



ODIHR Discussion Paper on standards and new developments in labour trafficking

Warsaw, August 2007

Introduction

This paper has been developed in response to a request by the Chairman-in-Office for the ODIHR to assist the Chairmanship in its 'Road to Madrid' preparations. In particular, the ODIHR has been asked to prepare an overview of international standards and commitments on labour trafficking, taking into account new developments, which could provide a basis for a focused discussion during a Human Dimension Committee meeting on OSCE labour trafficking commitments. This paper is intended to supplement and complement the report of proceedings of the Alliance Against Trafficking in Persons conferences on Human Trafficking for Labour Exploitation which have been issued by the Office of the Special Representative and Co-Ordinator for Combating Trafficking in Human Beings.¹

This paper is divided into two parts. Part I reviews the international standards and current commitments applicable to labour trafficking in the OSCE region. Part II reviews recent developments in labour trafficking. It summarises key issues and recommendations on labour trafficking that need to be addressed to effectively tackle trafficking for labour exploitation.

I. International standards and OSCE commitments on trafficking for labour exploitation

(i) Background to commitments on trafficking for labour exploitation

Trafficking for the purposes of labour exploitation has been recognized as a phenomenon in international law only since the adoption of the *United Nations Convention Against Transnational Organised Crime* and its accompanying *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially*

¹ CIO.GAL/83/07

Women and Children (the 'Palermo Protocol') in 2000.² Prior to this, there was little consensus on how trafficking was defined but generally it was considered synonymous with the trade in women for prostitution. For instance the earlier *1949 Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* focused exclusively on criminalizing the procuring or exploitation of another person for the purposes of prostitution.³

Not surprisingly, the earlier commitments of the OSCE that reference trafficking make similar associations. In **Moscow (1991)** the participating States committed to '*seek to eliminate all (...) forms of traffic in women and exploitation of prostitution of women*'. In **Istanbul (1999)** participating States pledged to '*undertake measures to (...) end (...) sexual exploitation and all forms of trafficking in human beings*.'⁴

By the late 1990's, however, the ODIHR identified new developments in the definition of trafficking. For the first time in the OSCE context it linked forced labour and slavery to the phenomenon of trafficking. In its 1999 background paper, the ODIHR remarked that '*despite divergent definitions, there is a growing agreement that the problem of trafficking in human beings involves two key elements: recruitment/transport and forced labour/slavery. Moreover most experts agree that trafficking should be defined as involving deception or coercion of some kind*.'⁵

It is notable that earlier OSCE commitments were sensitive to forced labour issues but these concerns were expressed in the context of migrant workers rights and discrimination and not trafficking. For example in **Bonn (1990)** the participating States were committed to the principles concerning '*economic activity that accordingly upholds human dignity and is free from forced labour, discrimination against workers on grounds of race, sex, language, political opinion or religion or denial of the rights of workers freely to establish or join independent trade unions...*'⁶

In recognition of a growing problem of trafficking for purposes other than sexual exploitation, the Palermo Protocol adopted a broad definition of trafficking which includes purposes representative of labour exploitation such as forced labour, slavery and servitude alongside sexual exploitation.⁷ To mark these events in

² Adopted by the UN General Assembly resolution 55/25 of 15 November 2000.

³ Article 1 of the Convention requires States Parties to punish any person who (i) procures, entices or leads away for purposes of prostitution another person, even with the consent of that person; (ii) exploits the prostitution of another person, even with the consent of that person. Accessed at: <http://action.web.ca/home/catw/readingroom.shtml>

⁴ See OSCE Human Dimension Commitments, Volume I, Thematic Compilation, 2nd edition at 210.

⁵ 'Trafficking in Human Beings: Implications for the OSCE.' *ODIHR Background Paper 1999/3*

⁶ See OSCE Human Dimension Commitments at 134.

⁷ Article 3 of the Palermo Protocol defines trafficking as follows: '*Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of*

Vienna (2000) the Ministerial Council welcomed ‘*the adoption, by the United Nations General Assembly of the Protocol to Prevent, Suppress and Punish Trafficking in Persons...as well as the definition of trafficking in persons contained therein and calls upon all participating States to sign and ratify the United Nations Protocol...*’⁸

The definition of trafficking from the Palermo Protocol has since been approved and adopted in other important regional instruments including the *EU Council Framework Decision on trafficking* adopted in 2002⁹ and the *Council of Europe Convention on Action Against Trafficking in Human Beings* adopted in 2005.¹⁰ It is also the definition upon which the *OSCE Action Plan to Combat Trafficking in Human Beings* is based.¹¹ There is therefore widespread consensus that measures to be taken to address trafficking, in compliance with international instruments and OSCE commitments, should apply to all forms of trafficking, including trafficking for the purposes of labour exploitation.

