

Mandate of the Special Rapporteur on trafficking in persons, especially women and children

The importance of implementing the non-punishment provision: the obligation to protect victims¹

Maria Grazia Giammarinaro

Special Rapporteur on trafficking in persons, especially women and children

Contents

Introduction.....	1
Non-punishment in international and regional legal instruments	4
The practical implementation of non-punishment	8

Introduction

1. It is to be recalled that it was the need to increase the prevention of trafficking in persons in the context of the right of victims to protection of their human rights that gave rise to the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (“Palermo Protocol”)². As we know, the internationally agreed definition of trafficking in persons in the Protocol is “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”³ Such exploitation includes, *inter alia*, “the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”⁴. The consent of a trafficking victim to any of the acts above, or indeed to their exploitation, is rendered irrelevant whenever they are subjected to any

¹ Maria Grazia Giammarinaro would like to thank the leading independent expert, Professor Parosha Chandran of King’s College London, barrister, for her essential collaboration and expert assistance with this paper.

² Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (Palermo, 15 November 2000) (entered into force 25 December 2003) (hereinafter “Palermo Protocol”), see Preamble,

³ *Ibid.*, Article 3.

⁴ *Ibid.*

one or more of the means, it being an impossibility for a person to exercise free will in these circumstances. In the case of a child, none of the means is ever required to establish human trafficking, since children are vulnerable to being trafficked on account of their age alone. Consequently their consent in the context of trafficking can never be relevant. The application of all these legal requirements are critical to the application of the non-punishment principle.

2. The 2002 Recommended Principles and Guidelines on Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights (OHCHR)⁵ recognised for the first time both that trafficking in persons could be aimed at the exploitation of the victims' involvement in unlawful activities but also that victims might incidentally commit unlawful acts in the context of their status as trafficking victims. The Recommended Principles and Guidelines firmly advised, therefore, that such victims must be provided with protection, not punishment, for their unlawful acts arising as a direct consequence of their trafficking⁶. Correspondingly, and of great importance in respecting the non-punishment principle, the Recommended Principles and guidelines firmly advised that the actions of law enforcement involved in trafficking investigations must never take place at the expense of victim's rights.⁷
3. Since then, several other international anti-trafficking instruments have explicitly included a binding non-punishment provision⁸. One such instrument, the EU Trafficking Directive 2011/36/EU⁹, specifically recognises the increasing phenomenon whereby traffickers subject victims to enforced criminality and includes reference to this as one of the forms of exploitation included in the definition of trafficking in human beings. In particular, the Directive expressly mentions, amongst the open list of different forms of exploitation, the "exploitation of criminal activities"¹⁰, in addition to "forced begging"¹¹ as a form of forced labour or services. The Directive explains that "[t]he expression 'exploitation of criminal activities' should be understood as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain."¹²
4. The 2013 OSCE Policy and Legislative Recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking¹³ signalled the global

⁵ Office of the High Commissioner for Human Rights, Principles and Guidelines for Human Rights and Human Trafficking (2002) (hereinafter "OHCHR Principles").

⁶ *Ibid.*, Recommended Principle 7.

⁷ *Supra*, for example, Recommended Guideline 5.5 provides: "Guaranteeing that traffickers are and will remain the focus of anti-trafficking strategies and that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed as a consequence of their situation."

⁸ The first binding treaty to include a non-punishment provision was the Council of Europe Convention on Action against Trafficking in Human Beings 2005, Art 26. Other international treaties are also discussed in this paper.

⁹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims (5 April 2011) (entered into force 15 April 2011), (hereinafter "EU Directive"), Article 8.

¹⁰ *Ibid.*, Article 2.

¹¹ *Ibid.*,

¹² *Ibid.*, Recital 11.

¹³ OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, Policy and legislative recommendations towards the effective implementation of the non-punishment

“increasing prevalence”¹⁴ of human trafficking committed for the purpose of enforced criminality. The OSCE Recommendations highlighted how such a form of trafficking is often based on the “deliberate strategy of the traffickers to expose victims to the risk of criminalization and to manipulate and exploit them for criminal activities.”¹⁵ It is to be appreciated that the more traffickers can rely on a State’s criminal justice system to arrest, charge, prosecute and convict trafficking victims for their trafficking-related offences, whether criminal, civil or administrative, the better are the conditions for traffickers to profit and thrive, unencumbered in their criminality and undetected by the authorities.

