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# Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement

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# Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement

## **Abstract**

Guidelines prepared by the ILO as part of its efforts to help member states and others to conform to the conventions on forced labor. It focuses on a dual approach, combining prosecution and law enforcement with employment-based and other social measures for prevention and the rehabilitation of victims.

## **Keywords**

Bonded, Catherwood, Compulsory, Cornell, Economic, Enforcement, Exploitation, Forced, Global, Globalization, Globalisation, Human, ILO, ILR, Industrial, International, Labor, Labour, Law, Legal, Legislation, Library, Organization, Organisation, Portal, Relations, Rights, School, Standards, Statistics, Stories, Trafficking, University, Work, Workers, Workplace

## **Disciplines**

Public Affairs, Public Policy and Public Administration

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International  
Labour Office



# Human Trafficking and Forced Labour Exploitation

*Guidance for Legislation and Law Enforcement*

Human Trafficking and Forced Labour Exploitation  
Guidance for Legislation and Law Enforcement



# HUMAN TRAFFICKING AND FORCED LABOUR EXPLOITATION

Guidance for Legislation and Law Enforcement

Special Action Programme to Combat Forced Labour  
2005

INTERNATIONAL LABOUR OFFICE  
GENEVA

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# Foreword

The recent entry into force, in December 2003, of the United Nations Convention against Transnational Organized Crime, together with its Protocols on trafficking and smuggling, has drawn heightened attention to the problems of trafficking for labour exploitation. As is increasingly recognized, there can be two main purposes and outcomes of the crime of human trafficking. It can be for sexual exploitation, a crime that is perpetrated mainly against women and children. It can also be for other forms of forced labour, child labour and labour exploitation in a range of economic sectors.

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<sup>1</sup> As of March 2005.

The Trafficking Protocol to the new UN Convention now requires ratifying States to adapt their domestic law and law enforcement procedures, in order to take due account of these broader dimensions of human trafficking. They need to have appropriate and specific laws and regulations on the subject. But to make a real impact on these severe and sometimes growing problems of human rights abuse, they need to do more than this. Law enforcement agents and judicial officials need comprehensive training in order to understand the parameters of modern forced labour, which is so often an outcome of trafficking.

Of ILO member States over 160 have ratified one (and most commonly both) of the ILO's two Conventions on forced labour; and 150 member States have already<sup>1</sup> ratified the ILO's 1999 Worst Forms of Child Labour Convention, which calls for action against child trafficking and forced child labour. And yet in very many countries, specific laws on forced labour either do not exist, or are of such a general nature as to make it very difficult for law enforcement agents to identify, prosecute and punish individual forced labour cases. Furthermore, the ILO's own experience shows that law enforcement alone cannot be an effective remedy for these problems. There is always a need for a dual approach, combining prosecution and law enforcement with employment-based and other social measures for prevention and the rehabilitation of victims.

For guidance on these complex matters, international partners and governments are increasingly turning to the ILO. In response, we have prepared this document. It seeks to take a comprehensive approach, of relevance in the first instance to legislatures and law enforcement agencies, but also we hope to other government and non-governmental agencies - including employers' and workers' organizations as the ILO's principal social partners.

Experience is growing on an almost daily basis on this difficult issue. Thus these guidelines can also undergo constant improvement, on the basis of good practice that is now developing in both law and its implementation. We therefore publish this first edition in the hope that it can be of immediate practical value but can also elicit constructive feedback on how it can be improved.

ROGER PLANT

Head, Special Action Programme to Combat Forced Labour  
InFocus Programme on the Promotion of the Declaration on Fundamental Principles  
and Rights at Work



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# The ILO and trafficking in persons

## PURPOSE AND SCOPE OF THE GUIDE

A major outcome of the renewed international action against trafficking in persons was the adoption in 2000 of the UN Convention against Transnational Organized Crime (henceforth the Palermo Convention) and its supplementary Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (henceforth the Protocol). The objective of this treaty is to prevent and combat trafficking in persons, to protect and assist victims of trafficking and to promote cooperation among States to achieve these objectives. The Protocol entered into force in December 2003. The ILO Conventions relevant to trafficking and the Protocol originate from different bodies in different contexts. They do not legally substitute for each other. Instead, they are complementary contributing to the common goal of tackling the problem of trafficking in persons.

This guide has been designed to provide lawmakers and law enforcement authorities (both police and labour inspectors) with practical aid to understand and implement international standards on human trafficking and to take action accordingly, in particular from the viewpoint of forced labour and child labour - two fundamental issues with which the ILO has been dealing throughout its history. Another purpose of the guide is to highlight the broad spectrum of sanctions - criminal, administrative and civil - that are relevant to combating trafficking in persons. A further purpose of this publication is to demonstrate the importance of immigration and labour law, especially with regard to the identification, protection and rehabilitation of victims as well as the monitoring of recruiters and other auxiliaries. Hence, this guide proposes a multi-faceted approach to combating and preventing human trafficking, by including a broad range of useful legal frameworks as well as institutional actors.

The ILO's Forced Labour Convention, 1930 (No. 29), the Abolition of Forced Labour Convention, 1957 (No. 105) and the Worst Forms of Child Labour Convention, 1999 (No. 182) are most relevant to trafficking of human beings, and they have been ratified by a large number of member States. Other ILO Conventions pertinent to the protection of migrant workers also help to shed light on trafficking, in particular the Migration for Employment Convention (revised), 1949 (No. 97), the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and the Private Employment Agencies Convention, 1997 (No. 181). They contribute greatly to the process of strengthening national legal frameworks to combat trafficking and its forced labour outcomes. The aim of this guide is not only to highlight basic legal issues but also to help law enforcement or other agencies in the efficient identification and prosecution of traffickers as well in the adequate identification, protection and compensation of forced labour victims.

The guide is not intended to provide a legal interpretation of the Articles of the Protocol; rather it aims to highlight the relevance of ILO Conventions to the successful implementation of the Protocol. As Article 14 of the Protocol takes note of the existence of other international instruments, lawmakers are advised to consult these instruments as well as corresponding national legislation before drafting new anti-trafficking laws. The present guide is complementary to the Legislative Guide for the Implementation of the Protocol to Prevent Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (henceforth UNODC Guide), which has been prepared by the United Nations Office on Drugs and Crime (UNODC) in 2004.<sup>2</sup> They also take into account guidelines issued by other UN bodies, such as the Recommended Principles and Guidelines on Human Rights and Human Trafficking by the United Nations High Commissioner for Human Rights<sup>3</sup> and UNICEF Guidelines for Protection of the Rights of Children Victims of Trafficking in South Eastern Europe.<sup>4</sup>

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<sup>2</sup> Prior to this, the General Assembly had approved resolutions requesting the Secretary-General to promote and assist the efforts of member States to ratify and implement the Convention and its Protocols. See GA/RES/55/25, para. 12, GA/RES/56/120, para. 4, and GA/RES/57/168, para. 6.

<sup>3</sup> UN Economic and Social Council (2002): *Recommended principles and guidelines on human rights and trafficking: Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, addendum E/2002/68/Add.1.*

<sup>4</sup> UNICEF (2003): *Guidelines for Protection of the Rights of Children Victims of Trafficking in South Eastern Europe.*

The following chapters do not include suggestions for legal provisions relating to ILO Conventions that could be incorporated into national law verbatim. Instead, they highlight the specific importance and relevance of ILO standards in the fight against trafficking and contain examples from national legislation of countries with different legal traditions. In view of the very considerable differences which exist between criminal justice systems among States and the paramount importance for States of maintaining the highest standards of integrity in these systems, drafters of legislation will need to apply close scrutiny to the way these offences are incorporated into national law. Among the most important points will be:

- (1) Consistency with existing national criminal and other laws;
- (2) Coherence of definitions of elements of the offences with similar definitions in other laws;
- (3) Respect for national criminal law obligations as regards the standard of proof;
- (4) Definition within national criminal law norms of intent for the purposes of commission of the offence;
- (5) Respect for national law rules on evidence and its admissibility; and
- (6) Incorporation of the rights of defendants as defined in national criminal law.

As these six elements differ substantially across countries, the guide will not seek to set out a model law to be adopted at the national level but rather will alert legislatures and the law enforcement agencies to various issues and aspects which the Protocol and important ILO Conventions raise. It also provides guidance on how to resolve those issues while seeking to respect national traditions.

Apart from the introduction and the discussion of new treaty obligations regarding the Protocol (Chapters 1 and 2), the guide focuses on three important issues:

- Criminalization of forced labour and eradication of the worst forms of child-labour;
- Prosecution of recruiters and other auxiliaries;
- Identification and protection of victims.

Chapter 6 highlights the role of different actors, especially labour market actors, in the fight against human trafficking and forced labour. The recommendations are summarized in the final chapter.

## THE DEVELOPMENT OF TRAFFICKING IN PERSONS

Trafficking in persons became the subject of renewed international concern towards the end of the twentieth and the start of the twenty-first centuries. In a globalized world with increasing polarities of wealth both within and between countries, with an increased demand for cheap labour in developed countries, with increased possibilities for travel and telecommunications broadcasting, and (exaggerated) images of western wealth around the world, those living in relative and absolute poverty tend to migrate in search of a better life.

Yet, legal travel across international borders into the developed world has become the preserve of the highly skilled or economically privileged, while others who wish to travel are increasingly excluded. There has been a tendency in many developed countries to identify in the country of origin those considered to be at risk as regards irregular migration and to exclude them before they travel. Visa restrictions combined with placing obligations on airlines to carry out passport and visa checks on passengers before departure from the country of origin are common forms of action. Legal channels of labour migration are few, and are even more restricted for certain groups of people, such as women and ethnic minorities.

Where the demand for cheap and flexible labour moves beyond the boundaries of legal migration, the trafficker provides a link between demand and supply. However, contrary to the smuggler who merely provides an illegal service to the migrant, e.g. assistance in the crossing of an international border, the trafficker has more at stake in the process. The trafficker, who is usually part of a wider network, seeks to exploit the person beyond the migration itself in order to make continued profits.

## THE RESPONSE OF THE ILO TO TRAFFICKING

Since trafficking in persons is closely linked to forced labour as well as to the failure to protect workers, be they nationals of the State or foreigners, it is not surprising that the ILO has been working to combat it almost since the creation of the Organization in 1919. The ILO's mandate to combat forced labour and trafficking originates from social movements in the 20th century that battled against conditions of employment in overseas colonies and the forced movement of people for labour purposes.

International campaigns against forced labour in the nineteenth and twentieth centuries provided the impetus for two of the fundamental ILO Conventions: the Forced Labour Convention, 1930 (No. 29), followed in 1957 by the Abolition of Forced Labour Convention (No. 105). Furthermore, the ILO Convention on the Worst Forms of Child Labour (No.182) adopted in 1999 includes the sale and trafficking of children as one of the worst forms of child labour that must be tackled as a matter of urgency. In addition, a number of other ILO Conventions commit member States to protecting foreign workers against unfair working practices such as clandestine movements and illegal employment of migrant workers, including trafficking.

With the increase in trafficking since the 1980s and in particular the 1990s, it became evident that forced labour, trafficking in persons and other challenges of globalization required renewed commitment and concerted action. One of the major outcomes of

this realization was the ILO's Declaration on Fundamental Principles and Rights at Work, adopted in 1998, which provides a strong focus for the Organization's work in this field. The four principles, which reflected the eight fundamental ILO Conventions, are central to the fight against trafficking and for the rights of workers, whatever their nationality:

<sup>5</sup> As mentioned above, this principle is covered by the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105).

<sup>6</sup> See the Minimum Age Convention, 1973 (No. 138) and the Worst Forms of Child Labour Convention, 1999 (No. 182). Convention No. 138 lays down the basic obligation to eliminate child labour, and sets the conditions for entry of young persons into the world of work.

<sup>7</sup> See the Equal Remuneration Convention, 1951 (No. 100) and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

<sup>8</sup> See the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

- The **elimination of all forms of forced or compulsory labour**: most victims of trafficking are coerced into work they have not chosen freely. Often, the victims are unable to escape forced labour unless they are willing to risk expulsion to their country of origin. The violence or deception that the trafficker may have originally used against the workers to recruit them is reinforced by the fear of detection and expulsion from the host State. The stigmatization of the workers as people who have been trafficked, worked irregularly in another country and been expelled, may also render them more vulnerable on return to their country of origin.<sup>5</sup>
- The effective **abolition of child labour**: children constitute one of the key groups of concern regarding trafficking in persons. The sale and trafficking of children is clearly one of the worst forms of child labour that must be tackled urgently under ILO Convention No.182. The Protocol also makes specific reference to children both in the definition of trafficking and as a vulnerable group of victims, which requires special attention. In both ILO Convention No.182 and the Protocol, "children" are defined as persons under the age of 18, providing a clear definition, in line with the UN Convention on the Rights of the Child. Trafficked children are particularly vulnerable in view of their age. To find themselves in a foreign country where they do not speak the language and have no family to turn to, places them in a particularly difficult position. The fact that their family members may have been complicit in their trafficking places especially heavy responsibilities on all States Parties regarding their protection.<sup>6</sup>
- The **elimination of discrimination** in respect of employment and occupation: existing inequalities and discrimination based on sex, race, ethnic origin or other grounds, both in society and in the labour market, have been found to be important underlying factors contributing to or increasing the vulnerability of certain groups of society to being trafficked. In addition, due to restrictive migration laws and policies on entry, residence and employment, trafficked workers often find themselves in an irregular situation, which makes them even more vulnerable to multiple forms of discrimination. Discrimination based on sex puts women migrant workers in particular at risk of being trafficked, as they find it more difficult to migrate legally. Discrimination plays into the hands of traffickers and employers and it weakens the position of migrant workers. This creates particular problems for States, which, while anxious to maintain the integrity of their immigration laws, also seek to protect vulnerable workers from discrimination and exploitation.<sup>7</sup>
- **Freedom of association** and the effective recognition of the **right to collective bargaining**: trafficked persons are usually unable to exercise their right of freedom of association or collective bargaining power as they may find themselves in situations where their presence on the territory of the host State is illegal and their work is irregular. In such circumstances there is no effective freedom of association or collective bargaining because if the worker should even attempt to exercise either, the trafficker or employer can denounce the victim to the authorities and depend on them to expel the individual.<sup>8</sup>

The four principles of the ILO Declaration encapsulate the issues at the heart of trafficking in persons and provide a sound foundation for action. Through various technical programmes, the ILO is tackling trafficking from a normative as well as a practical perspective. It carries out research on issues such as trafficking for forced labour, child trafficking, irregular employment of migrant workers and discrimination. In recent years, the ILO has become increasingly active at the national level with projects focusing on awareness raising, law and policy advice, capacity building and rehabilitation of victims.<sup>9</sup>

The ILO's approach to prevention is to promote productive work under conditions of freedom, equity, security and dignity, in which rights are protected and adequate remuneration and social coverage are provided.<sup>10</sup> Most victims of forced labour fall into a trap while seeking decent employment abroad. The promotion of decent work could therefore include a range of measures such as monitoring of labour standards, especially in sectors known for abusive labour practices, creating employment in countries of origin, combating illegal employment in destination countries, and improving migration management.

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<sup>9</sup> For an overview of ILO's response and programmes on trafficking see: ILO (2003): *Trafficking in human beings - New approaches to the problem*, Geneva.

<sup>10</sup> This definition refers to the concept of decent work.





# The new international standards on trafficking in human beings

<sup>11</sup> The chapter is largely based on comments provided by UNODC.

In this chapter the key provisions of the Protocol will be summarized with due regard to the interpretative notes for the travaux préparatoires (A/55/383/Add.1) and the issues which various provisions raise.<sup>11</sup> The discussion will focus on the definition and the elements of the trafficking offence that States are required to criminalize. This is followed by a more detailed discussion of forced labour as one of the main purposes for which trafficking takes place.

Readers are strongly encouraged to consult the Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, as well as the Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and for the Implementation of the Protocol against the Smuggling of Migrants by Land, Sea and Air.

## THE PURPOSE OF THE PROTOCOL

Article 2 of the Protocol explains its overall purpose:

- “(1) to prevent and combat trafficking in persons, paying particular attention to women and children;
- (2) to protect and assist victims of such trafficking, with full respect for their human rights; and
- (3) to promote cooperation among States Parties in order to meet those objectives.”

These three objectives are of equal importance and require quite different types of legislative action. For instance, preventing trafficking may require intelligence-led policing actions, but enforcement of labour standards to reduce the scope of economic benefit for traffickers may be equally important. Punishing traffickers will usually require the adoption of legislation which creates criminal offences. The protection of victims will engage administrative law relating to foreigners in the country of destination, as well as special measures for returned victims in the country of origin, and civil law and/or labour law as regards the protection of their employment rights.

The section in the Protocol on general provisions also sets out the definition of trafficking and the requirement to criminalize trafficking. Section II contains the provisions on protection of victims of trafficking, followed by section III relating to prevention, cooperation and other measures. The final provisions are found in section IV.

## RELATION BETWEEN THE PROTOCOL AND THE PALERMO CONVENTION

Due to the nature of the Protocol supplementing the Palermo Convention, it is essential to understand the relationship between the two in applying the provisions of the Protocol. Article 1 of the Protocol and Article 37 of the Palermo Convention establish the following basic principles governing the relationship between the two instruments:

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<sup>12</sup> Note, however, that simultaneous ratification or accession is permitted. The sentence refers to both supplementing Protocols mentioned earlier.

(a) No State can be a party to [any of] the Protocol[s] unless it is also a party to the Convention (Art. 37, para. 2, of the Palermo Convention).<sup>12</sup>

(b) The Convention and the Protocol must be interpreted together (Art. 37, para. 4, of the Palermo Convention and Art. 1, para. 1, of the Protocol).

(c) The provisions of the Palermo Convention apply, *mutatis mutandis*, to the Protocol (Art. 1, para. 2, of the Protocol). The meaning of the phrase *mutatis mutandis* is clarified in the interpretative notes (A/55/383/Add.1, para. 62) as “with such modifications as circumstances require” or “with the necessary modifications”. This means that, in applying provisions of the Convention to the Protocol, minor modifications of interpretation or application may be made to take account of the circumstances that arise under the Protocol, but modifications should not be made unless they are necessary, and then only to the extent that is necessary.

(d) Offences established in accordance with the Protocol shall also be regarded as offences established in accordance with the Convention (Art. 1, para. 3, of the Protocol). This principle is a critical link between the Protocol and the Convention. It ensures that any offence or offences established by a State in order to criminalize trafficking in persons as required by article 5 of the Protocol will automatically be included within the scope of the basic provisions of the Palermo Convention governing forms of international cooperation such as extradition (Art. 16) and mutual legal assistance (Art. 18). It also links the Protocol and the Palermo Convention by making it applicable to offences established in accordance with the Protocol and other mandatory provisions of the Convention.

