

Women's Link Worldwide's input for the UN Special Rapporteur on trafficking in persons, especially women and children's report on the implementation of the non-punishment principle¹

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INTRODUCTION

1. Commonly, traffickers force victims of trafficking in human beings (hereinafter 'THB') to commit criminal offences, or THB see themselves involved in unlawful activities that carry legal sanctions. Under international and regional law, States have the obligation to decide not to punish, through prosecution or penalties, victims of THB if they have been compelled to undertake unlawful activities.² This is known as the non-punishment principle.³

2. We argue that the principle is routinely ignored in Spain, revictimizing victims, and vulnerating their human rights. First, we introduce the importance of adopting a gender perspective in implementing the principle. Second, we draw from cases that WLW has litigated to discuss and evidence the lack of the principle's implementation in the Spanish context. Last, we offer a conclusion.

A. IMPLEMENTATION OF THE NON-PUNISHMENT PRINCIPLE IN SPAIN

3. The non-punishment principle is codified in the Spanish Criminal Code, section 177bis para 11.⁴ In 2018, interpretative clarification was provided, establishing that the principle applies where the commission of the crime was undertaken 'under a context of violence, intimidation,

¹ Women's Link Worldwide! (hereinafter 'WLW') respectfully submits its contribution to the UN Special Rapporteur's call for submissions on the non-punishment principle. Women's Link Worldwide is an international non-profit organisation that uses the power of the law to promote social change that advances the human rights of women and girls, especially those facing multiple inequalities. It has two regional offices (Madrid, Spain and Bogotá, Colombia), as well as personnel working on projects in East Africa (Uganda, Kenya and Rwanda). In the last ten years, WLW has represented women victims of trafficking in human beings before national, regional and international courts, defending their right to access to justice and remedies. At WLW, we work to ensure that the only legal framework used to combat trafficking in human beings is a human rights framework, which prioritizes victim-protection as its main objective. For more information, please visit: www.womenslinkworldwide.org.

² Several binding international and regional instruments contain this obligation, including the Council of Europe Convention on Action against Trafficking in Human Beings (entered into force 1 February 2008) CETS 197, Art. 26; 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, and replacing Council Framework Decision 2002/629/JHA, Art. 8; Protocol to the Forced Labour Convention, 1930 (No. 29); Association of Southeast Asian Nations (ASEAN) Convention against Trafficking in Persons, Especially Women and Children (entered into force March 2017).

³ This principle is also contained in other instruments and guidance documents, such as: UNGA, 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro' A/HRC/44/45 (6 April 2020), paras 30-37; Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children, 'The importance of implementing the non-punishment provision: the obligation to protect victims' (30 July 2020), available at: <https://www.ohchr.org/EN/Issues/Trafficking/Pages/non-punishment.aspx#:~:text=HTMLCountry1-.The%20importance%20of%20implementing%20the%20non%2Dpunishment%20provision,the%20obligation%20to%20protect%20victims%20of%20trafficking%20in%20human%20beings,%20and%20the%20importance%20of%20protecting%20their%20rights.%E2%80%9D&text=In%20all%20these%20scenarios%20it%20is%20important%20to%20respect%20their%20human%20rights.%E2%80%9D>; CEDAW, 'General Recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration' (20 November 2020) CEDAW/C/GC38, para 98; Office of the High Commissioner for Human Rights (OHCHR), 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (2002) E/2002/68/Add.1, Guideline 4, principle 5. Other soft law instruments include OSCE, 'Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking' (2013) or the UNODC, 'Model Law against Trafficking in Persons' (2009).

⁴ Spanish Criminal Code. Available at (in Spanish): <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>. This section directly transposes Spain's obligations under the EU Directive 2011/36/EU, Art. 8, and reads as follows (non official translation): 'notwithstanding the application of the general rules of this Code, the victims of THB will be exempted from the penalties corresponding to the criminal offences committed while being exploited, provided their involvement was the direct consequence of the situation of violence, intimidation, deceit or abuse to which they were subjected, and provided there is an adequate proportionality between that situation and the criminal act perpetrated'.

deceit, or abuse, where this has caused a limitation of the trafficking victim's will'.⁵ The principle will be considered on a case by case basis and applied following a proportionality criteria.⁶ Where the punishment relates to an administrative offence, as a breach of immigration law, non-punishment is codified under article 59.1 of the Organic Law 4/2000 (henceforth, 'Aliens Law')⁷, but this disposition is only applied if the victim cooperates with the authorities or formally reports the traffickers. If the victim has been handed a final judgment, a revision procedure is considered extraordinary and is far from straightforward.⁸

