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THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza , Presiding Judge
 Judge Piotr Hofmański Title
 Judge Solomy Balungi Bossa Title
 Judge Reine Alapini-Gansou Title
 Judge Gocha Lordkipanidze Title

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v. Dominic Ongwen

Public Document

Observations on the crimes of sexual slavery, enslavement and trafficking in persons, and on the grounds for excluding criminal responsibility: defences of duress, mental defect or disease and the non-punishment principle

Source: [UN Special Rapporteur on Trafficking in Persons, especially women and children]

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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1. The United Nations Special Rapporteur on trafficking in persons, especially women and children, (the Special Rapporteur), established pursuant to Human Rights Council resolution 44/4, has the honour to submit these observations in the case of the *Prosecutor v Dominic Ongwen*, pursuant to rule 103 of the Rules of Procedure and Evidence and the Decision of the Appeals Chamber delivered on January 20 2022. The observations are provided by the Special Rapporteur on a voluntary basis without prejudice to, and should not be considered as, a waiver, express or implied, of any privileges or immunities which the United Nations, its officials or experts on mission, pursuant to 1946 Convention on the Privileges and Immunities of the United Nations. Authorisation for the positions and views expressed by the Special Rapporteurs, in full accordance with their independence, was neither sought nor given by the United Nations, including the Human Rights Council or the Office of the High Commissioner for Human Rights, or any of the officials associated with those bodies.
2. In relation to the legal issues arising concerning sexual and gender-based crimes, these observations will focus specifically on the: (i) the legal interpretation of the crime of sexual slavery, and (ii) the standards applicable to assessing evidence of sexual violence. In relation to these issues, international law relating to trafficking in persons can usefully inform the legal interpretation of the crime of sexual slavery and assessment of evidence of sexual violence. Article 21 of the Rome Statute requires the Court to apply the "applicable law," which includes, "where appropriate, applicable treaties and the principles and rules of international law." These observations draw upon relevant international instruments and case-law on trafficking in persons in analysing the legal interpretation of the crime of sexual slavery including: *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, supplementing the United Nations Convention against Transnational Organized Crime* (the Palermo Protocol); ILO Forced Labour Convention, 1930 (No. 29); the Protocol of 2014 to the Forced Labour Convention (P029); and the Convention on the Rights of the Child and its Optional Protocols.¹
3. The Rome Statute explicitly states that trafficking can amount to an international crime in the form of enslavement,² and sexual slavery,³ as crimes against humanity, and/or sexual slavery as a war crime.⁴ In the context of an attack on a civilian population, or an armed conflict, the Statute expressly permits and foresees the prosecution of trafficking in persons. Article 7(2)(c) of the Statute states that: "[E]nslavement means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular

¹See also: Convention on the Rights of the Child (CRC); Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict; Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; International Covenant on Civil and Political Rights, (ICCPR) (Article 8); International Covenant on Economic Social and Cultural Rights (ICESCR) (Article 7); Convention against Torture (CAT) (Article 3); Convention on the Elimination of Racial Discrimination (CERD) (Article 5); and the Convention on the Elimination of All Forms of Discrimination Against Women (Article 6). Article 4 of the Universal Declaration of Human Rights prohibits slavery or servitude, and provides that slavery and the slave trade "shall be prohibited in all their forms."

² Article 7(1)(c).

³ Article 7(1)(g).

⁴ Articles 8 (2)(b)(xxii) and 8(2)(e)(vi).

women and children.”⁵ The Elements of Crimes provides that the crime against humanity of enslavement includes the following element: “The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them *a similar deprivation of liberty*.”⁶ (emphasis added) An explanatory footnote provides:

“It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. *It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.*”⁷ (emphasis added)

The same explanatory footnote is included in the Elements of the Crimes of sexual slavery as a crime against humanity,⁸ and sexual slavery as a war crime, both in international armed conflict,⁹ and in non-international armed conflict.¹⁰ Despite the explicit references to trafficking in the Statute and the Elements of Crimes, there has been limited attention to international law on trafficking in persons by the Court or in other international courts and tribunals.¹¹ In a report submitted in 1998 to the UN Sub-Commission on Human Rights, the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime stated that “sexual slavery is slavery and its prohibition is a *jus cogens* norm”.¹² In the case of *Prosecutor v. Kunarac, Vukovic and Kovac*, 12 June 2002, the International Criminal Tribunal for the Former Yugoslavia observed at para 117:

