



Organization for Security and  
Co-operation in Europe  
Mission to Montenegro



Montenegro  
Ministry of Interior  
National office for fight against trafficking in human beings

# GUIDELINES ON NON-PUNISHMENT PRINCIPLE FOR VICTIMS OF TRAFFICKING IN HUMAN BEINGS FOR POLICE OFFICERS, STATE PROSECUTORS AND JUDGES





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## **General principles regarding non-punishment provision of victims of trafficking in human beings**

1. The Constitution of Montenegro<sup>1</sup> pursuant to Article 9 states that ratified international agreements and accepted rules of international law are an integral part of the internal legal order and shall prevail in the case of conflict with the national legislation.
2. By ratifying the Council of Europe Convention on Action against Trafficking in Human Beings (THB) on 01.02.2008 (CETS No.197), Montenegro committed to provide, in accordance with the basic principles of its legal system, ***the possibility of not imposing penalties on victims of THB for their involvement in unlawful activities, to the extent that they have been compelled to do so*** (Article 26 of the Council of Europe Convention).
3. Police officers, state prosecutors, and judges are obliged to act with special urgency to identify victims, if there are reasonable grounds to believe that a person has been victim of trafficking in human beings, and ensure that their human rights are protected, and to prevent secondary victimisation. The dignity and human rights of victims must be respected at all times.
4. THB cases have priority in the work of courts. Criminal proceedings must be conducted without delay and within a reasonable time. Every witness and victim of trafficking in human beings have the right to physical and other protection during the course of the criminal proceedings, which is exercised in accordance with the Code of Criminal Procedure and the Law on Witness Protection. Children are entitled to special protection measures, guided by the need to ensure their best interests.
5. The non-punishment principle flows from the obligation of the State to identify victims of THB, to provide them with protection and assistance, as well as an obligation to effectively investigate and prosecute perpetrators of human trafficking.
6. The State is obliged to ensure that victims receive appropriate and timely information regarding available support services, as well as their rights under the law. Victims should be referred to the Support Services, available in

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<sup>1</sup>“Official Gazette of Montenegro”, no. 001/07 and no. 038/13



all Montenegrin courts that offer special assistance to victims of THB. Victims should also be provided with and briefed on the informative leaflet for victims/witnesses of THB, which contains a detailed overview of the services available to victims, protection measures, and their rights and obligations during criminal proceedings.

7. Special consideration should be given to encourage victims to participate as witnesses in criminal proceedings against the perpetrators by providing them necessary support and safety. If the victim is a foreign citizen, special attention will be given to support and assistance in organizing their arrival for participation in criminal proceedings, especially in cases of prolonged length of proceedings.

8. The principle of non-punishment implies that a criminal/misdemeanour procedure should not be initiated against a victim of THB if a link between the (potential) victim and the committed criminal offence is identified, or in case when the procedure is already initiated, it should be suspended or ended as soon as possible, in a way that will result in no punishment of the victim.

9. The principle of non-punishment should also apply in cases where the perpetrator of THB has not been identified, or in cases where the proceedings against the perpetrator have been suspended or the criminal proceedings have been concluded with an acquittal.

10. Despite the lack of explicit provision, the principle of non-punishment is also present in the national legislation through Article 444 of the Criminal Code, where exploitation for the purpose of conducting criminal activity was defined as one of the forms of THB exploitation. The victim cannot be prosecuted for a criminal offence committed while being trafficked and/or as a result of trafficking. This is the simplest basis for applying the principle of non-punishment of the victim and it depends directly on the early identification of the victim of THB.

11. The application of the principle of non-punishment of victims implies defining in practice the meaning of the standard “to the extent that they were forced to do so”, in accordance with the Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings (CETS no. 197).

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## ***Identification***

12. The establishment of effective mechanisms for victim identification is crucial for the application of the principle of non-punishment in practice.

The identification of victims by police officers and/or civil society organisations or institutions of the social protection system must be followed by operational procedures to collect evidence of THB criminal offence, including identification of victims; means of their exploitation; mechanisms of obedience and control, and other relevant issues. The aim is to ensure respect for the rights of victims and to determine the circumstances, situation, and condition in which the victims were trafficked in order to establish the basis for the application of the principle of non-punishment.

