

◆ Research Brief

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Access to protection and remedy for human trafficking victims for the purpose of labour exploitation in Belgium and the Netherlands

Study Overview

Introduction

This research brief is based on a comprehensive [study on access to protection and remedy for human trafficking victims in Belgium and the Netherlands](#). The study focuses explicitly on (potential) human trafficking victims for the purpose of labour exploitation.¹ This research brief provides an overview of the study.²

Q: What was the main motivation that led to the study?

In light of the recent ratification of both Belgium and the Netherlands of the ILO Protocol of 2014 to the Forced Labour Convention, 1930 (No 29), we wanted to investigate the availability of access to protection and remedy both in theory and in practice for victims of human trafficking for the purpose of labour exploitation in these two countries. Through exchanges with identified victims, we realised that for those who are identified as human trafficking victims and benefit from the protection and rights available to them, many cases are dismissed and do not end in successful prosecution.

We wanted to find out what options victims in such situations must access protection and claim remedy such as compensation.

Q: What avenues of protection are available for (potential) human trafficking victims and how are they implemented in practice?

Access to protection (such as shelter, medical, psycho-social, and legal assistance) depends primarily upon being detected and identified as a potential human trafficking victim. In both countries, National Referral Mechanisms exist that establish specific responsibilities

¹ In this study “victim” refers to those persons who have been identified through the National Referral Mechanism (NRM) and have been granted access to protection and remedy through the anti-trafficking law and policy framework. “(Potential) victim” refers to those persons who refuse to cooperate with authorities and therefore are not given victim status and those who have their victim status withdrawn, (e.g., case is dismissed for procedural issues, has been dismissed, or proceedings have started but prosecutor decides to prosecute for other offences than human trafficking)

² See also separate Research Brief on key findings, promising practices and actions points.

and procedures to be followed if a potential victim is detected. In both countries, potential victims are entitled to benefit from an unconditional reflection and recovery period (45 days in Belgium, 90 days in the Netherlands) if the situation they are in presents any indicators pointing to a potential human trafficking situation.

In both countries, continued access to protection after the reflection and recovery period is tied to the victim complying with certain conditions, such as agreeing to cooperate with authorities in criminal proceedings. If victims decide not to cooperate, their access to protection typically ends. This has particularly dire consequences for victims who are in an irregular situation as they lose their right to remain in the country. In the Netherlands, where a potential victim does not cooperate, a humanitarian visa can be granted to victims on exceptional grounds.

If victims choose to comply with the conditions, they are entitled to continued access to protection (where relevant this includes access to a temporary residence and work permit) throughout the criminal investigation and potential subsequent proceedings. If victims do cooperate but during the criminal investigation their victim status is withdrawn (e.g., because the perpetrator could not be identified), their access to protection ends.

In both countries, in cases where the criminal investigation is lengthy (two years in Belgium and three years in the Netherlands), victims in an irregular situation may apply for a residence permit. In Belgium, regardless of the outcome of the prosecution, a permanent residence permit will be granted. However, in the Netherlands, in practice, a permanent residence permit appears to be granted only where there is a successful prosecution.

There are important differences and nuances in which these procedures are implemented in both countries. In Belgium, presumed victims often decide within a few days whether or not they want to comply with the conditions imposed. In the Netherlands, investigatory

considerations regarding the likelihood of a successful prosecution seem to have an influence on whether or not the recovery and reflection period will be granted. Specifically in the context of labour exploitation cases, a difficult dilemma arises between investigators' needs to secure important evidence as quickly as possible and the victims' right to use the fully allotted time to decide whether or not to cooperate (after which all evidence may have disappeared).

Furthermore, the implementation of the obligation to cooperate in criminal proceedings varies in practice. In Belgium, the cooperation requirement is rather "light" as it can be fulfilled by the victim's initial statement upon detection (with the possibility for a follow-up interview) and, as a result of well-developed inter-agency cooperation and collaboration between different actors, the involvement of the victim is minimised. However, in the Netherlands, the cooperation requirement is much more long-term in nature, and it is necessary for the victim to be present and available throughout the entire process.

