Chapter 6

# Unchained, Yet Prosecuted – Victims of Human Trafficking as Subjects of Criminal Liability and Art. 4 of the ECHR[1]

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**Abstract**

This paper examines the complex legal issue of criminal liability for victims of human trafficking under Article 4 of the European Convention on Human Rights (ECHR). The study addresses the tension between protecting trafficking victims from prosecution for crimes they were compelled to commit during their victimization and maintaining the integrity of criminal law systems. It analyzes the regulatory framework surrounding human trafficking, including the Warsaw Convention, the Palermo Protocol, and EU Directive 2011/36/EU, all of which provide for the possibility of non-prosecution or non-penalization of trafficking victims under specific circumstances. Through examination of recent European Court of Human Rights case law, particularly "V.C.L. and A.N. v. the United Kingdom" and "G.S. v. the United Kingdom", the paper demonstrates that neither international instruments nor ECHR jurisprudence establish absolute immunity for trafficking victims.

The author proposes a comprehensive two-step assessment framework for determining when non-prosecution obligations apply. First, victim status must be established

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through proper investigation by specialized authorities. Second, five critical factors must be evaluated: (I) the nexus between the crime and victim status, (II) the intensity of coercion, (III) reasonably expected consequences of non-compliance, (IV) the victim's personal situation and trafficking context, and (V) the nature and severity of the committed crime. The paper argues that the non-prosecution requirement should be understood as a standalone negative obligation under Article 4 ECHR rather than merely a component of positive protective obligations. This approach would provide clearer legal boundaries while preventing potential expansion to other victim categories. The research concludes that criminal prosecution of trafficking victims does not automatically violate Article 4 ECHR, but requires careful case-by-case analysis balancing victim protection with other legitimate interests, including the rights of crime victims and public safety concerns.

**Keywords:** human trafficking; criminal liability; victim immunity; ECHR Article 4; positive obligations; non-prosecution

## 1. Introduction

This year, the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'ECHR' or 'Convention') is celebrating its 70th anniversary. During the previous seven decades, the Convention has proven itself to be a strong, efficient and respected treaty on protection of human rights. Nevertheless, by nature of its scope, various new challenges that were hard to imagine in the times when it was adopted, occurred during this long period. The fact that the Convention does not exist in a legal vacuum, but that the level of human rights protection that it provides is supplemented by other treaties, as well as the interpretation doctrine adopted by the European Court of Human Rights (hereinafter "ECtHR" or "Court") according to which the Convention is a living instrument that must be interpreted according to present-day conditions (see *inter alia multa Tyrer v. the United Kingdom*[2]), present a solid basic legal tool in this never-ending struggle for better protection of human rights. However, since the primary protection lies on the Contracting States – their legislation and judicial system, it is necessary to ensure that the protection on a state level will be provided under same conditions and within the same scope as under the Convention as it is interpreted by the Court.

This paper highlights the question of protection of victims of human trafficking in one of its specific aspects, which is the protection from the consequences of Criminal Law of the illegal – criminal – activities they engaged in during their victim status.

2 Judgment of 25. April 1978 in case of *Tyrer v. the United Kingdom*, application no. 5856/72.

The idea that victims of human trafficking represent a highly vulnerable group of individuals due to their social and economic conditions and dependency on traffickers or those who benefit from human trafficking,[3] and can also be easily forced to commit crimes,[4] is not very surprising. Thus, the necessity of not holding victims liable for such illegal activities in order to protect their fundamental rights[5] seems to be legitimate. On the other hand, this requirement may be in contradiction with the obligation to protect the victims of such crimes, which may even carry the same quality of the positive obligation to protect under the Convention. The question of how to respond to such situations and how to reconcile these two requirements is the key issue of this article. Art. 4 of the Convention, prohibiting slavery and servitude, that has been recognised in the Court's case law as the most relevant in human trafficking cases (due to the absence of the explicit recognition of human trafficking and its prohibition in the Convention) does not provide an answer, nor does any other article of the Convention. The Court must thus rely on other international documents such as the Council of Europe Convention on Action against Trafficking in Human Beings (hereinafter the 'Warsaw Convention') or the instruments of European Union law, specifically Directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims (hereinafter the 'Directive'), that have frequently been recognised as sources of positive obligations of Contracting States by the Court in interpreting the Convention. Accordingly, the Contracting States, that either adopted the Warsaw Convention or are Member States of European Union, are obliged (under specified conditions) to provide the possibility of imposing no penalties or not prosecuting victims of human trafficking. The question is whether the absence of such provisions or their non-application would – in case of a criminal prosecution or punishment of the victim of human trafficking for criminal offence committed in connection with the fact that he or she was subjected to human trafficking – lead to a decision of the Court stating that Art. 4 of Convention was breached.

In order to provide an exhaustive answer to this question, firstly, we present relevant international instruments related to human trafficking and the positive obligations of states. Subsequently, we subject the relevant case law of the Court and its main conclusions to protect victims from imposing criminal sanctions or from criminal prosecution to a further analysis, so that we can understand how the Court interprets the concept of human trafficking and the scope of positive obligations of the Contracting States towards victims.

The case law study also allows us to point out some specific situations in which criminal activities of victims of human trafficking transpired. Based on the outcomes of previous parts of the text, we first provide analysis of the nature and content of

3 Realising these facts as well as the importance of victims' testimonies that plays a decisive role in the successful prosecution of traffickers led to an emphasis on the protection and assistance of victims of human trafficking (Rijken, 2009, pp. 217, 218.).

4 Piotrowicz, Sorrentino, 2016, p. 673.

5 Muraszkiewicz, 2019, p. 1.

the non-prosecution/non-penalisation obligation, followed by a proposition of assessment in which the non-prosecution/non-penalisation requirement is conducted.

Such assessment provides valuable outcomes, particularly in the context of Central European countries, as according to Group of Experts on Action against Trafficking in Human Beings (hereinafter 'GRETA') some of these countries are not fulfilling their international obligations and their obligations under the law of the European Union to adopt provisions that make it possible not to prosecute or impose criminal sanctions against victims of human trafficking.

## 2. Regulatory framework on human trafficking

### *2.1. Historical and general overview*

Human trafficking belongs to a group of the oldest criminal fields (along with *e.g.* political terrorism or currency counterfeiting) that have been recognised as a threat of such magnitude that had to be regulated at the international level in modern legal history. To name just a few, the predecessors of the current Central European Countries were the contracting parties or ascended to:

- International Agreement for the Suppression of the White Slave Traffic (Paris, 18 May 1904) and Protocol thereto (New York, 4 May 1949),
- International Convention for the Suppression of the White Slave Traffic (Paris, 4 May 1910) and Protocol thereto (New York, 4 May 1949),
- International Convention for the Suppression of the Traffic in Women and Children (Geneva, 30 September 1921) with a protocol thereto (New York, 4 May 1949),
- International Convention for the Suppression of the Traffic in Women of Full Age (Geneva, 11 October 1933) with a protocol thereto (New York, 12 November 1947),
- Convention Concerning Forced or Compulsory Labour, 1930 (International Labour Organization No. 29, Geneva, 28 June 1930) with its Protocol of 2014 (hereinafter 'Protocol 2014'),
- Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (New York, 21 March 1950) and the Final Protocol to the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others thereto (New York, 21 March 1950),[6]
- Abolition of Forced Labour Convention (International Labour Organization No. 105, Geneva 25 June 1957),

6 Except for Hungary.

- Convention to Suppress the Slave Trade and Slavery (Geneva, 25 September 1926),
- Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Geneva, 7 September 1956),
- Worst Forms of Child Labour Convention (International Labour Organization No. 182, Geneva, 17 June 1999),
- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (New York, 25 May 2000),
- United Nations Convention against Transnational Organized Crime (New York, 15 November 2000), with its Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children – hereinafter the 'Palermo Protocol' and Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime,
- International Convention for the Protection of All Persons from Enforced Disappearance (New York, 20 December 2006).[7]

On the regional level, the following conventions of the Council of Europe are particularly relevant:

- Warsaw Convention (Warsaw, 16 May 2005),
- Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote, 25 October 2007),
- Council of Europe Convention against Trafficking in Human Organs (Santiago de Compostela, 25 March 2015).[8]

With respect to all the aforementioned documents testifying that human trafficking is relatively thoroughly regulated by international law and that combatting it does not depend solely on the ECHR, the most important legal provision for our purposes is evidently Art. 4 of the ECHR.

