

# **Input of the German NGO network against trafficking in human beings**

on the implementation of the non-punishment principle

Contribution on the call for written submissions: Report of the United Nations Special Rapporteur on trafficking in persons, especially women and children until 14 February 2021

## **German NGO network against trafficking in human beings (KOK)**

KOK is the German NGO network against trafficking in human beings. Currently, KOK consists of 37 member organisations across Germany. KOK aims to promote the human rights of trafficked persons and migrants experiencing violence. It addresses trafficking and other forms of violence against migrants as a severe violation of human rights. KOK's work focuses on representing the interests of women and, more specifically, migrant women. Moreover, thanks to its experience, KOK provides expertise on all groups of trafficked persons.

## **The Non-punishment principle in German law**

The non-punishment principle is established in § 154c StPO (German Code of Criminal Procedure). Since 2016, the second paragraph also covers trafficking in human beings as criminal offence to refer to.

§ 154c para 2 states that, if a victim of coercion or extortion or trafficking in human beings (Art. 240, 253, 232 of the Criminal Code) files charges in respect thereof (Art. 158), and if as a result a misdemeanour committed by the victim comes to light, the public prosecutor may dispense with prosecution of the misdemeanour, unless expiation is imperative because of the seriousness of the offence.<sup>1</sup>

With the new law<sup>2</sup> in 2016, the Directive 2011/36/EU was meant to be implemented. However, inter alia concerning the non-punishment principle, there remains criticism on the application of the above-described German rule.

GRETA for example is concerned, that the German § 154 para 2 StPO leaves too much discretion to prosecutors and does not apply to all offences related to trafficking in human beings, namely Art. 232a (Forced prostitution), 232b (Forced labour), 233 (Exploitation of labour) and 233a (Exploitation involving deprivation of liberty) of the Criminal Code.<sup>3</sup> In general, the non-punishment principle determines 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.

In spite of this, the German law only states that public prosecutors may refrain from prosecuting, although a more binding rule would be necessary to guarantee the certainty of the law. Every public prosecutor has discretion to decide whether he\*she is going to proceed a prosecution against a victim. In addition, it is an individual case-by-case decision of the public prosecutor whether the criminal offence was too grave to refrain from prosecuting. However, the law is only applicable on crimes, which are to be penalised with a custodial sentence less

<sup>1</sup> Code of Criminal Procedure as published on 7 April 1987 (Federal Law Gazette I, p. 1074, 1319), as last amended by Article 3 of the Act of 11 July 2019 (Federal Law Gazette I, p. 1066).

<sup>2</sup> Gesetz zur Verbesserung der Bekämpfung des Menschenhandels vom 11.10.2016 (BGBl. 2016 I 2226).

<sup>3</sup> Greta (2019), Report concerning the implementation of the Council of Europe Convention Action against Trafficking in Human Beings by Germany, § 242.

than one year or a fine, so there is already a limit for offences, which are too grave. In conclusion, the law states a high uncertainty whether public prosecutors do apply this law of non-punishment.

In addition, this law only allows public prosecutor and not courts or judges to refrain from prosecuting. After proceedings are pending, judges cannot close the case under this law.

When public prosecutors refrain from prosecuting at one point, they can still resume proceedings under the condition that the factual circumstances have changed and no double jeopardy will take place.

### **The Non-punishment principle in German practice**

Due to the high uncertainty, whether prosecutors apply the non-punishment principle or not, the experiences which are made by practitioners vary widely.

One problem in the application of the non-punishment principle is one of the highest principles of German criminal procedural law, the so-called principle of legality in criminal proceeding (Legalitätsprinzip). Public prosecutors are obliged to open preliminary proceedings, if they receive any sufficient knowledge about a (possible) criminal offence, which constitutes an initial suspicion and the law doesn't direct something else. The non-punishment principle in German law is an exception of this principle. Nevertheless, public prosecutors are cautious to defy the principle of legality and most likely will first open a preliminary procedure. It can be assessed that in practice very few victims do not experience any prosecution, as the procedure will be at least opened, even if it will be closed again.

Often public prosecutors also have no knowledge about the existence of the non-punishment principle or have only rarely worked with this rule. It is of importance to raise more awareness on this rule, so that its application will become more common.

Counselling centres have made the experience that victims of trafficking in human beings are punished for criminal offences, they conducted while being in the exploitative situation. For example, in one case, a counselling centre reported that a victim did not explain her situation of being exploited before but only in front of the court where she was charged for forgery of documents in two cases, but as said before, the court cannot dismiss the procedure due to the non-punishment principle. In this case, the victim didn't have a lawyer during the procedure to defend her, which would have been important for her to have a trustful surrounding to explain to the lawyer the situation of being exploited. Not only in this matter, it is from great importance for victims of trafficking to have a lawyer and/or being accompanied by a counselling centre from the beginning of the preliminary proceedings. Those actors can also draw attention to the non-punishment principle and request the consideration of this provision. In another case, the victim of human trafficking received a more severe sentence than the

trafficker. The counselling centre reports, that the fact that the person was a victim of trafficking in human beings and the establishment of non-punishment principle in German law should at least have the effect to commute the sentence of the victim.

In contrary to the above-mentioned paragraphs, it is to emphasize that proceedings because of unlawful entry or residence are indeed often closed due to the non-punishment-principle. Counselling centres regularly report this improvement of an in general deficient situation.

### **Duty to pass on data and its impact on the Non-punishment principle**

It also has to be noted that other provisions in German law stand against the principle of non-punishment.

For example, civil servants are obliged to pass on personal data of victims of trafficking in human beings, when they become aware of someone in an irregular residence situation. According to German law (§ 87 AufenthG/ Act on the residence), they have to report cases of irregular residence to the competent immigration authority. Victims of trafficking in human beings are often found to be in irregular residence situations and face difficulties due to this law. They cannot freely report their exploitation or abuse without fearing legal consequences so that their access to important services is very limited. For victims, the simple act of going to see the doctor can lead to their personal data being shared with immigration authorities provoking immigration enforcement procedures. This rule is conflicting the non-punishment principle according to which victims should not be prosecuted for their criminal offences and therefore should not fear their prosecution when seeking help from the authorities. Firewalls, which separate immigration enforcement activities from public services, could ensure the access of victims of trafficking in human beings to fundamental services.

### **Résumé and recommendations**

The German legislature has implemented the principle of non-punishment in German law, which is however not yet adequate.

German authorities should consider to adjust § 154c para 2 StPO to guarantee the certainty of the law for victims of trafficking in human beings. It is necessary to have a law, which does not give public prosecutors absolute discretion, to decide whether they apply the law of non-punishment or not. Further, the law needs an amendment, which covers all offences related to trafficking in human beings, namely Art. 232a, 232b, 233 and 233a of the Criminal Code.

German authorities have to take additional measures to ensure compliance with the principle of non-punishment of victims of trafficking in human beings for their

involvement in unlawful activities, to the extent that they were compelled to do so. They should issue guidance and trainings to public prosecutors and other relevant professionals to raise more awareness to this important rule. Those guidances and trainings have to clarify the relation between the non-punishment principle and the principle of legality, so that the exceptional nature of the non-punishment principle is clarified and public prosecutors don't hesitate to apply this law.

In criminal proceedings, a suspected or accused person should always have a lawyer in order to be defended by a professional and have the possibility to talk to him\*her in a safe environment. When public prosecutors assume that the suspected or accused person is a victim of trafficking in human beings, they should offer to establish contact with specialised counselling centres in order to provide for professional support and counselling.

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