**UNICEF’s Submission to UN Special Rapporteur on Trafficking in Persons, Especially Women and Children Report on the Implementation of the Non-punishment Principle in the Context of Trafficking in Persons**

In what follows, we identify a few promising practices for the implementation of the non-punishment principle for trafficking in persons, focusing on children. Recognising that these practices are not void of challenges and difficulties, both in law and practice, we explore some child-specific concerns around implementation followed with a few recommendations to strengthen them further.

Please note that we are drawing on specific contexts to illustrate the issue at hand with examples – however, issues such as the lack of identification of child victims of trafficking are universal issues and not limited to the county contexts mentioned here.

# **Section 1- Examples of Good Practices - Legislation**

1. **Legislation in Belgium**

In Belgium, Article 433 quinquies of the penal code (on THB) has been complemented with a paragraph (Para.5) applicable to all forms of exploitation constituting human trafficking to expressly include the principle of non-punishment. According to this principle, the responsibility of the perpetrator is established but no penalty can be imposed on them. And this, regardless of the type of exploitation suffered (sexual or criminal exploitation, removal of organs, exploitation of begging, labour exploitation, etc.).

The new paragraph states that "a victim of trafficking in human beings who takes part in offences as a direct consequence of their exploitation shall not be punished for those offences".

It is promising that this principle has been enshrined in law to strengthen protection for victims. Nevertheless, this provision will hopefully only be applied when the prior safeguards relating to the principle of discretionary prosecution have not worked. The joint circular of the College of Prosecutors General and the competent ministers on the investigation and prosecution of acts of trafficking (COL 2015) draws the attention of the prosecutors specialising in this area to this particular situation. Challenges identified in implementing the non-punishment principle in practice are elaborated on below.

1. **Legislation in England, Wales, Northern Ireland and Scotland that to some extent enshrine the international principle of non-punishment [[1]](#footnote-1)**

About half of referrals (49%) in the UK were for individuals claiming exploitation as adults, with the remainder claiming exploitation as **children (46%)** or their age was unknown. For adult potential victims, labour exploitation was the most common exploitation type, whilst criminal exploitation was most commonly reported for **child potential victims at 55%.** For those exploited as children, an increase in the identification of **‘county lines’** cases has driven criminal exploitation. County lines are used to describe drug gangs in large cities expanding their reach to small towns. Often, children are exploited to transport substances, and mobile phone ‘lines’ are used to communicate drug orders.[[2]](#footnote-2)

**Law and Policy[[3]](#footnote-3)**

In 2015, new legislation was passed in England and Wales (the Modern Slavery Act), Northern Ireland (the Human Trafficking and Exploitation [Criminal Justice and Support for Victims] Act) and Scotland (the Human Trafficking and Exploitation Act) to address human trafficking and modern slavery.

In England and Wales, Section 45 of the Modern Slavery Act introduces a statutory defence for victims of modern slavery. In relation to children, this provides that a child is not guilty of an offence if the child does that act as a direct consequence of having been a victim of slavery or relevant exploitation, and a reasonable person in the same situation as the child would act in the same way. Schedule 4 of the Act sets out a substantial list of offences to which the defence will not apply.

The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act in Northern Ireland also introduced a statutory defence in Section 22, but with no reasonableness test for children. This defence is limited in that it applies only to offences which attract a maximum sentence of less than five years, as well as a small number of additional specified offences which are particularly linked to trafficking and exploitation.

In Scotland, there is no statutory defence in place.16 Instead, Section 8 of the Human Trafficking and Exploitation (Scotland) Act 2015 places a duty on the Lord Advocate to issue and publish Instructions about the prosecution of a person who is, or appears to be, the victim of an offence of human trafficking

Following the passage of the three Acts, all three prosecuting agencies across the UK – the Crown Prosecution Service (CPS – England and Wales), the Crown Office and Procurator Fiscal Service (COPFS – Scotland) and the Public Prosecution Service for Northern Ireland (PPSNI) – have produced revised guidance on non-prosecution (Lord Advocate’s Instructions in Scotland.