4. An analysis from a gender perspective of these regulations is crucial for their correct application. The principle only applies when victims have been identified as such within a criminal proceeding or where they collaborate with the authorities. A formal identification by *Policía Nacional* does not suffice for them to benefit from the non-punishment principle. Taking into account the difficulties and risks that THB victims face when resorting to the authorities, this conditioning of non-punishment derives in an extremely narrow and unsatisfactory implementation of the principle, in line with the Spanish approach to THB through a crime and migration control. This approach, that goes against Spain's international obligations to respect and fulfil victims' human rights,⁹ is explained by the fact that the domestic legal and policy framework on THB¹⁰ lacks a human rights and a gender perspectives which prevents the non-punishment principle to be fully and correctly applied. Notwithstanding the authorities' obligation to identify¹¹ and protect victims of trafficking, misidentification of victims as criminals is an extremely worrying tendency. Authorities commonly focus on the victims' wrongdoings, disregarding trafficking indicators. Thus, women are often punished for breaches of immigration rules and anti-prostitution measures and laws.¹²

⁵ Consejo General del Poder Judicial (CGPJ), 'Guía de criterios de actuación judicial frente a la trata de seres humanos' (Noviembre 2018), para 205. Available at (in Spanish): <https://www.poderjudicial.es/cgpj/es/Poder-Judicial/En-Portada/El-CGPJ-presenta-una-Guia-de-criterios-de-actuacion-judicial-para-detectar-e-investigar-la-trata-de-seres-humanos-con-fines-de-explotacion>.

Translation is ours.

⁶ Ibid para 205.

⁷ Organic Law 4/2000 on the Rights and Freedoms of Aliens in Spain (Aliens Law). Available at (in Spanish): <https://www.boe.es/buscar/pdf/2000/BOE-A-2000-544-consolidado.pdf> Art. 59.1. Please note this law does not apply to EU and EEA victims.

⁸ CGPJ (n5) para 228. See: Real Decreto de 14 de septiembre de 1882, aprobatorio de la Ley de Enjuiciamiento Criminal, Art. 954. Available at (in Spanish): <https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036>. See also: STJ (Valladolid) n 2241/2009 de 20 de octubre de 2009, rec 104/2009; SAN 1931/2017 de 26 de abril de 2017, rec. 89/2016: Annex 1.

⁹ UN Convention on the Elimination of All Forms of Discrimination Against Women, 1249 UNTS 13 (Spain Ratified 5 Jan 1984); UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the UN Convention against Transnational Organised Crime, 2237 UNTS 319 (Spain Ratified 1 Mar 2002); Council of Europe Convention on Action against Trafficking in Human Beings, CETS No 197 (Spain Ratified 2 Apr 2009).

¹⁰ Aliens Law (n7), Art. 59bis; the Framework Protocol for the Protection of Victims of Trafficking, adopted on 18 October 2011 by Ministries of Justice, the interior, Employment and Social Security, Health, Social Services and Equality, the Prosecution Service and the General Council of the Judiciary, available at: <https://violenciagenero.igualdad.gob.es/ca/otrasFormas/trata/normativaProtocolo/marco/docs/ProtocoloTrataEN.pdf>;

Ministry of Health, Social Services and Equality, 'Comprehensive Plan to Fight against Trafficking in Women and Girls for Sexual Exploitation 2015-2018' Available at:

https://violenciagenero.igualdad.gob.es/otrasFormas/trata/normativaProtocolo/planIntegral/DOC/Plan_Integral_Trata_2015-2018_ENG_DEF.pdf. These protection measures are without prejudice to procedural and extra-procedural rights afforded by Organic Law 4/2015 on Victim of Crime Statute.

