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Legal Aspects of Trafficking for Forced Labour Purposes in Europe

Rohit Malpani

Special Action Programme to
Combat Forced Labour

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Working Paper

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**Legal Aspects of Trafficking
for Forced Labour Purposes
in Europe**

Rohit Malpani

**International Labour Office
Geneva**

April 2006

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Foreword

In June 1998 the International Labour Conference adopted a Declaration on Fundamental Principles and Rights at Work and its Follow-up that obligates member States to respect, promote and realize freedom of association and the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation.¹ The *InFocus Programme on Promoting the Declaration* is responsible for the reporting processes and technical cooperation activities associated with the Declaration; and it carries out awareness raising, advocacy and knowledge functions – of which this Working Paper is an example. Working Papers are meant to stimulate discussion of the questions covered by the Declaration. They express the views of the author, which are not necessarily those of the ILO.

The ILO's 2005 Global Report, *A Global Alliance against Forced Labour*, drew much needed attention to the concerns of trafficking for forced labour purposes in Europe and other industrialized countries. Moreover, it pinpointed two major problems that impede more effective action against forced labour. First, with very few exceptions, forced labour is not defined in any detail in national legislation, making it difficult for law enforcement agents to identify and prosecute the offence. Second, and in consequence of this, there have been very few prosecutions for forced labour offences in the world.

These are the challenges that Rohit Malpani has taken up in a meticulously researched and clearly argued discussion paper. With numerous case examples of law and judicial practice from Europe, and some other countries, he painstakingly reviews the present gaps in identification and prosecution of trafficking for forced labour cases, as well as deficiencies in approaches to prevention and to compensation for the abuses suffered by the victims of trafficking. He takes as his starting point some concepts and provisions of the Palermo Trafficking Protocol – with a particular focus on the concept of “abuse of vulnerability” – arguing that these need to be articulated carefully in national legislation if they are to lead to more effective law enforcement and protection of trafficked victims. Mr. Malpani also makes a significant contribution to the law and policy debates on anti-trafficking, by considering the key role of labour and employment law and institutions. Vital concerns include the role of employment tribunals, the legal oversight of work permits, and the linkages between forced labour and inadequate subcontracting practices. The problems, as well as examples of good practices, are clearly illustrated through specific cases from a range of Central, East and West European countries.

The paper was prepared as part of an ILO project, financed by the European Union and the Government of the United Kingdom, for capacity building on forced labour and human trafficking in Europe. This project, involving a number of “source” and “destination” countries between Eastern and Western Europe, aims to enhance national capacities to tackle forced labour exploitation in different ways. It has created networks among police and labour inspectors in both source and destination countries. It has drafted best practice guidelines on means to address the forced labour dimensions of human trafficking. And it has sought to improve legislation and monitoring systems on private employment agencies.

As this innovative project draws to an end in mid 2006, we are pleased to publish this high quality discussion paper. We trust that it will be of practical value, not only in Europe, but

¹The text of the Declaration is available on the following web site: <http://www.ilo.org/declaration>.

in so many other countries where trafficking for both sexual and labour exploitation has become one of the most burning problems of modern times.

I am grateful to Rohit Malpani, and to Beate Andrees for her supervision of his work. Thanks are also extended to Anne Pawletta who made important contributions to this paper.

Roger Plant
Head, Special Action Programme to Combat Forced Labour
InFocus Programme on Promoting the Declaration

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Rohit Malpani
21 May 2006

TABLE OF CONTENTS

Foreword **iii**

EXECUTIVE SUMMARY **ix**

I. INTRODUCTION..... **1**

II. AN OVERVIEW OF INTERNATIONAL STANDARDS **1**

III. LEGISLATION TO COMBAT TRAFFICKING FOR FORCED LABOUR **3**

IV. ADHERENCE TO HUMAN RIGHTS STANDARDS..... **21**

V. COMPENSATION FOR VICTIMS..... **29**

VI. IMMIGRATION LAW AND TRAFFICKING **32**

VII. THE ROLE OF EMPLOYMENT TRIBUNALS..... **34**

VIII. LEGAL OVERSIGHT OF WORK PERMITS..... **37**

IX. SUBCONTRACTING AND FORCED LABOUR PRACTICES..... **38**

X. RECOMMENDATIONS..... **41**

BIBLIOGRAPHY **44**

List of Working Papers of the InFocus Programme on Promoting the Declaration..... **46**

EXECUTIVE SUMMARY

This paper aims to examine recent trends in Europe in the fast-changing legal landscape to prevent and prosecute trafficking for forced labour exploitation and to protect and compensate victims of forced labour exploitation. The relevant information that could be reviewed and the evidence that was relied upon was qualitative and of a limited nature, and thus, all conclusions and suggestions are only starting points for further investigation and testing by others. Evidence was chosen selectively from various countries to demonstrate certain trends, but no general conclusions should be made about the programmes to combat trafficking for forced labour exploitation in any one country. Instead, the examples should serve as guidance to analogize specific situations when analysing the same laws in a specific country. The paper covers several different areas of law to provide a comprehensive review. This includes an examination of:

- Penal laws criminalizing trafficking for forced labour exploitation, and an examination of how these laws have been implemented in practice by reviewing limited case law focusing on non-sex cases;
- Rogatory mechanisms, and how their functioning affects the success of prosecutions for forced labour;
- Protection measures for victims of trafficking following detection or escape;
- Compensation measures for trafficking victims;
- Immigration laws, and particularly how these laws affect the status of migrant workers most likely to be trafficked;
- Employment tribunals, and to what extent they are accessible to trafficking victims of labour exploitation;
- Work permits, the restrictions attached to work permits, and the consequences of these restrictions; and
- Supply chains, and how governments have attempted to regulate and prevent forced labour abuses in the supply chain.

Furthermore, throughout this examination, international, human rights and regional standards governing each of these areas of law are fully explained and used as a comparison with legislative standards and practice within countries. Also, comparisons are drawn with law and practice in the United States to provide a useful reference point of an approach that often differs from common practice in Europe.

Summary of findings

Penal laws punishing trafficking in persons across Europe mostly adopt the definition of trafficking in persons provided in the Palermo Protocol. One major shortcoming of this approach is that these penal laws fail to resolve certain ambiguities that exist in the Palermo Protocol definition, particularly in its use of the term ‘abuse of vulnerability’. Countries that have adopted this term without resolving its ambiguity have struggled to apply the concept consistently, and the ambiguity leaves judges with too much discretion to exculpate traffickers guilty of violating relevant penal laws. Current attempts to define abuse of vulnerability specifically are an improvement but are not adequate because they either exclude too many forms of vulnerability from a definition, fail to provide judges with a standard to evaluate whether a trafficker’s actions constitute forced labour exploitation or do not criminalize certain illegal acts that are prima facie evidence of forced labour exploitation. Definitions of forced labour exploitation that specify multiple forms of vulnerability, that criminalize specific acts that abuse the vulnerability of a victim, or that provide an objective standard for judges to measure whether an act constitutes forced labour exploitation are the best approaches to define abuse of vulnerability.

Besides different approaches to defining ‘abuse of vulnerability’, countries across Europe have defined the term ‘forced labour’ differently. While the ILO definition of forced labour under Convention No. 29 defines forced labour as all work or services obtained under menace of penalty, some countries have chosen to define forced labour differently. In particular, countries have determined that they may effectively prosecute by defining forced labour exploitation as any labour and services contrary to

human dignity. Furthermore, some countries have revised their penal code definition of trafficking for labour exploitation so as to not require the victim to have been coerced by the offending party. This makes it difficult to distinguish substandard labour from forced labour exploitation since it becomes unclear whether the victim was working involuntarily or was merely exploited for sub-par wages and benefits.

Finally, many source countries for victims of trafficking are becoming transit and destination countries; however, many country penal codes do not reflect these changes adequately, and countries should revise their penal codes in line with obligations under international law.

Efforts to prosecute traffickers for forced labour exploitation in both source and destination countries across Europe has been hindered or halted by the failure of the rogatory process, which seeks to facilitate the exchange of information between two countries. Although there are multiple international conventions that either obligate States to exchange information and evidence efficiently and rapidly, or which create mechanisms to facilitate the exchange of information and facilitate cooperation, many countries in Europe are struggling to use the process properly. Since most trafficking crimes are transnational and evidence from the other country is often essential to proving the crime, improvements to the rogatory process would enable prosecutors to punish traffickers more effectively.

To adhere to international human rights standards concerning trafficking in persons, countries should institute victim protection measures and ensure that victims can obtain compensation. Although international human rights standards obligate countries to provide protection to victims of trafficking even if they do not agree to cooperate, most countries in Europe only grant a residence permit in exchange for cooperation with the authorities. Furthermore, some evidence demonstrates that countries do not honour the reflection periods granted to trafficking victims by pressuring victims to immediately cooperate. Evidence suggests that countries also deny victims of forced labour exploitation use of victim protection measures, and many victims of forced labour exploitation may not be able to exercise their basic rights because of overzealous use of immigration laws where victims are immediately deported. Compensation measures in most countries include the right of trafficking victims to file civil charges simultaneously with criminal charges for forced labour exploitation; however, some evidence shows that civil complaints are not necessarily filed, thus denying victims of trafficking the compensation they deserve. Victim compensation funds designed to provide victims of crime with compensation are limited in scope, and would mostly exclude victims of forced labour exploitation since the individual must have suffered an intentional act of violence, which is less frequent in forced labour exploitation.

Immigration laws may also prevent many victims of forced labour exploitation from accessing employment tribunals, which would then provide an opportunity to contest their exploitation, which may or may not be coercive. However, many irregular migrants are fearful of deportation, have no knowledge of employment tribunals or are unable to secure expertise or assistance to use these tribunals.

When States have attempted to intervene to reduce illegal migration and prevent exploitation, the programmes designed to manage migration actually may institutionalize forced labour exploitation. Some countries examined have designed work permit programmes that bind a migrant to one employer, and provide no real and acceptable alternative to working solely for that employer. If the migrant is exploited, his/her only option is loss of work permit and return. This has led employers to coerce migrant workers into working for long hours at a substandard wage. Work permits should not be tied to one employer, and migrants should not have to jeopardize their status as a legal worker in a destination country because they seek to change their job and thus risk.

Besides needing to regulate the distribution and use of work permits, law enforcement officials need to also exercise greater regulatory control and oversight over supply chains. Labour providers, who function as a subcontractor supplying labour to employers and other subcontractors, have been found to be guilty of the most egregious forms of exploitation and countries are now introducing regulations to oversee their activities. In other countries, legal compensation mechanisms have been developed to

ensure that victims of labour exploitation (and forced labour) are able to recover pecuniary damages from either the subcontractor or the employer or contractor that is vicariously liable for the actions of the subcontractor. Recent case law indicates that the concept of vicarious liability applies in some circumstances, thus holding employers or contractors jointly and severally liable for the actions of subcontractors who commit forced labour abuses. Effective laws that define the scope of vicarious liability are necessary to reduce uncertainty and to create a minimum standard that will be honoured by all parties concerned.

I. INTRODUCTION

Since 2000, there have been rapid changes across Europe in the legal approaches utilized to combat trafficking in persons. This was mostly spurred by enactment of a new United Nations convention to combat organized crime, with an accompanying protocol to combat illicit trafficking, known as the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereafter known as the ‘Palermo Protocol’). The Palermo Protocol conveyed a growing consensus that trafficking in persons included trafficking for purposes other than sexual exploitation, such as forced labour, slavery, servitude, and organ removal.

Forced labour, slavery and servitude are terms used to refer to situations in which people are forced against their will to earn money for others. Besides criminalization of forced labour through the Protocol, all forms of forced labour have been universally condemned, initially through passage of the International Labour Organization (ILO) Forced Labour Convention No. 29 (1930), ratified by almost all ILO member States. Despite this early effort to eradicate forced labour, the practice has grown and changed with time to reflect the rapidly changing dynamics of the global labour market. The ILO Global Report on Forced Labour 2005 shows that significant numbers of men and women migrating internally or to other countries than their own were becoming victims of forced labour. As prosperity continues to push eastward across Europe, source countries of trafficking victims have become new destination countries, and countries that have long been destination countries are encountering new forms of forced labour exploitation that are more difficult to detect and prosecute.

This Working Paper aims to examine new developments in laws designed to combat trafficking for forced labour across Europe, including new policies and laws of the European Union and Council of Europe, and where appropriate, in the United States, which faces similar challenges. Thus, the paper provides an in-depth analysis of penal code revisions and whether they have been effective tools to prosecute trafficking and forced labour exploitation, and also examines mechanisms of collecting evidence across national boundaries, known as rogatories.

Secondly, the paper explores whether countries have fulfilled human rights standards related to protection of trafficking victims, including a State’s obligation to protect victims of trafficking and to provide victims with the right to seek redress. Thirdly, the paper considers the role of immigration law in either exacerbating or curtailing forced labour practices, and in particular how immigration law and policy affects the ability of victims of trafficking to seek full exercise of their basic rights. Finally, the paper will review how countries across Europe have sought, through legislation, litigation and administrative regulations, to address forced labour exploitation occurring through managed migration programmes and through subcontracting chains.

II. AN OVERVIEW OF INTERNATIONAL STANDARDS

Forced labour was originally prohibited through ILO Convention No. 29, which defined forced labour as “all work or service, which is exacted under menace of any penalty and for which the said person has not offered himself voluntarily”,² or when a person has not consented to the work or services performed. It concerns anyone who is forced by physical or psychological coercion to give their labour involuntarily, and, through reference to both “work” and “services”, the definition covers forced sexual services and other forms of acquiring money, as well as normal modes of work. Furthermore, Article 25 of Convention No. 29 criminalizes the exploitation of forced labour, stating: “the illegal exaction of forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation of any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and are strictly enforced”.³ Thus, States were compelled to eliminate forced labour as a practice and to establish an effective deterrent under the law to discourage further forced labour practices.

² See Convention No. 29, Forced Labour Convention (1930), Article 2(1).

³ Ibid, Article 25.

In 1957, a second ILO Convention on forced labour was drafted and widely adopted as a supplement to the original forced labour Convention. While Convention No. 29 provides for the general abolition of forced labour, Convention No. 105 requires abolition of forced labour in five specific cases: (1) as a means of political coercion or education or as punishment for holding or expressing political views, (2) as a means of mobilizing and using labour for purposes of economic development, (3) as a means of labour discipline, (4) as a punishment for having participated in strikes, and (5) as a means of racial, social, national or religious discrimination.⁴ Today, while some countries must continue to guard against these forms of forced labour practices, the movement of individuals, and the growth of forced labour as one of the negative consequences of this free movement, has become of foremost importance.

Historically, trafficking was mostly perceived as a means to facilitate sexual exploitation, and occasionally countries also recognized trafficking as a means to exploit children. On the other hand, forced labour was viewed primarily as a domestic phenomenon. In lieu of including forced labour into a framework to combat trafficking, forced labour practices were mainly criminalized through laws penalizing slavery or involuntary servitude or through laws prohibiting extortion, restriction of liberty, and coercion, or forced labour practices were only punished through labour fines and administrative penalties.

The Palermo Protocol provided the impetus to criminalize the recruitment, movement and exploitation of persons for all forms of forced labour, and enhanced the criminal penalties that traffickers would receive. The Palermo Protocol defines ‘trafficking in persons’ as “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 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.”⁵ “Exploitation” means “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 removal of organs”.⁶

Thus, there are three elements needed to establish the crime of trafficking in persons, or (1) the *act* of trafficking, which includes recruitment, transportation, harbouring or receipt of persons, (2) the *means* of overbearing or coercing an individual, or through the use of coercion, abduction, fraud, deception, abuse of power or abuse of vulnerability and finally (3) the *purpose* of trafficking, or sexual exploitation, forced labour, slavery, involuntary servitude and removal of organs. For purposes of trafficking for forced labour, means of coercion are those actions, or the threat of certain types of action, that overbear a person’s ability to make a voluntary decision to engage in labour or services. Thus, according to Section 3(b) of the Palermo Protocol, even if a victim of trafficking consents to engage in forced labour, sexual services or other forced services, that consent is null since coercion was employed to secure that person’s consent.⁷

How is this definition an improvement? Firstly, the Palermo Protocol recognizes that exploitation may not occur until the individual has arrived in a destination country. Many victims of forced labour exploitation are not trafficked into a destination country – instead, these individuals are smuggled voluntarily into destination countries and are coerced at some time after arriving. Secondly, the Protocol recognized that in addition to physical modes of coercion, indirect forms of coercion, such as psychological coercion, are often employed to induce consent. In the Protocol, this mode of coercion is labeled as “abuse of a position of vulnerability”. In these cases, the involuntary consent of an individual to exploitation is induced through indirect threats and psychological coercion that convinces a victim that they have no real alternatives but to submit to the trafficker’s wishes. In many cases, forced labour

⁴ See Convention No. 105, Article 1.

⁵ See Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, United Nations (2000), Article 3(a).

⁶ Ibid.

⁷ Ibid, Article 3(b), which states: “The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means (of coercion) set forth in subparagraph (a) have been used.”

victims are working in houses, restaurants, hotels and construction sites in plain view of others, without any physical evidence of the coercion they are enduring.

In spite of these advances, there are shortcomings with the Palermo Protocol's basic definition of trafficking in persons, and with the Protocol itself. With respect to the definition of trafficking in persons, it is vague or undefined with respect to many key terms, including terms such as 'abuse of vulnerability' and 'forced labour'. Secondly, human rights protections for victims of trafficking are only voluntary, even though human rights principles obligate countries to provide protection, assistance and redress to victims of trafficking.⁸ Also, the Protocol is silent with respect to other laws that have an important bearing upon the prevention and prosecution of trafficking, and the protection of victims, such as immigration and labour law, and does not require nor urge countries to oversee labour market arrangements, such as subcontracting chains.

III. LEGISLATION TO COMBAT TRAFFICKING FOR FORCED LABOUR

An overview

One of the compelling reasons to examine how European countries have adopted the Palermo Protocol is the diversity of legislative approaches across Europe to combat trafficking in persons. The chief reasons for divergent approaches are (1) membership (or lack thereof) of the European Union, (2) a country's self-perception as either a source, transit or destination country, and (3) whether the country relies upon common or civil law. The European Union's passage, on 19 July 2002 of Council Framework Decision 2002/629/JHA, obligated all Member States to take necessary measures to punish all forms of trafficking in persons in line with the standards advocated by the Palermo Protocol.

One push factor encouraging a common approach to trafficking in persons across Europe, besides further enlargement of the European Union, has been the Council of Europe, whose membership includes nearly all countries in Europe. The Council of Europe recently drafted a regional convention entitled "Convention on Action Against Trafficking in Human Beings", which was made available for signature and ratification on 16 June 2005.⁹ The definition of trafficking in human beings is identical to the Protocol's definition of trafficking in persons,¹⁰ and ratifying parties to the Council of Europe Convention, under Article 19, must accordingly criminalize trafficking in human beings. A second factor encouraging a common approach is the increasing realization amongst traditional source countries, which are mostly outside the EU, that they have become both source and destination countries and must adopt legislation to reflect this new reality.

Thus, many countries in Europe have made changes to their criminal code to satisfy their obligations under the Palermo Protocol, but their approaches have varied. In some countries, different penal code provisions have been introduced or used to charge offenders with trafficking for forced labour offences. In particular, some countries have identified seizure of identity documents as the preferred modus operandi of many traffickers and have criminalized, or are considering criminalizing, seizure of identity documents (without reasonable excuse). On the contrary, a few countries have not criminalized all forms of trafficking for forced labour, but are in the process of drafting laws that will enable prosecutions in the future; others do not consider themselves to be destination countries of trafficking for forced labour and their laws reflect this self-perception. Finally, some countries have not criminalized trafficking for forced labour exploitation, despite evidence of rampant forced labour practices.¹¹

⁸ See United Nations High Commissioner for Human Rights Principles and Guidelines on Human Rights and Trafficking, E/2002/68/Add.1 (2002), Article 8.

⁹ See Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, Council of Europe Treaty Series No. 197, www.coe.int/trafficking.