In both countries, there are indications that it is not uncommon for victims to choose not to cooperate or to have their victim status withdrawn because the criminal investigation is discontinued. This negatively impacts the victim's right to access protection and remedy. In such cases victims often disappear in the informal economy where they are vulnerable for re-trafficking and exploitation.

Q: You found that detection is difficult and that as a result most victims go undetected in both countries. What are the possible reasons for this?

There are multiple obstacles that can hamper the detection of victims of human trafficking. An important one is that human trafficking for the purpose of labour exploitation is a crime that is often hidden in plain sight

and not evident at first glance. Whether a potential victim is detected may depend on authorities' capacity to recognise signs of a trafficking situation, such as labour inspectors when they visit workplaces. Where a possible situation of exploitation arises, a thorough investigation requires a lot of time, capacity, and resources. This can be a challenge for authorities such as prosecutors, labour inspectors and police who already have limited staff and budget to dedicate to such cases.

Another key issue is that victims very often do not self-identify as victims of exploitation. This can be the case for several reasons: migrant workers in an irregular situation may be hesitant as, above all, they do not want to run the risk of being returned to their country of origin. Victims may also be unaware of the working standards and rights a worker is entitled to or hold a (false) belief that the fraudulent employer will eventually pay their salary and regularise their residence status. There may be an added unwillingness to come forward and share information about their situation due to a lack of trust in authorities. This is particularly the case where victims are in an irregular migration situation as they risk having a high level of dependency upon the employer or labour provider - not only for work but also for accommodation and transport. The precarity of their working and living situation often leaves them unable or unwilling to report their situation to the authorities.

Q: When it comes to remedy what appear to be important aspects for (potential) victims?

Receiving their unpaid wages appears to be a central component of access to remedy for potential victims of human trafficking for the purpose of labour exploitation. Our findings also indicate that there seems to be a preference of potential victims to receive their back wages in a quick and straightforward manner. Many potential victims appear to be willing to quickly accept

the agreed wage - much below the wage they would be entitled to - through informal negotiations with their employer, rather than claiming the full amount if this means having to go through lengthy formal proceedings.

In Belgium, inspectors of the Social Legislation Inspectorate can request employers to pay any back wages of workers 'on the spot' if, during workplace inspections, they come across potential victims who have not been paid. Importantly, inspectors can apply a three-month presumption of an employment relationship if the employer cannot prove otherwise. This is a good practice as it caters to the needs of potential victims to receive their back wages in a timely manner.

Q: What is the most viable route for human trafficking victims to access remedy?

We find that the most viable route for victims of human trafficking to access remedy is through a successful criminal prosecution for human trafficking. Nevertheless, there are several important obstacles that first, make it difficult to prosecute successfully for human trafficking and second, prevent victims from claiming the compensation where it has been awarded to them.

◆ First, generally the threshold for a successful prosecution for human trafficking for labour exploitation is high in both countries (although there are significantly more successful prosecutions in Belgium than in the Netherlands). This means rather than prosecuting for human trafficking, the prosecutor may choose to prosecute for lower-level (non-human trafficking) criminal offences. Furthermore, the high threshold appears to be anticipated by frontline actors which can negatively influence victim identification. Moreover, this also raises problems in "group cases" where multiple victims have been identified. In such cases the prosecutor will typically only include those victims with the strongest evidence or testimony on the indictment.

The points raised above have very detrimental consequences for the victims. If lower-level offences are pursued or if they are not included on the indictment, they will lose their victim status and the rights associated with it, including their right to remedy. Our study finds that is not uncommon for prosecutors to choose to prosecute for lower-level offences.

- ◆ Second, if compensation has been awarded, it is very difficult for victims to claim it from the perpetrator. A good practice can be found in the Netherlands, with the “advance payment option”. Where compensation has been awarded and the perpetrator has not paid after eight months, the government steps in and advances the compensation to the victim.

