

Key Concepts

~ Forced Labour, Trafficking of Persons, Worst Forms of Child Labour & Fundamental Labour Standards

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Overview

- International Labour Organization, International Labour Standards and Decent Work
- Key Concepts
- Legislation on Forced Labour and Trafficking
- Legislation - Some observations on China and France

Part I

International Labour Organization, International Labour Standards and Decent Work

International Labour Organization (ILO)

- (UN-associated) Organization of Governments, Employers and Workers from 182 countries
- Mandate to promote *social justice* & *fair globalization* through *decent work for all* so as to achieve
 - respect for individual dignity
 - economic and social development
 - international peace and stability

ILO's Decent Work agenda

- Decent work ~ work which does not only provide women & men a short-term **livelihood**, but also
 - the power to make and take responsibility for **choices** in relation to work (rights at work)
 - **protection** against risks and uncertainties (social protection)
 - the opportunity to influence and shape decisions affecting life inside and outside the workplace (social **dialogue**)

Fair Globalization

- = situation of open economies and open societies based on social justice, full and productive employment, sustainable enterprises and social cohesion

(Declaration on Social Justice for Fair Globalization, 2008)

ILO : Organizational Structure

- International Labour Conference
 - Tripartite « world assembly » of labour
 - (1 E + 2 G + 1 W) x 182
 - Adopts Conventions and Recommendations
 - Key role in "regular supervision" of ILS
- Governing Body of the IL Office
 - Tripartite executive council
 - 14 E + 28 G (10) + 14 W
 - Sets agenda of the Conference
 - Key role in "complaints-based supervision" of ILS
- International Labour Office
 - Secretariat, headed by a Director-General
 - International Labour Standards Department

ILO means of action

- Setting and supervising the application of international labour **standards**
- Providing **technical cooperation** to developing countries
 - E.g. Mekong Sub-Regional Project to Combat Trafficking in Children and Women
- Collecting and disseminating information (**knowledge**)
 - E.g. "The Mekong Challenge" series of case studies

International Labour Standards

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graph TD; A[International Labour Standards] --> B[Conventions]; A --> C[Recommendations];
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■ Conventions

- If ratified, they are binding under *international law*
- If not ratified, they influence national law & policy
- **Protocols** may only be ratified together with their Convention

■ Recommendations

- Same authority as Conventions
- Not open to ratification
- Guidelines or higher standards

International Labour Standards

- Since 1919, 188 Conventions & 199 Recommendations
- 76 C, 76 R and 5 Protocols are **up-to-date**, the rest is up for revision, abrogation, review ... over time
- Eight are **fundamental C.**, setting standards on 4 principles at work fundamental to globalization (Declaration on Fund Principles & Rights at Work, 1998)
 - freedom of association and collective bargaining
 - elimination of forced labour
 - abolition of child labour
 - elimination of discrimination at work
- Four Conventions are **priority C.** dealing with employment policy, labour inspection and tripartite consultation

As of 1 July 2008 / ILO:182 Member States

| Year | No. | Official Title | Ratifications |
|------|-----|---|---------------|
| 1930 | 29 | Forced labour | (173) |
| 1948 | 87 | Freedom of Association and Protection of the Right to Organise | (149) |
| 1949 | 98 | Right to Organise and Collective Bargaining | (159) |
| 1951 | 100 | Equal Remuneration | (166) |
| 1957 | 105 | Abolition of Forced Labour | (171) |
| 1958 | 111 | Discrimination (Employment & Occupation) | (168) |
| 1973 | 138 | Minimum Age | (150) |
| 1999 | 182 | Worst Forms of Child Labour | (168) |

| | 29 | 87 | 98 | 100 | 111 | 105 | 138 | 182 |
|-------------|------|------|------|------|------|------|------|------|
| Brunei | | | | | | | | 2008 |
| Cambodia | 1969 | 1999 | 1999 | 1999 | 1999 | 1999 | 1999 | 2006 |
| Indonesia | 1950 | 1998 | 1957 | 1958 | 1999 | 1999 | 1999 | 2000 |
| Lao PDR | 1964 | | | 2008 | 2008 | | 2005 | 2005 |
| Malaysia | 1957 | | 1961 | 1997 | | x | 1997 | 2000 |
| Myanmar | 1955 | | 1955 | | | | | |
| Philippines | 2005 | 1953 | 1953 | 1960 | 1953 | 1960 | 1998 | 2000 |
| Singapore | 1965 | | 1965 | 2002 | | x | 2005 | 2001 |
| Thailand | 1969 | | | 1999 | | 1969 | 2004 | 2001 |
| Viet Nam | 2007 | | | 1997 | 1997 | | 2003 | 2000 |

