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**OPENBAAR MINISTERIE**

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**UPHOLDING THE PRINCIPLES OF NON-PUNISHMENT AND NON-PROSECUTION AND UNDERLINING THE NEED FOR EFFECTIVE COOPERATION BETWEEN THE JUDICIARY, THE POLICE AND OTHER ACTORS WHEN PROTECTING AND ASSISTING VICTIMS.**



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# SUBJECTS:

## 1) NON-PUNISHMENT AND NON-PROSECUTION;

- PRINCIPLES AND LEGAL BASIS;
- EXAMPLES AND CASE LAW;
- IN THE NETHERLANDS AND INTERNATIONAL;
- SOME OBSTACLES;

## 2) EFFECTIVE COOPERATION BETWEEN AUTHORITIES IN ASSISTING AND PROTECTING VICTIMS;

## Non-prosecution/ non-punishment

Starting point is prosecution. In cases where it is evident that the victims were forced to commit criminal offenses the options are, for instance, deciding not to prosecute or requesting the court to convict without imposition of any punishment.

The decision not to punish the perpetrator (a victim of human trafficking him- or herself) can be made in case of self defense/ excess/psychological force majeure.

Although the formal requirements of an offense are met and a justification or exculpation ground in the strict sense is lacking, is the occurred such an edge case that prosecution or punishment would be disproportionately.

# Non-punishment principle

## Content of this rule:

- An international principle
- Protection of victims of exploitation
- If the person on the basis of a national act or on the basis of international provisions can be appointed as a victim, the victim can refer to the non-punishment principle.
- The offenses must be sufficiently directly related to the exploitation

## **Non-punishment principle**

### **Rationale:**

- Avoid further victimization: risk of being deported, detained or prosecuted
- Detection of the original offense
- To protect the human rights of victims

# Legal basis

The first legal basis of the non-punishment provision:

- **Convention of Warsaw (Council of Europe Convention on Action against Trafficking in Human Beings), art. 26**

*“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”.*

In 2011, the provision is further expanded. Also, the possibility of non-prosecution is specifically mentioned by this directive:

- **Directive 2011/36/EU, art. 8**

*“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.”*

- **Protocol of 2014 to the Forced Labour Convention, 1930, art. 4 sub 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.*

## Protection of victims (Rantsev case)

The protection of victims is an essential element in combating trafficking in human beings. The ECHR emphasizes the importance of a victim-centered approach in the “Rantsev” case:

- States must adopt an effective policy against combating trafficking
- Preventive measures
- Protection and assistance of victims



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME



# Non-punishment (and non-prosecution) in the Netherlands

**From 1 May 2014, a specific Directive for the decision not to punish a person who is a victim of trafficking in human beings comes into force.**

The decision not to punish a victim, based on this Directive, can be made in case of:

- 06: In case of self defense/excess/psychological force majeure
- 42: Although the formal requirements of an offense are met and a justification or exculpation ground in the strict sense is lacking, is the occurred such an edge case that prosecution would be disproportionately.

## **Other options:**

Art. 9a Dutch Criminal Code (CC): the opportunity for the judge to convict a person without punishment.

Judge can consider it as a circumstance beyond one's control (no convict or punishment)

Judge can reduce the sentence



# Example non-punishment: Amsterdam Court of Appeal ECLI:NL:GHAMS:2017:2889

In this case, a woman was accused of assisting the main suspect (G.K.) with exploitation of others for the period of one year.

- She was victim of THB for 9 years.
- She was forced into prostitution, and had to hand over her earnings.
- She was in love with the main suspect (G.K.).
- She declared she was unable to find 'a way out'.
- Her daughter lived with the mother of the main suspect (G.K.).
- She forced victims (3) into prostitution.
- She forced victims (3) to accept unfavorable conditions, for example they had to hand over a considerable amount of money they earned.
- It seemed money was her only motive
- She played an important (active) role in the enforcement. The victims declared they were most afraid of her.