5. Human trafficking victims are often held liable for unlawful activities committed by them in consequence of their situation as victims, not only in relation to the specific forms of exploitation they may be subjected to (e.g. for soliciting prostitution or engaging in illegal work¹⁶, or for drugs cultivation¹⁷ or other illicit form of exploitation or forced labour) but also for incidental or consequential acts, namely any immigration, administrative or civil offences committed by them, either in the course of being trafficked or as a direct consequence of their trafficking situation. This includes where, for example, a victim is prosecuted for their possession of false documents¹⁸ or their illegal entry or stay in a country. In all these scenarios it is critical that the human trafficking of the victim is detected instead, and the victim is protected and not prosecuted or punished in violation of their right to respect for their human rights.
6. In terms of the former, i.e. the exploitation crimes, it is critical to recall that it is the criminality of the traffickers upon whom the spotlight of investigation and detection must shine, otherwise they will undoubtedly, in everyday language, go free. It is they and not their trafficking victims who are legally responsible for choosing which particular form of exploitation the victims are subjected to and, as seen above, in legal terms, when a trafficker subjects its victims to any one of the means, the victims’ consent to their recruitment as well as exploitation is meaningless. Without this critical appreciation by States, when victims of trafficking in persons first come to the attention of States’ domestic authorities, and this may be as offenders, there is a risk of their victim status often going undetected. As a result, trafficking victims are often wrongly arrested, charged, prosecuted and convicted for crimes and other unlawful acts committed in their status as victims of trafficking. In such cases, the traffickers escape unpunished, remain free to continue their trafficking enterprises

provision with regard to victims of trafficking (2013) (hereinafter “OSCE Recommendations”).

¹⁴ *Ibid.*, § 1.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ See for example the United Kingdom landmark Court of Appeal case of *R v L and others* [2013] EWCA Crim 991, available at <http://www.bailii.org/ew/cases/EWCA/Crim/2013/991.html>. In this appeal case four trafficking victims successfully relied on the non-punishment provision, under the EU Directive 2011/36/EU, Art 8 to have their criminal convictions overturned. The case included three Vietnamese children who had been trafficked in the UK for the purpose of cannabis cultivation and had been unlawfully prosecuted and convicted in the UK of the drugs offences that were the very form of exploitation they had been subjected to by their traffickers. The fourth case involved a Ugandan woman whose use of a false identity document (which her trafficker had given her) had led to her prosecution and conviction for that crime, when she had not known it was a false document at the time she had used it and when the trafficker had put it in her hands, to cause her use of it and her prosecution. The Court of Appeal recognised L’s use of the identity document therefore represented just another step of her trafficking.

¹⁸ *Ibid.*, see the facts in *R v L and Others* of the Ugandan woman named L, at paras 68-74.

and their exploitation of other victims with complete impunity. These are the cases where it can be clearly said that the prosecution of the victims of trafficking represents a gross violation of their rights to protection.

7. Non-punishment provisions are therefore precisely and crucially aimed at granting trafficking victims the protection they are legally entitled to, while at the same time, preventing re-trafficking and punishing the perpetrators, in full compliance with the goals set out by the Preamble of the Palermo Protocol.¹⁹
8. As stated, non-punishment provisions are enshrined in several international and regional anti-trafficking instruments. The first section of this paper will examine the scope of non-punishment in international and regional law, while the second section will deal with its practical application by domestic authorities, with a focus on the best practices that States are called upon to adopt in their fight against trafficking.

