

Trafficking for Labour Exploitation - Conceptual Issues, and Challenges for Law Enforcement, by Roger Plant, Kiev, April 2009

Presentation to Fifth International Law Enforcement Conference, Kiev, 31 March- 2 April 2009

Distinguished participants,

I am very honoured to be with you today, at a gathering which has earned a high reputation among law enforcement agencies and other anti-trafficking practitioners. I have been doing my present job for just over seven years, and have seen progressive – and in recent times extraordinary – change in the way that forced labour and labour trafficking are dealt with at events of this nature.

A few years ago, the ILO and its partners were seen as add-ons at conferences which were concerned almost exclusively with criminal law enforcement against the serious offences of sex trafficking. These days it seems that the main focus of attention is, if not reversed, at least equally divided between the problems of labour and sexual exploitation. It means that labour actors and institutions are increasingly present at anti-trafficking conferences. More and more, Ministries of Labour are involved in the implementation of National Action Plans against trafficking. And I would like to highlight the efforts of our host country this week, Ukraine, in involving labour market actors in action to prevent human trafficking. The Public Employment Services has played a prominent role, together with the Ministry of Labour and Social Policy, in implementing those aspects of the national action plan that deal with awareness raising and prevention. Its staff have been carefully trained to advise job seekers on the dangers of irregular migration and human trafficking. The Labour Ministry has also given greater attention to the licensing of agencies which recruit for employment abroad, and to inspection for compliance.

But this week's conference is concerned with law enforcement, and the ways in which both criminal and labour justice practitioners can combine their efforts most effectively. Most countries are still at the foothills, only beginning to grapple with the concept of labour exploitation, let alone moving effectively forward against it. At the national level, when so few countries publish statistical data, it is hard to get reliable information on prosecutions. At the global level last year, the US State Department's Trafficking in Persons Report for 2007 indicated for the first time the number of prosecutions and convictions that related to labour trafficking as opposed to sex trafficking (490 prosecutions and 326 convictions, out of over 5,000 prosecutions and over 3,000 convictions for all cases of trafficking). And if we look at the recent global report on human trafficking published last month by the UN Office on Drugs and Crime, it estimated that 18 per cent of all trafficking around the world is for forced labour, and that these figures are almost certainly under recorded as a result of statistical bias. The ILO's own global estimate of forced labour in 2005, based on proactive surveys rather than police and prosecution records, was that approximately one third of all trafficking is for forced labour exploitation. Whatever figures we use, it is clear that prosecutors and law enforcement are finding it difficult to crack down on labour trafficking as effectively as on trafficking for sexual exploitation.

Why? Today I have been asked to set the ball rolling for our meeting by providing East European practitioners with help on the legal interpretation of what forced labour and labour exploitation actually mean, and to share ideas as to how – on a very complex subject – we are now developing some practical indicators to guide the efforts of future law enforcement.

The concepts of forced labour and labour exploitation, and the development of indicators

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

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

Despite the good intentions of the drafters of the Palermo Trafficking Protocol, and the evidence of some increase in prosecutions for labour trafficking, it is clear that courts are still struggling with the concepts.

Some interesting analysis has been conducted by the office of the Dutch National Rapporteur on Trafficking. In a report last year, it examined for the first time the question of exploitation in sectors other than the sex industry, and the methodological challenges involved, given that this has been a criminal offence in the Netherlands since 2005. The context is that the new legislation itself provided little detail on the concept, for example the dividing line between “bad employment and slavery like situations”, instead entrusting the judiciary with the task of further defining the concept of labour exploitation. The Rapporteur’s office came up with a formula, which identified the lack of freedom as a constant factor, together with other indicators such as excessive working conditions, or the abuse of a vulnerable position which may be so severe that the victim has no real choice but to suffer exploitation.

There are complex issues to be addressed, raised by the recent attention to trafficking for labour exploitation, and the difficulty that most governments have had in identifying specific cases, let alone deciding what are the most appropriate penalties and remedies once such cases have been identified.

An ongoing debate, among legislators and law enforcement, is whether coercion is a necessary condition to make up the offence of human trafficking; or whether an employer who subjects workers to inhuman or degrading conditions, with earnings way below the legal minimum or the national average, can also be convicted of the offence. National approaches, in Europe for example, are currently very mixed. Both

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

There has also been much discussion about the degree or severity of exploitation. It is a very subjective term, which has not generally been covered in labour standards, let alone in criminal law until the Palermo Trafficking Protocol put the subject so firmly on national legislative and law enforcement agendas. Common sense suggests that people are exploited when others derive unfair advantage, or make unfair profits, at their expense, by subjecting them to arduous and morally unacceptable conditions of work. But there are obvious gradations of this. No legislature or judiciary will find it easy to determine which practices should be dealt with through long prison sentences, which through fines, or which through the closure of enterprises.

At the bottom end of the spectrum some flagrant abuses are happening, even in Europe, and law enforcement is beginning to wake up to them.

