

Applying the Non- Punishment Principle in the Protection of Trafficking Victims

Learning for Practitioners in Costa Rica



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TABLE OF CONTENTS

1. Framing the issue. What is the non-punishment principle and why is it important?	4
2. Challenges in applying the non-punishment principle at different stages and in different situations	7
3. Solutions and strategies. Applying the non-punishment principle in day-to-day anti-trafficking work	9
3.1 Strengthen awareness and understanding of the non-punishment principle amongst all practitioners	9
3.2 Learn about different forms of trafficking in persons and the methods traffickers use to control their victims	9
3.3 Leverage expertise of colleagues to strengthen identification of victims involved in unlawful activities	10
3.4 Ensure that all identified victims of trafficking are protected and assisted	10
3.5 Ensure that any decision to prosecute a victim of trafficking is made on the basis of careful application of the non-punishment principle	11
3.6 Understand and apply discretions to not punish victims of trafficking	11
3.7 Uphold fair trial rights of victims who are on trial	14
3.8 Avoid conviction or mitigate sentences	15
3.9 Provide remedies to victims who have been wrongfully punished	16
Resources	17

1. Framing the issue. What is the non-punishment principle and why is it important?

Victims of trafficking in persons may be involved in a range of unlawful activities as a direct result of being trafficked – for example, for immigration or document-related violations, violations of labor regulations while being exploited or prostitution-related offenses in countries where prostitution is illegal. As a consequence, they risk being punished as offenders rather than protected as victims. Some trafficking victims who are trafficked for the express purpose of committing crimes, such as theft, cyber-scamming, drug-related, or other offenses, are at particular risk of being treated as offenders rather than as victims.

To mitigate these risks, the non-punishment principle sets out that victims of trafficking in persons should not be prosecuted or otherwise punished for unlawful acts they commit as a direct consequence of being trafficked.

Importantly, the non-punishment principle does not protect victims of trafficking from being punished for all unlawful activities they have been involved in. The principle does not provide immunity for offenses that are not connected to their trafficking. There are situations where a victim may have committed offenses that they should be held to account for. Rather, it protects victims from being punished for activities that they were involved in as a direct result of being trafficked. Where a sufficient connection is established between the unlawful activity and their trafficking, the non-punishment principle should be applied regardless of the gravity or seriousness of the unlawful activity.

Where victims are unjustly or inappropriately punished – whether through detention, deportation, prosecution, conviction, or even denial of access to assistance and protection – their human rights are violated. The experience of being prosecuted for unlawful activities can have a detrimental impact on victim recovery. The negative effects of conviction are felt long after sentences have been served. Criminal records or records for administrative offenses can pose barriers to accessing compensation, social security, and housing; can impede asylum or residency claims; result in denied education or employment opportunities; and even hinder custody of children.

In addition to the harms suffered by victims when they are punished for unlawful activities they have been involved in as a direct result of their trafficking, there are detrimental impacts on the State too. Where State authorities inappropriately punish trafficking victims, their capacity to counter trafficking by protecting victims and punishing traffickers is diminished.

For example, the ability of officials to effectively identify and protect trafficking victims is reduced where they approach them as potential offenders rather than as potential victims of serious crime. When trafficking victims are at risk of being punished, they are less likely to reach out to authorities or to cooperate with them. Upholding the non-punishment principle can therefore serve as a critical component of the State's efforts to identify and protect victims of trafficking in persons and to prevent their re-victimization.

Effective investigation and prosecution of traffickers is also compromised when authorities focus their investigative and prosecutorial efforts on victims of trafficking. Traffickers often exploit victims in unlawful activities as a deliberate strategy to shift the risk of punishment away from themselves and onto their victims. Victims who are punished rather than assisted, are unlikely to support authorities in their efforts to investigate and prosecute traffickers. Application of the non-punishment principle is therefore a way of ensuring that they are not distracted from their obligations to protect victims, to prosecute traffickers, and to cooperate to these ends.

