

HUMAN RIGHTS

Forced labour and labour exploitation: the scope of modern slavery practices and the European Court of Human Rights

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Introduction

For centuries, labour offered involuntarily under the threat of violence or under regimes, favouring slavery or servitude was as indication of a conflict of social classes and an oppression of vulnerable people. In modern ‘democratised’ societies, the problem remains having taken on various subtle forms that constitute modern practices of slavery and servitude. A closer examination of the international legal texts prohibiting such phenomena provided in this article attempts to interpret “forced labour” and “labour exploitation” and defines the conceptual boundaries, taking into consideration recent developments in European case law. Its aim is to offer an appropriate background for the detection and confrontation of “modern slavery practices”.

The international legal framework on forced labour and labour exploitation

Under Article 2 § 1 of the 1930 International Labour Organization (ILO) Convention concerning Forced or Compulsory Labour (Convention No. 29), the term forced or compulsory labour means all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered him/herself voluntarily. In addition, the 2014 Protocol to the Forced Labour Convention 1930 (ILO Forced Labour Protocol), adopted by the International Labour Conference in 2014,¹ and entering into force on 9 November 2016, deletes the transitional provisions of Article 1, paragraphs 2 and 3, while Articles 3 to 24 of the Convention, complete it.

The ILO’s definition of forced labour comprises two basic elements: the work or service is exacted under the menace of a penalty; and it is undertaken involuntarily. Clarifying both elements, the penalty does not need to be in the form of penal sanctions, but may also take the form of a loss of rights and privileges, and the menace of a penalty could take many different forms. Of course, its most extreme form involves physical violence or restraint, or even death threats addressed to the victim or relatives. However, subtler forms of menace may be noticed, sometimes of a psychological nature, including, as ILO has reported, threats to expose victims to the police or immigration authorities when they are occupied illegally, or in the case of girls forced to prostitute themselves in distant cities, denunciation to village elders. In addition, penalties can include economic penalties linked to debts or other of financial nature. Sometimes employers may require workers to deliver their identity papers, using the threat of confiscation of these documents to exact forced labour.²

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¹ Available at:

https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:P029

² International Labour Office, “The cost of coercion. Global Report on forced labour under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work”, *International Labour Conference, 98th*

With regard to the concept of voluntary offer, ILO supervisory bodies have touched on a range of aspects including the form and subject matter of consent, the role of external constraints or indirect coercion, and the possibility of revoking freely given consent. It is noticed that in many cases victims entering forced labour situations do so through fraud and deception, and later discover that they are not free to withdraw their labour, owing to legal, physical or psychological coercion. For this reason, initial consent may be considered irrelevant when deception or fraud has been used to obtain it.³

In addition, Article 3(a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially the Women and Children (“the Palermo Protocol”)⁴ -supplementing the United Nations Convention against Transnational Organised Crime - provides for the definition of Trafficking in persons:

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

Similar provisions and structure are common to other major international legal instruments when defining human trafficking. First, they describe the “act” of the perpetrator; secondly, the “means” which are used to serve the “act”; and, thirdly, the “purpose of exploitation”. In particular, Article 4 of the Council of Europe Convention on Action against Trafficking in Human Beings⁵ provides, firstly, in subparagraph (a), the definition of “trafficking in human beings”. This includes the triptych of act-means-purpose, and, in subparagraph (b), underlines that the consent of a victim of trafficking in human beings shall be irrelevant where any of the means set forth in sub-paragraph (a) have been used.

The explanatory report accompanying the Anti-Trafficking Convention emphasises that trafficking in human beings is a major problem in Europe today, threatening the fundamental rights and values of democratic societies. In brief, it is considered to be: “the modern form of the old worldwide slave trade”. According to the explanatory report, the term “abuse of a position of vulnerability” must be perceived as the abuse of any situation in which the person concerned has no other real and acceptable choice than to surrender. The “vulnerability” may be due to any kind of weakness, whether physical, mental, emotional, family, social or economic. In fact, a vulnerable position may include a precarious or illegal administrative situation, a state of economic dependence, inhuman living conditions, lack of ties with the state of residence, or fear of deportation or a fragile health condition. Consequently, a “vulnerable position” is considered any risk situation or state of weakness that may lead to a human being having no other choice but to surrender

Session 2009, Geneva, paragraph 24, Available at: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/--declaration/documents/publication/wcms_106268.pdf

³ International Labour Office, note 2, paragraph 25.