“...the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as ‘ chattel slavery ’ has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership [...] there is some destruction of the juridical personality; the destruction is greater in the case of ‘ chattel slavery ’ but the difference is one of degree ...”¹³

Expanding on the scope and character of the crime of enslavement, the Tribunal concluded at para 119: “[...] ... the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement [including] the ‘ control of someone’s movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour ’. Consequently, it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea ...”¹⁴

⁵ Article 7(2)(c).

⁶ Elements of Crimes, Official Records of the Review Conference of the Rome Statute of the International Criminal Court, Kampala, 31 May -11 June 2010 (International Criminal Court publication, RC/11), p.6.

⁷ *Id.*, fn.11.

⁸ *Id.*, p.8, fn.18.

⁹ *Id.*, p.28, fn.53.

¹⁰ *Id.*, p.37, fn.66.

¹¹ See P. Bradfield *International Criminal Accountability for Trafficking in Persons* (Irish Centre for Human Rights: Policy Brief) (2020), available at:

<https://www.nuigalway.ie/media/irishcentreforhumanrights/files/ugandaproject/Policy-Paper---International-Criminal-Accountability-for-Trafficking-in-Persons.pdf>

¹² UN Sub-Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Final report (cited in Vol. II, Ch. 32, § 1885, ICRC, Customary IHL Database).

¹³ *Prosecutor v. Kunarac* (Judgement) IT-96-23 and IT-96-23/1-A (12 June 2002) para 117.

¹⁴ *Ibid.* para 119.

4. The prevalence of trafficking in persons during armed conflict has been highlighted in Reports of the Special Rapporteur on Trafficking in Persons, especially women and children.¹⁵ Specifically it is noted that: “the general breakdown of the rule of law and political, economic and social structures, including community protection systems, higher levels of violence and increased militarism, as well as the lack of access to safe and legal migratory routes, foster conditions in which trafficking flourishes, including after hostilities have ceased.”¹⁶ Further the Special Rapporteur has highlighted that: “The trafficking of women and girls for sexual exploitation, including sexual slavery, forced marriage, forced prostitution and forced pregnancy, features within the broader picture of sexual violence perpetrated against the civilian population during and in the wake of conflicts.”¹⁷
5. The Special Rapporteur has highlighted the many subtle forms of coercion that occur in a trafficking context. Beyond instances of overt coercion or force (such as kidnapping), it is important to recognize that more subtle ‘means’ may be used to traffic persons, including abuse of a position of vulnerability.¹⁸ In *Rantsev v. Cyprus and Russia*, the European Court of Human Rights affirmed the status of the prohibition of trafficking in human beings within the *ordre public* of the European Convention on Human Rights (ECHR). In an oft-cited statement, the Court concluded that the prohibition of trafficking falls within the non-derogable norm stated in Article 4 ECHR:

“There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes “slavery”, “servitude” or “forced and compulsory labour”. Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.”¹⁹

The Council of Europe Convention on Action against Trafficking in Human Beings (COE Convention), expands on the international legal obligations on States Parties to combat trafficking.²⁰ The Explanatory Report states:

“Trafficking in human beings, with the entrapment of its victims, is the modern form of the old worldwide slave trade. [...] Most identified victims of trafficking are women but men also are

¹⁵ *Report of the Special Rapporteur on trafficking in persons, especially women and children, on the gender dimension of trafficking in persons in conflict and post-conflict settings and the importance of integrating a human rights-based approach to trafficking in persons into the women and peace and security agenda of the Security Council* (17 July 2018) A/73/171; *Report of the Special Rapporteur on trafficking in persons, especially women and children, on trafficking in persons in conflict and post-conflict situations: protecting victims of trafficking and people at risk of trafficking, especially women and children* (5 August 2016) A/71/303; *Report of the Special Rapporteur on trafficking in persons, especially women and children, on the intersections of trafficking and terrorism* (3 August 2021) A/76/263.

