**Information provided by the Government of North Macedonia on the questions raised by the mandate of the Special Rapporteur on** **trafficking in persons, especially women and children**

In reply to the letter of the Special Rapporteur on trafficking in persons, especially women and children of 14 December 2020, the Government of North Macedonia provides the following information:

The definitions in the Criminal Code in Article 122, define the term "victim" in an extensive manner: A victim of a crime shall refer to any individual who has suffered damage, including physical or mental injuries, emotional suffering, material loss or other injury or threat of the basic freedoms and rights as a consequence of a committed crime. A child – victim of a crime shall refer to a juvenile, younger than the age of 18.

The notion of a victim, in the narrower meaning of "trafficked person", should be derived from the legal definition of incrimination and enforcement actions focused on the individual that the perpetrator intends to use as a means of exploitation.

The victims impunity clause is contained in Article 418 - a "Trafficking in human beings", paragraph “(7) The victim of human trafficking forced to commit a crime or any other punishable act in the period during which he/she was a victim and which is directly connected to his position of a victim, shall not be punished.”

The victims’ impunity clause applies regardless of the form of exploitation that was the target of human trafficking.

In order to avoid secondary victimization of the victim, the provisions of the 2018 Law on Foreigners apply, where Article 10 stipulates that when there are grounds for doubt that a foreigner or an unaccompanied child is a victim (THB), illegal country entrance is not considered. For all listed actions recognized under the Law as an illegal entry, foreigner that is THB is not taken responsible.

The Criminal Code also contains a provision on the impunity of a child victim of trafficking. Trafficking in children under Article 418-d paragraph (8) A child - victim of human trafficking shall not be punished in cases where the law foresees punishment of a child, when forced to commit a crime, if such action is a direct consequence of his position of a victim.

It is also important to clarify the term "violence against a child" in Article 122 paragraph (41), which means "psychological violence, internet violence, peer violence, as well as stalking." Clarifying this term gives a broader content of the term violence as an element of the action of child trafficking, and thus its victim. The child victim is explicitly protected from impunity with a special clause contained in the criminal act.

At the same time, the child victim has a special position and protection in accordance with the Law on Justice for Children, which prescribes special manners of actiоns to assist, support, care and protect the child victim, avoid secondary victimization and re-victimization. In any case, when established that the child has become a victim and has been trafficked in other forms of exploitation for the purpose of carrying out activities prohibited by law, it must be interpreted that such a situation constitutes a special ground for excluding criminality.

This victim impunity clause applies regardless of the form of exploitation that was the target of human trafficking. Its correct interpretation and implementation should be correlated with the provisions of extreme necessity prescribed in the Criminal Code, as a general ground for excluding illegality.

The provision on impunity, the application of which assumes existence of probability, ie doubt that an individual is a victim, does not imply its extension to criminal acts or other illegal actions conducted by individuals that do not have the status of a trafficked person.

It refers to the trafficked person, being in an extremely vulnerable situation and circumstances, and it is important to be underlined that this protection is available due to the potential victim status. Hence, the notion of a victim, as narrower meaning of "trafficked person", should be derived from the legal definition of this incrimination and actions focused on the person that the perpetrator intends to use as a means of exploitation.

The victim is not punished for the criminal act or other criminal offense he/ she commits as a victim of trafficking in a state of fear, threat, necessity or lack of other choice while being a victim, when it is directly related to her victim status: making or obtaining false documents, illegal crossing of the state border, activities related to its exploitation - prostitution, begging, illicit trade, etc.

Doubt is the first step and ground for undertaking certain actions and activities. Of particular importance is the functioning of the whole mechanism and the delimitation of the competencies of the individual bodies in that process. First, identifying the victim and determining the form of exploitation; and second, determination of victims participation in the commission of a criminal act or misdemeanour and the fulfilment of the conditions for victims impunity, resulting in not initiating a criminal or misdemeanour procedure, termination of proceedings or acquittal.