Non-punishment in international and regional legal instruments

9. In the context of trafficking victims' rights, the right to non-punishment can be considered as 'the beating heart' of victim's human rights protection at the international, regional, and domestic level. It must be given high-level prominence since it relates to the unassailable legal right of the victim to be protected by law. As such, it holds a major role in States' fight against trafficking in persons. Its application is required by several international legal instruments; however, its scope varies according to which international or regional instrument is taken into consideration.
10. This section will analyse the different versions of this principle enshrined in the relevant sources of law, focusing on the three fundamental features characterising it: *i*) the domestic authorities' duty not to punish a victim of trafficking for his or her involvement in a trafficking-related unlawful activity; *ii*) the victim's involvement in an unlawful activity; and *iii*) the link between the victim's involvement in such unlawful activity and his or her subjection to trafficking.
11. The Council of Europe Convention on Action against Trafficking in Human Beings 2005 was the first treaty to contain a legally binding provision on non-punishment. Its Article 26 identifies non-punishment with the possibility of "not imposing penalties"²⁰ on trafficking victims to the extent that they have been compelled to engage in unlawful activities. The Explanatory Report to the CoE Convention²¹ further notes that "Parties can incorporate in their internal law a substantive criminal or procedural criminal law provision or adopt any other measure, allowing for the possibility of

¹⁹ Palermo Protocol (above n. 2), Preamble.

²⁰ Council of Europe Convention on Action Against Trafficking in Human Beings (Warsaw, 5 May 2005), C.E.T.S. No. 197 (entered into force 1 February 2008) (hereinafter "CoE Convention"), Article 26.

²¹ Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (Warsaw, 16 May 2005) (hereinafter "CoE Explanatory Report").

not punishing victims of trafficking in human beings.”²² GRETA, the monitoring body of the Council of Europe, has endorsed the approach taken by the OSCE non-punishment paper, in its role of an OSCE Alliance Partner, confirming GRETA’s clear position that non-punishment relates to a protection from liability, not just protection from being sentenced for the offence or otherwise punished.

12. The EU Trafficking Directive 2011/36/EU also contains an express binding provision on non-punishment in Article 8, according to which “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 in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence”²³ of their victim status. The wording of this provision, whilst albeit limited to criminal activities, confirms that non-punishment involves non-liability and enables a victim to be protected from an early stage from being charged, prosecuted and convicted. Notably, and similarly to the CoE Convention’s Article 26, there is no stated limit on the severity of the crime.
13. The ILO Forced Labour Protocol to the Forced Labour Convention²⁴, enacted in 2014, includes a non-punishment provision in respect of victims of forced labour who have committed unlawful acts linked to their subjugation to forced or compulsory labour: its formulation reflects the phraseology used in Article 8 of the EU Directive, requiring Member States to “take the necessary measures to ensure that competent authorities are entitled *not to prosecute or impose penalties*”²⁵ on victims of forced or compulsory labour.
14. Article 14(7) of the Association of Southeast Asian Nations Convention against Trafficking in Persons, Especially Women and Children²⁶ (“ASEAN Convention”) of 2015 requires States Parties to “consider *not holding* victims of trafficking criminally or administratively *liable*”²⁷. Such clear wording therefore excludes the possibility to interpret non-punishment as a mere mitigation of the penalty applied.
15. Within the UN system, the obligation to implement non-punishment stems from due diligence, requiring States to protect trafficking victims from being held liable for any unlawful act committed as a consequence of their subjection to their trafficker or traffickers’ dominant influence. As recommended earlier by the UN Special Rapporteur on Trafficking in Persons in 2015, “[d]ue diligence requires respect for the principle of non-punishment of victims.”²⁸

²² *Ibid.*, § 274.

²³ EU Directive (above n. 9), Article 8.

²⁴ International Labour Organization, P029 - Protocol of 2014 to the Forced Labour Convention, 1930 (Geneva, 11 June 2014) (entered into force 9 November 2016) (hereinafter “ILO Protocol”).

²⁵ *Ibid.*, Article 4(2).

²⁶ Association of Southeast Asian Nations Convention against Trafficking in Persons, Especially Women and Children (Kuala Lumpur, 22 November 2015) (entered into force 8 March 2016) (hereinafter “ASEAN Convention”).

²⁷ *Ibid.*, Article 14 (7).

²⁸ UN General Assembly, Report of the Special Rapporteur on trafficking in persons, especially women and children (3 August 2015) UN Doc. A/70/260.

