

# Comparative Perspectives On Non-Punishment Of Victims Of Trafficking In Human Beings

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*Each state party to the Council of Europe Convention on Action against Trafficking in Human Beings has a legal obligation, in accordance with the basic principles of its legal system, to “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” (Article 26). The Convention follows the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking according to which “trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.” Non-punishment provision is also a part of EU Directive on preventing and combating trafficking in human beings and protecting its victims. This paper contains analysis of international legal framework concerning non-punishment provision and short overview of comparative legislation and the case law in the first ten state parties that have been evaluated by the Council of Europe Group of Experts on Action against Trafficking in Human Beings.*

**Key words:** *trafficking in human beings, victim, non-punishment, non-prosecution, status related offence*

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## 1. Introduction

The exploitation of THB victims includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.<sup>1</sup> Apart from being exploited or at least trafficked for that purpose, victims of THB are constantly under serious risk of criminal (or administrative) proceedings against them for certain violations that are logical and inevitable consequences of their victimization. For instance, a person who has been trafficked for prostitution faces a risk to be prosecuted and punished for prostitution if this is criminalized in a given country. The same goes for persons subjected to a forced labor who can be held responsible for violating labor legislation. Likewise, in cases of transnational trafficking victims very often enter the country with forged travel documents whose possession is also a criminal (administrative) offence in most if not all the countries. Even in cases when they entered the country legally, they can still be held liable for overstaying or immigration related offences.<sup>2</sup>

<sup>1</sup> See Article 3(a), Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, A/RES/55/25, 8 January 2001; Article 4a, Council of Europe Convention on Action against Trafficking in Human Beings, 2005, CETS no. 197.

<sup>2</sup> „Trafficked persons may never be recognized as such or, even where they are identified, may still be treated as criminals rather than as victims, whether in States of destination, transit or origin. In States of destination, they may be prosecuted and detained because of their irregular migration or labour status. Alternatively, immigration authorities may simply deport them to the State of origin if their immigration status is irregular. Trafficked persons returning to their State of origin may also be subjected to prosecution for using false documents, having left the State illegally or for having worked in the sex industry. Criminalization limits the trafficking victims' access to justice and protection and decreases the likelihood that they will report their victimization to the authorities. Given the victims' existing fears for their personal safety and of reprisals by the traffickers, the added fear of prosecution and punishment can only further prevent victims from seeking protection, assistance and justice.“; „Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking“, UN Working Group on Trafficking on Persons, CTOC/COP/WG.4/2010/4, 9 December 2009, p. 2-3; „Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of

Having this in mind, one of the major challenges for sound anti-THB strategies and policies<sup>3</sup> is to recognize that those who were trafficked (or intended to be trafficked) for any type of exploitation should be treated as a victims, not criminals. *Conditio sine qua non* for that recognition is enactment and effective implementation of non-punishment provision. For State Parties to the *Council of Europe Convention on Action against Trafficking in Human Beings* (hereinafter: Convention), legal ground for introducing non-punishment provision in domestic legal systems is Article 26. As an exclusionary norm aimed at the prevention of THB victims secondary victimization, it lays down an obligation of a Party to, “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.”<sup>4</sup> Each Party can comply with the obligation established in Article 26, by providing for a substantive criminal or procedural criminal law provision, or any other measure.<sup>5</sup>

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the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is 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. This safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in.” Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Official Journal of the European Union, 5 April 2011, L 101/3.

- <sup>3</sup> Gallagher argues that „considerable and growing evidence that the policy preference for victims of trafficking not to be subject to criminalization is evolving into a widely accepted normative standard evidence that the policy preference for victims of trafficking not to be subject to criminalization is evolving into a widely accepted normative standard“. GALLAGHER, Anne T., *The International Law on Human Trafficking*, Cambridge University Press, 2010, p. 285.
- <sup>4</sup> See Article 26, Council of Europe Convention on Action against Trafficking in Human Beings, 2005, CETS no. 197.
- <sup>5</sup> Explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings, 2005, CETS no. 197., par. 274.