(e) The Protocol’s requirements are a minimum standard. Domestic measures may be broader in scope or more severe than those required by the Protocol, as long as all obligations specified in the Protocol have been fulfilled (Art. 34, para. 3 of the Convention).

It is particularly important to understand the difference between the **scope of application** and the criminalization requirements. In general, the Palermo Convention applies when the offences are transnational in nature and involve an organized criminal group (see art. 34, para. 2 of the Palermo Convention). However, it should be emphasized that this does not mean that these elements are to be made elements of the domestic crime of trafficking. On the contrary, drafters must not include them in the definition of domestic offences, unless expressly required by the Protocol. Any requirements of transnationality or organized criminal group involvement would unnecessarily complicate and hamper law enforcement. Drafters of legislation should also note that the Protocol applies to the protection of victims regardless of whether they have crossed a border and whether or not an organized criminal group was involved. Legislators may consider, however, the possibility of making the participation of organized crime an aggravating circumstance in the trafficking offence. An example is given below:

**Box 1**  
**Philippines' Anti-Trafficking in Persons Act, 2003**

The Act distinguishes between the “act that promotes trafficking in persons” and “qualified trafficking” and provides for more severe sanctions for the latter. It is considered qualified trafficking when the victim is a child, when adoption is used for purposes of sexual exploitation or forced labour, when the crime is committed against three or more persons or carried out by three or more persons conspiring together, when the offender is a guardian of the victim or a public officer, a member of the military or law enforcement agency, when the person is recruited to engage in prostitution with the military or law enforcement agencies and when the offended party dies, suffers mutilation, becomes insane or contracts HIV/AIDS due to or during the act of trafficking.

Thus contrary to the common misconception that the Protocol deals only with trafficking cases involving transnational organized crime, the Protocol can be utilized, if implemented fully, to combat trafficking in persons regardless of the involvement of an organized criminal group or the presence of the element of transnationality.

## DEFINING TRAFFICKING IN CRIMINAL LAW

A major challenge regarding trafficking is to provide a clear legal definition. The Protocol, in Article 3, provides the first internationally agreed definition of trafficking in persons:

“For the purposes of this Protocol:

(a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”

As regards the issue of **consent of the victim**, it is added in article 3(b) that the consent of the victim shall be irrelevant where the means set out in (a) have been used; and in 3(c) where the victim is a child (defined as any person under 18 years) irrespectively of the means used. The definition of child trafficking raises certain issues especially for its implementation in practice, and will be discussed separately.

In order to protect victims, the interpretative notes for the travaux préparatoires state that the provisions on consent should not be interpreted as imposing any restriction on the right of accused persons to a full defence and to the presumption of innocence. Further, they should not be interpreted as placing the burden of proof on the victim. They further indicate that “as in any criminal case, the burden of proof is on the State

or public prosecutor". Thus the Protocol does not seek to transform the relationship between the accused and the prosecution in criminal matters. It seeks only to add a new criminal offence as regards trafficking.

The nature of the **trafficking activity** is the "recruitment, transportation, transfer, harbouring or receipt of persons". The definition of these activities may pose a challenge to the legislator, in particular with regard to the distinction between genuine commercial activities and criminal activities linked to trafficking. "Recruitment", for example, can involve activities in the country of origin, of transit or of destination, involving legal or semi-legal private recruitment agencies. Legislatures have to take into account that the initial recruitment can be voluntary and that the coercive mechanisms to keep a person in an exploitative situation may come into play at a later stage. "Transportation" may involve traffickers or it may be carried out by airlines or other transport companies in good faith. It may also be carried out by an organized crime group. "Transfer" will include the activities of individuals who may be facilitating trafficking in transit countries. Finally "harbouring" and "receipt" of trafficked persons also present sensitive issues about the knowledge of the accused person. For instance, staying in a hotel or guesthouse may or may not involve the owner in trafficking depending on the amount of knowledge which he or she has of the activities, and whether he or she was in fact participating in the trafficking or merely renting out rooms in the normal course of business.

A critical element of the definition is the purpose of trafficking, namely exploitation. This refers to the intention of the trafficker. At a minimum, "exploitation" must include exploitation for the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs." The inclusion of "exploitation for the prostitution of others" creates some separate difficulties. There is no duty under the Protocol to criminalize prostitution. However, the definition could include an individual who employs a prostitute depending on whether the employment relationship is one that falls within the definition of exploitation. Dealing with prostitution and related matters outside the scope of trafficking in persons is specifically reserved for the laws and policies of individual States Parties.

Slavery and servitude are also concepts which have been elaborated in international instruments and which should guide the implementation and application of the Protocol. With regard to the concept of forced labour or services, ILO standards have focused substantially on this issue, which will be discussed in detail in chapter 3. ILO Convention No. 29 already provides for the adoption and appropriate application of penal sanctions against the illegal exaction of forced labour. However, criminalizing certain acts is only part of possible action in the application of standards. In contrast, the Protocol is prescriptive regarding how certain activities should be criminalized. The ILO welcomes the objectives of the Protocol but is not in a position to provide a model criminal law with regards to forced labour, which could be adopted by any member State.

Therefore, States, either because of their commitments under Convention No. 29, or under the Declaration that promotes the principle under this Convention, should review existing legislation on forced labour in view of the new international standards. It may not be necessary to punish all trafficking-related offences under one specific law - this will depend on how successfully these offences can be prosecuted under existing legislation such as that on forced labour.

## Box 2

### Internal trafficking for labour exploitation in Brazil

In Brazil, thousands of people, mostly men, work in forced labour conditions on large ranches (fazendas) in the Amazon and in other economic sectors such as mining and charcoal production. The workers are hired in poorer States of Brazil and moved within the country from contract to contract in a cycle of debt bondage that often ends in death. They are transported by buses and trucks to destinations hundreds or even thousands of kilometres away from their homes. Sometimes entire families are taken to these areas, which can be quite remote. Leaving their homes to improve their situation, they fall prey to labour contractors (gatos), who deceive them about the nature of the work they are being hired for. Conditions in labour camps are gruelling, malaria is prevalent, and workers are often restricted in their freedom of movement. Expenses are deducted from wages and the worker is lucky to get any money at all for his labour. Since the money earned is so little, if any, it will not be long before the worker signs up for a new contract with a gato. Thus the cycle of forced labour continues.

The Brazilian Government has adopted sanctions for the exaction of forced labour in Act No. 9777, section 149 of the Penal Code. It has also taken action to raise the number of prosecutions and reinstate the rights of forced labour victims. More recently, legislative changes have been introduced that also address abuses carried out by intermediaries. Though the employers are probably those who benefit most from the criminal exaction of forced labour, the network of recruiters and transporters is also important in sustaining the continued supply of exploitable labour. Brazilian legislation is thus an example where trafficking for labour exploitation is addressed under the Forced Labour Act, whereas trafficking for sexual exploitation is dealt with separately.

See: ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Geneva, 2004, pp. 124-128 (Report III, Part IA).

## ASSOCIATED CRIMINAL OFFENCES

Article 5, paragraph 1 of the Protocol requires the criminalization of trafficking in persons as defined in Article 3. In addition, States Parties are obliged to make the following activities related to trafficking in persons criminal offences:

- (1) attempting to commit the offence of trafficking in persons, subject to the basic concepts of its legal system;
- (2) participating as an accomplice in the offence; and
- (3) organizing or directing other persons to commit the offence.

Thus there are four criminal offences which must be created: trafficking in persons, subject to the basic concepts of the national legal system; attempting to do so; participating as an accomplice in doing so; and organizing or directing others to do so. For the first offence, trafficking, there is a fairly wide scope of activities which will be included and which the prosecution must prove. For the other three, attempting, participating

and organizing or directing trafficking in persons, the evidential burden on the State to prove the relationship with the principal offender to the standard of proof required by a criminal trial may be difficult. These concepts are particularly sensitive in some countries. When law enforcement agencies seek to prosecute offences, which may not (yet) have taken place, such as an attempt at trafficking, often a particularly strong evidential base is needed to secure a conviction.

## DISTINCTION BETWEEN TRAFFICKING AND SMUGGLING

The Palermo Convention and its supplementing Protocols make an important distinction between smuggling and trafficking, which must be respected in the implementation and application of international norms relating to human trafficking. However, distinguishing between the two activities may require detailed information on the circumstances of the smuggling/trafficking cases. Smuggling of migrants is defined as “the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”. It does not necessarily involve exploitation even though it may be carried out under degrading and dangerous circumstances. It may be that governments find that action against smugglers is more easily enforced than action against traffickers, as the activity of smuggling is less complex and does not necessarily engage the wider sphere of obligations. Indeed, many cases of trafficking for sexual exploitation, but especially for labour exploitation, are treated as smuggling cases either because the legal framework does not provide sufficient clarity on the issue or because proof is difficult to assemble.

It is important to note that trafficking may also involve the irregular - or in many cases apparently regular - crossing of the border. The person may well be in possession of genuine travel documents, which authorize entry onto the territory of the State Party. For the activity to constitute cross-border trafficking it is necessary that there is the intention of or actual exploitation by means of coercion, fraud or force.

### Box 3

#### Belgian anti-trafficking law

Belgium is taking concerted action to combat trafficking and has one of the broadest definitions of trafficking in persons. The Suppression of Trafficking of Human Beings and Child Pornography Act (Law of 13 April 1995) amended the Criminal Code and the Immigration Law regarding access to the country, stay, residence and removal of organs. Section 1.1 of the anti-trafficking law defines trafficking in human beings as crimes related to article 77bis of the Immigration Law and articles 379 and 380bis of the Criminal Code.

Section 77 of the Immigration Law criminalizes smuggling, whereas Section 77bis criminalizes involvement in the entry into Belgium of a foreigner if violence, intimidation, coercion or deception were used, or if there was abuse of the vulnerability of a foreigner in terms of illegal status, precarious situation, pregnancy,

disease or disability. A fairly recent amendment extended sanctions to the abuse, directly or indirectly, of the particular vulnerability of a foreigner and the selling, renting or providing of premises used with the aim of making an extortionate profit.

The anti-trafficking law punishes any act of enticement into prostitution (with or without consent). Penalties are higher where this enticement includes deception, violence, threats, constraints or the abuse of a foreigner's vulnerability. As such, under Belgian Law either commercial sexual exploitation or smuggling with the use of threats, violence, abuse of the vulnerable or precarious position of a foreigner are understood to be trafficking. The latter is used to prosecute traffickers in cases not involving prostitution. The problem is that sentences for smuggling are much shorter than those for trafficking, and that the two articles are so similar that perpetrators may use this as an argument to get one of the charges struck off.

The agreed notes for the travaux préparatoires (A/55/383/Add.1 para. 79), when providing guidance on Article 11 of the Protocol relating to the strengthening of border measures, note that "victims of trafficking in persons may enter a State legally only to face subsequent exploitation, whereas in cases of smuggling of migrants, illegal means of entry are more generally used. This may make it more difficult for common carriers to apply preventive measures in trafficking cases than in smuggling cases and legislative or other measures [against carriers] taken in accordance with this paragraph should take this into account." It should be recalled finally that "trafficking" and "smuggling" are not necessarily exclusive of each other. A person smuggled into the destination country can become a trafficking victim subsequently.

## ASSISTANCE TO AND PROTECTION OF VICTIMS

Articles 6, 7 and 8 of the Protocol include measures that must be considered in respect of trafficking victims. Those articles should be read and implemented in conjunction with articles 24 and 25 of the Palermo Convention (protection of witnesses and victims), which make provisions for victims and witnesses that apply to all cases covered by the Convention. Essentially, the intention of the drafters of the Convention and the Protocol was to supplement the general rules for dealing with witnesses and victims with additional assistance and support specifically established for victims of trafficking. Thus, where the Protocol applies, trafficking would be an offence covered by the Convention and victims would be covered by Articles 6-8 of the Protocol and Article 25 of the Convention. To the extent that the victims are also witnesses, they would also be covered by Article 24 of the Convention.

Generally, the provisions of the Protocol setting out procedural requirements and basic safeguards are mandatory, while requirements to provide assistance and support for victims incorporate some element of discretion. The various obligations apply equally to any State Party in which the victims are located, whether a country of origin, transit or destination (see the interpretative notes A/55/383/Add.1, para. 71). The nature of the social obligations reflects concerns about the costs and difficulties in delivering social assistance to all victims, particularly in developing countries.



## PREVENTION OF TRAFFICKING

The Protocol includes several Articles related to the prevention of trafficking. Article 9 states that “States Parties shall establish comprehensive policies, programmes and other measures:

- (a) to prevent and combat trafficking in persons; and
- (b) to protect victims of trafficking in persons, especially women and children, from re-victimization”.

Preventive measures to be taken by ratifying States include research, information, mass media campaigns, and social and economic initiatives (Art. 9.2). In addition, Article 9 stipulates cooperation with civil society (Art. 9.3), developmental measures and other strengthening measures such as the conclusion of bilateral labour agreements (Art. 9.4) as well as measures, such as educational, social or cultural measures, that discourage demand for victims of trafficking (Art. 9.5).

The Protocol also addresses in Article 11 border measures. Measures should be taken to prevent and detect trafficking at borders (Art. 11.1), prevent commercial carriers from being used to commit trafficking offences (Art. 11.2) and impose the obligation of carriers to ascertain whether their passengers have the required travel documents (Art. 11.3). If the trafficking offence is established it should be punished with sanctions (Art. 11 of the Palermo Convention) and the possibility considered of the denial of entry or revocation of visa of those implicated in the commission of the trafficking offence (Art. 11.5). The Protocol also requires that States Parties shall ensure the security and control of documents (Art. 12) and the legitimacy and validity of documents (Art. 13).

The Protocol thus considers prevention from a three-pronged perspective. First, there are general prevention measures that involve mainly non-legal initiatives. Second, there are the measures dealing with commercial carriers (related to criminalization). States Parties must adopt legislative measures to prevent commercial carriers from being used by traffickers to the extent possible. The exact nature of these measures is left to the specific State Party except for the requirement that carriers should check the travel documents of their passengers. The third set of preventive measures stipulated by the Protocol provides that measures must be taken to ensure the quality, integrity and security of travel and identity documents.

## COOPERATION MEASURES AGAINST TRAFFICKING

Various articles of the Protocol set out specific obligations to cooperate with other States Parties with respect to the specific subject matter and, in two cases, obligations to cooperate with entities that are not States Parties to the Protocol. As with other requirements of the Protocol, it is essential that, both in developing and applying implementing legislation, the Protocol provisions must be read and applied together with the corresponding articles of the Palermo Convention. For example, apart from the specific obligation to assist in verifying travel or identity documents under Article 13 of the Protocol, there are no articles on extradition or mutual legal assistance in the Protocol because these are already fully covered by Articles 16 and 18 of the Palermo Convention.

## CONCLUSIONS

The important issues that need to be addressed under the Protocol, as regards the definition of **criminal offences** are:

(1) the application of the Palermo Convention to the Protocol. In establishing the offences required by the Protocol, it is important to bear in mind that the Protocol must be read in conjunction with the Palermo Convention. The provisions of the Palermo Convention apply to the Protocol, *mutatis mutandis*, and among States Parties to the Protocol. The offences established in accordance with the Protocol are to be considered offences established by the Palermo Convention;

(2) non-inclusion of both transnationality and of participation of an organized criminal group in domestic offences. The element of transnationality is one of the criteria for applying the Palermo Convention and the Protocol (Art. 3 of the Convention), but it should not be required as proof in a prosecution for a purely domestic offense. For this reason, transnationality is not required as an element of domestic offences. By the same token, the involvement of an organized criminal group should not be required as a proof in a domestic prosecution. Thus, offences established in accordance with the Protocol should apply equally, regardless of whether they were committed by individuals associated with an organized criminal group and regardless of whether this can be proved (see Art. 34, para. 2, of the Palermo Convention and the interpretative notes (A/55/383/Add.1, para. 59);

(3) the nature of the activity which the accused person has carried out: recruitment, harbouring, etc. When adopting legislation regarding this aspect, great care needs to be taken to target the legislation correctly. Genuine commercial activities should not be at risk of criminalization;

(4) the means used to achieve control over the victim: legislatures should bear in mind that the means used are one of the central elements of the offence (except where children are concerned). The definition of the means in national law should mirror existing criminal law, for instance as regards "threat" or "coercion", rather than seeking to establish new and different definitions applicable only to this category of offence. Reliance on pre-existing criminal law definitions will facilitate the work of the prosecutor and allow existing case law and circulars to provide guidance to law enforcement and judicial instances;

(5) the exploitation intended or carried out: the form of exploitation that is of particular concern to the ILO is forced labour. In the next chapter we will return to this concept and provide greater clarity on its constituent parts;

(6) the special definition of trafficking in children under 18, which does not even require the use of illicit means such as threat, coercion or deception.

States Parties are also under a duty to develop comprehensive policies, programmes and other measures both for the purpose of **prevention** and for the **protection of victims**. Articles 6, 7 and 8 of the Protocol contain safeguards for the protection and rehabilitation of victims, in particular the protection of the victims' identity and safety, participation of the victim in judicial proceedings, the possibility of obtaining compensation as well as the status and repatriation of victims. State Parties are also required to **cooperate** by way of exchange of information with one another, and to reinforce measures to control their borders.



# Punishing forced labour and trafficking in persons

The ILO Forced Labour Convention, 1930 (No. 29) provides the starting place for an examination of the obligations of States Parties in relation to the “harbouring and receipt” aspects of the Protocol. Harbouring is the more difficult of the two concepts, relating more to the provision of accommodation than to the use of coercion.

“Receipt” means receiving persons into employment or for the purposes of employment, including forced labour. By focusing on the forced labour aspect of the Protocol’s definition, countries may find the task of implementation somewhat easier as it can be tied to existing national legislation and to the implementation of Convention No. 29. This focus is also useful as it corresponds to the component of intent in the offence of trafficking in the Protocol. The offence requires that the perpetrator has the objective of exploitation of the individual. Exploitation is defined as specifically including forced labour. Thus the emphasis on the suppression of forced labour corresponds to a number of State duties, both those that have been in force in most States for years, and new duties assumed under the Protocol.

## THE COMMITMENT TO STOP FORCED LABOUR

Conventions No. 29 and 1957 (No. 105) are the primary ILO instruments aimed at the prohibition and elimination of forced or compulsory labour, and each has been ratified by more than 160 member States. According to the ILO Declaration on Fundamental Principles and Rights at Work of 1998, all ILO member States have an obligation, even if they have not ratified the ILO Conventions in question, to respect, promote and realize the principle of the elimination of all forms of forced or compulsory labour. The ILO Declaration also places a duty on the ILO to assist member States in their efforts to do so.