⁴ The Protocol was adopted in Palermo, Italy in November 2000, available at:

<https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>

⁵ Signed in Warsaw, on 16th/5/2015, available at: <https://www.lastradainternational.org/wp-content/uploads/2020/10/Council-of-Europe-Convention-on-Action-against-Trafficking-in-Human-Being.pdf>

to the perpetrator's "sphere of authority" and thus accept the exploitation. The "abuse" of a vulnerable situation with the purpose of exploitation constitutes a violation of human rights and an intrusion on human dignity, integrity, and personal freedom.

According to the generally accepted definition, within the sense of "trafficking of human beings" (THB) include forms of exploitation such as sexual exploitation, labour exploitation or other practices of modern slavery. However, the integral difference between slavery or servitude and human trafficking is that in the case of THB the "sphere of authority" that a victim of trafficking is submitted to amounts neither to complete enslavement (as in slavery) nor to a total deprivation of liberty of the victim (as in servitude). Rather, it is a "breakage of a victim's personal liberty" that leads to his voluntary submission as an object of exploitation by the perpetrator.⁶

Moreover, THB is broader when compared to labour exploitation, with the latter been one of the forms of exploitation covered by the THB's definitions. This highlights the intrinsic relationship between forced or compulsory labour and human trafficking.⁷ When dealing with labour exploitation and forced labour, forms of psychological threat as a means of coercion that serve the act of THB, may include complaints to the police or immigration services, the refusal to pay wages or, generally, the exploitation of the vulnerable position of the worker, due to an illegal employment regime intensified by inhuman living conditions. These means may include any act of violation of labour or insurance legislation, regarding e.g., the timetable, the mandated minimum wages, the working conditions, the employers' insurance and their the declaration to labour authorities, overtime payments, health and safety conditions etc., pursued by the employer and capable of bringing pecuniary gain or any financial benefit to the employer.⁸ In this sense, when the employer exploits and controls workers by taking advantage of their status as illegal immigrants and, therefore, by their weakness, when the surveillance is done in situ, when working hours are long, when wages are low or are not properly paid, when there are threats of violence in the event of failure to cooperate with the conditions submitted, then the work becomes compulsory.⁹

Within the sphere of the Council of Europe, although the European Convention on Human Rights (ECHR)¹⁰ does not provide explicitly for a prohibition of THB, Article 4(2) prohibits forced labour (without defining it), reading as follows: "No one shall be required to perform forced or compulsory labour". In a landmark case, the European Court of Human Rights (ECtHR) attempted an interpretation of Article 4(2) of the ECHR.¹¹ This was based on the provisions of ratified international legal texts, such as Convention No. 29 of the ILO, the Palermo Protocol and the Council of Europe Anti-Trafficking Convention, which safeguard fundamental rights in labour and prohibit the

⁶ As this phrase adopted by the Penal Plenary of the Greek Court of Cassation in its Decision of 18th of June 2019, No 2/2019, which was published after the public prosecutor lodged an appeal on points of law after Greece's conviction by ECtHR for misapplication of the legislation on Labour Trafficking.

⁷ See also paragraphs 85-86 and 89-90 of the Explanatory Report accompanying the Anti-Trafficking Convention

⁸ Michopoulou, K. "The protection of labour rights in the agricultural sector after the 'Manolada cases' and the role of Labour Inspectorate in the application of the Employers' Sanctions Directive", *ILO, PICUM, ETUC's Legal Seminars on "Criminal law approaches to exploitative working conditions"*, 20th October 2021

⁹ As analyzed in the Intervention Anti-Slavery International report in the ECHR case, *Chowdury and Others v. Greece*, judgment of 30.3.2017, at 84, available at: <https://hudoc.echr.coe.int/eng?i=001-172701>

¹⁰ Available at: https://www.echr.coe.int/Documents/Convention_ENG.pdf

¹¹ *Chowdury and Others v. Greece*, note 9

forced labour and labour exploitation. The Court thus reiterated that human trafficking fell within the scope of Article 4 ECHR and that exploitation through labour is one aspect of trafficking in human beings. In addition, the ECtHR underlined that the prohibition provided in Article 4(2) of the Convention is not aimed at situations of total vulnerability of the victims, or the deprivation of liberty or exclusion from the outside world. As such, restriction of freedom of movement is not a prerequisite for a situation to be characterised as forced labour or even human trafficking.¹² This is because freedom of movement relates not to the provision of work itself, but rather to a situation of servitude which is prohibited by the first paragraph of Article 4.

