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Input for the Report on the Implementation of the Non-Punishment Principle

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Input for the Report on the Implementation of the Non-Punishment Principle

Introduction

This submission addresses the following aspects of the call for input:

- The limits or challenges on the application of the non-punishment principle, in law or in practice.
- Specific models of implementation of the non-punishment principle.

It proceeds in two parts, drawing on secondary sources and examples of national practice in the UK (both England/Wales and Northern Ireland jurisdictions) and Italy. Part 1 considers issues related to the identification of trafficking victims in the context of exploitation of criminal activities, with a particular focus on the ‘purpose’ element of the trafficking definition. Part 2, meanwhile, focuses on the ‘means’ element of the trafficking definition, exploring how this can inform interpretation of the requirement that trafficked persons have been compelled to commit unlawful acts under the ‘duress’ model.

¹ Submission led by the Human Trafficking Research Network based at Queen's University Belfast, Human Rights Centre. Report produced by John Trajer (EUI), Gillian Kane (QUB), Marta Minetti (QMUL), and Sarah Craig (QUB).

1. Non-identification and Misidentification in the Context of Exploitation

The growing recognition of the importance of the non-punishment principle in ensuring protection of trafficked persons is encouraging.² In the UK, for instance, the non-punishment principle has recently acquired a statutory basis in both England/Wales³ and Northern Ireland.⁴ Concerns, however, remain with this statutory defence in two core areas, namely: 1) the defence requires trafficking victims to be recognised within the relevant legal framework,⁵ and 2) the scope of application is narrow with regard to the offences covered.⁶

The extent to which the non-punishment principle can play a meaningful role in practice rests on a holistic approach which addresses not only the principle itself, but many connected aspects of the anti-trafficking framework. In particular, the effectiveness of the non-punishment principle hinges upon accurate identification of conduct amounting to trafficking.⁷ Admittedly, identification of human trafficking in the context of criminal conduct by victims will not necessarily mean that the non-punishment principle will be relevant. Further, accurate identification in these scenarios does not guarantee that the principle will be utilised in the way in which it should be. In addition to accurate identification, there is therefore also a need for awareness of how the trafficking offence relates to the commission of unlawful activities committed by victims (nexus of causation). These issues, while conceptually discrete, are closely linked in practice.

² See, inter alia, Maria Grazia Giammarinaro, 'The importance of implementing the non-punishment provision: the obligation to protect victims' (30 July 2020).

³ Modern Slavery Act 2015, s45.

⁴ Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, s22.

⁵ Criminal Justice Inspection Northern Ireland, 'Modern Slavery and Human Trafficking: an inspection of how the criminal justice system deals with modern slavery and human trafficking in Northern Ireland (Criminal Justice Inspection Northern Ireland, October 2020) available at: <<http://www.cjini.org/getattachment/df690ef3-5352-457e-bbeb-ea2957b531b0/report.aspx>> (accessed 8 February 2021), at para 2.65, which notes "concerns that genuine victims of MSHT were failing to be identified and were incorrectly being prosecuted for crimes committed as a result of their exploitation."

⁶ Group of Experts on Action Against Trafficking in Human Beings (GRETA), 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom (2016) 21, para 287.

⁷ See Marija Jovanovic, 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance' (2017) 1 *Journal of Trafficking and Human Exploitation* 41, 62-63. The author argues here that most problems in applying the non-punishment principle arise because of the failure of state authorities to identify defendants as victims of trafficking.

For accurate identification of victims, clarity must be pursued in law, policy, and practice. In both England/Wales and Northern Ireland, the statutory definition of trafficking is centred around ‘acts’ relating to travel,⁸ an issue which has been noted by GRETA⁹ and criticised within the United States Trafficking in Persons Reports.¹⁰ This aspect of the statutory definition risks fuelling existing misconceptions surrounding trafficking that undermine efforts to identify victims.¹¹ It is therefore essential that those working in frontline roles who may come into contact with trafficked persons (such as police officers, immigration officials, and healthcare workers) are given the necessary training to enable them to identify trafficking where it has occurred.¹²

While the parameters of each of the elements of the trafficking definition ought to be effectively clarified and understood within domestic systems, the purpose element, insofar as it may apply to the exploitation of criminal activities, warrants particular attention in the context of identification. Given the grave consequences of misidentifying victims of trafficking as potential criminals and prosecuting them as such, these situations require a proactive and comprehensive approach on the part of law enforcement officers who come into contact with offenders who might have been trafficked. Failure to recognise victims as such in this context will not only deny trafficked persons of their entitlement to protection (non-identification) but will also risk exposing them to prosecution and punishment as criminal offenders (misidentification). Meanwhile, those orchestrating the trafficking may simultaneously avoid prosecution and continue to exploit other vulnerable individuals.