In legal theory, imposing penalty on innocent agent<sup>6</sup> (victim) instead of focusing law enforcement infrastructure on mastermind (trafficker), cannot be justified neither from moral blameworthiness nor from sentencing goals perspective. As a cog easily replaceable in the mechanism, trafficked person is often not more than an instrument (mean) under the perpetrator's control.<sup>7</sup> In addition to the theoretical considerations, non-punishment provision has also an extensive practical potential as a conjunction of three relevant pillars or foundations of the Convention – prevention, protection and prosecution. Needless to say, non-criminalization of victim for status related offences creates environment indispensable for appropriate identification as well as to meaningful protection and assistance. It is well known fact that likelihood of getting trafficked persons to collaborate with law enforcement authorities significantly increases if they are treated as a victims, not suspects.<sup>8</sup>

Valuable source for interpretation of the content and scope of non-punishment provision is Explanatory report to the Convention (hereinafter: ER) which clarifies that Article 26 “constitutes an obligation to Parties to adopt and/or implement legislative measures providing for the possibility of not imposing penalties on victims, on the grounds

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<sup>6</sup> Innocent agent doctrine presupposes that person who carries out actus reus of the offence is not liable (for reason of insanity, or being under age of criminal responsibility etc.). For more on this doctrine see in WILLIAMS, Glanville, Innocent Agency and Causation, *Criminal Law Forum*, Vol. 3, No. 2 (1992), p. 289-298,

<sup>7</sup> This form of responsibility is known as indirect perpetration or perpetration by means (mittelbare Täterschaft in German criminal law).

<sup>8</sup> “Prosecution, the imposition of penalties and/or detention deny trafficked persons the rights to which they are entitled, such as access to justice and redress or the right to protection against secondary victimization and further trauma. Non-prosecution and non-application of penalties as well as a prohibition on the detention of trafficked persons are equally in the interest of the prosecution, as victims will refrain from seeking help from the authorities, when they risk or fear being arrested and detained.”, A Joint UN Commentary on the EU Directive – A Human Rights-Based Approach, 2011, p. 35. McGaha and Evans correctly pointed out that „... fostering fear of authority in victims is a common contributor to poor detection of human trafficking victims“, McGAHA, Johnny E. & EVANS, Amanda, Where Are The Victims? The Credibility Gap in Human Trafficking Research, *Intercultural Hum. Rts. L. Rev.* 239 (2009), p. 244;

indicated in the same article.”<sup>9</sup> From referring to “illicit means” referred to in Article 4<sup>10</sup>, it follows that “compulsion” goes beyond the practice of “compelling the individual to do some act against his or her will by the use of psychological pressure, physical force, or threats.”<sup>11</sup> In other words, compulsion requirement is met if any illicit mean has been used (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). Furthermore, ER clearly indicates that non-punishment provision does not require that state party unconditionally refrain from imposing penalty on the victim but just to provide “possibility of not punishing victims when the abovementioned legal requirements are met”.<sup>12</sup> Each Party can comply with the obligation established in Article 26, by providing for substantive criminal (non-liability of victim) or procedural criminal law provision (non-initiating or discontinuing/terminating of criminal proceedings), or any other measure (for instance instruction to the prosecutors), allowing for the possibility, in accordance with the basic principles of every national legal system.<sup>13</sup>

Despite of interpretative guidelines given by ER, there are still some issues/uncertainties concerning the content and the scope of non-punishment provision: in addition to the possibility not to impose penalty on the victim, does it encompass non-prosecution and non-detention requirement (both could interfere with pending identification of a victim), does it cover all offences committed by victim irrespective of their gravity or only status related offences, how to apply non-punishment provision while respecting some other fundamental principles of national legal system (for instance legality, necessity and/or proportionality principles), what is the relationship between non-punishment provision and justifications/defenses in criminal proceedings (for instance duress) etc. Hav-

<sup>9</sup> *Supra* 5, par. 272.

<sup>10</sup> *Ibid.*, par. 273.

<sup>11</sup> See <http://legal-dictionary.thefreedictionary.com/coercion>, 10 June 2012.

<sup>12</sup> *Supra* 5, par. 274.