On the level of the EU, the fundamental provision guaranteeing every person within the scope of the EU the right not to be subjected to human trafficking is Art. 5 of the Charter of Human Rights of the European Union. Apart from that, several other legal instruments to tackle this problem area have been adopted:

- Directive,
- Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or

7 This convention has been signed by Czechia, Poland and Slovakia, however, only Slovakia has ratified it so far.

8 So far Czechia is the only Central-European country which has ratified this convention. Poland has signed it, Hungary and Slovakia have not done so yet.

who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities,
- Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast),
- Directive 2010/45/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs intended for transplantation.[9]

As is apparent, basically since the dawn of modern international law regarding criminal issues, all aspects encompassing the current notion of human trafficking (forced labour, sexual exploitation, illegal adoption of children etc.), as well as some newer forms (*e. g.* illegal organs trafficking[10]) have been frequently recurring objects of attention of the international community as well as of the European Union, and the Central-European states have cooperated in this global endeavour from the very beginning.

### *2.2. Article 4 of the ECHR, Palermo Protocol, Warsaw Convention*

Among all these legal instruments, Art. 4 of the ECHR plays a crucial role, as, apart from other international conventions, it has a strong centralised judicial authority – the ECtHR, which unifies its interpretation for all the Contracting States.

Art. 4, along with Art. 2 and Art. 3 of the ECHR, enshrines one of the most fundamental values of the democratic society (*e. g. Siliadin v. France*, *Stummer v. Austria*[11]). While no provision of the ECHR explicitly mentions 'human trafficking', according to the Court, the ECHR is not the sole framework of reference for the interpretation of rights and freedoms enshrined therein (*e. g. Rantsev v. Cyprus and Russia*[12]). In interpreting the concepts under Art. 4[13] of ECHR, the Court relies on various international treaties. In case of human trafficking, these are, for instance, the Warsaw Convention and the Palermo protocol. According to the Court, a conduct or situation may give rise to an issue of human trafficking under Art. 4, only if all

9 For further details about the history of the EU's strive to tackle the challenge of human trafficking, see *e. g.* Berman, Friesendorf, 2008, pp. 195–207.

10 For a European perspective see *e. g.* Meyer, 2006, pp. 215–219.

11 Judgment of 26 July 2005 in case of *Siliadin v. France,* application no. 73316/01, judgment of 7 July 2011 in case of *Stummer v. Austria*, application no. 37452/02.

12 Judgment of 7 January 2010 in case of *Rantsev v. Cyprus and Russia*, application no. 25965/04.

13 This provision is the most often applied in the human trafficking cases, but naturally, it is not the only one that may be activated in relation to this type of criminal activity – typically, the issue may arise also under Art. 3 of the ECHR (*e. g. M. and others v. Italy and Bulgaria*), but some other provisions are not *per se* excluded as well (Art. 2, Art. 10 etc.).

three constituent elements of international definition of human trafficking, under the Warsaw Convention and the Palermo Protocol, are present [*e. g. S. M. v. Croatia (GC)*[14]]. These conditions are prescribed in Art. 3 letter a) of the Palermo Protocol and Art. 4 of the Warsaw Convention as a combination of three elements – action, means and purpose. It can thus be summarised as:

1) the recruitment, transportation, transfer, harbouring or receipt of persons (action),
2) by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person (means),[15] while the eventual consent being irrelevant, if after a thorough examination of the context it did not exclude the forced character of the activity (*e. g. Chowdury and others v. Greece* or *Zoletic and others v. Azerbaijan*[16]),
3) for the purpose of exploitation, which shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs (purpose).[17]

Although the Court has derived its considerations on human trafficking from these two legal instruments and sticks to the definition of human trafficking provided by them, it does not follow that the ECHR must not be applied in cases in which the definition is fulfilled, but some of the conditions of the scope of application of one of these instruments are missing. The Court has for example explicitly verbalised that Art. 4 of the ECHR might be relevant even if an international aspect or aspect of organised criminality is missing [*e. g. S. M. v. Croatia (GC).*[18]]

Regarding the victims, the Palermo Protocol enshrines only very general obligations of the Contracting States regarding the physical well-being of the victims, suitable assistance etc. It does not impose an obligation on the Contracting States to grant the victims a full criminal immunity for the acts which they conducted in their capacity of the victims of human trafficking, neither recommends it. On the contrary, the Warsaw Convention explicitly covers this issue in its Art. 26, which reads as follows: "*Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.*" At least four very interesting outcomes follow from such a short provision.

14 Judgment of Grand Chamber of 25. June 2020 in case of *S. M. v. Croatia*, application no. 60561/14.
15 This criterion need not be fulfilled in cases of child victims at all.
16 Judgment of 30 March 2017 in case of *Chowdury and others v. Greece*, application no. 21884/15, judgment of 7 October 2021 in case of *Zoletic and others v. Azerbaijan*, application no. 20116/12.
17 See *e. g.* Smartt, 2003, p. 165ff.
18 Judgment of Grand Chamber of 25 June 2020 in case of *S. M. v. Croatia*, application no. 60561/14.

First, it is clear from the wording that it is not formulated in an absolute or categorical way, because it does not grant the victims a subjective right not to be criminally liable or prosecuted, it merely requires the states (as direct addressees) to provide for a *possibility* (as contrasted to an obligation) not to impose sanctions.

Second, it only mandates the opportunity for exemption from sanctions, but not from prosecution or even from general liability. In theory, it thus does not prevent the states to subject the victims of human trafficking to a full-blown criminal proceedings, which would result in a declaration of guilt while refraining from imposing a penalty. Regarding this point, it is also noteworthy that this provision encompasses all illegal activities, not only crimes (*e. g.* beyond Art. 14 of this Convention regarding the residence permit, it also allows the victims to be exempted from an administrative penalty for illegal stay on the territory).

Third, it only very vaguely defines the scope of the *possibility* as relating to the illegal activities to which they *have been compelled*. This formulation, as it will be explained further in more details, leaves a latitude for interpretation of both the necessary level of compelling as well as the scope of application in relation to the severity and other circumstances of the illegal activity in question.

