

TRAFFICKING FOR LABOUR EXPLOITATION: CHALLENGES FOR CRIMINAL LAW ENFORCEMENT

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Today, I would like to focus my comments on one particular issue, which is increasingly taxing law enforcement worldwide, namely the offence of human trafficking for labour exploitation. What is it? How do you define it, and develop appropriate indicators for identifying the offence, and also its relative degrees of gravity? What is the appropriate response, in terms of punishing the offender and compensating the victim? And which law enforcement agencies are best equipped to deal with the problem? Is this a matter for criminal justice, labour justice, civil courts, or a mixture of all of these?

A lot of noise is being made about labour trafficking. It is now common wisdom in policy circles that it is as serious a problem as trafficking for sexual exploitation. Most countries, particularly in Europe, have now amended their criminal laws to recognise the offence, sometimes providing for severe penalties. And over the past few years I have attended a growing number of international conferences and training seminars devoted specifically to this subject.

Yet what is the state of law enforcement? How many cases are actually documented? As this week we are discussing economic crime, what do we know about the monetary dimensions of this crime? How much money is stolen from workers at the bottom of the pile, in the shady or criminal area of the labour market, by being in a forced labour or trafficking situation rather than a free employment relationship.

On law enforcement statistics probably the best source – though sometimes an erratic one – is the US State Department's annual Trafficking in Persons Report. For the past two years it has provided global figures on both labour and sex trafficking, and they are quite revealing. In 2007, 490 prosecutions were for labour trafficking, as opposed to over 5,000 for sex trafficking. For 2008, the number was down to 312. And actual prosecutions for labour trafficking decreased more than threefold from 326 in 2007 to 104 in 2008. In Europe moreover – somewhat paradoxically, in view of the heightened attention to the issue – convictions for labour trafficking fell from 80 in 2007 to only 16 last year.

As far as I know, only the ILO has made rigorous efforts to estimate the profits made by those who exploit the victims of human trafficking. By our account these profits are immense, far more than has been commonly realised. Our first estimate in 2005 was that total illicit profits produced in one year by trafficked forced labourers are just under US\$ 32 billion, half of it made in the industrialized countries. Of this, some US\$ 28 billion was made from exploiting victims of sex trafficking, the

remaining US\$ from other forms of economic exploitation (what is usually referred to as labour trafficking)¹.

We then extended the analysis to all forms of forced labour, beyond the forced labour that results from human trafficking. The figure rises to over US\$ 44 billion per year, with over US\$ 10 billion generated by forced labour outside trafficking.

In our third global report on forced labour published earlier this year, *The Cost of Coercion*, we took a slightly different angle. What, in addition to human suffering, are the financial costs of coercion to the people who work in forced labour situations? This requires an estimate of the “opportunity cost” of being in forced labour, namely the income lost through being in coercion rather than a free employment relationship. We argue that the loss of income associated with coercion can be traced to two main sources. The first is systematic underpayment of wages. People in forced labour obviously receive wages under the market rate through artificial deductions from wages, inflated accommodation and food charges, forced overtime and other forms of “excessive work” which are inadequately remunerated. The second source of lost income, which arises mainly in cases of human trafficking, is the financial costs associated with the recruitment process. Migrant workers trafficked into forced labour tend to incur a series of charges linked to their recruitment, such as high payments to a job broker or recruitment agency, or payments for visas, transportation and other transaction costs. On this basis, we calculated that the total costs of coercion *outside the sex sector* were just under US\$ 21 billion, at least twice as much as our calculations four years ago.

Why the revised estimates? The early ones had been based on the assumption that, at least in developing countries, modern forced labour is concentrated mainly in the agricultural sector. There has been increasing evidence that victims of forced labour and trafficking are found in a range of sectors – including mining, construction, garments and textile manufacturing, domestic work – and also high value sectors including electronics and steel production. Thus the new estimate looked at agriculture, industry and services, calculated average profits per worker in different regions, and multiplied these by the known number of workers in different regions.

