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Italian Supreme Court (Court of Cassation), VI Criminal Section  
Judgment of 16 November 2023 - 18 January 2024 (dep.), no. 2319

*Protecting the vulnerable offender:  
the non-punishment of the victim of trafficking  
within the Italian penal system*

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**Keywords**

*Non Punishment/Non Prosecution of Victims of Trafficking – Duress – Necessity (Art. 54 Criminal Code)*

**Abstract**

*The decision under comment tackles the issue of the non-punishability of the victim of trafficking (VoT) for a crime related to her condition. To establish the exemption from punishment, the Court emphasizes the victim's vulnerable position, interpreting art. 54 of the Italian Criminal Code (necessity/duress) accordingly. In this way, the Court sets out a convincing path to be followed in order to secure the non-punishment of VoTs at the domestic level. The decision thus marks a significant step towards fully compliance with the obligation to protect VoTs, especially as ultimately articulated by the ECtHR.*

*However, specific legislative mechanisms on non-prosecution/non-punishment remain necessary to averting the risk of further victimizing VoTs through criminal proceedings.*

## **A. FACTS and JUDGMENT**

### **1. Facts**

The case before the Supreme Court concerns a Nigerian woman convicted of a crime committed under conditions of socio-economic vulnerability linked to her *status* of trafficked victim. Recruited at the age of 18 by a Nigerian criminal organisation to work as a babysitter in Italy, she later embarked on a journey through Libya. During the trip, she suffered various forms of violence, including sexual abuse. Once in Italy, where she didn't know the language, she was forced into prostitution to repay the debt she had incurred for the trip, under the threat of retaliation against her grandmother. Finally, in an attempt to escape sexual exploitation, she accepted an offer of employment within a criminal group, whose leader knew of her material need and her urgent need for money, to work as a drug courier (p. 14).

After being identified as a victim of trafficking (hereafter VoT) and recognized as beneficiary of humanitarian protection (under art. 18 [d.lgs. 286/1998](#)), she was convicted of illicit drugs transportation. In her appeal to the Supreme Court, she argues that the judge of the lower court failed to recognize that her criminal behaviour was covered by the non-punishment clause for victims of trafficking. Notably, she contends that it failed to apply art. 54 of the Italian Criminal Code (which includes the defenses of necessity and duress - hereby: art. 54 c.p.) thereby violating art. 117 of the Italian Constitution, art. 8 of the [directive 2011/36/EU](#), and art. 4 and 8 of the European Convention on Human Rights (ECHR).

### **2. Judgment**

#### **2.1 The International sources of the non-punishment clause**

The Supreme Court's decision starts from a comprehensive analysis of the European and International legal framework surrounding the protection of VoTs. Central to this analysis is the non-punishment clause, which addresses illicit activities that victims are forced to engage in due to the «abuse of their position of vulnerability or of any other situation where the person has no real and acceptable alternative to submission» (p. 10).

Among the legal sources referenced, the Court places particular emphasis on the [CoE Anti-Trafficking Convention of 2005](#) and the [directive 2011/36/EU](#). The former sets forth the principle of identification of the VoT (art. 10) and requires each Party to implement

mechanisms, in line with the fundamental principles of its national legal system, that exempt VoTs from criminal sanctions for the illegal activities they were compelled to commit (art. 26). The latter explicitly mandate Member States to provide for non-punishment/non-prosecution mechanisms in relation to crimes committed as a direct consequence of being victim of trafficking (art. 8).

In addition, the Court reminds that the ECtHR has recognized that trafficking in human beings falls within the scope of Article 4 of the European Convention (ECtHR, [Rantsev v. Cyprus and Russia](#)). Moreover, the Court emphasizes that the ECtHR has recently acknowledged an operational link between article 4 ECHR and the non-punishment clause set forth in art. 26 of the CoE Anti-Trafficking Convention (ECtHR, [V.C.L. and A.N. v. UK](#), [commented in this blog](#)).