Article 1(1) of Convention No. 29 requires that States Parties “suppress the use of forced or compulsory labour in all its forms within the shortest possible period”.<sup>13</sup> This encompasses forced labour exacted by public authorities as well as by private persons. States that have ratified the Convention have both an obligation to abstain and an obligation to act. The definition of forced labour is found in Article 2(1): “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”. The provision then goes on to exclude certain types of forced or compulsory labour: namely compulsory military service, work or service as part of the normal civic obligations, certain forms of prison labour, work or service that is exacted in emergency situations, and minor communal services.

A second ILO instrument on forced labour, Convention No. 105, was adopted in 1957. It does not constitute a revision of the earlier instrument but may be regarded as supplementing it. While Convention No. 29 provides for the general abolition of compul-

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<sup>13</sup> Article 1(2) provides for exceptions from the prohibition of forced labour during a transitional period and subject to the conditions and guarantees in Articles 4 to 24 of the Convention. This transitional period elapsed five years after the coming into force of the Convention in 1937. Recommendation No. 35 concerning Indirect Compulsion to Labour is related to C. 29 and still considered up-to-date. The Recommendation refers to (in)voluntary flows of labour in the process of “economic development of territories in a primitive stage of development”.

sory labour, Convention No. 105 requires the abolition of any form of forced or compulsory labour in five specific cases: (a) as a means of political coercion or education or as a punishment for holding or expressing political views; (b) as a means of mobilising and using labour for purposes of economic development; (c) as a means of labour discipline; (d) as a punishment for having participated in strikes; and (e) as a means of racial, social, national or religious discrimination.

Article 25 of Convention No. 29 stipulates 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 specific mechanism by which this is to be done is left to the State. The exaction of forced or compulsory labour could be a “penal offence” under either the criminal or labour law, although “adequate” penalties for this basic human rights violation are more likely to be included in the penal or criminal code. Penal sanctions can be imposed in the form of fines or imprisonment. Fines should be high enough to act as an effective deterrent.

Today, forced labour is almost universally recognized as a crime. However, it is rarely prosecuted because of the difficulties in articulating the various offences that constitute forced labour in national laws and regulations. In addition, there are various obstacles to law enforcement and the identification of forced labour victims, which will be discussed in Chapters 5 and 6. In many countries forced labour is prohibited by constitutional provisions or principles. In some countries where the constitution is directly enforceable, this may be sufficient protection, particularly if there is no recent tradition of practices resembling forced labour. In others it may well be necessary to adopt a legislative prohibition of forced labour, which may take the form of a general prohibition, with or without a specific definition of forced labour. However, given the broad potential scope of the concept of forced labour, it is recommended to specify specific offences, which - individually or in a cumulative manner - add up to a criminal offence of forced labour.

#### **Box 4**

##### **Forced labour offence in the Labour Code of Iran (1990)**

Sect. 172. In accordance with section 6 of this Code, all forms of forced labour shall be prohibited. Any person who commits an offence on that account shall, with due regard to his situation and means and to the degree of the offence, be subject to a term of imprisonment...and to a fine of [...], in addition to the payment of fair remuneration for work completed and compensation for damages. Where several persons, jointly or on behalf of an organization, cause a person to perform forced labour, each offender shall be subject to the penalties prescribed above and shall be jointly subject to payment of fair remuneration...

Note. Where several persons are collectively made to perform forced labour, the offender shall, with due regard to his situation and means and to the degree of the offence, be subject to the maximum penalty provided for in this section in addition to payment of fair remuneration.

In the 1979 General Survey<sup>14</sup> by the ILO Committee of Experts on the Application of the Conventions and Recommendations (hereafter the Committee of Experts), two main categories of forced labour were of concern: the first was cases of call-up of labour, that is to say where the State imposes obligations of service or production or the imposition of other restrictions on free choice of work; the second was labour imposed as a means of political coercion or education or as punishment. Since then, new forms of forced labour have emerged that are not directly related to acts committed by the State but rather by private agents. The increasing involvement of private agents as perpetrators is also reflected in the annual Reports of the Committee of Experts. Most of these new forced labour offences are related to trafficking in human beings.

In its general observation on Convention No. 29 in 2001,<sup>15</sup> the Committee of Experts called for governments to report on “measures taken or contemplated to prevent, suppress and punish trafficking in persons for the purpose of exploitation”. It asked for two kinds of information. First, it asked for the provisions of national law aimed at punishment, in other words criminal sanctions for the exaction of forced or compulsory labour, trafficking in persons and exploitation of prostitution, and their application.

Secondly, the Committee sought information regarding the “measures designed to encourage victims to turn to the authorities”, such as permission to stay in the country (which falls under administrative law), efficient protection of victims willing to testify and of their families from reprisals (which requires inter-governmental cooperation in many cases); measures designed to inform victims and potential victims of trafficking; and other measures relating to investigation, training and international cooperation [i.e. measures of policy programmes]. The continuing monitoring of these aspects of trafficking legislation is relevant to the implementation of the Protocol. States Parties will wish to review the responses they have provided to the Committee of Experts, when considering new legislation in respect of the Protocol.

## IDENTIFYING AND SANCTIONING FORMS OF COERCION

Notwithstanding the definition of forced labour in the ILO Conventions and the clarifications given by the Committee of Experts, legislatures and law enforcement agencies continue to have difficulties with the application of the concept. Clearly, “forced labour” encompasses activities which are more serious than the mere failure to respect labour laws and working conditions. For example, the failure to pay a worker the statutory minimum wage does not constitute forced labour. However, action to prevent the worker from leaving the workplace will normally come within the ambit of forced labour.

In considering Article 1(1) of ILO Convention No. 29, the first element is not problematic: the activity must constitute either work or services. As noted by the Committee of Experts, the exaction of work or service may be distinguished from cases in which the obligation is imposed to undergo education or training. The second element: “exacted from any person under the menace of any penalty” needs further clarification both for the legislator and law enforcement agencies and will be dealt with here. The final element of ‘voluntariness’ has been the subject of definition by the Committee of Experts, and is considered in the next section.

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<sup>14</sup> ILO: *Abolition of forced labour, General Survey of the Report relating to the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 57), Report III (Part 4B); ILC, 65th Session, 1979. The Committee of Experts is scheduled to carry out a new General Survey on the forced labour instruments in its 2006 session.*

<sup>15</sup> ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 89th Session 2001, Geneva.*

<sup>16</sup> Debt bondage, in the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery (1956), is defined as "the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined" (Art. 1a).

The extraction of work or services "under the menace of any penalty" does not mean that some form of penal sanction is applied; the penalty might take the form of a loss of rights or privileges. The following six elements point to a forced labour situation; usually two or more are imposed on a worker in a combined fashion. Each of these acts, when committed intentionally or knowingly by an employer against an employee, is likely to be a criminal offence within existing criminal law of most countries.

1. **Physical or sexual violence:** Forced labour is frequently exacted from workers by the threat and application of physical or sexual violence. Violence against the individual will come within the scope of the criminal offence of assault. In many jurisdictions, assault is defined as any act which is committed intentionally or recklessly, which leads another person to fear immediate and unlawful personal violence. The severity of the act of violence can place it in the category of aggravated assault with more severe penalties on conviction.
2. **Restriction of movement of the worker:** A common means by which labour is extracted by duress from workers is through their confinement. The workers are locked into the workplace or their movement is restricted to a very limited area, often with the objectives of preventing contact with the host community, and extracting the maximum amount of labour from the individuals. Restriction of movement corresponds to the common law offence of false imprisonment, which is any restraint of liberty of one person under the custody of another.
3. **Debt bondage/bonded labour:**<sup>16</sup> Occurs when a person becomes a security against a debt or loan. It is a situation that lies on the borderline between forced labour and slavery. The individual works partly or exclusively to pay off the debt which has been incurred. In most cases, the debt is perpetuated because on the one hand, the work or services provided are undervalued and on the other hand, the employer may provide food and accommodation at such inflated prices that it is extremely difficult for the worker to escape from debt. Debt may also be incurred during the process of recruitment and transportation, which affects the degree of freedom of the employment relationship at the final stage.

The key to the hold of the employer over the employee is the appearance of lawfulness of the contract. So long as the contract is unlawful, which in many jurisdictions will be the case either as a result of the unlawfulness of the taking of a human being as security for a debt or the unfair contract terms of the agreement regarding food and accommodation, the hold of the employer over the worker is the result of deception as to the rights of the worker. This falls under the offence of obtaining pecuniary advantage or services by deception, which is unlawful in virtually all countries.

4. **Withholding wages or refusing to pay the worker at all:** Workers are found in situations where they work in the expectation of payment but the employer either has no intention of paying the individual for the work performed or intends to withhold, unreasonably and without just cause, substantial sums from the worker's wages. The withholding of wages - where a person dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it - is theft in criminal law. The fact that the property is in the form of wages due does not remove it from the scope of the offence, even if withholding of wages may form other offences under labour law.

5. **Retention of passports and identity documents:** It is not uncommon in particular in the case of migrant workers, that the employer takes the worker's identity documents and/or passport, often on the excuse of arranging some immigration matter and refuses to return them to the individual unless he or she continues to work for the employer. The inability to prove identity or indeed even nationality often creates sufficient fear that the workers feel they are obliged to submit to the employer.

The withholding of identity documents and passports may be theft depending on the intention of the employer, or it may be part of an offence of deception. Passports normally remain the property of the government, which issues them. They are issued to an individual. The government that issues the passport has the right to its return and the duty to issue to its nationals a new passport subject to the qualifications of national law.

6. **Threat of denunciation to the authorities:** This is a form of menace or penalty that applies primarily to irregular migrant workers. While it may, depending on the circumstances of the work, also apply to nationals of a State, this is less frequent. The threat of denunciation to the authorities comes within the legal definition of blackmail in many jurisdictions. The standard definition is that a person is guilty of blackmail if, with a view to gain for him or herself, or another or with the intent to cause loss to another, he or she makes any unwarranted demand with menaces. A demand with menaces is unwarranted unless the person making it does so in the belief that he or she has reasonable grounds for making the demand and that the use of menaces is a proper means of reinforcing the demand. For the offence to be committed it may be immaterial that the menaces relate to action to be taken by the person making the demand.

Some victims are **kidnapped or abducted** and then forced into labour or service. Abduction involves deliberate action to seize, transport and detain a victim against his/her will. In other cases, the person is sold and bought for the purpose of forced labour. Kidnapping and abduction are criminal actions and not in themselves forms of forced labour, even if they are perpetrated for the purpose of forced labour. The same can be said for the sale and purchase of a person. The imposition of forced labour is an additional separate offence.

The examples of criminal offences relating to the elements of forced labour may differ in particular criminal law jurisdictions. However, their counterparts are found very widely throughout the criminal codes of almost all countries. Indeed, in some jurisdictions there is an even greater variety of choices of criminal offences in respect of the elements of forced labour. Their identification and enforcement of such offences is vital because without the possibility of forced labour in the destination country, trafficking in persons as a practice becomes less profitable and thus may cease to be of interest to organized criminal groups.

## THE NOTIONS OF CONSENT AND VOLUNTARINESS

The ILO Committee of Experts has provided valuable guidance for the implementation of the Protocol regarding the issue of "voluntary offer". Among the issues the Protocol presents is the extent to which voluntary submission to trafficking and forced labour can



be a ground to deprive the victim of the right to support, which is set out in the Protocol. Under the UN Protocol the consent of the victim is irrelevant to the conviction of the trafficker if the trafficker has used any of the following means: “threat or use of force, other forms of coercion, abduction, fraud, deception, abuse of power, a position of vulnerability and/or the giving or receiving of payments or benefits to achieve the consent of the person having control over another person in order to get the person to submit to being recruited, transported, transferred, harboured or received for the purpose of exploitation”. For the purposes of implementing the obligation, the question of voluntariness is essential, as it also must be considered in the context of the meaning of coercion and of forced labour.

The degree of coercion and the meaning to be given to the concept must take into account the particular situation in which the individual is found. At the same time, the State or a particular employer cannot be held accountable for all external constraints or indirect coercion existing in practice. Both legislatures and law enforcement agencies should remember that under the Protocol, the consent of the victim is irrelevant to the commission of the crime. In the travaux préparatoires of the Protocol (Art. 3), the “position of vulnerability” was defined as “any situation in which the person involved has no real and acceptable alternative to submit to the abuse involved.” While this gives some clarification it still leaves substantial questions, for instance, to what extent do conditions of hardship amount to a position of vulnerability? The following is an example of how legislatures can confront the issue:

#### **Box 5**

##### **Abstract from the Criminal Code (article 379bis) of Luxembourg**

“If the victim is employed, incited or abducted by fraud or using violence, threats, abuse of authority or any other form of constraint [...] or if the offender takes advantage of the particularly vulnerable situation of the victim, such as their illegal or precarious administrative situation, pregnancy, ill health or an infirmity or physical or mental disability, the sentence shall be [...]”.

The issue of voluntariness may have different consequences as regards the determination of whether the offence has been committed. For example, assault will usually be a criminal offence whether or not the individual has consented. Theft, however, requires a lack of consent in order to differentiate it from a voluntary gift. The degree of consent or lack thereof needed to achieve a conviction in respect of the crimes associated with forced labour will differ depending on the rules and interpretation in different jurisdictions. This issue needs to be addressed by the legislator in particular in circulars and guidance to prosecutors and other law enforcement agencies.

Coordination with immigration authorities will be very important, as the evidence of the victim/worker may be critical. A victim/worker who is still in a vulnerable position with regard to administrative status or whose consent has been manipulated is unlikely to cooperate with the authorities. Notwithstanding the intention in the Protocol that the consent of the victim be irrelevant to the commission of the offence, depending on the legal system into which the offence is being inserted, the intention of the trafficker may be impossible to establish if the victim is unable on account of having been expelled, or unwilling on account of the lack of protection available to him or her, to give evidence to support the prosecution case regarding intention.

Furthermore, legislators and law enforcement authorities have to take into account that the seemingly “voluntary offer” of the worker may have been manipulated or was not based on an informed decision. Where migrant workers were induced by deceit, false promises and retention of identity documents or force to remain at the disposal of an employer, the ILO supervisory bodies have noted a violation of the Convention. They have also noted that in cases where an employment relationship is originally the result of a freely concluded agreement, the workers’ right to free choice of employment remains inalienable<sup>17</sup> - i.e., a restriction on leaving a job, even when the worker freely agreed to enter it, can be considered forced labour.

### Box 6

#### The US Victims of Trafficking and Violence Protection Act, 2000

The Act not only added new crimes to already existing sanctions for peonage and slavery such as human trafficking, sex trafficking, forced labour and servitude, it also broadened the definition of ‘coercion’ in forced labour and sex trafficking to include psychological manipulation. This means that alleged perpetrators can be held accountable if they cause a victim to believe that his or her failure to comply with their orders would result in serious harm to the victim or others. The law also criminalizes the confiscation or destruction of identity or travel documents, a practice traffickers often use to control their victims.

The full implementation of ILO standards on workers’ rights and the allocation of State resources to their enforcement for all workers including migrants, are critical to the suppression of the conditions of work which give rise to the possibility for traffickers and unscrupulous employers to exploit workers on the basis of their nationality and immigration status.

## THE SPECIAL CASE OF CHILDREN

Article 3 (a) of ILO Convention No. 182 explicitly defines trafficking in children as one of the worst forms of child labour, which needs to be prohibited and eliminated as a matter of urgency.<sup>18</sup> However, the process of trafficking minors into exploitative child labour is complex and not easy to define. In general terms trafficking refers to a process of recruitment, and/or transportation for the purpose of sexual or labour exploitation. As a widely accepted international definition, reference is often made to the Protocol’s definition of “child trafficking” provided specifically in Article 3 (c) and (d) as follows:

- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” **even if this does not involve any of the means** set forth in subparagraph (a) of this article;
- (d) “Child” shall mean any person under eighteen years of age.

In other words, a child under 18 is regarded as a victim of trafficking whenever he or she has been recruited or transported with a view to being exploited, even if there is no use of means such as coercion, fraud, deception or abuse of power. This is in clear contrast to the case of adults being trafficked, where the use of such illicit means is one of the crucial elements for the definition of trafficking. In addition, the child’s consent to

<sup>17</sup> ILO (2003): *Fundamental Rights at Work and International Labour Standards*, Geneva, pp. 36 - 38.

<sup>18</sup> See ILO/IPU (2002): *Eliminating the Worst Forms of Child Labour. A practical guide to ILO Convention No. 182*, Geneva and ILO (2003): *Eliminating the Worst Forms of Child Labour under Time-Bound Programmes: Guidelines for Strengthening Legislation, Enforcement and Overall Legal Framework*, Geneva

being recruited or transported is completely irrelevant to the definition of child trafficking, even where there is no use of deception, fraud, etc. This would make the distinction extremely delicate in some cases between child trafficking and migration for employment of adolescents above the minimum working age. This is not only a legal issue but also has implications for practical action, such as data gathering and identification of victims.

Thus, the Palermo Convention and Protocol tackle trafficking in human beings from the angle of transnational organized crime, while ILO Convention No.182 declares the sale and trafficking of girls and boys under 18 years of age one of the worst forms of child labour and calls for immediate measures including prevention, withdrawal and rehabilitation. Convention No.182 covers cases where trafficking occurs within a national boundary and does not involve organized criminal groups.

Convention No.182 further sets out the framework for action against child trafficking, and other worst forms of child labour. Article 7 of the Convention calls for “the provision and application of penal sanctions or, as appropriate, other sanctions”, as well as “effective and time-bound measures” to prevent child trafficking, withdraw children from it and rehabilitate them. Criminal provisions are by no means the only action to tackle the problem of child trafficking. There should be appropriate mechanisms (Article 5) to monitor the implementation of the relevant national provisions, and also programmes of action (Article 6) designed and implemented to eliminate child trafficking, inter alia. Its Article 8 promotes international cooperation and assistance to apply the Convention, including support for poverty alleviation and universal education, so as to tackle the root causes of trafficking in children. ILO Recommendation No.190, supplementing Convention No.182, also includes many useful suggestions for practical action that may be considered by countries that wish to enhance their action against child trafficking.

#### **Box 7**

##### **Sanctions against child trafficking in Mali**

In Mali, section 63 of the Code concerning the Protection of Children states that “Child trafficking is defined as the process by which a child is moved inside or outside of a country in conditions that transform the child into a commercial commodity for at least one of the persons present and whatever is the objective of the displacement. Any act involving the transport, the receiving, the recruitment and the sale of children is considered an element of child trafficking.”