⁸ Modern Slavery Act 2015, s2; Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, s2. For further analysis, see QUB Human Rights Centre, ‘Public Consultation: Draft Modern Slavery Strategy 2021/22’ available at: <<https://www.qub.ac.uk/research-centres/human-rights-centre/FileStore/Fileupload,1015157.en.pdf>> (accessed 8 February 2021), 14ff.

⁹ GRETA UK Report (2016) (n 6) paras 260 – 261.

¹⁰ United States Department of State, ‘Trafficking in Persons Report’ (June 2020) (accessed 3 January 2021), 511-514.

¹¹ On misconceptions and misunderstandings, see, inter alia: Christiana Gregoriou, *Representations of Transnational Human Trafficking Representations of Transnational Human Trafficking Present-day News Media, True Crime and Fiction* (Palgrave Pivot 2018); Silvia Rodríguez-López, ‘(De)Constructing Stereotypes: Media Representations, Social Perceptions, and Legal Responses to Human Trafficking’ (2018) 4 *Journal of Human Trafficking* 61.

¹² See, for instance, Detective Superintendent Jennifer Bristow and Detective Inspector Helen Lomas, ‘The Modern Slavery Act 2015 Statutory Defence: A Call for Evidence’ (October 2020) available at: <<https://www.antislaverycommissioner.co.uk/media/1478/the-modern-slavery-act-2015-statutory-defence-call-for-evidence.pdf>> (accessed 8 February 2021), para 3.2.6.

The impact of misidentification on the application of the non-punishment principle has been highlighted in a recent report from the UK’s Anti-Slavery Commissioner, which followed a call for evidence on the statutory defence under the Modern Slavery Act 2015. The report notes that “evidence illustrates that police are not proactively anticipating the statutory defence at the beginning of an investigation or spotting victims of trafficking early enough.”¹³

1.1. Example of ‘County Lines’

In the UK, this issue can be illustrated by considering the growing phenomenon of ‘county lines’ activity. ‘County lines’ refers to activity by “gangs and organised criminal networks involved in exporting illegal drugs into one or more importing areas [within the UK], using dedicated mobile phone lines or other form of ‘deal line’.”¹⁴ In the process, children are often exploited in ways which could be linked to trafficking. Concerns have been raised regarding the potential misidentification issues outlined above. For example, it has been reported that “[s]ome evidence from the police colloquially referred to the statutory defence as the ‘county lines defence’. Law enforcement practitioners are not associating this phenomenon with modern slavery, but with drug dealing.”¹⁵ Further, it has been noted that often the police “see a drug dealer in front of them and without additional understanding and expertise are unlikely to investigate trafficking.”¹⁶ Regarding misidentification and non-identification, the statutory defence adopted in the England/Wales and Northern Ireland jurisdictions is evidently only beneficial where trafficking victims are correctly identified *as victims*, so that the non-punishment principle may apply where it ought to.

Despite the concerns highlighted above, there is evidence that those involved in exploiting young people in ‘county lines’ activity are being prosecuted for human trafficking offences. The case of *R v Glodi Wabelua, Dean Alford, Michael Karemera* is one such example.¹⁷ The focus should be on ensuring that this practice becomes the norm, rather than an exception.

¹³ *ibid*, para 3.1.3.

¹⁴ National Crime Agency, ‘County Lines’ <<https://www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/drug-trafficking/county-lines>> (accessed 8 February 2021).

¹⁵ Statutory Defence: A Call for Evidence (n 12) para. 3.2.6.

¹⁶ *ibid*.

¹⁷ [2020] EWCA Crim 783.