16. Within the system in question, non-punishment is included in the 2002 Principles and Guidelines of the Office of the High Commissioner for Human Rights. Recommended Principle 7, concerning protection and assistance to victims of trafficking, generally provides that “trafficked persons shall not be *detained, charged or prosecuted*.”²⁹ It is important to note that such formulation not only radically excludes the interpretation of non-punishment as a mere factor mitigating a punishment or penalty, but that it also brings victims’ rights not to be detained and charged (at the earliest stage of the investigation) clearly within the scope of the non-punishment principle.
17. As for children, Guideline 8 of the OHCHR Principles recommends States to consider “ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences *related to* their situation as trafficked persons.”³⁰ This is also to be considered in the context of the special legal position of trafficked children as stated earlier, whereby their consent to the act, of being recruited or harboured, for example, or their consent to their exploitation or the form of their exploitation, is always considered irrelevant in law as none of the means ever have to be employed by traffickers to traffick them. Children are vulnerable to trafficking by virtue of their age alone and must be protected from punishment by the State whenever and wherever their condition to do the unlawful act is related to their trafficking.
18. The second basic feature of non-punishment is the commission of an unlawful act by the victim of trafficking or forced labour. Such element is mostly defined as the victim’s “involvement in unlawful” acts³¹: this wording has the value of extending the scope of application of non-punishment provisions beyond the mere involvement in criminal activities³². This aspect is crucial, since, as noted by the OSCE Recommendations, “even an unpenalized conviction is in fact a punishment”³³ and victims of trafficking are often prosecuted and convicted for civil, administrative or immigration offences, including for their possession of false documents or their illegal entry or stay in a country.
19. The 2009 Working Group on Trafficking in Persons of the Conference of the Parties to the United Nations Convention against Transnational Organized Crime highlighted that a critical element in the protection of victims and of their rights must be that “States do not prosecute or punish trafficked persons for trafficking-related *offences such as holding false passports or working without authorization*, even if they consented to hold false documents or to work without authorization.”³⁴

²⁹ OHCHR Principles (above n. 5), Recommended principle 7.

³⁰ OHCHR Principles (above n. 5), Guideline 8, emphasis added.

³¹ CoE Convention (above n. 20), Article 26; ASEAN Convention (above n. 26), Article 14 (7); OHCHR Principles (above n. 5), Recommended Principle 7.

³² As provided by the EU Directive and by the ILO Protocol.

³³ OSCE Recommendations (above n. 13), § 77.

³⁴ Conference of the Parties to the United Nations Convention against Transnational Organized Crime, 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 (Background paper prepared by the Secretariat), UN Doc. CTOC/COP/WG.4/2010/4 (9 December 2009) 3 [10].

20. Special attention is also drawn to immigration offences, which are specifically mentioned in OHCHR Recommended Principle 7.³⁵
21. In this regard, it should be mentioned that the UN General Assembly, in paragraph 13 of its Resolution no. 55/67³⁶, invited Governments “to consider preventing, within the legal framework and in accordance with national policies, victims of trafficking, in particular women and girls, from being prosecuted for their *illegal entry or residence* taking into account that they are victims of exploitation.”³⁷
22. The third fundamental element of the non-punishment principle relates to the criterion linking the commission of the offence to the victim’s subjection to trafficking, *i.e.* either a causation link (when the offence has been committed as “a direct consequence” of the victims’ subjection to trafficking”³⁸ or when the offence is “directly related”³⁹ to it) or a duress defence (when the victim was “compelled to”⁴⁰ commit the offence due to his or her situation as victim of trafficking).
23. The ASEAN Convention and the OHCHR Principles employ a direct causation link between the victim’s involvement in unlawful activities and his or her subjection to trafficking in persons: such a direct relation is undoubtedly easier to prove and to employ in practice than the duress defence model. The causation criterion also has the merit of highlighting the offence committed by a trafficking arose as a result of her or his lack of complete autonomy or independence, such as in the ‘run away’ cases where trafficking victims use false documents or illegally cross a border to escape from their trafficker or trafficking situation.
24. The CoE Convention, the EU Directive, and the Protocol to the Forced Labour Convention instead include a duress element in their non-punishment provisions, as they require States not to punish victims of trafficking “to the extent that they have been compelled to commit the offence as a direct consequence”⁴¹ of being subjected to human trafficking or forced or compulsory labour. In trafficking cases, the application of the test of “compulsion” would be satisfied in any case where the victim was subjected to one of the means at the time of the commission of the offence. Moreover, it is necessary to appreciate situations where a victim is subjected to grave and continuing mental and physical abuses, albeit maybe not directly exposed to the immediate risk of harm such where a traditional duress defence might require. This is the reason why the *compulsion* required by the non-punishment duress model needs to be interpreted broadly: as pointed out by the 2013 OSCE Recommendations, “being “compelled” to commit a crime [...] includes the full array of factual circumstances in which victims of trafficking act without autonomy because

³⁵ OHCHR Principles (above n. 5), Recommended Principle 7

³⁶ UNGA RES (31 January 2001), A/RES/55/67.

