

A SUMMARY OF CHALLENGES FACING LEGAL RESPONSES TO HUMAN TRAFFICKING FOR LABOUR EXPLOITATION IN THE OSCE REGION

Background paper for the Alliance against Trafficking in Persons
High-Level Conference
Human Trafficking for Labour Exploitation/Forced and Bonded Labour
Prosecution of Offenders, Justice for Victims
Vienna, Hofburg, Neuer Saal, 16–17 November 2006

“Human Trafficking is a serious crime that violates human dignity and poses a threat to human security in all our societies. The OSCE, on the basis of its comprehensive and multidimensional approach to security, its unique geographical representation and the substantial framework of its political commitments in this area, is ideally equipped to play an important role in the global effort to combat trafficking in human beings.”

Eva Biaudet

Special Representative and Co-ordinator for Combating Trafficking in Human Beings



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CONTACT INFORMATION

Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings
OSCE Secretariat
Kärntner Ring 5 – 7
A-1010 Vienna, Austria
Tel: +43-514-36-6256
e-mail: info-cthb@osce.org

FOREWORD

Occasional Paper Series: Combating Trafficking in Human Beings in the OSCE Region

In December 2003 the OSCE Ministerial Council in Maastricht endorsed the OSCE Action Plan to Combat Trafficking in Human Beings¹ as a fundamental and comprehensive document which contained far-reaching recommendations for the participating States on best ways and means to implement the OSCE anti-trafficking commitments.

The Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings assists participating States in the implementation of commitments and full usage of recommendations set forth in the OSCE Action Plan, ensuring a cross-dimensional and comprehensive approach. The Office raises public awareness and the political profile of the fight against all forms of human trafficking, provides advice and technical assistance and facilitates co-operation among key stakeholders in the OSCE Region.

The Office of the Special Representative is pleased to introduce, with this publication, the first Occasional Paper on Combating Trafficking in Human Beings in the OSCE Region. These Occasional Papers will feature contributions by leading experts on current topics related to combating human trafficking. The aim is to assist participating States in the development and implementation of national anti-trafficking policy in compliance with OSCE commitments and other relevant international obligations. Building on co-operation and synergy with partners in the Alliance against Trafficking in Persons, the Occasional Papers offer an opportunity to move forward with empirical research, reliable analysis and technical expertise to translate knowledge into practice.

This first Occasional Paper was originally prepared as a background paper for the recent Alliance Against Trafficking in Persons' High-Level Conference "Human Trafficking for Labour Exploitation/Forced and Bonded Labour. Prosecution of Offenders, Justice for Victims," held in Vienna in November 2006.

The Conference focused on the implementation of international obligations, OSCE commitments and national legislation relevant to combating trafficking in human beings for labour exploitation, bringing perpetrators to justice and ensuring legal redress for victims of this crime.

The background paper was written to provide a summary of national practices and challenges in legal responses to trafficking in human beings for labour exploitation illustrated with reported cases in the OSCE Region. The aim is to contribute to bridge the gap between international commitments, national anti-trafficking responses and the experiences of trafficked persons.

Michele Clark
Editor, Occasional Papers
Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings

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¹ OSCE Ministerial Council Decision No. 2, adopted in Maastricht, 2 December 2003, MC.DEC/2/03.

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1. INTRODUCTION

The exploitation of human beings for labour is a centuries-old problem long acknowledged to cause misery, hardship and degradation. The global community has committed itself in numerous international legal documents to guarantee freedom of movement and respect for human dignity and to take steps to prohibit and criminalise forced labour, servitude and slavery as well as trafficking for these purposes.¹ Despite these steps the phenomenon persists. Trafficking in persons for labour exploitation continues to be a serious global problem, including in the OSCE region. It is a multi-faceted issue related to numerous economic and political challenges, including: effective criminal justice and the fight against organised crime; global migration trends and immigration policy; social and economic inequality, discrimination and xenophobia.

This paper provides a short explanation of the issue followed by an examination of a small sample of the legal challenges faced by OSCE participating States in implementing their political commitments and legal obligations to end trafficking for labour exploitation. It highlights some of the technical or legal steps which need to be taken to ensure effective prosecution of perpetrators but also makes clear that, without effective and comprehensive protection of potential and actual victims, prosecution efforts will have limited impact. These protection measures are not limited to guaranteeing the physical and psychological safety of identified victims but extend also to protection of the community in the wider sense i.e. to ensuring that the labour market and work place are adequately and effectively regulated and that safe and legal migration opportunities are available.

2. UNDERSTANDING THE PROBLEM: WHAT IS TRAFFICKING FOR LABOUR EXPLOITATION?

Trafficking for labour exploitation remains largely invisible. In a survey conducted by the OSCE Special Representative on Trafficking in Human Beings in 2005, the participating States were asked if they considered trafficking in human beings to be primarily a problem of irregular migration, human rights violations, prostitution, forced labour, organized crime, poverty, exploitation or other. Trafficking as a problem of forced labour was the least frequent response². Additionally, only 27 respondents indicated that they recognized that people are trafficked for labour exploitation as one of the main forms of trafficking in their jurisdictions³. In general, few cases of trafficking for labour exploitation are detected, few victims are identified and protected, and few perpetrators are actually prosecuted and convicted.

There have been very few prosecutions of trafficking for labour exploitation in almost all of the OSCE participating States.⁴ This seems to be due to several reasons, *inter alia*:

- The concept is relatively new.
- States have not criminalised the concept or have only recently done so.
- Cases are rarely identified because (among other reasons): the crime is often inherently “underground” by virtue of a victim’s legal status and the economic sectors they work in;
- There is a lack of familiarity with the relevant indicators by law enforcers (authorities);
- There is a disproportionate focus on an individual’s immigration status rather than on the conditions of their exploitation.

¹ See e.g. Slavery Convention (1926), Protocol amending the Slavery Convention signed in Geneva on 25 September 1926 (1953), Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956), Forced Labour Convention No. 29 (1930), Abolition of Forced Labour Convention No. 105 (1957), Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949), Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime UN TOC (2000).

² See From Policy to Practice: Combating Trafficking in Human Beings in the OSCE Region, ATAU, OSCE Secretariat, 2006 (“From Policy to Practice”) p10.

³ *ibid*

⁴ Exceptions to this include the large number of cases taken in the USA under the Trafficking Victims Protection Act 2000 and the reports provided by the Attorney General to US Congress under the obligations of the Trafficking Victims Protection Reauthorization Act of 2003. See also Eurojust and Human Trafficking: The State of Affairs, de Jonge, B., Dutch desk 2005 (“Eurojust report”), p25. The report concluded, based on country studies and interviews with practitioners, that only very few transnational investigations of labour exploitation are started in the European Union.

- Regulatory bodies have fragmented frameworks and do not co-ordinate with each other (e.g. labour regulation, immigration control and police).
- There is no central clearing point for monitoring and analysing the cases at national level (e.g. a National Rapporteur) or at international level.
- Lack of resources committed to detection and identification of cases, as well as to protection of victims and training officials does not permit adequate responses.
- There are inherent evidential difficulties for police and prosecutors in establishing a criminal offence of such complexity to the standard of proof required.