2. Irrelevance of Consent under the ‘Duress’ Model

This section focuses on the criteria used to define the link between the commission of the unlawful act and the victim’s subjection to the influence of the trafficker. It calls for greater conceptual clarity on how the principle of irrelevance of consent in the international trafficking definition can inform the correct application of the non-punishment provision under the ‘duress’ model that has been favoured in international instruments.¹⁸

The recent paper of the former UN Special Rapporteur¹⁹ submits that, under the duress model, the threshold of ‘compulsion’ (as applied to adults) should be interpreted broadly to reflect the recognition that victims of trafficking often act under the influence of subtle forms of pressure that would not usually be recognised by traditional defences of duress in national legal systems.²⁰ Specifically, “the application of the test of ‘compulsion’ would be satisfied in any case where the victim was subjected to one of the means [in the trafficking definition] at the time of the commission of the offence.”²¹ This, however, raises an additional question that could benefit from further conceptual clarification, namely: does the nature of the offence, and the point at which it occurs in the trafficking process, have any bearing on the satisfaction of the compulsion requirement?

¹⁸ Council of Europe Convention on Action against Trafficking in Human Beings (ETS No. 197), Art. 26; Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims [2011] OJ L 101/1, Art. 8; ILO Protocol to the Forced Labour Convention 1930 (11 June 2014), Article 4(2).

¹⁹ Giammarinaro (n 2).

²⁰ See also: Ryszard Piotrowicz and Liliana Sorrentino, ‘Human Trafficking and the Emergence of the Non-Punishment Principle’ (2016) 16(4) *Human Rights Law Review* 669, 691; Andreas Schloenhardt and Rebekkah Markey-Towler, ‘Non-Criminalisation of Victims of Trafficking in Persons – Principles, Promises, and Perspectives’ (2016) 4(1) *Groningen Journal of International Law* 10, 35.

²¹ Giammarinaro (n 2) para 24.

This question has elicited a range of responses in the academic literature. Piotrowicz and Sorrentino agree that the compulsion requirement should be interpreted broadly to include all the ‘means’ in the trafficking definition,²² distinguishing between ‘causation-based offences’ (committed in the process or as a consequence of being trafficked) and ‘duress-based offences’ (where victims are compelled to commit offences for reasons other than coercion exerted by traffickers, for instance in efforts to escape).²³ This approach does not distinguish between unlawful acts committed in the course of trafficking and those committed in the context of subsequent exploitation. Jovanovic, by contrast, argues that there is a need to establish separate rules for the application of the non-punishment principle to these different categories of offences, distinguishing between ‘status offences’ (which directly facilitate the commission of the trafficking offence, such as immigration offences and presentation of false documents) and ‘purpose offences’ (which relate to the intended exploitation of victims for financial gain, but fall outside the parameters of the trafficking definition).²⁴

According to Jovanovic, the presence of trafficking means in the commission of status offences will automatically satisfy the compulsion requirement, while application of the non-punishment principle to purpose offences may require additional evidence of compulsion where similar means cannot so readily be established.²⁵ This argument ultimately comes down to a stricter interpretation of the scope of the trafficking definition as an offence which does not extend to exploitation *per se*. It has been argued, alternatively, that the commission of status offences, such as breaches of immigration rules, may pose a greater challenge for the compulsion requirement, especially when victims of trafficking commit these offences knowingly and the intended exploitation never materialises.²⁶ On this basis, for status offences related to immigration infractions, Schloenhardt and Markey-Towler suggest a ‘presumption model’ that places the burden of proof on prosecutors for establishing that the offence is unrelated to subjection to the control of traffickers, rather than the model of blanket immunity suggested for this category by Jovanovic.²⁷

²² Piotrowicz and Sorrentino (n 20) 677.

²³ *ibid*, 685. On the inability of the duress model to recognise how a causal relationship can persist between unlawful acts and subjection to trafficking even after the trafficking situation has ended, see Bijan Hoshi, ‘The Trafficking Defence: A Proposed Model for the Non-Criminalisation of Trafficked Persons in International Law’ (2013) 1(2) *Groningen Journal of International Law* 54, 55.

²⁴ Jovanovic (n 7) 65-66.

²⁵ *ibid*, 68. Jovanovic adds, however, that the presumption should be that victims lack autonomy where their involvement in lawful activities is the manifestation of the exploitative purpose of their trafficking.

²⁶ Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States’ Positive Obligations in European Law* (Cambridge University Press 2017), 149-150.

²⁷ Schloenhardt and Markey-Towler (n 20) 36.