<sup>13</sup> *Ibid.*

ing in mind all of these issues, it is not surprising that there is no uniform approach on how to implement non-punishment provision. As indicated in UN Working Group on Trafficking in Persons document titled „*Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking*“, two legislative models designed to meet the conditions set up in international law have been identified – duress model and causation model. States address this issue either through “duress”- based provision, whereby a trafficked person is compelled to commit the offence, or through “causation”- based provision, whereby the offence committed by the trafficked person is directly connected or related to the trafficking.<sup>14</sup> Non-punishment provision set out in Article 26 of the Convention has been taken as an example for duress model.<sup>15</sup> Causation model has been adopted in *Argentinean Law on Prevention and Criminalization of Trafficking in Persons and Assistance to Victims of Trafficking*<sup>16</sup>, *United Nations Interim Administrative Mission in Kosovo Regulation 2001/14 on the Prohibition of Trafficking in Persons in Kosovo*<sup>17</sup>, *Philippines Anti-Trafficking in Persons Act*<sup>18</sup> and *United States Victims of Trafficking and Violence Protection Act*<sup>19</sup>.

<sup>14</sup> „Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking“, UN Working Group on Trafficking on Persons, CTOC/COP/WG.4/2010/4, 9 December 2009, p. 2.

<sup>15</sup> Ibid., p. 5.

<sup>16</sup> “Victims of trafficking in persons are not punishable for the commission of any crime that is the direct result of having been trafficked.” Ibid.

<sup>17</sup> „A person is not criminally responsible for prostitution or illegal entry, presence or work in Kosovo if that person provides evidence that supports a reasonable belief that he or she was the victim of trafficking.“ Ibid.

<sup>18</sup> “Trafficked persons shall be recognized as victims of the act or acts of trafficking and as such shall not be penalized for crimes directly related to the acts of trafficking [...] or in obedience to the order made by the trafficker in relation thereto. In this regard, the consent of a trafficked person to the intended exploitation set forth in this Act shall be irrelevant.” Ibid.

<sup>19</sup> “Penalties for the crime of unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labour do “not apply to the conduct of a person who is or has been a victim of a severe form of trafficking in persons, [...] if that conduct is caused by, or incident to, that trafficking.” Ibid.

Due to the various approaches<sup>20</sup> on the implementation of non-punishment clause, the purpose of this paper is to examine these issues from the perspective of current international legal framework and national legal systems of State Parties to the Convention that have been evaluated by the *Group of Experts on Action against Trafficking in Human Beings* (hereinafter: GRETA).

## 2. International legal framework

There are numerous international legal documents, both binding and non-binding, that address the issue of non-punishment.<sup>21</sup> *Anti-trafficking Protocol to the global UN treaty on transnational organized crime* does not contain explicit non-punishment provision.<sup>22</sup> Nevertheless, it was subject of negotiations concerning Article 4 paragraph 3 of the Protocol.<sup>23</sup> In this regard, United Nations Commissioner for Human Rights in the Informal note to the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime has stressed that due to the fact that „trafficked persons are often subject to detention and prosecution for offences related to their status (including violation of immigration laws, prostitution, etc.)... States parties should be directed to refrain from detaining or prosecuting trafficked persons for such status-related offences”.<sup>24</sup> Some commentators have suggested that

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<sup>20</sup> See *infra* at 3.

<sup>21</sup> For comprehensive overview see *supra* 3. p. 283-297.

<sup>22</sup> For international protection and non-punishment of illegal migrants and refugees see Article 5, Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, A/RES/55/25, 8 January 2001 and Article 31, Convention relating to the Status of Refugees, Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950.

<sup>23</sup> See *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Theret*, United Nations Office on Drugs and Crime, 2006, p. 368.

<sup>24</sup> Informal note to the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, United Nations Commissioner for Human Rights, A/AC.254/16, par. 17.

the absence of explicit non-punishment provision in the Anti-trafficking Protocol “may well be understood in a way that the Protocol intends the same considering its provisions on protection”.<sup>25</sup> This argument that non-punishment principle stems from obligation to protect trafficking victims has been supported by the acknowledgement of the Conference of Parties to the Organized Crime Convention which has recommended that “with regard to ensuring the non-punishment and non-prosecution of trafficked persons, States parties [to the Trafficking Protocol] should ... consider, 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”<sup>26</sup>

The first international legal document with specific reference to non-punishment is 2001 *United Nations General Assembly Resolution on Traffic in Women and Girls* which invites states „to criminalize trafficking in women and children, in particular girls, in all its forms, to condemn and penalize all those offenders involved, including intermediaries, whether their offence was committed in their own or in a foreign country, while ensuring that the victims of those practices are not penalized, and to penalize persons in authority found guilty of sexually assaulting victims of trafficking in their custody.”<sup>27</sup> *UNHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking* provide that “trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked

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<sup>25</sup> TOUZENIS, K., *Trafficking in Human Beings - Human rights and transnational criminal law, developments in law and practices*, UNESCO migration studies (3), 2010, p. 119.