**Practice and Implementation of the non-punishment principle**

The lack of quantitative data means it is difficult to assess the exact scale and impact of the statutory defence and implementation in practice. Whereas, section 45 of the Act is silent in respect to the burden of proof required to establish the defence, the ruling in R v MK [2018] clarified that the burden of proof is on the prosecution to prove that an individual is not a victim of modern slavery once the defence is raised by that individual. A qualitative research was conducted in 2020, commissioned by the Independent Anti-Slavery Commissioner (IASC) and it found that,

*“The majority of submissions from the police related to examples where the person raised the statutory defence or was recognised as a victim after charge but before trial, or the defence was raised at trial. The evidence illustrates that in many cases police are not proactively anticipating the statutory defence at the beginning of an investigation or spotting victims of trafficking early enough. The researchers did receive evidence where trafficking or the defence was proactively recognised early, investigated and dealt with appropriately. It was reassuring to see examples where the police encountered a person who has committed a crime, but before arrest or charge have recognised them as a victim of trafficking and investigations against those responsible for their exploitation have commenced. This ought to be happening more often.*

*There was little evidence of cases where the statutory defence has been raised and the prosecution has continued. The Crown Prosecution Service suggested in their submission that the requirement for the prosecution to disprove the defence beyond reasonable doubt is resulting in many cases being dropped.”*

Based on this research, the IASC identified the following concerns regarding implementation of s. 45:

* Police are not consistently considering from the outset of an investigation whether a suspect could be a victim of trafficking and whether the statutory defence may apply;
* Discontinuation of investigations and prosecutions as soon as the defence is raised;
* Over-reliance throughout the criminal justice system on the decision making of the Single Competent Authority in the National Referral Mechanism;
* The statutory defence being raised late in the criminal justice process.

These concerns are leading to abuse of the statutory defence; victims for whom the statutory defence was intended are not benefitting from it; Inadequate child protection interventions following National Referral Mechanism (NRM) referrals triggered by the statutory defence.

# **Section 2- Child-specific Concerns around the Implementation of the Non-punishment Principle**

Despite the strong recognition that children are vulnerable to trafficking by virtue of their age and **must** be protected from punishment by the state when their condition to do an unlawful act relates to their trafficking, there are various limits and challenges in implementing this principle of non-punishment, even where legislation has been made as with the practices above.

**Challenges in the Identification of Child Victims of Trafficking**

Successfully implementing the non-punishment principle begins with early victim identification. However, we continue to witness shortcomings in efforts and limited capacities to identify children who are victims of trafficking. In some contexts, this stems from lack of awareness and training across organisations, service providers and authorities involved in identification (including border officials and personal in reception centres). Training and awareness must also include the identification of children who are vulnerable to trafficking, not only children who have been or are in the process of being exploited.

Challenges remain across all continents and here are only two examples to illustrate. In Belgium, proper identification of potential victims is a major challenge, in particular relating to child victims, and those implicated in drugs dealing or thefts, are at risk of being placed in closed centres for young offenders.[[4]](#footnote-4) In the UK, UNICEF UK found that the availability and quality of training for police and prosecutors in relation to trafficked children and the non-punishment provisions varies widely, with differing practice across the UK. Almost all police forces organise training and have in place a procedure to deal with cases involving trafficking. However, most of them use the e-learning module developed by the College of Policing which is not comprehensive enough. Several forces (including the Metropolitan Police and Greater Manchester Police) have developed their own more comprehensive training packages. [[5]](#footnote-5)

For certain domains, the subtle distinction between perpetrator and victim coupled with lack of training and capacity in identification, means that failure to identify victims is even more prominent. For example, in Belgium, very few victims are identified for cases linked to forced criminal activities such as theft and the sale of drugs. The complexity of this type of investigation linked to the distinction between perpetrator and victim, the fact that it is not the sections specialising in trafficking that are responsible for this type of case, and the fear the victims have of speaking out, are all factors that may explain why there are so few cases in this realm.