¹⁶ Report of the Special Rapporteur on trafficking in persons, especially women and children, UN Doc. A/73/171, 17 July 2018, para.5.

¹⁷ Report of the Special Rapporteur on trafficking in persons, especially women and children, UN Doc A/71/303 (5 August 2016) para.33

¹⁸ Report of the Special Rapporteur on trafficking in persons, especially women and children, UN Doc A/76/263, (3 August 2021) para.38

¹⁹ *Rantsev v. Cyprus and Russia* App no 25965/04 (Judgment of 7 January 2010) para 282.

²⁰ CETS No 197

sometimes victims of trafficking in human beings. Furthermore, many of the victims are young, sometimes children.”²¹

The President of the UN Security Council (UNSC) has also noted that trafficking in armed conflict contexts is linked to other forms of exploitation, such as sexual violence and forced criminality.²² In Security Council Resolution 2388, it was recognised, “that certain acts or offences associated with trafficking in persons in the context of armed conflict may constitute war crimes.”²³ In Resolution 2331, the UNSC condemned, “trafficking in persons and violations and other abuses committed by Boko Haram, Al-Shabaab, the Lord’s Resistance Army, and other terrorist or armed groups for the purpose of sexual slavery, sexual exploitation, and forced labour.”²⁴ The UNSC also highlighted the vulnerability of children and unaccompanied minors to abduction and trafficking during armed conflict, calling on states to hold perpetrators accountable for violations of international law.²⁵

6. The characterisation by the Trial Chamber in this case, of criminal conduct of sexual slavery as a more “specific form” of enslavement, and its finding that enslavement, “is in the abstract entirely encompassed within sexual slavery,” does not recognise the distinct though related crimes, and the potentially wider definition of the crime of enslavement, not entirely encompassed within sexual slavery, as such. Sexual slavery may also be a component or form of enslavement, and an indication or essential element of enslavement. Enslavement, as such, is not limited to forced labour or services, or other forms of exploitation. In specifically listing both the crimes of sexual slavery and enslavement in the Rome Statute, the drafters of the Statute reflected a concern to ensure greater attention to the gender dimension of international crimes, including through recognising that sexual slavery is, “a prevalent contemporary crime warranting express recognition.”²⁶ Separately listing the crime of sexual slavery also highlights the conceptual distinction between it and other forms of enslavement, which not excluding its recognition as a form of, or indicator, of the crime of enslavement, and as frequently intricately linked to the context of enslavement. In *Kunarac et al.*, the ICTY stated that: “The setting out of the violations in separate subparagraphs of the ICC Statute is not to be interpreted as meaning, for example, that sexual slavery is not [...] enslavement. This separation is to be explained by the fact that the sexual violence violations were considered best to be grouped together.”²⁷
7. Sexual exploitation is not defined as such in the Palermo Protocol, and is deliberately left open so as to include a range of forms of exploitation. While the Palermo Protocol draws a distinction between exploitation for forced labour or services and sexual exploitation, since the coming into force of ILO Convention No. 29, the ILO Committee of Experts has treated trafficking for the purpose of commercial sexual exploitation as one of the forms of forced labour.²⁸ The Convention on the Rights of the Child

²¹Council of Europe, “Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings” (2005), at para 3

²² Statement by the President of the Security Council, UN Doc. S/PRST/2015/25, 16 December 2015, p.1.

²³ UNSC Resolution 2388, UN Doc. S/RES/2388, 21 November 2017, p.2.

²⁴ UNSC Resolution 2331, UN Doc. S/RES/2331, 20 December 2016, para.11.

²⁵ UNSC Resolution 2388, para.19.

²⁶ See: Valerie Oosterveld, ‘Sexual Slavery and the International Criminal Court: Advancing International Law’, 25 Mich. Int’l L.J., p. 625

²⁷ *Kunarac et al.* supra n.13, para. 541.