Before considering the extent to which the key international standards and commitments on trafficking, referred to above, incorporate measures developed to address labour trafficking, it is important to review other international standards relevant to this issue. In particular, the Palermo Protocol definition of trafficking does not provide guidance on what is meant by forced labour, slavery and servitude, so reference must be made to the international instruments which define these concepts.

(ii) International standards relevant to eliminating trafficking for forced labour and slavery

The ILO has adopted two Conventions on forced labour (Nos. 29 and 105) which also represent two of the eight core conventions covered by the 1998 Declaration on Fundamental Rights and Principles at Work.¹² Forced labour is defined under

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.’

⁸ See OSCE Human Dimension Commitments at 211.

⁹ EU Council Framework Decision 2002/629/JHA obliges all EU Member States to take necessary measures to punish all forms of trafficking in line with standards set by the Trafficking Protocol.

¹⁰ Adopted on 3 May 2005 at the 925th meeting of the Ministers’ Deputies and signed in Warsaw on 16 May 2005.

¹¹ MC.DEC/2/03. Part II Definition of trafficking in human beings provides : ‘The Action Plan is based on the following definition contained in Article 3 of the United Nations Protocol...’

¹² The prohibition of the use of forced or compulsory labour is considered now a peremptory norm of international law on human rights. See ‘*General Survey concerning the Forced Labour Convention, 1930 (No.29) , and the Abolition of Forced Labour Convention, 1957 (No. 105)*’ presented at the International Labour Conference, 96th Session, 2007, ILO, Geneva

Convention 29 as '*all work or service which is exacted from any person under the menace of a penalty and for which the said person has not offered himself voluntarily*'.¹³

International action against forced or compulsory labour has historically been directed towards the fight against slavery. Forced labour issues as such became the subject of systematic study and standard setting at the international level only after the First World War where forced labour was largely viewed as a colonial phenomenon and exacted by the State. This led to the adoption of Convention 29 which required ratifying States to '*suppress the use of forced or compulsory labour in all its forms within the shortest possible period*.'¹⁴ It would do this by ensuring that '*forced or compulsory labour shall be punishable as a penal offence, and it shall be an obligation on any Member ratifying this Convention to ensure that the penalties imposed by law are really adequate and strictly enforced*.'¹⁵ The Convention also included a series of transitional measures providing : '*with a view to this complete suppression, recourse to forced or compulsory labour may be had, during the transitional period for public purposes only and as an exceptional measure*...'¹⁶

The treaty-body of the ILO, the Committee of Experts, have noted that while certain forms of forced labour are still exacted by States, it is now primarily private persons who exploit labour in particular through instances of vestiges of slavery, abductions in the context of armed conflict, entrapment through debt bondage and trafficking in human beings.¹⁷ To ensure that States suppress trafficking in human beings the Committee issued a 'general observation' on trafficking in 2001 requesting information from States Parties not only on the measures taken to punish trafficking but also on the measures taken to encourage victims to turn to the authorities, such as permission to stay in the country, protection from reprisals and other measures relating to investigation, training of law enforcement and international cooperation. In the absence of the guidance issued under the general observation however, Convention 29 is otherwise rather limited in terms of the standards it sets to tackle forced labour in the context of trafficking. It for instance includes no provisions on measures to be taken to prevent forced labour (besides the obligation to prohibit forced labour under article 25) or protect its victims. On the other hand the ILO's 2005 Global Report on Forced Labour includes numerous recommendations that might be taken to more effectively address trafficking in human beings, including for labour exploitation.¹⁸ It is not fully clear though how far such recommendations are

¹³ Article 2, para 1, of the Convention.

¹⁴ Article 1, para 1 of the Convention

¹⁵ Article 25 of the Convention

¹⁶ See *General Survey* at 6. The Committee of Experts of the ILO however would no longer accept a State's reliance on these transitional measures.

¹⁷ *General Survey* at 35.

¹⁸ These recommendations shall be discussed in part II.

setting new standards for States or are used by the Committee of Experts in reviewing State Party compliance with the ILO's forced labour conventions.