**Case examples**

* In the UK, one example of failure to adequately protect potential victims of child trafficking is the case concerning two Vietnamese youths who police officers had discovered working on cannabis farms (applications nos. 77587/12 and 74603/12).[[6]](#footnote-6) They were arrested and charged with drugs-related offences, to which they pleaded guilty. Following their conviction, they were detained in young offenders’ institutes. A competent authority subsequently recognised them as victims of trafficking. However, the prosecution service having reviewed its decision to prosecute them, concluded that they were not victims of trafficking and the Court of Appeal found on the facts of each case that the decision to prosecute had been justified. For the Court, the fact that the applicants had been discovered on cannabis farms while still minors should by itself have given rise to a credible suspicion that they had been victims of trafficking. However, instead of referring them to the body responsible they had been charged with criminal offences and allowed to plead guilty. The prosecution services subsequently reviewed their decisions to prosecute and found that they had been justified as the applicants had not been victims of trafficking. In the Court’s view, however the prosecution had not given clear reasons consistent with the definition of trafficking for reaching a different conclusion to that of the competent authority. Although the authorities had made some accommodations to the applicants after their guilty verdicts, the Court nevertheless found that the lack of an assessment as to whether the applicants had been victims of trafficking had potentially prevented them from securing evidence which might have helped their defence. As a result, the state had not fulfilled its duty to take operational measures to protect the applicants, either initially, as potential victims of trafficking, or subsequently, as persons recognised by the Competent Authority to be victims of trafficking.
* In a Bulgarian case (Corr. Brussels, 30 May 2012) a victim began a relationship with the defendant, even though she was a minor, and accompanied him to Brussels to work as a prostitute. She stated that she was satisfied with her income and her professional situation. She was subsequently actively involved in a prostitution network and, upon the request of the defendant, she allocated a place for prostitution to a new victim. While the public prosecutor’s office named her as a victim in its summing-up for the prosecution, the court did not recognise her as such.
* In a more recent decision ([Criminal court of Liège, 13 June 2018](https://www.myria.be/fr/traite/jurisprudence/tribunal-correctionnel-liege-13-juin-2018)) (summary in ENG in [Myria 2019 report](https://www.myria.be/files/2019-Annual-report-Trafficking-of-human-beings.pdf) (p. 121-123) a victim has been acquitted by the court. The court took into consideration the non-punishment principle, considering that she was forced by her boyfriend to prostitute herself and to force other victims to prostitute. The court considered that she was in a state of submission and dependence and that she could not be charged wih having trafficked others. It also explicitly noted that the non-punishment clause should be taken into account in such a case. More specifically, in the absence of a specific provision (*N.B: decision taken before the new provision*)  the court considered that Article 71 of the Criminal Code should be applied: a person who is coerced by an overpowering force at the time of the events, cannot be accused of the offence. It therefore considered that the defendant's actions were the result of coercion by her boyfriend and the other co-perpetrators. For her own security, and her physical and psychological integrity (and that of her family members), she therefore had no other option than to participate in the offence through certain acts against other girls. The court therefore acquitted her of the charge of human trafficking and prostitution.
* Trafficking victims are sometimes led to work with false documents or under a false identity. This is especially the case for minors. In a case that was judged by the [criminal court of Liège on 26 September 2012](https://www.myria.be/fr/traite/jurisprudence/tribunal-correctionnel-de-liege-26-septembre-2012), Bulgarian defendants were found to be prostituting several young women. The latter, in particular a minor, were working under false identities to avoid being harassed by the police. The defendants were charged for forgery. The victims were not prosecuted.

**Challenges in the Identification of Child Victims of Trafficking – Misclassifying trafficking as smuggling**

Also closely intertwined with the challenges of limited capacities, training efforts as well as insufficient funding that mean trafficking cases often go under-reported, one prevalent barrier for the implementation of the non-punishment principle is that trafficking cases are misclassified and therefore not investigated further.