Fourth, states enjoy a very wide range of ways in which they implement this requirement into their legal orders, as each such solution shall be in accordance with *the basic principles of their legal systems*. The explanatory report for this provision, alas, does little more than just rephrasing its text, apart from mentioning that the solution may be conducted through a provision of criminal substantive or procedural law.[19]

However, the position of GRETA on the non-prosecution/non-penalisation requirement towards the Central European countries is quite strict. Regarding the Czech Republic, GRETA advocates for a concrete provision on the non-penalisation of victims of human trafficking for their involvement in unlawful activities to the extent that they were compelled to do so, eventually accompanied also by a guidance for law enforcement authorities.[20] The same applies to Hungary,[21] Poland[22] and Austria,[23] despite the fact that all of those countries have either a general solution in the terms of substantive criminal law (*e. g.* Hungary with the condition excluding or limiting liability in cases of coercion) or in the terms of criminal procedural law (*e. g.* the possibility not to prosecute in the Czech Republic, Poland etc.) and some even have specific internal instructions or regulations for the law enforcement authorities regarding the victims of human trafficking (*e. g.* Poland, Austria). Slovakia was praised by GRETA for introducing a specific provision immunising the victims of human trafficking from criminal liability, albeit stressing out that the scope of

19 Explanatory report, 2005, p. 42.
20 GRETA report for Czech Republic, p. 55.
21 GRETA report for Hungary, p. 40.
22 GRETA report for Poland, p. 32.
23 GRETA report for Austria, p. 34.

the provision at hand is too narrow, as it provides immunity only for minor offences under criminal law, and recommended its extension to all crimes and administrative offences alike.[24]

*Sine ira et studio*, we cannot accept that the one and only way to satisfy the requirement of non-prosecution/non-penalisation according to Art. 26 of the Warsaw Convention is a special provision applicable only to the victims of human trafficking. The wording and legal construction which we have summarised above do not support such a claim. On the contrary, this article explicitly anchors the above-mentioned requirement in the fundamental principles of the Contracting State. In our opinion, introducing specific provisions for each requirement following from an international legally binding document is not a proper way and may be even harmful in the end, because it has a huge possibility of increasing chaos and particularism in the legal order.

To put it bluntly, the only concern that GRETA (rightfully and legitimately) has is the combat against human trafficking, while states have so many different obligations, often contradictory or mutually exclusive that they necessarily need to resort to general frameworks and solutions when balancing them. Regarding the human trafficking, we think that practical application of the relevant provision is of greater significance than its formulation. As far as the provisions in any way satisfy the non-punishment/non-penalisation requirement, all our effort should be put to the training and specialisation for the sake of professional conduct by the law enforcement authorities, other public authorities and helping professions in order to efficiently execute them in real cases. It can be argued that introducing a specific provision by no means contradicts this approach and that it may only help it thrive. That is however true only in an isolated view. The more special provisions for very specific situation are introduced in the legal order, the greater is the risk that they will not be properly applied as a result of overburdening and entropy and/or unforeseen conflicts among them, inconsistency and legal dead ends. The risk of a slippery slope is quite obvious here, as there are many other specific and highly sensitive situations that may legitimately call for a special treatment requiring a special provision as well (*e.g.* sexual crimes, hate crimes, crimes committed by the drug addicts as a result of their addiction, traffic crimes etc.).

### *2.3. Directive 2011/36/EU*

Along with the Art. 4 of the ECHR, the second very important legal tool in Central Europe is the Directive, as it is backed by the EU and subjected to a unifying interpretation of the Court of Justice of the European Union (hereinafter 'CJEU').

24 GRETA report for Slovakia, p. 27.

The Directive takes a very similar approach as the previously mentioned documents and is clearly inspired by them, often appealing to them in the recitals.[25]

With regard to the immunisation clause, the Directive is a little bit more precise, as its Art. 8 stipulates: "*Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure 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 as a direct consequence of being subjected to any of the acts referred to in Article 2.*"

It should be mentioned that practically the same provision was introduced in the Protocol 2014, which states in its Art. 4 par. 2. "*Each Member shall, in accordance with the basic principles of its legal system, take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.*"

Once again, it is evident that this provision does not bestow a right to be immunised from criminal liability on the victims rather than enables the Member States not to prosecute or punish them *in accordance with the basic principles of their legal systems*. It also clarifies that this provision should apply only if the illegal activity was a *direct* consequence of being treated as an object of human trafficking.

It is worth mentioning that when it comes to the nature of the non-prosecution/non-penalisation requirement, the European Parliament has taken a similar stance as GRETA, *i.e.* anything less than a special provision dedicated only to the victims of human trafficking cannot satisfy it.[26] We have demonstrated above why we do not share the same view.

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## 3. Human trafficking and obligations of the state in the Court's case law

### *3.1. Obligations of the state relating to human trafficking in general*

According to Art. 1 of ECHR, the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention. Two branches of securing the rights and freedoms by states are

25 It should be mentioned, that the Directive also goes beyond texts of above-mentioned documents. For instance, when defining minimal scope of term 'exploitation' in Art. 2 par. 3 it clearly states, that exploitation of criminal activities of victims also falls within subject of the Directive.

26 Resolution of the European Parliament 2021/C 465/04, par. 59

recognised in the Court's case law – the so-called negative obligations and the positive ones. The negative obligations consist of a duty to refrain from a wrongful conduct, *i.e.* to refrain from actions incompatible with Convention (*e.g. Ilaşcu and Others v. Moldova and Russia*[27]).

When applied to human trafficking, states have an obligation not to bring their people into a situation of human trafficking themselves.[28] The positive obligations consist of a duty to guarantee respect for the rights and freedoms secured under the Convention in an active manner (*e.g. Ilaşcu and Others v. Moldova and Russia*[29]).[30] The distinguishment between positive obligations and negative obligations is that *"the former require positive intervention by the state, whereas the latter require it to refrain from interference. Violation of the Convention will result in the first case from inaction, i. e. passivity, on the part of the national authorities, and in the second case from their preventing or limiting the exercise of the right through positive action".*[31] In the context of human trafficking, the positive obligations of the Contracting States lie especially in a duty to establish an effective legal and administrative framework prohibiting and punishing human trafficking as well as in a duty to conduct an effective investigation if a relevant suspicion of human trafficking occurs (*e.g. C.N. and V. v. France*[32]).

When discussing human trafficking, which undoubtedly falls under the scope of Article 4 – as the Court stated in *Rantsev v. Cyprus and Russia*[33] – the limit of negative obligations, *i. e.* the situations when interference with rights guaranteed in Art. 4 of ECHR by states is not considered as a breach of Art. 4, is set forth in Art. 4 par. 3 of ECHR. Most of the other obligations identified in the Court's case law regarding human trafficking fall into the category of the positive ones.

The duty of the state not just to interfere with concerned right or freedom but to take specific steps to secure its enjoyment and thus comply with its obligations derived from Art. 1 of ECHR was illustrated in case *Siliadin v. France*[34] with regard to human trafficking. In this case the Court noted that states are – in order to comply with Art. 4 of ECHR – obliged not only to take direct actions but also to fulfil their positive obligations such as to adopt a criminal-law provision which penalises the practices referred to in Art. 4 and to apply them in practice (*e. g. M. C. v. Bulgaria*[35]). The duty to penalise and prosecute human trafficking (*e. g. Rantsev v. Cyprus and*

27 Judgment of 8 July 2004 in case of *Ilaşcu and Others v. Moldova and Russia*, application no. 48787/99.
28 Rijken, 2009, p. 216.
29 Judgment of 8 July 2004 in case of *Ilaşcu and Others v. Moldova and Russia*, application no. 48787/99.
30 For further analysis of this phenomenon, we recommend the reader article of Stoyanova, V., 2023.
31 Akandji-Kombe, 2007, p. 25.
32 Judgment of 11 October 2012 in case of *C.N. and V. v. France*, application no. 67724/09.
33 In contrary to his reasoning in *Siliadin v. France* (see Stoyanova, V., 2011, p. 804.).
34 Judgment of 26 July 2005 in case of *Siliadin v. France*, application no. 73316/01.
35 Judgment of 4 December 2003 in case of *M. C. v. Bulgaria*, application no. 39272/98.