¹⁰ Ibid, Article 4(a)

¹¹ Israel, for instance, does not have a law that punishes human trafficking. However, a new law is currently under deliberation in the country's parliament (Knesset) that would punish all forms of trafficking with the possibility of maximum sentences of

This paper will review five themes and trends that have emerged across Europe with respect to legislation criminalizing trafficking in persons for forced labour purposes; they are: (1) the inability of legislation to define abuse of vulnerability as a mode of coercion, and the corresponding failure of criminal courts to apply ‘abuse of vulnerability’ as a mode of coercion, (2) legislation that modifies the definition of forced labour so that it is no longer compliant with international law, (3) eliminating the necessity of demonstrating coercion to prove that a trafficker has engaged in forced labour exploitation, (4) the criminalization of identity document seizure, and (5) source countries writing and enforcing new laws to reflect their recent transition to destination countries for forced labour exploitation.

‘Abuse of vulnerability’ as a mode of coercion

‘Abuse of vulnerability’ was introduced as a means of coercion in the Protocol in recognition of the propensity of traffickers to coerce individuals into performing labour or services, including sexual services, without relying upon direct physical abuse, threats or fraud. Instead, traffickers take advantage of a specific vulnerability or vulnerabilities that many victims experience, including those who voluntarily move from source to destination country. In particular, victims are poor, are without legal papers or legal status to work in the destination country, are isolated, are unable to communicate in the local language, have few job skills which will allow them to gain immediate employment or could have a particular mental or physical disability. Without legal immigration status in countries with restrictive immigration laws, these individuals are particularly vulnerable to the threat of denunciation to the police or immigration inspectors who may immediately arrest and deport the individual. Others will have monetary debts that they will have to pay to smugglers, private employment agencies (in the source or destination country) or to potential employers who recruited them through legal or illegal channels. Besides monetary debts, many migrants recruited through work permits that are provided by the employer or a recruitment agency may be particularly vulnerable to the will of the employer. Given their high degree of vulnerability, these individuals are vulnerable to inducements, demands or the coercive behaviour of smugglers, employers and intermediaries during passage from source to destination country, while others are vulnerable to forced labour practices as migrants to destination countries through the various forms of indirect or psychological coercion. This is done by threatening denunciation, restricting the individual’s movement (thus creating or sustaining an individual’s isolation), withholding pay (thus creating or sustaining economic dependency), or refusing to legalize the individual’s status.

The Palermo Protocol includes ‘abuse of vulnerability’ as a means of coercion, but the Protocol itself does not define nor explain ‘abuse of vulnerability’ adequately. The Travaux Préparatoires state: “abuse of vulnerability is understood to refer to any situation in which the person involved has *no real and acceptable alternative* but to submit to the abuse involved”.¹² This standard has been adopted by the European Union, which mandated in 2002 that all EU countries must adopt legislation criminalizing trafficking in persons. In particular, the EU Council Framework Decision of 19 July 2002 states that abuse of vulnerability is where a “person has no real and acceptable alternative but to submit to the abuse involved.”¹³ Neither the Protocol nor the EU Council Framework Decision provides any further guidance as to the meaning of abuse of vulnerability. This paper will consider various approaches countries have adopted to tackle this ambiguity in the Protocol.

The elements of ‘abuse of vulnerability’

An abuse of vulnerability, like other methods of coercion mentioned in the Protocol, involves a conscious act by a trafficker to coerce an individual to perform labour or services, which in this case are acts that are designed to exert psychological control over the individual. Yet unlike other modes of

16 years for normal cases, and 20 years if a minor was trafficked. Source : “*Bill to jail human traffickers for 16 years passes first reading*”, accessed at www.haaretz.com on 16 November 2005.

¹² See Report of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime on the work of its first to eleventh sessions: Interpretive Notes for the official records (Travaux Préparatoires) of the negotiation of the UN Convention Against Transnational Organized Crime and the Protocols thereto, A/55/383/Add.1, 55th Session, Agenda item 105, Article 3(a), Paragraph 63.

¹³ See Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA), Article 1(c).

coercion, an abuse of vulnerability also relies upon whether the victim was vulnerable or susceptible to the trafficker's abuses. Thus, there are two interrelated elements: (1) the vulnerability of the victim, and (2) the act of the trafficker that successfully coerces an individual by abusing that vulnerability. The vulnerability of a victim can result from some innate characteristic of the victim (physical or mental deficiency, ill health, or youth) or may develop due to the situation the victim finds him/herself in within a destination country (poverty, precarious administrative status). Also, the actions of a trafficker could either create or worsen a victim's vulnerability (extremely poor wages causing poverty, restricted movement causing isolation, seizure of identity documents causing fear of deportation). However, none of these forms of vulnerability are specifically mentioned in the Protocol's definition of trafficking in persons; therefore, one cannot assume that any vulnerability (if not mentioned in the penal code), will be recognized by criminal courts as a form of vulnerability.

Thus, if the vulnerability is an innate characteristic of the victim, or is a result of the situation the victim finds him/herself in upon arriving in a destination country, then one must consider two questions: (1) did the victim's vulnerability create a state of mind that made the individual susceptible to coercion, and (2) were the subsequent actions and behaviour of the trafficker sufficient to constitute an abuse of that vulnerability (thereby causing the victim to involuntarily consent, or that he or she had no real and acceptable alternative to the coercion)? For example, if a victim is already fearful of deportation, a trafficker's seizure of a victim's identity documents would constitute an abuse of the victim's fear of deportation (only if a country recognized fear of deportation as a vulnerability).

Or, if the trafficker's actions are the direct cause of the victim's vulnerability, the same two questions should be asked: (1) is this vulnerability recognized under the penal law as having created a state of vulnerability that made the individual susceptible to exploitation and coercion, and (2) were the trafficker's actions sufficiently onerous to cause the victim to involuntarily consent to forced labour exploitation. Thus, a penal law criminalizing trafficking for forced labour is important because it enables judges to identify: (1) what forms of vulnerability are recognized under the law and (2) what actions taken by traffickers are abuses of vulnerability that cause involuntary consent.

This paper will demonstrate that, as most penal codes in Europe are currently written, applying abuse of vulnerability as a mode of coercion to punish traffickers is highly difficult because common forms of vulnerability, and common forms of abuse exerted by traffickers to abuse victims, are neither specified nor included in these penal codes. Instead, penal laws are as ambiguous as the Trafficking Protocol and do not provide any useful legislative guidance, which means that judges are forced to make these determinations 'blindly'. Generally, this paper argues that there are two major shortcomings with how penal laws in Europe define abuse of vulnerability:

- (1) Penal codes do not provide specific examples of vulnerabilities which traffickers will take advantage of to compel a victim's involuntary consent, or penal codes only provide a few specific examples of vulnerability that do not account for all forms of vulnerability that result in forced labour exploitation;
- (2) Most penal codes do not codify specific acts of traffickers as prima facie criminal acts of trafficking for forced labour exploitation, such as seizure of identity papers or forcing a victim into debt bondage. A review of a few cases shows that judges are inclined to excuse criminal acts that should be punished if the offender also provided a few benefits or freedoms to the victim.

Use of the term 'abuse of vulnerability' in legislation

Instead of clarifying 'abuse of vulnerability' through specific legislation, a number of countries have merely adopted the Trafficking Protocol's definition without providing additional guidance. Countries do not even acknowledge the Protocol's explanatory notes in their legislation, which define an abuse of vulnerability as having 'no real and acceptable alternative'. For example, the Netherlands defines abuse of vulnerability as "abuse of a situation of dominance arising from given circumstances, (or) through

abuse of a vulnerable situation”.¹⁴ However, it does not provide any additional guidance to policemen, prosecutors or judges to recognize, prosecute or convict traffickers who employ abuse of vulnerability as a mode of coercion.

The main difficulty with solely adopting the term ‘abuse of vulnerability’ (without further clarification) is that it is open to interpretation and that it is difficult to apply in practice. In many cases the relationship of the employer and victim is not outwardly coercive, and the abuse is neither overwhelming nor constant. Often, the victim is granted certain ‘freedoms’ or ‘benefits’ that may colour the judge’s perception of the victim and employer. Thus, the penal code should clearly and specifically define when an abuse of vulnerability constitutes a criminal act by defining the term’s two elements: what are vulnerabilities that cause an individual to be susceptible to coercion, and what types of acts of an offender are sufficiently abusive to cause that individual to thereby consent to the coercion?

This is necessary because without guidance, some judges will not view vulnerability of a victim and an act of a trafficker to abuse that vulnerability in a light that recognizes victim’s mental state and the effect of the act upon the victim’s ability to make independent decisions.

This paper will argue that certain vulnerabilities of victims, and certain acts of traffickers, should be viewed as indicators and also possibly as prima facie evidence of forced labour exploitation, and should be defined as such by the legislator (either in the travaux préparatoires or directly under law). These indicators could then be assigned by judges as facts that establish vulnerabilities or certain acts of traffickers. In these cases, only strong evidence would militate against finding the offender guilty of forced labour exploitation. Yet, as most legislative frameworks do not provide for these indicators, cases show that judges will diminish the seriousness of the offender’s abusive actions as they may not be inclined towards individuals who claim that certain vulnerabilities left them susceptible to exploitation. On the contrary, individual acts that provide the victim with some benefits or freedoms are sufficient to negate the offender’s culpability. Thus, if a trafficker seizes the identity documents of a victim who fears deportation, judges do not recognize the act as sufficient to constitute a criminal act, and may excuse the offender’s actions if the offender can introduce some evidence of fair treatment. Similarly, if a victim introduces evidence of a vulnerable mental state due to isolation, evidence that the victim could leave their place of residence or employment is sufficient to negate or supersede the mental isolation they may actually experience. The following cases illustrate these shortcomings.

In *Affaire Siliadin v. France*, a French court initially ruled that a victim of forced labour exploitation was not sufficiently vulnerable to involuntarily consent to coercion. In France, the law defines ‘abuse of vulnerability’ in cases of forced labour exploitation as subjecting or obtaining the performance of services from a person “whose vulnerability or dependence is obvious or known to the offender”.¹⁵ As with legislation that only incorporates the term “abuse of vulnerability” into the penal code without further explanation, French law neither defines nor specifies either vulnerability or dependence. The case was overturned by the European Court of Human Rights (ECHR) for failing to recognize that the victim was entitled to protection and redress for forced labour abuses under Article 4 of the Convention of Human Rights.¹⁶ The court noted that the French law failed to recognize the victim’s grievances because the law was too ambiguous to consistently address forced labour abuses. As the court stated, the law was ‘susceptible to widely varying interpretations from one tribunal to another, as was seen in this case’ and that the penal code provisions ‘would not assure a minor a concrete and effective protection against the acts (of exploitation) of which she was a victim’.¹⁷

In the case, a 15 year-old Togolese girl had been invited to study and live with a French family. She was made to repay the family who sponsored her journey through domestic work. However, she was not properly credited for her work and her passport was confiscated. Thereafter, she was sent to work for a second family, first during a period of time where her employer was pregnant, and then was made

¹⁴ Korvinus, Anna: “Trafficking in Human Beings, Supplementary Figures”, Fourth Report of the Dutch National Rapporteur” (2005), Appendix 1.

¹⁵ EUROPOL public information (Annex III), *Legislation on Trafficking in Human Beings* (2005), p. 45.

¹⁶ See *Affaire Siliadin v. France*, European Court of Human Rights, Requete No. 73316/01 (2005).

¹⁷ See *Affaire Siliadin v. France*, op.cit., p. 34, para. 134.

to stay thereafter against her will. She was made to work 12 hours a day every day of the week, and was only allowed to leave on Sundays for a short period of time, increasing her sense of isolation. She was not paid at all for her work except that she received 500 French francs once or twice. Her immigration status was never regularized and she continued to not have access to her travel documents, which according to her testimony left her constantly in fear of deportation. For a while she managed to escape these circumstances without her identity documents and worked for a friend for a fair salary. However, pressure from her original hosts to return to the second family led her to return to work there, again without any change in her immigration status and without receiving any further salary. She finally managed to regain her passport and was able to seek the help of a non-governmental organization.¹⁸

Here, there were several clear indicators of the victim's vulnerability that could all be considered prima facie evidence of her vulnerability, including her illegal status, isolation, dependence on money provided by the host families, fear of denunciation to the authorities and fear of deportation. Despite clear evidence of her vulnerability, the French court found that she was neither in a state of vulnerability nor dependency. Instead, it declared that because she was able to leave her employment to work for a different family, because she was capable of calling her family in Togo from time to time, could speak French well, and had never complained about the terms of her employment, she was not sufficiently vulnerable to involuntary consent to forced labour exploitation.¹⁹ In overturning the decision, the ECHR noted that the victim was entirely at the mercy of her employer since she did not have possession of her identity papers, was mostly isolated, had been falsely promised resolution of her precarious administrative status, and did not move around freely because she feared detection and deportation.²⁰ The ECHR determined that criminal charges should have been upheld against the employers, significantly more compensation should have been paid, and the French penal law criminalizing forced labour was too ambiguous and was too open to multiple interpretations.²¹

A second case from Belgium demonstrates the difficulty in determining when a trafficker's actions are sufficient to constitute an abuse of a victim's vulnerability. Prior to a recent revision of the Belgian Penal Code, trafficking for forced labour was criminalized under Article 77 of the Immigration Code. Here, the law was less ambiguous than the French law, defining an abuse of vulnerability as abusing the vulnerability of a foreigner in terms of his or her illegal status, precarious situation, pregnancy, disease or disability.²² However, the Belgian law did not specifically mention any acts as means to abuse a victim's vulnerability. Thus, it did not provide any guidance to judges to determine under what circumstances psychological coercion causes an individual to involuntarily consent to forced labour exploitation.

In the case, a young Guinean girl was recruited to work in Belgium as an au pair. She had her identity papers seized and did not have access to them, at one point was not paid salary for nine months, and did not have her immigration status regularized by her employer.²³ Each of these actions constitutes abuse of the victim's vulnerability under the Belgian law (including her illegal status and her poverty which was exacerbated by the employer withholding her wages). Yet the court exonerated the employer because the offender introduced evidence of efforts to regularize her immigration status in Belgium.²⁴ Since there was no guidance under the law as to what actions constitute an abuse of a victim's vulnerability, the court ruled that the employer's efforts to regularize her stay demonstrated that he did not intend to abuse the vulnerability of the victim. This judgment was entirely within the judge's discretion since the Belgian law did not specify any specific abusive practices (such as seizure of papers or withholding of wages), and the law also did not provide any guidance for judges to determine when psychological coercion was sufficiently abusive to cause a victim to involuntarily consent.

¹⁸ Ibid.

¹⁹ Ibid, para. 37-40, p. 6.

²⁰ Ibid, p. 35.

²¹ Ibid.

²² See "Human Traffic, Human Rights: Redefining Victim Protection", *Anti Slavery International* (2002), p. 87.

²³ Centre pour l'égalité des chances et la lutte contre le racisme, *Plaidoyer pour une approche intégrée* (2003), p. 68.

²⁴ Ibid.

In both cases described above, there was no shortage of evidence establishing (1) the vulnerability of the victims and (2) actions taken by their employers to take advantage of that vulnerability. Secondly, both cases demonstrate that in nearly all employment relationships involving an abuse of vulnerability as the mode of coercion, there are instances where the employer will have provided some benefit to the victim, and instances where the victim had an opportunity to exercise some degree of freedom. By finding the offenders innocent in both cases, an important question is raised, namely: if these exceptional moments of freedom or good will on the part of the offender are usually sufficient to negate an abuse of vulnerability, when would a court actually find a trafficker or employer guilty of abusing the vulnerability of an individual? In all likelihood, the coercion and abuse would be so severe, and the vulnerability of the victim would be so obvious, that one of the other modes of coercion (threat, abuse, fraud, violence) provided in the definition of ‘trafficking in persons’ under the Palermo Protocol would also be applicable. Thus, the term ‘abuse of vulnerability’ becomes meaningless. Under this scenario, only by defining when an abuse of vulnerability constitutes a punishable act can a legislature ensure that judges will not strip the term of any real applicability as a mode of coercion. This would involve, as mentioned above, providing specific examples of vulnerabilities that would leave an individual susceptible to coercion, and secondly, including examples of acts that are prima facie evidence of an abuse of vulnerability.

Analysis of other approaches to defining ‘abuse of vulnerability’

It is instructive to see how other countries have attempted to define ‘abuse of vulnerability’ rather than only adopting the Protocol definition verbatim, and to see whether other countries have enacted laws that overcome any of the problems discussed above.

In Germany, abuse of vulnerability, under a new law enacted in 2005 that specifically criminalizes trafficking for forced labour exploitation, is defined as “taking advantage of a predicament or helplessness associated with the person’s stay in a foreign country”.²⁵ Thus, this law defines ‘vulnerability’ as a ‘predicament’ or ‘helplessness’. However, this law is just as ambiguous as the Palermo Protocol definition of trafficking in persons since it does not specify or define the forms of vulnerability that would constitute a predicament or helplessness. Secondly, the law does not explain how to interpret ‘taking advantage’ as a standard for measuring whether an employer’s actions qualified as criminally abusive acts, although ‘taking advantage’ indicates that a trafficker or employer could be criminally liable for actions that would not be viewed as coercion under a penal code which utilizes the term ‘abuse of vulnerability’. Finally, the law does not state whether personal freedoms granted to victims or ‘good intentions’ of traffickers are to be weighed as mitigating considerations against guilt. In fact, some State criminal investigators and prosecutors in Germany raised concern that they are uncertain how to utilize this new provision in forced labour cases.²⁶ Prosecutions are only carried out for clear-cut cases of forced labour exploitation, or cases where traffickers employ physical force, heavily restrict the victim’s movements or threaten the victims with serious harm.²⁷

In Italy, ‘abuse of vulnerability’ is defined as “when anyone takes advantage of a situation of physical or mental inferiority or poverty”.²⁸ This law defines vulnerability as physical or mental inferiority or poverty. While this provides specific examples of when a judge may find an abuse of vulnerability under the law, it limits the law’s overall scope since it only defines abuse of vulnerability in three respects. It would have been preferable for the legislation to state that the listed forms of vulnerability were non-exclusive, and other forms of vulnerability, although not enumerated in the law, could also be actionable in Italian courts. For example, the law does not include fear of deportation as a type of vulnerability. While irregular administrative status leads to mental inferiority, a judge would have to infer this vulnerability without guidance from the legislation. Similarly, it is not clear whether the law would characterize seizure of identity documents as an action that would constitute an abuse of vulnerability, unless it can be argued that it creates a mental inferiority in the victim.

²⁵ See Section 233, German Penal Code.

²⁶ Personal communication with Norbert Cyrus (by Anne Pawletta).

²⁷ Interview with Mr. Holger Bernsee, Senior Officer, State Office of Criminal Investigations, 14 November 2005 (Conducted by Anne Pawletta).

²⁸ Article 600, Law No. 228, 11 August 2003.

Can poverty be a type of vulnerability?

Another form of vulnerability in the Italian law, poverty, is highly difficult to apply in practice. For example, how poor must an irregular migrant be to qualify as vulnerable? Does it make a difference if the irregular migrant has dependents, and must an employer know that an irregular migrant has dependents? Furthermore, in what ways may a trafficker take advantage of the poverty of a victim? If the trafficker recognizes the migrant is poor and offers a substandard wage, without coercing the migrant to remain in the job (except that the migrant will lose his or her salary and will fall into even more dire poverty), is the employer abusing the vulnerability of the migrant? A case from Belgium demonstrates the difficulty courts face in determining whether paying an impoverished individual a substandard wage constitutes an abuse of vulnerability.

The former Belgian law punishing trafficking, or Article 77 of the Immigration Code, mentions that a precarious situation is a vulnerability. In the case, a family exploited for forced labour stated that they were in the country illegally, had absolutely no resources and were constrained to accept the awful working and living conditions imposed upon them. Victim testimony established that “the abuse consists of being paid a miserable remuneration, of about 1 euro per hour for fifty hours of work per week for numerous months, without benefits or social protection.”²⁹ The victims did not argue that the traffickers took advantage of their precarious administrative status; thus, their only vulnerability was their dire poverty and the punishable abuse was the employer’s unwillingness to pay them a fair wage for their labour. Does this constitute an abuse of vulnerability? Here, the employer clearly knew that the family was poor and needed a wage to survive as irregular migrants. And if the family did not accept the wages and working conditions imposed by the employer, they would not be able to survive. Thus, it can be argued that the family had no real or acceptable alternative to the terms of employment. This would accord with the intent of the Protocol, which states that abuse of vulnerability occurs when the victim has no real and acceptable alternative. On the other hand, the employer did not force the victims to continue working for him. Although he paid the victim an awful wage, he also permitted the victim to leave his employment at any time. Presumably, the court had to ask itself whether the conditions of work that normally exist in a forced labour situation, or poor salary, long working hours and no benefits, can also be a form of abuse in itself. If poor wages and working conditions constitute a form of abuse, and if this form of abuse can leave a poor individual with no real and acceptable alternative except to continue working in awful conditions, it can be argued that poverty is a valid vulnerability. In the case, the Belgian court ruled that no abuse was established, and that the victims were not found in a particularly vulnerable situation.