| | 29 | 87 | 98 | 100 | 111 | 105 | 138 | 182 |
|-------------------------|------|------|------|------|------|------|------|------|
| China (1919 / 25) | | | | 1990 | 2006 | | 1999 | 2002 |
| RoKorea (1991 / 22) | | | | 1997 | 1998 | | 1999 | 2001 |
| Mongolia (1968 / 16) | 2005 | 1969 | 1969 | 1969 | 1969 | 2005 | 2002 | 2001 |
| Japan (1919 / 48) | 1932 | 1965 | 1953 | 1967 | | | 2000 | 2001 |
| US (1934 / 14) | | | | | | 1991 | | 1999 |
| Canada (1919 / 30) | | 1972 | | 1972 | 1964 | 1959 | | 2000 |

Part II
Key Concepts

Forced Labour C. 29 / C. 105

- Definition contains three elements
 - "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"

Is **NOT** Forced Labour C. 29

- compulsory military service for work of a purely military character
- minor communal services
- normal civic obligations
- emergency
- "prison labour"

Even when exempted under C. 29,
forced labour must **NEVER** be
used ... - C. 105

- (a) as a means of **political** coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
- (b) as a method 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**;
- (e) as a means of racial, social, national or religious **discrimination**.

Examples of forced labour

- the farmer trapped in debt bondage to the landlord because of lack of alternative job opportunities, failing credit system, age-old patterns of discrimination, failing property protection ...
- the undocumented (trafficked ?) migrant worker toiling in sweatshops, on fishing boats, in private households ...
- the documented migrant worker working endless hours without pay to pay back the sum (s)he borrowed to get a job abroad
- the woman or child lured away from home by promises of a bright future that evaporate in the commercial "sex industry"
- the young farmer who finds a job in the city, is initially not paid for months on end so that a deposit builds up with an unscrupulous employer who uses it to extract excessive overtime at will ...
 - ... and gets away with it because the law is vague, independent unions are absent and labour inspections are a virtual concept

Trafficking "Palermo" Protocol

- The UN Protocol to the UN Convention on Transnational Organized Crime to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children primarily a law enforcement tool obligating state parties
 - to prosecute traffickers
 - extradite suspects and share information
 - but it is also the first international legally binding instrument explicitly addressing preventive anti-trafficking measures, as well as action in the field of protection for and assistance of trafficked persons

Trafficking Definition

- (transaction/movement) the recruitment, transportation, transfer, harbouring or receipt of persons,
- (absence of consent) by means of threat or use of force or other forms of coercion, of abduction, of fraud, 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
 - this criterion is irrelevant for persons < 18 years
- (exploitation) for the purpose of exploitation

Trafficking Definition

- women AND men
- children AND adults
- for sexual AND labour exploitation
- Exploitation in legal AND illegal activities
- within AND across national boundaries
- private AND public "traffickers"

What is "Exploitation" ?

- States must establish criminal liability for (transactions leading up to), **at a minimum**, the following forms of exploitation
 - (sexual exploitation) "the exploitation of the prostitution of others or other forms of sexual exploitation"
 - States can decide whether to consider all or only forced prostitution as exploitation
 - (labour exploitation) "forced labour or services, slavery or practices similar to slavery, servitude"
 - the removal of organs

Understanding "exploitation"

- Is a term (almost) not used in international labour standards, because all standards are meant to combat exploitation
- Can be usefully understood as a situation where one party disproportionately benefits from the work of the other party
 - compare marxism ~ all extraction of surplus value from worker (i.e. employer profits) is exploitation
- Key aspects
 - vulnerable position of the exploited
 - manifest disproportion of the work and the reward
 - human dignity affected

Difficulties with concept of (child) trafficking

- How important is the “movement” aspect of trafficking?
- How to distinguish migration, smuggling, trafficking of child?
- How does one prove 3rd persons' intent to exploit?
- What if the trafficking outcome is not strictly forced labour?
- In many places trafficking doesn't happen through organized criminal networks, right?
- Placement with extended family (confiage)?
- Age of child (in particular if not registered at birth)?

Smuggling versus Trafficking

Smuggling of a person:

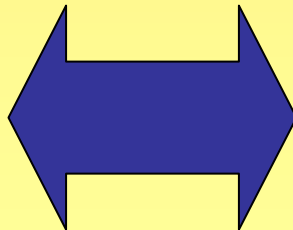
- Provide assistance to migrant to cross a national border illegally;
- Agreement/consent;
- Intention is to assist in illegal border crossing in return for a reward;
- Crossing international border;
- Is crime against immigration law;

See Art. 3(a) of Smuggling Protocol to Transnational Crime Convention

Trafficking of a person:

- Deception (at a minimum) for the purpose of exploitation;
- No agreement/consent (or irrelevant due to force or age);
- Intention is to exploit;
- Not necessarily crossing of international border;
- Is crime against person (human rights violation);

See Art. 3 of Trafficking Protocol to Transnational Crime Convention



Worst Forms of Child Labour

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and **forced or compulsory labour**, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for **prostitution**, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for **illicit activities**, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the **health, safety or morals** of children.