²⁸ UNODC *Model Law against Trafficking in Persons* (2020) at p.14

identifies the following practices as “sexual exploitation of children”: (a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials.²⁹

8. According to the Special Representative of the Secretary-General for Children and Armed Conflict: “[...] the recruitment and use of children nearly always constitutes trafficking. The action (recruitment) and purpose (exploitation) are intrinsic elements of the grave violation.”³⁰ It should be noted, that the consent of a victim is irrelevant for the existence of the crime of trafficking in persons, where any of the means listed in the definition of trafficking are established.³¹ In relation to child victims, it is not necessary to establish means. The act and purpose of exploitation, are sufficient.³² A child is defined in the Palermo Protocol as “any person under eighteen years of age.”³³ As such, the recruitment and use of children for varying purposes of exploitation, including sexual slavery, forced marriage, forced labour, forced pregnancy and forced criminality, can be characterised as coming within the scope of the crime of trafficking.
9. On the assessment of evidence in relation to sexual and gender based crimes, and specifically crimes of sexual slavery or trafficking in persons, it is important to note that inconsistencies in victim testimony may arise from a wide range of reasons, including “lapses in memory, confusion about the chain of events or traumatic reactions.”³⁴ In addition, victims may fear reprisals against them or their families. A lack of trust may also hinder the disclosure of experiences of sexual slavery and trafficking. As such, it is essential that the Court recognises the impact of trauma in assessing victim testimony. The Grand Chamber of the European Court of Human Rights in a case involving trafficking for purposes of sexual exploitation, *S.M. v. Croatia*, noted that “an excessive burden is placed on victims both before and during criminal proceedings”.³⁵ The Court concluded that there may be different reasons why victims of human trafficking and different forms of sexual abuse may be reluctant to cooperate with the authorities and to disclose all the details of the case. Moreover, they said, “the possible impact of psychological trauma must be taken into account. There is thus a risk of overreliance on the victim’s testimony alone, which leads to the necessity to clarify and – if appropriate – support the victim’s statement with other evidence.”³⁶ This necessity and the risks of retraumatisation of victims is well recognised in the context of international criminal law, and specifically in relation to crimes of sexual

²⁹ Article 34 CRC

³⁰ Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict A/HRC/37/47 (2018) para. 16.

³¹ Article 3(b) of the Palermo Protocol.

³² Id. Article 3(c)

³³ Id. Article 3(d)

³⁴ UNODC (2017) *Evidential Issues in Trafficking in Persons cases* p.21

³⁵ *S.M. v. Croatia* (Application no. 60561/14) Judgment of 25 June 2020, Grand Chamber, Joint Concurring Opinion of Judges O’Leary and Ravarini

³⁶ Id. at para.344, see also see paragraphs 138, 171, 206 and 260.

slavery, enslavement. As such, it is appropriate that measures are taken to support victims and witnesses in participation in legal proceedings.³⁷

Grounds for Excluding Criminal Responsibility: Article 31 (d)

10. The principle of non punishment of victims of trafficking is raised by the Defence in this Appeal, on behalf of Mr Dominic Ongwen. It should be noted that the principle of non-punishment is essential to the object and purpose of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the Palermo Protocol), to protect and assist victims of trafficking, “with full respect for their human rights.”³⁸ It is set out in the Principles and Guidelines for Human Rights and Human Trafficking (“OHCHR Principles”): Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.”³⁹ The non-punishment principle is essential to the protections provided by Article 5 of the African Charter on Human and Peoples Rights.⁴⁰
11. The Security Council has repeatedly called on states not to penalise or stigmatise victims of trafficking “for their involvement in any unlawful activities”.⁴¹ The Special Representative of the Secretary General on Children and Armed Conflict has highlighted states’ legal obligations not to ‘doubly victimise’ children who have been “abducted, recruited, used and exposed to violence at an early age,” and to ensure that, “all children associated with parties to conflict and encountered in security operations should be treated primarily as victims rather than as security threats.”⁴² In its resolution 2427 (2018), applicable to the treatment of children associated or allegedly associated with all non-State armed groups, including those who commit acts of terrorism, the Security Council called for the establishment of standard operating procedures to ensure their timely handover to civilian child protection actors. Reiterating the focus on child protection, the Security Council called upon Member States to consider non-judicial measures that were focused on the rehabilitation and reintegration of children as alternatives to prosecution and detention and called for the application of due process for all children detained for association with armed forces and armed groups.

³⁷ See: Bradfield, P. (2019). Preserving Vulnerable Evidence at the International Criminal Court – the Article 56 Milestone in Ongwen, *International Criminal Law Review*, 19(3), 373-411.