<sup>26</sup> *Activities of the Working Group on Trafficking in Persons, Conference of the Parties to the United Nations Convention on Transnational Organized Crime*, 10 August 2010, CTOC/COP/2010/6, p. 4.

<sup>27</sup> *General Assembly Resolution on Traffic in Women and Girls*, A/RES/55/67, 31. January 2001.



persons.<sup>28</sup> Further, the Guideline No. 8 concerning special measures for the protection and support of child victims of trafficking states: “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.”<sup>29</sup> In 2005, *Organization for Security and Cooperation in Europe Action Plan to Combat Trafficking in Persons* recommended action at the level through its Recommendation 1.8; “Ensuring that victims of trafficking are not subjected to criminal proceedings solely as a direct result of them having been trafficked.”<sup>30</sup> According to the *UNODC Model Law against Trafficking in Persons* “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 as trafficked persons.”<sup>31</sup> This generic law aimed to guide member States in preparing their respective national laws<sup>32</sup> further states that non-punishment provision excludes criminal or administrative liability of a victim for immigration offences established under national law.<sup>33</sup> However, non-punishment shall be without prejudice to general defences available at law to the victim and shall not apply where the crime is of a particularly serious nature as defined under national law.<sup>34</sup>

*EU Council Framework Decision on Combating Trafficking in Human Beings*, as primarily criminal law instrument, was silent on non-

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<sup>28</sup> Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, E/2002/68/Add.1, 20. May 2002., p. 3.

<sup>29</sup> *Ibid.*, See also *supra* n. 25, p. 120.

<sup>30</sup> OSCE Action Plan to Combat Trafficking in Persons, Decision 557, Revision 1, 7 July 2005.

<sup>31</sup> Model Law against Trafficking in Persons, United Nations Office for Drugs and Crime, available at <http://www.unodc.org/unodc/en/frontpage/2009/July/model-law-on-trafficking-in-persons-.html>, 10 June 2012.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

punishment provision.<sup>35</sup> Recognition of this important principle can be found in *EU Recommendations on Identification and Referral to Services of Victims of Trafficking in Human Beings* that invite states to “take appropriate measures providing that victims including children are not punished for offences they have been involved as a direct consequence of their situation as trafficked persons, such as violations of immigration law or working without a work permit, or the use of false documents.”<sup>36</sup> According to the Recommendations, exceptions from non-punishment should be possible in case of extreme severity of the offence.<sup>37</sup> Holistic and human rights approach taken in drafting *Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA*<sup>38</sup> has resulted in integration of the non-punishment provision in EU *acquis*. Directive in Article 8 leaves up to the states whether not to prosecute or to 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 of being subjected to any of the acts referred to in Article 2 (illicit means).<sup>39</sup> Measures for implementation of non-punishment provision shall be taken in accordance with the basic principles of domestic legal system and applied for criminal activities such as “the use of false documents, or offences under legislation on prostitution or immigration“. However, this safeguard „should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in”<sup>40</sup>

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<sup>35</sup> Council Framework Decision on Combating Trafficking in Human Beings, 2002/629/JHA, 19 July 2002.

<sup>36</sup> Presented on the first EU Anti-Trafficking Day in 2007, these recommendations were developed to better identify and refer victims of human trafficking to the relevant actors, in particular civil society organizations and other service providers. See at <http://ec.europa.eu/anti-trafficking/>, 10 June 2012.

<sup>37</sup> *Ibid.*

<sup>38</sup> Directive 2011/36/EU of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision, 2002/629/JHA, 5 April 2011.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

### 3. Domestic legal framework of countries evaluated by GRETA

Recent findings on non-punishment provision in ten countries monitored in the first round of GRETA's evaluation<sup>41</sup> have indicated that differences between two approaches/models suggested by the UN Working Group on Trafficking in Persons<sup>42</sup> are not always clear-cut. Indeed, while elements of duress model may prevail in a given country, it does not exclude at least some elements pertaining to the causation model and *vice versa*. Therefore, instead of drawing sharp edge dividing line between two models, the first ten countries are categorized by whether their relevant provision(s) mostly rely on substantive (prevailing) elements of duress or causation model.