The non-punishment principle is included in the 2014 Protocol to the Forced labor Convention No. 29 that entitles authorities to not prosecute victims for unlawful activities they have been compelled to commit as a direct consequence of being subject to forced or compulsory labor. The principle is not explicitly contained in *the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*. However, Article 25 of that Convention requires States to safeguard the rights of victims of organized crime and article 14 of the Protocol requires States to ensure its counter-trafficking efforts accord with their international human rights obligations.

The non-punishment principle is captured in the *Recommended Principles and Guidelines on Human Rights and Human Trafficking* of the Office of the United Nations High Commissioner for Human Rights that sets out 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 persons.

Guideline 4(5) sets out that States should consider:

Ensuring that legislation prevents trafficked persons from being prosecuted, detained or punished for the illegality of their entry or residence or for activities they are involved in as a direct consequence of their situation as trafficked persons.

In specific relation to children, Guideline 8(3) sets out that States, and, where applicable, intergovernmental and non-governmental organizations, should consider:

Ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offenses related to their situation as trafficked persons.

The Special Rapporteur on trafficking in persons, especially women and children, has given significant attention to the implementation of the principle as part of comprehensive and victim-centered response to counter-trafficking.¹

At the domestic level, many countries around the world have included an explicit non-punishment provision in their counter-trafficking legislation.² In Costa Rica, Article 70 of the Law against Trafficking in Persons and Creation of the National Coalition against the Smuggling of Migrants and Trafficking in Persons (Law 9095) expresses the non-punishment principle as follows:

Trafficking victims are not criminally or administratively punishable for committing offenses or crimes, if they were committed during the execution of the crime of trafficking in persons and as a result of it, without prejudice to the legal actions that the aggrieved party may exercise against the perpetrator or perpetrators.

Persons below the age of eighteen are specifically protected from punishment under the Article 17 of the Penal Code (Law 4573).

[1] Mullaly, Siobhán (2021) Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children, UN Doc. A/HRC/47/34 (17 May 2021), Submitted to the 47th Session of the Human Rights Council, 21 June to 9 July 2021.

[2] Even in those countries that have not explicitly captured in the principle in law, practitioners still have opportunities to apply the principle in practice.

2. Challenges in applying the non-punishment principle at different stages and in different situations

There are several opportunities to apply the non-punishment principle, from the point at which victims of trafficking are first encountered, through to any decisions made thereafter about their status and their culpability for unlawful acts. Challenges arise at every stage.

- **At identification.** Identification of victims of trafficking is challenging even for those who are actively seeking victims and have been specially trained in screening and identification techniques. Practitioners who are not counter-trafficking specialists but who may encounter victims of trafficking incidentally among people they encounter as offenders, face acute challenges. For instance, authorities and others may encounter children or adolescents who are cultivating, transporting, or selling drugs, or who are committing theft or other crimes. Police, teachers, social workers, and others who they come into contact with may not be attuned to the signs that a person has been manipulated by traffickers to participate in such activities. Where they do not recognize that a person may have been trafficked to participate in an unlawful activity, there is a risk that victims will be misidentified as offenders. Where victims are placed in detention, deported, or proceed through criminal justice processes, it is challenging to subsequently identify them as victims and divert them into protection channels.
- **During an investigation.** At the stage that a person is facing arrest and investigation for their involvement in unlawful activities, arresting officers may not have sufficient understanding of trafficking in persons and the modus operandi used by traffickers. Where they observe signs or indicators that a person may be a victim of trafficking, they may not know what steps to take, who to contact, nor understand the obligations they have to provide protection and the discretions they have to not arrest a person.