*Russia*[36]) is the key positive obligation. Nevertheless, it is not the only obligation[37] as the Court pointed in the same judgment, where necessity to adopt whole spectrum of safeguards was mentioned. Such safeguards should ensure both practical and effective protection of the rights of victims or potential victims of human trafficking.

This idea of the Court for comprehensive approach to human trafficking cases was inspired by both the Palermo Protocol and the Warsaw Convention that include not just measures to punish traffickers, but also to prevent trafficking and to protect its victims in order to effectively fight against human trafficking. We agree with the argument[38] that such obligations of the state form part of the universal obligation to fight slavery and are not binding just for those that ratified the above-mentioned treaties to suppress human trafficking.

In *Rantsev v. Cyprus and Russia*[39] the Court provided a general framework of the positive obligations under Art. 4 that includes:

I) the duty to put in place a legislative and administrative framework to prohibit and punish trafficking;
II) the duty, in certain circumstances, to take operational measures to protect victims, or potential victims, of trafficking; and
III) a procedural obligation to investigate situations of potential trafficking.

The first type of positive obligation needs no further explanation since its content generally derives from relevant international instruments and their implementation in the legal order of each particular state (especially introducing crimes of trafficking in persons, illegal removal of human organs etc.).

The second type of positive obligation (as stated in *V. C. L. and A. N. v. the United Kingdom*[40]) arises where certain circumstances of a particular case demonstrate that the state authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being trafficked or exploited within the meaning of Art. 3 letter a) of the Palermo Protocol and Art. 4 letter a) of the Warsaw Convention.[41] Once such a suspicion is established, the authorities must act with due diligence *propriu motu*, regardless whether the victim has filed an official complaint (*e. g. C. N. v. the United Kingdom*[42]). In these situations, the Court shall find a violation of Art.

36 Judgment of 7 January 2010 in case of *Rantsev v. Cyprus and Russia*, application no. 25965/04.
37 Opposite approach limiting positive obligations of the state to adoption of relevant provisions of criminal law aiming on human traffickers, that could be deduced from *Siliadin v. France,* has been subject of criticism in its time (see Stoyanova, V. 2011, p. 806.).
38 Kirchner, S., Frese, V. M., 2015, p. 142.
39 Judgment of 7 January 2010 in case of *Rantsev v. Cyprus and Russia*, application no. 25965/04.
40 Judgment of 16 February 2021 in case of *V. C. L. and A. N. v. the United Kingdom*, applications nos. 77587/12 and 74603/12.
41 See for example case *V. F. v. France*, where the applicant did not manage to prove that the state authorities were aware, or ought to have been aware, that the applicant was a victim of human trafficking.
42 Judgment of 13 November 2012 in case of *C. N. v. the United Kingdom*, application no. 4239/08.

4 of ECHR in case the state authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk.[43] However, the obligation of the state is, as it is common for all procedural positive obligations, one of means, not of outcomes (*e. g. L. E. v. Greece*[44]).

Despite the answer to the question whether the state took appropriate measures is connected with the facts of the case (and giving regard to a condition that it does not impose an impossible or disproportionate burden on the authorities as noted in *Rantsev v. Cyprus and Russia*[45]), there are some general operational measures that the Court identified in its case law. In *V. C. L. and A. N. v. the United Kingdom*[46] the Court categorised these measures as either preventive or protective. The preventive measures include those that strengthen national coordination between the various anti-trafficking bodies and discourage the demand for all forms of human exploitation, whereas the protective measures include facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery.

The third type of positive obligation requires from states to conduct an effective investigation as soon as the official authorities become aware of a probable case of possible human trafficking, which is in principle identical to the same obligation which form the procedural limb of Art. 2 and Art. 3 of the ECHR, *i.e.* the investigation must be prompt, impartial, independent, reasonably led in terms of securing all relevant evidence and victim-sensitive (*e. g. J. and others v. Austria*[47]).

### *3.2. Obligation of the state of non-prosecution and non-penalisation*

The status of the obligation to provide possibility of non-prosecution or non-penalisation of victims of human trafficking (hereinafter as 'non-prosecution and non-penalisation'), which is the main theme of this paper, is somewhat debatable. It may be understood as a part of the positive obligation of the state to effectively investigate human trafficking suspicions, or it may be perceived as a standalone negative obligation of the state, triggered by the state's failure to prevent the individual from becoming a victim of human trafficking (see below in detail). The first understanding of this obligation is based on the fact that the issue of the non-prosecution

43 In connection with case *L. E. v. Greece* the question of how proactive the state authorities should be in order to identify the victims of human trafficking – whether they should actively search for them, or just react on situation when victims address themselves (with respect to the fact that the victims of human trafficking usually do not report that they have been subjected to such behaviour for scale of reasons) was raised, with strongly negative evaluation of the secondly mentioned – passive – approach that the Court used in this case when assessing possible violation of art. 4 of ECHR by state before the applicant reported herself to Greek authorities (see Milano, V., 2017, p. 717-719.).

44 Judgment of 21 January 2016 in case of *L. E. v. Greece*, application no. 71545/12.

45 Judgment of 7 January 2010 in case of *Rantsev v. Cyprus and Russia*, application no. 25965/04.

46 Judgment of 16 February 2021 in case of *V. C. L. and A. N. v. the United Kingdom*, applications nos. 77587/12 and 74603/12.

47 Judgment of 17 January 2017 in case of *J. and Others v. Austria*, applications no. 58216/12.

and non-penalisation is connected with the above-mentioned operational measures, because the purpose of these provisions is the protection of the victims and ensuring their cooperation with law enforcement authorities free of fear of their own criminal prosecution as well as recognition of the specifics of their situation when considering level of compulsion. This approach seems to be the one that the Court favours. However, we believe that there are some very convincing objections to it (see below).

The Court did not shed much light on the state's specific obligation of non-prosecution and non-penalisation until recent judgment of *V. C. L. and A. N. v. the United Kingdom*[48], delivered in spring of 2021. In this judgment, the Court – when considering whether the state fulfilled its positive obligation to take operational measures to protect the victims of human trafficking under Art. 4 of ECHR – stated, that there is no general prohibition of the criminal prosecution of the victims of human trafficking (not even of minors), when considering the Warsaw Convention or other international documents. However – the Court stated – in some cases, the criminal prosecution of the victims may be incompatible with the state's duty to take operational measures to protect the victims, or possible victims, of human trafficking. A similar approach was taken in the decision *G. S. v. the United Kingdom*[49] of autumn of the same year. These two cases are basically the first ones to deal explicitly with the issue of non-prosecution and non-penalisation, so they deserve a closer attention.

In the case of *V. C. L. and A. N. v. the United Kingdom*[50] the applicants – both Vietnamese, 15 and 17-year-old minors – were arrested during police actions where sophisticated cannabis factories were discovered.