³⁷ *Ibid.*, § 13, emphasis added.

³⁸ OHCHR Principles (above n. 5), Recommended Principle 7.

³⁹ ASEAN Convention, Article 14(7).

⁴⁰ CoE Convention (above n. 20), Article 26; EU Directive (above n. 9), Article 8; ILO Protocol (above n. 24), Article 4(2).

⁴¹ *Ibid.*

*traffickers exercise control over them*⁴². Their subjection to the trafficker’s dominant force – or the dominant influence of their trafficking scenario- is necessary and sufficient to shield such a victim from liability.

25. The Explanatory Report to the CoE Convention further clarifies that “the requirement that victims have been *compelled* to be involved in unlawful activities shall be understood as comprising, at a minimum, *victims that have been subject to any of the illicit means* referred to in [the definition of trafficking] when such involvement results from compulsion⁴³ and the OSCE Recommendations also provide that “States should adopt a broad, not literal, interpretation of the word “compelled.”
26. Moreover, consistently with the definition of child trafficking - which does not require any of the trafficking means to apply for a child to have been trafficked⁴⁴- the application of the non-punishment provision will apply when the offence committed by the child was *related to* the trafficking⁴⁵, and no other “compulsion test” should be taken into account.
27. Again, this corresponds with Guideline 8 of the OHCHR Principles, which recommends States to consider “ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences *related to* their situation as trafficked persons.”⁴⁶

The practical implementation of non-punishment

28. As regards the practical application of non-punishment, it must be noted that States are recommended to introduce a specific and straightforward legal provision on non-punishment within their domestic legislation. The OHCHR Principles and Guidelines provides that States should ensure: “...that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for the activities they are involved in as a direct consequence of their situation as trafficked persons.”⁴⁷
29. The Special Rapporteur proposes the following text as a basis for a domestic legal provision on non-punishment:
“Non liability [non punishment/non prosecution] of victims of trafficking in person
 1. *A victim of trafficking in persons shall not be held liable under criminal, civil or administrative laws for unlawful acts or immigration offences committed by them, to the extent that such involvement is a direct consequence of their situation as trafficked persons.*
 2. *A child victim of trafficking shall not be prosecuted or punished for unlawful acts which are related to their trafficking.”*

⁴² OSCE Recommendations (above n. 13), § 12, emphasis added.

⁴³ CoE Explanatory Report (above n. 21), § 273, emphasis added.

⁴⁴ Palermo Protocol (above n. 2), Article 3 (c).

⁴⁵ OSCE Recommendations (above n. 13), § 41, emphasis added.

⁴⁶ OHCHR Principles (above n. 5), Guideline 8, emphasis added.