- **During prosecution.** Prosecutors are driven and incentivized to prosecute offenders; the decision not to prosecute a person who has been involved in unlawful activities is counter-intuitive to their role. Furthermore, prosecutors may not have an understanding of particular crime types and may not recognize that the offender they are prosecuting for one crime, may also be a victim of another. They may lack the skills and experience to recognize, for example, that a person they are prosecuting for drug-related or gang-related offenses, has been trafficked to commit them. Prosecutors may also not understand the discretion they have to not prosecute cases, nor know how to exercise that discretion in practice.
- **During adjudication.** Members of the judiciary also face challenges in applying the non-punishment principle in adjudicating cases against victims for offenses they have been involved in. Members of the judiciary may not be aware of trafficking in persons, nor understand its impact on victims. Issues such as inconsistent testimonies, complicated relationships, and fear of retaliation, and the impact of trauma may mean that a victim of trafficking does not present as a victim. Where they are on trial as accused persons, adjudicators may not be able to see the victimization at play in their unlawful activities.

The non-punishment principle can only be effectively applied by practitioners who understand what human trafficking is, how victims are impacted, and what obligations they as practitioners have to protect victims from punishment for unlawful activities they were involved in as a result of being trafficked.

3. Solutions and strategies. Applying the non-punishment principle in day-to-day anti-trafficking work

Practitioners must be equipped to recognize the nexus between the person's trafficking and his or her offending, and understand how that nexus serves as a basis for applying the non-punishment principle. Practitioners can take the following measures to address the challenges outlined above to more effectively apply the non-punishment principle in practice.

3.1 Strengthen awareness and understanding of the non-punishment principle amongst all practitioners

The non-punishment principle is widely recognized as a critical component of human rights-based and victim-centered counter-trafficking response. However, practitioners may not be aware of it nor understand their role in applying it in practice. Therefore, awareness must be raised among practitioners in Costa Rica who encounter victims of trafficking in practice. Such practitioners include those whose role is to identify victims of trafficking, as well as others working in fields such as education, healthcare, or law enforcement who may incidentally encounter victims of trafficking in their day-to-day work. For instance, a police officer who encounters a child involved in drug trafficking, should be attuned to signs that the child may be a victim of trafficking who should be referred for screening rather than arrested. Similarly, healthcare workers who encounter children in conflict with the law should know about referral mechanisms to protection services where trafficking indicators suggest that a person may be a victim of trafficking to whom the non-punishment principle should be applied.

3.2 Learn about different forms of trafficking in persons and the methods traffickers use to control their victims

Trafficking in persons takes different forms, including sexual exploitation, forced labor in a range of different sectors, and even includes trafficking of people into criminal activities. Victims of trafficking, including children and adolescents, have been trafficked to commit pickpocketing, burglary, and fraud. Some victims – including children and adolescents – are trafficked to commit drug-related offenses, including cultivation and trafficking and selling of drugs. The use of children to commit such crimes is often a deliberate strategy of traffickers to deflect risk of arrest away from themselves and onto their victims.

Practitioners who encounter such victims of trafficking must be aware that trafficking in persons can occur in these contexts and be able to recognize victims. They must understand that a person who may seem to be a willing participant in an unlawful activity, may, in fact, have acted under the influence of traffickers. Traffickers can use threats or force, but their methods may also be more subtle. For example, traffickers may groom victims, create and manipulate romantic or sexual relationships with them, or control them through cultural or familial ties. Practitioners who are likely to encounter victims of trafficking, should familiarize themselves with the *modus operandi* and control tactics of traffickers.

3.3 Leverage expertise of colleagues to strengthen identification of victims involved in unlawful activities

By bringing specialized expertise to bear, practitioners are better equipped to identify victims of trafficking among the people they encounter who may initially seem to be offenders. For instance,

- Fuerza Pública, Policía Municipal, Policía de Fronteras, and other law enforcement officers who encounter people who may be victims of trafficking, should reach out to PANI CTI in the case of children, and to the Immediate Response Team (ERI) where there are indicators that a person in conflict with the law may be a victim of trafficking.
- ERI, as the only agency with a mandate to identify victims of trafficking, must be equipped to understand that victims may come to participate in unlawful activities. To effectively understand, ERI may need to call upon the expertise of colleagues with specialization in particular crime types, including the police. Where those victims are children, the expertise of PANI may be required to support engaging with child victims who are in conflict with the law and to understand the impact their experiences have on them.