¹¹ Aliens Law (n7), Art. 59bis, section 1; Identification of Non-EU victims of trafficking is regulated by Article 141 of the Royal Decree 557/2011. The Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) has raised severe issues with the identification of trafficking victims, as submitted in its two monitoring reports on Spain's implementation of the Council of Europe Convention on Action against Trafficking. See GRETA, 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Spain: First Evaluation Round' GRETA(2013)16 (Strasbourg, 27 September 2013), available at: <https://rm.coe.int/168071c836>; GRETA, 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Spain: Second Evaluation Round' GRETA(2018)7 (Strasbourg, 20 June 2018), available at: <https://rm.coe.int/greta-2018-7-frg-esp-en/16808b51e0>

¹² Framework Protocol (n10) pt VI.A para 3 reads, that in the context of trafficking, 'if a presumed victim is a foreigner and does not have the appropriate legal papers, the competent immigration unit shall not instigate penalty proceedings based on a violation of Article 53.1(a) of Organic Act/2004, following the reform thereof by Organic Acts 2/2009 and 10/2011, in accordance with the terms of Article 59bis (2) thereof.'

5. The interpretation from a gender perspective should also extend to administrative penalties. Trafficked women for sexual exploitation face constant police harassment when they are forced to exercise prostitution in the streets, because in Spain, many cities have passed laws which regulate prostitution and soliciting in public places without any regard to potential victims of trafficking.¹³ These regulations are gender blind, leading to a disproportionate negative impact on women that are potential trafficking victims, and to their intersectional discrimination. These women are fined with administrative penalties that put at risk the renewal of their resident permits and further increase their debt with the traffickers.

6. The implementation of the non-punishment principle with a gender perspective requires an understanding of how women and women's bodies are utilized by traffickers. This include controlling their children and reproductive capacity. The mafias use young children as a strategy to have the trafficked women cross borders, especially in the south of Spain.¹⁴ This is because heavily pregnant women and women carrying children are referred to protection centers instead of to immigration detention centers ('CIEs') and have better chances to stay in the country.

7. WLW has litigated cases before Spanish courts where the authorities' lack of identification, and lack of application of the non-punishment principle from a gender perspective have ensued serious human rights violations and abhorrent consequences for the physical and psychological integrity of THB victims.

CASE 1 - L.O, a Moldavian national, was trafficked for sexual exploitation in 2011. She was exploited for years in Barcelona, under the strict control and violence of traffickers, who also had control over her children. In 2011, she contacted the local police to report that she was being forced to sell sex against her will. Since this first interaction with the police, countless followed. In 2012, she was brought before *Policía Nacional* and was served with a procedure of expulsion. Between 2012 and 2018, although being informally identified as a trafficking victim, she was subjected to multiple administrative sanctions under local prostitution regulations (accumulating up to 24 fines). After years of prolonged State inaction, she died in March 2019. Despite there was a wealth of evidence and indicators available, including information on the traffickers' identities, the police failed to conduct an investigation. L.O grew increasingly scared of interaction with authorities, and multiple reports captured her physical and mental degradation.

Case 1 evidences an appalling lack of due diligence by the Spanish authorities, and lists a plethora of violations of L.O's human rights, including her right to life. The authorities failed to initiate formal identification proceedings.¹⁵ The evidence available was more than sufficient to raise a reasonable belief that L.O could be a trafficking victim, which should have triggered an effective investigation. However, the investigation and her identification and protection were conditioned to her formal declaration against the

¹³ For example: Ordenanza de medidas para fomentar y garantizar la convivencia ciudadana en el espacio público de Barcelona, Acuerdo del Consejo Plenario de 23 Diciembre 2005, Art. 39.3, available at (in Spanish): <https://ajuntament.barcelona.cat/dretsidiversitat/sites/default/files/convivencia.830.pdf> . See also: RTVE, 'La prostitución en España, una actividad no regulada pero sí castigada en caso de proxenetismo y trata' (30 Agosto 2018), available at (in Spanish): <https://www.rtve.es/noticias/20180830/prostitucion-espana-actividad-no-regulada-pero-si-castigada-caso-proxenetismo-trata/1788540.shtml>; Laura Galaup, 'La 'Ley Mordaza' empieza a multar a prostitutas y a víctimas de trata', elDiario.es (20 de Julio de 2015), available at (in Spanish): https://www.eldiario.es/sociedad/prostitucion-dia-mudial-contra-la-trata-de-personas-explotacion-sexual-ley-mordaza_1_2550992.html