The first applicant claimed that he was smuggled into the United Kingdom and upon arrival he was taken by another Vietnamese national to the address where cannabis was being grown and where he was later arrested. Despite the Refugee and Migrant Justice' (which is a legal advice and representation charity) information that he may have been the victim of human trafficking, the first applicant pleaded guilty to the production of cannabis after a consultation with his legal counsellor. The Crown Prosecution Service then reviewed its decision to prosecute and concluded that there was no credible evidence that the first applicant had been trafficked. A day later, the Crown Prosecution Service received a letter from United Kingdom Border Agency indicating that the circumstances of the first applicant's case had been considered as there were reasonable grounds to believe, that he had been trafficked. The case was adjourned at this moment. Later, a report from the United Kingdom Border Agency pointed at trafficking indicators in first applicant's case, such as that he had been found at a cannabis factory highlighting criminality involving adults; he was not

48 Judgment of 16 February 2021 in case of *V. C. L. and A. N. v. the United Kingdom*, applications nos. 77587/12 and 74603/12.

49 Judgment of 23 November 2021 in case of *G. S. v. the United Kingdom*, application no. 7604/19.

50 Judgment of 16 February 2021 in case of *V. C. L. and A. N. v. the United Kingdom*, applications nos. 77587/12 and 74603/12.

enrolled in a school; and he was not allowed to leave the property. The case was then reviewed by the Crown Prosecution Service, but the Chief Crown Prosecutor subsequently confirmed that it should be prosecuted. At a court hearing the first applicant maintained his plea, while it appeared that this decision followed a meeting with his solicitor in which he had been informed that the finding that he had been trafficked had not been definitively confirmed (based on the fact mentioned above and pointed out by the Council of the Crown during the hearing). As a result, the first applicant was sentenced to twenty months detention in a young offenders' institution.

The second applicant was arrested together with a number of other Vietnamese nationals when hiding close to the premises where sophisticated cannabis factory was found by the police. During the police interview, he explained, that after arrival to the United Kingdom, he met some Vietnamese people and was given accommodation, clothes and food for a week. While he was staying in a house, he was told that it was best for him if he did not go out. However, when he was asked if he was held there against his free will, he denied it. After a week he was taken to a cannabis factory, where the windows were bricked up, the only door was locked from the outside and he believed that the factory was guarded. His work included watering the plants and cooking. He slept, ate and worked in the factory, and he was not paid for his work. Later, the second applicant became suspicious and wished to leave. He was allowed to leave for a few days, but when he decided not to come back, he was instructed that he might be killed if he stopped working. Thus, he returned to the factory. During file review conducted by the Crown Prosecution Service, the possibility that the second applicant had been smuggled into the United Kingdom was considered.

His legal counsel was instructed accordingly, but since the second applicant during his conference with his counsel described facts of the case as mentioned above, the counsel advised him to plea guilty, which he followed and later was sentenced to an eighteen-month detention and training order. Later, the second applicant's new solicitor referred his case to the National Society for the Prevention of Cruelty to Children National Child Trafficking Advice and Information Line and this organisation found about different background of the second applicant's arrival to the United Kingdom and concluded, that there were reasonable grounds for considering the second applicant to be a victim of child trafficking from Vietnam to the United Kingdom (clear links appeared between the people who arranged his travel out of Vietnam, those who held him in the Czech Republic as a transit country and moved him to the United Kingdom, and those who exploited him for work in the cannabis factory; the previously known facts of the case also provided for this suspicion). Competent authorities had then concluded that the second applicant had been trafficked. Nevertheless, the Crown Prosecuting Service remained firmly of the view that he was not a victim of trafficking and that the public interest would require a prosecution.

Both applicants then sought permission to appeal against conviction and sentencing. The first applicant on the basis (among others) of the fact that he was

credibly a victim of human trafficking and as such should not have been prosecuted. The second applicant argued that his conviction was unfair because as a minor and victim of trafficking and forced labour contrary to Art. 4 of ECHR he had been entitled to protection rather than prosecution. In particular, he argued that the Crown Prosecution Service should have carried out a more thorough investigation into whether he had been trafficked into the United Kingdom and exploited in a cannabis factory. Both appeals were joined, and the Court of Appeal dismissed them. The applicants later addressed the Supreme Court, but their permission to appeal were refused. A subsequent first applicant's application for a review of his conviction based on new evidence and new legal arguments was refused.

In the case of the first applicant the Court found shortcomings in the competent authorities' effort to establish whether he was a victim of human trafficking, and it did not approve of the fact that instead of elucidating this issue, they charged him with cannabis production. The Court mentioned that the relevant information was provided even by other state authorities and that the Crown did not consider whether a relevant nexus had been established between the trafficking and the criminal offence (rather, it repeatedly found that there was no clear evidence that the first applicant had been trafficked) and it did not put forward any clear reasons for reaching a different conclusion from that of the competent authority. According to the Court, at the time of the first applicant's arrest, the Vietnamese minors had already been identified by the Crown Prosecution Service as a specific vulnerable group and trafficked children as more reluctant to disclose the circumstances of their exploitation.

The second applicant's case was also connected to illegal cannabis production, since he was arrested close to it. Even after the Crown Prosecution Service became aware of the existence of circumstances giving rise to a credible suspicion that he had been trafficked, the prosecution continued, and the competent authority was not addressed until a year later. Two years later, the Crown Prosecution Service reviewed the case in the light of information provided by National Society for the Prevention of Cruelty to Children National Child Trafficking Advice and Information Line and competent authority and decided that the second applicant was not a victim of human trafficking. At this point the Court noted that based on the same facts, the Crown Prosecution Service did not explain its opposing view to that of the competent authority. It was also found difficult by the Court to reconcile with the finding of both state organisations mentioned above that the second applicant had in fact been trafficked into the United Kingdom. The Court thus concluded that the facts of the case were sufficient to establish a positive obligation to take operational measures to protect the second applicant, but he was prosecuted and pleaded guilty instead, and even though he was subsequently recognised as a victim of human trafficking, the prosecution continued without providing clear reasons for its opposing opinion.

Based on these considerations the Court decided that the United Kingdom had not fulfilled its duty under Art. 4 of ECHR to take operational measures to protect both applicants either initially as potential victims of human trafficking, and subsequently

as persons recognised by the official authorities to be the victims of human trafficking. Thus, the Court ruled that there had been a violation of Art. 4 of ECHR.

In the case of *G. S. v. the United Kingdom*[51] the applicant – and adult woman – was charged with being knowingly concerned with importation of cocaine on the basis of the fact that she had been stopped by customs officers after arriving into Heathrow Airport on a flight from Trinidad and twenty-three packets of cocaine were recovered from her. The defence objected that her client had acted under duress through all the relevant time as there had been threats of serious injury or death to her and (or) her young son if she had refused to comply with the demand to smuggle drugs. The applicant was convicted and sentenced to seven years in prison and recommended for deportation. After applicant's release from prison, she applied for asylum in the United Kingdom and during the process, the deciding tribunal found out that the applicant had been trafficked when she entered the United Kingdom carrying the drugs. The same decision was then again provided by a competent authority. Later, the applicant sought an extension of time to appeal against her conviction on the basis that the new evidence undermined the safety of the conviction. Among this new evidence there were the two above-mentioned decisions recognising her as a victim of human trafficking, but also evidence concerning her physical and mental state indicating that she was likely to be very vulnerable to exploitation and less able to resist pressure at the time the offence had been committed, and last but not least, a change in the law regarding victims of trafficking accused of criminal offences.

The Court of Appeal then refused the applicant's leave to appeal, because it concluded that neither the Warsaw Convention nor the Directive conferred a blanket immunity from prosecution on victims of trafficking. Instead, the obligations of the state required a careful and fact sensitive exercise of discretion by prosecutors as to whether it was in the public interest to prosecute a victim of human trafficking or not, mentioning the nexus between the crime committed by the applicant and the trafficking as an obvious factor when exercising such a discretion.