In short, identifying victims of trafficking who have been trafficked into criminal activities or who have otherwise committed crimes as a direct result of being trafficked, requires a range of expertise that ERI may need to draw on in its determinations.

3.4 Ensure that all identified victims of trafficking are protected and assisted

People who are identified as victims of trafficking must be provided with appropriate protection and assistance in accordance with their rights as victims of trafficking. This is true also for victims of trafficking who have participated in unlawful activities.

3.5 Ensure that any decision to prosecute a victim of trafficking is made on the basis of careful application of the non-punishment principle

In practice, victims of trafficking may be channeled through the criminal justice system as offenders, whether because they have not yet been identified as victims, or because their offending was not a result of their having been trafficked, or because that link needs to be adjudicated. It is important to understand in this context that the non-punishment principle does not confer blanket immunity on victims of trafficking for the unlawful activities they participate in. For instance, where a victim of trafficking has assaulted or raped another victim and his crime is not considered to have resulted from him having been trafficked, it may be determined that the interests of justice can only be served by prosecuting the case against him. In such situations, where the decision is taken to prosecute even though his victim status is known, prosecutors should be able to explain how the non-punishment principle was applied and resulted in a conclusion that the link between the offending and the victimization did not warrant his diversion away from the criminal justice process.

In other situations, a person may be channeled through the criminal justice process as a suspect in a crime, because he or she has not yet been identified as a victim of trafficking. In both situations, where more information comes to light clarifying the nexus between the victim's unlawful activity and his or her trafficking experience, there are several opportunities to apply the non-punishment principle to victims of trafficking who are facing trial.

3.6 Understand and apply discretions to not punish victims of trafficking

Having determined that a person involved in an unlawful activity is a presumed victim of trafficking, officials can exercise their discretion to not arrest them, and to not lay charges against them for any unlawful activities they reasonably believe the person has engaged in as a result of being trafficked.

Where the age of the presumed victim is uncertain and there are reasons to believe he or she is a child (being a person under age 18), practitioners should apply the presumption of minority in making this determination.

In the case of child and adolescent victims, the Special Rapporteur on Trafficking in Persons, especially women and children, explains that where the relationship between the offense committed by the child and the child's situation as a victim of trafficking is established, "that relation must be accepted as necessary and sufficient grounds to discontinue the proceedings or to expunge an already issued conviction, as well as to immediately release the child from detention facilities."

With respect to children, given that no means are required in order to establish their status as victims of trafficking, no test of compulsion can be applied.”³ In other words, the application of the non-punishment principle to a child, does not require that the child was forced, coerced or otherwise manipulated by the trafficker; it is sufficient to establish that the unlawful activity relates to the fact of the child having been trafficked.

In Costa Rica, several practitioners have opportunities to use their discretions to apply the non-punishment principle in practice:

Practitioner	Applying the principle in practice
National Police (Fuerza Pública); Municipal Police (Policía Municipal); Border Police (Policía de Fronteras); Judicial Investigation Police (OIJ); DGME Professional Migration Police (PPM)	Can exercise discretion to not arrest presumed victims of trafficking and to not lay charges against them for unlawful activities they reasonably believe a victim was involved in as a result of being trafficked. Must report all cases of potential trafficking to ERI, including of persons who are involved in illicit activity.
Immediate Response Team (ERI)	In fulfilling their work to formally identify victims of trafficking, ERI may need to seek support from law enforcement colleagues to accurately determine how a victim has been involved in unlawful activities and to determine appropriate actions to be taken in response to victim-offenders.
Patronato Nacional de la Infancia (PANI)	Should be equipped to recognize that a child who is in conflict with the law (for instance, because they are involved in crimes such as selling drugs) may have been trafficked to commit these crimes and so should be referred to ERI for formal identification.