¹⁴ See: Women's Link Worldwide (2009), *Migrant Women's Rights: an Invisible Reality*. Available at <http://en.calameo.com/books/004373773fee4885045ec> ; Women's Link Worldwide (2012), *Migrant Women in Hiding: Clandestine Abortion in Morocco*. Available at <http://en.calameo.com/books/004373773e8bbcb1b0d2e> ; Women's Link Worldwide (2014), *Trafficking of Nigerian Women and Girls: Slavery across Borders and Prejudices*. Available at <http://en.calameo.com/books/004373773069cca8ed099>

¹⁵ For more on the identification of trafficking victims in Spain please see: GRETA 2013 (n11) para 146.

trafficking network,¹⁶ even though victim protection should never be conditioned to their participation in proceedings, or to their willingness to collaborate with the investigation.¹⁷

CASE 2 - M.O., a Nigerian National, arrived in Spain in 2011 in a dinghy from Morocco, holding a baby that was not hers. Spanish authorities had *prima facie* evidence that M.O could be a victim of THB, as F.O, the mother of the child M.O. was holding, was identified as such. F.O declared that the traffickers – and not M.O.– had obliged her to give her baby to M.O.

Legal proceedings were initiated against M.O. and she was detained in pre-trial detention in a women's prison. At the request of the prosecutor, the police presented a report concerning M.O.'s potential victimhood, that suggested that non-identification could be a consequence of a lack of investigation. No further investigation was instructed. M.O. was sentenced to 9 months and 12 days in prison for a duress offence. Having spent the duration of her sentence in pre-trial detention, she was freed after the sentence was handed out. Due to her 'irregular' migration status, she was interned in a CIE, pending expulsion to Nigeria.

There, after 6 days from being freed, she was identified as a trafficking victim given the presence of reasonable indicators following which she filed a revision appeal concerning the criminal sentence. The Court refused her application, holding that her identification by the police was not demonstrative of her victimhood status. She applied for asylum on the grounds of being a trafficking victim and obtained international protection, building on which, she re-applied for a revision of her sentence. The Supreme Court rejected her application again, on the grounds that this condition could not be understood as new facts.

CASE 3 - A.B.M., a Uruguayan national, was trafficked by relatives into Italy for sexual exploitation. She escaped and arrived to Spain, where her sister resided. She was detained, given an order of expulsion, and sent to a CIE. Fearful of the death threats she had received from her traffickers, she refused to board her deportation flight. She self-identified as a trafficking victim and requested protection, showing a willingness to collaborate with *Policía Nacional* in the traffickers' investigation. A day after her identification interview, without an effective investigation, the police considered that there was no reasonable evidence pointing to her victimhood status.

She resisted against a second deportation attempt, resulting in the police using a disproportionate use of force and various discriminatory verbal abuse against her. She filed a complaint against the police officer for the injuries she received, which was rejected, and he filed a countercomplaint against her. This resulted in a sentence to six months imprisonment and a fine, for resisting law-enforcement and injuries. Overall, she was detained for over six months.

8. All three cases evidence the State's lack of due diligence to undertake an effective investigation after having reasonable indicators of trafficking, and victim's testimonies. Intersectional discrimination played a role in all cases as authorities based their decisions on stereotypes regarding the victims' credibility, based on their gender and migration status. These evidence a serious failure to apply a gender perspective in the identification of trafficking victims.¹⁸

9. In *cases 1 and 2* women were punished in relation to acts committed as a result of their status as trafficking victims, in a situation of violence and coercion.¹⁹ Their sanctions were not overturned,

¹⁶ Ibid para 146. GRETA 'urged Spanish authorities to review the victim identification procedure with a view to ensuring that possible victims are treated, in the first place, as persons who have been exposed to human rights violations rather than as a source of evidence for criminal investigations'.

¹⁷ *Inter alia*: OHCHR (n3) guideline 6; CGPJ (n5) para 700. GRETA 2018 (n11) at para 151 urged Spanish authorities to 'take further steps to improve the identification of victims of THB, and in particular to: ensure that, in practice, formal identification of victims of THB does not depend on the presence of sufficient evidence for the initiation of criminal proceedings'.

¹⁸ See further: Gema Fernández Rodríguez de Liévana and Viviana Waisman, 'Lost in Translation': Assessment of the (Non)-Implementation of the Trafficking Directive from a Gender Perspective in Spain' (2017) 9 *Journal of Human Rights Practice* 504.