Countries that adopt substantive (prevailing) elements of **duress model** are Austria, Croatia, Denmark, Albania, Slovakia and Bulgaria. According to 10(1) of the **Austrian** Criminal Code on the exculpatory state of necessity, „a person who commits a punishable offence in order to avert an imminent and considerable disadvantage from him/herself or from another person is exonerated if the damage from the offence is not disproportionately graver than the disadvantage to be averted, and if in the situation of the offender no other conduct was to be expected from and individual attached to the values protected by law“. If the requirements of Article 10(1) are not met, the provisions on the withdrawal from prosecution (diversion) could be applied.<sup>43</sup> Exculpatory state of necessity as a general substantive criminal law provision has also been used by **Croatian** authorities as a vehicle to implement non-punishment clause. According the Article 31 of the Croatian Criminal Code “there shall be no criminal offense when the perpetrator acts under the influence of irresistible coercion. If the perpetrator commits a criminal offense under

<sup>41</sup> This overview covers only those State Parties in respect of whom final reports have been adopted and published so far – Cyprus, Austria, Slovak Republic, Croatia, Albania, Bulgaria, Denmark, Georgia, Moldova and Romania.

<sup>42</sup> See *supra* at 2.

<sup>43</sup> Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Austria, GRETA(2011)10, 15 September 2011, par. 157.

resistible coercion or threat, the provisions of Article 30 of this Code shall apply, treating such coercion or threat as a danger”.<sup>44</sup> According to the **Albanian** authorities, victims of trafficking in that country are not prosecuted for the criminal offences they were forced to commit in connection with trafficking. In such cases, the prosecutor puts forward arguments to the effect that the victim should not be held criminally liable for offences committed in connection with trafficking, owing to their vulnerable position and the absence of the subjective aspect of commitment of a criminal offence (*mens rea*), i.e. the mental or moral element accompanying the material element (*actus reus*), to constitute an offence. Furthermore, in Albanian criminal law, acts committed under violent duress or the threat of violence, in a case of *force majeure* or out of extreme necessity, are not punishable, and this could apply in certain cases to acts committed by victims of trafficking under coercion.<sup>45</sup> The **Bulgarian** Criminal Code does not include a specific provision which introduces Article 26 of the Convention. However, in the Bulgarian report, reference has been made to the Draft Criminal Code which excludes prosecution of victims of trafficking under Article 279(5) of the CC (illegal crossing of the national border) when the offence is committed under coercion during the execution of the crime of THB. Further, it is proposed to amend the Law on Bulgarian Identity Documents with a view to dropping the fine imposed on victims of THB whose identity documents have been destroyed and issuing them with new Bulgarian identity documents free-of-charge.<sup>46</sup> In **Denmark**, article 82(6) of the Criminal Code includes as mitigating circumstances that the offence was committed under the influence of coercion, deceit or exploitation of the offender’s young age or considerable financial or personal difficulties, irresponsibility or state of

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<sup>44</sup> Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Croatia, GRETA(2011)20, 30 November 2011, par. 126.

<sup>45</sup> Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Albania, GRETA(2011)22, 2 December 2011, par. 164.

<sup>46</sup> Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Bulgaria, GRETA(2011)19, 14 December 2011, par. 207.

dependency. The Danish authorities have also reported that, depending on the circumstances, a crime committed under the influence of coercion may not be punishable. Article 83 of the CC establishes that the penalty may be reduced to less than the usual minimum when information about the offence, the perpetrator or other circumstances conclusively warrant a reduction. The Danish authorities have indicated that the penalty may be rescinded in other mitigating circumstances and that there is case law concerning the overturn of court decisions to expel a person convicted for using a false passport after the person was identified as a victim of trafficking.<sup>47</sup> Similar to this approach is the one found in the legislation of the **Slovak Republic** which does not provide for the possibility of not imposing penalties on victims of THB compelled to be involved in unlawful activities. The only manner to alleviate the penalties is to invoke the mitigating circumstances applied to any offence in the framework of the criminal procedure (for instance if the crime has been committed under pressure of dependence or subordination or under the influence of threat or coercion, Article 36 of the Criminal Code).<sup>48</sup> According to the Slovak authorities, the court will consider all mitigating circumstances pursuant to Article 36 of the CC when determining a penalty for a victim of THB. The court may also use alternative legal possibilities to reduce the penalty in accordance with Article 39 of the CC (exceptional reduction of a penalty) or to waive the punishment in accordance with Article 40 of the CC (waiver of punishment).<sup>49</sup>