[3] Mullally, S. (2021) Implementation of the non-punishment principle Report of the Special Rapporteur on trafficking in persons, especially women and children, UN Doc. A/HRC/47/34, 17 May 2021, [62]

labor inspector	Can identify indicators that suggest that a person engaged in work contrary to labor laws is potentially a victim of trafficking and refer them to ERI for screening as a possible trafficking victim rather than approaching the situation as a labor violation.
Education sector (MEP)	Can identify indicators to suggest that children and adolescents in the school system who seem to be involved in unlawful activities or are otherwise at risk of coming into conflict with the law may in fact be victims of trafficking who should be referred for screening and identification.
Immigration official	Can identify indicators that a person detained for immigration violations may be a victim of trafficking and refer them to ERI for screening as a possible trafficking victim.
Prosecutors (Public Prosecutor's Office) (Ministerio Público or MP)	Can exercise discretion to not prosecute a person they believe has been involved in unlawful activities as a direct result of being trafficked, or request the court to discontinue proceedings against them.
Judicial officials (Judicial Investigation Agency)	Can recognize that a person on trial has commit offenses as a direct result of being trafficked, and exercise discretion to discontinue cases against them.

All of these practitioners should understand their discretions and familiarize themselves with trafficking in persons legislation including the non-punishment principle. Where practitioners exercise their discretion to not punish victims of trafficking who are involved in unlawful activities as a direct result of being trafficked, they are taking action to uphold the rule of law and avoid miscarriages of justice. By referring presumed victims of trafficking into screening and protection processes, State practitioners are also acting in fulfillment of their obligations to protect victims of trafficking within their jurisdiction.

To effectively do this in practice practitioners should check the laws, policies, and procedures that govern their work and discuss with their superiors what processes should be followed in determining when to apply the non-punishment principle and how to record decisions made and discretions exercised in this respect.

3.7 Uphold fair trial rights of victims who are on trial

When victims of trafficking are prosecuted for their unlawful activities, there are still opportunities to apply the non-punishment principle. Significantly, the human right to a fair trial requires that accused persons have access to justice in the form of legal aid to provide an effective defense. Defense lawyers should equip themselves to apply defenses that exist in domestic legislation to defend victims from unjust convictions for offenses they have committed in the context of being trafficked. Recourse can be had to the non-punishment provision in Article 70 of the *Law against Trafficking in Persons and Creation of the National Coalition against the Smuggling of Migrants and Trafficking in Persons* (Law 9095). Additionally, depending on the offense that victims of trafficking are on trial for and the circumstances of a particular case, general statutory defense contained in domestic legislation may be useful. For instance, defense in the Penal Code concerning self-defense, duress, and necessity may be invoked in some situations.

Defense lawyers should also learn how to counter arguments that prosecutors may make against the victim who is accused of an offense. Defense lawyers need to be able to show how the force, fraud, deception, coercion, or other means were used against the accused victim by the trafficker to damage the victim's will to such an extent that the victim did not participate in the unlawful activity of their own free will. They may wish to consider the use of expert witnesses to explain the impact of trafficking on its victims. Where the person on trial is a child in conflict with the law, it should be enough to establish that the child was trafficked, without needing to establish that the trafficker used means.

Judges who are adjudicating trials should also be equipped to apply the non-punishment principle. They can do this by ensuring that the fair trial rights of persons on trial are upheld, and by ensuring that any person on trial who is or may be a victim of trafficking, is also treated in accordance with his or her rights as a victim of trafficking. Judicial officials should familiarize themselves with trafficking in persons and the non-punishment principle and consider defenses that could apply even when the parties themselves do not raise them. Equipped with that understanding, judges can consider whether to discontinue cases where they recognize a link between the person's offending and his or her having been trafficked.