* Case example: One particular incident worth highlighting concerns two boys, victims of trafficking, in the Netherlands in 2019. On 23 October 2019, 39 bodies of Vietnamese migrants were found in a refrigerated container in the port of Essex; they died of suffocation. Among them were two underage boys who had previously been placed in a protected facility in the Netherlands because the Dutch government suspected they were victims of human trafficking. These boys had also reported human trafficking, but the case was classified as human smuggling and therefore not investigated. Between 2015 and 2019, a total of 96 Vietnamese children disappeared, and for years there have been strong signs that Vietnamese migrants are ending up in forced prostitution, labour, and crime. The Dutch government points out that they are not obliged to investigate these cases, because they are classified as ‘human smuggling’, because the exploitation does not take place in the Netherlands, and because the migrants concerned do not have the Dutch nationality. For this reason, none of these cases has ever been investigated.[[7]](#footnote-7)

**Inadequate Protection Efforts**

In the case of child victims of trafficking, all actions need to be undertaken with their best interests in mind, and independent of their cooperation with law enforcement, as in line with Convention on the Rights of the Child. However, we witness issues with the protection and assistance of child victims which renders them vulnerable to even more exploitation. In the Netherlands for example, we are concerned about group sof minors who disappear from reception facilities. The frequent disappearance of unaccompanied minors from reception facilities has been in the news [several times](https://www.nrc.nl/nieuws/2020/01/13/2500-kwetsbare-jonge-asielzoekers-verdwenen-a3986602). Between 2010 and 2019, approximately [2,570 unaccompanied minors](https://zoek.officielebekendmakingen.nl/kst-27062-110.pdf) left a reception facility with an unknown destination. Many of these unaccompanied minors are presumably victims of human trafficking, but are not registered as such and are therefore [not included in official figures](https://www.nationaalrapporteur.nl/publicaties/rapporten/2020/10/16/slachtoffermonitor-mensenhandel-2015-2019). UAMs who are expected at risk of disappearing, for example because of a realistic suspicion that they are victims of human trafficking, are placed in a protected facility. However, even though a protected facility comes with protective measures (e.g., the door is open although no one can enter the facility without permission, and it is not allowed to have your own mobile phone or to be on the internet without supervision), it is not a closed facility, so [UAMs also disappear from these facilities](https://www.nationaalrapporteur.nl/publicaties/rapporten/2020/10/16/slachtoffermonitor-mensenhandel-2015-2019).

**Arrest, detention or other forms of custody of trafficked children**

In addition to the lack of provision of immediate care and protection for children and concerns around ensuring safe and suitable accommodation for all children immediately after their identification, we are concerned about children being placed in detention which is in itself a form of punishment and never in the best of interests of a child.

In Belgium, we note that if it has not been possible to properly identify victims, they sometimes run the risk of being expelled. In the past, Myria has already had the opportunity to draw attention to this problem and the need to properly train staff in detention centres. It may still be the case that some Nigerian victims for instance, who are not identified as potential victims, are detained in detention centres for repatriation.

**The impact of COVID-19**

Finally, during **COVID-19** and against the backdrop of mass, and often forced returns, we witnessed restricted abilities and capacities for states to identify child victims of trafficking owing to the short time frames, high numbers of returns and the conditions imposed by COVID-19, which meant that the **failure to detect victims of trafficking intensified further** in certain contexts over the past year. Additionally, it must be noted that, COVID-19 has **compounded risks for children to be trafficked**, including among those stranded, unable to return and with no access to regular pathways; with lockdown measures and school closures creating obstacles for children to rejoin education systems and be connected with child and social protection systems; and in the absence of livelihood options and reintegration support compounding destitution for families.

# **Section 3 - Recommendations to Enhance the Implementation of the Non-punishment Principle for Child Victims of Trafficking**

* **Ensure training and awareness-raising on early identification and the protections from prosecution available for trafficked children is made widely available for all stakeholders involved throughout the process**

As seen with the UK case study, there is variation in awareness of the provisions and the way in which they can be used to ensure children who may have been trafficked are not criminalised. Moreover, we continue to witness lack of awareness and difficulties in the identification of child victims which necessitates further capacity building and training.