Besides the forced labour conventions, the ILO also has at its disposal other instruments which address the issue of forced labour and trafficking either directly or indirectly and are particularly relevant in terms of the preventive and protective measures they propose. Of particular note are the following:

Employment Policy Convention, 1964 (No.122), which requires ratifying States to declare and pursue an active policy designed to promote full productive and freely chosen employment (Article 1(1));

The Worst Forms of Child Labour Convention, 1999 (No. 182) which requires that ratifying States take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency (Article 1). Article 3(a) provides that the worst forms of child labour include '*all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour...*'

The Migration for Employment Convention (Revised), 1949 (No. 97), which contains provisions to assist migrants for employment, in particular through the establishment of free services to provide them with various kinds of assistance and accurate information. It also requires ratifying States to take all appropriate steps against misleading propaganda relating to emigration and immigration (Articles 2 and 3). These provisions may be viewed in the context as preventing conditions conducive to trafficking in persons. The core principle of Convention 97 is that all migrant workers should receive the same treatment as nationals with regard to terms and conditions of employment and working conditions. Under Article 6 of Convention 97, equal treatment is required among other matters, in relation to remuneration, hours of work, holidays, membership of a trade union, collective bargaining, social security and taxation. This standard is important in light of increasing reports of the forced labour exacted from authorized migrant workers, often new EU nationals, in EU Member States which represents discrimination against new EU nationals.¹⁹

The Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143), requires ratifying States to adopt measures both within its jurisdiction and in collaboration with other States, to suppress clandestine movement of migrants for employment and illegal employment of migrants in abusive conditions (Article 3(a)) and to prosecute authors of manpower trafficking (article 5). It also contains a similar guarantee of equal treatment to that in Convention 97 (article 10). Article 8 sets out the proposition that workers '*who have resided legally in*

¹⁹ See report from ODIHR HDIM side event entitled 'Exploitation in the 'Old Union'; 3rd October 2006. Also see '*Trafficking for forced labour in Europe*', report on a study in the UK, Ireland, the Czech Republic and Portugal, Anti-Slavery International, 2006.

the territory for the purpose of employment should not become unauthorized simply through loss of employment. Instead they are to be given equality of treatment with nationals as regards security of employment, alternative employment and retraining. This standard is important in the context of trafficking in that unauthorised migrants are particularly vulnerable to coercion and exploitation.²⁰ Therefore steps taken to avoid migrants slipping into such irregularity represent important preventive measures in trafficking. Since many trafficked persons are in fact unauthorized migrants, article 9 of this Convention also provides an important standard on protection for them. It provides that where a worker is unauthorized and cannot have their situation regularized, they and their families should nevertheless '*enjoy equality of treatment...in respect of rights arising out of past employment as regards remuneration, social security and other benefits.*' Therefore trafficked persons should be entitled to their back pay and other benefits arising during a period of exploitation.²¹

The United Nations has also adopted a number of human right instruments containing standards and principles on forced labour and slavery including the *Universal Declaration of Human Rights (1948)*: '*No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms*' (article 4)) and the *International Covenant on Civil and Political Rights (1966)*: '*no one shall be required to perform forced or compulsory labour*' (article 8(3)(a)).

The 1926 Slavery Convention contains a definition of slavery (art 1(1)) and the *Supplementary Convention on the Abolition of Slavery* includes definitions on practices similar to slavery including debt bondage as '*the status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of the services as reasonably assessed is not applied towards liquidation of the debt or the length and nature of those services are not respectively limited and defined.*'

By way of instruments relevant to the protection of victims mention should be made of:

²⁰ See for instance '*A Global Alliance Against Forced labour*', ILO, Geneva 2005 at 2 which notes that the precarious legal status of millions of irregular migrant women and men makes them particularly vulnerable to coercion, because of the additional and ever-present threat of denunciation to the authorities.

²¹ It is important to note that many of the provisions of the *Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1975*, make reference to the same standards outlined here. The participating States will '*ensure through collaboration between the host country and the country of origin, the conditions under which the orderly movement of workers might take place, while at the same time protecting their personal and social welfare...; ensure equality of rights between migrant workers and nationals of the host countries with regard to conditions of employment and work and to social security, and to ensure that migrant workers may enjoy satisfactory living conditions, especially housing conditions;...ensure that the children of migrant workers established in the host country have access to the education usually given there...; facilitate, as far as possible, the reuniting of migrant workers with their families;*'

The United Nations Convention on the Rights of the Child (1989) which requires States parties to take measures to prevent the abduction, sale of and the trafficking in children for any purpose or in any form (article 35);