In the United Kingdom, “abuse of vulnerability” occurs when:

“He [the victim] is requested or induced to undertake any activity, having been chosen as the subject of the request or inducement on the grounds that he is mentally or physically ill or disabled, he is young or he has a family relationship with a person, and a person without the illness, disability, youth or family relationship would be likely to refuse the request or resist the inducement.”³⁰

Although the legislation provides guidance to law enforcement officials and judges, it does not define vulnerability broadly enough to include all potential forms of ‘abuse of vulnerability’. But the British law only requires that the victim is ‘requested or induced’ by the employer to engage in forced labour exploitation, which means that a trafficker’s actions would not have to be abusive to constitute coercion. However, the legislation does not list specific acts that constitute an abuse of vulnerability, and it does not provide any guidance to judges to determine when an abuse of vulnerability constitutes coercion.

²⁹ Tribunal correctionnel de Liège, 22 December 2004 (unpublished opinion).

³⁰ Accessed at www.legislationonline.org on 3 October 2005.

In the following, examples are given where the definition of trafficking for forced labour adequately lists examples of vulnerabilities. The Luxembourg penal code defines ‘abuse of vulnerability’ as “taking advantage of a 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”.³¹ Here, examples of vulnerability are numerous, including an illegal or precarious administrative situation, which would include residing illegally in a foreign country, pregnancy, ill health or a physical or mental disability. These forms of vulnerability should provide clear evidence to judges, prosecutors and law enforcement officials as to what constitutes a type of vulnerability under the law, even when the trafficker may provide minimal benefits to the victim. Furthermore, the law does not exclude other potential forms of vulnerability, since it only defines specific vulnerabilities as non-exclusive examples of ‘taking advantage of a particularly vulnerable situation of the victim’. Nevertheless, the law does not provide any guidance as to what actions of employers or traffickers are prima facie evidence of abuse of vulnerability. Thus some ambiguity remains in the law. However, by introducing many examples of a victim’s vulnerability, the law does ensure that abusive situations are recognized as constituting trafficking in persons.

Under Article 165 of the Moldova penal code, three specific acts that can compel an individual’s involuntary consent through an abuse of vulnerability are punished under the penal code, including confiscation of documents, servitude for the repayment of debt (bonded labour) and threatening to disclose a victim’s confidential information to his or her family or other persons. However, while the law includes an abuse of vulnerability as a form of coercion, it does not provide specific examples of types of vulnerabilities that a trafficker may abuse to compel a victim’s involuntary consent, thus making it difficult for a court to prosecute traffickers for abuses of the different types of vulnerabilities of victims.

The United States defines an abuse of vulnerability uniquely under the Victims of Trafficking and Violence Prevention Act (TVPA) of 2000. This was enacted prior to drafting of the Trafficking Protocol, which the US only ratified in December 2005. Under the Act, a trafficker abuses the vulnerability of a victim: (1) “by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labour or services, that person or another person would suffer serious harm or physical restraint” or (2) “by means of the abuse or threatened abuse of law or the legal process.”³² Here, the law differs from previously discussed examples by providing a measurable standard to determine whether psychological coercion results in a victim involuntarily consenting to a trafficker’s demands. Under the law, an individual is guilty of forced labour exploitation if he or she causes a victim to believe that his or her failure to comply with a trafficker’s orders would result in serious harm to the victim or to other individuals. However, the law limits the scope of use of ‘abuse of vulnerability’ as a mode of coercion because the individual must believe that he or she would suffer serious harm or physical restraint, which while undefined in the Act, probably means that a victim would have to believe that they would suffer greater potential harm than the potential harm a victim would have to qualify under a penal code in most European countries (especially when countries like Germany define vulnerability as a predicament or helplessness).

A further reason why the TVPA is a good law is that it acknowledges that abuse of vulnerability can occur by means of the abuse or threatened abuse of law, which presumably would include denunciation to immigration authorities. Finally, the Act criminalizes unlawful possession of identity documents (of a victim) as prima facie evidence of trafficking for forced labour purposes, which is one type of abusive act consistently employed by traffickers.

Thus, countries have attempted to define abuse of vulnerability in greater detail than the drafters of the Protocol. However, specific definitions of abuse of vulnerability should not wholly exclude other forms of vulnerability that a legislature does not anticipate, and should only list specific types of vulnerability as examples of vulnerability. Secondly, penal codes in Europe, for the most part, do not criminalize acts of traffickers that could be seen as prima facie evidence of an abuse of vulnerability, such as seizure of

³¹ ILO: *Human Trafficking and Forced Labour Exploitation: Guidance for Legislation and Law Enforcement*, (2005) p. 22.

³² Accessed at www.state.gov/documents/organization/10492.pdf on 12 October 2005.

identity documents. Some countries have written their penal code to only require that a trafficker had ‘taken advantage’ or ‘requested’ an individual to engage in forced labour or services, instead of ‘abusing’ an individual. Still, this does not provide a clear and unambiguous standard for judges to determine whether psychological coercion causes an abuse of vulnerability. Only if a law that provides a standard measure (such as the TVPA) as to when an abuse of vulnerability is coercion, or a law that punishes specific acts that abuse a victim’s vulnerability, as in Moldova, can a law potentially ensure some success in prosecuting traffickers and employers engaged in forced labour abuses.

Comparing civil and common law jurisdictions

All laws maintain some ambiguity, which is necessary for judges to exercise their discretion and to make a law conform to diverse situations that arise on a daily basis. Nevertheless, it particularly behooves legislatures in civil law jurisdictions to avoid ambiguity as much as possible. Most European countries, with the exception of the United Kingdom and Ireland, are civil law jurisdictions. The UK and Ireland, which are common law countries, can rely upon the judicial system to develop a body of law that incrementally resolves ambiguities in legislation. Thus, with a general term such as abuse of vulnerability, common law courts will gradually define the forms of abuse of vulnerability through a process known as *stare decisis*. In a common law jurisdiction, a lower court will interpret legislative intent in a court decision, which is then affirmed or modified by other lower courts. When a party to a case disagrees with the court’s interpretation of the term, the case is appealed to an appellate court, that either agrees with the lower court’s definition or makes some modifications. Further appeals can occur, and the final word of the highest court, which is usually a Supreme Court, becomes the settled law of the land. Lower courts are then obliged to abide by the Supreme Court’s interpretation, and only another case that reaches the Supreme Court on the same point of law can challenge a previous interpretation. This creates certainty, predictability and uniformity throughout a legal system.

However, *stare decisis* is only used in common law jurisdictions. All other European countries, which rely upon a civil legal system, do not utilize *stare decisis*, as it is seen to interfere with the right of legislatures to make law. Instead of *stare decisis*, judges are asked to apply the principle of *jurisprudence constante*, which holds that although judges make independent decisions from other judges, they should try to be consistent, predictable and non-chaotic. Without uniformity throughout a court system, judges, who are not sensitized to modern forced labour exploitation, and without legislative guidance defining abuse of vulnerability, can issue judgments that other judges with greater sensitization would disagree with.

Criminalization of coercive acts

As mentioned, most countries do not criminalize any acts or abuses that employ psychological coercion to induce involuntary consent. The Palermo Protocol itself does not mention any acts as forms of psychological coercion that abuse the vulnerability of a victim, but it does provide under Article 5(1) that States should adopt legislative and other measures to establish criminal offences for trafficking in persons. Thus, what legislative measures, besides adoption of the definition of trafficking in persons into the penal code, could effectively establish criminal offences for trafficking in persons? The ILO has provided guidance as to types of acts that cause a victim to involuntarily consent to forced labour exploitation. As previously mentioned, the ILO, under Convention No. 29, defines coercion as a situation where labour or services are “exacted from any person under the menace of any penalty”. Under Convention No. 29, work or services exacted from any person under the menace of any penalty means that, besides the threat or imposition of penal sanction, a penalty may “take the form of a loss of rights or privileges”.³³ The following six acts, according to the ILO Committee of Experts, indicate a forced labour situation: (1) physical or sexual violence, or threat of violence (2) restriction of movement of the worker, (3) debt bondage or bonded labour, (4) withholding wages or refusing to pay the worker at all, (5) retention of passports and identity documents or (6) threat of denunciation to the authorities.³⁴

³³ See ILO: *Human Trafficking and Forced Labour Exploitation – Guidance for Legislation and Law Enforcement*, (2005), pp. 19-20.

³⁴ *Ibid*, p. 20.

The latter four acts, or debt bondage, withholding of wages, retention of identity documents and threat of denunciation to the authorities, are all acts that are designed to abuse the vulnerability of a victim. Each of these acts creates a fear or vulnerability, or exacerbates a pre-existing fear, that can cause a victim to involuntary consent to the demands of an offender. In addition, countries like Moldova have identified other acts that abuse the vulnerability of a victim, such as threatening to disclose personal information about a victim to his or her family or other persons.³⁵

Criminalization of wrongful possession of identity documents

It is not uncommon for traffickers to seize the identity documents of migrant workers, particularly those who are irregular, in order to coerce the individual. This act leaves the victim fearful of detection, arrest and deportation, and powerless to leave an employer to either change jobs or to leave a country. However, a review of legislation shows that most countries have not enacted laws that penalize seizure of identity documents. One of the first countries to penalize this act was the United States under the TVPA, which penalizes seizure of identity documents with a five-year prison sentence. The provision states:

“Whoever knowingly destroys, conceals, removes, confiscates or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person, to prevent or restrict or to attempt to prevent or restrict, without lawful authority, the person’s liberty to move or travel, in order to maintain the labour or services of that person, when the person is or has been a victim of a severe form of trafficking in persons, shall be fined under this title or imprisoned for not more than five years, or both.”³⁶

Thus, the act of seizing, confiscating, concealing or removing a victim’s identity documents establishes the mode of coercion necessary to secure a conviction for trafficking in persons. In Europe, there has been little compunction to adopt this approach. Until this year, only a few countries have adopted or are considering laws that criminalize acts relating to travel or identity documents. In Macedonia, Article 418-a (Trafficking in Human Beings) states:

“A person who withholds or destroys another person’s identity card, passport or other identification document for the purpose of committing the crimes referred in paragraphs 1 and 2 (trafficking in persons), shall be punished with imprisonment of 6 months to five years”.³⁷

The only shortcoming with the Macedonian provision, in comparison to the US provision, is that it does not include “purported” or false identity documents. Traffickers often provide fake documents to victims, who view these documents as their one form of security against deportation or arrest. This identity document is then seized and control of the document augments the trafficker’s authority. By not including fake or manufactured documents, the legislation excludes a common ploy used by traffickers to exert control over victims.

The United Kingdom is also considering legislation, entitled the Identity Cards Bill (projected to become law in 2006), which would criminalize illegal possession of identity documents.³⁸ Under this new act, it will be a criminal offence for a person to possess an identity document that was either improperly obtained or that belongs to someone else (without reasonable excuse), punishable by a term of imprisonment not exceeding two years.³⁹ The criminal sentence may be elevated to ten years if it can be shown that the person possessing the identity documents had the intention of inducing another person to use the documents to establish registerable facts about himself or herself.⁴⁰

³⁵ See Moldova penal code, Article 165.

³⁶ Accessed at www.state.gov/documents/organization/10492.pdf on 12 October 2005.

³⁷ See Legislative Compendium, Former Yugoslav Republic of Macedonia, United Nations Development Programme, accessed from www.anti-trafficking.net on 6 December 2005.

³⁸ Communication with Tim Woodhouse, Immigration and Nationality Directorate, United Kingdom, on 7 October 2005.

³⁹ Accessed at www.publications.parliament.uk/pa/cm200405/cmbills/008/2005008.htm on 2 January 2006.

⁴⁰ Ibid.

However, there are some problems with the proposed British law. It is possible that law enforcement and immigration authorities will misuse a new Identity Cards Bill. Under the same provision that criminalizes possession of another's identity document, it is also a criminal offence for 'a person with the requisite intention to have in his possession or under his control an identity document that is false and that he knows or believes to be false' and uses such document to register facts about himself or herself. While this provision has been introduced to discourage illegal immigration into the United Kingdom, it is highly likely that the new law could result in victims being unnecessarily arrested, and in some circumstances, incarcerated under the law. Victims who may worry about the fate of their families or others may choose to accept responsibility for a charge under this law in lieu of revealing the identity of a trafficker or employer who induced the victim to obtain false identity documents. Finally, there is always the possibility of the new law being disproportionately applied against certain minority communities.

Current research also shows that other countries would benefit from criminalizing seizure of identity documents to combat forced labour exploitation, both to prevent forced labour exploitation and to reduce organized crime. An investigation carried out by the Sociale Inlichtingen-en Opsporingsdienst (SIOD) in the Netherlands, which describes itself as "a new division within the Ministry of Social Affairs and Employment...(that) combats the misuse of social legislation, employment of aliens and benefits and premium fraud" analysed West African criminal networks for evidence of identity and social security fraud.⁴¹ The project conducted six discrete investigations of social security fraud. It discovered pervasive use and abuse of false identity documents, including use of the documents to smuggle individuals into Schengen countries, to place irregular migrants into legal employment, and then to leverage the irregular migrant's use of the identity documents as a debt that must be paid back as a form of debt bondage. The debts for use of the illegal identity documents sometimes equalled up to two-thirds of the labourer's actual earned wages. This rampant use of identity documents to first smuggle irregular migrants into the Netherlands and thereafter to traffic the migrants into situations of forced labour should prompt Dutch lawmakers to include criminalization of identity documents as a necessary tool in the fight against trafficking in persons.

Although national laws may not reflect the increasing use and abuse of identity documents to exploit migrant workers, the Council of Europe, in the recently created Council of Europe Convention on Action Against Trafficking in Human Beings, has stated in Article 20 that:

"Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the following conducts, when committed intentionally and for the purpose of enabling the trafficking in human beings: forging a travel or identity document, procuring or providing such a document, or retaining, removing, concealing, damaging or destroying a travel or identity document of another person."⁴²

Thus, the new Council of Europe Convention, if ratified by Member States, would compel all States to criminalize the use of identity documents as an end to further human trafficking.

Withholding of wages, threat of denunciation to the authorities and debt bondage

Other acts that the ILO has identified as strong indicators of a forced labour situation, such as withholding of wages, debt bondage or threat of denunciation to the authorities, are not explicitly criminalized in penal codes across Europe. While withholding of wages is probably implied as an abuse of vulnerability in the definition of trafficking of persons, and has been recognized in courts as an abuse of vulnerability, it is not specifically criminalized (like seizure of identity documents). Threat of denunciation, which is used against irregular migrant workers (but not commonly), comes within the legal definition of blackmail in some jurisdictions. The standard definition of blackmail, as the ILO explains, occurs when "a person...with a view to gain for him or herself, or another or with the intent to

⁴¹ Summary Report of Labyrinth, Sociale Inlichtingen-en Opsporingsdienst (SIOD), 2005.

⁴² See Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, Council of Europe Treaty Series No. 197, www.coe.int/trafficking.

cause loss to another...makes any unwarranted demand with menaces.”⁴³ For instance, Austria punishes abduction with use of blackmail under its penal code.⁴⁴ Besides statutes punishing blackmail, other countries have included threat of denunciation to the authorities as a type of vulnerability under the definition of trafficking in persons. However, it is only recognized as an abuse of an individual’s illegal administrative status (as in Luxembourg) or abuse of an individual’s precarious situation.

By not listing denunciation to the authorities in the penal code, it is unlikely that prosecutors can successfully convict a trafficker utilizing this mode of coercion. The United States, under the TVPA, includes “abuse or threatened abuse of law” as a punishable offence.⁴⁵ However, this does not include explicit mention of a threat of denunciation to the authorities as a punishable offence. Secondly, other acts that could be characterized as illegal acts that result in forced labour exploitation, such as the withholding of wages and debt bondage, are not criminalized under country laws punishing forced labour exploitation. It is unclear why countries have not criminalized these acts as punishable crimes, but it can be argued that expanding the range of punishable offences to include these actions would enhance the ability of law enforcement authorities to punish forced labour offences.

The definition of forced labour in the Trafficking Protocol

Another ambiguity with the definition of trafficking in persons in the Palermo Protocol is that the term, forced labour, is undefined. As previously mentioned, ILO Convention No. 29 defines forced labour as “*all work or service, which is exacted under menace of any penalty and for which the said person has not offered himself voluntarily*”. Under Article 25 of the same convention, countries are obligated to criminalize forced labour exploitation through appropriate penal sanctions. However, this definition of forced labour is specifically limited to Convention No. 29, since Article 2(1) specifically states that the definition of forced labour is for the purposes of Convention No. 29. Nevertheless, parties to the Convention are obligated to criminalize forced labour, and to ensure that any criminal law penalizing forced labour is consistent with Article 2(1). All countries in Europe, with the exception of Latvia, have ratified Convention No. 29.

The Trafficking Protocol does not specifically define forced labour, nor does it specifically incorporate or refer to the ILO definition of forced labour. But it does not explicitly state that the Protocol should supersede or limit the applicability of any prior treaty or convention. In fact, Legislative Guidelines for the Protocol written by the UN Centre for Organized Crime state that:

“The basic principle established is that any rights, obligations or responsibilities which applied to a State Party prior to the Protocol are maintained and not affected by the Protocol. The Protocol does not narrow or diminish rights, obligations or responsibilities, and only adds to them to the extent that is provided for in the text.”⁴⁶

Thus, countries must continue to enforce prior obligations under international law, such as the obligation to criminalize forced labour under Article 25 of Convention No. 29 utilizing the definition of forced labour provided under Article 2(1). In any case, countries would not face any conflicting obligations by adopting the Convention No. 29 definition of forced labour for the purposes of punishing trafficking for forced labour purposes (as required by the Protocol). The ILO definition of forced labour has three elements: (1) all labour or services, (2) extracted under the menace of penalty, and (3) for which the person has not offered himself voluntarily. The Palermo Protocol definition does not specify the forms of labour or services that qualify as forced labour. Thus, the first element does not conflict with the Protocol definition. The second element, that the labour is extracted under the menace of penalty, conforms with the Protocol, which requires that trafficking for forced labour purposes be extracted through coercion, for which it provides several modes. Finally, the ILO definition requires

⁴³ See ILO: op. cit. (2005), p. 21.

⁴⁴ EUROPOL public information (Annex III), *Legislation on Trafficking in Human Beings* (2005), p. 3.

⁴⁵ Accessed at www.state.gov/documents/organization/10492.pdf on 12 October 2005.

⁴⁶ See 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, United Nations Centre for International Crime Prevention, March 2003, p. 11.

that the victim's performance of such labour and services is offered involuntarily, or that the person does not offer his consent.

While the ILO Committee of Experts has sought to define when a person may or may not make a voluntary offer to provide his or her labour or services, the Palermo Protocol states, under Article 3(b) that the consent of the victim is irrelevant to convict a trafficker if he or she has used one of the modes of coercion specified under the Protocol definition of trafficking in persons.⁴⁷ Therefore, countries would face no conflict of obligations if they defined or interpreted forced labour, as a purpose of exploitation under the Palermo Protocol, as including "all labour and services", so long as they are extracted through coercive means.

Furthermore, the ECHR has held that Convention No. 29 can be applied to Article 4 of the European Convention of Human Rights, which binds Member States (of the Council of Europe) to insure that "No one shall be required to perform forced or compulsory labour".⁴⁸ While the ILO Convention specifies forms of labour that are not recognized as forced labour under Article 4,⁴⁹ it does not indicate, like the Trafficking Protocol, what forms of labour or services are included under the definition of forced or compulsory labour. In *Van der Musselle v. Belgium*, the Court acknowledged that Article 4 of the European Convention on Human Rights does not define forced or compulsory labour, but that "the authors of the European Convention [...] based themselves, to a large extent, on an earlier treaty of the International Labour Organization, namely Convention No. 29 concerning Forced or Compulsory Labour."⁵⁰ Thus, the Court held that since the Convention is binding on nearly all Member States of the Council of Europe, the definition of forced labour can provide a starting point for interpretation of Article 4 of the European Convention.⁵¹

Country definitions of forced and compulsory labour

Although the ILO definition of trafficking for forced labour has been widely adopted, some countries have chosen to alter the definition of forced labour for the purposes of their penal code. In Germany, trafficking in persons for the purpose of forced labour is defined as:

"Whoever, by taking advantage of a predicament or helplessness associated with the person's stay in a foreign country, places another person in slavery or bondage, or brings him to take up or continue employment with him or a third person under working conditions that show a crass disparity to the working conditions of other employees performing the same or comparable tasks..."⁵²

Here, the German penal code provision changes the definition of forced labour by only penalizing labour and services where the individual must work under conditions that show a crass disparity to the working conditions of others performing comparable tasks.