In this case, the Court recalled the facts of the *V. C. L. and A. N. v. the United Kingdom*[52] case and noted that in case of the current applicant there was no evidence whether or not, at the time of her apprehension, she fell within the category of persons at particular risk of being trafficked and that her arrest, charge, trial and conviction was conducted before adoption of the Warsaw Convention and the Directive (and only after that the National Referral Mechanism, through which the competent authorities conduct their assessments in order to identify potential victims of modern slavery and ensure that they receive the appropriate support was adopted). The Court again mentioned that the applicant was charged, tried, convicted, and sentenced without a trafficking assessment having first been made by a qualified person. Nevertheless, the Court of Appeal recognised that in fact she had

51 Judgment of 23 November 2021 in case of *G. S. v. the United Kingdom*, application no. 7604/19.

52 Judgment of 16. February 2021 in case of *V. C. L. and A. N. v. the United Kingdom*, applications nos. 77587/12 and 74603/12.

been a victim of trafficking, and her leave to appeal was not refused because the Court of Appeal disagreed with finding that she was a victim of human trafficking, but rather because it found that at the time of the offence she had not been under such a level of compulsion that her criminality or culpability was reduced to or below a point where it was not in the public interest for her to be prosecuted.

As to the positive obligations of state under Art. 4 of ECHR, the Court highlighted that these are – in case of contracting states of the Warsaw Convention – constructed in the light of this treaty (or in case of Member States of the European Union by the Directive), which does not forbid prosecution of the victims of human trafficking itself, but only provides for the possibility of not imposing penalties on the victims of trafficking for their involvement in unlawful activities to the extent that they have been compelled to do so.

To sum up, these two cases brought forth two new requirements in Court's assessment of operational measures under Art. 4 of the ECHR.

The violation of Art. 4 of the ECHR would be found in situations where criminal prosecution is conducted against an individual whose status of victim of human trafficking is not considered at all or when competent state authorities come to a conclusion that the applicant was or might have been a victim of human trafficking, but its criminal prosecution continues without convincing explanation of the opposite view on applicant's status of victim. On the other hand, the violation of Art. 4 of the ECHR would not be found in cases where the status of an individual as a victim of human trafficking was assessed with the conclusion that he/she is a victim of human trafficking, but the level of his/her compulsion to commit a crime (as a consequence of such a status of victim) did not reach the exculpatory level.

## 4. Criminal liability of the victims of human trafficking

If we consider all the aforementioned information, we can draw a few starting standpoints for a further analysis.

First, there has not been a requirement for an absolute, total, categorical immunity of the victims of human trafficking from criminal prosecution and/or criminal liability neither in the relevant international or EU documents nor in the case law of the Court (and as far as we know, of the CJEU as well) so far. On the other hand, the states have not enjoyed an unlimited margin of appreciation on this issue, so *some* form of immunity has to be available.

Second, the legal construction of the requirement for *some* form of immunity which can be found in the Warsaw Convention, in the Protocol 2014 and in the Directive is configured in such a way that the states should develop a system in which their authorities are entitled not to prosecute/punish a victim of human trafficking.

It is thus clear that the relevant provisions of the international conventions are not self-executing[53] and the relevant provision of the Directive has not direct effect.[54]

Third, the Court places this requirement among the bundle of protective positive obligations that the Contracting States have towards the victims of human trafficking, but it does not divert from the firstly mentioned standpoint, *i.e.* from the relative nature of this requirement.

Fourth, the concrete form of the implementation of non-prosecution/non-penalisation requirement should take into consideration the nexus of the coercion with the status of the perpetrator as a victim of human trafficking, the basic principles of the legal order of the state, and the impact of the criminal proceedings on the fulfilment of the protective part of the positive obligation of the state towards such a victim.

Fifth, a breach of the Art. 4 of the ECHR may arise also in a situation in which a prosecution was launched against a person whose status as a (non-)victim of human trafficking had not been sufficiently clarified first.

First of all, we would like to address the issue of categorisation (classification) of the non-prosecution/non-penalisation obligation. Unlike the Court, we are leaning towards a conclusion that the obligation of the state to protect the victims of human trafficking constitutes not merely a component of its broader protective obligations, but rather that it is a separate negative obligation of the state. This conclusion is supported by the fact that a breach of this obligation may occur only if the state takes active steps towards the victim (prosecution, penalisation); if no action is taken, no breach occurs. The Court itself admits in *V. C. L. and A. N. v. the United Kingdom*[55] that the reason why it considers this issue to be a part of the protective positive obligations is the detrimental effect of the ongoing criminal proceedings and possibly also of the imposed sanction (the Court specifically names incarceration) on the victim's recovery from the traumatising experience of being trafficked and its aftermath. This approach uncovers that the only contribution of the non-prosecution/non-penalisation requirement to this bundle of positive obligations consists of the prosecution/penalisation *not happening*, so it is in fact a negative obligation of the state to refrain from a certain activity. We understand the Court's incentives to ascribe this requirement among the protective positive obligations, but to be frank, we do not think that the Court's argumentation for this conclusion is very convincing.

Tying the non-prosecution/non-penalisation requirement to the well-being of the victim creates a huge niche for the slippery slope argument – if the prosecution of a victim of a crime breaches his/her human rights just because it can be detrimental to the his/her coping (healing, rehabilitation) process and if it is an obligation of the state to accept that because it was the state who failed to fulfil its preventive obligation not to let the victim be subjected to victimisation in the first place, then why

53 See more in detail *e. g.* Enabulele, Okojic, 2016, pp. 1–37.

54 See *e. g.* Davies, Van Munster, Düsterhöft, 2023, p. 84.

55 Judgment of 16 February 2021 in case of *V. C. L. and A. N. v. the United Kingdom*, applications nos. 77587/12 and 74603/12.

the same courtesy should not be paid basically to every other victim of any other crime who commits a crime with any relation to the victimisation process? The same premise (detrimental effect on the rehabilitation process unjustified by the fact that the state failed to prevent victimisation) is valid also in cases in which the victim of a crime takes revenge against the perpetrator, commits another crime as a stress response to the fact of his/her own victimisation etc.

If we accept this argumentation line, the way to use it as a backing of a claim for criminal immunity of *e.g.* a victim of a rape or grievous bodily harm, who later kills the perpetrator out of frustration, is open. It is undebatable that in such a situation the state failed to fulfil its own positive obligation to prevent the victim from being victimised guaranteed by the Court's case law (see *e. g. Osman v. the United Kingdom*[56]). However, we do not share the view that this thought is reserved only for cases in which the victim of the other crime also enjoys a protection guaranteed by a protective positive obligation of the state to conduct an effective investigation once the prevention failed, but in these cases the downside of the Court's approach is most ostensible.

Apart from that, the basic presupposition of the Court's approach does not limit the immunity of the victim just to crimes with a close link to the conditions of the trafficking and the victim's role in it. After all, the rehabilitation process of the victim can be disrupted by a criminalisation for a totally unrelated crime (*e.g.* if the victim does not commit a crime like production of narcotics for which she/he was trafficked, but takes his/her frustration from the bad living conditions in the narcotics production facility out on a co-victim or an animal by torturing them).