Therefore it is recommended that the participating States take active steps to overcome these barriers through committed efforts to introduce legislation and/or policy implementation at national level. As in the case of trafficking for sexual exploitation, the concept of trafficking for labour exploitation is not simply restricted to the nature of the exploitation but consists of several elements defined in Article 3 of the Palermo Protocol.⁵ All of these elements need to be reflected in the law and be present in any individual case of trafficking for labour exploitation to be established (see Text Box 1 below).

TEXT BOX 1 | ELEMENTS REQUIRED FOR TRAFFICKING IN PERSONS FOR LABOUR EXPLOITATION

- a. The act of trafficking: recruitment or transportation or harbouring or receipt of persons. AND
- b. The means used to involve the individual: threat or use of force or forms of coercion or abduction or fraud or deception or abuse of power or abuse of a position of vulnerability or the giving and receiving of payments or benefits to achieve the consent of a person who has control over another person (i.e. “purchasing or selling” a person from another trafficker). AND
- c. The purpose of the trafficking, at minimum: forced labour or slavery or practices similar to slavery or servitude.

There are therefore only a limited number of legal cases available with which to illustrate different dimensions of trafficking for labour exploitation although there is detailed research conducted by NGOs, academics and IGOs which provide case-studies to illustrate the problem. We present a sample of these cases here and throughout the text to illustrate trafficking for labour exploitation more tangibly:

Case example 1: Illegal migrant workers in the textile sector suffering serious violence

United States v Lee 2001. Five defendants charged with subjecting 250 Vietnamese and Chinese nationals, mainly young women, to involuntary servitude in a garment factory in American Samoa. Some of the victims were held for up to two years, were forced to work through extreme food deprivation, beatings and physical restraint. They were held in barracks in a guarded company compound and were threatened with deportation, bankruptcy, false arrest, confiscation of their passports and severe economic hardship to their families. One victim had an eye gouged out after a defendant struck her with a pipe in order to punish her for refusing to comply with orders. The lead defendant was sentenced to 40 years incarceration for on a number of counts.⁶

Case example 2 : Child domestic servant from abroad subject to physical abuse

United States v Mubang 2003. A naturalized US citizen of Cameroonian origin was convicted of having brought an 11 year old girl to the USA to provide free labour to care for the defendant’s two children and to perform household chores. While at the Mubang household the victim received no wages, was isolated, was not allowed to attend school, and was subject to verbal and physical abuse i.e. being struck

⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. Entry into force 25 December 2003 (hereinafter “Palermo Protocol”).

⁶ US Department of Justice, *Report on Activities to Combat Human Trafficking 2001-2005*, p75.

with a cable, a high-heeled shoe, a metal broom handle leaving a scar. Mubang fled before sentencing but was recaptured and sentenced to more than 17 years incarceration.⁷

Case example 3: Vulnerable nationals subject to debt bondage & violence in fruit-picking

United States v Michael Lee 2001. “(D)efendants recruited homeless African American men for their orange picking operation. Once employed, the workers were involuntarily held through the use of beatings, threats and the use of “company store” debt run up by short-term loans for rent, food, cigarettes and cocaine. Three defendants received prison terms of up to four and a half years.”⁸

Case example 4: Slavery and the seizure of identity papers⁹

Judgment of the City of Tulalinsk in the Russian Federation 2005. The Court found four men to be treated as slaves by the defendant¹⁰ who forced them to work for him without wages, housing them in degrading conditions and providing them with food only occasionally depending on his goodwill. The victims’ papers were also seized and they were forced to return when they attempted to flee. The defendant was sentenced to four years imprisonment which was reduced to 7 months on appeal on the basis that he had small children, no previous convictions and previous good character.

3. CRIMINAL JUSTICE RESPONSES

3.1 The Challenge of Criminalisation

The Palermo Protocol contains a clear commitment that trafficking in persons for the purpose of labour exploitation and related offences should be criminalised by all State Parties.¹¹ Labour exploitation is stated to include *at minimum*: forced labour or services, slavery or similar practices and servitude.

In practice not all OSCE participating States have taken the step of ratification of the Palermo Protocol or of criminalising the specific offence¹². Other States have not criminalised the offence according to the requirements of the Protocol and, finally, where criminalisation has occurred, the number of actual criminal cases has been limited.

The first challenge examined here is that States should properly incorporate the crime into national legislation using appropriate guidance and definitions to enable them to take concerted legal action against trafficking for labour exploitation.

⁷ *ibid* p29.

⁸ *ibid* p27.

⁹ *Legal Department Information Bulletin*, Committee for Criminal, Civil and Procedural Legislation, Duma of the Russian Federation, Special Edition No.2. Moscow (2005).

¹⁰ The defendant was found guilty of Use of Slave Labour Art 127² of the Russian Criminal Code, which is one of the articles that were introduced in the Code following the signature of the Palermo Protocol.

¹¹ Article 5, Palermo Protocol: 1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally. 2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences: (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article; (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

¹² As of 7 Nov only 42 OSCE participating States have ratified or acceded to the Palermo Protocol. See http://www.unodc.org/unodc/crime_cicp_signatures_trafficking.html. See From Policy to Practice p10. In the 2005 survey conducted by the OSCE Special Representative on Combating Trafficking in Human Beings, all but two respondents indicated that their legislation included trafficking for labour exploitation.

3.1.1 All Elements of the Crime should be included in the Definition

All of the elements of trafficking for labour exploitation (See Text Box 1) need to be incorporated into national criminal legislation together with appropriate definitions in order for trafficking in persons for labour exploitation to be criminalised at the national level. According to questionnaires forwarded by States Parties to the Conference of the Parties to the UN TOC this is not yet the case.¹³

During the process of incorporating the offence into national law, definitional issues need to be addressed and, where appropriate, guidance drafted for the police, prosecutors and judiciary to aid their interpretation of the law. Definitions should as far as possible be consistent with similar existing concepts in national law to facilitate ease of application, whilst at the same time attempting to achieve some parity with other States in order to enhance legal co-operation. Even within the EU Member States, whose obligations are reinforced by an EU Framework Decision on Trafficking in Human Beings, differences in approaches exist, and some of the approaches contain inconsistencies.¹⁴

Several of the elements of trafficking are not self-explanatory and require further elucidation and definition in national law for them to be easily and appropriately interpreted by criminal justice agencies. These include, inter alia:

- Forced labour
- Coercion, abuse of power and abuse of a position of vulnerability

The degree of definitional clarity required and/or the degree of guidance which should be given is largely dependent on the type of legal system existing in a State. Civil law and common law jurisdictions allow judges differing degrees of autonomy to interpret the written law. The lesser the degree to which the judiciary can interpret the law and apply it to the facts before them, the greater the definitional clarity and guidance they require from parliamentary drafters.

