

The Protocol of 2014 to the Forced Labour Convention, 1930

The fundamental principle of elimination of all forms of forced or compulsory labour is expressed in the form of specific rights and obligations in two Conventions which were successively adopted to secure the abolition of specific practices. The Forced Labour Convention, 1930 (No. 29), aimed at putting an end to the use by colonial powers of compulsory labour in dependent territories. The Abolition of Forced Labour Convention, 1957 (No. 105), was adopted in response to emerging uses of forced labour, including in newly independent countries, such as for repression of political dissent or economic development.

What remains universally valid in Convention No. 29 is the definition of forced or compulsory labour (all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered him/herself voluntarily); exceptions to that definition (compulsory military service, normal civic obligations, as a consequence of a conviction in a court of law, in cases of emergency, or minor communal services); and the requirement that exaction of forced labour be punishable as a penal offence, with penalties adequate and strictly enforced.

For its part, Convention No. 105 requires to suppress and not to make use of any form of forced or compulsory labour: as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; as a method of mobilizing and using labour for purposes of economic development; as a means of labour discipline; as a punishment for having participated in strikes; and as a means of racial, social, national or religious discrimination.

The mere obligation to suppress the use of forced labour, including by making exaction of forced labour a serious criminal offence, progressively appeared insufficient to achieve its effective elimination. In its comments on the application of Convention No. 29, the Committee of Experts on the Application of Conventions and Recommendations (CEACR) increasingly expressed concerns about the growing incidence of contemporary forms of forced labour, including human trafficking and abusive conditions made to migrant workers amounting to forced labour, which were not satisfactorily apprehended by the existing instruments.

In that context, the Protocol and its parent Forced Labour (Supplementary Measures) Recommendation, 2014 (No. 203), require making the elimination of forced labour the goal of a national policy that would not only sanction perpetrators, but also prevent the use of forced labour, protect victims and ensure

their access to remedies, in an approach considering forced labour as much a labour market issue as a criminal justice one. They assign an important role to labour market institutions, including labour inspection, require specific protection of migrant workers and link forced labour to human trafficking.

Application in Mongolia of ratified Conventions on forced labour

Mongolia ratified both Conventions Nos. 29 and 105 in 2005. The CEACR has made comments on the application of both Conventions in requests addressed directly to the Government, the latest of them in 2017.

On Convention No. 29, the CEACR noted that the National Sub-Council on Combating Trafficking in Persons had been established and that a plan of action in implementing anti-trafficking activities was being drafted. It encouraged the Government to pursue its efforts to prevent, suppress and combat trafficking in persons, and to continue to provide information on the measures taken in this regard. The CEACR also noted the enactment of the Law on Witness and Victim Protection. It requested the Government to continue to take measures to provide protection and assistance, including legal assistance, to victims of trafficking, and to continue to provide information on the number of victims benefiting from these services.

Other issues raised by the CEACR included: the freedom of career members of the armed forces to leave the service; the nature of the work carried out by conscripts under military service laws; prison labour and the work of convicts for private companies; and sentences of community work as an alternative to imprisonment.

In its comment on Convention No. 105, the CEACR noted the confirmation by the Government that no sanction involving compulsory labour can legally be imposed for participation in a strike, even an illegal one. It could only repeat once again its request to the Government to supply copies of legislation indispensable for its examination of other aspects of the application of the Convention, namely: laws governing the press and other media; laws governing political parties and associations; and laws governing assemblies, meetings and demonstrations.

* This note was prepared by the ILO to facilitate the tripartite discussion on ratification prospects of the Protocol of 2014 by Mongolia. It relies largely on the findings of a gap analysis conducted by the Mongolian Bar Association, whose contribution is acknowledged with thanks. The views expressed are subject to the usual understanding that the International Labour Office has no authority to provide interpretations of ILO instruments and that it is only for the competent ILO supervisory bodies to assess compliance of national law and practice with them.

Effect currently given to the Protocol in Mongolian law and practice and suggestions for possible changes

Definition

Article 1 (3) – The definition of forced or compulsory labour contained in the Convention is reaffirmed, and therefore the measures referred to in this Protocol shall include specific action against trafficking in persons for the purposes of forced or compulsory labour.