* **Strengthen efforts to identify victims and potential victims promptly, including during contexts of returns, to ensure the proper identification of child victims of trafficking.** This includes promptly and systematically appointing a qualified guardian for all unaccompanied or separated children, so that they have a reference person they trust, facilitating identification.
* **Provision of safe and suitable accommodation for all child victims and ensure that staff responsible for care and protection understand the child’s rights, are age and gender-sensitive, and are able to adequately assist children throughout the process.**

Child victims of trafficking should never be placed in detention or other facilities connected with law enforcement. Please see: [Alternatives to immigration detention of children | UNICEF](https://www.unicef.org/documents/alternatives-immigration-detention-children)

* **Ensure that stakeholders prioritise and promote the well-being of children and act in their best interests even where circumstances are unclear and there are doubts around the relationship between the offence and trafficking.**
* **Mechanisms to collect and share data to monitor the implementation of the non-punishment principle and the issues and nature of trafficking for children.**

The Dutch National Rapporteur on Trafficking in Human Beings and Sexual Violence against Children [has repeatedly recommended](https://www.nationaalrapporteur.nl/publicaties/rapporten/2020/10/16/slachtoffermonitor-mensenhandel-2015-2019) to conduct research into the issue of human trafficking in European context. In their [most recent report](https://www.nationaalrapporteur.nl/publicaties/rapporten/2020/10/16/slachtoffermonitor-mensenhandel-2015-2019), they underlined how an international research can map out the nature and extent of human trafficking, including the possible role of organized crime, to create insight into how the Dutch government can more effectively deal with reports of human trafficking, to better help victims and better trace perpetrators.

UNICEF UK also recommends that mechanisms are put in place by the prosecuting agencies and government to properly monitor the implementation of the non-punishment principle across the UK, including by centrally recording data from individual cases such as the use of prosecutorial discretion in relevant cases, the raising of a statutory defence, and outcomes for a child where the statutory defence has been raised.

1. *More details on the legislation can be found in “Victim, not criminal”, UNICEF UK, 2017, available* [*here*](https://www.unicef.org.uk/wp-content/uploads/2017/05/Unicef-UK-Briefing_Victim-Not-Criminal_2017.pdf)*.*  [↑](#footnote-ref-1)
2. For more information on country lines, see [here](https://www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/drug-trafficking/county-lines). [↑](#footnote-ref-2)
3. See also: “THE MODERN SLAVERY ACT 2015 STATUTORY DEFENCE: A call for evidence”, October 2020, UK’s Independent Anti-Slavery Commissioner [↑](#footnote-ref-3)
4. See for examples: [annual report 2018](https://www.myria.be/files/RATEH-EN-2018-DEF.pdf) (profiles of underaged victims forced to commit crimes, pp.27-30). [↑](#footnote-ref-4)
5. UNICEF UK, 2017, available [here](https://www.unicef.org.uk/wp-content/uploads/2017/05/Unicef-UK-Briefing_Victim-Not-Criminal_2017.pdf) [↑](#footnote-ref-5)
6. More information in the Press Release here <https://hudoc.echr.coe.int/eng-press#{"itemid":["003-6940249-9330764>"]} and legal summary here <https://hudoc.echr.coe.int/eng?i=002-12882> [↑](#footnote-ref-6)
7. For more information (in Dutch): Argos ‘[Staatssecretaris doet of verdwenen Vietnamese amv’ers zijn gaan backpacken](https://www.vpro.nl/argos/lees/onderwerpen/lost-in-europe/2020/staatssecretaris-doet-of-verdwenen-vietnamese-kinderen-zijn-gaan-backpacken.html).’ 25-03-2020 en Argos, ‘[De laatste reis van Quyen en Hieu](https://www.nporadio1.nl/podcasts/argos/725315-de-laatste-reis-van-quyen-en-hieu).’ 23 januari 2021. [↑](#footnote-ref-7)