

Draft Talking Points
Twelfth Session of the Working Group on Trafficking in Persons
United Nations Convention Against Transnational Organized Crime

The principle of non-punishment: criminal justice approaches to victims' criminal conduct related to their victimization

Introduction

Good morning, and thank you for that introduction.

I'm honored to address this Twelfth Session of the Working Group on Trafficking in Persons, and eager to continue discussing the principle of non-punishment of victims of trafficking.

The Principle of Non-Punishment: Palermo Protocol

The principle of non-punishment is, of course, rooted in the Palermo Protocol itself, which requires State Parties to *prosecute* human trafficking crimes, *protect* trafficking victims, and *prevent* trafficking offenses. [10.2].

Victims who fear they will be arrested, charged, or punished for unlawful acts resulting from their victimization are afraid to report their traffickers to authorities, and are reluctant to be witnesses in criminal investigations and prosecutions.

Because of these fears:

- trafficking crimes go unreported and undetected;
- victims remain unprotected; and
- opportunities to prevent trafficking crimes are lost.

Even after victims break free of their traffickers' control, victims' criminal records for acts resulting from the trafficking can continue to disrupt their lives, and can raise their risk of re-victimization, by excluding them from pathways to security and stability such as employment, vocational training, public housing, and lawful residency.

Leaving victims without recourse from the harsh impacts of criminal records resulting from their victimization runs counter to Palermo's call to *protect victims from re-victimization* [9.1.b] and *alleviate factors that make them vulnerable* to trafficking. [9.4].

U.S. Recognition of the Non-Punishment Principle: The Trafficking Victims Protection Act

The U.S. Trafficking Victims Protection Act of 2000, or TVPA, enacted concurrently with the Palermo Protocol, expressly codifies the non-punishment principle, and notes its importance to the prosecution, protection, and prevention measures in that landmark anti-trafficking legislation.

The TVPA expressly declared that victims “*should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked.*” [22 U.S.C. § 7101(b)(19)] Common examples of such acts include using false documents, entering the country illegally, engaging in commercial sex acts, or distributing illegal narcotics at the trafficker’s direction.

Protecting victims from inappropriate punishment for such acts is essential to enabling victims to come forward without fear of authorities or risk of penalties.

Challenges in Applying the Non-Punishment Principle

The TVPA, by articulating and affirming the non-punishment principle, incorporates this important precept into the U.S. legal framework for combatting human trafficking.

Adopting this principle is an important step toward establishing victim-centered approaches that place victims’ rights, needs, and interests at the center of anti-trafficking responses, but it is only one step toward fully integrating this principle into government-wide anti-trafficking efforts. And implementing this principle in practice proves far more complicated than adopting it as an aspirational aim. The following situations highlight some of the challenges involved in interpreting and applying the U.S. version of the non-punishment principle.

First: how do we identify the victims covered by this principle?

One challenge is that evidence of other unlawful acts is often far more apparent than any indicators of human trafficking. In the United States, for instance, traffickers use addictive narcotics to compel victims to perform commercial sex acts, controlling the victims’ access to the addictive drugs to intensify their fear of painful withdrawal and compel their compliance with the trafficker’s demands.

When authorities first encounter victims of such schemes, often during narcotics investigations, evidence of the victims' drug possession and commercial sex activity is much more apparent than any indicators of the coercion the trafficker has used to compel the victims to commit those unlawful acts. Based on the available evidence at that stage, victims of drug-based coercion schemes face a high risk of arrest on narcotics and commercial sex charges, and a lower chance of being identified as victims.

Even if astute authorities detect subtle trafficking indicators and investigate further before pursuing charges against the as-yet unidentified victims, victims may remain reluctant to confide due to trauma, distrust of authorities, fear of punishment, induced dependency on their trafficker, and impacts of addiction and withdrawal. The investigation may then fail to confirm the trafficking, leaving the victims at risk of prosecution for narcotics and commercial sex crimes. *The non-punishment principle depends on our ability to identify victims as victims.*

Second: how do we determine what, if any, punishment is 'appropriate'?

The U.S. articulation of the non-punishment principle aims to protect victims from being "*inappropriately*" arrested or penalized for unlawful acts arising from their victimization. This term recognizes that victims may, in some instances, appropriately face *some* form of punishment for their involvement in *some* unlawful acts.

What is 'appropriate' punishment for a victim's unlawful conduct? There are no easy answers, and decisions must depend on the applicable laws, the available evidence, and the interests of justice in each individual case.

Balancing the interests of justice in any case requires careful consideration of all relevant circumstances, including:

- the gravity of the victim's unlawful acts, relative to the severity of the victimization;
- harm caused by the victim's unlawful acts, compared to harm caused by the victimization;
- proportionality of punishment among the victim, the trafficker, and others involved.

When a victim has committed relatively minor infractions, such as narcotics possession and commercial sex solicitation, as a direct result of severe victimization, substantial punishment for those minor infractions would, presumably, be 'inappropriate' once the victimization is known. Punishing the victim for such crimes would be especially inappropriate if the trafficker

were not facing significantly greater punishment for the far more serious crime of exploiting and abusing the victim.