The Court thus acknowledges the existence of an international «principle of non-punishment of trafficking victims who commit crimes by reason of their position». It further clarifies that this principle is based on the fact that «victims of trafficking are frequently involved in unlawful activities precisely because of the pressure, including economic pressure, resulting from the serious violation of their human rights, which amounts at excluding any form of an autonomous decision-making capacity given the blackmailing power to which they are subjected» (p. 10). Additionally, the Court specifies that the offences covered by this principle can be categorised into three groups: irregular migration-related crimes, crimes from which the trafficker takes economic advantage (such as sexual exploitation or drug trafficking), and crimes committed to escape the exploitation, also in cases where exploitation is caused by a third person.

## ***2.2 Recognizing the non-punishment clause at the national level***

In the absence of specific legislative provisions exempting victims from punishment, the Court agrees with the complaint, identifying art. 54 c.p. as the domestic legal foundation for applying the principle of non-punishment to VoTs. This article states that a person shall not be punished when compelled to commit the illicit act by the necessity of saving themselves or others from the imminent danger of serious bodily harm. Such a danger must be not voluntarily caused, nor otherwise avoidable, and the act must be proportionate to the danger.

Subsequently, the Court underscores the need of interpreting art. 54 c.p. in line with «international obligations and their underlying *rationale*». These obligations include safeguarding Vots' human rights, preventing secondary victimization through criminal proceedings, and shielding the State from liability for interpretations that could violate Articles 10, 11, and 117 of the Italian Constitution (p. 12).

Moreover, the Court clarifies that in this context, the position of vulnerability should be understood as the condition where «the person (...) has no real or acceptable alternative but to submit to the abuse involved» (article 2.2 of the Directive 2011/36). It then establishes the following principle: «the defenses under art. 54 c.p. may be invoked by a vulnerable individual recognized as a victim of trafficking (VoT), who, under coercion by a criminal organization, is compelled to engage in illegal drug transportation, with no realistic possibility of escape or recourse to public authorities».

Building on these interpretative premises, the Court holds that the lower judge failed to adequately consider the defendant's position of vulnerability when applying art. 54 c.p., particularly in assessing the feasibility of alternative actions – a key requirements of the defense. Despite the extensive documentation of her vulnerability, the lower court judge overlooked this factor and merely asserted that the defendant had the option of seeking assistance from public authorities. As a result, the judge concluded that a realistic and viable alternative existed to neutralize the imminent or ongoing threat/danger, and yet the woman realized an illicit behavior.

In the Court's view, the conclusion reached by the lower judge is overly generic and incomplete, relying on a partial and superficial interpretation of the requirements of art. 54 c.p. Notably, the Court argues that the lower court's reasoning fails to account for two critical points: first, the duty to adopt a *contextual* understanding of art. 54 c.p. (an approach already endorsed by the Court of Cassation itself) and second, the interpretative guidance provided by the European and International legal framework on the matter. The former duty, in particular, has specifically emerged in decisions addressing similar cases (see, for example, Supreme Court judgment no. 40270, October 2015, concerning a crime committed by a victim of enslavement linked to this condition). It imposes to carefully investigate the degree of "compression" of the freedom of self-determination characterizing the personal condition of the defendant before and at the time of the commission of the illegal act. Such investigation, indeed, underpins the correct assessment of both the existence of a coercion and the effective feasibility of an alternative behavior, since the «alternative between offending and being offended must be experienced in 'truly personal terms'» (ivi, par. 6).

For these reasons, the Supreme Court remands the case to the lower court with instructions to conduct a more thorough and individualized assessment. In particular, it stresses the importance of applying the UNODC Trafficking Indicators (i.e., [the Indicators of Trafficking](#)) and the guidelines annexed to [L. 228/2003](#) to determine the factual circumstances of the defendant at the time of the offence, and thus ascertain whether the conditions outlined in art. 54 c.p. are met.

## **B. COMMENT**

### ***1. Main aspects of the decision***

The core point of the decision lies in the identification of an internal legal basis capable of exempting the defendant from punishment. The Court initially states that the European and International legal framework, integrated into national law, mandates recognizing the principle of non-punishment for VoTs as pivotal in combating trafficking in human beings. Building on this conceptual foundation, it then identifies art. 54 c.p. as the appropriate domestic legal provision to articulate this principle, outlining an interpretative approach aligned with international legal standards.