We would thus favour the conclusion that the non-prosecution/non-penalisation requirement is a standalone obligation under Art. 4 of the ECHR, which is conditioned upon the other applicable international legal documents, here namely by the Warsaw Convention. The utility of this requirement would be more restrained this way, because it would limit its use, but it would prevent unexpected consequence and hardly controllable spreading to other categories of criminal activity with the analogic rationale.

Apart from this argumentation thread, the obligation in question may be also perceived as an integral part of the broader duty to conduct an effective investigation. However, we believe that that is not the case, as the obligation not to criminally prosecute or punish the victim can be pretty easily divorced from the obligation to effectively investigate the traffickers – it is quite plain to see that effectively investigating and prosecuting the organisers of human trafficking is not in any way dependent on the victims not being prosecuted at the same time.

Treating the aforementioned obligation as a standalone negative one can prove practical by distinguishing the particular obligations of the state more precisely, thus enabling a more accurate scrutiny in individual cases. It is not hard to imagine

56 Judgment of 28 October 1998 in case of *Osman v. the United Kingdom*, application no. 87/1997/871/1083.

that the state might honour the victim's right under Art. 4 of the ECHR in its positive procedural limb by efficiently prosecuting the traffickers while breaching its passive procedural limb by prosecuting and punishing the undeserving victim as well, or *vice versa*.

However, there might be a hidden reason why the Court considers the non-prosecution/non-penalisation requirement as a part of the positive obligation tied to Art. 4 of the ECHR – as we have already mentioned above, the Court correctly recognises that human trafficking is not explicitly covered by the ECHR or its Protocols, so the supplementary use of the Warsaw Convention and the Palermo Protocol is necessary. In this context, the Warsaw Convention is the only document that includes the non-prosecution/non-penalisation clause. If the basic human trafficking requirement is to be derived from this Convention when applying the ECHR in the praxis of the Court, the concrete form of the immunity of the victim – as we have also already explained above – is basically in the hands of the state.

That is not a position that the Court would be comfortable in, as it needs to secure that the reasons not to prosecute in principle related to human rights may trump any other public interest considerations that otherwise the states might be applying. Even this argument does not appear to be much convincing to us. Although it is undoubtedly founded on a genuine wish to promote as high level of human rights protection as possible, it throws the baby out with the bathwater, as we have demonstrated above.

To proceed to more practical issues, we believe that the aforementioned standpoints are to be interpreted in such a way that the impunity of the victim according to the valid international law is not supposed to be absolute and that not only the protection of the interests breached by the victim's crime may be given priority including the victim's criminal liability (as a principle, none shall be awarded a right to victimise another human being just because they were victimised in the first place), but also that the criminal law provision as a general rule applies to the victims of human trafficking as well, while their impunity is an exception for which certain conditions resting in necessity, connection to the victim status and proportionality must be met.

Impunity must thus be evaluated always against the fact of each individual case. After the analysis of all the abovementioned legal documents and the Court's case law, we believe that the assessment in which the non-prosecution/non-penalisation requirement shall be conducted consists of two steps. In the first one, the victim status has to be established after a due collection and inspection of all relevant facts in cooperation with official public authorities specialised in human trafficking. By skipping or neglecting this step, every subsequent partial step is compromised. If a victim status is established, the following aspects should be taken into consideration:

I) the nexus between the crime and the victim status,
II) the intensity of the coercion,
III) the reasonably expected consequences of not committing a crime,

IV) the personal situation of the victim and of the trafficking settings,
V) the nature and severity of the crime.

Ad (I) the nexus between the crime and the victim status, eventually the trafficking situation as such comes in a much broader spectrum than it may appear at a first glance. If the crime committed by the victim is the genuine core of the trafficking situation, it is a strong argument for impunity. *E.g.* the victim produces narcotic drugs, engages in illegal prostitution etc., which is exactly what he/she has been trafficked for. The same applies for situations where the crime arises as a necessary and inevitable by-product of the core of the trafficking (for example usage of counterfeited documents, illegal trespassing or occupying property of another person, because the traffickers use illegally an abandoned real estate as a place of residence for the victims) or where the victim is forced by the traffickers into a position of responsibility (*e.g.* to supervise the other victims or to organise some parts of the criminal activity),[57] in which he/she commits a negligent crime (*e.g.* he/she causes an accident) or even an intentional one directly caused by the conditions created by the traffickers (*e.g.* a victim forced to prostitution harms his/her violent client outside the conditions of necessary defence). In our opinion, this is similarly valid when the core of the trafficking is not a crime on its face (*e.g.* field labour). All these situations have in common that they are a direct and voluntary consequence of the trafficker's acting.

These would be the most typical situations, but they do not exhaust all of the thinkable spectrum, as the victims of human trafficking may divert from the core of the trafficking in their criminal behaviour. For example, a victim may commit a crime against its traffickers in order to escape from them, which need not be always covered by classical justifications as necessary defence or extreme necessity (*e.g.* the victim slicks the throats of its guardians in their sleep), or she/he may commit a crime out of frustration generated by the desolate living condition she/he has been cast into and target another co-victim or even just a random person totally unrelated to the trafficking. In these situations, the nexus between victim status and the crime is still present, but the impunity is not so strongly supported by it, because the interests of the others must be taken into consideration.

Third group of generic situations is formed by scenarios in which the victim deliberately commits a crime to unnecessarily improve his/her living conditions or his/her position in the traffickers' ring even though nobody forces him/her to it, sacrifices the interests of the co-victims for his/her own unnecessary profit, just abuses the circumstances out of a subjective lust for aggression etc. In these situations, the link between the victim status and the crime should play no role, as it was breached by the victim's own decision.

Ad (II) The intensity of the coercion also plays a crucial role. If the act of the victim is committed under conditions of general justifications or defences (typically

57 So called 'chain of abuse' situation – see Piotrowicz, Sorrentino, 2016, p. 686.

*vis absoluta* or extreme necessity), there is no need for special considerations about the non-prosecution requirement, because the act would not be a crime even when committed by anybody else outside a trafficking situation (*e.g.* if the victim damages a door of a house in which she/he has been locked to free himself/herself, injures traffickers when defending herself/himself or another victim etc.).

However, it is clear that the general justifications/defences concepts may turn out to be insufficient in specific trafficking context, especially due to the frequent requirement of imminence or proportionality or a high standard for coercion if it is supposed to exclude criminal liability (typically *vis compulsiva*).[58] The impunity of the victim (or grounds for a corresponding procedural solution) may thus be given also in situations in which the compulsion did not reach the threshold necessary for a general justification.

In cases in which the compulsion does not amount to a direct threat of death, grievous bodily harm or other serious consequence for the victim, all relevant factors have to be taken into consideration, especially the severity of the threat, immediate consequences of not obeying, the long-term consequences of not obeying (see below), the seriousness of the crime to which the victim is compelled, whether the compulsion is targeted at the victim or somebody else etc. The fact whether the compulsion was direct or indirect, physical, verbal or even just psychological (based on position of power or fear due to victim's vulnerable position), should also not play any role in this consideration, the only relevant fact is how the concrete victim evaluates the concrete situation.

Ad (III) This criterion should apply not only in situations in which there is a direct or indirect coercion by the traffickers (even though that can be expected to be the most typical situation), but also when the victim commits a crime due to being forced to it by the general conditions or a specific conjunction of conditions (*e.g.* the above-mentioned victim forced to prostitution who has harmed a violent client). Under this criterion, not only the direct outcomes of the not committing should be weighted (if the victim fails to act, she/he will suffer a harm, die etc.), but also the long-term ones (should the victim not take action, he/she will be transferred to a much hazardous, exhausting or health-exploiting work, his/her food rations will be restricted in a following period which will gradually but strongly affect his/her ability to fulfil the assigned activity over a course of time etc.).