The National Human Rights Institution (the Defensoría de los Habitantes), which is responsible for monitoring the human rights situation in Costa Rica and advising the government, has a role to play in ensuring that the non-punishment principle is applied when victims of trafficking face trials. The Defensoría de los Habitantes, for instance, can ensure that any and all decisions to prosecute victims of trafficking for unlawful activities, have been taken only after the non-punishment principle has been applied and it has been determined that there is no sufficient nexus between the trafficking and the offending. They can also play a role in advising government bodies on how to apply the non-punishment principle and integrate the non-punishment principle in their efforts to provide human rights education in the counter-trafficking context.

3.8 Avoid conviction or mitigate sentences

Where the efforts of prosecutors and defense lawyers do not succeed in stop a victim from proceeding through the criminal justice process as an accused person, there is a risk that he or she will be convicted. At this stage members of the judiciary who have not opted to throw the case out prior to this point, still have opportunities to apply the non-punishment principle, whether by not convicting the accused person or by mitigating the sentence imposed. Judges who are equipped with an understanding of the non-punishment principle, can consider whether to apply the non-punishment principle by opting to not convict an accused victim of trafficking.

In some situations, judges may be able to refrain from convicting a person on trial on the basis that there is reasonable doubt about the person's guilt, given that he or she is a victim of trafficking whose offenses were a direct result of that trafficking. In such cases, the person on trial will be acquitted and no sentence will be imposed. Where the person on trial is a minor to whom the Juvenile Criminal Justice Law (Law. 7576) applies, judges have a range of opportunities to discontinue proceedings.

Where rules of criminal procedure mean that it is not possible to avoid convicting a person, adjudicators may be able to mitigate sentences to provide victims with relief from punishment. Sentences imposed on any convicted persons must reflect their culpability. The Public Prosecutor's Office has the power to request that sentences be dispensed with in whole or in part, or be limited to one or more offenses or to some of the persons who participated, when the penalty is disproportionate in the circumstances.⁴

[4] Article 22(c), Code of Criminal Procedure (Law 7594)

In cases involving victims of trafficking who have committed a crime as a direct result of trafficking, judges may deem it appropriate to mitigate sentences or avoid imposing them altogether. Approaches may also be pursued under the Restorative Justice Act (Law 9582) to minimize the harm faced by victims through punishment.

3.9 Provide remedies to victims who have been wrongfully punished

Everyone in Costa Rica has the right to reparation for the injuries or damages received to their person, property, or moral interests.⁵ Where a person has been convicted, sentenced, imprisoned, detained or otherwise punished contrary to the non-punishment principle, practitioners can take steps to pursue remedies for them.

Criminal justice practitioners should familiarize themselves with their legislation to explore the remedies that may be possible in a given situation and to support victims to file motions in court to pursue them. Judicial officials can order the release from detention of persons detained contrary to the non-punishment principle and hear habeus corpus claims of victims of trafficking.

To effectively seek remedies, victims must be provided with sufficient information they can understand, as well as legal support to access remedies, including compensation. Guidance in this respect can be found in Article 2(f) of Costa Rica's Law against Trafficking in Persons and Creation of the National Coalition against the Smuggling of Migrants and Trafficking in Persons (Law 9095). The principle of participation and information therein sets out that:

Information shall be provided in a clear, precise and understandable language. The opinions and specific needs of victims shall be considered when making decisions that affect them. In the case of minors, the right of expression must be guaranteed in all stages of the process, always taking into account their best interests.

Where sentences have been imposed on victims, there may be possibilities for criminal records to be vacated (whereby the conviction is undone), expunged (whereby the conviction is removed from the criminal record), or sealed (whereby court orders are required to see them). Practitioners should inform themselves of what recourse victims have to seek reparations for miscarriages of justice and harm caused by their punishment.

RESOURCES

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