Substantive (prevailing) elements of **causation model** have been found in **Cypriot** Law 87 which in article 42 provides that victims will not be criminally prosecuted for committing offences directly related to their status as victims of HTB, provided that violence, coercion or abuse of power has been used (a requirement not applicable in the case of

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<sup>47</sup> Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Denmark, GRETA(2011)21, 20 December 2011, par. 197.

<sup>48</sup> Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Slovak Republic, GRETA(2011)9, 19 September 2011, par. 136.

<sup>49</sup> *Ibid.*, par. 137.

children). As regards in particular victims of THB who are third-country nationals, they will not be prosecuted for any offences perpetrated and directly related to their status as victims, especially in the event that the offences were committed as a result of their illegal entry, stay, employment, etc. In addition, Law 87 establishes that if victims of THB are prosecuted for offences committed while being subject to trafficking (a situation which may arise if the victim of THB is not identified as such before the prosecution or if he/she pleads the status of THB victim at a late stage of the trial), it will constitute a defense that the offences were committed under threat or use of violence or other forms or coercion, abduction, deceit, fraud, abuse of power or exploitation of their vulnerable position.<sup>50</sup> In **Romania**, both prostitution and begging are considered as criminal offences. However, Article 20 of the Anti-Trafficking Law (which was amended in 2010) stipulates that a trafficked victim, who, as a result of his/her exploitation, has committed the offence of prostitution, begging, crossing the border illegally or giving organs, tissues or cells of human origin shall not be punished. According to the Romanian authorities, this provision is being applied, but GRETA has not been provided with any examples of its application in practice. In cases of other offences (for instance destroying travel and/or identity document by a victim compelled to do so), more general Criminal Code provisions on irresistible physical constraint or moral constraint resulting from a threat or a serious danger would apply (Article 10 and 46 of the Criminal Code).<sup>51</sup> In **Moldovan** legislation, Article 165(4) of the CC stipulates that “a victim of trafficking in human beings shall be exempted from criminal liability for any crimes committed by him/her in relation to this procedural status.” According to information provided by the Moldovan authorities, there were no recorded cases of victims of trafficking committing a crime in relation to their status in 2008-2010.<sup>52</sup> Pursuant to Article 15 of the

<sup>50</sup> Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Cyprus, GRETA(2011)8, 12 September 2011, par. 179.

<sup>51</sup> Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Romania, GRETA(2012)2, 31 May 2012, par. 188,189.

<sup>52</sup> Report concerning the implementation of the Council of Europe Convention on Action

**Georgian** Anti-Trafficking Law, victims of trafficking are exempted from criminal liability for the acts envisaged in Articles 344 and 362 of the CC and Article 172(3) and 185 of the Code of Administrative Violations. Further, the CCP establishes that criminal prosecution will not be conducted or, if already initiated, shall be terminated regarding the offences envisaged in Article 322(1) of the CC (entering the occupied territories of Georgia), Article 344 of the CC (illegal crossing of the State border) and Article 362 of the CC (production, purchase or use of a forged document, seal or form) when committed by victims of trafficking.<sup>53</sup> Victims of trafficking are also exempted from administrative responsibility in case of prostitution, if they were compelled to do so (Article 172(3) of the Code of Administrative Violations). Further, victims of trafficking are exempted from administrative responsibility for the violation of the rules of registration of Georgian citizens and foreign nationals residing in Georgia, if they were compelled to do so (Article 185 of the Code of Administrative Violations).<sup>54</sup> The Anti-Trafficking Law establishes that victims of trafficking will not be held liable for their participation in the above-mentioned unlawful acts if they were compelled to do so given their condition of victims of trafficking and regarding legal violations committed before they were granted the status of victim or statutory victim of THB. In addition, victims of trafficking are exempted from criminal liability if they refuse to testify as a witness or victim during the reflection period of 30 days (Article 371 of the CC). A similar exemption from criminal liability was introduced at the end of 2006 in respect of persons in charge of a shelter for victims for trafficking who conceal information related to the commission of the crime of THB (Art. 375 of the CC).<sup>55</sup>

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against Trafficking in Human Beings by Moldova, GRETA(2011)25, 22 February 2012, par. 149.