The trend of narrowly defining forced labour is not limited to Germany. In France, there are three laws that criminalize forced labour exploitation, one specifically criminalizing the recruitment, trafficking and lodging of the victim, and two separate laws criminalizing the exploitation of the individual for forced labour in France. In all three laws, forced labour is defined narrowly. Under Article 225-4, which penalizes trafficking in persons, forced labour is defined as 'conditions of work or living contrary to his or her dignity'.⁵³ Under Article 225-13, forced labour is defined as 'unpaid services or services against which a payment is made which clearly bears no relation to the importance of the work performed',

⁴⁷ See ILO: op. cit. (2005), pp. 21-22.

⁴⁸ European Convention of Human Rights (1950), Article 4(2).

⁴⁹ Article 4(3) states: "For the purpose of this Article the term "forced or compulsory Labour" shall not include: (a) any work required to be done in the ordinary course of detention imposed according to the provision of Article 5 of this Convention or during conditional release from such detention; (b) any service of a military character, or in the case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; (d) any work or service which forms part of normal civic obligations."

⁵⁰ *Van der Musselle v. Belgium* (1983), para. 29, accessed at. www.echr.coe.int on 18 December 2005.

⁵¹ *Ibid*, para. 32.

⁵¹. See Section 231, German Penal Code.

⁵³ EUROPOL public information (Annex III), *Legislation on Trafficking in Human Beings* (2005), p. 45.

while under Article 225-14, forced labour is ‘working or living conditions incompatible with human dignity’.⁵⁴

Finally, the Belgian Parliament recently passed a new trafficking law that punishes actions made in order to put a person - or permit this person to be put – to work “in conditions contrary to human dignity”. It is important to note that forced labour is not specifically addressed by this law even if it can be prosecuted under the law. The Belgian parliament has tried to define “conditions contrary to human dignity” through the legislative record. During the deliberations for the new law, the Minister of Justice provided testimony to specify those conditions the Ministry considered to be contrary to human dignity: they were defined through examples such as low wages or non-payment of wages, long working hours, or unsafe working conditions. Under this law, judges are compelled to include all forms of labour or services where prosecutors can demonstrate such significant working conditions contrary to human dignity. A ministerial directive is being drafted to give to prosecutors and police services indications of the meaning of “working conditions contrary to human dignity”; it will list several indicators to be appreciated in each context.

Although, as discussed above, Convention No. 29 defines forced labour as all labour and services that are provided involuntarily under menace of penalty, some countries have chosen to only criminalize those forms of labour or services which are contrary to human dignity. In a sense, this states an obvious relationship, or that that most labour extracted through coercion is substandard or that it forces individuals to work under conditions contrary to human dignity. This standard could provide clearer guidance to law enforcement personnel to identify victims of forced labour, or it could provide greater guidance to judges within civil legal systems to issue consistent rulings as to whether forced labour exploitation has occurred.

Furthermore, the Belgian and French laws criminalizing trafficking for forced labour purposes do not require the prosecutor to demonstrate that the victim was coerced into performing forced labour or services. However, coercion is seen as an aggravating circumstance under Belgian law. Article 433 *quinquies* of the penal code, which penalizes trafficking for forced labour, states:

“It constitutes an infraction of trafficking in human beings to commit the act of recruitment, transport, transfer, hosting and receiving a person, or to pass or transfer control of a person to a third party, with the intent of putting the person to work or permitting the person to be put into work where conditions are contrary to human dignity.”⁵⁵

This law only punishes services and labour that are contrary to human dignity, and the prosecutor does not have to show that the victim’s labour or service was extracted through a trafficker’s use of coercion. Under the Belgian penal code, the use of coercion only increases the severity of punishment. This law may presume that no individual would consent to working under conditions contrary to human dignity, even though the Trafficking Protocol only states that consent cannot be given when the trafficker employs coercion. This law was enacted in part because prosecutors were unable to convict traffickers for forced labour exploitation involving an abuse of the victim’s vulnerability. Since coercion (and thus, abuse of vulnerability) is not an element of the new law, prosecutors believe that it will be far easier to convict traffickers for forced labour exploitation.⁵⁶

In France, Article 225-4 of the French penal code eliminates a prosecutor’s obligation to prove coercion for the crime of trafficking in persons, but requires that the labour or services are contrary to human dignity to prove forced labour exploitation.⁵⁷ The other two penal code provisions, which punish employers who force individuals to perform labour or services, require a showing of coercion.

By eliminating the requirement for prosecutors to demonstrate a mode of coercion, the penal code

⁵⁴ Ibid.

⁵⁵ See Section 433, Belgian Penal Code. Law of 10 August 2005 – *Loi modifiant diverses dispositions en vue de renforcer la lutte contre la traite et le trafic des êtres humains et contre les pratiques des marchands de sommeil.*

⁵⁶ Interview with Yves Segaeert-Vanden Bussche, Belgian prosecutor, on 23 October 2005.

⁵⁷ EUROPOL public information (Annex III), *Legislation on Trafficking in Human Beings* (2005), p. 45.

punishes employers for forced labour exploitation whenever individuals are forced to work under conditions contrary to human dignity, even if an employer does not employ a mode of coercion to compel the performance of labour or services. Convention No. 29 of the International Labour Organization, which defines forced labour as compelling labour under menace of penalty, provides the minimum standard that countries are obligated to adopt when they criminalize forced labour exploitation. While all forms of substandard labour should be eliminated, forced labour is specifically criminalized as a particularly egregious form of substandard labour, since it involves the use of coercion to compel another's subservience. Although prosecutors in Belgium and France may find it easier securing a conviction for forced labour exploitation by not having to demonstrate a mode of coercion, this penal code revision diminishes the characterization of forced labour as a serious human rights abuse. All forms of labour exploitation should be curtailed and punished, but punishing and eliminating forced labour, and providing the highest standard of protection to victims of forced labour abuses, means that countries should adhere to those standards delineated in Convention No. 29. The challenge is therefore to distinguish between forced labour exploitation where a victim is coerced and unable to leave the employment relationship and other forms of exploitation that are "contrary to human dignity". This is particularly relevant for the design of victim protection measures. A broad interpretation of forced labour may entail the risk that victim protection measures may be scaled back in these countries, as legislators may not want to provide protection, a residence permit and benefits to individuals who are working voluntarily in places of employment under substandard working conditions, but who are free to procure other labour and services.

Penal laws in countries transitioning from source to destination country

Until recently, countries on the eastern fringe of Europe were mostly characterized as source and transit countries. A 2005 US State Department classification of countries in Europe as a source, transit and/or a destination country (see Table 1) indicates that many recent entrants to the European Union, including Lithuania, Poland, Hungary, the Czech Republic, as well as candidate entrants (Bulgaria and Romania), and other countries in Eastern Europe (Bosnia-Herzegovina, Kosovo and Serbia) have also become destination countries (as well as continuing to be source countries).⁵⁸ Other countries, such as Estonia, Latvia, the Slovak Republic and Slovenia, as new entrants to the European Union, and aspirants to the European Union (Ukraine, Turkey and Romania), while supplying cheap labour to other EU countries, will also attract numerous regular and irregular migrants from poorer countries. Accordingly, these countries will need laws that criminalize the recruitment of labour (for the purpose of forced labour exploitation in other countries) and penal laws that punish exploitation for forced labour purposes within their own territories. All countries that are members of the European Union must comply with the EU Council Framework Decision of 19 July 2002 and criminalize all forms of trafficking in persons.⁵⁹ Other countries in Eastern Europe have developed penal laws that punish forced labour exploitation in their own countries, and some countries have successfully prosecuted cases of forced labour exploitation. As mentioned above, Moldova has recently enacted a new penal law that effectively criminalizes a set of illegal acts that result in compelling the involuntary consent of an individual for forced labour purposes. Nevertheless, considerable work must still be done, as all countries within Europe should enact laws and develop trafficking plans to combat forced labour exploitation.

⁵⁸ Poland recently reported its first conviction of a trafficker for exploiting Labour within Poland. A Vietnamese employer recruited a Vietnamese male to work in Poland. He smuggled the male from Vietnam for a bond of US \$ 3,000. During the victim's employment in Poland, he was housed in an apartment for which he was also charged for while working only for pocket money. Thereafter he was sold to a second employer who made the victim pay off the fee for his sale. Following detection, the traffickers were imprisoned for at least three years. Source: Communication from Ministry of Justice, Poland, at National Workshop on Combating Trafficking in Persons for Forced Labour Purposes, 21-22 November 2005, Legionowo, Poland.

⁵⁹ See Council Framework Decision of 19 July 2002 on combating trafficking in human beings, Official Journal of the European Communities, L 203/1.

Table 1: Classification of countries

Source countries	Source and transit countries	Source, transit and destination countries	Transit and destination countries	Destination countries
Group 1	Group 2	Group 3	Group 4	Group 5
Albania Belarus	Estonia Georgia Latvia Moldova Romania Slovak Republic Slovenia Ukraine	Bosnia- Herzegovina Bulgaria Croatia Czech Republic Hungary Lithuania Macedonia Poland Russia Serbia and Montenegro Kosovo	Austria Belgium Denmark Finland Germany Italy The Netherlands Portugal Spain Sweden Switzerland Turkey United Kingdom	Cyprus France Greece Israel Luxembourg Norway

Source: US Department of State (2005): Trafficking in Persons Report

Country examples

Serbia-Montenegro has enacted a law penalizing trafficking in persons, including trafficking for forced labour purposes, and the law also criminalizes the possession or destruction of a person’s identity documents for the purpose of extracting services or labour involuntarily.⁶⁰ However, the trafficking law does not punish an abuse of a victim’s vulnerability as a mode of coercion. Recently, prosecutors successfully convicted a group of traffickers who exploited individuals for labour at a construction site. The victims were forced to work without pay, were physically menaced and were threatened with the loss of accommodation if they complained to the authorities. In proceedings following detection and arrest, the traffickers were convicted with sentences ranging from 30 to 60 months imprisonment.⁶¹

Macedonia has adopted legislation punishing all forms of trafficking in persons, including for the purpose of labour exploitation. Also, Macedonia is one of the few countries in Europe to punish seizure or destruction of a person’s identity documents for the purpose of compelling forced labour.⁶² According to reports that have compiled recent prosecutions of trafficking in persons in Macedonia, there have been no prosecutions for the crime of trafficking in persons for the purpose of forced labour exploitation (although there have been prosecutions for other forms of trafficking, and particularly for the purpose of sexual exploitation).⁶³

On the contrary, Ukraine has not enacted a penal law that punishes all forms of trafficking in persons.⁶⁴ It does not punish traffickers who coerce individuals through an abuse of the victim’s vulnerability, and

⁶⁰ http://www.coe.int/T/F/Affaires_juridiques/Coop%E9ration_juridique/Combattre_la_criminalit%E9_%E9conomique/Projet_LARA/Natleg_mont.asp#TopOfPage1.

⁶¹ See “Montenegrin Prosecutor files first charges for human trafficking”, 26 November 2004, BBC Monitoring International Reports.

⁶² http://www.coe.int/T/F/Affaires_juridiques/Coop%E9ration_juridique/Combattre_la_criminalit%E9_%E9conomique/Projet_LARA/Natleg_FYROM.asp#TopOfPage.

⁶³ Velkoska, Violeta: “Combating Trafficking in Human Beings Through the Practice of Domestic Courts”, Coalition All For Fair Trials (2005), p. 20.

⁶⁴ See www.abanet.org/ceeli/publications/conceptpapers/humantrafficking/ukraine.html.

recruitment of the individual is not clearly included as a punishable act. Finally, the law requires that a victim must have been transferred across Ukraine's borders for the act of trafficking to have occurred. This is unnecessary since the Protocol also criminalizes recruitment, transport, transfer and exploitation of an individual solely within one country.⁶⁵

Rogatories: Improving collection of evidence between countries

Rogatories are formal requests from a court or prosecutors in one country to the judicial authorities of another country requesting service of process, in particular to procure evidence or transmit information for use in criminal and civil matters. Trafficking cases, which involve the commission of criminal acts in a source and destination country, often require prosecutors and judges to procure evidence from other countries to successfully evaluate the criminal liability of offenders. Letters rogatory between many countries are unnecessary, as both international and regional mechanisms to govern the transmission of documents have been created.

While rogatories originally depended on comity between nations, the first convention controlling transmission of documents internationally between countries is the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial documents (Hague Service Convention), developed between those countries that are parties to the Hague Conference on Private International Law, of which there are 55. The Hague Convention provides a simplified and standardized method of exchanging evidence and documentation between countries through the use of a central authority in each country.⁶⁶ A significant number of European countries are members of the Hague Service Convention.⁶⁷ However, the Convention does not specify what types of evidence may be collected through the process, nor does it dictate any substantive matters that may arise when exchanging evidence or documentation between two legal systems.

Within Europe, there have also been standards that have been enacted to govern the exchange of information. Prior to the Hague Service Convention, the Council of Europe enacted the European Convention on Mutual Assistance in Criminal Matters. Unlike the Hague Service Convention, which creates a mechanism and procedure to exchange evidence, the European Convention does not prescribe any specific mechanism to ensure a simplified exchange of information. Instead, it only obligates parties to the Convention to execute all rogatories issued by other parties for evidence in criminal matters. The Convention has been ratified by nearly all Member States of the Council of Europe, with the exception of Monaco and San Marino.⁶⁸

However, neither of these conventions was sufficient to ensure proper exchange of information between all potential source and destination countries. While many trafficking victims originate from Eastern Europe, many countries within Europe have large numbers of victims arriving from East Asia, Africa and even from Latin America (to Portugal and Spain). As some of these countries were not a party to either Convention, cooperation in criminal matters had become a serious obstacle to prosecuting traffickers.⁶⁹ The UN Convention on Transnational Organized Crime (Palermo Convention), which the Trafficking Protocol supplements, provides for a variety of measures that facilitate mutual legal assistance between these countries.

The Palermo Convention obligates all States party to the Convention to “afford one another the widest

⁶⁵ See ILO: op. cit. (2005), p. 8-9. The Trafficking Protocol supplements the UN Convention on Transnational Organized Crime (Palermo Convention). Generally speaking, crimes penalized under the Palermo Convention must be transnational and involve an organized criminal group. However, this does not need to be included in the definition of the domestic crime of trafficking unless expressly required by the Trafficking Protocol. Thus, the Protocol, if fully implemented, will obligate countries to enact penal laws that combat trafficking in persons regardless of the involvement of an organized crime group or if the crime is transnational.

⁶⁶ See <http://hcch.e-vision.nl/upload/outline14e.pdf>

⁶⁷ For a list of those countries that are a party to the Hague Service Convention, please see http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=17.

⁶⁸ See European Convention on Mutual Assistance in Criminal Matters, CETS No. 30, at <http://conventions.coe.int> for a list of signatories of the Convention.

⁶⁹ See Rijkman, Connie: “Trafficking in Persons: Prosecution from a European Perspective”, Section 7.1.3.5.

measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.”⁷⁰ In the context of the Convention, this includes provision of evidence, executing searches and seizures, providing information, evidentiary items and expert evaluations, providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records, identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes and other requests that are not contrary to the requested State party law.⁷¹ To facilitate the exchange of evidence, the Palermo Convention prescribes countries to designate a central authority with the responsibility and power to receive requests and either perform them or assign them to the relevant party in the requested State, and ensuring that these requests are performed *speedily*.⁷²

Yet despite the entry into force of these conventions, evidence from multiple countries indicates that the ability to prosecute traffickers is often hindered or obstructed by the ability of a requesting State to procure evidence from another State where acts of exploitation, whether it be recruitment, transport or procurement of labour occurred. Requests for evidence between two contracting States either take too long to be useful or are never actually fulfilled. A Romanian prosecutor discussed her inability to obtain evidence from the Czech Republic, where a Russian organized crime syndicate had exploited 30 Romanians for labour, but where cooperation was nonexistent between the two countries.⁷³ Other countries from which Romania requested information were responsive, but only after a very long period of time (6-10 months), which was usually too late for the prosecutors to use in a trafficking case.⁷⁴ Interestingly, this occurred even when a formal structure had been developed in both the requesting and requested State. In these cases, because the request would have to pass through a multitude of departments, including each country’s Ministry of Justice and Prosecutor’s Office (which is the case between Romania and Italy), the time to receive evidence or information from a request was too long to be useful.⁷⁵ This is frustrating since many prosecutions in Romania are currently for the recruitment of trafficking victims. Thus, evidence from the other country establishes the purpose of the exploitation, and often other evidence gathered in the destination country helps to establish the recruiter’s guilt, particularly when the recruiter is directly connected to the activities of others in the destination country. Without such evidence, prosecutors have to hope that bank and telephone records provide sufficient evidence to establish the trafficker’s criminal acts.⁷⁶ These same problems have been reported elsewhere. In the Ukraine, similar delays requesting information from other countries have prevented prosecutors from compiling evidence against traffickers.⁷⁷

Police investigators have also had difficulty communicating with other police departments to collect evidence against traffickers. The Palermo Convention obligates signatory countries to ensure that law enforcement agencies cooperate closely with their counterparts in other countries, by establishing channels of communication, facilitating the secure and rapid exchange of information, identifying the whereabouts of suspects, conducting inquiries and locating and securing assets of suspects and offenders.⁷⁸ Despite this obligation, countries find it difficult to cooperate with their counterparts elsewhere. For example, investigators in Germany complain that while the exchange of evidence and information with investigators from other countries is theoretically possible, it takes too much time and rogatory letters are not answered at all by foreign investigation offices, although some countries tend to be more responsive than others (e.g. Poland, Austria).⁷⁹ The lack of communication between law enforcement agencies also thwarts proactive investigations. Law enforcement officials from Portugal complain that they have been unable to follow up on reports of Portuguese workers being exploited in other countries, such as Ireland, Finland, Sweden and the Netherlands, because of a lack of Portuguese

⁷⁰ Ibid, Article 18(1).

⁷¹ Ibid, Article 18(3).

⁷² Ibid, Article 18(13) and 18(24).

⁷³ Communication with Iulia Diaconu, Romanian Prosecutor on 28 October 2005.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Interview with Suchansk (NGO fighting trafficking in persons in Ukraine), 24 October 2005.

⁷⁸ UN Convention on Transnational Organized Crime, Article 27.