The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000) which, as stated in the Preamble, extends ‘*the measures that States parties should undertake in order to guarantee the protection of the child from the sale of children, child prostitution and child pornography.*’

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) which includes measures to protect against slavery and forced or compulsory labour (article 11) and makes it unlawful for ‘*anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents...*’ (article 21) which is frequently the experience of trafficked persons. Article 25(1) of the Convention includes analogous provisions to those under ILO Conventions 97 and 143 requiring that migrant workers shall enjoy equal treatment with nationals of the State in respect of ‘conditions of work’ defined to mean remuneration, overtime, hours of work, weekly rest, holidays with pay, safety, health amongst others. Crucially these rights are stated to apply irrespective of whether the migrant workers have authorized status or not. Of particular importance Article 25(3) provides for the application of employment law to such persons: ‘*States Parties shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any irregularity in their stay or employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of such irregularity.*’ The Convention therefore contains a range of important measures that would make a difference to trafficked persons protection to the extent that they are frequently one and the same as migrant workers.

(iii) Key international standards and commitments on combating trafficking for labour exploitation

Just as the definition of trafficking has only recently evolved to encompass labour trafficking, so measures to combat trafficking adopted by the Palermo Protocol and Council of Europe Convention on Action Against Trafficking, which strengthen the protections available to trafficked persons, have on the whole been developed in view of practice and experience on tackling sex trafficking. Trafficking for the purposes of labour exploitation still remains largely invisible. In a survey conducted by the OSCE Special Representative on Trafficking in Human Beings in 2005, the participating States considered trafficking as a problem of forced labour least frequently.²² UNODC also report that many

²² See Background Paper ‘*A summary of Challenges Facing Legal Responses to Human Trafficking for Labour Exploitation in the OSCE Region*’ for the Alliance Against Trafficking in

countries still define human trafficking as applying to only sexual exploitation and therefore may overlook trafficking for labour exploitation altogether.²³ The ILO has also reported that little priority has been given to the labour dimensions of trafficking and few resources made available to tackle it.²⁴ Consequently many of the responses to trafficking, and measures adopted in the international standards and commitments on trafficking specifically, have not been designed with particular regard to the issues and responses needed to tackle labour trafficking effectively. For example during the negotiations for the Palermo Protocol although there were numerous discussions on the definition of forced labour attempts by the ILO to ensure that effective law enforcement would include training for labour inspectors and relevant civil society organizations such as workers and employers organizations, its proposals were not included in the final draft.²⁵ In the Council of Europe Convention although reference is now made to labour inspectorates as a 'competent authority' to be trained in identifying and helping trafficked victims, other references to labour or employment arise only in the context of reintegration measures (Article 12, Assistance to Victims and Article 16, Repatriation and Return of Victims).²⁶

Equally, although the **OSCE Action Plan** on Combating Trafficking provides a wide-ranging set of measures to be adopted in addressing all forms of trafficking, it is clear that at the time of its drafting much of the expertise provided derived from experience and practice in tackling sex trafficking. Similarly, the ODIHR's National Referral Mechanism model described in its handbook, consolidates much best practice on prosecution and protection issues, but drew its material from practices on tackling sex trafficking.²⁷ Its relevance to labour trafficking was recently critiqued at a meeting in Warsaw of specialized civil society organizations focused on tackling labour exploitation and trafficking.²⁸

Without denying that the commitments and recommendations on trafficking in the OSCE Action Plan are generally applicable to all forms of trafficking, a number of issues have emerged as a result of increasing research and events on labour trafficking, which arguably are not addressed by either current OSCE commitments or international standards on trafficking. Attempts to address

Persons High Level Conference 'Human Trafficking for Labour Exploitation/Forced and Bonded Labour, 16-17 November 2006 at 2.

²³ See '*Trafficking in Persons: Global Patterns*', UNODC, Vienna, 2006 at 44.

²⁴ See '*A Global Alliance Against Forced Labour*' at 46.

²⁵ UN Convention Against Transnational Organised Crime and Protocols *Travaux Préparatoires* at 399

²⁶ For reference to 'competent authority' see Council of Europe Convention on Action Against Trafficking in Human Beings *Travaux Préparatoires* para 129 at 21.