Forced labour

A definition of forced labour is not provided in the Palermo Protocol nor in its *Travaux Préparatoires* and may not be clear in national law. It is a concept which pre-dates the Palermo Protocol having been deliberated in the drafting of ILO Conventions Nos 29 and 105 regarding Forced Labour 1930 and the Abolition of Forced Labour 1957. A definition of forced labour is contained in ILO Convention No. 29 and this definition was adopted “as a starting point” by the European Court of Human Rights in their application of Article 4 of the ECHR against forced or compulsory labour¹⁵. Forced labour is

“all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”¹⁶

ILO expert guidance points out that the word “penalty” may take the form of “*a loss of rights or privileges*” and is not referring only to penal sanctions.¹⁷ The same guidance also highlights six “coercive” elements which, when present in an individual case, can point to a forced labour situation:

- a. Physical or sexual violence and/or threats.
- b. Restriction of movement of the worker.
- c. Debt bondage/bonded labour.
- d. Withholding wages or refusing to pay wages.
- e. Retention of passports and identity documents.
- f. Threat of denunciation to authorities.

¹³ See Analytical report of the Secretariat: 2006 Conference of the Parties to the UN Convention against Transnational Organized Crime CTOC/ COP/2006/3 available at http://www.unodc.org/pdf/ctoccop_2006/V0656278e.pdf.

¹⁴ *Eurojust report* see n4 pp20-21.

¹⁵ This phraseology was used to preserve a previously established principal of the ECHR in relation to the Convention's special features, the fact that it is a living instrument to be read “in the light of the notions currently prevailing in democratic States” ECHR Judgment in *Van der Mussel v. Belgium* Application no. 8919/80 (November 1983) para 32.

¹⁶ Art 2(1). It should be noted that the definition excludes certain types of compulsory labour e.g. military service.

¹⁷ *Human Trafficking and Forced Labour Exploitation, Guidance for Legislation and Law Enforcers*, ILO 2005 p20.

The importance of these elements is that they highlight situations where forced labour is likely to have occurred rather than a simple breach of labour or administrative regulations. A worker/victim may be subject to more than one at any time and may also experience different forms at different points in time.¹⁸ Research concludes that trafficking for labour exploitation is a complex phenomenon made up of multiple coercive and exploitative elements over a period of time. This makes identification of a case of trafficking far from simplistic and requires a sophisticated response from policy makers.

Case example 5: A Bangladeshi woman entering Ireland legally to work as a domestic servant subject to deprivation of wages and physical abuse.

Having paid 5000 Euro this woman entered Ireland legally to work in the employer's household looking after children, doing domestic duties and occasionally working in the employer's shop. She was paid 50 Euro per month after deductions for her lodgings. She believed money was being sent to her family by her employer but later learned this had been only one payment of 700 Euro. During 2 years she was constantly verbally abused and at times physically abused and was locked in a bathroom if the employer felt she had not listened, completed her work properly, or became upset or cried. She had no knowledge of the Irish work permit system and was eventually given a better opportunity after she approached a friend of the employer's household, which she did despite great fear of the possible consequences.¹⁹

The elements outlined in the Guidance tie in with the elements of coercion required to prove trafficking and can, sometimes, be separate criminal offences in their own right. Their existence can therefore be used to illustrate a forced labour situation which complies with both ILO and Palermo requirements. By adding this kind of definitional clarity and guidance to the concept of forced labour, law enforcers (authorities) may find these to be useful tools to better define the offence and to identify, prosecute and judge an individual case. (See also the next section regarding coercion).

Coercion, abuse of power and abuse of a position of vulnerability

As noted above, within the definitions and guidance of the ILO regarding forced labour and the Palermo Protocol regarding trafficking for labour exploitation an element of coercion is required. The Palermo Protocol also adds to coercion a new, complementary concept of abuse of power and abuse of vulnerability as a means of trafficking. Importantly, the Palermo Protocol connects the issue of coercion to that of consent. At Art 3 (b) the Protocol states that:

“The consent of a victim of trafficking in persons to the intended exploitation...shall be irrelevant where any of the means of coercion [set forth in subparagraph b)]... have been used.”

In other words it is absolutely irrelevant if the victim *apparently* voluntarily entered or stayed in a situation or conditions of labour exploitation if they were put in that situation through the use of threats, force, coercion, abduction, deception or fraud or by an abuse of power or an abuse of their own position of vulnerability. Most of these concepts will already be clear in national law, however *coercion* and *abuse of power/vulnerability* are unlikely to be. It therefore becomes vitally important that these concepts are explained so that law enforcers can appropriately identify cases of trafficking and use adequate investigation techniques and protection measures to enable potential victims to give a full account of their situation and for this to be properly identified as a case of trafficking.

This is particularly important in cases of labour exploitation where cases cover a wide range of situations including those of legal economic migrants whose vulnerable position as foreigners (perhaps also with limited language skills and knowledge of their own rights), is exploited by traffickers for forced labour.²⁰

¹⁸ *ibid* pp.20-21.

¹⁹ Case reported in “A working paper: Trafficking for Forced Labour in Europe. Report on a study in the UK, Ireland, Czech Republic and Portugal” van den Anker, C, Anti-Slavery International 2006 pp24-25.

²⁰ In a study conducted in the UK of 27 migrant workers trafficked into forced labour none of the cases were identified as trafficking by the agencies that initially identified them and the majority of the victims had entered the UK legally. Anti-Slavery International “Trafficking for Forced Labour: UK Country Report”, Skrivankova, K. 2006 (“ASI UK report”) pp1-2.

Case example 6: Afro-Caribbean hospitality worker working legally in the UK

"I left my first employer, because he was abusive. I had no means to live on, but I believe that I paid my taxes and had a national insurance number, (so) the authorities will be able to help me. But the social office told me that the national insurance number was false and because of my sort of visa I do not have recourse to public funds. I had no money and after sleeping outside for three days I went back to the employer who took me back, but I had to pay a big fine."²¹

Such cases may not, at first, appear to be trafficking cases where coercion or an abuse of vulnerability has taken place. A pro-active approach to investigation is required, focusing on detecting and investigating situations of exploitation, involving protection and support for the victim to obtain a full and detailed account of what has happened to the individual and for the circumstances of the coercion to become clear.

Based on research into cases of trafficking for labour exploitation, one commentator also believes that, without a clear and detailed definition of the concept of abuse of vulnerability in the penal code, "*one cannot assume any vulnerability will be recognised by criminal courts as a form of vulnerability*" nor that a court will be able to properly identify actions that constitute abuses of that vulnerability.²²

Case example 7: Togolese child brought to France as domestic servant: found by the ECHR not to be protected against forced labour despite her vulnerability.