At the same time, the actions of the law enforcement agencies to provide shelter, help, support and protect the potential victim are not conditioned by the cooperation of the individual if he / she is later identified as a victim of human trafficking.

As victim is also considered an individual that has not yet been exploited and does not know that he/she will be exploited or that there is such an intention in relation to him/her (so, especially when it comes to cases of trafficking with fraud, promise, etc.)

In the police work and in the procedures led by the public prosecutors and judges (in criminal and misdemeanor courts) so far, there is no case of a potential or identified victim of human trafficking to be deprived of liberty, detained or punished (for crime or misdemeanor) for a certain illegal activity done under pressure in the period while being controlled or exploited by the trafficker.

Moreover, there are no cases of discrimination on any ground (gender, race, nationality, religion etc.) that would result into forced return to the country of origin, restriction of rights, lack of necessary help or support regardless if the victim cooperates or not with the competent state authorities.

The provisions for non-punishment of trafficking victims are derived by the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings, ratified by the Assembly of the Republic of North Macedonia[[1]](#footnote-1).

Furthermore, Directive 2011/36/EU of the European Parliament and of the Council of 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision of 2002, envisages provisions in this direction.[[2]](#footnote-2)

In that regard, the Organization for Security and Cooperation in Europe (OSCE) in its 2005 Action Plan to Combat Trafficking in Human Beings, recommended that the victims are not punished for crimes which are a direct consequence to their condition of being victims, as well as the GRETA Second report published in 2017 containing recommendations in correlation with Article 26 of the Convention.[[3]](#footnote-3)

In accordance with the aforementioned, in February 2020 well-known academic professors in North Macedonia drafted Guidelines for applying the principle of non-punishment to victims of human trafficking and child trafficking. The Guidelines were drafted in order to help the competent authorities and subjects that prosecute crimes of trafficking in humans and in children, to apply correctly the principle of non-punishment of victims. These Guidelines serve as a practical tool for authorities which detect, prosecute and punish these serious crimes, as well as for bodies and institutions competent for prevention, identification, help and support to victims and civil associations, so that they can recognize and identify the presumptions for non-punishment of victims. The Guidelines refer to the action of the relevant authorities and subjects upon the first suspicionthat perhaps in the specific case there is a potential victim of trafficking. The suspicion is a basis for undertaking certain activities that should occur prior to the formal identification of the person as trafficking victim and can be used for assessing the situation according to the indicators, coordinated interdisciplinary and intersectoral cooperation, the initial provision of safety for the person, their accommodation and proper health i.e. psychological assistance. The authorities’ action, for provision of safety, assistance, support and protection to the potential trafficking victim, is not conditioned by the cooperation of the person if it is later confirmed that the person is identified as a victim.

According to the national legislation there is a general ground for exclusion of illegality (extreme necessity), as well as a special ground for impunity for the criminal offenses of Trafficking in Human Beings and Trafficking in Children (Article 418-a, paragraph 7 and Article 418- d paragraph 8). It is necessary in each individual case to recognize and determine the special conditions for application of either the general or the special provision.

When applying the Principle of non-punishment of trafficking victims one must take into consideration the complex questions regarding the determining of a status of a victim and the linkage of crimes and illicit activities with that status, as well as the legal grounds for non-punishment set as material and legal, as well as process and legal assumptions for: excluding the action, excluding the illegality, excluding guilt or releasing from punishment. Determining whether those grounds exist throughout the process of identifying the victim affects the non-initiation of criminal proceedings, halting the proceedings, reaching releasing verdict or dismissing verdict or release from punishment. Non-punishment clause is directed towards full protection of trafficking victims from applying measures of process duress (deprivation of liberty, detention), initiating criminal proceedings, criminal file, imposing penalties etc.

In that regard, the explicit manner for protection of victims from prosecution included in the clause of non-punishment of the victim in the Criminal Code shall be applied, regardless of the form of exploitation which was the target of human trafficking.