# Example non-punishment: Amsterdam Court of Appeal ECLI:NL:GHAMS:2017:2889

Several defenses:

- The admissibility of the Prosecutor's Office
- Proof of evidence
- Psychological force
- Art. 9a Dutch Criminal Code (CC)

## Examples non-punishment in other States:

**Argentina Law, 26.364**, Prevention and Criminalization of Trafficking in Persons and Assistance to Victims of Trafficking of 2008, Article 5

*“Victims of trafficking in persons are not punishable for the commission of any crime that is the direct result of having been trafficked.”*

**United States**, Victims of Trafficking and Violence Protection Act of 2000, Sect. 112

*“Penalties for the crime of unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labour do “not apply to the conduct of a person who is or has been a victim of a severe form of trafficking in persons, [...] if that conduct is caused by, or incident to, that trafficking.”*

**Philippines**, Anti-Trafficking in Persons Act (RA No. 9208) of 2003, Sect. 17

*“Trafficked persons shall be recognized as victims of the act or acts of trafficking and as such shall not be penalized for crimes directly related to the acts of trafficking [...] or in obedience to the order made by the trafficker in relation thereto. In this regard, the consent of a trafficked person to the intended exploitation set forth in this Act shall be irrelevant.”*



# From non-punishment to non-prosecution

## Non-prosecution - legal basis

- **UN Resolution A/RES/55/67**

*13 - "Also invites Governments to consider preventing, within the legal framework and in accordance with national policies, victims of trafficking, in particular women and girls, from being prosecuted for their illegal entry or residence, taking into account that they are victims of exploitation";*

- **Directive 2011/36/EU**

This EU-directive elaborates on the Convention of Warsaw by introducing non-prosecution.

*Art. 8 - Non-prosecution or non-application of penalties to the victim "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."*

- **The Netherlands: The principle of opportunity, art. 167 section 2 Dutch CC**

The right of the Public Prosecutor to prosecute or to drop a case.

- **The Netherlands: Directive on trafficking in human beings (2013A012 )**

Starting point is prosecution. In cases where it is evident that the victims were forced to commit criminal offenses the options are, for instance, deciding not to prosecute or conviction without imposition of punishment.

## **Example non-prosecution: Amsterdam district court, ECLI:NL:RBAMS:2017:4871**

- The perpetrator/victim was a female prostitute.
- Together with her husband, she forced the victim into prostitution (7 days a week from March until October 2011).
- She was aware that the main suspect beat the victim.
- She threatened to send the victim back to the Hungarian mafia (victim had told her she was exploited by the Hungarian mafia before she arrived in Netherlands).

## **Example non-prosecution: Amsterdam district court, ECLI:NL:RBAMS:2017:4871**

- It was argued that double victimization should be prevented.
- It was argued, on the basis of Directive 2011/36/EU that victims of THB cannot be prosecuted when their criminal activities are a direct consequence of being subjected to THB.

# Obstacles

- **A new strategy for perpetrators:**  
perpetrators use minors, because minors can not be penalized.
- **Non-prosecution in other nations:**  
Some nations don't have the legal possibility to apply the non-prosecution provision, because the Public Prosecutor must prosecute a suspect of trafficking in human beings, also when he is a victim of trafficking in human beings.



# Effective cooperation between authorities in assisting and protecting victims

- Legal basis
- First contact
- Costs of victims' assistance
- Special victim protection
- Victim support services

# Legal Basis

## **Directive 2012/29/EU**

- Some important changes:
  - Referral of victims to victim support services.
  - Family members have access to victim support services.
  - Victims may receive translation, free of charge, on request.
  - Victims have a right to receive information from the first contact with a competent authority.
  - Victims have a right to receive certain information about the criminal proceedings, for example when the decision is made not to proceed or end an investigation.

## **The Netherlands: Directive on trafficking in human beings (2013A012)**

- Important topics:
  - The Public Prosecutor has to inform victims of all important decisions made in the criminal proceedings.
  - Right of victims to have a solicitor and/or interpreter.
  - Right of victims to examine the content of procedural documents and to receive information about the progress of the case.
  - Support of the Prosecutors Office in receiving tangible and intangible compensation.
  - Right to speak or give a written statement at the trial.
  - Information about the (conditional) release of the suspect/convict.

# First contact

## **The Netherlands: Directive on trafficking in human beings (2013A012 )**

- Informative talk ('intake') between victim and investigative authorities.
  - Victims receive information about criminal procedures and the investigative authorities receive information about the what/how/when/why etc.
  - Victims are informed about victim support services.
  - A transcript is made of this conversation. This transcript is however, in most cases, not part of the procedural documents.