Siliadin v France, ECHR (Application no. 73316/01) 26 July 2005: A fifteen year old Togolese girl was brought to France to work in the household of a French family with promises that she would be sent to school and have her immigration status regularised. She was not paid for her work, was not allowed to go to school and her passport was taken away. She was shortly after "lent" to another family (family B) and became a housemaid working from 0730-2230 and only allowed to attend church exceptionally on a Sunday. She slept in the baby's room on a mattress on the floor and had to attend to him in the night. She managed to escape the situation and worked elsewhere as a domestic for an appropriate salary but, under family pressure, returned to family B who promised to regularise her immigration status which they failed to do and the other circumstances remained as previously. At a certain point she managed to recover her passport and explained her situation to a neighbour who then reported it to an NGO. Police then took action against the family who were prosecuted and convicted at first instance under Article 225(13) of the French Criminal Code "It shall be an offence punishable by two years' imprisonment and a fine of 500,000 francs to obtain from an individual the performance of services without payment or in exchange for payment that is manifestly disproportionate to the amount of work carried out, by taking advantage of that person's vulnerability or state of dependence." However, this conviction and civil damages award was overturned at the Court of Appeal. The case was again appealed but the appeal was only successful in respect to the civil damages. The victim took the case to the ECHR alleging a violation of Article 4 (prohibition of forced labour). The claim was upheld and it was found that she was subjected to forced labour and that the French criminal law did not provide "practical and effective protection"²³ from this. It found the law too narrow in scope to protect from breaches of Article 4 and quoted the French National Assembly's report that the law was too "open to very differing interpretations from one court to the next"²⁴ (regarding vulnerability). The court referred to the fact that the applicant had been a child and this particular status meant she deserved special protection of her personal integrity in criminal law.²⁵

The Travaux Préparatoires of the Palermo Protocol and the European Union Framework Decision on combating trafficking in human beings²⁶ indicate that:

²¹ *ibid* p12.

²² See Malpani, R. "*Legal Aspects of Trafficking for Forced Labour Purposes in Europe*", ILO, April 2006 who derives this conclusion from analysis of 2 cases: *Affaire Siliadin v France*, ECHR (see below) and a Belgian case reported by Centre pour l'égalité des chances et la lutte contre le racisme pp 6-7.

²³ Para. 148 ECHR Case of *Siliadin v. France*, (Application no. 73316/01) Judgment, Strasbourg, 26 July 2005 <http://www.echr.coe.int/echr>.

²⁴ Para. 147 ECHR Case of *Siliadin v. France*, (Application no. 73316/01) Judgment, Strasbourg, 26 July 2005 <http://www.echr.coe.int/echr>.

²⁵ Paras 143 & 148 ECHR Case of *Siliadin v. France*, (Application no. 73316/01) Judgment, Strasbourg, 26 July 2005 <http://www.echr.coe.int/echr>

²⁶ (2002/629/JHA) 19 July 2002.

“abuse of a position 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.”²⁷

But, in fact, there is great variance in the definitions used by States. It is either interpreted very narrowly (in a way which precludes other forms of vulnerability being identified by the courts) such as in the UK:

“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.”²⁸

Or defined more broadly allowing courts to identify forms of vulnerability not predicted by drafters and more in line with the intention of the drafters of the Palermo Protocol e.g.

Article 601 Italian Criminal Code “...profiting from a situation of physical or psychological inferiority or from a situation of necessity, or through promises or giving sums of money or other advantages to those having authority over a person to allow entry or a stay or to leave the territory of the State or internal transfer...”²⁹

It is recommended that a broad solution be adopted which is more reflective of the intentions of the drafters of the Palermo Protocol and which is not likely to breach basic human rights standards.³⁰

Extracting case details from a wide range of NGO, academic and legal research, as well as from a limited number of legal cases, we have noted various means used to ensure that an individual enters into or stays in a forced labour situation (see Text Box 2 below). These elements, where identified in the course of an investigation, could be treated as both indicators of means of coercion or abuse of vulnerability (i.e. the “*means*” required by the Palermo Protocol) and also indicators of the existence of forced labour. Such indicators should be regarded as non-exhaustive and be used on a case by case basis. There are some “means” which fall into a category other than coercion or abuse of vulnerability such as “force” or “deception” but which may be used alongside other coercive means. Interestingly, some of these indicators would not necessarily constitute abuse against nationals of a country who would be able to speak the language and would have security regarding their status and their relationship with governmental authorities. This means that foreigners are particularly vulnerable. It would therefore be appropriate for definition or guidance relating to vulnerability to include a reference to nationality status as a possible cause as is the case in some legislation e.g. the German Penal Code which defines abuse of vulnerability: “*the helplessness that is associated with their stay in a foreign country...*”³¹

Case example 8: Legal Polish migrants exploited in a UK food packaging agency³²

A group of Polish people came to the UK where they were legally entitled to work having been recruited by an English recruitment agency. They were promised the minimum wage of £4.50 per hour, accommodation for £25 per week and lots of overtime. There was no work and no wages in their first week and they were told to pay £40 rent. They were then taken by a minivan to a house in the middle of the night and were told to wait while some frightened looking Afghans were told to pack and leave in waiting vans. They were housed in dirty and dangerous conditions and taken to work by minivan between 2am-10pm. The Poles spoke no English and were not told that their employer was a subcontractor working for a super-market chain. They were threatened with eviction and loss of wages if they told anyone about the conditions and were told not to go out or the police would come. Their payslips showed they had £40 deducted

²⁷ UN Doc A/55/383/Add.1 UN 3 November 2000 Para 63.

²⁸ Asylum and Immigration (Treatment of Claimants etc.) Act (2004) Section 4 Para 4d.

²⁹ Unofficial translation.

³⁰ See also *Eurojust report* (see n4) p21 for other examples of narrow or broad definitions of “coercion”.

³¹ Section 233(1) German Criminal Code 2005. Unofficial translation.

³² Cited in *ASI UK Report* see n19 pp26-27.

for rent when the legal maximum was £25, huge tax deductions (although the tax office received nothing), and that they received £115 when in fact they received £100. Several were given the same national insurance number. The Polish workers had not been able to find the £50 fee to register with the authorities and so, eventually became illegal. They escaped their conditions with the help of a union.

Case example 9: Abuse and control of Peruvian smuggled migrants in USA

US v Zavala & Ibanez 2005. Between 1999 and 2004 2 defendants orchestrated a scheme to illegally obtain visas for Peruvian aliens seeking to go to the USA. They charged \$6-13,000 as a smuggling fee. By confiscating their passports and threatening to turn them over to the authorities the defendants compelled the Peruvians to work for them and other employers and would keep most of their pay check leaving them less than \$50 per week. The immigrants, including 13 children, were living in cramped and squalid conditions and were assisted by an NGO once the case had been detected. The defendants forfeited a residence worth \$175,000 and bank accounts containing \$30,000 as part of their guilty pleas.³³

TEXT BOX 2 | INDICATORS OF COERCIVE MEANS AND EVIDENCE OF FORCED LABOUR

The indicators below are derived extracting case details from a wide range of NGO, academic and legal research and a limited number of legal cases:

- Actual physical and/or sexual violence and/or threats to do the same to compel workers to obey orders or not to complain.
- Threats to or actual disappearances and killings of workers.
- Threats to carry out physical harm to individual's family.
- Not fulfilling promises regarding pay levels or frequency, legal status, conditions or type or work.
- Isolation: being cut off from physical and/or electronic communications with the outside world.
- Control of the freedom and/or movement of an individual.
- Threats to monitor the movement and communication of individual.
- Seizure of passports and identity documents.
- Actual control of communication of an individual with colleagues/co-workers
- Punishment with violence or financial or other penalty in the event of complaints.
- Provision of unsanitary, unsafe and/or overcrowded accommodation and inadequate access to food and drink.
- Debt bondage – charging exorbitant costs and sometimes interest (e.g. for transport to a country, transport to and from a work location, for overcrowded & unsafe accommodation & inadequate nutrition and water supplies) and deducting these costs from wages leaving the worker of being continually indebted to an employer or go-between.
- Paying low wages or never paying wages (e.g. dismissing or removing workers at the end of a job).
- Theft from wages e.g. by claiming to make legal deductions (e.g. tax and social security payments).
- Imposition of random “fines” or financial penalties e.g. for being sick, late, “inadequate performance” etc.
- Failure to take steps to regularise status of workers or falsely “regularising” using false identity, tax and/or social security details.
- Preventing workers from learning the language of country of destination and preventing interaction with nationals.
- Unsafe and unhealthy working environment.
- Excessively long working hours.
- Failure to allow access to adequate medical care.
- Misleading workers or failing to inform them about their actual immigration and/or work permit status and rights.
- Corruption of local officials: police, medical carers to prevent workers from being able to report their situation.
- Moving individuals to an even worse situation (or threatening to).