Just last month, on 9 February this year, the Spanish Interior Ministry reported that police has arrested 19 Romanians accused of enslaving 27 of their compatriots for forced labour and begging. In Barcelona and near Valencia, the 27 persons were released from the slum apartments where they had been held captive. They were employed mainly as farm labourers, working twelve hour days. They had been recruited in Romania, with false promises of jobs, forced to work without pay, and compelled to beg on the streets when no work was available. Press reports indicate that the ensnared persons had made to attempt to escape these conditions, for fear of reprisals. The investigations were made, after two Romanians reported in the town of Alicante that they had been held against their will.

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

A third flagrant example is the so-called "Terra Promessa" case in Southern Italy, first prosecuted in mid 2006. Polish workers, recruited under false pretences for agricultural labour in Apulia province, were housed in appalling conditions, and forced to work for almost nothing under the eyes of armed guards.

Over a hundred workers were eventually rescued, and provided assistance by Italian and Polish NGOs. Through cooperation between the Italian and Polish police, assisted by EUROPOL, arrests have since been made in both countries.

The above are the extreme and high profile cases, where there has been a law enforcement response. Yet most forms of exploitation on today's labour markets, which can involve some degree of coercion, are very subtle. Moreover, as is increasingly being argued, vulnerable people are being seriously exploited by employers and recruiters who do not flagrantly violate national laws, but operate dubiously within them. Notably, the US Government's Office to Monitor and Combat Human Trafficking has been arguing in its last few reports that labour trafficking can take place through perfectly legal recruitment mechanisms, particularly in Asia and the Near East. The main argument is that high transaction costs for internationally recruited migrant workers, together with deceptive practices, can place them in a situation of high vulnerability to debt bondage and forced labour in the destination country. The problems begin with a mix of excessive charges and transaction costs for visas, travel and job placement expenses in the country of origin. The workers may be deceived as to the work they will carry out in the destination country, or as to wage rates and hours of work. A common practice is "contract substitution", where they sign one contract in their home country, but are later compelled to sign a totally different one in the place of destination.

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

In most cases however, as in other aspects of possible labour trafficking, the exploitation is far more subtle. Let's take the case of China. It is widely known that over the past two decades there has been extensive Chinese migration to Europe, much of it irregular, that the irregular migrants and their families can pay vast amounts of money to "snakeheads" to be smuggled into Europe (around 25,000 Euros to Europe, and more than twice that amount to get to the United States), and that they can endure particularly arduous conditions while repaying these debts. We have been doing extensive research on this issue, covering the exploitation of Chinese workers in several European countries, and also examining the working of recruitment systems in China. One cannot draw hard and fast distinctions between the "legal" and "illegal" agencies. In some cases, the registered agencies can also carry out unlawful activities. Moreover, there has been heated debates as to whether the trafficking paradigm applies to the situation of Chinese workers who (while servicing massive debts, and working excessive hours for a seven day week both within the Chinese ethnic economy in Europe and outside it) arguably accept these conditions out of rational choice. Our Chinese research found that the fees change according to the destination country or area, and that it may take an average of two years of back-breaking work to repay them.

It is also difficult to know where to point the finger of responsibility, between the sender and destination countries. The problems usually start with the sender countries, when bogus and unregistered agents

overcharge for their services, and deceive potential migrants about anticipated conditions in the destination country. But interestingly, the Washington Post reported just a week ago, on 25 March, that China has warned its citizens not to work in Poland, Romania or Ukraine, saying the financial crisis meant that they might go unpaid and suffer human rights violations in these countries. Reportedly, a notice posted on the website of the Chinese Ministry of Commerce advised Chinese companies not to send workers to these countries, attributing the problems to insufficient work opportunities as a result of the crisis, and to frequent delays in the payment of wages. Particular problems were identified in the building and construction sectors.

Over the past few years, the ILO has carried out a mix of qualitative and quantitative research and surveys, which have prepared the ground for guidance documents on trafficking for labour exploitation. Country studies in France, Germany, Italy, Portugal, Russia and elsewhere have provided case examples, identifying the industries and sectors where trafficking into forced labour can occur, as well as the recruitment mechanisms. The earlier research was summarised in our 2005 report, *A Global Alliance against Forced Labour*, which provided the first global and regional estimates of the number of women, men and children in forced labour. We estimated that some 2.4 million of the 12.3 million people in forced labour around the world are trafficked, about one third of these clearly for labour exploitation. We also calculated that that forced labour of trafficked persons generates up to US\$ 32 billion per year in illicit profits, some US\$ 4 billion of which is clearly for labour exploitation. Some 360,000 persons were in forced labour in industrialised countries, about three quarters as a result of trafficking.

More recently, we have turned to assisting countries to conduct national estimates. This work is still at an early stage. Some pilot surveys in Central European and other countries include questions on forced labour in instruments like labour force surveys, population census and surveys of returned migrants. A key issue is asking the right questions, in such a way that the elements of coercion can be identified in the responses. Moreover, it is important to seek some national consensus as to the degree of gravity in labour trafficking situations, and the means of addressing them.