Balancing the interests of justice becomes more complex when a victim's conduct is more serious, particularly when it harms other victims. Victims may seek to gain favor with their traffickers by recruiting other victims, or in severe cases by physically abusing other victims. When the evidence, including statements of other victims and witnesses, directly implicates a victim in unlawful acts that inflict serious harm on other victims, the interests of justice may require imposing substantial punishment on the perpetrator of those acts, despite the severe victimization the victim-perpetrator also endured. However, any such punishment must account for the degree of coercive control the trafficker exercised over the victim, and the trafficker's greater culpability in directing and profiting from the coercive scheme.

Third: what constitutes a 'direct result' of being trafficked?

The non-punishment principle covers unlawful acts a victim committed as a 'direct result' of being trafficked. While some acts are committed at the trafficker's express command, others are more attenuated. Victims may seek to gain their trafficker's favor by independently recruiting more victims; such acts result from the trafficking, although less directly than acts the trafficker expressly commands. Thefts a victim may commit while escaping from the trafficker also result from the trafficking, but also less directly than acts committed during the victimization. Sex trafficking victims who flee from their traffickers with no money, identification documents, immigration status, or lawful means of subsistence may continue soliciting patrons for commercial sex, independently of their former traffickers; these subsequent commercial sex acts, solicited independently of the trafficker, result less directly from the victimization than commercial sex acts performed under the trafficker's command. Victims can face greater challenges establishing that unlawful acts they committed after fleeing their trafficker resulted from the trafficking, especially if they report their victimization only after being arrested for an unlawful act.

Approaches to Implementing the Non-Punishment Principle

In light of these challenges, a range of state and federal proposals have been introduced across the U.S. in an effort to implement the non-punishment principle more vigorously and consistently:

- **‘safe harbor’ laws:** exclude victims from criminal liability so they cannot be arrested or criminally charged. Over 25 U.S. jurisdictions have passed some version of a safe harbor law for minor victims of sex trafficking. This approach is more challenging to apply in adult sex trafficking or labor trafficking cases, in which evidence of coercion is required to identify a person as a victim.
- **affirmative defenses:** some proposals would afford victims an opportunity to assert their victimization as an affirmative defense to limit or negate criminal liability once they are charged. Discussions have focused on procedural and evidentiary issues involved in affording victims meaningful access to relief while trafficking charges are pending, without compromising the prosecution of the most culpable perpetrators.
- **vacatur and expungement:** victims’ criminal records for acts committed as a result of their victimization can impede their recovery and prolong their vulnerability to re-victimization. At least 32 U.S. jurisdictions have enacted some form of vacatur or expungement remedy, but these provisions vary widely regarding the types of offenses they cover, the evidence victims must present, and the procedures victims must follow to seek relief.

Under any of these approaches, access to legal counsel can significantly affect the victim’s ability to secure meaningful protection from the legal repercussions of unlawful acts related to their victimization.

Current U.S. Efforts to Implement the Non-Punishment Principle

The recently released [U.S. National Action Plan to Combat Human Trafficking](#) directs federal agencies to take decisive steps to protect victims from inappropriate arrest, detention, and punishment. This National Action Plan requires federal agencies to revise their policies, protocols, and trainings to incorporate the non-punishment principle, and directs an inter-agency working group to develop policy proposals for implementing the principle more effectively.

The Justice Department's [National Strategy to Combat Human Trafficking, issued in January](#), builds on these National Action Plan directives, and requires further concerted actions among federal law enforcement agencies to prevent inappropriate arrest, detention, and punishment of victims. Both sets of directives were informed by survivor-experts guiding federal authorities, based on their expertise and lived experience, to prioritize protections for victims and survivors living in fear of punishment for acts related to their victimization.

Recommendation

Although U.S. laws codified our commitment to the non-punishment principle over 20 years ago, we are still working to develop a coherent legal framework for implementing it. Even as most states enact remedies for victims to pursue protection from criminal consequences of certain unlawful acts resulting from their victimization, U.S. authorities, survivor-advocates, and anti-trafficking stakeholders continue to debate the appropriate procedural mechanisms, burdens of proof, and substantive scope of relief that will afford victims meaningful protection from unjust punishment, without impeding vigorous prosecution of traffickers.

The U.S. experience grappling with these issues since passage of the TVPA has informed our continuing debate, and it furnishes the foundation for the following recommendations:

State Parties should provide, in line with domestic law, provide protections so that trafficking victims are not punished or prosecuted for acts that traffickers compelled them to commit, and should, furthermore, provide remedies for victims who have been unjustly prosecuted or punished for such acts.

Expressly embracing the principle of non-punishment, and recognizing its vital importance to Palermo's prosecution, protection, and prevention priorities, are important first steps, but further action is required to make its promise of protection a reality. Meaningful implementation of this principle requires *proactive efforts to identify victims as victims*, through victim-centered and trauma-informed approaches that enable victims to safely report their victimization. And it requires *legal recourse for victims to seek relief* from unjust arrests, charges, or penalties so they can rebuild their lives and reduce their risk of re-victimization.

We welcome further dialogue on effective approaches for putting the principle of non-punishment into practice, in pursuit of justice for victims and survivors of human trafficking.