²⁷ '*National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons*', ODIHR, Warsaw, 2004

²⁸ See '*Report on Civil Society Meeting on the NRM approach to trafficking and its Application to Trafficking for Labour Exploitation*', ODIHR, July 2007

some of these gaps in the OSCE context were initiated with **Decision No.14/06** adopted by the Ministerial Council in Brussels in 2006.²⁹

Important developments include recognition of the fact that labour trafficking arises in both formal and informal sectors of the labour market.³⁰ Sectors particularly affected include construction, agriculture, food processing, hospitality, domestic work, health care and contract cleaning.³¹ Labour trafficking clearly touches on numerous employment issues which have not, for various reasons, been considered in the context of sex trafficking.³² To ensure that measures to address labour trafficking are comprehensive they should address enforcement of trafficked persons labour rights and improvement of working conditions in sectors vulnerable to exploitation; address systemic problems in labour markets that create an environment in which exploitation can flourish, and include labour market actors in responses. Little mention is made in the OSCE Action Plan on these points.³³

²⁹ MC.DEC/14/06. Preparations for this decision also included consideration of the following papers prepared by the ATAU and the ODIHR as background materials: *Overview of the Special Day on Trafficking at the 2006 Human Dimension Implementation Meeting, 20th November 2007* (PC.DEL/1119/06) and the *Food for Thought Paper on Recommendations presented during the Alliance Conference on Trafficking for Labour Exploitation, 23 November 2006* (SEC.GAL/210/06)

³⁰ See *ILO Global Report on Forced Labour* at 52 and *Forced Labour and Migration in the UK*, Anderson, B. and Rogaly, B (2005) Oxford: Centre for Migration Policy and Society (COMPAS), in association with the Trades Union Congress

³¹ See *ILO Global Report on Forced Labour* at 52.

³² It is recognized that such a discussion in the context of trafficking for sexual exploitation would have been too controversial in the OSCE context, which includes countries for which sex work is not work but exploitation, alongside countries which recognize it as work.

³³ The most important references to labour markets and employment issues arise under the Prevention chapter of the Action Plan (chapter IV). It provides that countries of destination consider 'implementing measures to reduce the 'invisibility of exploitation'. A multi-agency programme of monitoring, administrative controls and intelligence gathering on the labour markets, and where applicable, on the sex industry, will contribute greatly to this objective; Considering the liberalization by governments of their labour markets with a view to increasing employment opportunities for workers with a wide range of skills levels; Addressing the problem of unprotected, informal and often illegal labour, with a view to seeking a balance between the demand for inexpensive labour and the possibilities of regular migration; (s.3.2). References to employment also appear under s.3.3 recommending for countries of origin or destination that they take measures 'to raise levels of social protection and to create employment opportunities for all; ... to eliminate discrimination against women in the field of employment in order to ensure, on a basis of gender equality...the right to equality in employment opportunities;' S.4.3 and 4.4 also make reference to raising awareness of labour law via national embassies and raising awareness of employment officials 'to enhance their readiness to address it ...' There is also further reference to the need to address the demand for forced labour (s.4.10). In terms of protection measures, the Protection and Assistance chapter (chapter V) is weak on reference to labour and employment issues. Employment is only mentioned in connection with victims reintegration (s.4.4) and (s.5.1). No reference is made to labour rights or labour remedies. The Investigation, law enforcement and prosecution chapter makes no mention of labour or employment issues or labour market actors.

The Brussels decision does however take positive steps in this direction by recalling rights to work and to just and favourable conditions of work under the International Covenant on Economic, Social and Cultural Rights in the preamble; by urging co-operation with labour inspectors (para 2); by encouraging States to ensure *‘that minimum labour standards are reflected in their labour laws and that their labour laws are enforced in order to reduce the potential of trafficking in human beings for labour exploitation’* (para 6(b)) and by conducting training for labour inspectors to improve their ability to identify trafficking victims (para 6(c)).

II Key issues for consideration in addressing labour trafficking effectively

This section aims to highlight further issues for consideration in the context of addressing labour trafficking effectively. In doing so it draws on the findings and recommendations from recent OSCE and other events and research on labour trafficking.