(Fundamental) Labour Standards

- Give expression to (basic) human rights
- Are “universal, indivisible, interrelated and interdependent”
 - means that forced labour & trafficking are difficult to tackle w/o regard to other labour standards
 - e.g. an environment w/o unions or labour inspection, where discrimination is rife and children have few education opportunities, FL will thrive

FL ~ Trafficking

- There are forms of FL which are not trafficking
 - army officers who cannot leave service
 - bonded labour (India / Pakistan)
 - "rehabilitation through labour" (China)
 - peacefully striking workers in non-essential services ordered back to work
- There are forms of trafficking which are not FL
 - removal of organs
 - transportation, harbouring stage of the trafficking process

FL ~ Worst Forms of CL

- Forms of FL which are not WFCL, e.g.
 - all FL of adults (> 18)
 - [contractually tying young persons to the employer for excessive periods of time in return for schooling/training]
- Forms of WFCL which are not FL
 - children accompanying their parents scavenging on wastedumps (hazardous)

Migration ~ Trafficking

- Regular and irregular migration can degenerate into trafficking
 - e.g. natural rural-urban migration
- Trafficking can pose as regular migration
 - e.g. unscrupulous/unlicensed employment agencies offering regular jobs
- ILS do not promote migration for employment, but require proper governance if States decide that the **labour market** in both the labour exporting and importing country will benefit from migration
 - proper governance includes acting against all forms of exploitative migration, including FL & trafficking

Part III

Legislation on Forced Labour and Trafficking

Needed is ...

- Legislation stipulating penal sanctions for forced labour (C. 29), i.e.
 - forced labour itself
 - each of its various forms
 - vectors of coercion
 - criminalizing certain violations of legislation on protection of wages goes a long way towards preventing forced labour
 - same for criminalizing certain acts by unlicensed employment agencies or prohibited acts by licensed agencies
- Legislation outlawing trafficking for labour exploitation adds value in that it captures not only the end point (FL) but also intermediate stages

Needed is ...

- Legislation tackling the worst forms of child labour has the added value that it puts the child, not the crime at centre stage
- Legislation governing migration of employment is necessary to prevent disruptions of the labour market, quite apart of whether forced labour/trafficking occurs or not

Part IV

Legislation - Some observations on China and France

Chinese Law - Observations

- The notion of “exploitation” does not need to be legally defined and criminalized as such, as long as
 - the various forms of exploitation are captured and punished by law
 - slavery and similar practices : sale, serfdom, debt bondage, forced labour
 - prostitution of others, use / procuring / offering for pornography or pornographic performances

Chinese Law - Observations

- legal loopholes that provide avenues for exploitation are closed, for example legislation that
 - allows for employment contracts "for life" or for a very long period of time (> 3 to 5 years)
 - does not limit wage deductions by employers or loan installments for debts incurred by workers with employers
 - does not prohibit the payment of deposits with the employer for recruitment
 - has the effect of placing workers in the service of others in a position of disadvantage as compared with that of other workers (e.g. because rights with respect to housing, health care and pensions are rendered less accessible)
 - does not provide for the performance of overtime by individual or collective agreement
 - permits employers to withhold several months of pay so as to create a bond that will be forfeited if the worker quits the job
 - permits employers to withhold ID cards or registration certificates
 - allows employment taxes on employers to be passed on to workers

Chinese Law - Observations

- S. 134 Criminal Law - "If anyone forces employees to work under hazardous conditions in violation of rules, thereby causing an accident involving heavy casualties or causing other serious consequences, he shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention"
 - criminalizes forced labour only with respect to hazardous work (how is that defined?), and only if such work causes an accident
- S. 226 Cr. Law - "Whoever buys or sells commodities by violence or intimidation, or compels another person to provide or receive a service, if the circumstances are serious, shall be sentenced ..."
 - does the compulsion to provide a service include a work performance - or is it only meant to include regular extortion?

Chinese Law - Observations

- S. 244 Cr. Law - "Where an employer, in violation of the laws and regulations on labour administration, compels its employees to work by restricting their personal freedom, if the circumstances are serious ..."
 - what are the situations where an employer can force a worker to work without violating laws and regulations ?
 - what if an employer forces a worker to work other than by restricting personal freedom ?
 - what are serious circumstances ?
 - what if an employer forces a worker to work by restricting personal freedom and in violation of the law, but circumstances are not serious ?