I’d now like to turn to the substantive challenge, the main forms and manifestations of forced labour today. It is a huge challenge for law enforcement, mainly because the forms of coercion are so subtle, and difficult to capture without clear guidance and indicators. In August 2008 the Economist observed with some reason that “Coercing hapless human beings into sex or servitude is obviously evil, but defining the problem (let alone solving it) is very hard”². Reasons for this can include differences of opinion as to whether or not the offence of trafficking, for labour or sexual exploitation, actually requires the existence of coercion rather than extremely poor conditions of work.

In the ILO, we prefer to see human trafficking as a sub-set of forced labour concerns. It is a process, often involving multiple actors, through which vulnerable human beings end up in situations of severe exploitation, from which for various

¹ *A Global Alliance against Forced Labour*, ILO, Geneva, 2005

² “People Trafficking and People Smuggling. Drawing lines in a dark place”, *The Economist*, 14 August 2008.

reasons they find it difficult to extricate themselves. Whether it is for sexual or other forms of economic exploitation, we consider all of this to be forced labour. It does not matter whether a particular kind of work or service is recognised as lawful in any one country. What matters is the presence of coercion.

Moreover, under international law forced labour is a serious crime. Forced labour has been broadly defined by the ILO, in a Convention dating back to 1930 but still considered valid today, as a situation in which people enter work or service against their freedom of choice and cannot get out of it without punishment or the threat of punishment. Out of almost 190 international labour Conventions adopted by the ILO over a 90 year period, forced labour is the only issue in ILO standards that deals directly with a matter of criminal justice. Article 25 of the 1930 forced labour Convention provides clearly that “the illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced”.

The Palermo Trafficking Protocol has now opened up the need to set out the parameters of the criminal offence of *exploitation*, for which there is little precedent in international law, let alone court decisions. In several European countries, the term *forced labour* as such is not explicitly recognised in criminal law. And in others, the conceptual entry point for defining trafficking, whether for labour or sexual exploitation, may not be forced labour in the sense of the ILO Conventions.

Despite the good intentions of the drafters of the Palermo Trafficking Protocol, and the evidence of some increase in prosecutions for labour trafficking, it is clear that courts are still struggling with the concepts. In a report last year the Dutch National Rapporteur on Trafficking examined for the first time the question of exploitation in sectors other than the sex industry, and the methodological challenges involved, given that this has been a criminal offence in the Netherlands since 2005. The new law had essentially entrusted the judiciary with further defining the concept of labour exploitation. It identified the lack of freedom as a constant factor, together with other indicators such as excessive working conditions, or the abuse of a vulnerable position which may be so severe that the victim has no real choice but to suffer exploitation.

Other national approaches in Europe can be very mixed. Both Belgium and France have provisions in their criminal legislation which consider the offence of human trafficking to involve the imposition of living and working conditions considered “contrary to human dignity”. Under Germany’s penal code as amended in 2005, the new offence of trafficking for labour exploitation, applicable only to foreigners, includes the concepts of slavery-like conditions and debt bondage. One criterion for this offence is the payment of wages markedly less than those paid to German nationals.

There has also been much discussion about the degree or severity of exploitation. It is a very subjective term, which has not generally been covered in labour standards, let alone in criminal law until the Palermo Trafficking Protocol put the subject so firmly on national legislative and law enforcement agendas. Common sense suggests that people are exploited when others derive unfair advantage, or make

unfair profits, at their expense, by subjecting them to arduous and morally unacceptable conditions of work. But there are obvious gradations of this. No legislature or judiciary will find it easy to determine which practices should be dealt with through long prison sentences, which through fines, or which through the closure of enterprises.

At the bottom end of the spectrum some flagrant abuses are happening, even in Europe, and law enforcement is beginning to wake up to them. Examples can be cited from Italy, Spain and the United Kingdom. The so-called “Terra Promessa” case in Southern Italy was first prosecuted in mid 2006. Polish workers, recruited under false pretences for agricultural labour in Apulia province, were housed in appalling conditions, and forced to work for almost nothing under the eyes of armed guards. Over a hundred workers were eventually rescued, and provided assistance by Italian and Polish NGOs. Through cooperation between the Italian and Polish police, assisted by EUROPOL, arrests have since been made in both countries. A high profile Spanish case in early 2009 involved the arrest of 19 Romanians accused of enslaving 27 of their compatriots for forced labour and begging. Victims had been held captive in slum apartments in Barcelona and Valencia. They were employed mainly as farm labourers, working twelve hour days. They had been recruited in Romania with false promises of jobs, forced to work without pay, compelled to beg on the streets when no work was available, and apparently made no attempt to escape these conditions.