2.1 *Examples from the UK and Italy*

Examples of models of implementation at the national level can help clarify the relevance of this conceptual discussion. The Modern Slavery Act defence can only be relied on by adults if, inter alia, they have been compelled to commit an offence and that compulsion is attributable to slavery or to relevant exploitation.²⁸ This raises doubts as to whether the defence can apply in the context of immigration or false document offences where victims of trafficking have been identified prior to their exploitation.²⁹ Further complexity is introduced by the guidance for prosecutors (“CPS Guidance”).³⁰ This holds that, where victims of trafficking and slavery cannot rely on the statutory defence, prosecutors should consider the relevance of compulsion arising from their trafficking situation in deciding whether it is in the public interest to prosecute. Here, it is explicitly stated that ‘compulsion’ includes all the means identified in the UN Protocol definition of trafficking, and that even though the means of trafficking/slavery may not be sufficient to establish compulsion under either the statutory defence or the common law defence of duress, it might diminish culpability sufficiently to no longer be in the public interest to prosecute.³¹ This understanding of culpability in relative terms, even in situations where victims have been subjected to trafficking means at the time of committing the offence, has the potential to undermine effective implementation of the non-punishment principle.³² Nonetheless, similar approaches have been identified in a number of states.³³

²⁸ See supra (n 3), s45(1)(b)-(c).

²⁹ Jovanovic (n 7) 60. Piotrowicz and Sorrentino (n 20), 671, remind us that a trafficked person is recognised in law as a victim from the moment of recruitment, at which point they might already become involved in unlawful activity as a direct result of being trafficked.

³⁰ Crown Prosecution Service Legal Guidance on Human Trafficking, Smuggling and Slavery (updated 30 April 2020), available at: <<https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>> (accessed 10 February 2021).

³¹ *ibid.*

³² As noted by Piotrowicz and Sorrentino (n 20), 695: “It is difficult to envisage a situation where the trafficked person was partly responsible [...] rather than not responsible at all.”

³³ UNODC, ‘Issue Paper on the Role of ‘Consent’ in the Trafficking in Persons Protocol’ (2014), p. 90. Here, it is highlighted that states appear to apply a higher threshold for disregarding consent for the involvement of trafficking victims in criminal activities than when establishing the offence of human trafficking, even when ‘means’ are present in the former. See, also, *R v L and Others* [2013] EWCA Crim 991, at 13 & 33.

The Italian legal framework, despite the GRETA recommendations in 2014, does not include a dedicated provision prohibiting punishment for trafficking victims for unlawful acts traffickers compelled them to commit.³⁴ The main provision applied in order to prevent trafficking victims from facing prosecution is the defence of a “state of necessity”, which is only applicable when the person has been forced to commit the offence under threat of violence and only once the exploitation has been proven in a criminal procedure against the traffickers.³⁵ It is thus applicable only in cases in which the trafficking situation has been correctly identified³⁶ and once the criminal proceedings against the traffickers are already at an advanced stage. The victim until that point is criminalised for unlawful activity, including the breach of immigration laws.³⁷ NGOs have reported that the application of article 54 as an exonerating clause is rare for crimes that are typically linked with the trafficking experience (such as pickpocketing and drug smuggling) and for immigration-related offences.³⁸

The Italian case highlights the fundamental incompatibility between the core function of the criminalisation of irregular entry and the application of the non-punishment principle to immigration-related offences. As every third-country national entering the Italian territory irregularly is automatically treated as an offender, a bespoke provision on non-punishment would fulfil at best a restorative, rather than a fully protective function against criminalisation.

Summary

Together, these two sections argue that effective implementation of the non-punishment principle requires greater clarity on the scope of the international legal definition of trafficking and its distinct elements (act, means, and purpose), both in the context of identification and in satisfying the requirement that victims have been compelled.

³⁴ U.S. Department of State, ‘2019 Trafficking in Persons Report: Italy’, <https://www.state.gov/reports/2019-trafficking-in-persons-report-2/italy/> (accessed 10 Feb. 2021).

³⁵ Article 54, Italian Criminal Code.

³⁶ The Italian criminal law framework presents legislative overlaps between anti-smuggling and the anti-trafficking provisions, which often results in mis-categorisation of trafficking situations as aggravated smuggling. Among the practical consequences of the legislative overlaps are slightly more lenient penalties for the traffickers and the non-identification of trafficking victims as such. The victims are treated as irregular migrants, facing criminal charges for irregular entry along with all the additional offences their unrecognised trafficking experience has entailed.

³⁷ Article 10(bis)- Consolidated Text on Migration (Italy) Legislative Decree No. 286/1998.

³⁸ GRETA, ‘Report Concerning the Implementation of the Council of Europe Convention on Actions against Trafficking in Human Beings by Italy’ (2018).