The Penal Code (Act No. 01-079 of 20 August 2001) also uses this definition, in section 244, and adds that: “Every person convicted of child trafficking will be punished by imprisonment from five to twenty years”.

Decree No. 01-534 / P-RM of 1 November 2001 prescribes a travel document that should contain an exit authorization for children up to 18 years old. The technical specifications of the travel authorization are defined by Order No. 02-0302 / MPFF-MSPC-MATCL of 20 February 2002. According to section 1 of the Decree: “This travel document is compulsory for every child not possessing a passport”.

## COMMERCIAL SEXUAL EXPLOITATION OF ADULTS AND CHILDREN AS A FORM OF FORCED LABOUR<sup>19</sup>

Since Convention No. 29 came into force, the Committee of Experts has treated trafficking of persons for the purpose of commercial sexual exploitation as one form of forced labour. For the purposes of the present text, commercial sexual exploitation involves the use, procuring or offering of a person for prostitution or the production of pornography through the use of force or coercion and/or for financial or material gain. While some adults can be said to have chosen freely to work as a prostitute or as the subject of pornography, many others are coerced or forced into such work through deception, violence and/or debt bondage. Frequently, those involved are the victims of trafficking and are forced to work in slave-like conditions, virtually owned by their employers and without any choice over their “customers”, the numbers served, acts performed or hours worked.

<sup>19</sup> The following section draws mainly on the ILO Labour Legislation Guidelines

### Box 8

#### Ruling on forced labour in the sex industry

The question of forced labour was considered by the European Court of Justice in the case of six prostitutes from Central and Eastern European countries (CEECs) who sought to exercise a right of entry, residence and self-employed economic activity as prostitutes in the Netherlands. The Dutch authorities refused the women residence and establishment permits, among other reasons on the basis that their relationships with their pimps were ones of employment. The European Court of Justice found no justification for the Dutch Government’s contention that “a person engaged in prostitution whose personal and working freedom is restricted by her pimp - a situation which is covered, where appropriate, by the criminal law of the host Member State - is to be treated as a person in an employment relationship.” In order to determine whether Central and Eastern European prostitutes were entitled to exercise their professions as self-employed persons in the Netherlands in accordance with EC Agreements with their States of nationality, the European Court of Justice held “prostitution is an economic activity pursued by a self-employed person as referred to in [the EC Agreements with the CEECs], where it is established that it is being carried on by the person providing the service:

- outside any relationship of subordination concerning the choice of that activity, working conditions and conditions of remuneration;
- under that person’s own responsibility; and
- in return for remuneration paid to that person directly and in full.”

So long as these conditions are fulfilled in EU law an individual, even where exercising the activities of prostitution, is not in a position of forced or coerced labour.

See: C-268/99 Aldona, Malgorzata, Jany and Others [2001] ECR.I-8615

Child prostitution and pornography always constitutes forced labour and a modern form of slavery, and is one of the worst forms of child labour under Convention No. 182. Children are not considered to be capable of making a voluntary decision to engage in such work. Because of their immaturity and relative helplessness compared to adults, they are often the targets of trafficking, force and coercion. In some cases, it

is even the parents who sell their children into sexual slavery. Furthermore, children in such situations are more susceptible to disease, psychological trauma and stunted development. Consequently, the commercial sexual exploitation of children is both a form of forced labour and one of the worst forms of child labour and should be specifically addressed by national legislation.

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<sup>20</sup> In the UK this was defined as: "an illegal act which is a wrong against the public welfare and seems to have the necessary ingredients of a crime" *Mogul SS Co v McGregor, Gow & Co* (1889) 23 QBD 598.

<sup>21</sup> Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA).

<sup>22</sup> See *Anti-Slavery International* (2002): *Human traffic, human rights: redefining victim protection*, London.

## THE ROLE OF CIVIL, ADMINISTRATIVE AND LABOUR LAW

The Protocol requires the creation of new criminal law sanctions for a combination of constituent elements, which include forced labour. Measures in respect of crime prevention are called for which will include enhancing labour inspectorates to suppress forced labour. It also requires the adoption of certain measures in administrative law relating to the protection of victims. While the ILO has advocated the adoption of criminal sanctions in particular with regard to the elimination of forced labour, it has left the choice of legal mechanisms to the State Party. In many cases, for the person who was wronged, the most satisfactory remedy will be one in civil, labour and administrative law rather than criminal law.

Criminal law is concerned with the punishment of those who have committed a wrong that affects the security or well-being of the public generally so that the public has an interest in its suppression.<sup>20</sup> As regards the act of forced labour, the importance of criminal proceedings is the punishment of the perpetrator. The standard of proof in criminal proceedings is normally higher than that in civil proceedings. The burden of proof will normally be on the prosecutor to prove each element of the crime. It is for the prosecution to convince the court (whether composed of a magistrate alone or with a jury) that the individual has committed the offence. The rights of the defence and of victims are dealt with in very diverse ways in different legal systems. The complexity is experienced by the 25 member states of the European Union in bringing their criminal laws into alignment with the EU Framework Decision.<sup>21</sup>

Civil proceedings, on the other hand, have as their objective compensation for wrongs done to the aggrieved party. Civil remedies are based on both contractual and non-contractual rights, and the civil courts are thus empowered to provide compensation for breaches of either contract or statutory requirements. For the victims, redress through the civil courts is often more satisfactory than criminal prosecution as they receive compensation for the wrongs suffered. In civil law countries, victims have the possibility of joining a civil action for compensation to a criminal case. Provided that the accused is found guilty and the prosecutor requests compensation, the victim will receive compensation for the damage suffered. In common law countries, judges may have discretion to award compensation to victims as part of the sentence.<sup>22</sup> In some countries, victims can claim compensation through State funds set up for this purpose.

Labour law provides yet another mechanism and another set of sanctions that go beyond criminal and civil law. Statutes can provide for a variety of outcomes, including compensation for victims as well as reinstatement of their rights. Hence, decisions of labour tribunals may have a wider implication for labour relations in a given country. Administrative orders under labour law can also provide an entry point to tackle forced labour issues. Most countries with a civil law tradition have established labour codes that contain references to ILO labour standards or are based on them. In countries with

a common law tradition the legislature has also tended to intervene increasingly in the field of labour law, so that in many cases the most substantive issues are regulated in some detail, and often comprehensively, by the legislation. Labour law can also provide a useful entry point to tackle forced labour practices in domestic service which are pervasive in many countries.

Labour courts deal with the right of workers and employers as regards employment. In most jurisdictions, labour codes set standards of employment, which override the principles of free contract. Many victims will therefore opt for separate civil claims before industrial tribunals or labour courts concerning the non-payment of wages or other elements of forced labour. There are many organizations that can assist them in bringing these cases to court (in general legal representation in courts is not required under labour law) - most importantly trade unions, non-governmental organizations or independent human rights commissions (see Chapter 6).

### **Box 9** **US versus Manasurangkun case, 1995**

In the US versus Manasurangkun case, some 75 Thai workers, mostly women from impoverished backgrounds who had been trafficked into the United States, received restitution of US\$ 4,5 Mio. The Thai traffickers promised high wages and good working hours, however, once arrived in the United States, the women were forced to work in a clandestine garment sweatshop in 20-hour shifts. They had been made to pay an indentured servitude debt of between US\$ 8,000 and US\$ 15,000 and were held against their will.

See: Center for the Study of Intelligence (Amy O'Neill Richard): International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime, November 1999

In many jurisdictions there is also the concept of non-contractual liability whereby the acts of one party may give rise to a right to compensation or damages to another, outside the contractual relationship. For example, where an employer exercises violence against a worker and causes him or her harm, the employer may incur non-contractual liability for the harm, which he or she has caused to the worker (in addition to possible criminal liability). Very often the principle of non-contractual liability, which may be the responsibility of the civil courts, runs in parallel with criminal liability. Thus the employer who uses sexual or physical violence against the worker may be liable for criminal sanctions and also for non-contractual liability. In addition to the divide between the two concepts of the objective - for criminal law the protection of the well-being of the public; in civil law the compensation of the individual for the breach of contract or non-contractual liability incurred - there is often a very important procedural divide.

As mentioned above, civil and labour law is normally subject to a different standard of proof, known in some jurisdictions as the balance of probabilities, rather than the higher criminal law standard of beyond reasonable doubt. This means that the chances of success for an action brought by a worker against an employer for forced labour in the civil (or possibly administrative or labour) courts in an action based on breach of contract and possibly non-contractual liability may have a higher chance of success than an action brought by a prosecutor against the same employer under criminal law provisions. Thus the substitution of criminal law sanctions for civil or administrative law

remedies will not always protect or benefit the worker. Legislators and law enforcement agencies should be careful to protect the civil, labour and administrative law remedies of workers when introducing criminal law sanctions particularly in those jurisdictions where there is a substantial difference as to the possibility of success.

The last branch of law that is of central importance to the issue of forced labour when this involves migrant workers is administrative law, in particular regarding immigration status. This branch of law regulates the lawfulness of State action. It is normally quite separate from the branches of criminal and civil law, and often has its own institutions including specialized tribunals. This is where the rules are found determining the legality or irregularity of the presence and work of foreign nationals, the conditions under which regularity will be granted or extended, and the terms under which expulsion may take place. The right of migrant workers to remedies in this area is important. The State's duty to protect migrant workers from forced labour must also engage the administrative law aspect of the worker's status. The burden of proof in administrative law often rests on the individual and the standard of proof is usually the same as in civil matters - the balance of probability.

It is also in this field of administrative law that States Parties must undertake monitoring of workplaces as part of crime prevention activities under the Protocol. The strengthening of State workplace inspectorates and their empowerment to undertake proceedings of an administrative nature in the form of fines and other penalties against employers, who are failing to meet labour standards, is central to ensuring that those standards never fall so low as to become forced labour. The coordination of enforcement activities between workplace inspectorates and the police to pursue criminal charges against employers whose practices fall far below acceptable norms is also important. Where the victim of forced labour is a foreigner, the State's administrative authorities responsible for immigration will also need to be included in the coordinated action. It is the duty of States Parties to enforce their own labour legislation, crafted to comply with ILO standards, so that the downward drift of labour practices never reaches a situation of forced labour.

## CONCLUSIONS

This chapter has considered the intersection of the Protocol with the ILO's central concern to stop forced labour and eliminate the worst forms of child labour. It has reviewed the obligations of States Parties to stop forced and child labour and provided some further explanation of the definitions in ILO standards. Its meaning has been illustrated by specifying six circumstances in which forced labour occurs: (1) physical violence; (2) restriction of movement of workers; (3) debt bondage; (4) withholding of wages; (5) retention of passports or identity documents; and (6) the threat of denunciation to the authorities.

In most States Parties the six circumstances of forced labour are already criminal offences. Increased emphasis on law enforcement regarding these offences may be a helpful adjunct to new offences introduced in accordance with the Protocol. Those States that seriously want to stop forced labour need to implement substantial crime prevention programmes, particularly in the form of workplace inspections. The enforcement of existing criminal offences related to forced labour is needed. New instructions



to law enforcement agencies and prosecutors will assist in achieving the interests of society, namely protection against those who engage in forced labour.

However, in addition to this criminal law enforcement aspect, the existence of civil labour and administrative law remedies for the individual who has been subject to forced labour is critical. Workers will often need assistance in order to bring claims, not least in the form of assistance from an employees' representative. Last but not least, States Parties should use their administrative laws to protect victims of forced labour, in particular when they are foreigners. For sanctions against forced labour to be successful where the worker is a foreigner, the State's administrative laws need to provide some security to the workers that their contribution to the exposure of unacceptable working conditions will not result in immediate punishment in the form of expulsion. Forced labour is one result of a State's failure to maintain consistent and high labour standards throughout its territory.

When new criminal laws are introduced, those State agencies responsible for their application must receive additional funding if they are to carry out their duties. At the same time, increased funding for law enforcement agencies to pursue criminal sanctions in respect of forced labour should not be used to justify a diminution of State assistance to workers to pursue civil and administrative claims.





# Monitoring recruiters and other auxiliaries

The Protocol requires the introduction of criminal sanctions for persons who have recruited, transported or transferred by means of coercion, deception or persuasion, for the purpose of exploitation, which includes the exploitation of prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. Among the issues in the Protocol definition that require further clarification, is the relationship between the person who recruits, transports or transfers the worker and the person who engages the worker in unacceptable labour practice.

Monitoring recruitment as part of effective migration management will lead to the prevention of trafficking and other forced labour outcomes by stopping unscrupulous intermediaries, agencies and employers from luring (potential) migrants into exploitative employment. Recruitment occurs both in origin and destination countries. While the ILO recognizes private employment agencies as legitimate actors in the labour market, it also attempts to eradicate abusive practices, such as excessive fees, false job offers, provision of credits with high interest rates for travel and job brokering services as well as forged documents. This section will look at different types of recruiters and how they are covered in ILO Conventions that relate to aspects of the Protocol. The Conventions may thus aid in drafting appropriate anti-trafficking and anti-forced labour legislation through the identification of recruiters who can subsequently be monitored or sanctioned.<sup>23</sup>

## IDENTIFYING THE RECRUITER

The trafficking cycle most often begins with the recruitment of a person by means of deception, coercion and/or persuasion. Recruitment is a somewhat broad notion that can be used in common parlance to mean job advertising, candidate canvassing, candidate selection, job brokerage, direct hiring or hiring by delegation. In general terms, it can be defined as a free contractual agreement whereby one party commits itself to pay pre-determined remuneration in exchange of which the other party commits itself to perform pre-determined tasks in a pre-determined time.<sup>24</sup>

Recruiters, including traffickers, can be agencies, individuals, auxiliaries, employers, or an organization of these, usually working legally, semi-legally or with a facade of legality. They can also be entirely illegal. Traffickers may operate under several disguises, for instance, private employment agencies, travel agencies, model and fashion agencies, dancers' and entertainment agencies, actors' and performers' agencies, bridal and matrimonial agencies, agencies that do not have recruitment as their primary activity, yet engage in it, or pen and personal contact clubs. They can also be part of an organized crime network. Auxiliaries in the recruitment business can be, for example, the

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<sup>23</sup> For more information see ILO/SAP-FL (2005): *Trafficking for forced labour: How to monitor the recruitment of migrant workers*, Training manual, Geneva

<sup>24</sup> *Ibid.* For a legal definition of recruitment in the context of migration see Convention No. 97, Art. 2, Annex 1.

entire range of people involved in supplying documentation, including false documentation, and those involved in providing transport. Hence, a network consisting of recruiters and auxiliaries surrounds trafficking and forced labour.

There are various forms of abuse and exploitation that can be committed by recruiters and auxiliaries, which, even if this particular actor in the chain has no intention of putting the migrant in forced labour, make the migrant vulnerable to it. These abuses are also useful indicators of trafficking. They include charging exorbitant fees for visas and other travel documents, processing and providing fake travel documents without informing the migrant who is to use them, recruitment for non-existent jobs as well as misrepresenting the job and work conditions (e.g. women going abroad and believing they will work as domestics but ending up in prostitution). There is also the provision of a loan that is hard to pay back (particularly since the interest on the loan and the amount of the loan itself tend to be falsely inflated, though the migrant is not usually aware of this), leaving the person in debt to the recruiter and leading to situations of debt bondage and forced labour.

**Box 10**  
**Abuses carried out by recruitment agencies in Indonesia**

By the 1990s Indonesians were amongst the fastest-growing migrant population in Asia. Indonesians desiring to work abroad are officially required to find jobs abroad through 400 government-sanctioned agencies. These charge excessive fees for training, processing applications and placements. Because of this, migrants are usually seriously indebted before even leaving the country. Furthermore, they are required to sign contracts with the recruitment agencies and have little or no power to negotiate their terms.

The agencies require prospective migrants to live in training camps for one to 14 months. Here they are often forced to work for agency staff, as well as perform tasks such as cleaning, shopping and cooking. The majority of migrants in the camps do not have mattresses to sleep on and are underfed. Physical and sexual abuse also occur in the camps, illness is rampant but there is insufficient medical care.

Agencies continue to profit from the migrants' labour when the latter finally leave for a job abroad. The salary of the first months of work abroad is used to pay off the debt to the agency. However, even after the debt has been paid off most migrants still face forced labour conditions, this time at the hands of their employer/exploiter abroad. Indonesian migrants are unable to leave the forced labour situation because of the contract they signed with the agency, though often they have not even seen the contract or it is in a foreign language.

Even on return migrants are exploited. Returning migrants are required to pass through a special terminal of the Soekarno Hatta International airport. There have been reports of migrants subjected to rape and physical abuse. Moreover, many have to pay bribes in order to obtain basic information and services. If the migrant is dependent on transport from the agency, this once again leads to excessive fees, about ten times higher than the cost of public transport.

See: Comments made by the International Confederation of Free Trade Unions (ICFTU) concerning the exploitation of Indonesian migrant workers, noted by the Committee of Experts on the Application of Conventions and Recommendations, 75th Session, Geneva 2004.

Thus punishing the employer alone for forced labour practices leaves intact the trafficking network composed of recruiters and auxiliaries. Therefore appropriate legislation and other action are needed which allow for the monitoring and prosecution of all types of recruiters and auxiliaries. ILO Conventions can be of help here.

The recruitment of migrant workers for employment in a country other than that of their nationality has been treated in a number of ILO Conventions, notably the Migration for Employment Convention (Revised), 1949 (No. 97), the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and more recently the Private Employment Agencies Convention, 1997 (No. 181). When considering the definition of trafficking in persons in the Protocol, three activities are directly relevant: the recruitment, transport and transfer of persons (the other two activities, harbouring and receipt of persons, have been discussed in the previous section).

### THE PRIVATE EMPLOYMENT AGENCIES CONVENTION, 1997 (NO. 181)

ILO Convention No. 181 includes several provisions that are of relevance to the fight against human trafficking. The Convention contains a detailed definition of private employment agencies that can provide the following services: “(a) matching offers of and applications for employment [...], (b) services consisting of employing workers with a view to making them available to a third party [...], (c) other services relating to job-seeking, determined by the competent authority after consulting the most representative employers’ and workers’ organizations, such as the provision of information [...]” (Art. 1).