Interpretation and applying is in correlation with the last resort stipulated in the Criminal Code, as general basis for excluding illegality–

Article 10 – Last resort in the Criminal Code:

„(1) The crime perpetrated as last resort shall not be deemed as a crime.

(2) Last resort shall mean when the crime is perpetrated in order for the perpetrator to remove from oneself or from another person simultaneous danger that could not be otherwise removed, and the perpetrated crime shall not be more serious than the threatening crime.

(3) The perpetrator who caused danger and crossed the lines of last resort out of negligence, can be punished with a milder punishment, and if the crossing of lines was done under particularly extenuating circumstances, the perpetrator can be released.

(4) There is no final resort if the perpetrator was bound to expose themselves to danger.“

Taken into consideration that crossing the lines of last resort does not exclude illegality of the victim’s crime, and thus the possibility for the victim’s punishment for the perpetrated crime, it shall be determined on a case by case basis (taking into consideration all the circumstances and the condition of the victim indicating significant limitation of the freedom of choice) if there are grounds for applying the non-punishment provision. As a rule, that provision shall be applied when the crime perpetrated by the victim, under the circumstances the victim determines, causes a crime which is not significantly more serious than the crime threatening to the victim.

As regards the applying of the non-punishment clause of a child victim, it shall be applied regardless of the fact whether the child cooperated with the trafficker, opposed, expressed disagreement or if there was no reaction at all.

The applying of the standard of non-punishment of the trafficking victim shall be done through a process that will include:

* Identifying the victim, determined by the form of trafficking, the act and the manner of committing the act (duress, threat, fraud etc.) and the objective of the misuse (prostitution, forced marriage etc.);
* Identifying the crime perpetrated by the victim and its linkage with the status of a victim;
* Identifying the grounds for non-punishment of the victim for the perpetrated crime: absolute power, duress, threat, fraud etc. through the size of the intensity of the acts on the status of the victim and the victim’s sensibility to them, through consequences as excluding free will and choice of behavior, fear, addiction etc.;
* Identifying crimes perpetrated by the victim for which it is not excluded that the victim may be punished and the forms of involvement – as a perpetrator or accomplice.

These clauses shall apply to foreign citizens as well (adults and children) in accordance with the 2018 Law on Foreigners, by consistently applying and adhering to the Standard operative procedures for treatment of trafficking victims.

There are several examples of incriminated actions that the person being the trafficking victim can undertake, for which actions the non-punishment clause provides protection:

Crimes:

* Forging personal documents, uses personal documents with false content,
* Crimes against property - theft, grand theft, burglary, stealing a motor vehicle, damaging other’s belongings, covering-up
* Violence, bodily injury, serious bodily injury or crimes that result into depriving a trafficker of life
* Unauthorized production and putting into circulation of narcotic drugs, psychotropic substances and precursors, unauthorized production, holding, mediation and trafficking in firearms or dispersing substances
* Taking abroad goods under temporary protection or cultural inheritance or natural rarities, entering illegally obtained goods under temporary protection or cultural inheritance or natural rarities, Trafficking in goods under temporary protection or cultural inheritance or natural rarities
* Illicit production or illicit trade

Misdemanours:

Against public peace and order

* prostitution in a public place
* begging
* gambling and other games of chance

Misdemeanors that can be imposed to a foreigner

* illegal entry
* deleting or changing data in the visa
* not leaving the country within the given deadline
* moving and residing in a certain area on which movement or residence of foreigners is forbidden
* staying in the country illegally

1. Article 26 of the Convention regulates the principle of non-punishment of victims of trafficking:“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 “. [↑](#footnote-ref-1)
2. Article 8 includes provisions as follows:“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.” [↑](#footnote-ref-2)
3. Namely, item 153 of the abovementioned document reads as follows:“GRETA requested the national authorities to undertake additional measures in order to ensure compliance with the principle of non-punishment of trafficking victims for their participation in illegal activities when being compelled to do so, as referred to in Article 26 of the Convention.” [↑](#footnote-ref-3)