³⁸ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319, Article 2(b).

³⁹ Office of the High Commissioner for Human Rights (OHCHR), ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’ (2002) Guideline 5.5 provides that States should guarantee “that traffickers are and will remain the focus of antitrafficking strategies and that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed as a consequence of their situation.”

⁴⁰OAU, African Charter on Human and Peoples Rights (adopted 28 June 1981, entered into force 21 October 1986) OAU Doc CAB/LEG/67/3 rev 5, Article 5.

⁴¹UNSC Res 2331 (2016).

⁴²Office of the Special Representative of the Secretary-General on Violence against Children, “Protecting children affected by armed violence in the community” (New York, United Nations, 2016),p.19

12. In the OHCHR Principles and Guidelines for Human Rights and Human Trafficking, it is recommended that children who are victims of trafficking are not subject to criminal procedures or sanctions for offences related to their situation as trafficked persons. Similarly, in its recommendations, OSCE provides that the non-punishment principle applies when the offence committed by the child was “related to the trafficking”, with no other compulsion test required. Once the relation between the offence committed and a child’s status as presumed or identified trafficking victim is established, that is a “necessary and sufficient ground to discontinue the proceedings.”⁴³ The African Committee of Experts on the Rights and Welfare of the Child has repeatedly called on States to ensure that children trafficked for the purposes of forced criminality are treated as victims and not criminalised.⁴⁴ Child trafficking is closely linked to the six grave violations affecting children in situations of armed conflict. In such situations, the recruitment and use of children nearly always constitutes trafficking, in the light of the presence of the two required elements, namely, the action (e.g., recruitment or abduction) and the purpose (exploitation). Articles 38 and 39 of the Convention on the Rights of the Child are of particular relevance to children affected by armed conflict and to children who are victims of any form of exploitation, as is the Optional Protocol to the Convention on the involvement of children in armed conflict.
13. The non-punishment principle applies to criminal offences, “regardless of the gravity or seriousness of the offence committed.”⁴⁵ The Council of Europe Group of Experts on Action against Trafficking (GRETA) has repeatedly recommended that the non-punishment principle should be applied to all offences that victims of trafficking were compelled to commit, and has recommended the removal of exceptions.⁴⁶ According to the OSCE Recommendations, “the duty of non-punishment applies to any offence so long as the necessary link with trafficking is established.”⁴⁷
14. To ensure compliance with the principle of non-punishment, in the absence of a specific legal provision on non-punishment, the Special Rapporteur has recommended that defences of duress and necessity should be interpreted as general clauses of exemption of liability, and should be interpreted so as to take account of the specific context of trafficking recognizing, “the many subtle forms of coercion experienced by victims of trafficking, including abuse of a position of vulnerability and all the means set out in the definition of trafficking.”⁴⁸ A fundamental element of the non-punishment principle relates

⁴³OSCE, ‘Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking’ (2013), para 41

⁴⁴See eg, ‘Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Initial Report of the Republic of Angola on the Status of The Implementation of the African Charter on the Rights and Welfare of the Child’ (06-16 December 2017).

⁴⁵Report of the Special Rapporteur on Trafficking in Persons, especially women and children *On the Implementation of the Non-Punishment Principle* A/HRC/47/34, (17 May 2021) para 37

⁴⁶GRETA, ‘Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom’ GRETA(2016)21, para 291; ‘Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Denmark’ GRETA(2016)7, paras 164-5; ‘Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Armenia’ (2017)

⁴⁷OSCE, ‘Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking’ (2013) para 57.

⁴⁸ Supra n45, para. 67

to the standard and criterion linking the commission of the offence to the trafficked person's subjection to trafficking, specifically whether it is understood as a causation link, or a duress defence. The OHCHR Principles and the ASEAN Convention against Trafficking in Persons, especially women and children, refer to an offence being committed as a "direct consequence" of the trafficked persons' subjection to trafficking, or to an offence "directly related" to the trafficking situation.⁴⁹ In contrast, the Council of Europe Convention on Action against Trafficking in Human Rights (the COE Convention), the EU Anti-Trafficking Directive,⁵⁰ and the ILO Forced Labour Protocol specifically refer to a victim of trafficking being "compelled to" commit an offence. The Explanatory Report to the COE Convention provides: "the requirement that victims have been compelled to be involved in unlawful activities shall be understood as comprising, at a minimum, victims that have been subject to any of the illicit means referred to in [the definition of trafficking] when such involvement results from compulsion."⁵¹ The OSCE Recommendations provide: "being 'compelled' to commit a crime ... includes the full array of factual circumstances in which victims of trafficking act without autonomy because traffickers exercise control over them."⁵² Resolution 10/3 of the Conference of the Parties UNTOC (2020) applies the test of 'direct consequence of being trafficked.'⁵³