⁷⁹ Interview with Holger Bernsee, Senior Officer, State Office of Criminal Investigations (conducted by Anne Pawletta on 14 November 2005).

officials in the destination country and due to a failure of the destination countries to respond to information requests from Portuguese authorities.⁸⁰

What is the cause of this problem? One study examining mutual assistance in trafficking matters between European countries concluded that the main factors are the lack of priority assigned to responding to rogatories and bureaucracy in the departments responsible for fulfilling requests for evidence and information.⁸¹ Other factors that have contributed to a breakdown in the rogatory process, according to the same study, include: language problems between the countries, operational problems with executing requests, including a lack of contact details (no telephone or fax details are available or known in the requesting country), a lack of centralized systems in countries to track, confiscate or investigate bank records from accounts of suspects, an inability of officials from a requesting State to travel to the requested State to facilitate collection of evidence and deposition of witnesses, mostly because the requests are refused, an inability to obtain important information for serious cases because the rogatory system is overburdened by trivial or minor requests for mutual assistance, and a lack of resources in the processing departments for sending and receiving a request.⁸²

There are institutions that are available at the European and international level to facilitate the exchange of information to combat trafficking, including Europol and Interpol. While it is beyond the scope of this paper to review how these institutions are working to facilitate communication between law enforcement agencies and prosecutors in different countries, investigators have noted that the ability to exchange and obtain information is improved markedly when Europol or Interpol are involved in the exchange of information between two countries.⁸³

IV. ADHERENCE TO HUMAN RIGHTS STANDARDS

Trafficking in human beings is both a cause and a consequence of human rights violations.⁸⁴ A successful anti-trafficking response should empower victims and promote the rights of at-risk individuals and victims. Nevertheless, most national anti-trafficking responses have tackled all forms of trafficking as a law and order problem. The victim is not viewed as a holder of rights but as an instrument of the State that can enable an effective prosecution. This denies victims the opportunity to restore their basic dignity, contributes to their stigmatization in source and destination countries, pushes many at-risk individuals into forced labour, discourages interaction with law enforcement and social protection agencies to promote their rights, and following detection, places them in danger of being re-trafficked. These actions deny victims their basic rights guaranteed through international human rights standards and exacerbate a victim's vulnerabilities.⁸⁵

There are several fundamental rights that all States must uphold. All major treaties and conventions require States to uphold is the principle of non-discrimination, first promoted under Articles 2 and 7 of the Universal Declaration of Human Rights. State obligations to promote non-discrimination should ensure that any law or policy does not directly or indirectly discriminate against or deny any human right of a group of persons sharing an identifiable characteristic, or against any individual on account of his or her status, including but not limited to the individual's race, ethnicity, age or gender. Secondly, governments are obligated to prevent and combat trafficking, to protect, assist and provide criminal and civil redress to trafficking victims, and to ensure that no State-sponsored laws, policies or measures contribute to or exacerbate trafficking in persons. Furthermore, States must overcome any human rights abuses that "create the conditions for trafficking."⁸⁶ Thirdly, States must recognize all victims as

⁸⁰ Communication with Portuguese Ministry of Justice at National Workshop on Combating Forced Labour and Human Trafficking in Portugal, 29 November 2005.

⁸¹ See Rijkman, Connie: "Trafficking in Persons: Prosecution from a European Perspective", Section 6.3.2.

⁸² Ibid.

⁸³ Communication with Portuguese Ministry of Justice at National Workshop on Combating Forced Labour and Human Trafficking in Portugal, 29 November 2005.

⁸⁴ See "Report of the Experts Group on Trafficking in Human Beings", European Commission, Directorate-General Justice, Freedom and Security (2004), p.137.

⁸⁵ Ibid, p.139.

⁸⁶ Ibid, pp. 139-140.

holders of rights. This includes the right of trafficking victims to protection and assistance from the State independent of their willingness to cooperate with authorities, the preservation of confidentiality and privacy in any legal proceedings and the right of victims to pursue criminal, civil and other legal forms of redress. Finally, States have a responsibility to strengthen the position of affected groups to combat human rights abuses through legal instruments and processes, and to enable and defend victims of trafficking against subsequent exploitation.⁸⁷

This paper will consider how European countries comply with major human rights norms in two respects: (1) victim protection measures, and particularly provision of reflection periods and residence permits, and (2) compensation for victims of trafficking.

Victim protection measures

States have an obligation to provide protection and assistance to trafficked persons as victims of a gross human rights violation. Until recently, no protection or assistance was provided to victims following detection. Since the victim was present illegally in the destination country, they were immediately arrested and deported to their home country. The immediate return of victims ignores their insecurity in the country of origin, exacerbating the victim's vulnerability to further exploitation. From a law enforcement perspective, poor victim protection measures discourage victims of trafficking from seeking assistance from law enforcement officials for fear of mistreatment, deportation and potential risks to their personal safety. Most trafficking activity thus continues unabated, and, without an effective deterrent, traffickers can act with reckless disregard to anti-trafficking laws and policies.

The Palermo Protocol includes provisions for victim protection and assistance, but treaty negotiation only produced vague, non-binding guidelines. In particular, Article 6 of the Protocol recommends that Parties consider implementing measures to provide assistance and benefits to victims, which would include appropriate housing, counseling and information, medical, psychological and material assistance, and educational, training and employment opportunities.⁸⁸ Article 7 also makes further non-binding recommendations, stating that State Parties "shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases".⁸⁹ Other measures to provide protection and assistance, some of which will be considered below, include the right to seek compensation, protection of the victim's identity, privacy and physical safety, safe repatriation of trafficking victims to origin countries, and measures to prevent trafficking in persons.⁹⁰

Reflection periods and residence permits

Since the adoption of the Palermo Protocol, numerous countries have adopted schemes to provide victims with means to remain in the country following detection. These schemes generally include two measures; firstly, victims are granted a reflection period, which provides the victim with a specified period of time to consider their options, to overcome the trauma of their exploitation, and to decrease fears of immediate arrest and deportation into situations that are or could be potentially dangerous for the victim and his or her family. Following the reflection period, and depending on the country, victims are given an opportunity to apply for a temporary residence permit that normally lasts for six months. Although the Protocol does not limit application of these protection measures to victims of sexual exploitation, most countries in Europe until recently had only provided protections to victims of sexual exploitation.

The European Union, in 2004, adopted Council Directive 2004/81/EC, which obligates all EU countries, by 6 August 2006, to provide a reflection period and residence permit to victims of

⁸⁷ Other obligations of States include participation, or inclusion of all relevant actors in civil society, human rights institutions and NGOs dealing with trafficked persons. Finally, a human rights perspective will incorporate a gender sensitive perspective into the design of any laws, policies and mechanisms with respect to combating trafficking in persons.

⁸⁸ See UN Trafficking Protocol (2000), Article 6.

⁸⁹ *Ibid*, Article 7.

⁹⁰ *Ibid*.

trafficking under limited circumstances.⁹¹ According to the Directive, a reflection period, whose length can be determined under national law, should be provided to all victims of trafficking. Thereafter, EU Member Countries should grant a residence permit depending upon criteria developed by the country, which could include the opportunity for the victim to assist in investigative and judicial proceedings, whether the victim has shown a clear intent to cooperate, and whether the victim has severed all ties with their exploiters. It should be noted that these requirements are not dispositive. Article 4 of the Directive holds that Member States may adopt or maintain more favourable provisions for trafficked persons; therefore, victims of trafficking can be granted a residence permit solely based upon the danger they would face if they were deported to their home country.⁹² In addition, the Council of Europe, under the Convention on Action Against Trafficking in Human Beings, would require States, if they ratified the treaty, to provide a reflection period of 30 days to victims of trafficking, and thereafter, to issue a renewable residence permit to victims of trafficking if “the competent authority considers that their stay is necessary owing to their personal situation” or “the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.”⁹³ This establishes a regional standard that supports de-linking the grant of a residence permit from an agreement to cooperate.

Countries have introduced schemes to provide reflection periods and residence permits. While most victims’ rights groups advocate a reflection period of three months, actual reflection periods granted by countries vary greatly with respect to length of grant, and normally are for less than three months.⁹⁴ Longer reflection periods provide a victim with the opportunity to recuperate and to make an informed decision. Furthermore, almost all countries that have developed residence permit systems require the victim to agree to cooperate with investigations and prosecutions to remain within the country thereafter.⁹⁵

Are there compelling reasons to not link a grant of a residence permit to an agreement to testify? Human rights principles state that countries should not link victim protection with a willingness to cooperate with law enforcement and criminal investigations.⁹⁶ Otherwise, victims who are hesitant to testify, whether due to their unwillingness to recount previous trauma, fear for their personal safety and security or the security of family, will be unwilling to interact with authorities, since a failure to cooperate with result in arrest and deportation. Providing residence permits based upon whether the individual needs protection, instead of whether they decide to cooperate, is also in line with humanitarian principles. Secondly, when a victim seeks assistance to escape forced labour exploitation, linking grant of a residence permit with agreement to cooperate can deny individuals the right to redress. Countries are obligated to provide victims a right to redress, including the right to compensation, restitution and rehabilitation.⁹⁷ The ability to seek redress against traffickers is largely

⁹¹ See Council Directive 2004/81/EC of 29 April 2004.

⁹² Article 4 states: “This Directive shall not prevent Member States from adopting or maintaining more favourable provisions for the persons [victims] covered by this Directive.”

⁹³ See Council of Europe, Convention on Action Against Trafficking in Human Beings, Article 13 and 14, 2005.

⁹⁴ For instance, Belgium grants a reflection period of 45 days Germany grants a reflection period of 4 weeks and Poland grants a reflection period of 2 months

⁹⁵ For instance, Germany grants a reflection period for the victim to make a decision as to whether they would like to cooperate with the authorities. See International Organization for Migration, *Awareness raising of judicial authorities concerning trafficking in human beings* (2005), p. 42.

⁹⁶ Article 8 of *Recommended Principles on Human Rights and Human Trafficking* states “States shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings.” Furthermore, Article 9 states “Legal and other assistance shall be provided to trafficked persons for the duration of any criminal, civil or other actions against suspected traffickers. States shall provide protection and temporary residence permits to victims and witnesses during legal proceedings.” See United Nations High Commissioner for Human Rights Principles and Guidelines on Human Rights and Trafficking, E/2002/68/Add.1 (2002).

⁹⁷ See Universal Declaration of Human Rights, Article 8; International Covenant on Civil and Political Rights, Article 2; International Convention on the Elimination of All Forms of Racial Discrimination, Article 6; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 11; Convention on the Rights of the Child, Article 39; European Convention for the Protection of Human Rights, Article 13. Furthermore, the EU Charter on Human Rights prohibits trafficking in persons under Article 5 and provides for remedies of human rights violations under Article 47. Finally, Article 75 of the Rome Statutes that establishes the International Criminal Court mandates that reparations can include restitution, compensation and rehabilitation.

based upon a victim's ability to obtain a residence permit and remain within a destination country. Yet nearly all countries only grant residence permits if victims agree to testify. As discussed above, this ignores the trauma victims have suffered and the potential risks that victims must take into account by testifying, which many victims may believe will jeopardize either themselves or their family. Thus, countries present victims with a difficult choice, in the victim's mind, between two competing considerations: personal safety, security and avoidance of trauma (by not cooperating) or obtaining compensation (by cooperating and remaining within the country).

Italy does not always condition grant of a residence permit on a victim's agreement to testify. Under Italian law, an Article 18 permit, as it is commonly known, can be given under two circumstances, either for agreeing to cooperate with authorities to pursue criminal charges against traffickers, or to migrants in situations of abuse or severe exploitation where their safety is threatened.⁹⁸ In either situation, migrants must be willing to participate in a social assistance and inclusion programme provided through social organizations and funded by the Italian government. The Chief of Police for the particular district in which the victim resides grants a residence permit. A permit is granted in the course of an investigation, during an admission or request in court, or through a social welfare agency's request. In any situation, the permit is granted with the assent of the Public Prosecutor, either by acting on his proposal or as a result of a favourable opinion on his part. In practice, the Article 18 permit, according to previous reports, "may be obtained by making a simple statement to the police which reports that the crime has occurred, not only by making a full, sworn statement."⁹⁹ A residence permit may be renewed after six months if the victim is in the midst of pursuing criminal charges against the trafficker, or if they are employed or enrolled in an education programme at the end of the residence permit period.¹⁰⁰ Other revisions to the criminal code in 2003 introduced additional measures to support victims of trafficking in Italy. Under Law No. 228 (2003) entitled 'Action against trafficking in human beings', two new funds have been established to support victims following detection and grant of a residence permit. Under Article 12 of the law, a fund will be established to create more assistance and social integration programmes for victims, while under Article 13, a special programme with a funding grant of 2.5 million Euros will be created to provide immediate victim assistance, including immediate support and living grants, protected housing and health assistance.¹⁰¹ This was the result, according to On the Road, an NGO based in Italy that provides support to victims, through long negotiations with the Italian government to improve the level of services provided to victims.¹⁰²

While all EU countries will have developed victim protection measures by August 2006, only a few countries, according to current research, have developed specific victim protection programmes that conform to EU standards. These countries, in contrast to Italy, require victims to cooperate with the authorities in order to receive benefits under the programme. The one exception may be Finland, which announced the creation of a residence permit in September 2005. While the intended residence permits are to be granted mainly to victims of trafficking who agree to cooperate with authorities investigating the crime, there will also be a residence permit grant even if there is no cooperation, if denying the permit would be unreasonable.¹⁰³ In the Netherlands, the Dutch authorities consider it of the utmost importance that victims or witnesses of trafficking who report an offence remain available to the Public Prosecutor for an extended period of time to provide evidence. The B-9 regulation, which provides victim protection, guarantees a reflection period for victims of trafficking if there is even the slightest indication that the individual has been trafficked. Police are obligated to bring notice of the victim's rights under the B-9 regulation. Once identified, the victim is offered a three-month reflection period, where the victim must decide whether they will report the crime of trafficking. If they decide to report the crime, this is taken as an application to grant a residence period for a period of time, which is

⁹⁸ See Law on Immigration, Decreto Legislativo 25 July 1998, no. 286, Article 18 (translated excerpts). Accessed from <http://www.legislationline.org/>.

⁹⁹ See Human Traffic, Human Rights: Redefining Victim Protection, Anti Slavery International (2002), p. 141.

¹⁰⁰ Ibid, p. 140.

¹⁰¹ See Legge 11 August 2003, no. 228, "Misure contro la tratta di persone", published in the Gazzetta Ufficiale no. 195 of 23 August 2003, Article 12 and Article 13.

¹⁰² Communication with Mr. Marco Bufo, On the Road, 11 November 2005 (interview conducted by Ms. Gabriella Albertini).

¹⁰³ "Victims of human trafficking to get temporary residence permits", Helsingin Sanomat, 24 September 2005. Accessed at www.helsinginsanomat.fi/english on 24 September 2005.

honoured in the case of a criminal prosecution or investigation.¹⁰⁴ Until 2005, the B-9 regulation only applied to victims of sexual exploitation. Similarly, the Dutch penal code, until 2005, only criminalized trafficking for sexual exploitation. However, with passage of a new penal law criminalizing trafficking for forced labour and sexual exploitation, the B-9 regulation was revised to provide protection to both victims of sexual exploitation and labour exploitation.¹⁰⁵ Although there have been no prosecutions of trafficking for forced labour purposes, Dutch social organizations have reported cases of victims of forced labour exploitation who have been granted protection under the B-9 regulation.¹⁰⁶ Mechanisms elsewhere to grant a reflection period and residence permit tend to be similar to the measures employed in the Netherlands, with some variations.¹⁰⁷

Poland, as a new member of the EU and as a country that has recently become a destination country for forced labour exploitation,¹⁰⁸ has already developed a system of victim protection that provides a reflection period of two months and a residence permit to those victims who agree to testify.¹⁰⁹ Other transition countries within the EU will be required to provide reflection periods and residence permits by August 2006. A few other countries are starting to develop victim protection measures for victims of trafficking within the country's territory. Turkey, as both a source and destination country, has developed a humanitarian visa that can be granted to victims of trafficking for a period of six months in exchange for aiding authorities with the criminal investigation. Furthermore, two shelters have been provided for victims of trafficking, and the Government provides both medical treatment and legal aid.¹¹⁰ However, more specific data regarding how the programmes have been implemented, whether they have been effective, and whether victims of labour exploitation receive protection could not be ascertained.

Other countries have not enacted laws or implemented victim protection measures for trafficking victims. Macedonia has not enacted legislation to provide either a reflection period or a residence permit to victims of trafficking.¹¹¹ Instead, the State provides informal care through a government shelter, which provides medical, psychological and legal assistance. Following detection, police transfer victims identified during anti-trafficking raids to this shelter. A local NGO interviews the victims and repatriation, counseling, medical and other support services is offered by the International Organization for Migration (IOM). Those victims willing to testify may be included in a witness protection programme, if public prosecutors, the investigating judges or the president of the council find it necessary.¹¹²

Similarly, countries such as Ukraine and Romania have also failed to implement formal procedures to grant residence permits to victims of trafficking in either country. Ukraine and Romania are both

¹⁰⁴ See Dutch National Rapporteur: (2002) *Trafficking in human beings: First report of the Dutch National Rapporteur*, The Hague: Bureau NRM.

¹⁰⁵ Correspondence with Office of the Dutch National Rapporteur, 26 October 2005.

¹⁰⁶ Conversation with Ms. Pinky Toane, STV Unit, Netherlands.

¹⁰⁷ In Belgium, as soon as presumed victims of trafficking are detected by the police or social inspection, they are led to an official reception centre where they are harboured and provided with legal, administrative, social and medical support; in case of doubt about the status of the victim, the reception centre should at least be allowed to have some contacts with the victim. However, the authority to recognize the legal status belongs with the public prosecutor. A delay of 45 days is given to victims to decide whether they wish, or not, to give evidence against the perpetrators or return to their home country. In case of complaint or statement within this period, the victim gets an official residence document, valid for three months. The reception centre ought to give support during this period and the victim can get a time limited working licence and/or financial support from the administration for public assistance. At the end of the period (that can be extended once), the public prosecutor has to take a decision about the status of the victim and the investigation based upon the statements. If, at that time, he is unable to confirm the status and to draw conclusions on the statements, a residence document, valid for six months, is given to the presumed victim. In case of sentence at the first level of jurisdiction or even in case of demand by the prosecutors for sentencing upon the offence of trafficking in human beings, the victim gets an unlimited right of residence. Correspondence with Frederic Kurz, Principal Coordinator for Network to Combat Trafficking Against Persons, 24 October 2005.

¹⁰⁸ See <http://www.state.gov/g/tip/rls/tiprpt/2005/46614.htm>.

¹⁰⁹ Communication with Polish authorities, National Workshop to Combat Trafficking for Forced Labour, 21-22 November 2005, Legonigow, Poland.

¹¹⁰ Communication with Devlet Yelda, IOM Turkey on 28 October 2005.

¹¹¹ Velkoska, Violeta: *Combating trafficking in human beings through the practice of the domestic courts*, Coalition All for Fair Trials (2005), p. 61.

¹¹² See UNDP Compendium, Macedonia (2004) accessed at www.anti-trafficking.net.

important transit countries for trafficking, and thus victims of trafficking destined for Western countries should receive basic protection to overcome trauma and seek redress.¹¹³ Romania has not instituted formal procedures that provide victims of trafficking with a mandatory reflection period and the possibility of a residence permit. Under the Law on the Prevention and Combat of Trafficking in Human Beings enacted in 2005, authorities only guarantee repatriation to the country of origin with full security and without undue delay, and may provide victims of trafficking with temporary status in shelters, where the individual may receive medical, legal and psychological assistance. However, there are no guarantees that an individual will receive a reflection period or residence permit, and may be deported immediately to their home country without undue delay from Romania. In 2002, Anti-Slavery International reported that there was no legal provisions protecting individuals trafficked into Ukraine.¹¹⁴ A recent Human Rights Watch report confirmed that by 2005 no protection mechanisms for victims of trafficking had been developed in Ukraine.¹¹⁵ Secondly, countries on the eastern fringe that continue to be source countries must also provide protection, legal and medical assistance, and an opportunity to seek redress against traffickers, to victims of trafficking who are repatriated to these countries. Victims returning home are often vulnerable to being re-trafficked into destination countries, and even when unsuccessful in filing claims for redress in destination countries, may have claims for criminal and financial retribution in source countries against traffickers. There are reports of successful ongoing prosecutions in these countries. In Romania, certain regions have reported success in prosecuting recruiters who exploited individuals for forced labour purposes in other countries through informal trafficking networks. However, these efforts are limited to a few areas of the country where law enforcement and prosecutors are dedicated to punishing recruiters for trafficking practices.¹¹⁶ Furthermore, although the Romanian Government has opened a number of shelters around the country for repatriated victims of trafficking, social support organizations have stated that these shelters are run-down, inappropriate and are completely empty because trafficking victims do not want to use them. Because these shelters are empty, the Government has determined that there is no need to heighten awareness or improve conditions in these shelters to support victims of trafficking.¹¹⁷

Currently, the United Kingdom is holding open consultations to create a national plan to combat trafficking in persons, and this could stimulate the Government to provide a reflection period and residence permit to trafficking victims.¹¹⁸ Nevertheless, no protection to victims of trafficking has been provided until now, and the consultation's prospectus indicates some of the reasons for the Government's reluctance. According to the policy paper issued by the Home Office, the Government is reluctant to offer reflection periods and residence permits because "We have a serious concern that implementing such provisions might act as a "pull" factor to the UK. For example, they could be misused by individuals seeking to extend their stay in the UK, where they do not have a genuine claim as a victim of trafficking. Dealing with fraudulent applications will slow down our ability to respond to genuine claims. In addition, we need to consider the impact of a reflection delay on the ability of police to gather evidence in investigations, the risk being that the trail could run cold."¹¹⁹

The United Kingdom, as well as Ireland and Denmark, are not required to abide by the EU Council Decision on providing protection to victims of trafficking.¹²⁰ Thus, although the European Union and its Member States had probably discussed and concluded that the fears currently expressed by the UK were either not valid or not as important as protecting and promoting the rights of victims of trafficking, the current discussions clearly show a worry that these issues could become major problems in the UK, and

¹¹³ See <http://www.state.gov/g/tip/rls/tiprpt/2005/46616.htm>. Ukraine, according to the US State Department, "serves as a significant transit country for Asian and Moldovan victims trafficked to Western destinations".