Q: What are avenues to remedy for (potential) victims other than criminal proceedings?

If criminal proceedings are not pursued or are dismissed, the potential victim may try to claim remedy (including compensation such as back wages and social security contributions) through civil, labour, or administrative proceedings or mechanisms, which exist in both countries.

If criminal proceedings do not take place or end unsuccessfully, it is theoretically possible for victims (even those in an irregular situation) to launch civil proceedings against their employer to claim their back wages and unpaid social security contributions. Both countries have regulations on chain liability in place, that make it theoretically possible to claim back the wages from employers higher up in a supply chain in case the immediate employer has gone bankrupt or disappeared.

Furthermore, in both countries, in addition to judicial proceedings, there are administrative procedures and

mechanisms in place through which potential remedy can be claimed.

- ◆ First, both countries established state compensation for victims of violent crime. Human trafficking victims are formally eligible to access these funds. In Belgium, due to requirements such as having to exhaust other remedies (criminal or civil proceedings) first, human trafficking victims are unlikely to be successful in accessing the fund. In the Netherlands, the fund has been benefited by human trafficking victims for sexual exploitation. However, recent changes in the policy of the fund have the potential to improve access to it for human trafficking victims for labour exploitation.
- ◆ Second, in both countries, anyone, including workers in an irregular situation, can submit a complaint to the labour inspectorate about their working conditions. The complaints are treated confidentially and migrant workers in an irregular situation will not be reported to immigration authorities if they file a complaint. In Belgium, depending on the severity of the situation, the labour inspector might seek to engage with the employer to resolve the complaint and resolve the non-payment of wages and any other alleged violations of the worker’s labour and social security rights. In practice, the employer may be asked to formalise the employment situation of the worker for the period he or she was employed. This will grant such workers access to the social security system including pension rights and health insurance.
- ◆ Third, state operated compensation mechanisms for workplace accidents exist in both countries. These can be appealed to in cases the employer failed to get insurance for the workers. While in Belgium migrant workers in an irregular situation are eligible to benefit from the fund (and do so in practice), this appears not to be the case in the Netherlands.
- ◆ Fourth, in both countries, when employers go bankrupt, there are state compensation mechanisms

to which workers can file claims to recover entitlements and wages. In both countries, these mechanisms are available also to workers in an irregular situation, although there are significant obstacles to access these mechanisms below (see question on obstacles below).

- ◆ Finally, as mentioned above, it is also possible to claim back wages in informal negotiations with the employer.

A key finding of our study is that to identify any of the mechanisms or proceedings defined above, the assistance of support of third-party organisations such as specialised civil society organisations and trade unions is vital. Our research finds that it is nigh on impossible for potential victims, those in an irregular situation to make use of these avenues in practice without such assistance.

Q: What are the key obstacles to accessing these mechanisms?

While several mechanisms and avenues exist for potential victims, they are very unlikely to succeed on their own in making use of them, thus the support of third-party support organisations is crucial. We identified several significant barriers that hamper effective access to the avenues and mechanisms identified in the previous question.

- ◆ First, individuals need to systematically be informed of the existence of the different mechanisms available, include any eligibility requirements and timelines. Many (potential) victims may not be aware that these avenues are available to them.
- ◆ Second, proceedings in civil or labour courts tend to be lengthy and costly with the burden of proof being on the applicant. Legal aid in both countries is means-tested. The cost of a lawyer and the prospect of having to pay the cost of proceedings if the case

is lost, can deter victims from making use of them. In addition, potential victims in an irregular situation (if they are not recognised as human trafficking victims) are not entitled to protection services (such as access shelter, financial assistance, etc.) or a temporary residence permit for the duration of the proceedings.