Closer to Cambridge a similar case, also involving East Europeans, came to light a few months ago in the United Kingdom, in November last year. Some 60 individuals were taken by the police from vegetable fields, in what was seen as the UK’s largest single action against human trafficking for labour exploitation. Police believe the workers were receiving far below the minimum wage, for working up to 16 hours a day and six days a week. They also spent up to four hours a day travelling to the worksite. The vegetables were believed to be destined for large supermarkets. Detectives suspect that the exploited persons, most of whom were quite legally in the UK, had been recruited through advertisements and overseas agencies in countries like Lithuania and Poland. Police believed that the workers had been given money to reach the UK, but had been required to pay it back, probably with interest. Their passports would have been removed, and cash deducted from their incomes for transport to the fields. Violence was used against some of the workers. The Serious Organised Crime Agency, which carried out the investigations and the raid, described the system as “debt bondage”.

Further afield, fraudulent recruitment has sometimes led to tragic consequences. A notorious case five years ago involved Nepalese workers, who were reportedly told by their recruiters they would work in Jordanian restaurants, but has their passports taken and were instead sent to Iraq where all but one was later kidnapped and murdered. More recently, the IOM assisted a group of Sri Lankans who had been similarly duped and taken to Iraq against their will.

Yet many of the questionable practices – which can involve high fee charging by both licensed and unlicensed recruiters, often locking vulnerable workers into debt bondage situations – seem to escape national laws and law enforcement. Notably, the US Government’s Office to Monitor and Combat Human Trafficking has been arguing in its last few reports that labour trafficking can take place through perfectly

legal recruitment mechanisms, particularly in Asia and the Near East. The main argument is that high transaction costs for internationally recruited migrant workers, together with deceptive practices, can place them in a situation of high vulnerability to debt bondage and forced labour in the destination country. The problems begin with a mix of excessive charges and transaction costs for visas, travel and job placement expenses in the country of origin. The workers may be deceived as to the work they will carry out in the destination country, or as to wage rates and hours of work. A common practice is “contract substitution”, where they sign one contract in their home country, but are later compelled to sign a totally different one in the place of destination.

Let’s take the case of Chinese migrants abroad. Over the past two decades there has been extensive Chinese migration to Europe, much of it irregular, with migrants and their families paying large amounts of money to “snakeheads” to be smuggled into Europe (around 25,000 Euros to Europe, and more than twice that amount to get to the United States), enduring arduous conditions while repaying these debts. But our research so far suggests it is difficult to distinguish between the “legal” and “illegal” agencies. In some cases, registered agencies can also carry out unlawful activities. Moreover, is this trafficking or consensual exploitation? Chinese workers can service massive debts and work very long hours for a seven day week, but arguably accept these conditions out of rational choice. Our Chinese research found that the fees change according to the destination country or area, and that it may take an average of two years of back-breaking work to repay them.

It is also difficult to know where to point the finger of responsibility, between the sender and destination countries. The problems usually start with the sender countries, when bogus and unregistered agents overcharge for their services, and deceive potential migrants about anticipated conditions in the destination country. But interestingly, the Washington Post reported in March this year that China had warned its citizens not to work in Poland, Romania or Ukraine, saying the financial crisis meant that they might go unpaid and suffer human rights violations in these countries. Reportedly, a notice posted on the website of the Chinese Ministry of Commerce advised Chinese companies not to send workers to these countries, attributing the problems to insufficient work opportunities as a result of the crisis, and to frequent delays in the payment of wages. Particular problems were identified in the building and construction sectors.

