

G R E T A

Group of Experts on Action
against Trafficking in Human Beings

COUNCIL OF EUROPE



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Submission

**by the Council of Europe Group of Experts on Action against
Trafficking in Human Beings (GRETA)**

**pursuant to the call for written submissions from
the UN Special Rapporteur on trafficking in persons, especially
women and children**

**concerning input for the report on the implementation of the
non-punishment principle**

Introduction

The Council of Europe Group of Experts on Action against Trafficking in Human Beings (hereinafter "GRETA") congratulates Ms Siobhán Mullaly on her appointment as UN Special Rapporteur on trafficking in persons, especially women and children, and wishes to express its gratitude for her initiative to highlight the implementation of the non-punishment principle in her report to be presented to the 47th session of the Human Rights Council in June 2021.

The Council of Europe Convention on Action against Trafficking in Human Beings (hereinafter "Convention") is currently in force in 47 European States (46 Council of Europe member States and Belarus) and is open for accession to any country in the world. The Convention adopts a human-rights based approach to the fight against trafficking in human beings, and contains binding provisions in the areas of prevention of human trafficking, protection of victims, prosecution of traffickers, and co-operation with other States and civil society. The Convention provides a blueprint for improving anti-trafficking law, policy and practice.

The Convention, which was adopted in 2005 and entered into force in 2008, became the first treaty to include an explicit reference to the non-punishment principle. Article 26 of the Convention states that *"Each Party shall, 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."* Since then the non-punishment principle has been included in a number of other international instruments.¹

GRETA is currently the only independent panel of experts monitoring the implementation of binding international legal provisions on combating trafficking in human beings. GRETA has paid particular attention to the implementation of the non-punishment principle in its monitoring activities by including a separate sub-chapter on the issue in each of its country reports.²

Pursuant to the Special Rapporteur's call for submissions, GRETA would like to make the following observations.

Aim and scope of Article 26 of the Convention

The aim of the protection provided by Article 26 is to safeguard the human rights of victims and to avoid further victimisation. GRETA has stressed that the criminalisation of victims of THB contravenes the State's obligation to provide services and assistance to victims because, not being treated as victims of human trafficking, they are not provided with the support and services to which they are entitled under the Convention. Furthermore, such criminalisation discourages victims from coming forward and co-operating with law enforcement agencies, thereby also interfering with the State's obligation to investigate and prosecute those responsible for THB.³

¹ A list of international instruments can be found in the ICAT Issue Brief No. 8 "Non-punishment of victims of trafficking", page 3, available at: [Punishing traffickers, not victims – ICAT launches an Issue Brief on the non-punishment principle for victims of human trafficking | The Inter-Agency Coordination Group against Trafficking in Persons](#)

² All GRETA country reports are available at: <https://www.coe.int/en/web/anti-human-trafficking/country-monitoring-work>

³ [2nd General Report on GRETA's activities](#) (2012), paragraph 50.

Pursuant to Article 26 of the Convention, Parties shall provide for the possibility of not imposing penalties on victims of trafficking in human beings for their involvement in unlawful activities, to the extent that they have been compelled to do so. This might appear to allow some discretion to States in as much as it does not stipulate that States must not impose penalties, but that they have an obligation to provide for the “possibility” of not imposing penalties. However, Article 26, read in conjunction with the Explanatory Report to the Convention, establishes a positive obligation on Parties to adopt measures that specifically deal with the non-punishment of victims of trafficking. As noted in the Explanatory report, to comply with this obligation under Article 26, 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 not punishing victims of trafficking in human beings.⁴ Parties have room in the extent to which the national authorities apply such measures, but legislation specific to victims of human trafficking must first be provided for, in order to protect trafficked persons against punishment for trafficking-related crimes. The non-punishment principle creates a legal right for victims of trafficking and, as such, it should be safeguarded in domestic law.

GRETA emphasises the importance of taking a broader view of the non-punishment obligation, which should cover not only the non-application of a penalty, but also protection from prosecution and detention. GRETA considers that the prosecution of identified victims of trafficking in human beings may amount to a violation of Article 26 of the Anti-Trafficking Convention, and constitute a serious violation of their human rights.

The requirement that victims have been “compelled” to be involved in unlawful activities is interpreted in light of the definition of trafficking in human beings. “Compulsion” includes all the illicit means referred to in Article 4 of the Convention. In the case of children, no means are required to establish that a child has been trafficked. It is also immaterial whether or not the child has consented to be exploited.⁵

National implementation of Article 26 of the Convention

Of the 47 State Parties to the Convention, at the time of the last evaluation by GRETA, 19 had specific legal provisions concerning the non-punishment of victims of trafficking (i.e. 40%).⁶ The number of such countries increased after GRETA’s first evaluation in light of the recommendations made by GRETA, as a result of which six Parties adopted specific legal provisions concerning the non-punishment of victims of trafficking (Albania, Bosnia and Herzegovina, Bulgaria, Latvia, the Slovak Republic and the United Kingdom). In some countries (e.g. Armenia, Belarus, Finland, Georgia, Romania, Slovak Republic, United Kingdom) the non-punishment principle was limited in scope, i.e. applicable only to certain unlawful acts. Spanish law provided for a proportionality test comparing the possible ground for exemption and the crime committed by the victim.⁷

⁴ Explanatory report, paragraph 274, available at:

<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d3812>

⁵ Explanatory report, paragraphs 98 and 273.