It is very important that police officers, state prosecutors, and judges to pay attention to general indicators for early identification of victims of THB, as well as to the rights guaranteed to the victims. Indications, which can suggest that suspects of a crime may be potential victims of trafficking, may be different and include the following: looking exhausted, malnourished, do not have personal documents, money, wallet, and other usual belongings; no touchpoints with persons with whom they participated in the same criminal activity; no visible effects of the crime committed in the form of material benefits; multiple bruising, injuries or scars of the same or different origin on different places on the body; they are nervous, tense, frightened, show fear, anxiety, insecurity, disorientation, confusion, paranoid behaviour, constantly looking around (as if to check if someone is watching them), have panic attacks, get angry without a reason, show a tendency toward physical distance, do not allow anyone to approach or touch them (as if they do not fully understand the situation in which they found themselves), they are indifferent and without an obvious reasons justify other people, want to avoid or end the contact with the police as soon as possible; they are afraid to talk, speak as if someone is listening, show nonverbal signs of seeking help (they want to say something, but are afraid to do so), and do not answer questions about the criminal offence and their personal situation or give answers after longer pauses in an uncertain and disjoint manner; they do not know how to respond to the additional questions regarding something that they have said, act as if they received instructions from somebody, and leave an impression that they are presenting a memorised statement or similar. It should be noted that presumed victims of trafficking for criminal



activities tend to refuse the offers for assistance when the offers come from police officers (esp. during the first interview when the relationship of trust is not yet built) or when the offer is done in the presence of other persons and confidentiality is not guaranteed.

If after the initiation of the criminal proceedings it becomes obvious that the offense in question was committed during the human trafficking process or as a consequence of it, the criminal proceedings will be suspended or terminated by acquittal.

Criminal offences through which victims are most often exploited in international practice are criminal offenses against property (theft, robbery, fraud, etc.), unauthorized production and distribution of narcotic drugs, mediation in prostitution. Also, it is not excluded that the victim is exploited through the execution of various forms of other crimes (eg various forms of forgery), that is, through the commission of a misdemeanor (begging, theft) and other.

It is necessary for police officers to be aware that perpetrators of prostitution and begging offences (Articles 27 and 30 of the Law on Public Order and Peace<sup>2</sup>), suspects for production and distribution of drugs or other illegal substances as well as children or adolescents engaged in pickpocketing or similar non-serious offenses may be victims of THB, and all further police actions must be directed towards possible determination of existence of elements of the THB criminal offence.

13. Special attention is required in the investigation of criminal offences of procuring prostitution under Article 210 of the Criminal Code, in particular Paragraph 3, as at later stages in the procedure it is possible to replace the charges with the criminal offence of THB due to sexual exploitation.

When interpreting this provision, one should take into account the definition of THB and its methods of "negative impact on the autonomy of the victim`s will" - use of force or threat, deception , abuse of power, trust, dependence, position of vulnerability of another person, dispossession of personal documents or giving or receiving payments or other undue advantage. Therefore, the general rules on coercion should be interpreted broadly.

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<sup>2</sup> ""Official Gazette of MNE" no. 064/11



State prosecutors and judges may use the findings and opinions of experts in the relevant area (neuro-psychiatrist, psychiatrist, clinical psychologist, psychotherapist, special pedagogue, social worker, and other experts) as a basis for the application of the principle of non-punishment.

In this regard, one should examine written order from which the expert's opinion is based. It should clearly define the scope and tasks of the expert's report, for example, question of extent that the victim's free will was affected by his/her situation and the manner of execution of the offence, or in other words the question regarding the existence of fear and endangerment and coercion of any kind.

The main objective of the expertise is to assess the link between the human trafficking and the consequences on the victim, especially in terms of the impact on victim's freedom to manage his/her actions in the given situation. The expert's opinion in such cases is of great importance as it points to the direct link between the factual and psychological enslaving of the victim of trafficking (form, dynamics, intensity, context of violence) and to the specific consequences that are observed in a victim with respect to emotions, cognition, will, and behaviour.

More specific expertise should include:

a) an assessment of the victim's freedom to manage his/her actions and the level of fear, judgment, and behaviour of the victim in stressful and traumatic situations: including an assessment of violence as an abuse of power, and control mechanism over the victim – and its influence which may reduce the victim's "autonomy of will".

1 (a) Whether the status of victim (the duration of violence, the degree of psychological and existential dependence, threats to his/her life or the lives of close persons, etc.) influenced or could influence, permanently or temporarily (at the time of the offence), the victim's ability to understand his/her actions and their consequences and to assess the reality, or whether the status of a victim in the act of violence of THB produced permanent or temporary psychological conditions that affect that ability.





2 (a) Whether the specific context of THB (abuse of power, risk for their own and/or the lives of close persons, and similar) influenced the victim's ability to manage his/her actions, and whether there was internal and/or external coercion which led to the inability of the victim to manage his/her actions, and most importantly, to what extent;

3(b) The assessment of the additional factor of abuse of the relationship of dependence - assessment of the possible existence of a close emotional relationship between traffickers and victims (partners, parents, relatives) and the importance of their authority that could cause victims to feel fear, guilt, "debt", loyalty and similar, thereby significantly reducing their autonomy of will;

c) An assessment of the overall psychological and physical state of the victim as a result of the trafficking-related violence that the victim has suffered.