Convention No. 181 requires a ratifying State to adopt all necessary and appropriate measures, both within its jurisdiction and, where appropriate, in collaboration with other States, to provide adequate protection for and prevent abuse of migrant workers recruited or placed in their territory by private employment agencies (Article 8). Social partners should be consulted when applying this provision. In addition, Recommendation No. 188, which supplements Convention No. 181, suggests that member States adopt all necessary and appropriate measures to eliminate unethical practices of private employment agencies. Paragraph 8 (b) of the Recommendation puts special emphasis on the provision of information: private employment agencies should “inform migrant workers, as far as possible in their own language or in a language with which they are familiar, of the nature of the position offered and the applicable terms and conditions of employment”.

To ensure effective protection of migrant workers, legislation shall provide for penalties, including prohibition of those private employment agencies that engage in fraudulent practices and abuses. It is left to governments to determine the penalties for abuses by private employment agencies, which can include criminal sanctions but also, even more importantly, administrative sanctions. Administrative sanctions include, for example, payment of fines, withdrawal of licences or the confiscation of assets gained via abusive practices. Article 14 (1) of the Convention states that “provisions of this Convention shall be applied by means of laws or regulations or by any other means consistent with national practice, such as court decisions, arbitration awards or collective agreements”. When examining the Convention’s application by States that have ratified it, the ILO Committee of Experts regularly requests information on measures taken to ensure that

migrant workers recruited or placed in employment by private employment agencies enjoy adequate protection and are not subjected to abuse.

Labour inspection services or other competent public authorities should supervise the implementation of these provisions (Art. 14, 2). Furthermore, procedures should be in place “involving as appropriate the most representative employers’ and workers’ organizations [...] for the investigation of complaints, alleged abuses and fraudulent practices concerning the activities of private employment agencies” (Art. 10). The Convention stipulates that national law and practice should determine the legal status of private employment agencies and the conditions governing their operation. These might include regulatory measures such as registration, licensing, self-regulation via codes of conduct, certification of profession or rating. The Convention also promotes cooperation between private and public employment agencies (Art. 13), which should cover the protection of migrant workers as well as others.

The best defence against traffickers is to undermine the basis on which any profit from the activities can take place. In this respect, the Convention is based on the principle that private employment agencies shall not charge, directly or indirectly, in whole or in part, any fees or costs to workers. Exemptions to this rule are allowed, “in the interest of the workers concerned”. However, social partners should be consulted and the imposition of fees is closely monitored by ILO supervisory bodies (Art. 7).

The Protocol’s provisions on cooperation among States to eliminate trafficking mirror those in Article 8(2) of ILO Convention No. 181, which promotes in particular the negotiation of bilateral agreements to prevent abuses and fraudulent practices in recruitment, placement and employment of workers recruited in one country to work in another.

#### **Box 11** **Self-regulation by private agents**

Migrant-sending as well as migrant-receiving countries should encourage the self-regulation by private agents of their profession. Self-regulation should include the adoption by private agents of a code of practice to cover, inter alia, the following:

- (a) minimum standards for the professionalization of the services of private agencies, including specifications regarding minimum qualifications of their personnel and managers;
- (b) the full and unambiguous disclosure of all charges and terms of business to clients;
- (c) the principle that private agents must obtain from the employer before advertizing positions and in as much detail as possible, all information pertaining to the job, including specific functions and responsibilities, wages, salaries and other benefits, working conditions, travel and accommodation arrangements;
- (d) the principle that private agents should not knowingly recruit workers for jobs involving undue hazards or risks or where they may be subjected to abuse or discriminatory treatment of any kind;
- (e) the principle that migrant workers are informed, as far as possible in their mother tongue or in a language with which they are familiar, of the terms and conditions of employment;
- (f) refraining from bidding down wages of migrant workers; and

(g) maintaining a register of all migrants recruited or placed through them, to be available for inspection by the competent authority, provided that information so obtained is limited to matters directly concerned with recruitment and that in all instances the privacy of the workers and their families is respected.

See: Extract from the Report of the Tripartite Meeting of Experts on future ILO activities in the field of migration, op. cit., p. 17. For more information see <http://www.ilo.org/public/english/standards/re/m/ilc/ilc87/r3-1b3.ht>

<sup>25</sup> Annex 1, Art. 2 refers to recruitment, placing and conditions of labour migrants for employment, recruited otherwise than under Government-sponsored arrangements for group transfer.

## OTHER RELEVANT ILO STANDARDS

The Migration for Employment Convention (Revised), 1949 (No.97) and the Migrant Workers (Supplementary Provisions Convention), 1975 (No.143) also provide guidance on the monitoring of recruitment. ILO Convention No. 97 defines “recruitment” as “(i) the engagement of a person in one territory on behalf of an employer in another territory, or (ii) the giving of an undertaking to a person in one territory to provide him with employment in another territory, together with the making of any arrangements in connection with the operations mentioned in (i) and (ii) including the seeking for and selection of emigrants and the preparation for departure of the emigrants”.<sup>25</sup> This definition of recruitment is particularly relevant to the Protocol (which does not define the term) as it clarifies the relationship of the recruiter and the employer. As such, it encompasses intermediaries, agents and auxiliaries.

ILO Convention No. 97 is also relevant to the issue of fraud and deception in the Protocol’s definition of trafficking. It provides that where States Parties maintain a system of supervision of contracts of employment between an employer, or a person acting on his or her behalf and a migrant for employment, they undertake to require “(a) that a copy of the contract of employment shall be delivered to the migrant before departure or, if the Governments concerned so agree, in a reception centre on arrival in the territory of immigration; (b) that the contract shall contain provisions indicating the conditions of work and particularly the remuneration offered to the migrant; (c) that the migrant shall receive in writing before departure, by a document which relates either to him individually or to a group of migrants of which he is a member, information concerning the general conditions of life and work applicable to him in the territory of immigration.” (Annex 1, Art. 5).

Where the migrant is provided with the document on arrival, Article 5(2) provides that he or she shall be informed in writing before departure of the occupational category for which he or she is engaged and the other conditions of work, in particular the minimum wage which is guaranteed to him or her. This article provides guidance on how States Parties should assess the meaning of the terms “by means... of fraud, of deception...” in the definition of trafficking in persons. Where the intermediary has fulfilled the requirement of Article 5 of the Annex then he or she should not be considered to have committed a fraud or deception on the migrant worker.

**Box 12**  
**R&A Harvesting company in the US**

From the late 1990s, Jose Ramiro and Juan Ramos' farm labour contracting company, R&A Harvesting, supplied labour to harvest oranges and other citrus products for some of the largest citrus growers in the US. Between January 2000 and June 2001, the Ramoses forced as many as 700 Mexican and Guatemalan workers, mostly men, to work without pay, or for far less than the minimum wage, under the threat of violence. They instituted this coercive control under the pretence of collecting debt owed for transport from Arizona to Florida, and for charges made for supplying work equipment, housing utilities and other necessities.

After R&A Harvesting employees attacked a van driver suspected of helping the workers, the Coalition of Immokalee Workers (CIW), a local community organization, pressured prosecutors to investigate allegations of forced labour. The owners of R&A Harvesting were tried and convicted of forced labour charges in 2002.

United States v. Ramiro Ramos, Juan Ramos, Jose Ramos  
THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT  
No. 02-16478-AA 20 November 2001

Article 8 of Annex 1 of ILO Convention No. 97 requires States Parties to apply appropriate penalties to “any person who promotes clandestine or illegal immigration”, which is also the objective of the Protocol. Thus, States that have ratified Convention No. 97 have already this obligation. These provisions may be more useful as regards abuses taking place on the crossing of international borders than the new offences under the Protocol (see chapter 2). The disentanglement of the question of offences relating to immigration from offences relating to forced labour and other unacceptable conditions of work is likely to result in a greater degree of success in combating the activity. In order to achieve the conviction of a person accused of promoting clandestine or illegal immigration there is no need for the prosecution to prove either the use of threats of force or other coercion nor the relationship between the person promoting clandestine or illegal immigration and the employer under whose supervision the forced labour is taking place.

In addition, Article 3 of Convention No. 143 requires ratifying States to take measures to suppress clandestine movements of migrants for employment and illegal employment of migrants as well as measures against the organizers of illicit or clandestine movements of migrant workers and those who employ workers who have migrated irregularly. The Convention specifically states that one of the purposes for these measures is to prosecute the authors of labour trafficking whatever the country from which they exercise their activities (Article 5). Ratifying States are also required to provide in national laws or regulations for the effective detection of illegal employment of migrant workers and for the definition and application of administrative, civil and penal sanctions in respect of this illegal employment and the organization of movements of migrants for employment.

## CONCLUSIONS

Before embarking on fresh exercises of legislative drafting, governments are encouraged to review how they have implemented existing duties under ILO standards, in particular Conventions Nos. 97, 143, and 181, and to examine how extension of existing laws or administrative regulations can fulfil any lacunae which may exist.

For States Parties, a key consideration in adopting new criminal legislation is to ensure prosecution of those persons who are directly carrying out the offence as well as aiding or abetting in trafficking without criminalizing legitimate business. Thus the space between the promotion of labour migration and the activities of reputable international recruitment agencies and traffickers or between national transport companies and business enterprises engaged in assisting individuals to cross international borders irregularly must be carefully defined in law. It is not sufficient to leave this to the discretion of the law enforcement agencies after the law has been adopted.





## Victim identification and protection

The second objective of the Protocol under Article 2 is protection of the victims, which is at least as important as the prosecution of traffickers. Here ILO standards can be of use by recalling that the victim of trafficking is a migrant worker with rights. The following chapter should be seen as complementary to existing documents that are concerned with the protection of victims, in particular the UN Economic and Social Council Recommended Principles and Guidelines on Human Rights and Human Trafficking as well as the UNICEF Guidelines for Protection of the Rights of Children Victims of Trafficking in South Eastern Europe.<sup>26</sup>

Many trafficked persons, in particular for labour exploitation, remain unrecognized and are deported as “undocumented migrants”. Workers’ organizations and NGOs play a critical role in the identification process but there is a need for a broader sensitization of authorities who come into contact with potential victims. A major challenge is that most victims do not perceive themselves as “victims” but rather as migrants who happen to be in a “difficult” situation. As has been pointed out by one author: “Wrong expectations of how a ‘victim’ should behave often leads to misinterpretations by both the authorities and service providers, which may often shift blame on to the trafficked person”.<sup>27</sup> In addition, there is a wide spectrum of forced labour situations (see Chapter 2), ranging from those who have been locked up or severely restricted in their freedom of movement, and physically abused, to those who were deceived about the conditions of their contract. It is therefore paramount to treat each case separately and identify the specific needs of each victim.

### PROTECTION OF VICTIMS: A RIGHTS-BASED APPROACH

Many countries provide some sort of protection for identified victims of trafficking. This protection has two purposes. Above all there is a human rights issue, when the rights of victims of trafficking have been violated. Secondly, the most common way of prosecuting traffickers is via the testimony of the victims. The dual function of victim protection is set out explicitly by the Protocol. Article 6.1 states that “in appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential”.

The Protocol requires States Parties to take measures in domestic legal and administrative systems to provide victims with information on relevant court and administrative proceedings and assistance to allow their views and concerns to be presented and considered in the criminal proceedings (in a manner not prejudicial to the rights of the defence). States Parties are required to consider implementing measures to provide for physical, psychological and social recovery of victims. Here the Protocol recommends the inclusion of cooperation with non-governmental organizations, other relevant organizations (which could include employees’ representatives) and other elements of civil society.

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<sup>26</sup> See also *Anti-Slavery International (2002): Human traffic, human rights: redefining victim protection*, London.

<sup>27</sup> *ibid*, p. 33.

In order to provide this assistance, the Protocol specifies in particular the provision of:

- (1) appropriate housing;
- (2) counselling and information in particular regarding the victims' legal rights in a language that victims understand;
- (3) medical, psychological and material assistance; and
- (4) employment, educational and training opportunities.

<sup>28</sup> ILO: Report of the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 89th Session, 2001, Geneva.

States Parties are required to take into account age, gender and special needs of victims and the special needs of children including appropriate housing, education and care. Furthermore, States Parties are required to endeavour to provide for the physical safety of victims while on their territory and to ensure that their legal systems contain measures that offer victims the possibility of obtaining compensation for damage suffered.

Critical to this duty, from the perspective of the ILO, is the inclusion of powers for employees' representatives to represent and act on behalf of victims in legal proceedings. In its general observation in 2001, the Committee of Experts requested information from States Parties on "measures designed to encourage the victims to turn to the authorities, such as (i) permission to stay in the country at least for the duration of court proceedings, and possibly permanently; (ii) efficient protection of victims willing to testify and of their families from reprisals by the exploiters both in the country of destination and country of origin of the victim [...]; (iii) measures designed to inform victims and potential victims of trafficking of measures under (i) and (ii), with due regard to any barriers of language and circumstances of physical confinement of victims [...]".<sup>28</sup>

To testify against the perpetrator(s), the victim should be in the country hosting the trial. Article 7 of the Protocol provides that States Parties "shall consider" adopting measures that permit the victims of trafficking to remain on their territory, temporarily or permanently in appropriate cases. States Parties are required to give appropriate consideration to humanitarian and compassionate factors. This provision raises some of the most contested issues in a number of States: should victims of trafficking be permitted to remain because of what they have suffered?

According to the position taken in some States, victims should receive only temporary residence permits so long as they are useful or relevant to criminal proceedings underway. However, the victim may need time to take an informed decision on whether to testify, and to consider seriously the risks it entails (for example, whether the State offers a victim protection scheme and the reprisals the trafficker may take against the victim as well as on family members). As such, some countries give victims a reflection time. The victim who does decide to go ahead with the testimony may be given a temporary residence permit. If the victim decides the contrary, he/she may be repatriated. A few countries may give temporary residence permits even if the victim chooses not to testify.

### Box 13

#### **Dutch temporary residence permits for victims of trafficking: Immigration law circular B-9**

The Dutch authorities consider it of the utmost importance that victims or witnesses of trafficking who report an offence remain available to the Public Prosecution Office for an extended period of time in order to provide evidence. The B-9 regulation reflects these concerns.

The B-9 regulation is twofold: It stipulates the provision of facilities for the investigation and prosecution of perpetrators of trafficking, as well as the provision of shelter and protection for victims. Persons who may be victims of trafficking can obtain (temporary) residence in the Netherlands, as well as shelter and reception, medical assistance, legal aid and special provisions for maintenance. Even if there is only the slightest indication that a person is a victim of trafficking, the police must bring to their notice the rights linked to regulation B-9.

Once identified, the possible victim will be offered a three-month reflection period. During this time, the person must decide whether to officially report the crime of trafficking in human beings. If the victim decides to report the offence, this is automatically taken as an application to grant a residence permit for a certain time. The application is honoured in the case of a criminal prosecution or investigation.

Victims who fall under the Dutch anti-trafficking law must decide immediately whether they want to report the offence. The reporting of the crime is considered an automatic application to grant a residence period for a limited amount of time.

See: Dutch National Rapporteur: (2002) Trafficking in human beings: First report of the Dutch National Rapporteur, The Hague: Bureau NRM

Simply giving a residence permit to victims who cooperate with authorities in the country of destination can be seen as a rather narrow approach and may not take fully into consideration the needs of the victim. Indeed, return to the country of origin may result in re-trafficking due to the highly vulnerable situation of the victim, who most probably has no viable alternatives in the home country. Some traffickers have extensive networks that can bring the victim back under their control. In the light of this phenomenon, States Parties may consider providing more durable protection to victims in the form of an extendable residence right. This consideration is required by Article 7(2) of the Protocol on the grounds of humanitarian and compassionate factors.

The State, or the victim him/herself, may decide that the victim should be returned to the home country. Article 8 of the Protocol contains provisions requiring the State of origin or previous permanent residence of the individual to facilitate and accept the individual. Due regard for the safety of the individual is required. The victim is also to be returned without undue or unreasonable delay. Further, the return "shall preferably be voluntary". Provision is made for documentation to be issued. The repatriation of the victim is specifically stated to be without prejudice to any right afforded to victims of trafficking by the domestic law of the State Party. Further, it does not prejudice bilateral or multilateral agreements.

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<sup>29</sup> *When developing international criminal law, it is very important that concerns regarding the protection of victims do not, inadvertently, call into question the rights of workers in international labour law.*

<sup>30</sup> *See ILO: Towards a fair deal for migrant workers in the global economy, Report VI, International Labour Conference, 92nd Session 2004, Geneva.*

Though the Protocol does not specify it, in order to achieve successful, voluntary return it is advisable that the migrant worker has access to employees' representatives who are able to pursue legal claims the worker may have in respect of unpaid wages, tax deductions and social benefits. Further, the individual needs an opportunity to make the necessary practical arrangements, for instance, to collect and take belongings. Unless the individual is provided with some security that legal claims will be pursued after departure, and with an opportunity to collect belongings and say goodbye to friends, return is unlikely to be voluntary or indeed successful.

As has been seen, the protection of victims of trafficking is highly dependent on appropriate legislation, and on the way it is applied. ILO Conventions on migrant workers can be used as a stepping-stone for the drafting of this kind of legislation. They can be particularly useful in the drafting of legislation on residence permits and the right to compensation.

## ILO STANDARDS CONCERNING MIGRANT WORKERS

Victims or workers? The difference of wording reflects the specific concerns of criminal law and labour law.<sup>29</sup> ILO standards relevant to the Protocol on the protection of migrant workers are very wide. For certain groups of workers, who may also be victims of trafficking, their rights under ILO Conventions go well beyond those contained in the Protocol. In implementing the Protocol, governments should take the opportunity to include the greater rights arising from ILO standards; and indeed they will be legally bound to do so when ILO Conventions have been ratified. It would be good practice to extend to all victims of trafficking at least the minimum level of protection provided through ILO standards.<sup>30</sup>

The majority of trafficked and forced labour victims are undocumented migrants, for whom ILO Convention No. 143, Part I, provides the most important framework of protection. In the rather unusual case that regular migrant workers in a regular employment situation are found in forced labour, Convention No. 97 will apply. More important, all ILO fundamental principles and rights at work that are expressed in the 1998 ILO Declaration on Fundamental Principles and Rights at Work (see Chapter 1) apply to all migrant workers without distinction, whether they are temporary or permanent, or whether they are regular migrants or migrants in an irregular situation.

Part I of Convention No. 143 and several provisions of its accompanying Recommendation No. 151 deal explicitly with the suppression of clandestine migration flows and the protection of migrants with an irregular status. To date, this Convention has not enjoyed wide ratification. However, as a supplement to the Protocol, States Parties should consider ratification of Convention No. 143, which provides useful clarification and guidance on the issue of protection of the victim who is also a worker.

Part I of Convention No. 143 provides minimum standards of protection for those migrant workers, including trafficked workers, who find themselves in an irregular situation. According to Article 1 of Convention No. 143 ratifying States undertake to protect the basic human rights of "all migrant workers". In addition, Article 9 (1) of the Convention provides for equality of treatment between irregular migrant workers and those in a regular situation with regard to certain rights arising out of past employment.