⁴⁷ OHCHR Principles (above n. 5), Guideline 4.5

30. Where States do not follow the recommendation to introduce a specific provision, they must comply with their non-punishment duty by interpreting existing domestic norms – such as those providing for justification, based on duress or on a state of necessity – as general clauses of exemption of liability for victims of trafficking who have committed trafficking-dependent offences. It should be noted, however, that, as already mentioned, such “traditional” justification clauses need to be adapted to the trafficking context. This includes the appreciation that threats towards a trafficking victim to commit an offence or the coercion they are placed under might be indirect or psychological, that debt bondage, threats of denunciation to the authorities or other subtle means, such as an abuse of a position of their vulnerability, might be in play.
31. It is critical in all cases that the non-punishment provision be practically applied from the starting point of the detection of the victim by the authorities in order to afford the trafficking victim effective and full protection.
32. In this regard, and *a fortiori*, States are recommended to introduce a mechanism operating at a very early stage in the investigation: in fact, non-punishment should be understood as a compulsory tool which is required to be applied by all the domestic authorities, whether investigative, prosecuting and judicial authorities - including the police, immigration and border officials, labour inspectorate and any other law enforcement agency or officials - when a situation triggering the application of non-punishment is first identified.
33. National authorities are required to divert trafficking victims from the criminal justice system as offenders and safeguard them as victims when the conditions for the non-punishment principle have been met, as set out earlier. Where this diversion has failed at first instance and such trafficking victims are charged or prosecuted, national authorities are under the duty to discontinue the proceedings brought against victims of trafficking for the commission of trafficking-dependent offences as early as possible. The application of the non-punishment principle must therefore entail a discontinuation of the proceedings, which any authority in charge of any stage of the proceedings against the victim is required to order.
34. Moreover, the duty to implement non-punishment remains in place until the victim is granted full protection from prosecution and conviction. As a result, even in domestic systems of mandatory prosecution, whenever the link between the offence committed and the victim’s subjection to trafficking is uncovered, the investigating authorities – or, if these fail to correctly identify the situation, the prosecuting authorities – must be entitled to order – or, at least, to request the judicial authorities to declare – the discontinuance of the case, while, at the same time, opening new investigations on the uncovered trafficking situation to seek to identify, charge and prosecute the human traffickers responsible for the grave criminal offence concerning the victim’s human trafficking and predicament. Where protection fails or can only be applied later, and such identification of the victim occurs only at a later stage, the judicial authorities themselves need to be able to uphold the non-liability of the victim.⁴⁸

⁴⁸ OSCE Recommendations (above n. 13), § 73.

35. The due diligence principle requires that even after a conviction is issued against a victim where the non-punishment principle was not applied and yet ought to have been, the non-punishment principle remains fully operative and obliges States to introduce the possibility of overturning the unlawful conviction on appeal or of vacating it in any other way, including by clearing the victim's criminal file.
36. In systems of discretionary prosecution, where there is evidence of a trafficking-related offence, prosecutors should be under a clear duty (if possible, embodied in a specific legal provision or enforceable policy) to discontinue the proceedings against a victim for all trafficking-dependent offences. Such a duty, if correctly adopted, will ensure that every trafficking victim has the same right to be granted protection from prosecution and conviction, regardless of their immigration status and the form of exploitation they were subjected to. If the prosecuting authorities fail to order a discontinuance, the domestic courts should have the power to discontinue the proceedings on grounds of abuse of process or on the grounds that such prosecution would be in breach of the non-punishment obligation.⁴⁹
37. It clearly emerges, therefore, that non-punishment cannot be properly implemented by a mere mitigation of the penalties imposed: as noted by the OSCE Recommendations, "mere allowance for mitigation [...] would not amount to compliance with the obligation of non-punishment because it fails to take account of the victim's true condition", *i.e.* it ignores the victim's subjection to the trafficker's dominant force and a consequent lack of exercise of free will in the commission of the offence.
38. The duty of non-punishment applies to detention as well: as the OSCE Recommendations point out, victims should be "immune not only from punishment but also from prosecution and detention"⁵⁰ or, at least, such prosecution and detention should be terminated as soon as the situation is identified as a trafficking one. Indeed, victims of trafficking in detention are usually not provided with the protection and assistance they are entitled to, as staff working in detention facilities are often not properly trained to identify and assist trafficking victims. Not only does detention jeopardise the victims' physical, psychological and social recovery, it may also result in accumulative trauma, suicidal behaviour and post-traumatic stress disorder⁵¹, as well as lead to a secondary victimisation. Therefore, the SR is of the view that persons who are presumed or identified as trafficking victims must be removed from detention as soon as possible and granted appropriate assistance and protection in specialised facilities.
39. In light of these considerations, it is clear that the authorities must be able to identify the right of victims to non-punishment from their first detection of a victim, only in this case can non-punishment provisions be practically and efficiently applied. As a result, all the law enforcement,

⁴⁹ *Ibid.*, § 75.

⁵⁰ *Ibid.*, § 74.