¹¹⁴ See "Human Traffic, Human Rights: redefining victim protection", Anti-Slavery International (2002), p. 204.

¹¹⁵ See "Ukraine: On the Margins. Rights Violations against Migrants and Asylum Seekers at the New Eastern Border of the European Union" (2005), accessed at <http://hrw.org/reports/2005/ukraine1105/ukraine1105text.pdf> on 3 January 2006.

¹¹⁶ Communication with Iulia Diaconu, Romanian Prosecutor on 28 October 2005.

¹¹⁷ Communication with Yana Matei, Reaching out Romania, on 26 October 2005.

¹¹⁸ "Plan to let people smuggling victims stay in the UK", The Guardian, 5 January 2006, accessed at <http://politics.guardian.co.uk/homeaffairs/story/0,11026,1680127,00.html>. See also: http://www.ind.homeoffice.gov.uk/ind/en/home/news/press_releases/consultation_on_uk.html.

¹¹⁹ See "Tackling human trafficking – Consultations on proposals for a UK action plan", UK Home Office and Scottish Executive (January 2006), pp. 17-18. Accessed at www.homeoffice.gov.uk/documents/TacklingTrafficking.pdf?view=Binary.

¹²⁰ See Council Directive 2004/81/EC of 29 April 2004, Article 21.

that the UK would become a major magnet for irregular migrants seeking to take advantage of a law that protects the human rights of trafficking victims. Due to the current policy of not providing victim protection, victims of trafficking wishing to remain in the United Kingdom must depend upon asylum laws and lesser forms of victim protection for refugees. Otherwise these victims of trafficking are deported from the U.K., whether they were trafficked into the country for sexual exploitation, forced labour or other purposes. While victims of trafficking have successfully applied for asylum under the 1951 Refugee Convention and the European Convention of Human Rights, experience from the United Kingdom shows that this is only granted in the most exceptional of circumstances.

Following Britain's adoption of the European Convention on Human Rights, a national Human Rights Act was passed in 1998. This gave rise to possible claims for asylum under Article 3, which prevents return to countries where a person would risk serious harm (or if the victim fears re-trafficking), and Article 4, which grants asylum for individuals who are victims of forced labour trafficking and fear being re-trafficked. While these cases are almost always unsuccessful, asylum has been granted to victims of trafficking. In one case, *L.D. v. Home Department (2000)*, asylum was granted to a Ukrainian woman on the grounds of her fear of being persecuted by an organized criminal gang in the Ukraine.¹²¹ A separate case involving trafficking for labour exploitation resulted in a successful grant of asylum for a Nigerian woman. The case, nevertheless, reveals how difficult it is to gain asylum on account of a victim's well-founded fear of re-trafficking. In this latter case, the victim had been trafficked from Nigeria into the United Kingdom twice to perform domestic labour under harsh conditions, and the evidence was extremely strong that the victim would be re-trafficked upon return to Nigeria. Even with overwhelming evidence the case was only won on appeal.¹²²

Finally, if an application for asylum fails in the UK, or even before applying for asylum, an individual may apply for either humanitarian protection or discretionary leave, which was formerly known as exceptional leave to remain. Humanitarian protection is leave granted to a person who would, if removed, face in the country of return a serious risk to life arising from the death penalty, unlawful killing, torture or inhuman or degrading treatment or punishment. If a person has been refused asylum he or she may still be considered under this protection measure. A person who is granted humanitarian protection is allowed to work and has access to public funds. Discretionary leave can be considered for persons who have not been considered for international protection, or who have been excluded. Discretionary leave may be granted if, for example, the applicant is an unaccompanied child for whom adequate reception arrangements in their country are not available, or if the person is able to demonstrate particularly compelling reasons why removal would not be appropriate.¹²³

Israel has not enacted a law to punish trafficking for forced labour exploitation, and also has no mechanism to protect or provide any benefits to victims of forced labour exploitation. While no data of victims filing for asylum could be obtained, it is likely that victims of forced labour exploitation have no recourse to remaining in the destination country following detection. A case reported in the Israeli press demonstrates the effect of the lack of protections for forced labour victims. In the case, an Indian woman who had been hired on an illegal permit to work in Israel, was forced to work for almost no salary, did not have access to her identity documents, and was forbidden from leaving the house of her employer, where she was employed as a domestic servant.¹²⁴ Following detection, she was scheduled for deportation despite the fact that criminal proceedings had commenced against the traffickers. While victims of sexual exploitation are granted a work permit to remain in Israel for one year following detection, no such protection is offered to victims of forced labour exploitation.

Problems with implementation of victim protection measures

¹²¹ See "Human traffic, human rights: Redefining Victim Protection", Anti-Slavery International (2002), p. 106.

¹²² "The Struggle Between Migration Control and Victim Protection: The UK Approach to Human Trafficking", Women's Commission for Refugee Women and Children, June 2005.

¹²³ See www.immigration4uk.co.uk/leave.html. See also http://www.ind.homeoffice.gov.uk/ind/en/home/laws_policy/policy_instructions/apis/discretionary_leave.html and http://www.refugeecouncil.org.uk/infocentre/asylumlaw/seeking_asylum.htm.

¹²⁴ See Sinai, Ruth: "Indian woman seeks status as victim of human trafficking", accessed at www.haaretz.com on 22 December 2005.

Even if victim protection measures have been implemented, numerous problems have arisen. In particular, the following problems have been noted through prior research and through the observations of social protection agencies that often serve as the first point of contact with victims:

Police and prosecutors press victims to not use the reflection period they are legally entitled to or are reluctant to grant residence permits to qualified victims. In Italy, police and prosecutors have linked grant of the residence permit to willingness to testify, even if not compelled under the law;

Overzealous application of immigration laws and use of bilateral agreements exclude victims from mandatory reflection periods and residence permits.

The severity of exploitation a person must suffer to qualify for a residence permit may disqualify victims of labour exploitation.

Numerous reports from NGOs have found that police and prosecutors often pressure trafficking victims to file charges before full use of a reflection period. In Belgium, NGOs have reported that the procedure to grant a reflection period is “rarely applied”. Instead, upon referral to shelters, victims are asked to make declarations and are immediately granted three-month residence permits in lieu of first providing a reflection period of 45 days.¹²⁵ In Italy, grants of residence permits should be provided under limited circumstances even when the individual does not agree to cooperate with investigations or a prosecution of a trafficker (known as the social cooperation route). However, this is often not practiced in reality, though it depends more on the region of the country and its tendency to adhere to national laws and practices. In 2002, Anti-Slavery International reported that, where the police have developed a relationship of mutual trust with NGOs, Article 18 permits, in accordance with the law, are granted solely upon the advice provided by NGOs. In other regions, however, the police will not grant a permit without a victim’s sworn statement and the start of an investigation by a prosecutor.¹²⁶ This pattern appears to have continued. According to Marco Bufo of On the Road, the chief of police, who under Italian law is empowered to grant a residence permit, is usually reluctant to grant it without cooperation from the victim. Normally police chiefs prefer a full report about the trafficker and submission of a report to the prosecutor’s office that assures the police that there is sufficient evidence to start a prosecution.¹²⁷ This is partly due to the unwillingness of social protection agencies and NGOs to assert their right to make requests for victims to be issued a residence permit. Instead of making an assertion, the social protection organizations wait for the prosecutor’s opinion before asking for a permit, thereby negating their right under Article 18 to request residence permits.¹²⁸

Many victims of trafficking are not even given the opportunity to submit evidence for the purpose of filing criminal charges and seeking protection through residence permits. As discussed more thoroughly below, overzealous application of immigration laws, often results in deportation of victims of trafficking. Thus, in spite of laws that protect and provide victims with the opportunity to seek redress, victims are denied all basic human rights in many destination countries following detection. This violates State obligations to provide protection and assistance to victims of trafficking and to provide them with an opportunity to seek various forms of redress under national legal processes.

Finally, victims of forced labour exploitation may not qualify for a residence permit because the exploitation or abuse they suffered does not meet the minimum threshold designated by the relevant laws that require protection to be granted. In Italy, Article 18 states that residence permits may be issued to “victims of abuse or serious exploitation and whenever the safety of the said foreign citizen has seen to be endangered”¹²⁹. Legal advocates for victims have noted that prosecutors and police rarely grant a residence permit to victims of economic exploitation. Since the legislation does not define how serious the exploitation must be, and to what extent a person must be ‘endangered’, authorities are unsure as to when victims actually have suffered sufficient abuse or exploitation or are in sufficient danger to qualify for a residence permit.¹³⁰ Generally, law enforcement officials do not interpret Article

¹²⁵ Communication with Patricia Le Cocq, Centre pour l’égalité des chances et la lutte contre le racisme, 28 October 2005.

¹²⁶ See “Human Traffic, Human Rights: redefining victim protection”, Anti-Slavery International (2002), pp. 145-146.

¹²⁷ Communication with Mario Bufo, 11 November 2005 (interview conducted by Ms. Gabriella Albertini).

¹²⁸ Communication with Andrea Ronchi, 9 November 2005 (interview conducted by Ms. Gabriella Albertini).

¹²⁹ See Law on Immigration, Decreto Legislativo 25 July 1998, no. 286, Article 18 (translated excerpts). Accessed from <http://www.legislationline.org/>.

¹³⁰ Communication with Marco Bufo, On the Road, 11 November 2005 (interview conducted by Ms. Gabriella Albertini).

18 to justify granting victims of economic exploitation a residence permit.¹³¹ Furthermore, funds for implementation of programmes to protect victims of exploitation have been allocated solely to victims of sexual exploitation.¹³² While victims of sexual exploitation are much more likely to have suffered serious abuse and exploitation, a lack of protection or opportunity for victims of labour exploitation to remain in destination countries and file charges violates their basic human right to redress, and makes it exceedingly difficult to secure convictions against traffickers. As with the failure to implement other laws that should serve as an effective deterrent against trafficking in persons, a failure to grant protection and assistance to victims of economic exploitation contributes to a climate of impunity amongst traffickers since it discourages victims of forced labour exploitation from interacting with law enforcement personnel.

Victims of labour exploitation in the United States may face similar problems, although there is little empirical evidence on the issue. The United States provides protection, assistance and a residence permit to victims of trafficking, but only in exchange for an agreement to cooperate with the authorities. Furthermore, it only provides these benefits to victims of a “severe form of trafficking”.¹³³ Since the victim must prove that they have suffered severe abuse, it appears that federal officials have often not granted certification and residence permits (known in the United States as a T visa) to victims of trafficking because federal and state officials interpret the TVPA as excluding most trafficking victims from protection.¹³⁴

One important measure that could rectify some of the shortcomings discussed above would be to diversify the types of government officials within the destination country who could grant victims reflection periods and residence permits. Firstly, NGOs already play a role in identifying victims of trafficking in a number of European countries, including Italy and Belgium. NGOs could be given greater influence on the decisions of government authorities to provide reflection periods and residence permits to trafficking victims in the process.

A second measure would empower multiple government agencies to issue residence permits. Lobbying groups in the United States have requested the federal Government to allow, within an interagency scheme, the Department of Labour to issue residence permits to victims of trafficking.¹³⁵ In particular, this may be necessary because in many cases where victims have come forward and offered to cooperate, the federal authorities have still chosen not to go forward with the case, thus making the victim deportable under the law. In these cases, the Department of Labour, which may have an interest in pursuing charges against an employer, would be able to confer a residence permit for a victim to file charges through the labour department. One reason why a social ministry such as the labour department may be inclined (when a prosecutor is not) to pursue charges is that evidentiary standards and burdens of proof to punish employers for labour exploitation are far easier to satisfy. Many prosecutions for forced labour trafficking have been dropped across Europe for lack of evidence or lack of interest in moving forward with the case. One Belgian NGO, Payoke, stated that in 11 cases of labour exploitation that they followed, over half of the cases were dropped by the prosecutor for a variety of reasons, including a lack of evidence or an inability to identify the trafficker.¹³⁶

V. COMPENSATION FOR VICTIMS

Compensation is an important means for victims of trafficking to obtain restitution and recovery for their suffering and trauma, and to provide some compensation for economic loss and deprivation. It not

¹³¹ Communication with Andrea Ronchi, 9 November 2005 (interview conducted by Ms. Gabriella Albertini).

¹³² The Minister of Equal Opportunity has reserved funds only for use by victims of sexual exploitation. Judges have complained to the Minister that prosecutions of traffickers for the purpose of Labour exploitation are compromised to no avail. Source: Communication with Judge Maria Grazia Giammarinaro, 27 October 2005 (interview conducted by Ms. Gabriella Albertini).

¹³³ Trafficking Victims Protection Act, accessed at www.state.gov/documents/organization/10492.pdf on 12 October 2005.

¹³⁴ See “Hidden Slaves: Forced Labour in the United States”, Free the Slaves and Human Rights Center at the University of California at Berkeley, September 2004, p. 23.

¹³⁵ Ibid, p. 28.

¹³⁶ Communication with Payoke, 4 November 2005.

only provides victims with some measure of justice for the harm they have suffered, but it also contributes to their social reintegration.¹³⁷ The Trafficking Protocol obligates all State Parties to “promote measures that offer victims of trafficking in persons the possibility of obtaining compensation for damages suffered.”¹³⁸ This provision applies equally to victims of all forms of trafficking in persons. Pursuant to international human rights standards, countries are obligated to provide victims of human rights abuses, such as trafficked persons, with the opportunity to seek redress, restitution and compensation.¹³⁹

Regional standards, laws and conventions have also created obligations and standards for a grant of compensation for trafficking victims. The European Union has developed only basic measures to guarantee compensation to victims of crime, and mostly do not apply to victims of trafficking. The Council Framework Decision of 15 March 2001 obligates EU Member States to ensure that victims of crime can obtain a decision on receiving compensation from an offender.¹⁴⁰ However, the Framework Decision does not address many of the structural barriers that prevent victims from obtaining compensation, such as preventing deportation of victims, lack of legal assistance, and instituting or obtaining compensation when the offender is not prosecuted criminally or does not have the means to pay a victim compensation.¹⁴¹ A second EU Directive in 2004 establishes the right of EU citizens and legal EU residents to obtain compensation for crimes that they have suffered within the EU. This provision is quite limited and doesn't apply towards most trafficking situations since most victims tend not to be present in the EU legally.¹⁴²

The Council of Europe has delineated minimum standards for State compensation schemes for victims of crime. Under the European Convention on Compensation to Victims of Crime, States must pay compensation to nationals of other Member States who were victims of crime on the State's territory only when the victim's country of origin is a party to the Convention, and a State must pay compensation to nationals of all Member States of the Council of Europe who are permanent residents in the State on whose territory the crime is committed.¹⁴³ This Convention, however, does not deal specifically with cross-border crimes, such as trafficking in persons, and thus many of the barriers that may prevent victims of trafficking from obtaining compensation, such as deportation, lack of legal assistance or inability to charge the trafficker with a crime, make the Convention mostly inapplicable to victims of trafficking.¹⁴⁴

The recently enacted Council of Europe Convention on Action against Trafficking in Human Beings provides the best support to victims of trafficking with respect to compensation. Under Article 15 of the Convention, victims are to be guaranteed: (1) access to information on all relevant judicial and administrative proceedings, (2) a right to legal assistance and free legal aid, (3) a right to receive compensation from their perpetrators, and (4) compensation under the country's internal law, which could be provided through a victim compensation fund or social assistance which can be funded through use of a trafficker's assets.

Recent trends in countries providing compensation to victims of trafficking

Not surprisingly, the lack of guidance in regional and international conventions and treaties has meant that most victims of trafficking have received little or no compensation following detection. Two major barriers that prevent victims from seeking compensation are the tendency of authorities to deport victims of trafficking prior to giving the victim an opportunity to pursue a compensation claim and the inability to identify and hold offenders civilly and criminally liable (including the inability of victims to

¹³⁷ See “Report of the Experts Group on Trafficking in Human Beings”, European Commission, Directorate-General Justice, Freedom and Security (2004), p. 128.

¹³⁸ See UN Trafficking Protocol (2000), Article 6(6).

¹³⁹ See Footnote 82.

¹⁴⁰ See “Report of the Experts Group on Trafficking in Human Beings”, European Commission, Directorate-General Justice, Freedom and Security (2004), p. 216.

¹⁴¹ Ibid.

¹⁴² Ibid, p. 217.

¹⁴³ Ibid.

¹⁴⁴ Ibid, p. 218.

hold subcontractors or others in a contracting chain to account under a destination country's law). Under the Trafficking Protocol and pursuant to obligations under international human rights standards, countries are obligated to remove these barriers to provide victims the opportunity to seek compensation. Furthermore, other problems have also prevented victims of forced labour exploitation from obtaining compensation. They include the inability of prosecutors to seize the assets of traffickers to properly compensate victims¹⁴⁵ (which is beyond the scope of this paper), the exclusion of forced labour victims from State compensation, a failure to institute procedural mechanisms which ensure that victims will be able to file a civil compensation claim, and forced labour victims' lack of access to employment tribunals.

State compensation funds

Countries across Europe have instituted victim compensation funds for victims of trafficking. These compensation funds vary, but generally, they tend to exclude forced labour victims from obtaining compensation. In Germany, victims of trafficking may claim compensation from the Government under the Crime Victim Compensation Act.¹⁴⁶ Here, the victim can receive compensation and social services when he or she has suffered damage due to an intentional and unlawful act of physical violence, which would include medical support, loss of career, and pension payments.¹⁴⁷ While this provides some measure of relief to victims of trafficking, it appears that it will only have limited applicability for victims of forced labour trafficking, since forced labour victims are less likely to suffer from physical violence, or to suffer serious physical or psychological harm from physical violence.

In Belgium, victims of forced labour exploitation face a similar barrier to obtaining compensation. A victim of trafficking must have: suffered an act of intentional violence that was committed in Belgium, a physical or psychological injury from this violence, and the victim must already have tried to obtain compensation through a civil hearing but could not successfully do so.¹⁴⁸ Since victims of forced labour are far less likely to have suffered an act of intentional violence, it is likely that forced labour victims will be less capable of accessing victim compensation funds.¹⁴⁹ It should be noted that previously trafficking victims had been unable to access compensation funds because of their status as undocumented migrants, which was an absolute bar to qualifying for compensation.¹⁵⁰

In Poland, the Ministry of the Interior has recently decided to implement a State compensation fund that will provide economic compensation to victims of all forms of exploitation when the victim is unable to obtain compensation from traffickers.¹⁵¹ This will be paid out of general State coffers. While it has not been implemented to provide compensation to any victim, it appears that such a compensation scheme will provide some measure of relief to victims of forced labour exploitation.

Other issues related to compensation

In civil law jurisdictions, civil compensation claims are attached to criminal complaints. Thus, when a criminal charge is brought against a trafficker, a civil compensation claim is brought at the same time. Besides the inability of prosecutors and courts to seize offenders' assets to adequately compensate trafficking victims, in some instances victims are unable to even file civil compensation claims. In one case from Poland, although traffickers were successfully charged and imprisoned following prosecution of an offender for trafficking for forced labour purposes, the victim did not file or recover any compensation for the economic exploitation he suffered (for a case description see Footnote 61). In this

¹⁴⁵ One reason why it is difficult for courts to seize the assets of traffickers in Italy to pay compensation or restitution to victims is that the trafficker has either hidden his assets or doesn't invest in Italy the money he earned from his exploitation. Interview with Judge Maria Garcia Giammarinaro (conducted by Ms. Gabriella Albertini on 27 October 2005).

¹⁴⁶ See International Organization for Migration, *Awareness raising of judicial authorities concerning trafficking in human beings* (2005), p. 35.

¹⁴⁷ Ibid, pp.35-36.

¹⁴⁸ Communication with Patricia Le Cocq, Centre pour l'égalité des chances et la lutte contre le racisme, 17 November 2005.

