



Tool 6.1 Non-criminalization of trafficking victims

Overview

This tool explains the need to avoid criminalization of victims of trafficking.

Trafficked persons are sometimes treated as criminals rather than as victims, whether in States of destination, transit or origin. In States of destination, they may be prosecuted and detained because of irregular migration or labour status. Alternatively, immigration authorities may simply deport them to the State of origin if their immigration status is irregular. Trafficked persons returning to their State of origin may also be subject to prosecution for using false documents, having left the State illegally, or for having worked in the sex industry. Criminalization limits the trafficking victims' access to justice and protection and decreases the likelihood that they will report their victimization to the authorities. Given the victims' existing fears for their personal safety and of reprisals by the traffickers, the added fear of prosecution and punishment can only further prevent victims from seeking protection, assistance and justice.

Discussion

An essential element of protection of victims of trafficking and their rights must be that States do not prosecute or punish trafficked persons for trafficking-related offences such as holding false passports or working without authorization, even if they agreed to hold false documents or to work without authorization. Whether prostitution is legal or not, States should not prosecute persons for being trafficked into sexual exploitation, even if the person originally agreed to work in the sex industry. Without this approach, victim assistance and support programmes are rendered ineffective and meaningless.

In spite of this human rights perspective, trafficked persons are currently prosecuted for committing crimes during their period of victimization. Where this occurs and in the absence of State laws to prevent this prosecution from occurring, victims should be able to raise the defence of having been compelled to do so.

The Recommended Principles and Guidelines on Human Rights and Human Trafficking developed by the United Nations High Commissioner for Human Rights provide a number of elements on non-criminalization of trafficked persons.

Recommended principles

Protection and assistance

7. 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.

Recommended guidelines

Guideline 8

Special measures for the protection and support of child victims of trafficking

States should consider...

8. Ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons.



The Recommended Principles and Guidelines on Human Rights and Human Trafficking are available at:

www.unhcr.bg/other/r_p_g_hr_ht_en.pdf

Neither the Organized Crime Convention nor the Trafficking in Persons Protocol includes an explicit obligation for States parties to refrain from criminalizing victims of trafficking. However, a number of non-binding guidelines (such as those recommended here by the United Nations High Commissioner for Human Rights), action plans (such as the OSCE Action Plan) and declarations and resolutions (including, for example, General Assembly resolutions 55/67 and S-23/3) enjoin States to prevent trafficked persons from being prosecuted for their illegal entry or residence. Such provisions are consistent with the recognition of the human rights abuses to which trafficked persons are subjected. They are also consistent with the treatment of trafficked persons as victims of crime, whether or not the persons responsible for the trafficking are identified, arrested, charged, prosecuted or convicted.

Promising practice

Council of Europe Convention on Action against Trafficking in Human Beings

The Council of Europe Convention on Action against Trafficking in Human Beings (Council of Europe *Treaty Series*, No. 197) was adopted by the Committee of Ministers on 3 May 2005 and opened for signature in Warsaw on 16 May 2005, at the Third Summit of Heads of State and Government of the Council of Europe.

Article 26 of the Convention concerns non-punishment of victims:

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.



The Council of Europe Convention is available at:

www.coe.int/T/E/human_rights/trafficking/PDF_Conv_197_Trafficking_E.pdf