⁵¹ OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings in partnership with the Ludwig Boltzmann Institute of Human Rights and the Helen Bamber Foundation, *Trafficking in Human Beings Amounting to Torture and Other Forms of Ill-treatment*, Occasional Paper Series no. 5 (June 2013).

investigating, prosecuting, judicial authorities – as well as legal practitioners – must be adequately trained to identify trafficking situations as they are duty bound to apply non-punishment as early as possible. In fact, if victims are identified at a very early stage and are protected and provided with the assistance they are entitled to on account of their trafficked status, they may also be able to cooperate with the authorities in the investigation and identification of the traffickers by providing intelligence or evidence and even acting “as witnesses in criminal proceedings”⁵² against them.

40. In both systems based on mandatory and on discretionary prosecution, the training of the law enforcement agencies and of the prosecutors plays a crucial role in ensuring that the State is in full compliance with its duty of non-punishment. In particular, the investigating and prosecuting authorities need to be specifically trained to identify trafficking-dependent and trafficking-related offences (ideally on the basis of specific indicators) and to order/request the discontinuance of the proceedings as early as possible, granting the newly recognised victim the protection and assistance to which he or she is legally entitled. The existence of mere guidelines for prosecutors is not sufficient: non-punishment can only be adequately implemented if all the law enforcement and legal practitioners are offered detailed and updated practical guidance on both identification of trafficking situations and on the implementation of non-punishment provisions.
41. As to the second feature of non-punishment, *i.e.* the range of offences covered by the principle, States are recommended to include civil, administrative and immigration offences, in addition to criminal ones. The OSCE Recommendations and the Council of Europe monitoring body GRETA have both expressly disapproved the exclusion of any offences. Any trafficking-related unlawful activity carried out by a victim of trafficking must be covered by a guarantee of non-punishment, regardless of the gravity or seriousness of the offence committed. The more serious the offence, the more probing the enquiry will need to be to establish the circumstances in which the offence was committed and whether the right to non-punishment can validly apply. Far from entailing a sort of ‘blanket immunity’, such safeguard responds to (1) the necessity of identifying the true circumstances in which an offence is committed, (2) enables victims to be diverted into safeguarding and assistance features, to which they are entitled to receive and (3) encourages the investigation of the crime of human trafficking to take place, resulting in increasing the prosecution of traffickers and decreasing the prosecution of victims for offences they committed when they were subject to other’s dominant influence or exploitation. In addition, the non-punishment principle will operate without prejudice to any defence in national law.
42. Finally, with respect to the third feature characterising non-punishment, *i.e.* the link connecting the commission of the offence and the offender’s subjection to the dominant influence of the trafficker, States are called upon to adopt a causation model based on a direct consequentiality between the trafficking and the offence, which is both easier to prove and responds well to the specific dynamics of trafficking. However, where States employ a duress defence model that is based on the victim’s “compulsion” to commit the offence, it must be borne in mind that, as already mentioned, the test of such compulsion is to be considered fully satisfied when the victim was

⁵² EU Directive, Recital 14.

suffering from any use of the means contained in the trafficking definition⁵³ at the time of the commission of the unlawful act. Such clarification can be embodied in a specific, legally binding, provision or can be adopted in direct practical interpretation, in clear interpretative notes or in the form of enforceable policy.

43. Moreover, in the case of child victims of trafficking, since no means are required in order to establish their victim status, no literal test of “compulsion” can be applied. Instead, what needs to be established is the mere *relation* between the offence committed and their status of trafficking victims, which, once uncovered, must constitute necessary and sufficient ground to discontinue the proceedings or to expunge an already issued conviction, as well as to immediately release the child from detention facilities.
44. In fact, child victims of trafficking should never be detained in police cells or other detention facilities connected with law enforcement, neither before nor after a conviction: once again, the game-changer is the effectiveness of law enforcement officials’ training in the non-punishment principle and their identification of trafficking indicia, enabling the prompt application of non-punishment protective guarantees. The States’ duty to provide all “public servants who are likely to come into contact with trafficked persons, such as police officers, border guards, social services, labour inspectors”⁵⁴ as well as prosecutors, judges and lawyers, with adequate training and tools of co-operation becomes crucial in all cases and indeed even more stringent with respect to the most vulnerable victims of trafficking, children.

⁵³ CoE Explanatory Report (above n. 21), § 273.

⁵⁴ OSCE Recommendations (above n. 13), § 29.