¹⁴⁹ Ibid.

¹⁵⁰ See Human Traffic, *Human Rights: Redefining Victim Protection*, Anti Slavery International (2002), p. 87.

¹⁵¹ Communication with Polish authorities, National Workshop to Combat Trafficking for Forced Labour, 21 November 2005.

case, it appears that no civil claim for compensation was simultaneously filed.¹⁵² Though it is unclear why this occurred, the victim, who was deported to Viet Nam, received no compensation or support following years of work for almost no salary.¹⁵³ In most countries, claims for civil compensation are automatically filed when a criminal complaint is filed against the trafficker.¹⁵⁴ This ensures that a victim is at least provided with an opportunity to pursue civil compensation claims; however, as mentioned above, other procedural measures, including prevention of deportation, seizure of traffickers' assets and provision of legal assistance, must occur for victims to receive civil compensation.

Finally, as discussed below, it is imperative that victims of forced labour exploitation can access employment tribunals to assert their right to restitution and compensation. Employment tribunals provide forced labour victims with a direct route to gain compensation for lost wages. However, most countries have not instituted procedures to provide victims with compensation through employment tribunals.

VI. IMMIGRATION LAW AND TRAFFICKING

Immigration law and policy is an important determinant of the ability of countries to enforce anti-trafficking laws. Immigration police and border control officers play an important role in preventing and detecting trafficking, often representing the first and last line of defence against networks either smuggling or trafficking victims and individuals, many of whom will be subsequently exploited for their labour and services in destination countries.

However, strict enforcement of immigration laws could also result in detention and return of migrants to their home countries without assessing whether these individuals are victims of forced labour exploitation. Thus, human rights protections which countries are obligated to provide for trafficking victims are often superseded by rigid enforcement of immigration laws. While efforts to enforce immigration laws should be supported, law enforcement and immigration personnel, victims' rights groups and governments must determine whether strict enforcement of immigration laws are antagonistic to providing victims of forced labour with protection and support, or whether these two important goals can both be achieved.

In countries without victim protection measures, proper enforcement of immigration laws will mean that victims of forced labour exploitation will be deported. Until recently, the United Kingdom had not enacted a law instituting victim protection measures, and asylum and other immigration protections are rarely granted. Thus, most victims of trafficking are vulnerable to deportation.¹⁵⁵ This applies to victims of sexual exploitation and labour exploitation. In one case, of a group of 47 migrants trafficked for prostitution, all but one was immediately deported following detection.¹⁵⁶ Similar examples of mass deportations of forced labour victims have been documented. In one case from 2004, 40 Brazilians were deported from one immigration centre after having been discovered working in large factories processing food for supermarket chains. They were found to be using false identity documents, were charged exorbitant fees for other services and administrative fees, were made to pay fees for transportation to and from work and were made to live collectively (17 workers) in a one-bedroom flat. These fees made it difficult for them to barely cover their living expenses. Yet despite this evidence of exploitation, these workers were immediately deported following detection.¹⁵⁷

In countries with victim protection measures, deportation of victims immediately following detection is commonplace. For instance, although Belgium has an elaborate system to identify and provide victims

¹⁵² Communication with Polish authorities, National Workshop to Combat Trafficking for Forced Labour, 22 November 2005.

¹⁵³ *Ibid.*

¹⁵⁴ In Italy, for instance, civil claims are automatically attached to criminal complaints. Interview with Judge Maria Garcia Giammarinaro (conducted by Ms. Gabriella Albertini on 27 October 2005).

¹⁵⁵ See "The Struggle Between Migration Control and Victim Protection: The UK Approach to Human Trafficking", Women's Commission for Refugee Women and Children, June 2005, p. 24.

¹⁵⁶ *Ibid.*

¹⁵⁷ Communication with Felicity Lawrence, Consumer Affairs Correspondent, The Guardian, 12 October 2005.

of trafficking with a reflection period and residence permit following detection, the procedures necessary to identify and protect victims are not applied.¹⁵⁸ Instead, law enforcement agencies, and particularly labour inspectors, focus exclusively on whether or not the individual was engaged in illegal employment, and do not pay attention to whether the individual is a victim of trafficking. In these cases, the victim's irregular status is conveyed to the Aliens Office, who will then deliver the individual an order to leave the country within five days, and at times they are even directly deported.¹⁵⁹ The same pattern of treatment has been noted elsewhere, such as in Italy and Spain. In Italy, passage of the Bosso-Fini immigration law, No. 189/2002, allows the police to immediately deport migrants without a residence permit. Without proper safety procedures, immediate deportation poses a major risk for the re-victimization or re-trafficking of migrants.¹⁶⁰ Furthermore, victim protection measures designed to provide protection to trafficking victims are rendered useless, and State obligations to protect trafficking victims are only guaranteed in legislation and not in practice.

Victims that are placed into deportation proceedings, who may have an opportunity to identify themselves as victims of trafficking, do not do so. There are two reasons for this. Firstly, many victims placed in deportation proceedings due to their irregular status are fearful of reprisals against themselves or their families, and thus opt to keep silent instead of identifying themselves as victims to the police.¹⁶¹ Reflection periods provide victims with the opportunity to overcome trauma and to make an assessment as to whether they can testify safely on account of their own safety and the safety of their family. Deportation proceedings instituted immediately upon detection do not provide victims with that opportunity, and in many cases victims will be highly vulnerable to re-trafficking in their home country. Secondly, many individuals do not identify themselves as victims of trafficking, and arrest and deportation proceedings may reinforce a self-perception as criminals instead of as victims. In many cases "they [trafficking victims] do not know what trafficking is, do not understand their own legal situation, and are convinced that they are criminals."¹⁶²

Failure to provide a reflection period and residence permit violates obligations to provide victims with protection under international human rights law, and also violates the spirit of the European Council Directive of 29 April 2004, which mandates all EU countries to provide victims of trafficking with a reflection period and a residence permit (under conditions set by the destination country). Furthermore, it also hinders the ability of prosecutors to conduct investigations and file charges against known traffickers, even when victims are willing to testify following deportation. In the Netherlands, prosecutors complain that one of the main hindrances to successfully prosecuting traffickers is the absence of victims and witnesses, which they state is "often as a consequence of the policy of the immigration police".¹⁶³ Here, even when an individual has been identified as a trafficking victim, the immigration police still deport the individual. This becomes a problem when a victim is deported prior to having an opportunity to testify or provide evidence. If the defence asks for the victim's testimony or it becomes necessary to have the victim's testimony for evidentiary purposes, the prosecution must conduct a hearing to collect evidence in the country where the victim resides.¹⁶⁴ As detailed above, the rogatory process has been shown to work imperfectly at best between countries. Furthermore, even if a request is executed, tracing of the victim is extremely difficult, and often the treatment of the victim violates their rights, as they are often detained prior to taking their testimony.¹⁶⁵

Immigration law also restricts the ability of trafficking victims to seek redress through other legal mechanisms. In particular, immigration law has barred victims from seeking redress through employment tribunals, although some countries have started to recognize the importance of employment tribunals to hinder forced labour practices.

¹⁵⁸ Communication with Patricia LeCocq, Centre pour l'égalité des chances et la lutte contre le racisme, 23 October 2005.

¹⁵⁹ Ibid.

¹⁶⁰ Communication with Mr. Marco Bufo, On the Road, on 11 November 2005 (interview conducted by Ms. Gabriella Albertini).

¹⁶¹ Gallagher, Anne Marie: "*Country Report: Spain. Trafficking and Smuggling of Women*" (2003).

¹⁶² Macedonia Women's Jurist Organization: "*Assessment of the existing anti-trafficking legislation and legal obstacles in prosecuting trafficking cases*" (2003).

¹⁶³ See Rijkman, Connie: "Trafficking in Persons: Prosecution from a European Perspective", Section 6.3.1.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

VII. THE ROLE OF EMPLOYMENT TRIBUNALS

Labour courts provide an important venue for workers to file claims against employers engaging in abusive workplace practices. Many abusive practices, including illegal working hours, withholding or underpayment of wages and exploitive work conditions, are reflective of situations where workers have little or bargaining power vis-à-vis their employer. Undocumented and irregular migrants who are smuggled into a destination country are particularly vulnerable to exploitation, due to many of the factors discussed above, including poverty, irregular status, isolation, language barriers, debt and lack of proper identity papers, while victims of trafficking from a source country are likely to be forced into these working situations under the threat or use of force.

Thus, even if an employer does not use coercion, many migrants are likely to endure exploitation at the hands of their employer. While this employer may not initially coerce the worker to accept poor working conditions, over a longer period of time the vulnerability of the worker, whether due to continued irregular status, poverty or isolation may result in the worker involuntarily consenting to poor working conditions. In other words, the worker may subjectively believe that he or she has no real or acceptable alternative to an employer's exploitation. As discussed above, it is often difficult for victims of forced labour exploitation to seek redress through criminal prosecutions and civil compensation. Labour courts, on the contrary, provide victims of labour exploitation, who may or may not also be victims of forced labour, with an opportunity to contest the working conditions imposed by their employers through administrative proceedings.

Victims of forced labour exploitation, whether they are trafficked or smuggled into the country, are also irregular or undocumented migrants under national immigration laws. Under international law, all migrant workers are afforded certain basic protections under ILO Convention No. 143. While the Convention is not widely ratified, it creates an important framework of the human rights obligations applying to all countries. Under Article 1 of Convention No. 143, all migrant workers, including those who are trafficked and smuggled, are guaranteed protection for all basic rights. Article 9(1) of Convention No. 143 provides for equality of treatment between irregular migrants workers and those in regular employment, including remuneration, social security and other benefits.¹⁶⁶ Furthermore, under Article 9(2), "the worker shall have the right to present his case to a competent body, either himself or through a representative." More generally, international human rights principles uphold the principle of non-discrimination with respect to bestowing basic rights, such as basic labour rights, without regard to a person's status as an individual or as part of a group.¹⁶⁷

Immigration laws in most countries in Europe do not prevent workers from accessing employment tribunals.¹⁶⁸ Furthermore, employment tribunals in most countries in Europe do not have a duty to denounce irregular migrants to the immigration authorities. Some countries, however, have not guaranteed undocumented migrants immunity from prosecution. For instance, in the United Kingdom, irregular migrants are theoretically guaranteed the right to appear before an employment tribunal,¹⁶⁹ yet they are not guaranteed protection from deportation. Thus, most labour unions have advised undocumented migrants against appearing before employment tribunals because there is no guarantee that the migrant would not be deported.¹⁷⁰

In the United States, however, immigration law has been seen as limiting the labour rights of undocumented migrants guaranteed under international human rights law. In 2002, the US Supreme

¹⁶⁶ "Human Trafficking and Forced Labour Exploitation", International Labour Organization (2005), pp. 42-43.

¹⁶⁷ See Article 2 and Article 7 of the Universal Declaration of Human Rights.

¹⁶⁸ "Theoretically we can say that undocumented migrants have access to Labour and employment tribunals [in Belgium]." Email from Patricia LeCocq, Centre pour l'égalité des chances et la lutte contre le racisme, 17 November 2005. See also "Ten Ways to Protect Undocumented Migrant Workers", PICUM (2005), pp. 74-91. The paper, as discussed below, has documented countries which permit undocumented workers to appear before labour tribunals.

¹⁶⁹ In the case of *Sharma v Hindu Temple and Others (1991)*, a legal migrant whose immigration status was indeterminate was still permitted to file a claim for unpaid wages because public policy dictated that all workers should be guaranteed a minimum wage.

¹⁷⁰ Interview with Nick Clark, Transport and Services Union, on 15 October 2005.

Court ruled in *Hoffman Plastics v. National Relations Labour Board*, 535 U.S. 137 that although undocumented migrants may have a right to appear before the National Labour Relations Board (the US equivalent of an employment tribunal), immigration law prohibits an award of back-pay as a remedy to an appellant who was undocumented because it would contravene federal immigration law. In the Hoffman case, an undocumented migrant was fired from his job for attempting to organize a union; in this case, the dismissal directly contravened the National Labour Relations Act, which prohibits retaliation against an employee for union organizing activities. Nevertheless, the employer was exculpated from guilt because the defendant successfully argued that an undocumented migrant is forbidden from recovering compensation due to his or her illegal status in the United States.

Due to the decision, undocumented workers now believe they have no workplace rights. According to a recent Human Rights Watch briefing paper, “employers have made threats against workers, telling them of the decision and emphasizing that they can be dismissed for trade union organization with no right to reinstatement or back pay. Employers have also sought to expand the scope of Hoffman, threatening workers with dismissal if they complain about minimum wage or overtime violations, or another complaint before a Government labour law enforcement agency.”¹⁷¹ Thus, it is probably that the Hoffman decision also reinforces the ability of employers to abuse the vulnerability of undocumented migrants by threatening deportation if they seek to complain to any law enforcement figures.

Subsequent decisions in both the United States and before international human rights bodies have sought to limit the decision’s reach. In 2004, the 9th Circuit Court of Appeals ruled in *Rivera v Nibco* that, in the course of a federal lawsuit against an employer for civil rights violations filed by undocumented workers who were terminated due to discrimination, the employer could not inquire into the status of the plaintiff’s immigration status.¹⁷² While the defendant argued that Hoffman (see above) barred recovery for any claims by undocumented workers due to relevant immigration laws, the 9th Circuit disagreed and distinguished Hoffman as only specifically limiting the ability of migrants to apply for relief under the NLRA. It did not, however, preclude undocumented migrants from applying for civil rights relief (here under Title VII of the 1964 US Civil Rights Act). Furthermore, the Court held that allowing an employer to inquire into an employee’s immigration status during the course of a lawsuit would curtail the ability of undocumented workers to report abusive or discriminatory practices, and would “allow them [employers] to raise implicitly the threat of deportation and criminal prosecution every time a worker, documented or undocumented, reports illegal practices.”¹⁷³ Although this did not guarantee undocumented migrants the right to seek relief in employment tribunals, it provided some measure of relief against employers using an undocumented migrant worker’s employment status to compel victims to not report exploitation.

Furthermore, two other rulings have reviewed Hoffman and sought to limit its applicability. In 2003, in an advisory opinion filed by the Inter-American Court for Human Rights at the behest of Mexico, the Court ruled that “if undocumented workers are contracted to work, they immediately are entitled to the same rights as all workers [...] this is of maximum importance, since one of the major problems that come from lack of immigration status is that workers without work permits are hired in unfavorable conditions, compared to other workers”.¹⁷⁴ Thus, the Inter-American Court held that a number of rights must be furnished to undocumented migrant workers, regardless of whether they are legally in the country or not. In the case of migrant workers, there are certain rights that assume a fundamental importance and that nevertheless are frequently violated, including: the prohibition against forced labour, the prohibition and abolition of child labour, special attentions for women who work, rights that correspond to association and union freedom, collective bargaining, a just salary for work performed, social security, administrative and judicial guarantees, a reasonable workday length and in adequate

¹⁷¹ See “Immigrant Workers in the Meat and Poultry Industry”, accessed at www.hrw.org on 6 January 2006.

¹⁷² See *Rivera v Nibco*, 364 F.3d. 1057 (2004).

¹⁷³ See *Rivera v Nibco*, 364 F.3d. 1057, 1063 (2004).

¹⁷⁴ See Human Rights Watch, “Immigrant Workers in the Meat and Poultry Industry”, accessed at www.hrw.org on January 6, 2006, quoting the Inter-American Court of Human Rights, *Legal Condition and Rights of Undocumented Migrant Workers*, Consultative Opinion OC-18/03 (17 September 2003).

labour conditions (safety and hygiene), rest, and back pay.¹⁷⁵

A second major ruling in 2003, before the ILO Committee on Freedom of Association, concluded that Hoffman failed to protect the rights of all workers to organize, as “the remedial measures left to the NLRB in cases of illegal dismissals of undocumented workers are inadequate to ensure effective protection against acts of anti-union discrimination”.¹⁷⁶ Thus, these two rulings, and the Rivera decision, limit the applicability of the Hoffman decision both within the United States and internationally.

Other barriers prevent undocumented migrants from using tribunals. Even if employment tribunals are not compelled to report undocumented migrants, most undocumented workers are still reluctant to appear before labour tribunals because of the assumption that they will be deported.¹⁷⁷ Many others fail to use labour tribunals because of a lack of knowledge and awareness about the tribunal’s purpose or function.¹⁷⁸ In other cases, employment tribunals refuse to hear cases, stating that the source country of the victim is more appropriate to file claims.¹⁷⁹ Finally, many undocumented migrants have a difficult time filing cases because they do not have a legally binding contract to establish a formal working relationship between themselves and an employer; most courts view these contracts as unenforceable since they were entered into as a breach of national provisions permitting employment.¹⁸⁰

Despite these barriers, undocumented migrants have been able to file claims against employers in some countries, and some countries have even established procedures to ensure that undocumented migrants are able to file claims by alleviating a fear of deportation. In Portugal, a worker’s legal status does not bar him or her from filing a claim for relief before an employment tribunal. If a worker has a claim, the State Prosecutor for industrial tribunals, which brings cases on behalf of the employee, will not inquire into the immigration status of the worker but only into whether or not a contract is being violated. This ensures that undocumented workers can access an industrial tribunal without any fear of reprisal.¹⁸¹ Recently, Spanish courts have recognized a similar right for undocumented workers to seek compensation from industrial tribunals.¹⁸² In a case before the Supreme Court of Catalonia in 2002, the Courts found that workers, regardless of their immigration status, have certain inalienable labour rights and have the right to appear before a court to claim these rights. Since then, industrial tribunals have adjudicated cases on behalf of migrant workers without enquiring into their immigration status in Spain.¹⁸³

Does providing migrant workers with the right to appear before an industrial tribunal reduce forced labour practices? Although there is no empirical evidence, holding employers responsible for labour violations improves the ability of all workers to work under fair conditions, and prevents employers from exploiting workers that they know are present in the country as an undocumented worker. While such exploitation may not constitute forced labour at the outset, it may become coercive over time if the employee eventually resigns himself or herself to continue working in that place of employment due to some vulnerability (poverty, isolation) that makes the victim believe that he or she has no real and acceptable alternative. A second reason to encourage interaction between migrants and tribunals is that

¹⁷⁵ See Inter-American Court for Human Rights, Legal Condition and Rights of Undocumented Migrant Workers, Consultative Opinion OC-18/03 (17 September 2003). Accessed at www.hrw.org on 6 January 2006.

¹⁷⁶ See ILO Committee on Freedom of Association, *Complaints against the Government of the United States presented by the American Federation of Labour and the Congress of Industrial Organizations (AFL-CIO) and the Confederation of Mexican Workers (CTM)*, Case No. 2227: Report in which the committee requests to be kept informed of developments (20 November 2003) accessed at www.hrw.org on 6 January 2006.

¹⁷⁷ See “Ten Ways to Protect Undocumented Migrant Workers”, PICUM (2005), p. 90.

¹⁷⁸ Ibid. Also, Beata Waldek of Trade Union Information Centre for Migrant Workers in Germany notes that many cases of exploitation or withholding of wages are not brought to courts by the victims because they think they don’t have the right to do so or because they think they need to pay a lawyer. She stated that they don’t know that they may represent themselves at court or that they can apply for aid to the cost of the proceedings, and that only if something serious happens, such as an accident, do they attempt to file a claim. Interview with Beata Waldek on 10 November 2005 (conducted by Anne Pawletta).

¹⁷⁹ Interview with Benno Gabriel, IG BAU Hamm, on 28 October 2005 (conducted by Anne Pawletta).

¹⁸⁰ “Human Trafficking and Forced Labour Exploitation”, ILO (2005), pp. 43-44. Also see “Ten Ways to Protect Undocumented Migrant Workers”, PICUM (2005), pp.74-75.

¹⁸¹ See “Ten Way to Protect Undocumented Migrant Workers”, PICUM (2005), pp. 84-85.

¹⁸² Ibid, p. 83.

¹⁸³ Ibid, pp. 83-84

it may reduce the economic incentive for employers to continue exploiting labour and hiring undocumented migrants for the sole purpose of wage exploitation. If the employer is compelled to pay monetary penalties and face legal sanction, they will be deterred from engaging in exploitive and forced labour practices. Finally, improving interactions between migrants and the government is likely to increase the level of trust between law enforcement and migrants, and may encourage more migrants to report forced labour practices that are otherwise impossible to detect.