(i) Labour rights and labour remedies

Research and events have indicated that it may often be very difficult for victims of trafficking and forced labour to seek redress through criminal prosecution. Many cases of trafficking for labour exploitation are dropped due to a lack of evidence, failure to identify the trafficker or corruption.³⁴ In such cases civil society organizations have called for the need to allow persons to pursue their labour and social rights. In the US, the Department of Labour has sought to bring charges against employers under labour law where criminal proceedings for trafficking are dropped, as the evidentiary standards and burden of proof are lower and the cases may often make progress more quickly. In doing so it has called for the right to issue temporary residence permits to the victims of exploitation.³⁵

Also, since attempts by States to identify and assist victims of trafficking for labour exploitation are often weak and not necessarily improving, labour proceedings may provide the only means by which a victim can effectively denounce exploitation, contest abusive working conditions and contribute to a diminution in trafficking. The criminal justice focus of most anti-trafficking responses, which is dependent on the State’s intervention, has been subject of criticism by civil society organizations working on labour trafficking. They argue it makes more sense to give individuals opportunities to take action on their own

³⁴ See ODIHR report *NRM and labour exploitation* at 5, Alliance Conference Proceedings and *ILO Global Report on Forced Labour*

³⁵ See *‘Legal Aspects of Trafficking for Forced Labour Purposes in Europe’*, ILO, 2006 and ODIHR report on *NRM and labour exploitation*

behalf. Measures to empower victims of trafficking (regardless of whether they have been identified by the State as ‘victims’) to claim their labour rights through awareness raising and free legal assistance would be more effective in eradicating trafficking for labour exploitation in the long term. At the same time, victims will remain reluctant to denounce forced labour as long as there is a risk of expulsion and loss of wages due. There is therefore a need for States to lower sanctions against migrants generally in breach of immigration regulations as an incentive for victims to come forward.

Another important point in favour of enforcing labour rights for trafficked persons is the payment of compensation. Experience indicates that compensation awarded through criminal proceedings in many countries rarely reflects the unpaid wages or other violations of labour rights resulting from the exploitation. Also compensation payments awarded through State funds may often be dependent on evidence of physical injury to the victim, which is rarely evident in labour trafficking cases.³⁶ Labour proceedings therefore may provide concrete remedies to victims of labour exploitation where criminal proceedings fail them. At the same time successful labour processes are seen as instrumental in ensuring greater recourse to mediation with exploitative employers alongside providing incentives for other victims to come forward. Where employers understand that legal action against them might succeed they have been far more receptive to alternative forms of dispute resolution as well as ensuring better working conditions.³⁷

Immigration laws in most countries do not prevent workers from accessing employment tribunals and tribunals generally do not have a duty to denounce irregular migrants to migration authorities. However in certain countries victims in an irregular immigration situation are unable to enforce labour rights. Being unable to enforce labour rights gives a green light to abusive employers to employ workers who are unauthorized, secure in the knowledge that they cannot complain about subsequent mistreatment. This also seems inconsistent with policy to discourage unauthorized immigration and calls have been made to reverse this practice.³⁸

Key employment rights which should be enforced for all victims of labour exploitation reflect those to which migrant workers should be entitled and include :

- The right not to be discriminated against;
- The right to a written statement of employment terms;
- The right to a pay statement;

³⁶ See forthcoming ODIHR publication ‘*Analysis of compensation payments to trafficked victims in the OSCE region*’. An exception to this is the US which awards unpaid wages or the ‘value of the services to the trafficker’ to victims as part of ‘restitution’ in trafficking proceedings.

³⁷ See ODIHR report *NRM and labour exploitation*.

³⁸ See *Labour Migration and Employment Rights* pp 80-81.

- The right to a national minimum wage;
- The right not to have unlawful deductions from wages;
- The right to working time protection;
- The right to health and safety protection;
- The right to complain that dismissals or other employer decisions are unfair;
- The right to participate in union activities;
- The right to change employer;
- The right to social security³⁹

The fact that most of these rights will have been violated by an exploitative employer suggests that many of them might be useful for workplace inspection agencies or law enforcement as indicators of a possible labour trafficking situation. It has been seen that many law enforcement agencies have developed checklists for the identification of victims of trafficking sometimes inspired by the six indicators of a forced labour situation identified by the ILO's Committee of Experts. It is suggested that checklists could be enhanced with reference to the above employment rights.

In connection with discrimination claims, some countries have documented cases of trafficked victims making such claims where these provide an appropriate route to justice and compensation.⁴⁰ There have also been calls to introduce new grounds for discrimination in the country's discrimination law with proposals including inserting grounds of discrimination on the basis of immigration status.⁴¹ Since it is clear that most labour trafficking affects persons working with irregular immigration status, there is a high probability that employers seek to take advantage of a worker's immigration status when they subject that person to forced labour.⁴² Widening the rules on discrimination in this manner would strengthen the protection available to victims of labour exploitation.