Convention No. 29 provides a definition of forced or compulsory labour but does not require the inclusion of such a definition in domestic law. For that reason, the CEACR did not comment on the very inadequate definition in Article 3.1.14 of the Labour Law (1999) adopted before the entry into force of the Convention in Mongolia. It reads:

“Forced labour” means work or duties exacted on an employee to enforce workplace discipline, to reprimand for participating in strikes or expressing beliefs on political, economic or social establishment, or to discriminate against social origin, nationality or religion, or without taking into account circumstances that endangers life or health of the employee,

thus limiting the understanding of forced labour to four of its five uses prohibited by Convention No. 105 (therefore implicitly allowing its fifth use for the purpose of economic development), plus hazardous work.

For its part, by making the absence of payment a defining element of the offence of forced labour, Article 13.13 of the Criminal Code (2015) is unduly narrowing the scope of the illegal exaction of forced labour to be punished as a criminal offence in accordance with Article 25 of the Convention and Article 1 (1) of the Protocol:

Forcing others to work without fee or payment by using force, or threatening to use force, inflicting apparently undervalued conditions or terms, or subjugating others by taking advantage of wealth, health, disability, unpleasant family environment or other life hardships of others.

In addition, Article 13.1 (a) provides a definition of trafficking in persons, taken from the Protocol to the United Nations Convention against Transnational Organized Crime to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000), which includes the purpose of forced labour and is therefore in line with this provision of the Protocol calling for specific action against trafficking in persons for the purpose of forced or compulsory labour:

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

or practices similar to slavery, servitude or the removal of organs.

- Advantage could be taken of the ongoing drafting of a new Labour Law to bring in line the definition of forced labour with that of Convention No. 29 and its Protocol. Amending Article 13.13 of the Criminal Code could also be considered, to at least remove the reference to the absence of payment.

Effective measures, national policy and plan of action

Article 1 (1) – In giving effect to its obligations under the Convention to suppress forced or compulsory labour, each Member shall take effective measures to prevent and eliminate its use, to provide to victims protection and access to appropriate and effective remedies, such as compensation, and to sanction the perpetrators of forced or compulsory labour.

Article 1 (2) – Each Member shall develop a national policy and plan of action for the effective and sustained suppression of forced or compulsory labour in consultation with employers’ and workers’ organizations, which shall involve systematic action by the competent authorities and, as appropriate, in coordination with employers’ and workers’ organizations, as well as with other groups concerned.

Pursuant to the Law on Combating Human Trafficking (2012), a National Sub-Council on Combating Human Trafficking was established in 2013 at the Ministry of Justice to regulate the activities on combating and preventing trafficking. A National Plan of Action on Combating Human Trafficking was adopted in 2017 that includes measures to prevent and combat certain forms of trafficking in persons, such as sexual exploitation and labour exploitation, as well as to protect victims.

Apart from the number of prosecutions for human trafficking, limited information is available on the practical implementation of the national plan of action, making it difficult in particular to assess to what extent it addresses situations of forced labour without a trafficking element. No information is available as to the involvement of the employers’ and workers’ organizations in the design and implementation of the plan.

- Measures could be considered to ensure a closer involvement of the Ministry of Labour and Social Protection and social partners in the development and implementation of a national policy and plan of action that would expressly include forced labour without trafficking.

Prevention

Article 2 – The measures to be taken for the prevention of forced or compulsory labour shall include:

(a) educating and informing people, especially those considered to be particularly vulnerable, in order to prevent their becoming victims of forced or compulsory labour;

(b) educating and informing employers, in order to prevent their becoming involved in forced or compulsory labour practices;

(c) undertaking efforts to ensure that:

(i) the coverage and enforcement of legislation relevant to the prevention of forced or compulsory labour, including labour law as appropriate, apply to all workers and all sectors of the economy; and

(ii) labour inspection services and other services responsible for the implementation of this legislation are strengthened;

(d) protecting persons, particularly migrant workers, from possible abusive and fraudulent practices during the recruitment and placement process;

(e) supporting due diligence by both the public and private sectors to prevent and respond to risks of forced or compulsory labour; and

(f) addressing the root causes and factors that heighten the risks of forced or compulsory labour.

The Law on Prevention of Crimes (1997) provides in general terms for information of the public on crime prevention, while more specifically the Law on Combating Human Trafficking requires training in secondary schools on prevention of trafficking. There is no information available on specific measures of education and information of employers.