- ◆ Third, while human trafficking victims in the Netherlands appear to make use of the state fund for victims of violent crime, in Belgium, in particular the requirement to exhaust other remedies first, appears to impede (potential) human trafficking victims from making use of this fund.
- ◆ Fourth, in order to access state compensation mechanisms for workplace accidents and employer insolvency, it is important to demonstrate that the potential victim had an employment relationship with the employer. For potential victims in an irregular situation this may be very difficult. Furthermore, the workplace accident mechanism in the Netherlands is not available to migrant workers in an irregular situation. In Belgium, the practical arrangements that exist to make this fund accessible to migrant workers in an irregular situation in practice is of informal nature and may end if relevant officials move to another position or retire.

Even if compensation claims have been successful in any of the above mechanisms, it may be difficult for potential victims to receive it in practice. Migrant workers in an irregular situation may not have a bank account, hence the compensation cannot be transferred. In Belgium, the Deposit and Consignment Fund (*Deposito en Consignatiekas - DCK/ Caisse des Dépôts et Consignations - CDC*) overcomes this obstacle by allowing the amount to be held until the worker is contacted (if he or she has left the country) and given instructions on how to access the money.

Given these obstacles, many victims may forego their right to remedy or seek resolution through informal

negotiations with the employer, as discussed above, even if it means settling for less than what they are entitled to.

Q: What role do third party support organisations play in facilitating access to remedy for potential victims?

Civil society support organisations including trade unions play a crucial role in supporting potential victims and helping them navigate the different mechanisms to remedy that are available. A key finding of the study is that without advice and guidance from these organisations, access to effective remedy is nigh on impossible.

In the first instance, these organisations have amassed key institutional knowledge and expertise when it comes to the options for support and remedy. They have very good professional contacts with key actors and can facilitate and advise on bespoke access to protection and remedy on a case-by-case basis.

Similarly, where support organisations detect potential victims, they can greatly facilitate the evidence gathering process by advising workers on how to collect the best evidence that can then ensure that both objective and subjective elements are used in any subsequent investigations.

Critically, in both countries, these organisations have developed good professional networks and working arrangements with institutional actors e.g., by established informal working agreements and protocols to ensure that potential victims, and those without a residence status, can access the benefits they are entitled to. However, they often lack financial resources which prevent them from dealing with all cases and from exploring new avenues for potential remedies, including those that are less frequently used. This has a detrimental impact on potential victims' access to remedy.

Trade unions do not yet have an overly visible role in the anti-trafficking context, but there are important examples that illustrates the strong role they can play in both detecting and facilitating access to remedy for potential victims. The Dutch trade union foundation FNV-VNB has played a key role in the detection of human trafficking victims in the transport sector and has engaged with prosecutor to ensure victims receive remedy. The Belgian CSC-ACV union offers a reduced rate of EUR 4 per months to migrant workers in an irregular situation. Through the reduced membership, such workers can access legal support and advice including legal support in judicial proceedings.

Q: In your study, you analyse the role of labour inspectors in supporting access to protection and remedy, why are these important actors?

Labour inspectors in both countries play an important role in both the detection of potential human trafficking victims and in facilitating access to remedy for them.

Labour inspectors' main task is to ensure employers respect applicable labour law, offer decent and safe working conditions and workers are protected while they are engaged in their work. To this end, they can make unannounced workplace inspections and interview workers. They are thus uniquely placed to come into contact and detect potential human trafficking victims. Both countries have specialised units or teams of labour inspectors who are specifically trained to detect potential human trafficking victims. In the Netherlands, inspectors of the criminal investigation unit in the Dutch labour inspectorate have investigative powers equivalent to law enforcement and de facto grant the reflection and recovery period to potential human trafficking victims.

Furthermore, labour inspectors in both countries have an important role in facilitating access to remedy. In both countries, labour inspectors have a duty to inform potential human trafficking victims about their rights. Amongst others, they receive and follow-up on

complaints, and can take measures to ensure employers pay outstanding back wages, like the already mentioned Belgian mechanism for 'on the spot payments'.

Moreover, the inspection report that is drawn up following a workplace inspection appears to be of crucial importance in several respects. First, the quality and comprehensiveness of the information included in the report concerning description of workplace/working conditions/job role can influence a prosecutor's decision of whether to launch a criminal investigation in each case and thus impact a victim's right to remedy. Second, it is very important that labour inspectors include in their report contact details of the workers that consider their mobility, as otherwise contact with potential victims is lost.