The “Delphi” indicators of trafficking

To this effect, together with the European Union, our programme has embarked on a Europe-wide expert consultation regarding harmonised indicators of unfree recruitment, forced labour and exploitation. It covers the various aspects of deception, coercion, withholding of money or identity documents, isolation, violence and threats of denunciation to the authorities. It should help build a European consensus, as to what acts and practices need to be punished with the full force of criminal law, and what might best be tackled through awareness-raising and other means. The results of this survey were officially presented by the ILO in Prague yesterday, at a meeting held under the auspices of the Czech Presidency of the European Union. I am happy to distribute a leaflet with the main findings at this meeting, setting out the main operational indicators of trafficking of adults for labour exploitation.

Experts were chosen for their personal expertise not only among national police forces, but among a broader group involving also labour inspection services, academia, social partners and civil society. The consultation followed a methodology called the Delphi method, developed in the 1950s to reach consensus among a groups of experts and widely used for a large set of applications in social, medical or

political sciences. Following the definition of human trafficking in the Palermo Protocol, experts were asked to provide a list of indicators (or typical elements) of coercion, deception, exploitation and vulnerability which they know are relevant in modern cases of trafficking in Europe. In a second round of consultation, experts were asked to rank all the proposed indicators by order of relevance, from the highly significant to the insignificant. Overall, 68 experts (39 women and 29 men) from 23 European countries participated in the survey.

As a result of this process, experts agreed on a list of 67 indicators. Each indicator covers a different dimension of trafficking cases, namely: deceptive recruitment, coercive recruitment, recruitment by abuse of vulnerability, exploitative conditions of work, forms of coercion at destination, and abuse of vulnerability at

While the indicators of course include all the elements of the stereotypical case of human trafficking such as abduction, violence and confinement, they also go beyond. In particular, the combination of all these indicators provides a useful guide to better understand the variety and complexity of modern human trafficking. As some indicators of a trafficking situation are considered stronger than others, they are divided into strong, medium and weak categories. While few strong indicators are sufficient to identify a situation as human trafficking, an accumulation of weak indicators can also lead to the same result.

A key issue is that this method can involve a proactive approach, probing into a hidden problem that may eventually merit criminal investigation and prosecution, rather than relying on the available criminal statistics (which are highly likely to under represent the reality of the problems).

National Surveys and pilot estimates

We have recently started with some partner countries to design and implement national surveys. National surveys on the trafficking experience of returned migrants have been developed and tested in two source countries, Georgia and Moldova. Questions on forced labour and trafficking were incorporated in Moldova's 2008 Labour Force Survey, implemented between April and June 2008. We can now state with a degree of statistical confidence what percentage of Moldova's migrants have been subjected to more serious and milder forms of coercion in the destination countries. The findings will be presented in more detail in our next global report on forced labour, to be published in May 2009. And we believe that robust data of this kind will be of much importance in building consensus among the European destination countries as to the need to give more systematic attention to trafficking for labour exploitation.

Challenges of labour market policy and governance

Once the knowledge base has been improved, different actors need to be involved in the fight against labour trafficking. Our own efforts have been directed at, first, placing these concerns on the agenda of what we may call different "labour actors and institutions" who have not normally been part of anti-trafficking networks; and second, making sure that there is cooperation between criminal law enforcement, employment tribunals, and the labour inspectors who (at least in some countries and legal traditions) do not think that forced labour and trafficking are problems that fall within their mandate.

This is why we published, in June this year, a handbook specifically for labour inspectors on forced labour and trafficking. This insists that labour inspectors are particularly well equipped to provide early warning, and also to negotiate remedies or close down offending enterprises before abusive practices proliferate.

Government policies have to be based on a sound assessment of the demand for labour, including foreign workers, in different industries. In Europe for example there is a growing commitment to crack down on "illegal" forms of employment, usually with sanctions against the offending employer. But such policies won't get very far if European nationals are unwilling to do the work on offer, and foreign workers cannot enter through legal channels. This is precisely what creates the preconditions for labour trafficking, if criminal elements see the chance to make sizeable profits by meeting this demand.

I'd now like to draw your attention to a new publication, shortly to be printed, of which I had some advance copies specially prepared for this meeting. It is a casebook of court decisions on forced labour and human trafficking, designed as a training manual for judges, prosecutors and other legal practitioners. It covers forced labour cases in both international and regional courts, as well as national jurisdictions from countries of Europe, Asia and the Americas (with a particular focus on the United States given the very clear momentum to prosecute cases of forced labour and trafficking). It seeks to illustrate how national court decisions have taken into account the provisions of the ILO's own Conventions on forced labour, and to show how this can provide guidance for future prosecutions and court decisions. We also hope to promote cross fertilisation of judicial experience, and dialogue among judicial practitioners. The first version is only a start. Readers are encouraged to share copies of court decisions, so we can enrich this information sharing through electronic and other means. The invitation is of particular importance for the countries of central and eastern Europe, where there appears to have been a marked growth of late in attention to labour trafficking.

Roger Plant

Head, Special Action Programme to Combat Forced Labour

International Labour Office

Geneva, Switzerland

For more information contact:

plant@ilo.org

www.ilo.org/forcedlabour