Concerning enforcement, the new Labour Law currently being drafted is intended to improve coverage of the informal economy, in accordance with the State Policy on Informal Employment (2017). The obligation made on labour inspectors of the General Agency for Specialized Inspection (GASI) to announce their visits in advance may prevent them from playing an effective role in forced labour prevention.

The Law on Sending Labour Abroad and Receiving Foreign Labour and Specialists from Abroad (2001) contains some protective provisions, including the requirement of written employment contracts.

- Regulations governing the operation of the GASI labour inspectorate should be amended to allow inspectors to access to workplaces without prior notice. In the current drafting of a new Law on Labour Migration to replace the Law of 2001, additional provisions could be introduced to prevent migrant workers from falling into situations of forced labour in the process of their recruitment or placement.

Identification and protection of victims

Article 3 – Each Member shall take effective measures for the identification, release, protection, recovery and rehabilitation of all victims of forced or compulsory labour, as well as the provision of other forms of assistance and support.

Under the Law on Combating Human Trafficking, identification of victims of trafficking is primarily for the National Police Agency, which has established an anti-trafficking unit; no record is available of the number and nature of cases investigated by that unit. No information is available on identification of victims of forced labour by labour inspectors.

Measures of legal, material and medical protection and rehabilitation of victims of trafficking can be found in several laws and regulations, in particular the Law on Protecting Witnesses and Victims (2013), but in accordance with the Code of Criminal Procedure access of victims to them is subject to the initiation of a case by the prosecution. In practice, it seems that most protection services are provided by NGOs.

- Measures could be considered to strengthen the contribution of labour inspectors to the identification and protection of victims of forced labour; these measures could include the development of forced labour indicators. Conditions of access to protective measures could be reviewed to ensure that they are effectively available to all victims, irrespective of judicial proceedings.

Access of victims to remedies

Article 4 (1) – Each Member shall ensure that all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies, such as compensation.

Article 4 (2) – Each Member shall, in accordance with the basic principles of its legal system, take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.

Judicial remedies open to victims include the possibility to file joint complaints with the State Prosecutor, to independently file complaints in a civil or criminal court and to seek compensation through criminal and civil proceedings. However, they are available only to victims of trafficking for forced labour. In practice, victims tend to seek to recover unpaid wages without claiming further compensation. Concerning the access to remedies of victims with irregular migration status, the Law on Combating Human Trafficking protects them against the immediate deportation otherwise required by the immigration law. There is no evidence of a practice of not prosecuting victims for illegal acts committed as a consequence of being subjected to forced labour.

- Laws and regulations could be reviewed and harmonized to facilitate access to remedies of all victims of all forms of forced labour, irrespective of their migration status.

International cooperation

Article 5 – Members shall cooperate with each other to ensure the prevention and elimination of all forms of forced or compulsory labour.

Mongolia has concluded a number of agreements of mutual assistance in civil and criminal matters that do not appear to contain specific provisions on either forced labour or trafficking. In its first report on the application of the Private Employment Agencies, 1997 (no. 181), the Government reported the conclusion of bilateral agreements with the Republic of Korea (2004), China Taipei (2001), the Czech Republic (1999) and Japan (1998). The CEACR requested the Government to provide information regarding all bilateral agreements it has concluded which address the prevention of abuses and fraudulent practices in the recruitment, placement and employment of migrant workers and to provide copies of these agreements.

Conclusion

Mongolia has adopted measures that would appear to give effect to the central requirement of the Protocol to develop and implement a national policy and plan of action for the effective and sustained suppression of forced or compulsory labour, including through specific action against trafficking in persons for the purposes of forced labour. There seems to remain scope, however, for the strengthening of enforcement by labour authorities, including by giving to labour inspection services, in the words of Recommendation No. 203, “the necessary mandate, resources and training to allow them to effectively enforce the law and cooperate with other organizations concerned for the prevention and protection of victims of forced or compulsory labour”.

As in the case of Conventions calling for a national policy to pursue their goals – such as Conventions Nos. 100, 111, 122, and also 182, all ratified by Mongolia – the CEACR is likely to ask for more information about the application in practice of the Protocol than seems readily available. The logic for supervising the application of these instruments is that collection and analysis of the relevant data is indispensable for both the design of the policies and measures to be implemented and the evaluation of the results they have achieved.



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