### ***Legislative framework***

14. According to the existing legal framework, the application of the principle of non-punishment in national legislation is possible through application of the following substantive and procedural criminal legislation:

Extreme necessity (Article 11 of the Criminal Code and Article 14 of the Law on Misdemeanours). Extreme necessity exists where a perpetrator commits an act to eliminate concurrent or imminent danger to his/her well-being or the well-being of another person, which he/she did not cause and which could not have been eliminated in any other manner, provided that the caused harm does not exceed the threatened harm. Danger in addition to danger to life and body, it can also refer to the endangered freedom and health of the victim and persons close to the victim. Concurrent danger can be interpreted in the way that it relates not only to simultaneous and immediate danger, but also to a probable danger, when the victim believes that he/she or a person close to him/her will certainly be injured. For victims of THB these circumstances can be determined through correct and exhaustive analysis of victim's position and situation, i.e., through the level of force or threat used and other methods of coercion, not only against the victim, but also against the person close to him/her. The prosecutor or judge must assess in each specific case whether the danger could have been eliminated in any other way, and whether the harm caused does not exceed the threatened harm.



In order to determine these circumstances, the necessary expertise (medical, psychological, psychiatric, etc.) may also be carried out in order to define the condition of the victim at the time of commission of the criminal offence.

Legitimate self-defense (Article 10 of the Criminal Code and Article 14 of the Law on Misdemeanours) is a defense where it is absolutely necessary for one to defend himself of another person from a concurrent or imminent unlawful attack.

Force and threat (Article 12 of the Criminal Code and Article 14 of the Law on Misdemeanours) - when deciding on the prosecution for a criminal offense committed by a victim of THB, it is necessary to determine in all cases the connection between the commission of a crime and the fact that this person as a victim of THB criminal offense may have been forced or threatened into the commission of the offence.

Absolute (without any possibility to resist) force excludes the possibility of decision-making; therefore, the criminal offence does not exist due to the lack of wilful action.

A compulsive force, which in some cases may contain elements of a threat, affects the freedom of decision-making of the person against whom it is used. Depending on the concrete circumstances, it may constitute the basis for exclusion of guilt, as a general element of a criminal offense.

When it comes to absolute and compulsive force or threat, the principle of non-punishment should always be interpreted in relation to the methods of commission of the THB criminal offence prescribed in Article 444 of the Criminal Code, particularly in relation to coercion. Victims of human trafficking operate without a real autonomy of the will (they do not have the free will, or this freedom is limited by the methods used by traffickers). They operate under coercion that excludes or limits the freedom of decision making, which means that they are not responsible for their actions – there is no culpability as a general element of a criminal offense.

Mental incapacity (Article 14 of the Criminal Code) - when the victim commits a criminal/misdemeanor offense in a state of mental incapacity, there is no culpability as a general element of a criminal offense, i.e., such person is not responsible for the offense.



15. Minors who are victims of THB represent a particularly vulnerable category and need to be provided with special protection. They should be treated in accordance with the Law on Treatment of Juveniles in Criminal Proceedings. When victims are children, i.e., persons less than 18 years old, it is not necessary to prove force, threat or other means of commission of the crime, according to Article 444, paragraph 2 of the Criminal Code of Montenegro. Therefore, when it comes to children, in order to determine the child's status as the victim, there is no need of the existence of any means: neither compulsion, nor deception or threat. In accordance with the above article, children cannot agree to be the subject of human trafficking, nor is there a legal basis for the persons who are the subject of a trafficking to agree to be exploited. Since according to the law the consent of the child is not relevant, it is not necessary to examine whether the child has given consent for exploitation. However, this does not exclude the duty of police officers and state prosecutors and judges to interview the child victim regarding all circumstances related to the situation in which the child was.

On the basis of the above, when it comes to child victims of trafficking, there is an obligation to interpret the words "forced" in the widest possible way in reference to the provision of Article 26 of the Council of Europe Convention on the fight against human trafficking.

In case that an offense committed by a child is in connection with trafficking in human beings, criminal proceedings will not be initiated or it will be suspended if it has already been instituted.

16. In case when the criminal proceedings against victim of trafficking was effectively concluded and the person was found guilty and punished, the possibility of filing an extraordinary legal remedy, such as a Request for a Repetition of the Criminal Proceedings, should be considered when the fact that the person was a victim of trafficking accrues as a new circumstance, which was not previously known.