¹⁹ CGPJ (n5).

leaving them in a situation of added vulnerability posed by their records.²⁰ Due to their irregular migration status, women -in *cases 2 and 3*- were imprisoned in immigration facilities, vulnerating their right to liberty and OHCHR's non-detention principle.²¹ Furthermore, State authorities failed to comply with the non-punishment principle due to a lack of identification and investigation.²² A.B.M.'s deportation was attempted in the face of her self-identification as a victim, and her fear of facing harm upon her return. No risk-assessment was undertaken to comply with the principle of non-refoulement, an obligation of Spain under domestic and international law.²³

CASE 4 - G.J., a Nigerian national, was trafficked into Spain for sexual exploitation. The trafficking network forced her into prostitution without protection, causing her a pregnancy. She was detained and sent to a CIE where she applied for asylum giving supporting evidence of trafficking. Her application was rejected, despite her fear to return to Nigeria and her added vulnerability as a pregnant woman.

WLW represented her in her application for a reflection and restoration period, which was refused. Shortly after, she was deported without prior warning, and without a previous risk-assessment of the consequences of her expulsion. Attempts at expulsion without proper risk assessments happen regularly²⁴, even if an order of expulsion should not be executable in cases where non-refoulement may be at play or where it affects pregnant women, vulnerating their health.²⁵ It is highly unlikely that G.J.'s status as a pregnant woman and potential trafficking victim was duly considered as a vulnerability factor in her asylum application, requiring a differentiated treatment under Law 12/2009.²⁶ Her forced return put G.J. integrity at risk of torture or cruel, inhuman and degrading treatment. WLW has evidence that she has been re-trafficked.

B. CONCLUSION

10. The effective implementation of the principle is conditional to an intersectional and gender sensitive application. Criminalisation and prosecution of trafficking victims impact them differently and carry grave consequences for their human rights. A gender application of the principle requires that it is interpreted to encompass both criminal and administrative sanctions, which disproportionately affect women trafficked for sexual exploitation. Regulations against prostitution are highly problematic as they are gender and migration-status blind, and disproportionately impact trafficking victims.

11. As this submission shows, failure to implement the principle has severe consequences for trafficking victims, putting Spain in a breach of its due diligence obligations to investigate and prosecute trafficking. Change must happen without delay to ensure that women's right to live free from trafficking in Spain is real and not illusory.

²⁰ UNGA, 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Maria Grazia Giammarinaro' A/HRC/44/45 (6 April 2020), para 37.

²¹ UNGA, 'Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo' (6 June 2012) A/HRC/20/18, para 25; OHCHR (n3) Guideline 6 para 1.

²² OHCHR (n3) guideline 2(6) states that states should ensure 'that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody'.

²³ CGPJ (n5) 54. Underpinning obligations: Council of Europe, European Convention on Human Rights, as amended by Protocols NO 11 and 14 ETS 5 (entry into force 3 September 1953), Art. 3; Council of Europe Convention on Action against Trafficking in Human Beings, Art. 40(4); EU Directive 2011/36, Art. 11.6; Alien's Law.

²⁴ Clínicas Jurídicas de Universidad Pontificia Comillas, Per la Justicia Social (Universidad de Valencia), Dret al Dret (Universidad de Barcelona), and Observatorio de Derechos Humanos (Universidad de Valladolid) for the non-governmental organization "Pueblos Unidos-Servicio Jesuita a Migrantes", 'Situación actual de los centros de internamiento de extranjeros en España y su adecuación al marco legal vigente' (Madrid, June 2015), available at (in Spanish): www.icade.comillas.edu/images/Clinica_Juridica_ICADE/Informe_situacion_actual_CIE_junio_15.pdf. See also: Servicio Jesuita a Migrantes, Informe CIE 2018 'Discriminación de origen' (Madrid, 2018), available at (in Spanish): sime.org/wp-content/uploads/2019/06/Informe-CIE-2018-SJM.pdf

²⁵ CGPJ (n5) pg 54.

²⁶ Law 12/2009, of 30th October, regulating the right to asylum and subsidiary protection. Available at (in Spanish): <https://www.boe.es/buscar/act.php?id=BOE-A-2009-17242>

12. We hope the information provided is taken into account, and we authorize its publication in the Special Rapporteur's website.

ANNEXES

- **Annex 1.** Case-law (in Spanish): STJ (Valladolid) n 2241/2009 de 20 de octubre de 2009, rec 104/2009; SAN 1931/2017 de 26 de abril de 2017, rec. 89/2016.