingdom. 9th General Report GRETA, 2020.

provisions, however often do not apply to all types of unlawful acts victims committed under compulsion; their application is limited in scope and refers to certain offences only, e.g. illegal border crossing or irregular stay or employment. (See Annex 1.1-3). There also remains a lack of clarity about the interpretation of these provisions by legal professionals, and restrictive interpretation tend to prevail e.g. not applicable to serious offences, or it depends on when the offence was committed, or the 'direct consequence' link is challenged. (See Annex 1.4-5).

Still in most European countries there are no specific legal provisions and these countries rely on general provisions (defences of duress, state of necessity etc), which are restrictively interpreted. These general provisions seem unfit to deal with the complex trafficking scenarios that victims face and are often too narrow to be effectively used to shield victims of trafficking from unjust punishment. (See Annex 1.6-8) Overall, we observe different interpretations, lack of awareness among legal professionals and serious shortcoming in implementation. Specific legislation, policies or guidance adopted on the non-punishment provision have not effectively prevented trafficked persons from being held liable under criminal, civil or administrative laws, including for immigration and sex work related offences.

Successful applications of the non-punishment provision do exist but these positive experiences are more the exception than the practice. LSI members in Serbia, Spain, Netherlands, Germany and Austria reported successful applications of the NP provision, concerning violations of alien law, use of false documents and offenses related to involvement in sex work. (See Annex 1.9-13). Overall, LSI members reported failures to apply the non-punishment for all forms of human trafficking, but in particular in cases of trafficking for forced criminality, where victims seem more automatically be regarded as perpetrators.

An important criterion for the application of the NP provision, often is the requirement for victims to be formally identified by criminal justice authorities, or a (successful) outcome of trafficking court proceedings against their traffickers, often these two issues are closely connected and go beyond victims' ability or willingness to cooperate. Generally in Europe, access to rights and residence is very much linked to whether or not an investigation and prosecution takes place, or whether there is a successful prosecution, regardless of the fact that the persons is a victim of trafficking⁶. The lack of formal identification of victims is a major challenge and the number of identified victims remains low.

Lacking awareness

This closely relates to lack of awareness, knowledge and capacity of all those responsible for the (early) identification of victims⁷, including lack of awareness about victims' rights and the specific non-

⁶ Practice shows that victims have limited access to protection, support and assistance if they are not able or willing to cooperate with the authorities, or if the criminal procedure has not started or is discontinued.

⁷ La Strada International submission for the European Commission's Third Report on the Progress made in the fight against trafficking in human beings, 2018 <https://lastradainternational.org/lisidocs/3359-Submission%20La%20Strada%20International%203rd%20EU%20progress%20report%20THB%20-%2020%20May%202020.pdf>

punishment provision. While in Spain, Bulgaria, Germany and Belgium specific legal provisions exist, our members note that many judges and prosecutors are not aware of them. (*See Annex 1.14*). It is therefore needed for NGOs to raise the issue constantly among legal professionals. Generally, it is noted that beyond the circle of specialised police and prosecutors, other authorities (e.g. non-specialised criminal justice professionals, judiciary, authorities dealing with administrative and civil proceedings, fiscal matters, asylum, labour inspectors, pro-bono lawyers etc.) do not screen for trafficking indications and do not know the non-punishment provision. Very often victims are sanctioned for administrative violations they were compelled to commit resulting in huge fines and or imprisonment when they fail to pay. (*See Annex 1.15-16*)

There are also many examples that persons who were identified as trafficked, are left with high debts, e.g. debts for costs they had to make for their perpetrators, e.g. high telephone bills when they were forced to sign contracts with telephone companies on their names etc; or other costs for damages caused by them as victims, these fines can lead to arrest or detention.

Arrest, detention and prosecution

Victims of human trafficking face arrest, detention and prosecution, especially when they are not identified formally as victims, but there also cases in which victims were detained or prosecuted, even though they were formally identified and recognised as victims. (*Annex 1.17-21*) Our members encountered cases where the victim did not infringe the criminal code, but other administrative regulations, and in such cases there is no protection; the non-punishment provision in the criminal code does not apply to such cases. Cases have been reported of persons officially considered as victims of trafficking but still they were convicted for use of fraudulent documents, including in the Netherlands.

Our members in the Netherlands, Belgium and France noted more cases of young African boys that committed petty crimes, only in the Netherlands there seems now more attention for the fact that these boys may have been forced into criminality. The Dutch law enforcement announced to start further investigation into this, while in France the government is actually working on signing an agreement with Morocco about the return of these convicted ‘young criminals’ to their country of origin⁸.

Lack of specialism, coordination and lack of clearances of criminal offences

While several European countries work with specialized legal professionals, there are not sufficient specialized or experienced lawyers, that are able to assist victims of trafficking and defend them against unjust punishment in legal proceedings. Concerning is that criminal justice authorities dealing with cases of trafficking, do not coordinate proactively with their colleagues investigating and prosecuting the same victims as ordinary offenders for crimes they were compelled to commit during or as a result of their trafficking. (*See Annex 1.22*). Criminal records of repeated arrest of a person for

⁸ Information provided by Comensha, PAG-Asa and CCEM, LSI Members meeting 29 January 2021

stealing or drugs dealing across the country are also not analysed proactively to identify possible indications of human trafficking.