<sup>53</sup> Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Georgia, GRETA(2011)24, 7 February 2012, par. 206.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid., par. 208.

#### 4. Conclusion(s)

- Compliance with obligation established in Article 26 is met if State Party provides substantive criminal (non-liability of victims) or procedural criminal law (non-initiating or discontinuing/terminating of criminal proceedings against victim) or any other measure (instructions to prosecutors not to prosecute victims of THB);

- Although non-punishment principle can be achieved through any legislative (substantive or procedural) or other measure, there are advantages of having explicit provision on non-punishment. Therefore, State Parties should be encouraged to introduce explicit non-punishment clause in their legislation;

- Non-punishment provision should be applied in non-discriminatory manner to all categories of victims, including children, regardless of their ability or willingness to cooperate with the authorities<sup>56</sup>, including children;

- Non-punishment provision concerns unlawful activities such as, but not limited to, acts concerning travel and identity documents including fraudulent ones<sup>57</sup>, illegal entry into the country or overstaying, prostitution, begging and work without a valid work permit.

- With regard to status related offences, non-punishment entails non-detention and non-prosecution of victims compelled to engage into these unlawful activities. State Parties must ensure that while the identification procedure is ongoing, potential victims of trafficking are not detained, prosecuted and/or punished for status related offences.<sup>58</sup>

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<sup>56</sup> A Joint UN Commentary on the EU Directive – A Human Rights-Based Approach, 2011, p 40.

<sup>57</sup> “While it is true that the offences generally concerned by the non-punishment principle are those likely to be directly connected to the exploitation (e.g. prostitution, begging), GRETA underlines that the non-punishment provision could also concern other offences than the ones foreseen in Article 20(1), such as destroying an identity document when they have been committed by victims of trafficking to the extent that they have been compelled to.” See supra 51, par. 189.

<sup>58</sup> See supra 47, par. 202.



However, this exemption should not be limited to recovery and reflection period<sup>59</sup>;

- Element of “compulsion” envisaged in Article 26 goes beyond the practice of “compelling the individual to do some act against his or her will by the use of psychological pressure, physical force, or threats”<sup>60</sup> and refers to any illicit mean of trafficking.

- Contracting parties have discretion to decide whether this provision applies where a victim of THB has committed a crime of a serious nature<sup>61</sup> violating fundamental values protected by criminal law and inflicting harm to others.

- The non-punishment provision shall be applied in accordance with the basic principles of the national legal system (for instance proportionality principle) and without prejudice to general defenses in criminal proceedings such as duress. For crimes of serious nature violating fundamental values protected by criminal law and inflicting harm to others general defenses are subject to strict proportionality requirements;<sup>62</sup>

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<sup>59</sup> „It would be a matter of concern to GRETA if this exemption were to apply only during the 30-day reflection period“, See *supra* 53, par. 208.

<sup>60</sup> See *supra* 11.

<sup>61</sup> Such serious criminal offences may be, for instance, robbery or burglary but also crimes under international humanitarian or human rights law which could imply criminal responsibility of trafficked persons (for this issue see International Criminal Court recent conviction of head of the Union of Congolese Patriots (UPC) Thomas Lubanga and Special Court for Sierra Leone judgment against former Liberian head of state Charles Taylor for conscripting child soldiers, sexual slavery and other forms of exploitation during armed conflict). Discussion whether trafficking in human beings could amount to crime against humanity see POCAR, Fausto, *Human Trafficking: A Crime Against Humanity*, in SAVONA, Ernesto U., and STEFANIZZI, Sonia, Springer, 2007. See also 7(2)(c) of the Rome Statute of the International Criminal Court: “Enslavement means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children” Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9.

<sup>62</sup> On defense of duress and proportionality principle with reference to ICTY Erdemovic case see CHIESA, Luis E., *Duress, demanding heroism and proportionality*, Vanderbilt Journal of Transnational Law, vol. 41, n. 3.

- Non-punishment requirement goes beyond mere undertaking of legislative measures and also concerns practical application of non-punishment provision as well as its periodical assessment by the authorities.<sup>63</sup>

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<sup>63</sup> See supra 43, par. 158 and supra 45, par. 165.