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Working Group on Trafficking in Persons

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Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking

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Background paper prepared by the Secretariat

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* CTOC/COP/WG.4/2010/1.



I. Introduction

1. In decision 4/4, the Conference of the Parties to the United Nations Convention against Transnational Organized Crime acknowledged that the Trafficking in Persons Protocol was the principal legally binding global instrument to combat trafficking in person. The Conference further decided to establish an open-ended interim working group, in accordance with article 32, paragraph 3, of the Organized Crime Convention, and rule 2, paragraph 2, of the rules of procedure for the Conference, to be chaired by a member of the Bureau, to advise and assist the Conference in the implementation of its mandate with regard to the Trafficking in Persons Protocol.

2. A first meeting of this Working Group was held in Vienna, Austria from 14 to 15 April 2009. It was decided to hold a second meeting of this Working Group in Vienna, Austria from 27 to 29 January 2010.

3. The provisional agenda for the meeting was prepared in accordance with decision 4/4 of the Conference of the Parties, entitled “Trafficking in human beings”, which was adopted at the fourth session of the Conference, held in Vienna, Austria, from 8 to 17 October 2008. The present background paper was prepared by the Secretariat to aid in the discussion of provisional agenda item 5.

II. Development of appropriate measures

4. Member States might consider the following points in providing for the non-punishment of trafficking victims:

- The challenges in identification of trafficked persons
- Establishing the principle of non-liability of the illegal acts committed by victims of trafficking:
 - Through a “duress”-based provision, whereby a trafficked person is compelled to commit the offence; or
 - Through a “causation”-based provision, whereby the offence committed by the trafficked person is directly connected or related to the trafficking
- The relationship, if any, between the non-liability of a victim and their cooperation with the criminal justice process.

III. Overview of issues

5. Trafficked persons may never be recognized as such or, even where they are identified, may still be 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 their irregular migration or labour status. Alternatively, immigration authorities may simply deport them to the State of origin if their immigration status is irregular.

6. Trafficked persons returning to their State of origin may also be subjected 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.

7. Neither the Organized Crime Convention nor the Trafficking in Persons Protocol include an explicit obligation for States parties to refrain from criminalizing victims of trafficking. However, a number of non-binding guidelines (such as those recommended by the United Nations High Commissioner for Human Rights referred to below at section III), action plans, 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.

8. The OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking stress that:

“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.”

9. Such provisions are consistent with the recognition of the 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. In spite of this rights perspective, however, trafficked persons are currently prosecuted for crimes committed during their period of victimization.

IV. Guidance for response

10. One of the purposes of the **Trafficking in Persons Protocol** is stated in Article 2 (b) as being to “protect and assist the victims of such trafficking, with full respect for their human rights.” 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 consented to hold false documents or to work without authorization. Similarly, it is argued that States should not prosecute or punish trafficked persons for crimes they may have committed in the course of trafficking.

11. States have adopted two approaches to deal with the principle of non-liability:

(a) The duress model is grounded on the belief that despite a person committing an offence the individual should not be held responsible because he or she was compelled to commit the offence.

(b) According to the “causation” based model, trafficked persons are not to be held liable for offences that are directly connected or related to the trafficking.

Without the principle of non-liability, victim assistance and support programmes are rendered ineffective and sometimes meaningless.

12. The UNODC model law, article 10, includes the following discretionary provision to deal with the principle of non-liability:

(a) A victim of trafficking in persons shall not be held criminally or administratively liable [punished] [inappropriately incarcerated, fined or otherwise penalized] for offences [unlawful acts] committed by them, to the extent that such involvement is a direct consequence of their situation as trafficked persons.

(b) A victim of trafficking in persons shall not be held criminally or administratively liable for immigration offences established under national law.

(c) The provisions of this article shall be without prejudice to general defences available at law to the victim.

(d) The provisions of this article shall not apply where the crime is of a particularly serious nature as defined under national law.

A. International guidance

13. The United Nations High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking provides a number of elements on non-criminalization of trafficked persons. It states clearly that:

“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.”

14. In outlining special measures for the protection and support of child victims of trafficking, the recommended principles and guidelines also highlight the need for:

“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.”

B. Regional guidance

15. 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. The Council of Europe Convention on Action against Trafficking in Human Beings defines a victim of trafficking in Article 4 as:

“Any natural person who is subject to trafficking in human beings.”

16. The Council of the European Union framework decision 2001/220/JHA of 15 March 2001, on the standing of victims in criminal proceedings, defines a victim in Article 1 (a) as:

“A natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State.”

C. Example of duress model

17. Article 26 of the *Council of Europe Convention on Action against Trafficking in Human Beings* 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.”

