



Tool 1.3 The issue of consent

Overview

This tool discusses the role that the consent of the victim plays in the crime of trafficking in persons.

Article 3 (b) of the Trafficking in Persons Protocol states that if a victim's consent to the intended exploitation is obtained through any improper means (threat, force, deception, coercion, giving or receiving of payments or benefits, abuse of power, or position of vulnerability) then the consent is negated and cannot be used to absolve a person from criminal responsibility.

Regardless of whether their consent was obtained without use of any prohibited means, children have special legal status.



A person cannot be considered to have consented to being exploited where consent was obtained through improper means or, in the case of children, where their particularly vulnerable status makes it impossible for them to consent in the first place.

Where consent is rendered irrelevant

A fraudulent job offer

In many trafficking cases the false offer includes the promise of valid work and residency permits. Sometimes the victim will agree to being smuggled into a country illegally in order to find work. The victims clearly do not consent to the subsequent exploitation.

Deceit regarding the conditions of work

The fact that a victim knew in advance that she was going to work in a brothel does not mitigate the criminal liability of the trafficker—the element of exploitation remains. The gravity of the offence is not diminished because the victim was aware of the nature of the work but not aware of the working conditions.

Where exploitation involves children

Where a child and the child's parents give their consent to the use of the child for labour, the child is still a victim of trafficking—even where they gave their consent without being threatened, forced, coerced, abducted or deceived. Where an act of trafficking and the purpose of trafficking are established, the fact that none of the improper means were utilized does not mitigate the crime where children are involved.



Consent issues in practice

Consent of the victim can be a defence in domestic law, but as soon as any of the improper means of trafficking are established, consent becomes irrelevant and consent-based defences cannot be raised.

In most criminal justice systems the effect would be that prosecutors would raise evidence of improper means and the defence counsel would tender evidence of the victim's consent, leaving the court to assess the validity of the evidence of both the prosecution evidence and the defence.

Trafficking occurs if consent is nullified or vitiated by the application of any improper means by the trafficker. In other words, consent of the victim at one stage of the process cannot be taken as consent at all stages of the process—and without consent at every stage of the process, trafficking has taken place.

Another legal question which will arise is whether under domestic law the subject had the capacity to consent to the recruitment or subsequent treatment. Article 3 (c) of the Trafficking in Persons Protocol makes the consent of a child irrelevant and the capacity to consent may be further restricted under the domestic law of a particular State.