In addition to this primary profile, it is remarkable that the Court emphasises the need for public authorities to cultivate greater sensitivity towards the protection of trafficking victims as vulnerable offenders. In particular, the Court recalls that the Public Prosecutor is bound to contribute to the early identification of VoTs, also in order to avoid exposing them to secondary victimization through criminal proceedings. In order to concretize and operationalize this obligation, the Court even refers to Article 358 of the Code of Criminal Procedure, which obliges the Prosecutor to investigate facts and circumstances favorable to the accused.

#### ***1.1. On the application of Article 54 c.p.***

Regarding the application of art. 54 c.p., it is noteworthy to stress that the Court does not delve into the question of the legal theoretical nature of the provision – i.e., whether it provides a basis for excluding the unlawfulness of the act (justification) or serves as an exculpatory defense (excuse). Instead, the focal point of its reasoning lies in considering the vulnerability of the defendant crucial within the interpretation of art. 54 c.p.

Namely, the Court requires to take into primary account the position of vulnerability of the VoT – as defined in art. 2.2 of the [directive 2011/36/EU](#) (v. *supra*) – in applying art. 54 c.p. to a crime related to their condition. This hermeneutic guideline represents the decision's most significant and innovative aspect, pivotal for achieving a *conforming interpretation* and a *contextual understanding* of this provision. Following this line of interpretation, the Court considers the situation of vulnerability to be a crucial factor in understanding the mechanisms that impede the VoT's interaction with the authorities of the host country. It therefore assigns to this element a central stage in assessing the feasibility of alternative actions, which is one of the key requirements of art. 54.

From this perspective, the decision thus enhances the position of vulnerability of the VoT in an interpretative context which is distinct from the one considered by art. 2.2 of the Directive

2011/36, although related to it. Indeed, art. 2.2 offers an interpretative tool for the correct understanding of the meaning of «the abuse of a position of vulnerability», i.e. one of the alternative modal elements of the offence referred to in art. 2.1 of the Directive. In the decision under comment the position of vulnerability is instead considered as a decisive element to apply a favorable provision (i.e., art. 54 c.p.). In this manner, the Supreme Court expands the role of vulnerability establishing a symmetry between an element of the crime of trafficking and an element of the defense of art. 54 c.p.

## *2. Final remarks*

Situated within the broader context of the interplay between punitive measures and mixed migratory flows, the issue of the non-punishment of the VoT has urgently [come to the forefront in the last years](#) and recently gained momentum after the decision of the ECtHR of 2021 (i.e., the aforementioned [V.C.L. and A.N. v. UK](#)). This decision, in particular, has set the stage for a general acknowledgement of «a human-rights-based limit to prosecution» (Moresco 2021) by establishing a link between the duties enlisted in art. 4 of ECHR and art. 26 of the [CoE Anti-Trafficking Convention of 2005](#).

The provision of non-punishment/prosecution mechanisms of VoTs can be thus considered now as an essential component of the states' duty to protect them under art. 4 ECHR. However, the effective implementation of the non-punishment principle for VoTs remains deficient in many European countries (see [GRETA, 13th GENERAL REPORT](#), p. 62). In Italy, specifically, no specific provisions have been introduced to ensure the non-punishment/prosecution of VoTs, neither on the substantial nor on the procedural level. Thus, the decision under discussion represents a commendable effort to address this gap through the application of an already existing legal tool.

Anyway, this effort alone cannot serve as a definitive solution. The number of criminal proceedings involving suspected (and even confirmed) trafficking victims remains high, with [varying responses from authorities](#). Therefore, legislative reforms are imperative to ensure the implementation of exemption mechanisms, alongside comprehensive training programs targeting prosecutors and law enforcement agencies specifically on the issue of vulnerability of VoTs.

## C. SELECTED REFERENCES

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