Just last week, the US Department of Justice announced that it was prosecuting its first forced labour case based on pure economic coercion, with no physical force or restraint involved. It concerns recruiters from Thailand, charged in a human trafficking conspiracy for exploiting Thai farm workers in Hawaii. Interestingly, the workers had been brought to Hawaii under the federal agricultural guest worker programme, an official programme allowing employers to take on foreign workers on short-term temporary visas, when they cannot find nationals to do the work. In this case the recruiters had allegedly arranged for the Thai workers to pay high recruitment fees, financed by debts secured with the workers’ family property and homes. The recruiters has confiscated passports, failed to honour employment contracts, and threatened to send the workers back to Thailand where they would face serious economic harm created by the debts. The indictment also charges a visa fraud

conspiracy to obtain employment-based visas. If convicted, the defendants could face up to 15 years imprisonment.

Cases of this kind are now cropping up all over the world, though rarely do they meet such a vigorous law enforcement response as last week in the United States. It is a pattern which now calls for serious reflection, as to how to address quite systematic practices of fraud, deception and abuse, when many of these practices fall in a grey area between legality and illegality.

Perhaps the best way to conclude is to summarise some key messages from our recent global report on forced labour (and also invite participants to read it carefully).

First, while the most egregious cases require a criminal law enforcement response, trafficking for labour exploitation has also to be seen as a labour market issue. The instruments of labour justice, or a combination of criminal and labour law enforcement, are an essential part of the response. In some countries and jurisdictions, labour inspection is an integral part of criminal law enforcement, seeking the application of criminal sanctions against offenders. In other cases labour justice is separate from criminal justice, applying sanctions other than criminal penalties. Labour inspectors can be motivated mainly by the concern to secure fair living and working conditions, perhaps including compensation for any wrong suffered. They also have the power to apply sanctions against abusive employers, including fines or, in extreme cases, the closure of enterprises. And there are innovative approaches such as in Italy, where special combined units of the police and labour inspection have the powers to apply criminal, labour or other administrative sanctions, depending on the circumstances. A key objective of any policy response should be to help victims obtain compensation for lost earnings, receiving at least the equivalent of a minimum wage payment for all the hours worked.

Second, the problems can only be tackled through coordinated efforts between governments and business actors, and also workers' representatives. An example of good practice was the creation after 2003 of the Gangmasters' Licensing Authority in the United Kingdom, whose main responsibility is the licensing of the temporary work providers known as "gangmasters" (who had been completely unregulated before then), but which can in the more extreme cases also instigate criminal prosecutions. While there has been much emphasis on working with business actors, to prevent forced labour and trafficking in their own company supply chains, there has been insufficient focus on the need bring all these actors together to seek consensus as to the best way, through tightened regulations or other mechanisms, to address these new forms of forced labour in the private economy. All partners need to work intensively to develop consensus on the laws and policies against forced labour, including its more subtle forms. They need to build similar consensus on the roles and responses appropriate to modern forced labour,; how to monitor it; when to apply sanctions, and again who; how serious these sanctions should be, as punishments or deterrents; and how to reconcile law enforcement approaches with the prevention and protection needed to address the root causes of the problem.

In addition to our global report, I can share some our other guidance tools, which can hopefully be of use to the law enforcement practitioners here today, in their

future work. One is a handbook on forced labour for employers and business. Another is targeted specifically at labour inspectors. A recent publication, to which I attach much importance, is casebook of court decisions on forced labour and human trafficking, designed as a training manual for judges, prosecutors and other legal practitioners. It covers forced labour cases in both international and regional courts, as well as national jurisdictions from countries of Europe, Asia and the Americas (with a particular focus on the United States given the very clear momentum to prosecute cases of forced labour and trafficking). It seeks to illustrate how national court decisions have taken into account the provisions of the ILO's own Conventions on forced labour, and to show how this can provide guidance for future prosecutions and court decisions. We also hope to promote cross fertilisation of judicial experience, and dialogue among judicial practitioners. The first version is only a start. Readers are encouraged to share copies of court decisions, so we can enrich this information sharing through electronic and other means.

A final document is a set of operational indicators we have developed, together with the European Union, on ways to identify the more subtle forms of exploitation. These were initially prepared for the purposes of data gathering and analysis. But we have found interest in them from the prosecutors and investigators who are having such a hard time coming to grips with labour exploitation. So later this month, together with the Government of Portugal, we are holding a technical meeting to assess their value to law enforcement. I am happy to share copies of these indicators with anyone interested, and would welcome discussions and advice on the best way to move forward on this critically important matter.