Competent authorities can start an investigation without a decision of the victim whether to proceed.

## **The 'intake' can result in an official report of the crime.**

- The Netherlands: Directive on auditive and audiovisual registration of interrogations comes into force.
- Competent authorities can start an investigation without a decision of the victim whether to proceed.

# Special victim protection

## Foreigners:

- **The Netherlands: Directive on trafficking in human beings (2013A012)**
  - This directive contains special protection for victims who do not have the Dutch nationality.
  - B8/3 procedure

## Children (<18):

- **UN Convention on the Rights of the Child, art. 3.1:** "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration foreigners."
- 13 Oceans:
  - Victim support services, such as BNRM, CoMensha, the Ministry of Justice and Security, RvdK, LdH and Defence for Children worked close together with police and the Public Prosecutor throughout the proceedings.



Ministerie van Sociale Zaken en  
Werkgelegenheid

## Some authorities involved in the fight against THB

Some examples:



Ministerie van Veiligheid en Justitie

Gemeente ?



Police

ISZW

NIBUD

Fier



Immigratie- en Naturalisatiedienst  
Ministerie van Veiligheid en Justitie



Ministerie van Buitenlandse Zaken



Ministerie van Binnenlandse Zaken en  
Koninkrijksrelaties



Koninklijke Marechaussee



de Rechtspraak



comensha  
mensenhandel in beeld



Ministerie van Volksgezondheid,  
Welzijn en Sport

## **Statements:**

### **Statement 1.**

When can a victim of THB be qualified for the non-punishment principle and in which cases should a victim be punished?

### **Statement 2.**

Perpetrators use minors, because minors can not be penalized.  
In which way can this be discouraged?

### **Statement 3 (case).**

Three women from China were approached by a man. The man could smuggle them to the USA and promised the women that they would earn a lot of money. During a stopover at Schiphol, there was another woman with false passports. The woman provided the false passports to the women so they were able to continue the trip. Shortly after that, the women were arrested on suspicion of complicity of an attempt to possess a false passport.

Results of the interrogations

The three women had to pay a lot of money for the trip

They didn't know their final destination

They didn't know what kind of work they had to do in the USA

The man who organized the trip told them that they had to work 4 years for their return journey.

Attorney: the women were afraid for the criminal organization that arranged the trip. For that reason the three women didn't want to make a statement at the police.

At the hearing the attorney referred to the non-punishment principle.

**Question: What do you think? Can these three women be regarded as a victim or as a suspect?**



### **Statement 3 (outcome).**

The three women were convicted: 4 weeks of prison (two weeks were conditional)

Why?

The women didn't report to the police

No cooperation with the public prosecutor

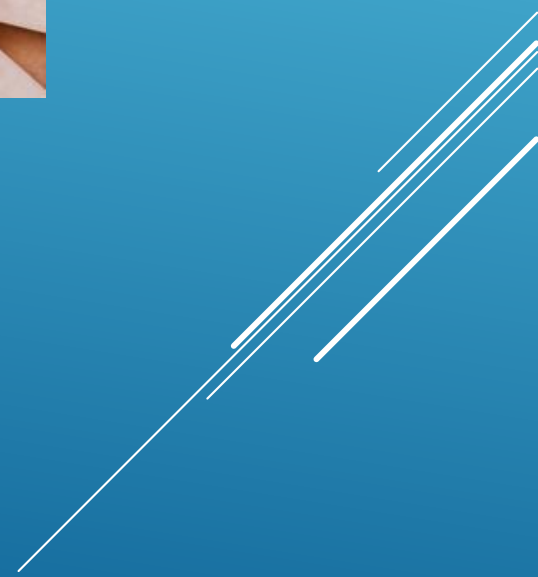
Result: They were not qualified as victims of trafficking in human beings, so the appeal on the non - punishment principle wasn't successful.

**Statement 4 (discussion).**

In what way are the principles of non-prosecution and non-punishment currently implemented in your country?



COMBINE FORCES AND  
KNOWLEDGE:





AWARENESS OF THE PUBLIC:

**QUESTIONS ?**

**Thank you for your attention !**

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