These relate to remuneration, social security and other benefits. This is particularly important for trafficked migrant workers who find themselves in an irregular situation and whose wages have not been paid. Furthermore, under Article 9 (2), in case of dispute about the rights referred to in the preceding paragraph, “the worker shall have the possibility of presenting his case to a competent body, either himself or through a representative.” Article 9(4) of ILO Convention No. 143 provides guidance for States in implementing the Protocol regarding the treatment of victims in an irregular situation as regards their presence and work. It states that “nothing in this Convention shall prevent Members from giving persons who are illegally residing or working within the country the right to stay and to take up legal employment.”

**Box 14**  
**RIVERA v. NIBCO, INC.**

In a precedent-setting 2004 opinion, closely watched by labour and immigrant rights groups, the US Federal Appeals Court blunted the effect of a controversial 2002 US Supreme Court decision that denied back pay to an illegal immigrant who was fired for union organizing. Immigrant advocates have said that some employers have used the Supreme Court ruling to intimidate immigrant workers, implying that they had no workplace rights.

The case involved 23 Latin American and Southeast Asian female immigrants formerly employed at the NIBCO factory in California. All had limited English proficiency, this not being a requirement for the work at the factory. In 1997/98 the plaintiffs were asked to take a basic job skills test in English, on which all performed poorly. NIBCO allegedly responded to the poor results with adverse employment consequences such as demotions or transfer to undesirable jobs. All plaintiffs were terminated in 1998.

The plaintiffs subsequently filed an action in a federal court, claiming disparate impact discrimination based on national origin. During the deposition of the plaintiff Rivera, NIBCO asked her where she was born and where she was married. Once the deposition had been terminated, the plaintiffs filed for a protective order against additional questions pertaining to immigration status.

The protective order was granted, the magistrate judge barring all discovery into each plaintiff’s immigration status. Though NIBCO was not prevented from conducting an independent discovery investigation, thereby possibly decreasing its liability, the ruling dictated that NIBCO, under the circumstances, did not have a right to use the discovery process to gain that information as this would ‘unnecessarily chill legitimate claims of undocumented workers’ (p. 4820).

See: UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT  
No. 02-165332 D.C. No. CV-99-06443-AWI/SMS OPINION April 13, 2004

One difficulty that migrant workers encounter when they have been working irregularly on the territory of a State Party, including in conditions of forced labour, is that their contracts of employment are considered unenforceable as they were entered into in breach of national provisions permitting employment. In such circumstances not only is the worker punished as he or she is not able to obtain payment for the work carried out, but the employer who has profited from forced labour is not required to compensate the worker. States Parties may wish to remedy this situation as part of the package

of measures they adopt regarding the implementation of the Protocol. This would be consistent with the duty under Convention No. 143 to ensure equal treatment for migrant workers.

The victim must also be protected against claims for the full cost of his or her expulsion in accordance with Convention No. 143, Article 9(3): “In case of expulsion of the worker or his family, the cost shall not be borne by them”. The interpretation of this provision by the Committee of Experts has limited the duty of States Parties to incur the costs of expulsion beyond their borders. Administrative rules adopted to implement the Protocol should reflect ILO standards on the costs of expulsion.

For those migrant workers with a regular status, Article 6 of ILO Convention No. 97 requires States Parties to apply without discrimination in respect of nationality (or other criteria as set out) treatment no less favourable than that which they apply to their own nationals as regards remuneration, including family allowances and other benefits, membership of trade unions and the enjoyment of the benefits of collective bargaining; accommodation; social security subject to specified limitations; employment taxes, dues or contributions and legal proceedings relating to matters included in the Convention. Whether the worker has been trafficked or not is irrelevant to his or her right to equal treatment under this provision: “(a) in so far as such matters are regulated by law or regulations, or are subject to the control of administrative authorities”.

The right to take legal proceedings and to be represented may be of particular importance to the worker/victim where the regularity of his or her presence on the territory and of work is in question. A right to appeal against any determination by government authorities that the worker’s presence and work are irregular is central to his or her protection. Unless there are overriding considerations of national security or public policy, States Parties should provide that the exercise of the right to appeal gives rise to suspension of the decision.

The Protection of Wages Convention, 1949 (No. 95) also deserves attention, in part because it is the most widely ratified Convention after the fundamental and priority Conventions. Article 12, paragraph 2 provides for the settlement of wages due upon the termination of a contract. The most serious cases of non-compliance of this provision relate to wage claims by migrant workers who have been expelled from the country of employment without being paid the wages and other benefits that they already earned. In addition, Article 9 provides that “any deduction of wages with a view to ensuring a direct or indirect payment for the purpose of obtaining or retaining employment ... shall be prohibited”.

Finally, of central importance for the protection of the worker irregularly present on the territory is the UN Convention on the Rights of all Migrant Workers and Their Families, 1990. This Convention entered into force in 2003 and provides an important complement to the Protocol as regards the specific rights of migrant workers both regularly and irregularly present on the territory of a State.

## PROTECTION AND PREVENTION THROUGH TARGETED INFORMATION

One of the most effective ways of protecting workers is through information about their rights. Access to employees' representatives and legal advice about their position is critical. Trafficked workers are least likely to know their rights, or to have information on how to protect them. They may even believe that they are irregularly present in the State when in fact they have a residence right. Examples have arisen in a number of EU Member States where nationals of other Member States who had a right to move there for the purpose of employment were unaware of their right and had been convinced by traffickers that their residence was irregular. Without investment in information campaigns together with workers' organizations where possible, successful action to protect the victims of trafficking and prevent further trafficking will not be possible.

In this context, some of the provisions of Convention No. 97 provide useful guidance. For example, Article 2 requires ratifying States to maintain an adequate and free service to assist migrant workers, and in particular to provide them with accurate information. They also have to take all appropriate steps against misleading propaganda (Article 3). Finally, States that have ratified the UN Convention on the Status of All Migrant Workers and Their Families may wish to take advantage of the revision of national legislation which will be required by the implementation of the Protocol to incorporate into their national legislation the important commitments to migrant workers, both regularly and irregularly present on the territory, which are contained in that convention.

## PROTECTING DOMESTIC WORKERS

Migrants working in domestic service, many of whom are women, are especially at risk of becoming victims of forced labour because domestic service occurs mostly in the informal sector and in the private sphere. Therefore it tends to remain outside the scope of regulation, monitoring and inspection. To avoid rights abuses in this sector, 'domestic workers must be covered by the labour laws in the countries of destination. This means that domestic work as paid employment in the "informal sector" must be taken out of its currently private, individual realm and regulated publicly. Currently, domestic workers are not covered under the labour laws in many countries.'<sup>31</sup>

Children are particularly vulnerable to exploitation in domestic service. Some children may be subjected to the worst forms of child domestic labour as a result of trafficking and/or debt bondage. They may be sexually abused or exploited, suffer practices similar to slavery or be forced to undertake hazardous work (see ILO Recommendation No. 190, which supplements Convention No.182). All worst forms of child domestic labour are unacceptable and must be eliminated.

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<sup>31</sup> Blackett, A. (1998) *Making domestic work visible: the case for specific regulation.*



### **Box 15**

#### **Regulation of the domestic service sector**

An example of the regulation of domestic employment is the draft Magna Carta for Domestic Workers, or Batas Kasambahay, by the Philippines. The proposed law, promoted by organizations of domestic helpers, includes a comprehensive definition of a domestic helper, stipulates the obligation of a written contract, specifies working hours, pay, overtime, rest days and holidays, as well as maternity and paternity leave. The bill also includes articles on annual salary increases, basic necessities such as food and sleeping arrangements, medical assistance, social security, 13th month pay and termination pay. Furthermore, the bill prohibits bonded labour and outlines the rights of self-employed and child domestic workers. Finally, the pending bill details sanctions for the violation of its provisions.

As of March 2005, the bill was still pending in the Philippine Congress.

## CONCLUSIONS

The key to protecting victims of trafficking lies in treating them as rights holders entitled to the benefit of all of the protections contained in the relevant international instruments, adopted by the United Nations or the ILO. While the Protocol itself gives rather wide latitude to States Parties in the treatment of victims of trafficking and permits a substantial degree of discretionary decision-making, the relevant ILO Conventions set out standards for the protection of migrant workers, including trafficking victims. From the viewpoint of the ILO and in relation to ILO standards, among the most important points for States Parties in implementing the Protocol regarding protection of victims are:

1. Where the victim is irregularly present on the territory and his or her work is irregular, States Parties must consider whether to regularize the worker's status taking into account compassionate and humanitarian concerns. If the State Party wishes to reject an application for regularization by the worker, he or she should have access to advice and representation.
2. Victims should have the right to redress and compensation as regards wages and other types of remuneration and social contributions and benefits; States Parties should permit them access to representation and recognize the standing of workers' representatives in respect of legal proceedings. Employers who have never employed trafficked workers should not be able to avoid their obligation to pay wages and other benefits on the basis that the contract of employment with the victim was irregular and therefore unenforceable.

Finally, in adopting legislation concerning non-nationals, whether these are migration laws, labour codes, social security laws or general human rights laws, countries should take into account that migrant workers are protected against discrimination on the grounds of race, colour, sex, religion, political opinion, national extraction and social origin covered in the Discrimination (Employment and Occupation Convention), 1958 (No.111) and under the Equal Remuneration Convention, 1951 (No.100), which provides for equal remuneration for men and women whether they are nationals or non-nationals. They should also take into account the provisions of the UN Convention on the Elimination of All Forms of Racial Discrimination and the UN Convention on the Elimination of All Forms of Discrimination Against Women.

# The role of different actors in combating trafficking

Different actors have a prominent role in addressing forced labour outcomes of migration and trafficking. Among them are: legislative bodies, law enforcement (e.g. police, labour inspectors), the judiciary, independent commissions, employers' and workers' organizations, and NGOs. It is important to note that each type of actor will have a different expertise in relation to trafficking and forced labour, as well as different abilities to combat these problems. As such, it is crucial that the actors cooperate with each other in order to fight trafficking and forced labour most effectively.

## LEGISLATIVE BODIES AND THE CHALLENGE OF DRAFTING NEW ANTI-TRAFFICKING LEGISLATION

One of the main roles of legislative bodies is to approve the ratification of the Protocol as well as the relevant ILO Conventions mentioned in this guide. The ratification of treaties gives a clear indication to the international community, as well as to domestic public opinion, that a country is committed to the pursuit of certain goals and to the implementation of certain policies. The ratification of pertinent Conventions will provide a policy goal and a framework of action.

The act of ratification constitutes a commitment by the State to take action that will lead to the goal of eradicating trafficking, which is the second main role of legislative bodies. Legislation is the basis for such action as it:

- Translates the aims and principles of international standards into national law.
- Sets the principles, objectives and priorities for national action to combat trafficking and other forced labour outcomes of migration.
- Creates the machinery for carrying out that action.
- Creates specific rights and responsibilities.
- Places the authority of the State behind the protection of victims of trafficking/migrant workers.
- Creates a common understanding among all actors involved.
- Provides a basis and procedure for complaints and investigations.
- Provides legal redress for victims.
- Provides sanctions for offenders.

A number of questions arise from these points, for instance: do criminal laws prohibit all forms of forced labour and trafficking? Do they include provisions to prosecute all the perpetrators involved? Do the laws provide adequate protection for victims, regardless of whether they agree to file a complaint against the perpetrators of trafficking and forced labour upon identification? Legislative bodies must make sure that their country's legislation effectively prohibits all forms of exploitation as defined by the Protocol and the relevant ILO Conventions, as well as providing appropriate protection and assistance for victims.

Bringing existing legislation into line with treaty obligations is easier said than done. This is for three principal reasons. First, there are often gaps in existing legislation. For instance, in many countries existing legislation on trafficking is interrelated with legislation on prostitution. Other countries have no clear distinction between trafficking, smuggling and migration law. Some countries use legislation on slavery and slavery-like practices, though slavery is not the same as forced labour. For one thing, slavery includes the ownership by one person over another, which is most often not the case in modern forms of forced labour. Hence slavery legislation could be considered out-of-date in most situations and may not be the most efficient way to deal with trafficking offences. All these problems can impede the identification of offences constituting trafficking and forced labour, and the identification and prosecution of perpetrators.

Second, new legislation has to be made consistent with the entire body of existing laws. The trafficking legislation must be coherent, for instance, with the constitution, the existing labour code and migration law. An inter-agency approach involving all the relevant ministries throughout the drafting process is most efficient here.

Third, migration laws can impede victim protection. Most migration laws criminalize the irregular residence and work of a migrant, but do not respond to the need to recognize victims of trafficking. Yet, instead of harmonizing trafficking and migration law, there is an easier way around contradictions between them. For example, if migration laws require the expulsion of irregular migrants found on national territory, a regulation can be issued declaring that victims of trafficking are not covered by these particular provisions.

Legislation has to be complemented by carefully designed and coordinated programmes to combat the underlying causes of forced labour and trafficking. Depending on whether the country in question is a source or a destination for migration, such programmes are likely to be different. Countries of origin will want to implement programmes to develop the country in a general sense, but more particularly to improve schooling, reduce poverty, take the appropriate labour market measures leading to adequate job supply, to inform the public about the risks concerning migration, as well as improve migration management, and so on. They may also set programmes of cooperation with countries of destination. Countries of destination may develop programmes aimed at the employers/exploiters of forced labour and trafficking, which could look into the root causes of the use of abusive work, such as pressure to remain competitive and employ cheap labour, on lack of adequate inspection. Countries of employment could also raise awareness amongst employers about what forced labour is and help them take actions to prevent it being used by their subcontractors, etc.

Once the anti-trafficking and forced labour programme has begun to be implemented, its progress needs to be evaluated. In order for this evaluation to be reliable, accurate data on the nature and magnitude of the problem needs to be collected and analysed. The facts provided by the data should form the basis for an informed debate on the effectiveness of existing policies and programmes and on corrective action that may be taken.

Legislative bodies should therefore ensure that an effective system of data gathering and mechanisms for monitoring implementation are in place. National statistical offices or other competent central bodies should have the necessary authority to collect data relating to trafficking and forced labour. Moreover, reporting obligations should be clearly spelled out for enterprises, local authorities, law enforcement agencies and oth-

ers whose information can be useful for monitoring the situation of trafficking and forced labour in the country.

However, a programme aimed at combating trafficking and forced labour, as well as its implementation and the monitoring and evaluation of the implementation, cannot be carried out without adequate financial and human resources. Funding comes primarily from government. An adequately funded central unit for the development and monitoring of the programme is advisable, to avoid duplication of activities among departments. Such a programme requires the investment of resources in areas such as law enforcement, education, public health and social services. A large part of these funds should be devoted to the training of personnel, for example, lawyers, law enforcement personnel, administrators, social workers and statisticians.

## LAW ENFORCEMENT: THE ROLE OF POLICE AND LABOUR INSPECTORS

Legislation is meaningless without enforcement. As such, the machinery for enforcement should also be reviewed. Labour inspectors and police play important roles. Indeed, they are the ones who monitor workplaces and thus have the ability to identify victims as well as perpetrators of trafficking, and to take corrective measures. Increased monitoring is likely to result in a decrease in forced labour in the workplace.

In its Constitution the ILO requires all member States to set up a system of labour inspection. ILO instruments provide that labour inspection is a public function, a responsibility of government, best organized within the wider context of a State system to administer social and labour policy and to supervise compliance with all national legislation, regulations and standards that give effect to it.

The principal ILO instrument in the area of labour inspection is its Labour Inspection Convention, 1947 (No.81), which covers industry and commerce. It is supplemented by Recommendations Nos. 81 and 82, and a Protocol adopted in 1995 that allows its extension to the services sector. Other ILO Conventions on labour inspection exist for other sectors, such as agriculture, mining and transport. Convention No.81 defines the functions and organization of the labour inspectors. They have the power to enter freely in a workplace liable to inspection, to carry out inquiries freely and in particular to interrogate persons alone, to examine documents and take samples; and the powers to make orders with a view to remedying defects and to decide whether it is appropriate to give warnings and advice or to institute or recommend proceedings. In return, inspectors are required to respect certain obligations: they are prohibited from having any direct or indirect interest in the undertakings under their supervision and shall not reveal manufacturing or commercial secrets of the workplaces they inspect, or the source of any complaint.

The main functions of labour inspection lie in the areas of general working conditions, occupational safety and health, employment (legal or illegal) and industrial relations. Some countries have also included social security as part of the labour inspectors' responsibilities. Among other duties, inspectors should supply information and advice to employers on how to comply with existing laws. They should also alert the competent authorities to any defects or abuses not covered by existing legal provisions (Art. 3.1).

Labour inspectors face a myriad of challenges in performing their responsibilities.

Absence of effective arrangements for cooperation and coordination at all levels can lead to fragmentation of responsibilities, draining limited resources. Because of this labour inspectors may have no contact with those responsible for particular aspects of forced labour, such as police and specialist safety inspectors. At worst there can be rivalry, leading to duplication or one authority leaving the problem to the other. Yet labour inspectors, with wide responsibilities and large geographical coverage, can be the eyes and ears of the police in the world of work. Also, cooperation between police and labour inspectors can be fruitful since criminal and labour laws tend to overlap in the workplace as concerns victims of forced labour.

When considering cooperation between police and labour inspectors, legislatures must ask themselves several important questions. First of all, it is important to ask where the work of the labour inspectors ends and that of the police begins. Each inspectorate needs to be clear about its responsibilities and how to fulfil them, where these responsibilities may overlap, and how cooperation between inspectorates can be ensured on the basis of these responsibilities. Secondly, the most important difficulties that the police and labour inspectors have to overcome should be taken into consideration. For example, many forms of forced labour are hidden from the public eye, such as domestic forced labour, which takes place in the private sphere. In this case, enforcement services need to be strengthened and should improve their relationship with the local communities. Decisions may have to be made about what police and labour inspectorate activities should be given priority in the case of a serious lack of resources.

#### **Box 16** **Special Mobile Inspection Unit in Brazil**

One of the measures to combat forced labour implemented by Brazil has been the creation of a Special Mobile Inspection Unit (Ordinance No. 550 MTb of 14 June 1995): a flying squad of labour inspectors and federal police officers. Both are drawn from a body of volunteers, none of whom operate in the federal state of residence for reasons of personal safety and independence from local pressures. Their job is to investigate allegations of slave labour on fazendas. Sometimes judges are also part of the unit so that prosecution can be done swiftly and on the spot.