³³ US Department of Justice, *Report on Activities to Combat Human Trafficking 2001-2005*, p88-89.

3.1.2 Criminalising Acts which are Related to Trafficking for Labour Exploitation

Some of the coercive acts mentioned above are already criminalised in some jurisdictions as crimes in their own right, and it is strongly advisable that such practices be considered by all OSCE participating States. Difficulties in establishing reliable evidence for the full offence of trafficking in persons for the purpose of labour exploitation may allow a trafficker or accomplice to go unprosecuted when in fact they could easily be charged with one or more of these complementary offences which are easier to prove. The offences include e.g. threat of denunciation to the authorities, the seizure of identity papers³⁴, and the withholding of wages. It is possible that such measures would assist in providing a prosecutor with prima facie evidence of the crime of trafficking.

Case example 10: Ukrainian worker in Russian construction industry subject to deception, debt bondage, passport seizure, threats and minimal wages.

A 31 year old Ukrainian man graduated as an engineer went to Russia to earn money for a new flat for his family. A recruiter accompanied him and settled him to a job but not the one promised to him. He owed the recruiter US\$200 for the transport, work and housing and gave the recruiter his passport. This “credit” has become debt bondage. He could not leave because he would have to pay for the travel for a new person plus a “fine”. He worked 12-14 hours a day, 6 days a week as an unskilled labourer and was paid only a proportion of the wages. The employer kept the rest for debt which was mounting. “I cannot change work. I cannot leave, I receive very little, have no money, my debt is increasing I do not know why. It is complete exploitation. If you refuse to work, they might beat me, I can go nowhere without my passport, besides they may come down hard on my family. I am lucky I am not ill... They did not allow me off site. Only once a month can I go to the city. We live in a van which is not equipped with facilities. There is no water supply...I wish to go back, but do not know how to deal with my debts.”³⁵

3.2 The Challenge of Co-operating Across National Borders

As discussed above, there are very few prosecuted cases of trafficking for labour exploitation across the OSCE region. This low number is related to the difficulties in obtaining the right evidence to prove the crime and to identify and secure the arrest of suspects. The problems of building a case are exacerbated by several elements in trans-national cases including the procedural and logistical obstacles posed by the fact that the evidence and witnesses may only be available in *another* State’s jurisdiction (usually the country of origin of the victim and/or the country to which the victim has been returned).

Numerous commentators and individual States have documented the problems encountered in making formal requests for trans-national legal co-operation between police, prosecutors and judiciary.³⁶ Such co-operation is crucial to enable, *inter alia*:

- Interviewing witness and obtaining other evidence (e.g. documentation) located in another State.
- Locating witnesses and suspects in another State.
- Executing searches and tracing financial assets in another State.
- Serving documents on witnesses and suspects in criminal and civil cases.
- Completing risk assessments in home countries for any nationals who wish to return or for whom a destination State is considering deportation.

Physical protection for witnesses also has a transnational dimension. Where victims/witnesses are returned or return to their countries of origin, testimonies become difficult or impossible to obtain. This is because of problems ensuring

³⁴ This is also an obligation for States who have ratified the Council of Europe Convention on Action against Trafficking in Human Beings. See also Trafficking Victims Protection Act 2000 (USA).

³⁵ Interviewed for “*Forced Labour in the Russian Federation Today: Irregular migration and trafficking in human beings*” Tyuryukanova, E. ILO, Sept 2005 (“Forced Labour in Russia”). pp 122-123.

³⁶ See for example Rijken, C. “*Trafficking in Persons, Prosecution from a European Perspective*.” TMC Asser Press, 2003 pp164-198, “*Eurojust report*” See n4, Malpani, see n21 pp19-21.

that the procedural requirements of the prosecuting country are met and also because the witness/victim cannot be protected from intimidation and threats.³⁷ In their study on legal co-operation in Europe regarding trafficking in human beings, Eurojust noted no examples of co-operation to protect witnesses due to distrust between authorities and concern that evidence would simply be “lost”.³⁸

The procedural minutiae are essential to the pursuit of a criminal investigation and witness protection but the problems with carrying them out successfully are manifold, including *inter alia*:

- Long delays in responses to request caused by logistical or resource problems.
- Refusals of requests for officials from requesting/investigating States to carry out investigations on another State’s territory even with the supervision of the local authorities.
- Different definitions of crimes.
- Language problems in dealing with such requests including incorrectly translated documents.

When a case may involve numerous trans-national requests for mutual legal co-operation it is not difficult to see how investigations grind to a halt.³⁹ The *UN Convention on Transnational Organised Crime* contains important commitments on establishing and improving these mechanisms.⁴⁰ However, problems persist despite these provisions as well as other international conventions regarding the actuality of co-operation on legal assistance and the implementation of specific modalities for streamlining the processes. Several agencies and programmes have been established to enhance such co-operation (e.g. Europol, Eurojust, European Judicial Institute, Southeast European Prosecutors Advisory Group, Council of Europe Programme Against Corruption and Organised Crime in SE Europe, CIS Co-ordination Council of General Prosecutors etc).

The OSCE has already taken its own political decision on enhancing legal co-operation in criminal matters to counter terrorism and combating organized crime⁴¹ and could consider strengthening these commitments in relation to mutual legal assistance to combat trafficking in human beings and developing practical approaches to implementation.

3.3 The Challenge of Protection for Witnesses and Victims

It has been well established in cases relating to sexual exploitation that the prosecution of cases of trafficking for sexual exploitation can be enhanced through the availability of certain protective measures for victims and potential witnesses.⁴² This is also considered to be the case in relation to labour exploitation especially given that currently most reports indicate victims to be fearful of the law enforcement agencies. There are reports of victims being returned directly to the hands of their exploiter⁴³, issued with a deportation order or handed over to the immigration authorities without any investigation of the exploitation⁴⁴, or simply turned away because of an inability to provide documentary evidence of their identity.⁴⁵

³⁷ *Eurojust report*. See n4, pp39-40.

³⁸ *Eurojust report*. See n4. p39.

³⁹ Many States do not share the same specific legal commitments on mutual legal co-operation with each other (e.g. compare countries within and outside the Council of Europe, which has numerous treaties relating to mutual legal co-operation). Additionally these countries may not have concluded the relevant bilateral agreements to overcome this obstacle. Another example of a regional mechanism for judicial co-operation is the CIS Convention on legal assistance and legal interactions on civil, family and criminal matters.