What should also be duly assessed is the scope of the impact of not committing, *i.e.* whether it will affect only the single victim or also some of the others or all of them (*e.g.* whether the traffickers apply such brutal methods as collective punishments or decimations). On the other hand, if non-compliance with the coercion can only result in losing privileges that the victim has apart from the other victims, the loss of chances to such privileges or to rise in the structure of the victims (or even

58 As in infamous Dutch *Mehak case* (see Esser, 2017, pp. 77–80., or Piotrowicz, Sorrentino, 2016, pp. 688–689.).

the trafficking ring) and these privileges are not necessary for survival, the impunity requirement might not apply.

Ad (IV) The personal situation of the victim as well as the overall trafficking settings needs to be thoroughly examined. The situation of the victim comprises of her/his general condition, health, psychic resistance etc., as well as the stringency and intrusiveness of the victim status (*e.g.* if the victim is subjected 'only' to forced labour or straight to slavery). If the victim is especially vulnerable (due to age, disability, gender etc.) or is more vulnerable in comparison to the other victims, a special sensitivity should be deployed and greater tolerance for his/her acts should be provided.

Regarding the objective trafficking context, aspects like the professionalism, organisation and size of the trafficking ring and the trafficking operation, its focus (especially the gravity of the core trafficking activity indicating how far the ring is probably willing to go to achieve its goals and not to compromise its existence), brutality of the traffickers, their strategy applied towards the victims (*e.g.* if they are allowed to cooperate and support one another or if they are set against each other or completely separated),[59] the sophistication of covering its illegal activities, the extent of its internationality and relations to the public authorities (*e. g.* if there is a structural bribery or favouritism at place, or on the other hand if the ring has already been investigated by the official authorities etc.) in the place where the core trafficking activity is taking place etc. should be observed. These considerations are necessary to evaluate how much the victim was at risk of a serious harm or abuse, how probable an escape or a rescue from the outside was etc. The outcomes of this partial analysis shall contribute to the overall evaluation whether the victim's act was necessary and proportionate against its complex background.

Ad (V) The nature and severity of the crime reflect the proportionality principle which is present in most applicable justifications or defences. As stated above, we do not need or should contemplate on the general justification or defences in this context (*e. g.* to solve the eternal question whether sacrificing a live of one person is justifiable if it saves the lives of five others under the conditions of extreme necessity), because if general justification or defences apply, the impunity requirement is fulfilled without any doubt, even if these legal constructs are not designed purely for the human trafficking situations.

In the situations not covered by the general justifications or defences, the nature and severity of the crime committed should play a specific role of corrective measure or mean of moderation. Especially if the crime impinges upon the rights of other individuals, the high severity of the crime may override the impunity requirement even if most of or even all the other criteria speak for it. *E.g.* if a victim kills an innocent passer-by due to a frustration completely caused by the conditions, he/she has been put to by the traffickers, we do not believe that there is any room for a complete impunity consideration.

59 For more examples see Zimmerman, Pocock, 2013, p. 267ff.

Naturally, the middle part of the spectrum of crimes is quite broad according to their severity and the thoughts whether the severity of a certain crime already excludes the full impunity of its perpetrator – victim of human trafficking are bound to occur. Especially in these cases, their nature shall be thoroughly examined, namely whether they left a victim behind or not (if only an abstract interest of the society was breached, *e.g.* by using counterfeited documents or currency, the full immunity of the victim should in principle be given), if there was a victim, whether it was the trafficker or not, whether the crime was provoked etc. Attacks against the traffickers should be met with a greater leniency than attacks against third unrelated subjects or even co-victims (although, as already mentioned, the victims should never have a *carte blanche* even against the traffickers, who are subjects to human rights as well).

On the other hand, attacks against the third parties or even against the co-victims shall significantly raise the bar of the other criteria for impunity. Even when duly acknowledging all the specifics of the unfortunate situations of the victims, they in principle cannot outbox the protection of the interest of other people (the more if they are the co-victims), especially (but not limited to) if those interests enjoy human rights guarantees (*e.g.* Art. 2, Art. 3, Art. 8 of the ECHR). In extreme (and rather hypothetical) cases, the severity might be so high that it blocks the full impunity even if the crime committed presents the core of the trafficking activity (*e.g.* committing mass atrocities on a civil population during an armed conflict by a victim of human trafficking).[60]

In principle, each of these criteria may exclude the victim's impunity if it is not fulfilled in a sufficiently convincing manner (the nexus is absent or is too loose, the coercion is absent or is of insufficient intensity, there were no or only negligible immediate or enduring adverse consequences for the victim as a result of non-compliance, the personal situation of the victim and the overall trafficking context did not dictate the commission of a crime or the severity of the crime was too high), but if neither of them counters the impunity *per se*, they all need to be complexly assessed separately and in their mutual connections and context. In such a situation, none shall have an *a priori* dominance over the other.

In each case, all these criteria should be interpreted from the victim's point of view *ex ante* with a special consideration for the specific psychical state of the victim, the availability of the relevant information to him/her, her/his subjective prospect etc. If the result of this extremely intricate analysis results against the impunity of the victim (because a single criterion was not sufficient or as a joint outcome of all of them taken together), all the criteria should be once more taken into consideration when sentencing. Even in the cases in which the victim is found guilty, they may call at least for the application of general (or even specific) legal tools for mitigating the punishment, imposing alternative sanctions or withdrawing from the imposition of a sanction at all.

60 For a list and evaluation of typical criminal activities that are victims of human trafficking being exploited, see Rodríguez-López, 2020, pp. 2–6.

## 5. Conclusions

The question whether the victims of human trafficking should be prosecuted or even punished is not a dichotomy, meaning that it cannot be simply answered by 'yes' or 'no'. As any other situation where there is a conflict between two individual interests (of a victim of human trafficking and victim of its criminal offence or public interest) it calls for a careful consideration and evaluation of all relevant facts of the case. The case law of the Court as well as the Warsaw Convention and the Directive which the Court reflects, do not require an absolute, total, categorical immunity of the victims of human trafficking from criminal prosecution and/or criminal liability.

Thus, criminal prosecution or even penalisation of such victims does not automatically lead to a breach of Art. 4 of ECHR. The question of whether the absence of clear domestic legal provisions regarding such non-prosecution/non-penalisation of the victims of human trafficking would – in case of prosecution or even punishment of such victims – automatically lead to the determination of a violation of Art. 4 of ECHR must be also answered negatively, because it requires a thorough, careful analysis.

According to our conclusions, the Court's case law provides a basic two-steps scheme for evaluating the non-prosecution/non-penalisation requirement, which we have enriched for other important aspects that cannot be omitted.

First, it is establishing the victim's status after a due collection and inspection of all relevant facts in cooperation with official public authorities specialised in human trafficking. If the victim status is established, the second step consisting of careful consideration of five aspects – the nexus between the crime and the victim status (I), the intensity of the coercion (II), the reasonably expected consequences of not committing a crime (III), the personal situation of the victim and of the trafficking settings (IV) and the nature and severity of the crime (V) – follows. The paper provides a detailed analysis of each relevant aspect with necessary explanation and examples in order to convincingly decide whether the impunity of the victim in each individual case was established and its criminal prosecution or even punishment would constitute a violation of Art. 4 of the ECHR.

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