With respect to rights to a minimum wage, it has been argued that enforcement action against employers failing to comply should result in the payment of penalties to the victim in question, which would provide incentives for others to come forward. Also calls have been made for simplified procedures when an exploitative situation is detected that the employer has not paid proper wages or contributed to tax and social security funds and setting penalties of, for instance, six months wages payable to the victim, which would place the burden of proof on the employer.⁴³

³⁹ Ibid at 88.

⁴⁰ See 'No Way Forward: No Going Back: Identifying the Problem of Forced Labour in Ireland', MRCI and forthcoming ODIHR publication on compensation payments to trafficked persons.

⁴¹ See *Labour Migration and Employment Rights* at 88.

⁴² See *ILO Global report on Forced Labour* at 46.

⁴³ See ODIHR report *NRM and Labour Exploitation*

There is also evidence to suggest that labour trafficking victims are vulnerable to excessive deductions from pay: facing deductions for items such as transport and accommodation and for 'poor' work or other alleged failures.⁴⁴ As a result victims may end up with little or no cash income. Civil society organizations have argued that it should be unlawful for employers to provide goods or services as an alternative to wages and unlawful for employers to make deductions from pay where the effect is to reduce earnings to less than the minimum wage.

Finally, trafficked persons need the support of trade unions precisely because they are in a position of vulnerability. Acting on their own it is difficult to resist exploitative employment practices that can degenerate into forced labour. Trade unions can usefully provide a range of services including representation and assistance in individual cases. They need to be supported however to do so and they also need training on the existence of rights available. There is also a need for unions to have rights to enforce employment law independently of trafficked persons, where such persons do not wish to come forward.

(ii) Labour market issues

In the first ILO Global report on forced labour, trafficking was characterized as the 'underside of globalisation'. In this, reference was made to the fact that labour exploitation resulted from the need for cheap and unprotected labour because certain sectors of the economy were now dependent on it. Complex contracting and sub-contracting chains were also seen as a major feature in sectors prone to forced labour including agriculture, food processing and construction buoyed on by de-regulation of the labour markets in certain countries. Changing consumer tastes, leading to an increased demand from retailers, were also seen to be impacting on labour market trends. Groups of workers were required to work at short notice intensively for short periods. With tremendous competition over costs there was seen to be a real risk that companies at the bottom of the supply chain use forced labour.⁴⁵

During the Special day on Trafficking at the 2006 HDIM, demand for such exploitative labour was expressed to have been shaped by policy developments which foster a climate in which precarious work flourishes, characterized by low pay, long hours, temporariness, insecurity and inapplicable (or difficult to implement) labour standards.⁴⁶

Also globalization and political and economic changes in many countries of the former Soviet Union and Central and Eastern Europe have put pressure on

⁴⁴ See *ILO Global report on forced labour*, case study on UK at 54.

⁴⁵ See *ILO Global Reports on Forced Labour*, 2001 and 2005. Many of these issues were also identified in the ODIHR side event on 'Exploitation in Western Europe', May 2005.

⁴⁶ See presentation by Dr Bridget Anderson, keynote speaker at Special Day on Trafficking, 2006 HDIM summarized in '*Overview of Special Day*', ODIHR.

people to migrate in search of work. Yet either legal channels for migration are restrictive or authorizations to work difficult to obtain, resulting in the creation of large populations of 'unauthorised' migrants vulnerable to exploitation and abuse.

At the same time attempts to 'manage migration' by destination countries have been seen to lead to complex administrative rules regulating a multitude of immigration statuses which have also been the subject of abuse. Numerous reports point to the trafficking and forced labour of migrants authorized to live and work in EU Member States which represent new challenges for trafficking responses.⁴⁷ In particular legal migration schemes requiring migrant workers to be bound to one employer have been seen to invite exploitation.⁴⁸

In response numerous organizations have called for the development of appropriate labour and migration policies that recognize the demand for cheap labour in certain sectors and the demand to migrate from countries of origin.⁴⁹ At the same time labour inspection needs to be stepped up particularly in those employment sectors vulnerable to exploitation and forced labour.

Calls have also been made to stem the process of de-regulation of the labour market which has contributed to the 'casualisation' of the labour force, particularly in lower paid sectors and occupations it being argued that if we are to improve the position of trafficked and exploited persons, there is a need for labour market regulation for all workers.⁵⁰

Labour providers should also be licensed who must abide by certain conditions in the provision of labour. Also we need to look at the role of consumers and the role that they can play in pressing for higher labour standards. Promoting fair trade labels to enable the consumer to identify products produced fairly without the need for forced labour being recommended.⁵¹

(iii) Labour market actors

⁴⁷ See for instance 'Trafficking for Forced Labour in Europe: Report on a study in the UK, Ireland, the Czech Republic and Portugal', Anti-Slavery International, 2006; *Legal Aspects of Trafficking for Forced Labour Purposes in Europe*, Rohit Malpani, ILO, 2006; 'No Way Forward, No Going Back: Identifying the problem of trafficking for forced labour in Ireland'; Migrant Rights Centre Ireland in association with Dublin City University, 2006

⁴⁸ See "Legal Aspects of Trafficking for Forced labour", *ibid*, where reference is made to a report by Ireland's Labour Relations Commission on the exploitation resulting from tied work permits at 37.