⁴⁰ Articles 16, 17, 18 & 19 UN TOC.

⁴¹ See OSCE Ministerial Council Decisions 3 and 4 of 2005.

⁴² See Anti-Slavery International, *Human Traffic, Human Rights: Redefining Victim Protection*, 2002. See also Council of Europe Convention on Action against Trafficking in Human Beings, Explanatory Report (CETS No. 197) “Failure to identify a trafficking victim correctly will probably mean that victim’s continuing to be denied his or her fundamental rights and the prosecution to be denied the necessary witness in criminal proceedings to gain a conviction of the perpetrator for trafficking in human beings. Para.127 .

⁴³ *Forced Labour in Russia*, see n33 p114.

⁴⁴ *Malpani*. See n21 p32.

⁴⁵ ASI UK report. See n19 p13.

Case example 11: Alleged police involvement in trafficking in Russia

An officer of the Russian Drug Control Federal Service arrested five Uzbek migrants at the railway station of Aksarajsk and brought them to a Regional Office in order to ascertain their identities. The migrants had just arrived from Dushanbe. The Officer seized their passports and immigration cards. According to the investigation he used physical and psychological force in order to get their consent to be involved into the forced labour. One out of five managed to escape; the others were sold to a dealer for 500 roubles per person (approx. USD20). The dealer in turn resold them for 3000 roubles each (approx. USD100) to an entrepreneur for the purpose of labour exploitation in the agricultural sector. On 30 September 2005 the Regional Prosecutor formulated an indictment against the officer of the Drug Control Service with charges of trafficking in human beings with regard to four persons.⁴⁶

Legal and political commitments dictate that protective measures are necessary to guarantee the human rights of the victim.⁴⁷ The protective measures required include, but are not limited to, the following:

- Privacy and confidentiality.
- Right to information about their legal rights and the status of any legal proceedings.
- Provision of a “reflection period”⁴⁸ to allow the victim time to recover from trauma and time to make an informed decision about next steps (including whether to participate as a witness in criminal proceedings).
- Possibility of regularised status through a system of temporary and permanent residence permit schemes following the reflection period.
- Access to accommodation, financial support, psychological and legal counselling, medical care and educational opportunities.
- Physical protection through bodyguards, alarm systems, safe-houses, identity change or other similar measures.

It should be added that other essential requirements include measures to tackle corruption, and to ensure training and resources for law enforcement agencies and other relevant State agencies and for NGOs who can provide support services. The importance of such measures for the upholding the victim’s human rights as well as for securing a just solution is highlighted in the following case:

Case example 12: “Kevin Cosmetics”, Italy 2002. Romanian illegal workers assisted by NGO during police investigation and granted residence permits.

A company was created by an Italian businessman to manufacture cosmetics. It was located in a remote area and exclusively employed illegal Romanian men and women. They were gradually recruited as needed, with an average of 12 at a time. (Only three employees were legally employed Italians.) The businessman accommodated these foreign workers in the building where production was carried out and paid them arbitrarily at his own discretion amounts that were less than half the remuneration provided for in normal employment contracts. The establishment was entered and seized by financial police who had been conducting the investigations with the Public Prosecutor. The investigation was not actually concerned with the exploitation of illegal immigrants but with business fraud and the safety of the products sold by Kevin Cosmetics. After the offence of incitement to illegal immigration for the purpose of profit had been established on the basis of the successful investigation, nine Romanian citizens were granted a temporary residence permit. They were supported by an NGO, which attempted to find work and accommodation for them. Ultimately the Romanian citizens were granted regular residence permits. Of decisive significance was the fact that the NGO immediately took charge of the aliens who were no longer able to work or earn any income.⁴⁹

⁴⁶ E.B. Mizulina, *Trafficking In Persons and Slavery In Russia. International Legal Aspects*, Moscow Jurist, 2006 p179.

⁴⁷ Arts 6 & 7 Palermo Protocol, Arts 11 and 28(1) Council of Europe Convention on Action against Trafficking in Human Beings, OSCE Action Plan to Combat Trafficking in Human Beings Addendum, Recommended Principles and Guidelines on Human Rights and Trafficking UNHCHR E/2002/68/Add.1, Arts. 8 & 12 EU Framework Decision on Trafficking in Human Beings, EU Framework Decision on Standing of Victims in Criminal Proceedings 2001,

⁴⁸ Obligatory in EU countries. See EU Council Directive 2004/81/EC of 29 April 2004. Obligatory also for State parties to the Council of Europe Convention on Action against Trafficking in Human Beings.

⁴⁹ Presentation by Judge Giuseppe Battarino at the OSCE Conference “Alliance against Trafficking in Persons”, Human Trafficking for Labour Exploitation/Forced and Bonded Labour. Identification – Prevention – Prosecution, Vienna, 7 – 8 November 2005.

Given the difficulties so far encountered with the identification and prosecution of cases of trafficking for forced labour, a multi-agency approach to investigating is required:

“Regarding the approach to the situation of the aliens, positive mention should be made of the “soft” initial contact, the provision of suitable language services, the rapid involvement of the various (NGO) bodies and the positive attitude of the members of the criminal police (particularly the financial police). This rapid reaction to break the isolation of the aliens demonstrated the ability of the public authorities to offer an alternative to the exploiters.”⁵⁰

Not all OSCE participating States have implemented such protection schemes nor have they extended the available protection to victims of labour exploitation.⁵¹ Where protection schemes have been established, the following problems have been identified:⁵²

- Victims are requested to become involved in criminal proceedings very early and not allowed time to reflect on the consequences.
- Residence permits are not available or are only conditional on co-operation in legal proceedings and not on the victim’s needs for protection.
- Victims tend to be treated as violators of immigration law rather than as victims of trafficking. They are not identified as victims by the State agency with whom they first come into contact so are not referred for assistance or are referred to immigration services who take steps only in relation to immigration status e.g. deportation without consideration given to their exploitative situation.
- Protective measures are not available or are insufficient for victims of labour exploitation or they are perceived not to have suffered a sufficient level of abuse and endangerment to qualify for assistance.
- Potential victims are not aware of their rights or agencies which can offer support and do not seek assistance because of cultural, social and linguistic isolation, fear of deportation or legal liability.
- The available services are insufficient, under-resourced or targeted only at female victims of trafficking for sexual exploitation and in some instances child victims.

4. OTHER LEGAL RESPONSES

4.1 The Challenge of Providing Adequate Compensation and Damages Including in Labour Courts/ Employment Tribunals

In addition criminal justice remedies, other forms of reparation should be available to trafficking victims. They should have access to civil justice in the form of compensation claims for damages and for breach of labour rights. Sometimes it may be more straightforward for a victim to pursue a civil claim for damages, rather than to pursue compensation through criminal proceedings, and it can have more tangible outcomes for the victim (in the form of financial damages calculated for pain, injury, loss of wages, breach of contractual obligations etc); moreover, the standard of proof is less burdensome on the party taking the case than it is in criminal cases. (In some jurisdictions civil claims are attached to criminal cases.) Arguably a claim for compensation can be provided more quickly through a State funded and administered compensation schemes although this may require a “finding” of victimhood e.g. through a criminal court conviction of a trafficker. Additionally victims may have claims based on labour rights through a labour court or employment tribunal. Such claims could be based e.g. on breaches of contractual conditions, loss of wages, breaches of labour law. Sometimes more than one avenue of legal redress may be available. However, trafficking victims face difficulties in pursuing and achieving any of these options for the following reasons:

⁵⁰ Presentation by Judge Giuseppe Battarino at the OSCE Conference “Alliance against Trafficking in Persons”, Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Identification – Prevention – Prosecution, Vienna, 7 – 8 November 2005

⁵¹ Responses to survey conducted by the OSCE Special Representative on Combating THB, 2005.