A challenge for NGOs, assisting victims, is that often there is also no clarity about how many charges have been – or will be - brought against the victim, which also leaves the person in a very uncertain and precarious ‘re-victimising’ situation. Pro-bono lawyers are challenged by these cases and usually not aware of relevant non-punishment provisions. Specialised NGOs are challenged by these cases because they require a huge amount of support for very long time and specialised legal aid for years to assist these persons. Most victims are often unaware of the nature of proceedings and their own status - they are apprehended by the police, brought before a judge and detained.

It is noted that criminal records of victims of trafficking are not (automatically) cleared and vacated; administrative sanctions are not lifted, when victims are identified as trafficked. *(See Annex 1.23-24)* These unjust punishments continue having a huge impact on the victim and they result in their re-victimization and further stigmatization. Criminal records can have life-long negative consequences on the enjoyment of other rights, including rights to residence, employment and social welfare. In most countries little attention is paid to these matters, and too little efforts are made to clear criminal and administrative records of victims unjustly punished, and to remedy to the injustice they experienced.

Non Punishment failed application in asylum procedures

There are cases of victims of trafficking, who seek asylum and are denied access because they have entered with fraudulent documents, did not approach the authorities to apply for asylum without delay. Victims may be compelled by traffickers to commit serious crimes, e.g. recruit other victims or otherwise assist traffickers in their operation, carry or sell drugs. In such cases, when they seek asylum, their involvement in serious offences may raise exclusion considerations and even lead to the denial of their refugee status, unless a defence of duress or a state of necessity is established. It is important that asylum authorities be trained on THB and the non-punishment provision. These cases need to be assessed carefully and in light of all the circumstances where a person may be unable to act with free will because of the control and abuse exerted on them by traffickers.⁹ The assessment of the individual responsibility in such cases needs to interpret compulsion in the trafficking context, i.e. broadly meaning that it includes “the full array of factual circumstances in which victims of trafficking lose the possibility to act with free will; not only under the threat of physical violence or emotional abuse, but also in the devastatingly prevalent scenarios wherein traffickers exploit victims by abuse of a position of vulnerability.”¹⁰

⁹ REST Report, forthcoming (expected 22/2/2021) - http://www.lefoe.at/tl_files/lefoe/Project%20description%20REST.pdf

¹⁰ OSCE, 2013



La Strada International believes that the non-punishment principle should be meaningfully applied to protect all victims of trafficking. It is therefore needed to make the NP accessible and applicable in practice to a range of contexts, across a range of jurisdictions.

Recommendations

- Trafficked persons should not be arrested, detained, charged, prosecuted or convicted for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.
- The implementation of the non-punishment provision should be applied in accordance with a human rights based approach, fully complying with the available legal instruments. The NP should not be seen only as a mitigating circumstance and not be arbitrary limited, according the gravity of the offence.
- Every kind of compulsion, should be interpreted in the light of the THB definition; all the means of THB should be taken into consideration in assessing that the victim acted under compulsion and was deprived persons of their free will.
- States should adopt specific legal provisions on Non Punishment of victims of trafficking for status offences. The NP should not be limited in scope, but apply to any civil, administrative or criminal offence, including serious offences.
- After identification of a person as a trafficked person, the application of the NP should immediately apply, including during the process leading to a trial. Investigative and prosecutorial authorities should have an obligation to apply the non-punishment principle from the very beginning of an investigation and of a prosecution.
- It is necessary to have legislation in place, which does not give public prosecutors absolute discretion, to decide whether they apply the non-punishment provision or not. Further legislation in place needs to cover any trafficking-related offence, as well as refer to non-detention and non-prosecution.
- Judges, prosecutors and other legal professionals should be made aware about the existence and applicability of the NP provision; there is a need for greater specialization, guidance and training of professionals involved at various stages of proceedings..
- Specialized victim's organizations should be included at the earliest stage possible In criminal proceedings, a suspected or accused person should always have a lawyer in order to be defended by a professional and have the possibility to talk to him*her in a safe environment. When public prosecutors assume that the suspected or accused person is a victim of trafficking , they should offer to establish contact with specialised counselling centres in order to provide for professional support and counselling.
- More coordination is required among legal professionals.Criminal records should be cleared and administrative sanctions lifted, when the person is identified as a victim of trafficking, and those charges, criminal records or sanctions are a result of having been trafficked. Judicial discretion should be provided to enable the judge to clear/vacate also other sanctions that the victim incurred because of their trafficking.



- Pro-active investigation is needed to investigate all charges and sanctions that the person received for their involvement in illicit activities as result of their trafficking, and to shield them from unjust punishment
- More funding and resources are needed to support victims in seeking remedies for unjust punishment, and for annulment of these wrong legal acts (not only conviction but also arrest, fines etc)