VIII. LEGAL OVERSIGHT OF WORK PERMITS

Many European countries have allowed for legal migration as a solution to reducing illegal immigration by discouraging migrants from exposing themselves to exploitative practices of traffickers. While managed migration may be well intentioned, it has also become a conduit for forced labour exploitation. Although migrants are entitled to work legally in the destination country on permits, they are often denied of fundamental legal rights that make them highly vulnerable to exploitation and abuse at the hands of their employer.

In particular, many legal migration schemes require migrant workers to be bound to one employer. In practice, these schemes leave a migrant with two options, to either work for an employer or to be deported. This is because if employers cancel a permit or do not renew a permit, the employee loses his or her job and is deported. Furthermore, if the worker does not have legal status, he or she cannot take a case against the employer. This invites employers to exploit and abuse individuals, and then to coerce them into accepting this abuse by threatening to cancel their work permit and deporting them. In Ireland, numerous cases of forced labour exploitation of migrant workers have been documented and reported recently by the Labour Relations Commission.¹⁸⁴ Under the current system, migrants to Ireland who are not from the European Economic Area (the European Union and Iceland, Liechtenstein and Norway) are granted a restricted right to work under a work permit that is non-transferable and can only be issued for a period of one year, after which an employer may apply for renewal. However, if an employer dismisses the employee or does not renew the permit, the migrant is deported.

According to an October 2005 report by Ireland's Labour Relations Commission, various forms of exploitation have resulted. Although employers should pay for a permit, these costs are more often transferred illegally to the employee. Employers also make their employees work excessive hours, pay drastically below the minimum wage and refuse to honour other guaranteed benefits.¹⁸⁵ Under Irish law, migrants are allowed to file direct appeals to employment tribunals in Ireland to contest poor treatment conditions and to seek recompense for their treatment. However, most migrants do not contest working conditions because, according to the Government report:

“The fear factor is the single most important factor influencing workers in not taking action against an exploitive employer. They are fearful of intimidation, losing their job and being without an income. However, their greatest, and over-riding fear is that of losing their work permit and being deported. They are therefore unwilling to take any action that might result in their being dismissed by their employer and thus becoming undocumented.”¹⁸⁶

These fears are the same vulnerabilities that compel trafficked migrants to involuntarily consent to forced labour practices. In other situations, employers in Ireland have resorted to physical threats and violence to compel migrant workers to remain in exploitive working conditions and to not file complaints against the employer, either through direct pressure against the victim or through agents against the individual's family in their country of origin. The following case illustrates this coercion:

“Sasha, from the Philippines, lived in Dublin, working as a domestic. She had been recruited through a

¹⁸⁴ See Labour Relations Commission, “*Migrant Workers and Access to the Statutory Dispute Resolution Agencies*”, October 2005.

¹⁸⁵ *Ibid.*, pp. 18-19.

¹⁸⁶ *Ibid.*, p. 20.

recruitment agency. When she tried to leave and take a case the agent threatened her that she was endangering her family in the Philippines. She was too terrified to pursue the case.”¹⁸⁷

This work permit system severely restricts the ability of workers to leave unacceptable working conditions. By only permitting a migrant worker to remain with one employer, the employer is able to coerce the victim into remaining in one place of employment under poor working conditions by threatening deportation. A migrant fearing deportation and losing his or her job is thus left with no real and acceptable alternative.

In Israel, workers are also restricted to working for only one employer when admitted on a work permit. Although charging migrant workers fees to obtain work permits is prohibited, “the reality of the scheme is that most workers pay between US\$2000 and US\$15000 to employment agencies for a permit”.¹⁸⁸ Thus, not only are workers bound to a single employer and cannot complain against exploitive work practices, but they are also constrained to remain within Israel because of heavy debts they need to pay off. Furthermore, while migrant workers in Ireland are at least guaranteed access and redress through courts to overcome forced labour abuses, the police, authorities and courts rarely provide any redress to migrant workers in Israel. As one Israeli NGO, Kav La’Oved, explains: “The Israeli Government not only repeatedly allows the massive import of foreign workers, but it binds over each and every one of them to a specific employer. This gives employers untrammelled freedom to violate all the legal rights of the workers in bondage to them. Complaints to the police or to the Ministry of Labour about the criminal offences of employers are almost always ignored. On the other hand, should an employee try to disengage himself from such an employer, such action is considered illegal flight: the person’s work permit is invalidated and the offence is punishable by arrest and deportation.”¹⁸⁹ Furthermore, employers go further and often confiscate identity documents and passports of migrant workers, thus exerting even greater control over the individual.¹⁹⁰ Under all these restrictions, the employer is able to exploit the worker with non-payment or underpayment under difficult working conditions since the employer owns the visa, or what some have termed a “binding arrangement”.¹⁹¹ At all times, the worker is under threat of being deported if they make a complaint or seek assistance of any time, which enables employers to rid themselves of employees they may consider bothersome.¹⁹²

Recent efforts have been made in Israel to change the situation. Under efforts led by NGOs before the Israeli Supreme Court, a regulation was issued that allows workers to change employers. However, the procedure is complicated, there is lack of knowledge amongst Interior Ministry officials how to implement the regulation. Language barriers make communication difficult, and even some workers who have complied with the regulation are deported. Furthermore, workers are only provided one month to find new employment, which often is not enough time. Thus, a second effort to compel a better procedure to change employers has been initiated.¹⁹³

Thus, even as countries attempt to prevent exploitation of irregular migrant workers in destination countries by providing work permits and greater access to their labour markets, work permit systems that restrict the ability of a migrant to change employers often result in the migrant having to choose between two equally unattractive outcomes, namely exploitation or deportation.

IX. SUBCONTRACTING AND FORCED LABOUR PRACTICES

Manufacturers, distributors and service providers often rely upon subcontractors to perform many

¹⁸⁷ Ibid, p. 23.

¹⁸⁸ See “Report of the Experts Group on Trafficking in Human Beings”, European Commission, Directorate-General Justice, Freedom and Security (2004), p. 149.

¹⁸⁹ See “Bonded Labour In Israel”, Kav La’Oved, Newsletter 2002.

¹⁹⁰ See Kruger, Martha, “Strangers in a strange land: International migration in Israel”, Global Commission on International Migration, January 2005, p. 7.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ See Kav La’Oved annual report (2004), p. 16, accessed at www.kavlaoved.org.il.

essential functions. Often, subcontractors engage in exploitive labour practices, which may include forced labour practices. As recent evidence shows, many of these sub-contractors engage in the most egregious forms of labour abuses. Nevertheless, there was traditionally very little oversight over these subcontractors or recruiters. Recently, due to severe exploitation of migrants, laws have been enacted to prevent exploitation and regulate subcontracting more closely.

In UK many companies rely upon labour provided by gangmasters (who essentially represent the last link in a subcontracting chain). Prior to the recent introduction of regulations, there were no administrative controls exerted over gangmasters. This resulted in severe abuses, which were evident in the few criminal cases that uncovered and punished gangmaster exploitation. In one case, a Ukrainian gangmaster, Victor Solomka, had established a recruitment company with hundreds of Eastern European migrants and illegal workers.¹⁹⁴ Each was paid no more than £ 2 per hour for their work, and the victims were coerced into continuing to work for Solomka by the use of violence, threats and abuse. These workers were all employed in legitimate factories and manufacturing plants, with Solomka earning nearly £ 5 million over a three-year period. While companies had procured services directly from Solomka, only Solomka was held criminally responsible. Migrant workers exploited by Solomka were mostly deported and received no compensation from either Solomka or the companies that benefited from this exploitation.¹⁹⁵ A subsequent incident led to introduction of legislation to exert administrative control over the activities of gangmasters. In this case, Chinese gangmasters coerced a group of cockle pickers into working for extremely low wages, through a combination of threats, violence and underpayment of wages. When forced to work in highly dangerous conditions, 21 cockle pickers drowned, leading to charges of manslaughter against the gangmasters and charges of facilitation against the purchasers of the cockles, who were aware that the workers were illegal immigrants.¹⁹⁶ This spearheaded passage of the Gangmasters (Licensing) Act, which makes it a criminal offence to operate as a gangmaster without a licence, to possess a false licence, to use an unlicensed gangmaster, or to obstruct enforcement officers. It also enables aggressive seizure of convicted gangmasters' assets.¹⁹⁷ Thus, it attempts to curtail the ability of gangmasters to operate illegally and discourages contractors and employers from engaging unlicensed gangmasters to obtain labour.

Civil liability of employers and contractors for the actions of subcontractors

Although criminal liability may only hold the subcontractor liable for forced labour abuses, employers and contractors may be held liable for the actions of subcontractors who exploit workers. In Portugal, for example, lawmakers have developed a liability scheme that ensures that all migrant workers are compensated for exploitation. In many instances, migrant workers are unable to recover damages from subcontractors because subcontractors disappear upon detection, or simply do not have sufficient assets to pay workers fair compensation.¹⁹⁸ Thus, Portugal passed a Social Responsibility Law in 1998 that holds that when a worker files a case against an employer for exploitation or abuse, blame is put on his employer. However, if the worker is unable to recover compensation from the employer, then the blame is placed on that person or contractor who contracted services from the original subcontractor. This continues 'up' the subcontracting chain until the blame is placed on the main employer if necessary.¹⁹⁹

In other countries, where a law has not been explicitly written to hold contractors liable for the actions of subcontractors, courts must inquire as to whether a contractor can be vicariously liable for the action of its subcontractors. Under tort law, vicarious liability is when a party may be held responsible for injury or damage, even though they may not be directly involved in the action or incident in question. Thus, the question arises as to when a court may hold a company or employer liable for the actions of its subcontractors who engage in forced labour abuses. In the United States, there have been a few cases recently that indicate that courts may be inclined to rule that contractors could be held liable for the

¹⁹⁴ See BBC News, "Rise of a modern-day slave trader", accessed at <http://news.bbc.co.uk/go/pr/fr/-/1/hi/England/Norfolk/4226617.stm>.

¹⁹⁵ Ibid.

¹⁹⁶ See www.theherald.co.uk/news/47311.html.

¹⁹⁷ See <http://www.opsi.gov.uk/acts/acts2004/20040011.htm>.

¹⁹⁸ See "Ten Ways to Protect Undocumented Migrant Workers", PICUM (2005), p. 63.

¹⁹⁹ See "Ten Ways to Protect Undocumented Migrant Workers", PICUM (2005), pp. 84-85.

abuses of subcontractors. In a settlement negotiated with the federal Government, Wal-Mart agreed to pay US\$ 11 million in fines to settle allegations that it used illegal immigrants to clean its stores.²⁰⁰ The immigrants were hired by various janitor contracting services, and were forced to work seven days a week in stores without overtime pay or injury compensation, and were often locked into the stores at night. Evidence collected by the authorities demonstrated that company executives knew that subcontractors were using irregular migrant workers.²⁰¹ No actual determination of Wal-Mart's legal liability was made since the case was settled, thus providing no useful legal precedent to rely upon.

In a second case, a multinational oil and gas company, Unocal, agreed to settle a lawsuit with 15 Burmese plaintiffs who charged that Unocal had supported the Burmese military's use of forced labour and other forms of abuse to compel Burmese labourers to build a gas pipeline for Unocal.²⁰² The plaintiffs filed the case in US federal court under the Alien Tort Claims Act, which is a Congressional statute providing federal courts with jurisdiction over any civil action by a foreigner against any other person on US territory for acts committed abroad "in violation of the law of nations or a treaty of the United States".²⁰³ Recently, the law has been increasingly used to file lawsuits on behalf of individuals who suffered human rights violations in other countries. Although Unocal settled the case before the court could rule on its merits, a federal appeals court did rule that the plaintiffs only needed to demonstrate that Unocal knowingly assisted the military in committing the abuses, and not that Unocal had wanted the Burmese military to commit human rights abuses. Although it is unclear what forms of assistance a company or employer would have to provide a third party to be liable for their actions, presumably the ruling could hold companies liable for forced labour abuses committed by subcontractors when the company had some degree of knowledge or participation in the commission of the exploitation.²⁰⁴

Subsequently, the French corporation Total, which had operated in a consortium with Unocal to build the gas pipeline, settled a case with the same plaintiffs, who had filed a claim against Total for forced labour exploitation in a French court in Nanterre.²⁰⁵ Total did not have to admit liability in its settlement, thus leaving no precedent for other French courts to rely upon.

As subcontracting arrangements continue to proliferate, it is possible that courts will eventually have to determine when corporations can be held vicariously liable for the actions of subcontractors that commit forced labour abuses. For example, in November 2005, *Der Spiegel* published evidence of forced labour exploitation of undocumented workers along the Gulf Coast of the United States, who were hired by subcontractors that had been hired by KBR (a subsidiary of Haliburton) to fulfill contracts for post-Hurricane Katrina reconstruction work.²⁰⁶ There is no evidence that Haliburton initially knew that subcontractors were committing forced labour exploitation.²⁰⁷ Yet, if a company like Haliburton is given notice and evidence of forced labour abuses, and does not make reasonable or good faith efforts to eliminate forced labour abuses, including termination of a contract with a subcontractor who engages in forced labour abuses, then a company could be held vicariously liable for civil damages for the actions of the subcontractor. As countries continue to revise trafficking and forced labour legislation, they may wish to consider developing clear cut laws that delineate when contractors will be liable for forced labour abuses committed by subcontractors.

²⁰⁰ See "Wal-Mart mops up immigrant flap", www.cbsnews.com/stories/2005/03/18/national/main681593.shtml.

²⁰¹ Ibid.

²⁰² See "Foreign Crimes come home to the US", accessed at http://www.atimes.com/atimes/Southeast_Asia/FL16Ae01.html.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ See "Total Settles Rights Case", International Herald Tribune, 29 November 2005, accessed at <http://www.ihf.com/articles/2005/11/29/business/total.php>.

²⁰⁶ See Lovato, Roberto: "Gulf Coast Slaves", accessed at www.spiegel.de/international/0,1518,385044,00.htm on 16 November 2005.

²⁰⁷ Ibid.

X. RECOMMENDATIONS

This paper has provided an analysis of some trends occurring across Europe with respect to laws that affect prevention and prosecution of trafficking and protection of trafficking victims. Because the experience of each country can vary greatly within Europe, these recommendations are intended more as suggestions of potential areas of improvement. Whether they relate to the specific situation in any one country is not known. Secondly, some of the recommendations relate to initiatives that require cooperation between multiple countries, or are areas of technical assistance that organizations like the ILO could implement in multiple countries.

Penal law and criminal procedure

Define ‘abuse of vulnerability’ specifically and precisely in the penal code as a mode of coercion to reduce confusion and bias in judicial decisions that result from ambiguity. Specific examples of vulnerability should be included in the penal code definition as non-exclusive evidence of the vulnerability of the victim, while still permitting the court to recognize and punish unanticipated vulnerabilities that may be taken advantage of.

Criminalize specific acts often employed by traffickers to coerce individuals to involuntarily consent to exploitation, including seizure of identity documents, threatening to reveal confidential secrets and debt bondage.

Ensure that any penal code provision that punishes trafficking for forced labour exploitation includes a mode of coercion as an element of the crime, while separately punishing sub-standard labour conditions through other penal code or administrative laws.

Conduct an in-depth examination of the rogatory process across Europe to identify current deficiencies in the process and its consequences. Improve the speed and responsiveness of the rogatory system, implement cooperation measures between Ministries of Justice and court systems in source and destination countries to facilitate exchange of evidence, and ensure that prosecutors, judges and victims’ groups collecting evidence or examining witnesses are provided full and free access to the requested country’s resources.

Victim protection measures

Countries should provide maximum protection to victims of trafficking, as obligated under international human rights law, by providing all victims of trafficking for forced labour exploitation a reflection period of three months upon detection, and a residence permit thereafter for any victim who has an identifiable need to remain in the destination country and regardless of whether or not the victim agrees to cooperate with either the investigation or prosecution of the crime of trafficking.

Oversight mechanisms should be imposed to ensure that victims of trafficking are not pressured into foregoing their reflection period in order to immediately cooperate with authorities. Secondly, if countries offer a residence permit that is not linked to a victim’s decision to cooperate or assist in the prosecution of a trafficker, ensure that this route for obtaining social protection is actually utilized. Currently, victims of forced labour exploitation that are entitled to protection without having to cooperate are required to provide evidence or testify before receiving a residence permit.

Currently, some countries only provide residence permits to individuals who have suffered serious forms of exploitation, which can exclude many victims of forced labour exploitation. All victims of trafficking should be entitled to use residence permits, and not only those who have suffered serious exploitation. Furthermore, officials granted discretion to provide residence permits should not be given wide discretion to exclude victims of forced labour exploitation, since many perceive forced labour victims to be less deserving than victims of sexual exploitation. With respect to budget allocation, funds earmarked for social services should not exclude forced labour victims.

Source countries for trafficking should provide extensive protection services to victims of trafficking that have been repatriated from destination countries, and avoid passing strict restrictions that prevent individuals from using shelters and protection facilities. Furthermore, as source countries for trafficking in Eastern Europe are increasingly also becoming transit and destination countries, these countries should develop a full range of measures to provide reflection periods and residence permits to victims of trafficking.

Enhance the role of NGOs in recommending and facilitating the grant of residence permits to victims of trafficking, with final decision-making authority still resting with law enforcement or the government. Develop regulations to expand the government agencies that can provide residence permits to victims of forced exploitation, such as labour inspections, which may have a wider mandate to eradicate all forms of forced labour exploitation.

Compensation

Ensure that victims of forced labour exploitation can obtain compensation for their exploitation from State compensation funds designed to assist victims of trafficking. Thus, compensation should only be predicated upon whether or not the individual was a victim of forced labour exploitation. Victims who did not suffer physical violence should not be excluded from receiving compensation.

Ensure that all criminal prosecutions for forced labour exploitation simultaneously enable the victim to file a civil complaint to obtain compensation from the accused. Some cases have been documented where victims of forced labour exploitation that deserved civil compensation were denied access to civil complaint measures. Civil complaints should be mandatory with criminal prosecutions, free legal assistance and legal aid should be provided to the victim, and efforts should be made to overcome any language barriers that may prevent a victim from understanding their legal rights. Countries that have traditionally been source countries for trafficking should also develop measures to combat forced labour exploitation.

Immigration law

Implement safeguards to ensure that victims of trafficking are not deported by law enforcement officials due to their irregular status. Measures to reduce deportation of trafficking victims could include training and education to enable law enforcement officials to recognize trafficking victims, avoiding immediate or quick deportation of irregular migrants to enable victims to identify themselves as trafficking victims, and encouraging law enforcement officials to regard prevention of exploitation as an important part of their job description.

Institute safeguards or develop measures to evaluate whether victims in deportation proceedings may be victims of trafficking. Providing irregular migrants with access to legal assistance or legal aid ensures that victims have an opportunity to express whether they were victimized and placed into forced labour.

Employment tribunals

Ensure that all workers, including undocumented migrants, are allowed unfettered access to employment tribunals to file complaints against employers for exploitation, such as underpayment or withholding of wages, excessive working hours and poor working conditions. Ensure that employment tribunals do not inquire into a plaintiff's immigration status.

Create a complaint mechanism to facilitate undocumented migrants' access to employment tribunals, which could include a legal assistance centre or a government office that files cases on behalf of all applicants. Countries should examine the current programme established in Portugal under the Social Responsibility Law. Awareness campaigns should be targeted at ethnic communities and at all workers in industries where forced labour exploitation is commonplace (e.g. agriculture, manufacturing, services).

Work permits

Work permits should be granted in greater numbers to encourage legal migration. However, work permits should not be 'owned' by sponsoring employers in destination countries. Migrants should be given the right to switch jobs without fear of having a work permit cancelled and being deported.

Complaint mechanisms for migrant workers should be promoted and punishment strictly enforced against employers violating the basic rights of migrants on work permits. Furthermore, labour inspectors should review the labour conditions in workplaces with migrants brought into the country via a work permit, and particularly in workplaces where exploitation is hard to detect, such as service industries and domestic work.

Subcontracting mechanisms

Ensure strong regulatory oversight and accountability over all employers and subcontractors, and particularly labour recruiters and gangmasters functioning as the bottom of the subcontracting chain.

Develop liability laws that hold employers and companies accountable for monetary damages and redress for abuses committed by subcontractors if the victim cannot recover compensation from the subcontractor.

Expand the doctrine of vicarious liability to hold employers or contractors liable for forced labour abuses committed by subcontractors and determine under what circumstances an employer or contractor is liable for the actions of a subcontractor.

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