⁵² See ASI UK Report see n.19 pp12-14, Forced Labour in Russia (see n33) pp85-90, Anti-Slavery International Report on Trafficking for Forced Labour in Europe, 2005 (see n18) pp18-20, Malpani R. see n21 pp27-29.

- Compensation schemes do not exist or are restrictive (e.g. not open to individuals who illegally entered the country, not open to victims of labour exploitation or only open to “serious” cases e.g. where injury has occurred).
- Compensation claims rely upon a finding of guilt relation to the alleged trafficker.
- A victim may have been deported without the opportunities to pursue criminal or civil claims and therefore without the opportunity for legal redress.
- Civil justice is lengthy and requires evidence to be provided and heard. Victims may not be available to commence or pursue a case if they have been unable to remain in the country. Victims may also not afford the payments of expenses to pursue a compensation or civil claim.
- It may not be legally obvious who the employer is (e.g. in a subcontracting chain) and therefore against whom to pursue a civil suit.
- Victims do not know of compensation or civil/labour law rights and do not know how to access legal assistance to enable them to make a claim.
- If victims are illegal or irregularly working they fear that through making a claim their status would become known to the immigration authorities.
- Their immigration status may preclude them entirely from making a claim.
- Civil damages are subject to the seizure of assets from the trafficker which could prove impossible or insufficient (especially where the trafficker is a foreign national or the assets are abroad). (It is also possible that some systems of compensation could also be subject to such asset seizure).

The Palermo Protocol obliges State parties to promote measures to offer the possibility of obtaining compensation to trafficking victims.⁵³ This leaves considerable flexibility to each individual State in establishing a system whereby a court or legal entity will decide on a victim’s entitlements and a fund to provide any compensation. The Council of Europe Convention contains a more rigid obligation in this regard:

“compensation under the country’s internal law, which could be provided through a victim compensation fund or social assistance which can be funded using trafficker’s assets.”⁵⁴

Serious consideration should be given to the establishment of State funds⁵⁵ for compensation schemes to victims of trafficking to enable consistent and streamlined access to restitution which does not require lengthy civil proceedings. Such schemes should not offset the right of the victim to claim damages through civil and/or labour courts.

Case example 13: Exploited Farm Labourers in California take civil case for damages.

Case against Victoria Island Farms/JB Farm Labor Contractor. California asparagus harvesters, numbering in the hundreds, were forced to harvest in substandard conditions for virtually no pay on the property of Victoria Islands, an internationally known asparagus grower, during the 2000 growing season. Hired by JB Farm Labor Contractor, the workers, recruited mostly from Mexico, were powerless to stop the huge deductions for transportation and other “debts” the employer deducted from their weekly wages. Some escaped during the season. Some of the workers filed a civil case against JB Farm Labor Contractor and Victoria Island Farms that resulted in the defendants paying the workers the wages owed them.⁵⁶

Claims taken through labour law routes have the added benefit of imposing regulatory standards on employers e.g. forcing them to change practices regarding working hours and conditions. Additionally they financially penalise the trafficker/exploiter for the actions by ordering damages or compensation. The ability of trafficking victims to obtain justice through civil courts and labour courts should be proactively enabled by the participating States through raising awareness of rights and legal aid to pay for advice and representation.

⁵³ Art 6(6) Palermo Protocol.

⁵⁴ Art.15 Council of Europe Convention on Action against Trafficking in Human Beings.

⁵⁵ See Chapter III 1.5 of the OSCE Action Plan to Combat Trafficking in Human Beings, MC.DEC/2/03.

⁵⁶ Human Rights Center, UC Berkeley, “Freedom Denied. Forced Labor in California”, February 2005, p7. <http://www.hrcberkeley.org/download/freedomenied.pdf>.

4.2 The Challenge of Prevention and Protection Through Labour Regulation and Immigration Policy

Almost all studies on trafficking for labour exploitation have concluded that certain practices derived from immigration policy or from labour regulation (or deregulation) contribute to exposing migrants to risk of trafficking for labour exploitation. Some States have taken steps to amend such legislation or policies because they have been seen to contribute to exploitative practices. The reported problematic practices include:

- The absence of regulation of “go-betweens”⁵⁷ (e.g. recruitment agencies, gangmasters) often responsible for trafficking or exploitative practices (e.g. through “selling” or charging a fee for their services or “valid” work visas, purporting to provide valid visas but failing to regularise the status of the worker, promising work in a particular sector or at a certain wage and failing to deliver either, or through organising the workers into groups of sub-contractors).

Case example 14: Exorbitant mediation fees charged to migrants to Israel

Five Romanian women went to Israel as caregivers during 2005. Prior to their arrival they contacted a mediation company which arranges for Romanians to work as caregivers. The workers were asked to pay a \$3500 mediation fee. Most of them could not afford to pay the sum demanded and therefore signed a loan contract, in which they mortgaged their home to the sister of the company owner. If the employees failed to pay back the loan, their homes would become her property. However, the workers did not receive the “loan”, which was immediately ‘collected’ as commission. Not only were the workers charged an illegal mediation fee but they were also underpaid. The working contract signed by the workers in Romania, indicates a salary of \$550 per month when the Israeli minimum wage for a caregiver is \$950. The workers were told that the agency represents different placement companies in Israel to whom most of the mediation fee is transferred. In practice, the workers were received in Israel by a different job mediator against whom one of the Romanians filed a complaint. As a result, he threatened her that her employer would file a complaint to the police saying that she had run away and stolen his jewels. After she resigned a letter was sent to her family in Romania saying that she ran away from her employer stealing her jewels. The letter was published in her home town causing her family great embarrassment. The Israeli Police, however, did not receive any such complaint against the worker.⁵⁸

- Visas linking a migrant to a single employer. The fewer options available to a migrant to change employer, the more vulnerable s/he is to being exploited.⁵⁹ These types of visas have caused particular problems for those entering as domestic servants living in the employer’s home. In an Israeli case one Judge spoke of this type of visa regime in the following way:

“Indeed, one must conclude – painfully and shamefully – that the migrant worker became the employer’s serf; ... that binding workers to employers created a form of modern slavery. In this binding arrangement the state ...shackled the workers’ hands and feet to the employer who “imported” them – nothing less. The migrant worker turned from a subject of law – a person who has rights and obligations under the law – into an object of law, as if he were a piece of property. This arrangement infringed on the autonomy of workers, and practically denied them their liberty. According to the binding arrangement the workers became machines ... slaves of olden days, like the people who built the pyramids or rowed Roman ships into war.”⁶⁰

⁵⁷ Employment Agencies Act 1973 and Gangmaster (Licensing) Act 2004 in UK.