Chinese Law - Observations

- S. 96 Labour Law 1994 - "Where an employing unit commits one of the following acts, the person in charge shall be taken by a public security organ into custody for 15 days or less, or fined, or given a warning; and criminal responsibilities shall be investigated against the person in charge according to law if the act constitutes a crime: (1) to force labourers to work by resorting to violence, intimidation or illegal restriction of personal freedom; or (2) humiliating, giving corporal punishment, beating, illegally searching or detaining labourers."

Chinese Law - Observations

- S. 32 LL 94 - "A labourer may notify at any time the employing unit of his decision to revoke the labour contract in any of the following circumstances: (1) within the probation period; (2) where the employing unit forces the labourer to work by resorting to violence, intimidation or illegal restriction of personal freedom; or (3) failure on the part of the employing unit to pay labour remuneration or to provide working conditions as agreed upon in the labour contract."

Chinese Law - Observations

- the LL does not establish criminal liability by itself, and S. 96 suggests that forced labour is not a crime by itself, but may become one depending on the circumstances
- the LL addresses forced labour, but only within the context of a labour relationship between a worker and an employing unit - see S. 2 LL "This Law applies to all enterprises and individual economic organizations (hereafter referred to as employing units) within the boundary of the People's Republic of China, and labourers who form a labour relationship therewith."
- the LL does not provide objective criteria for its application, i.e. does not state when a labour relationship exists irrespective of the type of contract employer and worker have chosen
- S. 32 appears largely irrelevant as no worker is likely to be able to separate him/herself from a work situation he/she is forced to undertake

France

- French law : no specific offence of trafficking in persons
- Slavery is nevertheless encompassed and punished by generally applicable, non-specific legal provisions designed to cover certain forms of conduct offensive to human dignity that can be assimilated to situations of enslavement or the constituent elements thereof. These include the classic offences of:
 - Unlawful confinement & abduction (Criminal Code, art. 224-1 & 224-2);
 - Deprivation of basic necessities & care (Criminal C., art. 227-1 & 223-3);
 - Sexual violence (Criminal Code, art. 222-22 et seq.);
 - Intentional violence (Criminal Code, art. 222-7-art. 222-16)
- They also include the use of clandestine or illegal labour, the entry or residence of unauthorized aliens, and breaches of labour regulations

France

- Since 1994 : domestic slavery & economic exploitation became punishable offences
 - article 225-13 of the new Code : it is an offence "to obtain, by taking advantage of a person's vulnerability or dependent situation, the performance of unpaid services or services for which the payment clearly bears no relation to the amount of work performed"
 - article 225-14 : it is an offence "to subject a person, by taking advantage of his or her vulnerability or dependent situation, to working or living conditions incompatible with human dignity"
- Both offences are punishable by two years' imprisonment and a fine of 75,000 euros

France

- A specific penalty - namely two years' imprisonment and a fine of 25,000 francs - can be imposed on parents or any person acting instead of the parents who, gratuitously or for consideration, places children or apprentices aged under 16 in the hands of professionals working in the entertainment industry, whether settled or itinerant, the film industry, radio, television or sound recording, or modeling, or hands them over to vagabonds, vagrants or professional beggars. The same rules apply to intermediaries or agents who hand over children or cause them to be handed over, or who persuade children aged under 16 to leave home in order to take up with such professionals

France

- Prostitution of adults : increasingly characterized as "a form of sexist violence", and tendency towards evaluating true scale of prostitution and trafficking to be evaluated in order to take consistent action, and while studying patterns of behaviour among prostitutes' clients
- 2002 : new paragraph added to article 227-23 of the Criminal Code which makes child pornography an offence, stipulating that the possession of pornographic images or representations of minors shall henceforth be punishable offences on the same footing as the taking, development, transmission with a view to dissemination in any form, and the direct or indirect import or export of such images or representations

France

- A number of proposals have been put forward (report of the Council for Assistance to Victims in 2001)
 - Granting victims administrative and legal status, leaning particularly towards the idea of temporary admission to French territory for humanitarian reasons;
 - Increasing the resources available to collaborative agencies to provide victims with psychological, legal, social and administrative support; establishing specialized, secure shelters; introducing assistance with training and job placement;
 - A protective status in criminal proceedings for witnesses and their families or relatives;
 - Better coordination of initiatives to punish offenders and look after victims of contemporary slavery;
 - Publicity and awareness-raising campaigns in the countries of origin of victims, potential victims and populations at risk.