However, a concern is that in Belgium labour inspectors are obliged to report workers in an irregular situation to immigration authorities. As human trafficking situations are difficult to detect, this requirement can have negative consequences for potential victims. While the reporting obligation does not exist in the Netherlands, in cases where migrant workers in an irregular situation are suspected, often joint inspections take place with police units competent in both anti-trafficking and immigration authorities. Hence, workers in an irregular situation may come to the attention of immigration authorities before they can claim back outstanding entitlements. The ILO Labour Inspection Convention, 1947 (No. 81), which both countries have ratified, stresses that the main objective of the labour inspection system should be to protect the rights and interests of all workers and to improve their working conditions rather than the enforcement of immigration law.

Q: What are the main recommendations that emerged from the study?

Our main recommendations can be categorised into three broad themes.

First, making existing rights of access to protection and remedy for trafficking victims more effective.

As most human trafficking victims go undetected in both countries, it is important to continue training and awareness raising of frontline actors and ensuring they have adequate resources to investigate potential cases. Furthermore, a decoupling of the condition to cooperate from access to protection after the reflection and recovery period should be considered, as the existing conditionality is contrary to international and regional law. Victims should also be systematically informed about their rights including the contact details of organisations and avenues for remedy that may be available to them to recover back wages as well as contact details of organisations and unions that may be able to support them even if they are not identified as a human trafficking victim at a later stage. To ensure that the threshold to prosecuting human trafficking does not exceed what it should be, it would be important to exchange case law, judgments and international guidance with prosecutors and judges. Efforts should also be made to help victims recuperate compensation once it is awarded. The Dutch advance payment model (discussed above) could provide inspiration in this regard.

Second, effective complaint and compensation mechanisms for all workers who are not identified as human trafficking victims should be enabled.

At a minimum, such workers should be systematically informed about their rights and possibilities to claim unpaid wages and social security contributions upon detection. If they lodge complaints, these should be taken seriously by authorities.

Access to civil or labour proceedings could be improved, such as through a better provision of legal aid. In Belgium for instance, when employers are fined for non-payment of social security contributions in proceedings, the employer should also be ordered to pay the arrears of social security contributions in the

same judgment. This prevents the worker from having to lodge additional proceedings for compensation on the same case based on the fine of the employer. Similarly, in Belgium, prosecutors could include more routinely the charge of non-payment of wages on the indictment as this would allow workers to claim them rather than having to launch separate civil proceedings to claim them. In both countries, judges could apply the three- or six-months' presumption of an employment relationship derived from the transposition of the Employers' Sanctions Directive when determining due wages.

Both countries should consider making available temporary residents permits to workers in an irregular situation who launch civil or administrative proceedings to recover their back wages and social security, in line with the relevant provision of the Employers' Sanctions Directive 2009/52/EC. Both countries could further reflect on how to facilitate and expand possibilities to lodge complaints for such workers. This should include strengthening the capacity and resources of civil society support organisations and trade unions.

Third, labour market governance should be tightened, and labour law should be better enforced.

The research reveals a need to better enforce existing labour laws and rights to ensure respect for decent

working conditions and a level-playing field for employers. This concerns the effective implementation of applicable international law, the full transposition of EU Directives and the implementation of existing national legislation and collective agreements, including the enforcement of sanctions to dissuade fraudulent employers.

Furthermore, the go-to solution for violations of labour law appears to be the imposition of an administrative fine on the employer. While this may be important, it does not by default help the worker recover any entitlements or remuneration that is owed to him and her. Given the importance workers place on receiving their back wages (as discussed above), it would be important to reflect on how administrative competences or sanctions imposed for violations of labour law could better be used to materially benefit the workers. The Belgian "on the spot payment" mechanism would be a step in this direction. The intention of the Dutch labour inspectorate to refer underpaid workers to labour lawyers to help them recover their full wages is also positive in this regard.

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