D. Example of the causation model

18. Argentina Law, 26.364, Prevention and Criminalization of Trafficking in Persons and Assistance to Victims of Trafficking of 2008, Article 5

“Victims of trafficking in persons are not punishable for the commission of any crime that is the direct result of having been trafficked.”

19. United Nations Interim Administrative Mission in Kosovo, Regulation 2001/14 on the Prohibition of Trafficking in Persons in Kosovo, Sect. 8

“A person is not criminally responsible for prostitution or illegal entry, presence or work in Kosovo if that person provides evidence that supports a reasonable belief that he or she was the victim of trafficking.”

20. Philippines, Anti-Trafficking in Persons Act (RA No. 9208) of 2003, Sect. 17

“Trafficked persons shall be recognized as victims of the act or acts of trafficking and as such shall not be penalized for crimes directly related to the acts of trafficking [...] or in obedience to the order made by the trafficker in relation thereto. In this regard, the consent of a trafficked person to the intended exploitation set forth in this Act shall be irrelevant.”

21. United States, Victims of Trafficking and Violence Protection Act of 2000, Sect. 112

“Penalties for the crime of unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude, or forced labour do “not apply to the conduct of a person who is or has been a victim of a severe form of trafficking in persons, [...] if that conduct is caused by, or incident to, that trafficking.”

22. Some countries choose to make the exemption from criminal liability contingent upon the victims' willingness to cooperate with the competent authorities.

Dominican Republic, Law 137-03 on Unlawful Traffic of Migrants and Trafficking in Persons of 2003, Art. 8

“If the victim of trafficking in persons or of illicit traffic of migrants cooperates or provides the traffickers' or smugglers' identity or provides useful information for their capture, he/she may be excluded from criminal liability.”

Annex

Key tools and recommended resources

Combating Trafficking in Persons: A Handbook for Parliamentarians

The Inter-Parliamentary Union (IPU) and UNODC, in the framework of the Global Initiative to Fight Human Trafficking (UN.GIFT), launched the publication *Combating Trafficking in Persons: A Handbook for Parliamentarians*. The Handbook is intended to inspire Parliamentarians to enact sound laws and adopt good practices that will strengthen national responses to human trafficking. **Section 4.2** concerning identification of victims of trafficking in persons, addresses the issue of non-criminalization.

http://www.unodc.org/documents/human-trafficking/UN_Handbook_engl_core_low.pdf

UNODC / UN.GIFT Model Law against Trafficking in Persons

The Model Law against Trafficking in Persons has been developed to assist States in implementing the provisions contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing that Convention. It aims to facilitate the review and amendment of existing legislation as well as the adoption of new legislation. Each provision provided in the Model Law is accompanied by a detailed commentary, providing several options for legislators, as appropriate, and legal sources and examples. **Article 10** of the UNODC Model Law against Trafficking in Persons provides extensive commentary on provisions concerning non-liability [non-punishment] [non-prosecution] of victims of trafficking.

http://www.unodc.org/documents/human-trafficking/Model_Law_against_TIP.pdf

UNODC Trafficking in Persons Toolkit

In pursuit of the goals of preventing and combating trafficking in persons, protecting and assisting its victims and promoting international cooperation to these ends, the UNODC Toolkit to Combat Trafficking in Persons seeks to facilitate the sharing of knowledge and information among policymakers, law enforcers, judges, prosecutors, victim service providers and members of civil society who are working at different levels towards these same objectives. Specifically, the Toolkit is intended to provide guidance, showcase promising practice and recommend resources in thematic areas. **Tool 6.1** addresses the issue of non-criminalization of trafficking victims.

<http://www.unodc.org/unodc/en/human-trafficking/electronic-toolkit-to-combat-trafficking-in-persons---index.html>

The United Nations High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking

The *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (included as an addendum to High Commissioner for Human Rights' report to the Economic and Social Council (E/2002/68/Add.1), have been developed in order to provide practical, rights-based policy guidance on the prevention of

trafficking and the protection of victims of trafficking. Their purpose is to promote and facilitate the integration of a human rights perspective into national, regional and international anti-trafficking laws, policies and interventions. The *Principles and Guidelines* serve as a framework and reference point for the work of OHCHR on this issue. States and intergovernmental organizations are also encouraged to make use of the *Principles and Guidelines* in their own efforts to prevent trafficking and to protect the rights of trafficked persons. Recommended Principle 7 provides succinct guidance on the issue of non-criminalization and Recommended Guideline 8 specifically stresses the need to ensure that child victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons.

<http://www.ohchr.org/Documents/Publications/Traffickingen.pdf>