⁵⁸ Case reported by NGO Kav LaOved www.kavlaoved.org.il/word/261005b.rtf.

⁵⁹ *ASI UK Report*, see n19 p22, *ASI Europe Report* see n18 p10. Forced Labour in Russia see n33 p95.

⁶⁰ Supreme Court Judge M. Cheshin (Case no. 4542/02, March 30, 2006) Kav LaOved’s Annual Report 2005, Part II Migrant Workers in Israel: “A form of modern slavery”, see website <http://www.kavlaoved.org.il/>.

Based on the 2005 Annual Report of the Israeli NGO Kav LaOved, there has been a frequent practice in Israel whereby employers exploit the “tied” worker and, when the worker protests or leaves his/her job, then the employer denounces the worker to the authorities as “escaped” and therefore illegal. The worker is often arrested.

Case example 15: Legal worker arrested after reports by employer.

A Philippine national, was apprehended at the home of the family for whom she was working legally as a caregiver in Israel. Twelve months after having arrived in the country she had requested to leave her place of work due to especially deplorable conditions. The employers asked her to remain until her replacement arrived from the Philippines and she agreed to do so. When her replacement arrived, she asked for her last salary before leaving for her new job. Instead of receiving her salary the Immigration police turned up at the house. The Hotline for Migrant Workers protested against expulsion to the Ministry of the Interior but received no reply at all. The Hotline then appealed to the Custody Review Tribunal and only 13 days after having been detained the person was released. The court wrote in the decision: “I was not convinced that the detainee in any way violated the conditions of her visa. Furthermore, the hearing held by the Interior Ministry also confirms the detainee’s claim, adding that her employer applied for her arrest before she “ran away”. It is not clear to me why a government office agreed to go along with this arrest.”⁶¹

- Absence of or unimplemented labour standards⁶²: health and safety, minimum wages. Effective and co-ordinated enforcement by all relevant law enforcement agencies including a sufficiently large cadre of qualified labour inspectors who are also trained to identify victims of trafficking for labour exploitation would assist.
- Absence of co-ordinated and accessible information on labour rights for employers and workers.⁶³
- Policies which exacerbate the problems faced by already vulnerable groups e.g. women, children, minorities etc.

“The most frequently cited factors which «restrict women migrants’ ability to leave situations of forced labour [are] (a) the lack of alternate employment; (b) the lack of legal literacy, particularly in regard to workers’ rights; (c) the financial obligations to her family and their dependence on her income; (d) the lack of financial resources; (e) the fear of deportation; (f) restrictions on her movement; (g) the lack of identity papers; (h) the fear of arrest; (i) violence by traffickers and employers; (j) debt bondage and the often concurrent fear of retaliation against her family for not paying debts; and (k) the fear of reprisals.”⁶⁴

- Immigration policies which focus excessively on the immigration status of the person at the expense of efforts to detect cases of trafficking in human beings.⁶⁵ This means that the exploitative situations of migrants are not identified, detected or investigated and the victim is not given the protection to which s/he has a right.
- Absence of legal opportunities and regulated migration channels based on existing market demand for low skilled labour⁶⁶ through bilateral and multilateral labour agreements, which can also enhance the possibility for information exchange regarding migrants’ rights between origin and destination countries.
- Demand for highly flexible, short term and cheap labour force e.g. from companies operating in marginal profit sectors, or in competitive and flexible markets, or in sub-contracting chains.⁶⁷

The specific steps required to address these questions vary greatly from country to country depending on legal regimes, administrative structures and available resources. However, enforcing the criminal law against traffickers and providing justice to victims will always be a challenge when the rest of the regulatory environment is not conducive to preventing trafficking and exploitation.

⁶¹ Case reported by Israeli NGO <http://www.kavlaoved.org.il/word/110804.html> Accessed 7/11/06.

⁶² Ibid, See also Forced Labour in Russia n33 p95.

⁶³ Citizen’s Advice Bureau Briefing Home from home? Experience of migrant workers in rural parts of the UK and the impact on local service providers Dec 2005 p17.

⁶⁴ Report of the Special Rapporteur, Ms. Gabriela Rodríguez Pizarro, submitted pursuant to Commission on Human Rights resolution 1999/44 E/CN.4/2000/82_6 January 2000, p13.

⁶⁵ *ibid.* See also Malpani, n21 p32-33 and Rijken, C. n34 pp204-292.

⁶⁶ *Forced Labour in Russia* see n33 p95-96.

⁶⁷ Anderson, B. & Rogaly, B. “Forced Labour and Migration to the UK”, *Compass /TUC*.

“In practice, police officers first of all approach Ecuadorian street sellers as illegal immigrants and then as undeclared workers⁶⁸. Consequently, they do not dwell on the fact that these Ecuadorian street sellers are forced to work in degrading circumstances. The issue is most acute in the case of local police services: district police officers are not always familiar enough with the issues associated with illegal immigration and employment, they do not have any investigatory experience in this area and they are not highly motivated.”⁶⁹

A co-ordinated, and committed inter-agency approach to anti-trafficking policy is needed in all countries so that all relevant agencies are mandated to work pro-actively against trafficking using a variety of creative approaches which are in the interests of victims and potential victims.

5. CONCLUSIONS

Most OSCE participating States exhibit several areas of legal and political reform which should be further pursued in order to successfully combat trafficking for labour exploitation.

The ratification and implementation of the Palermo Protocol remain an obligation. Additionally, greater efforts need to be made to criminalise the offence in national law in a manner consistent with the Palermo Protocol and to ensure that trafficking for labour exploitation has definitional clarity, especially regarding the concepts of vulnerability and/or forced labour. Where appropriate, indicators should be finalised to enable law enforcement and other agencies to become sensitised to the detection of cases through identifying exploitative practices.

Law and policy relating to immigration and labour control, as well as law enforcement should prioritize the identification of victims of trafficking for labour exploitation. A multi-agency approach supported by training needs should be established in line with the National Referral Mechanism method already established by the OSCE.

Action in the area of criminal justice alone will not solve the problem of trafficking for labour exploitation. There is a need to ensure that all types of protection and assistance are available to victims including appropriately developed services tailored for needs of a diversity of individuals. To improve access to justice for the victim, compensation schemes should be significantly improved and States should take active efforts to ensure that victims can exercise their civil and labour rights without fear of repercussion.

Finally, to reflect the multifaceted nature of the phenomenon, States need also to propose multifaceted responses which encompass all relevant policy areas: labour regulation, labour market practice, migration policy and factors causing social and economic inequality. These all impact on creating the conditions for exploitation to flourish and hence require concerted action not restricted to the legal sphere.

⁶⁸ Federal Police, Trafficking in Human Beings Department, Ecuadorians in Belgium: Trafficking in Human Beings?, Brussels, 2005, in-house document cited in Annual Report, Belgian Policy on Trafficking in and Smuggling of Human Beings: Shadows and Lights, November 2005, Centre for Equal Opportunities and Opposition to Racism (CEOOR).

⁶⁹ Ibid, page 11.