⁶ Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Cyprus, Finland, Germany, Georgia, Greece, Latvia, Lithuania, Luxembourg, Malta, Romania, Slovak Republic, Spain, United Kingdom.

⁷ GRETA’s 2nd report on Spain, paragraphs 232-234.

Countries without a specific non-punishment clause rely on general duress provisions or exonerating or mitigating circumstances not specific to trafficking victims. In several countries, the public prosecution service has discretion to decide whether or not to initiate a case. In Poland and Serbia, which have no specific legal provision on the non-punishment provision, GRETA was informed that prosecutors directly invoked Article 26 of the Convention to drop criminal charges against a victim of human trafficking.⁸

In a number of countries (e.g. Austria, Belgium, Croatia, Denmark, Netherlands, Norway, Serbia, Spain, United Kingdom) guidance on the application of the non-punishment provision has been developed for prosecutors and law enforcement agencies.⁹

Further, some countries have appointed prosecutors who monitor cases where accused persons might be victims of trafficking with a view to ensuring the application of the non-punishment provision.¹⁰

Most countries do not collect information on the application of the non-punishment provision and only some countries have referred to case-law related to it.¹¹

GRETA's assessment of national practice and recommendations

GRETA has received information from NGOs, lawyers and other sources, indicating that victims of trafficking have been punished for status-related offences in many countries. GRETA has also noted that police officers, prosecutors and judges were sometimes inadequately trained to identify victims of trafficking, and consequently there was a risk of prosecuting and convicting them for offences committed while they were being trafficked.¹²

GRETA considers that the absence of a specific provision on the non-punishment of victims of trafficking entails a risk of differential treatment, depending on the prosecutor in charge of the case.¹³ Moreover, trafficking victims often cannot rely on exceptions based on general criminal law provisions (for example duress, necessity) because these concepts are narrower in scope than the non-punishment principle enshrined in the Convention¹⁴ and/or shift the burden of proof to the victim of trafficking.¹⁵ Consequently, to ensure compliance with the non-punishment provision, GRETA has recommended to State Parties to adopt a specific legal provision on the non-punishment of victims of trafficking for their involvement in unlawful activities, to the extent that they were compelled to do so, and/or to develop detailed, updated guidance for police officers and prosecutors on the aims and scope of the non-punishment provision.

⁸ GRETA's 2nd report on Poland, paragraph 174; GRETA's 2nd report on Serbia, paragraph 180.

⁹ [9th General Report on GRETA's activities \(2020\)](#), page 63.

¹⁰ GRETA's 2nd report on the UK, paragraph 290.

¹¹ For example, GRETA's 3rd report on Austria, paragraph 135.

¹² This is a concern in both countries with and without a specific non-punishment clause, see GRETA's 2nd report on Azerbaijan, paragraph 166; GRETA's 2nd report on Poland, paragraph 176.

¹³ [4th General Report on GRETA's activities \(2015\)](#), page 54; GRETA's 2nd report on Switzerland, paragraph 238.

¹⁴ Ryszard Piotrowicz, *Article 26 "Non-punishment provision" in A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings*, paragraph 26.42, available at: <https://doi.org/10.4337/9781788111560>

¹⁵ GRETA's 3rd report on Croatia, paragraph 101.

Concerning those countries that limit the non-punishment principle to certain offences, GRETA stresses that the non-punishment principle covers all offences which victims of trafficking were compelled to commit, including serious offences.¹⁶ The non-punishment principle not only applies to criminal liability but also to administrative and other types of liability.¹⁷ GRETA has repeatedly expressed concern about narrow interpretation of the non-punishment principle.¹⁸

GRETA has recommended to State Parties to improve the identification of victims, in particular among irregular migrants, and to ensure that while the identification procedure is ongoing, potential victims of trafficking are not punished for immigration-related offences.¹⁹ Moreover, convictions should be reversed and criminal records erased in an expedient manner when clear evidence subsequently emerges that a crime was committed as a direct consequence of being a victim of trafficking.

In its country reports, GRETA has referred to the recommendations on non-punishment for legislators and prosecutors contained in the paper issued by the Office of the OSCE Special Representative and Co-Ordinator for Combating Trafficking in Human Beings, with contributions from GRETA Expert Co-ordination Team, as an authoritative guide.²⁰

GRETA hopes that the increased awareness of the non-punishment principle will lead to positive changes in the treatment of trafficked persons by law enforcement authorities.

¹⁶ GRETA's 3rd report on the Slovak Republic, paragraphs 118 & 121

¹⁷ GRETA's 2nd report on Romania, paragraph 177.

¹⁸ GRETA's 2nd report on Georgia, paragraph 171; GRETA's 2nd report on the UK, paragraph 287.

¹⁹ 4th General Report on GRETA's activities (2015), page 54; GRETA's 2nd report on France, paragraph 247.

²⁰ Available at: <https://www.osce.org/secretariat/101002?download=true>