Regular evaluations of the operations of this Unit have pointed to two main criteria for effectiveness: centralized organization and absolute secrecy in planning. Attempts to decentralize activities have proved unsuccessful in that news of inspection raids has invariably reached landowners in advance, enabling them to disperse workers or to cover up the situation.

The low-budget interagency team has proven crucial in the fight against forced labour. For example, the investigative work of the federal Special Mobile Inspection Unit has been replicated at the local and state level. The municipality of Vila Rica, in the state of Mato Grosso do Sul, set up a commission with the participation of the Mayor's office and municipal council, and the agricultural producers' and rural workers' organisations. Upon receiving allegations of forced labour, the commission has negotiated with local landowners and intermediaries. The very threat of calling in the Mobile Unit, and the prospect of fines, has facilitated negotiations. The Mobile Unit has only been brought in if such negotiations have broken down.

A major challenge faced by labour inspectors is finding and gaining access to premises. This is particularly the case for informal employment. In some countries only registered, established, large or medium-establishments are monitored, though this is not where forced labour occurs most often. In addition, much formal employment, such as in domestic service, is invisible to labour inspectors. In this type of situation community awareness of the problem of forced labour can be very helpful and can lead to reports of forced labour practices by community members. Unfortunately the situation becomes even more complicated when workplaces shift on a regular basis, such as street vendors.

Moreover, in many countries the law provides that when workers live and work on the same premises, labour inspectors may only gain access to the workplace if the occupier agrees. If permission is refused, the labour inspector has very little power to do anything. An inspector who does gain access to the premises may encounter significant difficulties interviewing victims of forced labour who have been intimidated and threatened by their boss and are thus too scared to talk to the inspectors.

If the inspector does manage to talk to employees who are likely to be victims of forced labour, they may not tell the truth about working conditions and will simply repeat what the employer ordered them to tell the authorities in the case of inspection. Of course some employees may perceive their alternatives to indecent work as so limited and can be so distrustful of the authorities that they will cooperate with their employer/exploiter because they feel that this is their best option. In this case the inspector must use tact and powers of persuasion and be completely informed about forced labour practices and forced labour indicators, such as the withholding of wages, debt bondage, and fear of employer/exploiter, in order to identify victims of forced labour in more indirect ways. For instance, a labour inspector should know that the withholding of wages is not only a civil, but also often a criminal offence.

Labour inspectors can play a vital role not only at the end of the trafficking cycle, when a migrant is already in the position of a victim, but also at the beginning of the trafficking cycle, i.e. the recruitment stage. Monitoring and inspecting can also be extended to recruiters and thus be used during the prevention phase. As already demonstrated by this legal guide, recruiters fall under the term 'agency' as defined by the ILO Private Employment Agencies Convention, 1997 (No.181). Labour inspectors can therefore monitor them if they are backed by national legislation.

Both when monitoring recruitment and actual forced labour practices, labour inspectors often have no choice but to resort to some legal, or even at times physical force. This is unseemly in professional terms and also raises the serious issue of their own safety. This in turn raises the issue of the status of the labour inspectors, as well as their working conditions. In some countries, the low status of labour inspectors seriously weakens their determination to press for enforcement measures. When inspection is backed by enforcement, with visible application of available and effective legal sanctions, it will reduce the scale of trafficking and other forced labour outcomes of migration.

To date most victim identification by law enforcement is done in large part either through police raids or because the victim came forward. Apart from police raids, immigration authorities can assist in the identification of victims. Since victims of trafficking have to pass through these authorities in order to enter the country, they should be trained on how to identify a potential victim of trafficking as well as those that are/have been victims of trafficking. Secondly, the customs police can provide essential information to other law enforcement agencies. Their task lies in the interception of

imported illegal products into the country. Since traffickers often also tend to be active in more widespread criminal activities, including the trafficking of drugs and arms, the detection of these illegal products may provide important clues. In addition, many countries have anti-trafficking squads or units. These are units of police officials specialized in tracking down victims of trafficking, traffickers and trafficking networks.

The correct identification of victims by police is paramount since they supply the most significant incriminating evidence against traffickers. Though proactive policing can occur, using techniques including human and technical surveillance, phone tapping, undercover deployments as well as more standard investigative techniques, most cases tried in court are based on the testimony of victims of trafficking. This is particularly so because proactive operations can be resource intense, take time and tend to be expensive.

The police face some of the same challenges as labour inspectors in the area of victim identification. First of all, since forced labour is a covert activity it may be difficult to detect. If suspicions arise concerning forced labour, care needs to be taken when interviewing victims. For the same reasons as those mentioned above (fear of employer/exploiter, distrust of authorities, a certain complicity with the employer/exploiter because this is wrongly perceived by the victim as the best option, as well as fear of reprisals and fear of deportation), the victim may not be cooperative with police officials.

Because of these obstacles in victim identification, police should be careful not to look for a 'pure' victim of trafficking, especially because of the complex relationship between the victim and the trafficker. In fact, the victim may not even perceive him/herself as a victim but simply as someone with no other viable alternatives. More important, situations of forced and lucrative labour are not necessarily mutually exclusive. For instance, a victim of forced labour can become a gangmaster, thus leading others into forced labour and making a profit, and at the same time be forced to work for the employer/exploiter. As such, police should be trained to identify victims of trafficking and forced labour, be aware of the contradictions of the nature of this identity, and ask the appropriate (preferably indirect) questions.

Another obstacle encountered by the police when attempting to identify forced labour is the isolation of victims. There are several reasons for this. First of all, many victims of forced labour go unnoticed since police raids focus on victims trafficked for sexual exploitation. Thus victims of forced labour can be said to be isolated from outreach by the police. Furthermore, victims of trafficking are often geographically isolated - for example, they may work on farms in remote areas where police do not usually investigate. Also, geographical isolation makes it more difficult for victims to seek assistance.

Another type of isolation is cultural. Many victims of trafficking are employed/exploited by nationals from their home country. Indeed, forced labour exploitation can occur within an ethnic niche. This makes policing more difficult because of the language barrier. Undercover surveillance, for example, is also made more difficult by cultural and linguistic barriers. In addition, the cultural affinity between victim and employer/exploiter can once again contribute to a highly complex relationship between the two, thus preventing the victim to denounce abusive practices.



In the light of the challenges faced by police, adequate training should be provided to them. This training should include components such as the broadening of policing of trafficking for sexual exploitation to trafficking for forced labour and services, the nature of the identity of the victim, the array of relationships victims have with their employers/exploiters, as well as how to deal with an uncooperative victim, to mention but a few.

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*32 International Centre for Migration Policy Development (2003): Development of an anti-trafficking training module for judges and prosecutors.*

## THE ROLE OF JUDICIAL AUTHORITIES

A crucial basis for efficient prosecution of traffickers is a credible judicial system. Credibility is partially related to jurisdictional clarity. Jurisdiction to investigate, prosecute and punish needs to set out clear responsibilities for all actors involved. For instance, are federal or local courts responsible for prosecuting traffickers? A lack of clarity in this area can result in no prosecution at all as courts may refuse to take on the case.

Credibility of the judicial system is also linked to effective enforcement of sanctions for traffickers. However, judicial authorities must be well acquainted beforehand with the issues of trafficking and forced labour. They need to be sensitized to these issues and be trained on them. Judicial associations, judicial training institutions, etc., can carry out such training. Also, it is not enough to only train judicial authorities specialized in criminal law. Immigration judicial authorities may also have to deal with cases of trafficking and forced labour due to the close association with migration. In addition, immigration issues are usually covered by civil rather than criminal law.

Judicial authorities need to have the appropriate legislative tools to prosecute and pass judgment. Other factors associated with judicial credibility are corruption and obstruction of justice. Cases should preferably be prosecuted in a location and by prosecutors and judges who are not liable to be influenced by attempts at obstruction of justice emanating from, for example, criminal networks.

Once judicial credibility has been asserted, the role of the victim in criminal proceedings needs to be considered. The victim of trafficking provides the most concrete incriminating evidence against the perpetrator(s). Nevertheless, other incriminating evidence can be used. This type of evidence can be subdivided into five categories:<sup>32</sup>

1. Advertizing: recruitment and activity
2. Rentals: dwellings, premises, vehicles and so on
3. Transport: all forms
4. Communications: landlines, mobiles, emails, faxes, etc.
5. Financial transactions: all forms

These types of evidence are more likely to supplement victim testimonies than replace them. In some countries (e.g., the Philippines), however, anyone with knowledge about forced labour and trafficking can file a complaint, thus increasing the chances of successfully prosecuting traffickers.



**Box 17**  
**Filing of complaints by third parties and duty to inform**

The Human Trafficking Bill before the parliament of Ghana (mid 2005) places duties on both the victim of trafficking and any person with knowledge of the offence. Under section 6 entitled ‘Duty to inform’ the Bill places an obligation on such persons to inform the police - “any person who fails to inform the police commits an offence and is liable on summary conviction to a fine of 250 penalty units or a term of imprisonment of not less than 12 months or both”

Revised draft prepared by the Attorney General’s Office in Ghana in 2004

Considering the importance of the victim in criminal justice proceedings, care needs to be taken that adequate protection is provided. Articles 6 to 8 of the Palermo Protocol set out the obligations of States Parties to victims. The first is a right to privacy and identity: where possible under domestic law legal proceedings relating to trafficking should permit the identity of the victim to be confidential.

In some countries, contrary to legislation on witness protection, victims and traffickers may appear in the courtroom together. This can have several results, including the increased risk of reprisals by the trafficker and/or connections, intimidation of the victim to retract a complaint, as well as secondary victimization of the victim.

The burden of proof is not on the victim, but on the prosecutor. Many countries have consequently instituted protection measures related to court procedures, often linked to witness protection. This has also helped to obtain the cooperation of victims in court. Measures include testimony via video-link, enabling the victim to testify without being in the same room as the abuser, and putting up a screen in the courtroom between them.

In some cases the European Court of Human Rights has waived the requirement of adversarial court proceedings as a requirement for fair trial. Victims can make a written or video statement instead of having to face their abuser, even in an indirect fashion such as a video link. If it is possible to preserve anonymity, only the legal defence counsel is allowed to see the statement. The evidence used in court is based on interviews with the victim, which can be conducted in the presence of the investigating judge, the public prosecutor, interpreter, and a member of a victim support agency and the legal counsel of the victim. The counsel for the defence can ask for additional material and further interviews can be carried out, yet the victim and the abuser do not have to meet.

## OTHER INSTITUTIONS: HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSIONS

The strength of Equal Opportunity and Human Rights Commissions and similar institutions, modern day ombudsperson, lies in the fact that they are often able to investigate without needing the complaint of a victim. For instance, a commission may react to a report by a UN agency by investigating it further. In addition, these commissions often have a wide scope of investigation, which includes the investigation of State bodies, which civil courts usually cannot examine.

The structure, powers and arrangements of these Commissions are diverse and so is the weight of the findings of investigations. Though in countries such as the UK the decisions of the Human Rights and Equal Opportunity Commission have the force of law, this is often not the case. This means that the commission has to take the results of the investigation to civil courts. Nevertheless, the impact of the investigation on the general public, due to visibility that creates public pressure, should not be underestimated.

**Box 18**  
**The Australian Human Rights and Equal Opportunity Commission**

The Human Rights and Equal Opportunity Commission is a national independent statutory government body, established in 1986 by an Act of the federal Parliament, the *Human Rights and Equal Opportunity Commission Act*. Under the legislation administered by the Commission, it has responsibilities for inquiring into alleged infringements under four anti-discrimination laws - the *Racial Discrimination Act* 1975, the *Sex Discrimination Act* 1984, the *Disability Discrimination Act* 1992 and the *Age Discrimination Act* 2004 as well as inquiring into alleged infringements of human rights under the *Human Rights and Equal Opportunity Commission Act* 1986.

The Commission's responsibilities include education and public awareness, the investigation of discrimination and human rights complaints, human rights compliance, as well as policy and legislative development. The Commission achieves this through:

- resolving complaints of discrimination or breaches of human rights under federal laws
- holding public inquiries into issues of national importance, such as the forcible removal of indigenous children from their families and the rights of children in immigration detention centres
- developing human rights education programmes and resources for schools, workplaces and the community
- providing independent advice to assist courts in cases that involve human rights principles
- providing advice and assistance to parliaments and governments to develop laws, programmes and policies
- undertaking and coordinating research into human rights and discrimination

See: <http://www.hreoc.gov.au/es>. The government of Australia is currently considering amendments to the legislation which could affect the Commission's power. According to the new bill the Commission would keep its existing powers to investigate and conciliate complaints, however, it would no longer have the power to recommend compensation or intervene in court proceedings involving human rights and discrimination issues.

## VICTIM SUPPORT THROUGH TRADE UNIONS AND NON-GOVERNMENTAL ORGANIZATIONS

Trade unions are increasingly becoming involved with issues related to migrant workers and can contribute to their welfare if they have adequate participation in the consultative process that leads to national regulations on migrant workers. Their role in supporting migrants may differ depending on whether they operate in countries of origin or destination. However, within all unions, initiatives should be made to provide free legal counselling for migrant workers on national legislation concerned with migrant issues and in particular those relating to trafficking and forced labour. Furthermore, the trade union should maintain a close relationship with government, NGOs and other bodies that undertake to represent migrant workers at national forums. They should also disseminate information about the risks of migration in the country of origin and the availability of assistance in the destination country.

When considering trafficking, forced labour and other exploitative and abusive practices related to migration, trade unions can negotiate for internationally-accepted employment contracts. In addition, they can monitor recruitment abuses and report on high recruitment fees, corrupt practices and exploitative conditions. Trade unions can also protect migrants against delayed payment and non-payment of wages. Furthermore, they can network with unions of migrant receiving/sending countries for concerted action to protect migrants from trafficking and exploitation.

Much can be done by trade unions representing and assisting migrant workers dealing with employers/exploiters and/or the authorities, for instance: assistance with wage negotiations, protection from unlawful dismissals, assistance in conflict resolution, and provision of legal assistance. They should be able to intervene in complaints filed by migrant workers against their employers/exploiters.

For example, in the country of origin, information on offenders is often obtained through the complaints of returning victims of trafficking and forced labour. The complaint of a migrant concerning abusive recruitment practices, even if he/she was not in a situation of forced labour, can constitute an important lead. However, for complaints to be of use to the police, a complaints procedure should be in place. If the migrant has a complaint that cannot be settled directly with a private employment agency, he/she should be able to ask the trade union for assistance. Trade unions can provide impartial and effective third party assistance consistent with the principles of conciliation, arbitration, and mediation. Trade unions can get in touch with counterparts in destination countries, who can represent a victim desiring to file a complaint against his/her employer/exploiter. As a result, law enforcement agencies may be able to take appropriate action to sanction the offenders.

**Box 19**  
**Cooperation between trade unions**

German unions have developed close relationships with Polish unions from the construction and agriculture sectors. They have opened an office in Warsaw through which information on working conditions and labour rights in Germany is disseminated. Polish workers are invited to join the union before going to Germany. Unions have also supported bilateral and trilateral agreements between sending and receiving countries in which common union membership is acknowledged. This has made it legal for German unions to assist migrant workers without demanding an immediate change of membership. German unions assist migrants (including undocumented migrants) legally and organize the transfer of payments to the country of origin. Umbrella organizations of trade unions such as the International Federation of Building and Wood Workers have supported such cooperation and network building between many other countries.

See: ILO (2003), *Forced labour outcomes of irregular migration and human trafficking in Europe*, Geneva.

NGOs can be very effective in the battle against trafficking and other forced labour outcomes of migration. Since they are less bound by bureaucratic or political ties, they can lobby more forcefully than other organizations. As a result, they can put more pressure on the State to acknowledge the problems of trafficking and forced labour, to enact or amend appropriate legislation on these issues, and to take concerted action against them.

NGOs can take on a variety of roles in relation to the forced labour outcomes of migration. To name but a few, they can legally represent migrant workers, and provide shelter and assistance to victims of trafficking and forced labour, they can advocate for the elimination of forced labour around the globe and they can raise awareness. Thus they are active in the prevention of trafficking as well as in assistance to victims.

A major strength of NGOs is global advocacy for the elimination of forced labour and trafficking. NGOs can follow up research with parliamentary lobbying, and raising awareness through publicity events. NGOs may also provide legal assistance to migrant workers.

**Box 20**  
**Kav La'Oved (Israel)**

Kav La'Oved (workers' hotline) is a non-profit Israeli NGO, dedicated to the protection of workers' rights. Kav La'Oved helps the most vulnerable in Israeli society: 250,000 migrant workers (10 per cent of the Israeli workforce), Palestinians working in Israel and Jewish settlements, ethnic minority citizens, and people employed via subcontractors. Many of these workers are subject to withheld payment and underpayment of wages, confinement, and criminal abuse. Most of these have no representation or access to institutional help. Due to their nationality, legal status, socio-economic background, cultural-linguistic barriers, or gender, these workers are less likely to be familiar with their rights, and less capable of guaranteeing their implementation.

At the individual level, Kav La'Oved provides legal aid to disadvantaged workers. More generally, Kav La'Oved advocates for a systemic change in labour policies. During 2003 the NGO provided legal representation to over 1,700 workers, and obtained over US\$1,000,000 in compensation for them. The legal aid provided ranged from settlement mediation to Supreme Court petitions, and covered issues ranging from minimum wages and social benefits violations to passport confiscation, deportation, and under-performance by the authorities.

In addition, Kav La'Oved conducts site tours, distributes multilingual rights information, publishes reports and online contents, initiates media exposure, and lobbies for improved policies. The NGO publishes a weekly column in the "Yediot Achronot" ("I deserve") newspaper in which it answers readers' questions regarding workers' rights and social benefits, and participates in a weekly radio show, answering listeners' questions and raising issues regarding the Israeli labour market. It conducts education workshops for youth movements, students, lawyers, international groups and workers.

See: <http://www.kavlaoved.org.il>

NGOs are the principal actors on the stage of victim protection. Indeed, though many shelters are owned and managed by international agencies, the majority are owned and managed by NGOs. In these shelters victims receive medical, social, psychological, legal and financial assistance. Increasingly shelters are also active in providing vocational training for victims in order to allow them to reinsert themselves into the labour market.

Last but not least, many NGOs maintain extended networks with actors including other NGOs, international agencies, trade unions, employers' organizations, and government. Though the situation in the country may not always be receptive to these kinds of networks, countries should make an effort to create cooperation between all relevant actors.

