Mandate of the Special Rapporteur on trafficking in persons, especially women and children

Ms. Siobhán Mullally


Thank you Madam Chair for the opportunity to contribute to this important discussion concerning Agenda Item 1: Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked.

I would like to draw the attention of participants to the recent position paper, published by the UN Special Rapporteur on Trafficking in Persons, Maria Grazia Giammarinaro, on July 30, on The importance of implementing the non-punishment provision: the obligation to protect victims.1

My remarks and the recommendations presented are set out in full in the position paper, drawing on international and regional legal obligations, the 2002 Recommended Principles and Guidelines on Human Rights and Human Trafficking (OHCHR) and the 2013 OSCE Policy and Legislative Recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking.

The key points and recommendations set out in the position paper of the UN Special Rapporteur on Trafficking in Persons, especially women and children, are:

- It is critical to ensure that in all cases that the non-punishment provision is practically applied from the starting point of the detection of the victim by the authorities in order to afford the trafficking victim effective and full protection.

- In this regard, and a fortiori, States are recommended to introduce a mechanism operating at a very early stage in the investigation: in fact, non-punishment should be understood as a compulsory tool that is required to be applied by all the domestic authorities, whether investigative, prosecuting and judicial authorities - including the police, immigration and border officials, labour inspectorate and any other law enforcement agency or officials - when a situation triggering the application of non-punishment is first identified.

On the use of general defences to criminal liability, the position paper provides that:

- Where States do not follow the recommendation to introduce a specific provision on non-punishment, they must comply with their non-punishment duty by interpreting existing

1 The importance of implementing the non-punishment provision: the obligation to protect victims
Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children
Available at: https://www.ohchr.org/Documents/Issues/Trafficking/Non-Punishment-Paper.pdf
domestic norms – such as those providing for justification, based on duress or on a state of necessity – as general clauses of exemption of liability for victims of trafficking who have committed trafficking-dependent offences.

- Where general defences are used, however, it should be noted that, such “traditional” justification clauses need to be adapted to the trafficking context. This includes recognition that threats towards a trafficking victim to commit an offence or the coercion they are placed under might be indirect or psychological, that debt bondage, threats of denunciation to the authorities or other subtle means, such as an abuse of a position of their vulnerability, might be in play.

- The requirement to link the commission of the offence with the context of trafficking in persons, should be based on a ‘direct consequentiality between the trafficking and the offence’, which is both easier to prove and acknowledges the specific dynamics of the crime and serious human rights violation of trafficking in persons.

- If the model of non-punishment adopted by States relies on a defence of duress, it is important to ensure that the test of such compulsion is considered to be fully satisfied when use of the means contained in the trafficking definition at the time of the commission of the unlawful act is established. This specification and clarification should be incorporated into a specific, legally binding provision, provided in practical guidance to all relevant actors, or in the form of enforceable policy position.

It is critical to note that the duty to implement the non-punishment obligations remains until the victim is granted full protection from prosecution and conviction. As such, if the prosecuting authorities fail to order a discontinuance of criminal proceedings, the domestic courts should have the power to discontinue the proceedings on grounds of abuse of process, or on the grounds that such prosecution would be in breach of the non-punishment obligation.

It is important to also recall that the non-punishment obligation applies in the context of detention. Persons who are presumed or identified as trafficking victims must be removed from detention as soon as possible and granted appropriate assistance and protection in specialised facilities.

Concerning child victims of trafficking, as no means are required in order to establish their victim status, no literal test of “compulsion” can be applied. It is sufficient to establish the relation between the offence committed and the child’s status as a trafficking victim, which, must constitute a necessary and sufficient ground to discontinue the proceedings or to expunge an already issued conviction, as well as to immediately release a child from detention facilities, if detained.

Thank you Madam Chair.