⁴⁹ See recommendations of the Alliance Expert Coordination Team presented on the Special day on trafficking at the 2006 HDIM.

⁵⁰ See 'Labour Migration and Employment Rights' ed. Bernard Ryan, Institute of Employment Rights, London, 2005 at 102 on consequences of de-regulation of the labour market.

⁵¹ See 2006 HDIM Special Day presentations and Alliance Expert Coordination team recommendations.

Reference has already been made to the need to increase labour inspection, particularly in those sectors vulnerable to exploitation. However it has also been pointed out that although labour inspectors and immigration control in the workplace are more frequently identifying exploitative practices, current legal frameworks do not give the relevant officials a role in providing assistance to trafficked persons. Instead their activity is increasingly leading to the denunciation of irregular migrants and their expulsion from the country. Organisations have urged that it is important that both agencies have duties to protect exploited persons and provide assistance and that institutional or cultural bias against irregular migrants be addressed through education and training.

There have also been strong calls to ensure that labour inspection functions in its primary duty of protecting workers and not enforcing immigration law so that workers can safely file complaints with labour inspectors, or independent complaint procedures such as Ombudsmen, without being threatened with expulsion. The failure to separate the two functions often means that serious breaches of labour rights go unnoticed as individuals fearing expulsion, and other penalties relating to an irregular immigration situation, fail to come forward to complain.⁵²

Employment agencies and ‘gangmasters’ provide work for many migrant workers, both legal and irregular. They also exercise much control over their labour which has given rise to instances of trafficking and forced labour as noted above. The relaxation of regimes governing employment agencies in many countries is seen to have underpinned the emergence of many new intermediaries, including gangmasters. Such agencies need to be regulated by the State, and the UK’s introduction of the ‘Gangmaster Licensing Act’ is seen as a good model in this regard. But again civil society organizations have called for a separation of the functions of immigration and employment law enforcement in the regulation of gangmasters and intermediaries to avoid serious breaches of labour rights going unidentified.

Problems also arise where persons are employed through agencies in sub-contracting chains and yet it is not clear who is the employer and who has responsibility for employment rights. It is crucial that people are able to identify an employer against whom to enforce their rights. Organisations are calling to treat the intermediary and main user of services as jointly liable for compliance with labour rights which would maximize protection for a trafficked person.⁵³ It would also oblige users to ensure the adequacy of employment practices of intermediaries who supply labour to avoid subsequent liability themselves. A model in this regard is the ‘Social Responsibility law’ adopted in Portugal.⁵⁴ The

⁵² See ODIHR *NRM and Labour Exploitation* report, *Labour Migration and Employment Rights and 10 Ways to Protect Undocumented Migrant Workers*, and *Legal Aspects of Trafficking for Forced Labour Purposes in Europe*.

⁵³ See *Joint Comments of ETUC, PICUM and Solidar on Expected Commission Proposals to fight ‘illegal’ employment and exploitative working conditions*, Brussels, 2007

⁵⁴ See ‘*Ten Ways to Protect Undocumented Migrant Workers*’ PICUM (2005), pp 84-85.

US has also held main contractors 'vicariously liable' for the abuses of subcontractors in certain cases.⁵⁵

Finally, payment to agencies for work placements is also a problem and can degenerate into debt bondage and forced labour. For instance health-care and other workers may accumulate debts steadily over the recruitment and transporting process for video interviews, visas and air fare. On arrival, they may be made to stay in pre-selected accommodation at above-average cost. When wages are lower than anticipated they find themselves in situations equal to debt bondage.⁵⁶ Civil society organizations have called for these practices to be prohibited and licenses for such agencies revoked where there is evidence of charging.⁵⁷

⁵⁵ See *Legal Aspects of Trafficking for Forced Labour Purposes* at 39-40

⁵⁶ See *ILO Global Report* at 53

⁵⁷ See *Labour Migration and Employment Rights*