## THE ROLE OF EMPLOYERS IN PREVENTIVE ACTION AGAINST TRAFFICKING

Individual employers and employers' organizations can play a crucial role in the prevention of trafficking for forced labour.<sup>33</sup> Trafficking is especially relevant for employers in agriculture, construction, the textile and garment industry, tourism, restaurants and catering and transportation. The competitive environment particularly in these sectors has led enterprises to apply various cost cutting measures. These include downsizing, outsourcing and subcontracting, and the dissolution of traditional tenure employment agreements. The strategy is to reduce labour costs; hence many sectors rely on the employment of cheap (often irregular) migrant labour. As such, trafficking can affect business at various stages of the cycle - from initial recruitment to final employment. Trafficking victims are often found in the sub-contracting chain or hired by private agencies that provide short-term labour for major companies.

As part of their corporate social responsibility, law-abiding employers should first of all seek full information about their sub-contractors, such as private recruitment agencies or small manufacturing workshops to prevent the incidence of forced labour in their sub-contracting chain. They could also conduct their own random checks and thus assist law enforcement agencies in the detection of forced labour practices. A more proactive policy would be the development of a voluntary code of conduct that is adopted by a specific company and extended to all sub-contractors. Codes of conduct are also an instrument that could be promoted by national and international employers federations. They should be consistent with existing legal frameworks, and compliance should be monitored through an internal or external mechanism.

### Box 21

#### **Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism**

The Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism (the Code) is a project joining the tourism private sector and the children's rights non-governmental organization ECPAT, aiming to prevent sexual exploitation of children at tourism destinations. The tour operators and their umbrella organizations, travel agents, hotels, airlines, etc. which endorse the Code, commit themselves to implement the following measures:

- To establish a corporate ethical policy against commercial sexual exploitation of children.
- To train the personnel in the country of origin and travel destinations.
- To introduce clauses in contracts with suppliers, stating a common repudiation of sexual exploitation of children. (The tour operator has the right to cancel the contract should the clause not be respected by the supplier)
- To provide information to travellers through catalogues, brochures, in-flight films, ticket-slips, websites, etc.
- To provide information to local "key persons" at destinations i.e. restaurants, excursion companies, local police and others with whom tour operators collaborate more informally.
- To report annually (on the implementation of the above five criteria to the secretariat).

The Code was initiated in April 1998 by ECPAT Sweden in cooperation with Scandinavian tour operators and the World Tourism Organization (WTO). It is currently implemented globally by 45 companies: - 42 tour operators from 13 countries (including the 25 members of the Tour Operators Initiative for Sustainable Tourism Development (UNEP, UNESCO, WTO); -and 3 hotel chains.

<sup>33</sup> For more information see: ILO (forthcoming): *Preventing trafficking and forced labour: A handbook for employers*, Geneva.

## CONCLUSION

Combating and preventing trafficking in human beings requires a multi-agency approach in which labour market actors, such as labour inspectors, labour courts, and employers' and workers' organizations should play a vital role. One way to go about ensuring effective interagency cooperation is by drawing up a memorandum of understanding. This mutual agreement sets out the rights and responsibilities of the institutions involved as well as the measures that different sides must take. Agencies that could cooperate include law enforcement agencies (police and labour inspectors), prosecution agencies, inter-ministerial departments, and international organizations, NGOs, trade unions and employers' organizations.

Participation in international cooperation to fight trafficking and other forced labour outcomes of migration is essential. The problem of forced labour outcomes of migration cannot be tackled at one point only: countries of origin and destination, as well as of transit, must work together in order to fight trafficking and the forced labour outcomes of migration.

# Recommendations and conclusions

The main aim of this document is to provide guidance on several ILO Conventions that are pertinent to combating and preventing trafficking in human beings. Much may be achieved by adequate implementation of the Protocol and related international instruments, inter alia, ILO Conventions. Some of the main issues in this respect are not only the coherence of those criminal, labour, civil and administrative laws, but also finding ways for these laws to allow for efficient and appropriate action by law enforcement.

This guide has outlined a range of legal actions that can be taken to combat and prevent trafficking in human beings. The main recommendations are summarized below. They are not meant to cover all aspects of prosecution, victim protection and prevention of human trafficking. Other UN agency documents, including the UNODC guide, the Recommended Principles and Guidelines on Human Rights and Human Trafficking of the United Nations High Commissioner for Human Rights, and the UNICEF Guidelines for Protection of the Rights of Children Victims of Trafficking in South Eastern Europe, have alluded to this topic. Rather, the recommendations intend to shed light on the labour dimensions of trafficking, and the need for a coherent legal framework that takes these dimensions into account, as well as concerted action by law enforcement agencies and labour market institutions to implement these laws.

## IDENTIFYING AND SANCTIONING FORCED LABOUR AS AN OUTCOME OF TRAFFICKING

- Acknowledge the spectrum of forms and mechanisms of forced labour, which encompasses not only trafficking for forced sexual services, but also trafficking for forced labour exploitation.
- Acknowledge that trafficked victims can be men, women, girls and boys.
- Adopt definitions of trafficking and smuggling that allow distinctions among the victims.
- Recognize trafficking as an offence independently of cross-border movement and the involvement of organized crime
- Criminalize forced labour in anti-trafficking laws and define the types of coercion used. Determine the relevance of the consent of the victim and specify the circumstances in which consent is not relevant. Include definitions of aggravating circumstances to address especially atrocious cases.
- Define the sanctions in criminal, labour and administrative law for specific wrongs including associated criminal offences, so as to target all actors in the trafficking network.
- The message to abusive employers profiting from forced labour should be that prosecution will lead not only to criminalization, but also to reinstatement of rights of the victim, financial compensation, and, most importantly, to confiscation of assets.
- Increase workplace inspections, and foster cooperation between labour inspectors and police authorities.



## ACTION AGAINST THE TRAFFICKING OF CHILDREN

- Recognize that the trafficking of children has special characteristics and requires a specific approach in legislation, including possibly the adoption of specific provisions and regulations.
- Recognize that the illicit means used for trafficking, such as fraud, coercion and deception, are not relevant criteria for identifying and criminalizing child trafficking.
- Ensure that forced labour and trafficking-related criminal provisions consider it an aggravating circumstance if the offence is committed against a person under 18 years of age, and that more severe penalties are foreseen for such cases.
- In countries of origin, provide for measures to prevent children from becoming victims of traffickers, including public information and awareness initiatives.
- Provide for direct measures to rescue trafficked children from situations of sexual exploitation and labour exploitation, and to rehabilitate them and ensure their social integration and/or safe return to their country of origin.
- Provide for special protection measures for children as concerns victim compensation and victim protection, taking into account their special vulnerability.

## ADDRESSING THE COMMERCIAL SEXUAL EXPLOITATION OF ADULTS AND CHILDREN

- Ensure that provisions for the protection of victims of commercial sexual exploitation cover women and men, girls and boys.
- Punish any person who procures, entices or leads away by means of fraud, coercion or deception for purposes of commercial sexual exploitation, another person.
- Ensure strict enforcement of criminal sanctions against those trafficking in, exploiting or abusing others for the purpose of sexual exploitation.

## MONITORING RECRUITERS AND AUXILIARIES

- Monitor all types of recruiters and auxiliaries in countries of origin and destination.
- Ensure efficient cooperation between labour inspectors and police in order to achieve satisfactory monitoring.
- Improve migration management to increase legal channels of migration and reduce the market for traffickers.
- Reinforce corporate liability, also covering practices of subcontractors, including recruiters.
- In the area of prevention, private employment agencies and employers making use of these agencies should be provided with guidance on how trafficking and forced labour may affect their business and how to avoid it.

## COMPENSATION FOR VICTIMS

- Provide for a reinstatement of rights through labour or other courts.
- Provide for compensation for wrongs, which might be obtained from the confiscated assets of the traffickers. This can either be done directly or via publicly managed funds designed for victims.
- View victims as workers and give them access to employees' representatives and legal advice. Trade unions should play an active role in this, and should be specifically empowered to do so.

## VICTIM PROTECTION

- Provide victims of trafficking with temporary residence permits. First and foremost victims should be given a reflection time. If the victims accept to testify against the perpetrator(s), a more long-term residence permit should be given, at least for the duration of the legal proceedings. Regardless of whether they testify, it is advisable to provide victims with long-term residence permits on humanitarian grounds.
- Victims should be protected during judicial criminal proceedings from reprisals by perpetrator(s).
- Protect victims from migration status-based arguments in court. In addition, grant a victim the right to appeal against any determination by the State that his/her work and presence are irregular.
- Identify possible loopholes in regular migration schemes (e.g. seasonal and contract work) and recognize the need for protection of these migrant workers.
- Integrate a gender-sensitive approach to all protection measures.

## SPECIAL PROTECTION FOR DOMESTIC WORKERS

- Ensure that labour legislation, including minimum wage laws and regulations, apply to domestic workers and that domestic workers are included within the minimum wage fixing system, having due regard to the general level of wages in the country, the cost of living, social security benefits, the relative living standards of other social groups and economic factors.
- Ensure respect of freedom of association for domestic workers.
- Prohibit and take measures to eliminate child domestic work.
- Limit the hours of domestic workers by specifying: a) a 40-hour work week, with adequate remuneration for overtime work; b) the specification of the maximum hours of work permitted per day; c) a fixed uninterrupted rest period of eight hours per day; d) a limitation on the hours spent "on call" and adequate remuneration for those hours.
- Provide for proper procedures for termination of employment. Ensure that migrant domestic workers are always free to change their employer.
- Ensure that domestic workers are entitled to a wide range of employment benefits such as maternity leave and annual holidays.

## GENERAL

- Provide for penal provisions against corrupt enforcement authorities.
- Ensure effective inter-agency cooperation at the national and international levels or on a bilateral basis.
- Provide that offences relating to trafficking and forced labour are extraditable.

## APPENDIX I:

# The ILO's supervisory mechanism

The unique tripartite structure of the ILO helps it to tackle forced and child labour from all angles: governments, employers' organizations and trade unions.<sup>34</sup> The ILO works together with all three constituents towards the elimination of forced and child labour and the promotion of decent work. Since 1919, the ILO and its tripartite structure have built up a system of international standards in all work-related matters. These standards take the form of Conventions, which are binding international treaties; as well as Recommendations, which are non-binding guidelines often supplementing Conventions, and which orient national policy and action. Drafts of both instruments are developed by the ILO and are then presented to the annual International Labour Conference (ILC), which convenes tripartite representatives of all member States. The ILC decides the type of the instrument(s) - Convention, Recommendation or both together - as well as their contents. Once adopted by the ILC, Conventions are open for ratification.

All member States are required to present the newly adopted ILO instruments to competent authorities in their countries. Once a country ratifies a Convention, it is required by article 22 of the ILO Constitution to submit a report to the ILO on the application of the Convention in law and practice, at appropriate intervals as established by the Governing Body of the ILO (which is in practice at intervals of one to five years). The reports must be copied to representative organizations of employers and workers for possible comments.

The Committee of Experts, the main supervisory body from a legal point of view, examines the reports. It is composed of experts of recognized competence who are completely independent of governments and are appointed in their personal capacity. In examining the effect given to ratified Conventions, the Committee is not limited to the information provided by governments; it uses a variety of sources and documentation. If the Committee finds that a government is not fully complying with the requirements of a ratified Convention, it addresses a comment to that government, drawing attention to the shortcomings and requesting that steps be taken to eliminate them. The Committee's comments may take the form of observations or direct requests. The report of the Committee of Experts is submitted to each annual session of the International Labour Conference, where it is examined and discussed by a specially appointed tripartite Conference Committee on the Application of Conventions and Recommendations. The Conference Committee may call governments before it to discuss the issue directly.

In addition, according to article 19 of the Constitution, even those member States, which have not ratified a Convention, may be required to submit a report on the position of their law and practice in regard to the matter dealt with in the Convention and on Recommendations on a different subject each year. The reports supplied by governments provide the basis for carrying out a general survey by the Committee of Experts. The general surveys are of considerable value, since they often help to clarify doubts concerning the scope or requirements of a Convention or Recommendation.

<sup>34</sup> For a detailed overview of the ILO supervisory system: <http://www.ilo.org/public/english/standards/norm/sources/handbook/hb2.htm#p1>

See also ILO (1990): *International Labour Standards: A workers' education manual*, Geneva.

It is also worth noting that, in addition to these mechanisms of regular monitoring of its standards, the ILO also has ad hoc procedures established by the Constitution to examine allegations of non-observance of a ratified Convention: Representations submitted by employers' or workers' organizations (national or international) and examined by a tripartite committee set up to examine the particular case; and Complaints submitted by a State alleging non-observance by another State of a Convention ratified by both of them (or initiated by the Governing Body or a Conference delegate) examined by a Commission of Inquiry of independent persons. Both are followed up by the regular supervisory procedures.

## APPENDIX II:

# ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up

Whereas the ILO was founded in the conviction that social justice is essential to universal and lasting peace;

Whereas economic growth is essential but not sufficient to ensure equity, social progress and the eradication of poverty, confirming the need for the ILO to promote strong social policies, justice and democratic institutions;

Whereas the ILO should, now more than ever, draw upon all its standard-setting, technical cooperation and research resources in all its areas of competence, in particular employment, vocational training and working conditions, to ensure that, in the context of a global strategy for economic and social development, economic and social policies are mutually reinforcing components in order to create broad-based sustainable development;

Whereas the ILO should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers, and mobilize and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at job creation;

Whereas, in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and on the basis of equality of opportunity their fair share of the wealth which they have helped to generate, and to achieve fully their human potential;

Whereas the ILO is the constitutionally mandated international organization and the competent body to set and deal with international labour standards, and enjoys universal support and acknowledgement in promoting fundamental rights at work as the expression of its constitutional principles;

Whereas it is urgent, in a situation of growing economic interdependence, to reaffirm the immutable nature of the fundamental principles and rights embodied in the Constitution of the Organization and to promote their universal application;

The International Labour Conference,

### 1. Recalls:

(a) that in freely joining the ILO, all Members have endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia, and have undertaken to work towards attaining the overall objectives of the Organization to the best of their resources and fully in line with their specific circumstances;

(b) that these principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both inside and outside the Organization.

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization, to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.

3. Recognizes the obligation on the Organization to assist its Members, in response to their established and expressed needs, in order to attain these objectives by making full use of its constitutional, operational and budgetary resources, including by the mobilization of external resources and support, as well as by encouraging other international organizations with which the ILO has established relations, pursuant to article 12 of its Constitution, to support these efforts:

- (a) by offering technical cooperation and advisory services to promote the ratification and implementation of the fundamental Conventions;
- (b) by assisting those Members not yet in a position to ratify some or all of these Conventions in their efforts to respect, to promote and to realize the principles concerning fundamental rights which are the subject of those Conventions; and
- (c) by helping the Members in their efforts to create a climate for economic and social development.

4. Decides that, to give full effect to this Declaration, a promotional follow-up, which is meaningful and effective, shall be implemented in accordance with the measures specified in the annex hereto, which shall be considered as an integral part of this Declaration.

5. Stresses that labour standards should not be used for protectionist trade purposes, and that nothing in this Declaration and its follow-up shall be invoked or otherwise used for such purposes; in addition, the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up.

## ANNEX

### I. Overall purpose

1. The aim of the follow-up described below is to encourage the efforts made by the Members of the Organization to promote the fundamental principles and rights enshrined in the Constitution of the ILO and the Declaration of Philadelphia and reaffirmed in this Declaration.

2. In line with this objective, which is of a strictly promotional nature, this follow-up will allow the identification of areas in which the assistance of the Organization through its technical cooperation activities may prove useful to its Members to help them implement these fundamental principles and rights. It is not a substitute for the established supervisory mechanisms, nor shall it impede their functioning; consequently, specific situations within the purview of those mechanisms shall not be examined or re-examined within the framework of this follow-up.

3. The two aspects of this follow-up, described below, are based on existing procedures: the annual follow-up concerning non-ratified fundamental Conventions will entail merely some adaptation of the present modalities of application of article 19, paragraph 5(e) of the Constitution; and the global report will serve to obtain the best results from the procedures carried out pursuant to the Constitution.

### II. Annual follow-up concerning non-ratified fundamental Conventions

#### A. Purpose and scope

1. The purpose is to provide an opportunity to review each year, by means of simplified procedures to replace the four-year review introduced by the Governing Body in 1995, the efforts made in accordance with the Declaration by Members which have not yet ratified all the fundamental Conventions.

2. The follow-up will cover each year the four areas of fundamental principles and rights specified in the Declaration.

#### B. Modalities

1. The follow-up will be based on reports requested from Members under article 19, paragraph 5(e) of the Constitution. The report forms will be drawn up so as to obtain information from governments which have not ratified one or more of the fundamental Conventions, on any changes which may have taken place in their law and practice, taking due account of article 23 of the Constitution and established practice.

2. These reports, as compiled by the Office, will be reviewed by the Governing Body.

3. With a view to presenting an introduction to the reports thus compiled, drawing attention to any aspects which might call for a more in-depth discussion, the Office may



call upon a group of experts appointed for this purpose by the Governing Body.

4. Adjustments to the Governing Body's existing procedures should be examined to allow Members which are not represented on the Governing Body to provide, in the most appropriate way, clarifications which might prove necessary or useful during Governing Body discussions to supplement the information contained in their reports.

### III. Global report

#### A. Purpose and scope

1. The purpose of this report is to provide a dynamic global picture relating to each category of fundamental principles and rights noted during the preceding four-year period, and to serve as a basis for assessing the effectiveness of the assistance provided by the Organization, and for determining priorities for the following period, in the form of action plans for technical cooperation designed in particular to mobilize the internal and external resources necessary to carry them out.

2. The report will cover, each year, one of the four categories of fundamental principles and rights in turn.

#### B. Modalities

1. The report will be drawn up under the responsibility of the Director-General on the basis of official information, or information gathered and assessed in accordance with established procedures. In the case of States which have not ratified the fundamental Conventions, it will be based in particular on the findings of the aforementioned annual follow-up. In the case of Members which have ratified the Conventions concerned, the report will be based in particular on reports as dealt with pursuant to article 22 of the Constitution.

2. This report will be submitted to the Conference for tripartite discussion as a report of the Director-General. The Conference may deal with this report separately from reports under article 12 of its Standing Orders, and may discuss it during a sitting devoted entirely to this report, or in any other appropriate way. It will then be for the Governing Body, at an early session, to draw conclusions from this discussion concerning the priorities and plans of action for technical cooperation to be implemented for the following four-year period.

### IV. It is understood that:

1. Proposals shall be made for amendments to the Standing Orders of the Governing Body and the Conference which are required to implement the preceding provisions.

2. The Conference shall, in due course, review the operation of this follow-up in the light of the experience acquired to assess whether it has adequately fulfilled the overall purpose articulated in Part I.