

The trafficking-terror nexus and application of the non-punishment principle

Submission to the U.N. Special Rapporteur on
trafficking in persons, especially women and children

by

Prof. Jayne Huckerby, Clinical Professor of Law, Duke University School of Law

February 2021

1. A number of examples indicate terrorist groups' use of trafficking. These include reports of Boko Haram's use of child beggars for fundraising; forced marriages in Timbuktu, Mali by Ansar Dine and Al Qaeda in the Islamic Maghreb; forced marriages of females abducted by Boko Haram involving sexual exploitation; kidnapping of Eritrean migrants in Libya by ISIL for sexual exploitation, including in forced marriage; and trafficking of Yazidi women and girls by ISIS for sexual exploitation and slavery.
2. One of the most complicated aspects of exploring the human trafficking and terrorism nexus is understanding when persons linked to terrorist groups might be trafficked. This submission briefly addresses how the non-punishment principle applies when ISIS foreign recruits are themselves trafficked. It argues that in practice many aspects of States' responses to those trafficked to ISIS are antithetical to the non-punishment principle, resulting in a form of double punishment—both criminalization and other sanctions against trafficking victims and imposition of sanctions that on their own terms are also often independently not human rights-compliant.
3. To detect trafficking in situations of recruitment or otherwise unlawful association with ISIS, it is important to recall that trafficking can occur through an exploitative process or when an exploitative situation results or is maintained without a preceding exploitative process. Depending on the facts, for example, there might be an exploitative process if individuals from Central Asia were falsey promised jobs that then led to involuntary recruitment to ISIS. Or if women who traveled to Syria were genuinely deceived about conditions in ISIS-controlled territories. And because trafficking can occur due to changed circumstances, if women linked to ISIS originally freely agreed to a marriage that instead became "domestic servitude or sexual slavery" this might change voluntary travel to an involuntary stay. Children too are often targeted by terrorist and violent extremist groups such as ISIS in circumstances that can meet the definition of child trafficking when there is an "act" (e.g., recruitment or transportation) with the specific intent or "purpose" to exploit.
4. Investigating whether a case is one of human trafficking before sanctioning individuals for alleged crimes of terrorism is consequential. In particular, if the person is a trafficking victim the principle of non-punishment would apply, meaning that they should "not be held liable under criminal, civil or administrative laws" for unlawful activities that are either a direct consequence of (for adult victims) or "related to" (for child victims) having been trafficked. Indeed, the U.N. Security Council has explicitly noted that trafficking victims should be "treated as victims of crime and in line with domestic legislation, not penalized or stigmatized for their involvement in any unlawful activities."

5. This non-punishment principle as guaranteed by international, regional, and domestic law exists alongside a host of other human rights guarantees for trafficked persons. These human rights obligations, including the non-punishment principle, apply to those individuals within a State's jurisdiction, including extraterritorially (e.g., citizens of a country who are abroad in connection with ISIS). This guarantee of non-punishment should apply "regardless of the gravity or seriousness of the offence committed." For child trafficking victims, a human rights-based approach requires that their involvement in "criminal activities shall not undermine their status as both a child and a victim, or their related rights to special protection."
6. As an initial matter, the non-punishment principle relies on States' identifying trafficked persons. However, policies of not proactively repatriating citizens who have traveled abroad to proscribed groups such as ISIS, as well as denial of consular protection or assistance to those alleged to be linked to ISIS necessarily frustrate the identification of trafficked persons. In turn this undermines the non-punishment guarantee that hinges on States having mechanisms in place to recognize persons as having been subjected to trafficking.
7. In assessing States' responses to those linked to ISIS, it is also important to recall that the offences that are covered by the non-punishment principle include criminal, civil, administrative, and immigration ones. And also, that the range of penalties that States are not allowed to impose is similarly wide, including criminal as well as non-criminal sanctions. As such, the following penalties toward those who have committed terrorism-related offences in connection with being trafficked implicate the non-punishment guarantee:
 - a. Denial of refugee status or other immigration relief on the basis that a trafficked person has provided material support to terrorism.
 - b. Citizenship stripping of those alleged to be linked to ISIS.
 - c. Termination of social welfare benefits for those linked to ISIS.
 - d. Other expansive administrative measures, including imposing travel bans, confiscation of travel documents, and blocking entry into, or transit through, countries.
 - e. Child removal proceedings because of a parent's coerced travel to Syria or Iraq and/or involuntary continued stay in terrorist-controlled areas.
 - f. Restrictions on movement, arrest, detention or other undue restrictions on the liberty of those suspected to be linked to ISIS, including non-repatriation and "the continued detention, on unclear grounds, of women and children" in the Al Hol and Roj camps in northeast Syria.
 - g. Conviction for participating in a terrorist act, or facilitating or funding terrorism, including *in absentia*.
8. The integrity of the non-punishment principle is further undermined by the fact that the penalties described above are often imposed without a proper and/or complete process for determining whether the trafficked individual has actually been involved in an unlawful terrorism-related activity. Rarely too are gender and/or age considerations fully factored into assessments of culpability. The result is that criminalization and other adverse sanctions are imposed against trafficked persons even in those circumstances when there is a lack of credible evidence of unlawful activity; this indelibly weakens the protections of the non-punishment guarantee.

9. In practice, States can also fail to analyze the link between a victim's actual involvement in unlawful activity and their status as a trafficked person. Determining whether an unlawful act is compelled is a complex, fact-specific inquiry. It includes examining the absence of "the possibility to act with free will; not only under the threat of physical violence or emotional abuse, but also in the devastatingly prevalent scenarios wherein traffickers exploit victims by abuse of a position of vulnerability." In the case of foreign ISIS recruits, an array of States' responses—from refusal to proactively repatriate to citizenship stripping—circumvent this complex fact-specific inquiry that would include, for example, in-depth interviewing of trafficked persons. Often this causality analysis is also sidelined at an early stage when some States refuse to even consider in the first instance whether individuals linked to groups such as ISIS are also trafficked persons.
10. In the case of reintegration, the recognition—via the non-punishment principle—that a trafficked person associated with ISIS is at once a victim as well as a potential perpetrator can help in designing and implementing a more effective plan for their rehabilitation and recovery. Indeed, the U.N. Security Council has emphasized that women and children associated with "foreign terrorist fighters" require a "special focus when developing tailored prosecution, rehabilitation and reintegration strategies," including assisting those who "may be victims of terrorism, and to do so taking into account gender and age sensitivities." Conversely, according to the U.N. Office on Drugs and Crime, "[t]he consequences of labelling children as 'terrorists' when they come in contact with the justice system are particularly serious. Such labelling encourages reliance on punitive approaches and increases the risk of secondary victimization . . ."
11. In sum, States' responses to those foreign ISIS recruits who are themselves trafficked routinely undermine the non-punishment principle because such policies in practice mean that: individuals are not identified as trafficked persons; there is failure to individually scrutinize whether trafficked persons are involved in unlawful activity; and/or there is insufficient analysis of the links between the purported unlawful activity and subjection to trafficking in persons to determine the specific application of the non-punishment principle in individual cases. This results in denying the human rights of those who are at once victims of terrorism and trafficking, including rights linked to their rehabilitation and recovery.