15. The Explanatory Report to the COE Convention provides: "the requirement that victims have been compelled to be involved in unlawful activities shall be understood as comprising, at a minimum, victims that have been subject to any of the illicit means referred to in [the definition of trafficking] when such involvement results from compulsion."⁵⁴ In its Model Legislative Provisions against Trafficking in Persons (2020), UNODC states that: "[...] so called "duress-based" defences (e.g., cases where the victim has been compelled to commit crimes) should not be interpreted as requiring the same evidence as the traditional defence of duress. Compulsion should be understood broadly to include the various means used by traffickers."⁵⁵ In *V.C.L. and A.N. v U.K.*, the European Court of Human Rights, specifically addressed the compulsion test, citing, the comments of the Court of Appeal in *R. v. M(L) [2010] EWCA Crim 2327*, on the requirements of Article 26 of the COE Convention: "What it says is no more, but no less, than that careful consideration must be given to whether public policy calls for a prosecution and punishment when the defendant is a trafficked victim and the crime has been committed when he or she was in some manner compelled (*in the broad sense*) to commit it."⁵⁶ (emphasis added)

⁴⁹ Article 14(7).

⁵⁰ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims

⁵¹ 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' (2005) para 273.

⁵² OSCE Recommendations *supra* n.47 para 12

⁵³ Conference of the Parties to the United Nations Convention against Transnational Organized Crime, resolution 10/3, entitled "Effective implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against transnational Organized Crime", para.26(g)

⁵⁴ *Supra* n. 51 para. 273.

⁵⁵ United Nations Office on Drugs and Crime (UNODC) Model Legislative Provisions against Trafficking in Persons (UNODC, 2020), p.47.

⁵⁶ *V.C.L. and A.N. v. United Kingdom*, (applications No. 74603/12 and No. 77587/12), Judgment of 16 February 2021 at para. 79.

16. The Report of the Special Rapporteur on Trafficking in Persons, especially women and children, on the *Implementation of the Non-Punishment Principle*, states that:

“[...] it is important to ensure that the non-punishment principle may be applied wherever any of the means in the trafficking definition exist. The causation criterion has the merit of highlighting that the offence committed by a trafficked person may arise as a result of their lack of independence or ability to exercise free will. Given the risk of continuing psychological and physical abuse, which may not give rise to an immediate risk of harm, a causation requirement should be interpreted broadly and the complex impact of the trauma endured taken into account.”

Grounds for Excluding Criminal Responsibility: Art.31 (a)

17. The intersection of disability and trafficking in persons is an area that has been neglected in law and practice. The Committee on the Rights of Persons with Disabilities (CRPD) has highlighted the impact of discrimination and lack of procedural and reasonable accommodations, on access to justice and to remedies for persons with disabilities.⁵⁷ In her Report on the Implementation of the Non-Punishment Principle, the Special Rapporteur states: “States are required to ensure non-discrimination and disability inclusion in all anti-trafficking measures, including in ensuring non-punishment of trafficked persons with disabilities. This requirement is particularly urgent where persons with disabilities may be at heightened risk of exploitation, including for the purpose of forced criminality.”⁵⁸



[Siobhán Mullally, UN Special Rapporteur on Trafficking in Persons, especially women and children
on behalf of

Dated this 21 January 2022, Galway, Ireland

At [place, country]

⁵⁷See Article 13, (Access to Justice) CRPD. See also: Statement of Special Rapporteur on Trafficking in Persons, especially women and children to the 24th session of the Committee on the Rights of Persons with Disabilities (8 March 2021).

⁵⁸ *Supra.* n 45, para.27