

CIVILIAN SECURITY, DEMOCRACY, AND HUMAN RIGHTS



PROTECTING VICTIMS FROM WRONGFUL PROSECUTION AND FURTHER VICTIMIZATION

For years, the *Trafficking in Persons Report* has detailed the importance of protecting victims of human trafficking throughout the law enforcement process. A central tenet of the victim-centered approach is that victims of trafficking should not be held criminally responsible for their involvement in unlawful activities that are a direct result of their victimization.

At the heart of human trafficking is the use of force, fraud, or coercion to exploit a person. Traffickers use the control they exercise over victims to force their victims to carry out activities for the traffickers' profit. Traffickers often compel victims to engage in criminal activities such as prostitution, pick-pocketing, or drug trafficking and cultivation.

Law enforcement authorities often fail to properly screen and identify victims of human trafficking when they detain or arrest criminal suspects. This can result in re-victimization when victims are punished for their engagement in the crimes their traffickers forced them to commit.

Compounding the injustice, a criminal record can have a profoundly negative effect on victims throughout their lives—for example, a survivor of sex trafficking who cannot rent an apartment because of prior arrests for prostitution; or an individual forced by a criminal gang to steal or sell drugs who cannot get a job due to the resulting criminal record. Even if a trafficking victim never faces charges, or if charges are dropped, arrest records and stigma remain, affecting where victims live, their employment opportunities, and how others perceive them.

While the *United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the *United Nations Convention against Transnational Organized Crime* (Palermo Protocol) does not specifically address the non-criminalization of trafficking victims, article 2(b) states that one of the Protocol's purposes is "to protect and assist the victims of such trafficking, with full respect for their human rights." In addition, the Working Group on Trafficking in Persons, which advises the Conference of the Parties to the *United Nations Convention against Transnational Organized Crime*, recommended the following in 2009:

"With regard to ensuring the non-punishment and non-prosecution of trafficked persons, States parties should: (a) Establish appropriate procedures for identifying victims of trafficking in persons and for giving such victims support; (b) Consider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts..."

In the United States' Trafficking Victims Protection Act, Congress found that:

"Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation."

The Council of Europe and the EU have adopted instruments that recognize this non-punishment principle. Article 8 of the 2011 EU Directive on preventing and combating trafficking in human beings provides:

"Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that the competent authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts [i.e., offences concerning trafficking in human beings] referred to in Article 2."



The non-binding 2013 Addendum to the Action Plan to Combat Trafficking in Human Beings of the OSCE states in Section IV, paragraph 2.6, under Access to justice and appropriate remedies:

“2.6 Taking adequate measures to ensure that, where appropriate, identified victims of THB [trafficking in human beings] are not penalized for their involvement in unlawful activities to the extent that they have been compelled to do so.”

The ASEAN *Convention Against Trafficking in Persons, Especially Women and Children* states under Chapter IV, Article 14(7):

“Each Party shall, subject to its domestic laws, rules, regulations and policies, and in appropriate cases, consider not holding victims of trafficking in persons criminally or administratively liable, for unlawful acts committed by them, if such acts are directly related to the acts of trafficking.”

Effectively identifying trafficking victims, including among those who may have committed unlawful offenses, is key to a victim-centered approach. Victims of trafficking may be more likely to report their victimization if they were confident doing so would not lead to their arrest or prosecution. In turn, this would allow a government to better meet its obligations to provide protection and assistance to victims, as well as to investigate and prosecute trafficking cases. Early identification of trafficking victims is essential to prevent further victimization and will help them start the recovery process as soon as possible.

VACATUR

In 2010, New York became the first U.S. state to pass a law allowing survivors of trafficking to vacate their convictions for prostitution offenses. In 2013, Florida’s law went even further providing for the expungement of “any conviction for an offense committed while . . . a victim of human trafficking.” As of March 2018, 39 states had vacatur laws allowing survivors to seek a court order vacating or expunging criminal convictions entered against them that resulted from their trafficking situation.

Vacatur is the formal recognition of “factual innocence.” Vacatur laws should apply to both adults and children, given that anyone who has been forced, deceived, or coerced into criminal activity should not be considered as having consented to that activity. States should also ensure these laws cover convictions that encompass the wide variety of nonviolent crimes that victims are forced to commit.

These laws not only allow victims to correct past injustices, but also thereby help trafficking victims reclaim and rebuild their lives. Vacatur increases a survivor’s ability to find work, reducing their economic vulnerabilities and the risk of being re-trafficked. In the absence of a vacatur law, trafficking victims are condemned to being perpetually viewed as former criminals, which in numerous ways compromises their efforts to rebuild their lives.