Regarding the state's obligations as stemming from Article 4(2), the ECtHR held that these are not confined merely to the direct actions of the State authorities, ruling that the triptych of positive obligations includes:

- (1) the prevention of trafficking by informing vulnerable groups about their rights and how they are claimed, including adequately training all relevant actors in cooperation with relevant anti-trafficking bodies;
- (2) the protection of victims by taking measures to protect the actual or potential victims of trafficking in human beings;¹³ and
- (3) on a repressive level, the punishment of perpetrators.¹⁴

Consequently, the general legal framework of a State's positive obligations as derived by the ECHR positively obliges a State to take further action at national level, not only legislating as general law, but also, in addition, issuing Ministerial Decisions, Joint Ministerial Decisions, and regulatory Circulars etc.¹⁵

The pathogenesis of European agricultural sector and ECtHR's case law on labour trafficking: *the decision in Chowdhury*

Over the last decade, the system of agricultural operating mechanisms of production in Southern Europe has been based on the existence of rudimentary housing for workers - third-countries nationals hired to support the needs of agricultural productivity. During the harvest period, in the biggest agricultural areas, i.e. New Manolada in Western Greece, Foggia and Caserta in Southern Italy and Huelva in Southwestern Spain, numerous seasonal workers are employed to cover the needs of the agricultural sector.¹⁶

¹² *Chowdhury and others*, note 9, at 123

¹³ This is in order to identify the conditions that constitute exploitation in the workplace and thus to identify the victims according to Article 4, and the right of victims to be compensated by the perpetrators of crime, along with measures to set up a compensation fund for victims.

¹⁴ *Chowdhury and others*, note 9, at 93, 99, 104, and 128.

¹⁵ Michopoulou, K. (2017), *Positive Obligations of State Institutions. The case law of the European Court of Human Rights and the Greek Constitution*, Doctoral Thesis, Panteion University of Social and Political Sciences, Athens, 95-103, available at: <https://www.didaktorika.gr/eadd/handle/10442/40614?locale=en>

¹⁶ OHCHR, Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo - Addendum - Mission to Italy, at 7, Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/128/13/PDF/G1412813.pdf?OpenElement>; D' Agostino L., "Ghettos' and gang masters: How migrants are exploited in Italy's tomato fields", Available at: <https://edition.cnn.com/2017/12/07/europe/italy-migrant-camp-exploitation/index.html>; *Chowdhury and Others v. Greece*, note 9; Manolada Watch, Report on the situation at Manolada - January 2019, Available at: <https://g2red.org/report-on-the-situation-at-manolada-january-2019/>; Augère-Granier M-L., Members' Research Service PE 689.347, "Migrant seasonal workers in the European agricultural sector", *European Parliamentary Research Service (EPRS)*, European Union, February 2021, Available at: [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689347/EPRS_BRI\(2021\)689347_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/689347/EPRS_BRI(2021)689347_EN.pdf)

In this sector, undeclared work is more prevalent compared to other sectors of the EU economy in general. However, its magnitude is difficult to measure. It is estimated that more than half of the EU agricultural labour force would be engaged in informal employment. For example, in Italy between 450,000 and 500,000 migrants work in the agricultural sector and it is estimated that 40 per cent of them are irregular workers.¹⁷ Similarly, in West Peloponnese, Greece, during the harvest period the migrant workers may reach 8000, in total, with only around 4 per cent of them been occupied regularly. As such, these workers have no access to social security and other social rights in the country they are working. In most of these cases, their origin from poor countries along with their illiteracy is a deterrent factor to even being aware of their rights. The temporary residence for land workers is usually situated in isolated rural areas, in shantytowns or makeshift camps with containers or rudimentary shelters next to the main town under the tolerance of the authorities. The camp site selected to serve the needs of carrying out seasonal agricultural work, usually in a land not owned by the employer, results in the diminishment of any liability for such degrading living conditions. Consequently, their vulnerability makes them potential victims of exploitation by intermediaries and employers.¹⁸

In 2015, a case that revealed these problematic phenomena in the agricultural sector, occupied the ECtHR,¹⁹ called to diagnose “labour trafficking” through the prism of the prohibition of forced labour under the second paragraph of article 4 ECHR. The case took place in New Manolada, Western Peloponnese, and Southern Greece, and concerned 42 Bangladeshi nationals (applicants to ECtHR) who did not have work permits when they were recruited between October 2012 and February 2013. Those applicants were living in makeshift huts without toilets or running water. Their employers had recruited them to pick strawberries on a neighbouring farm but failed to pay them wages and obliged them to work every day from 7 a.m. to 7 p.m., in difficult physical conditions and under the supervision of armed guards. They had been promised a wage of 22 euros for seven hours’ work and three euros for each hour of overtime. Their employers had warned them that they would only receive their wages if they continued to work. Between February and April 2013, the workers went on strike demanding payment of their unpaid wages, but without success. On 17 April 2013, the employers replaced them with other Bangladeshi migrants. Fearing that they would not be paid; 100 to 150 workers from the 2012-2013 season started approaching the two employers to demand their wages. One of the armed guards then opened fire, seriously injuring 21 of them. The wounded were taken to hospital and were subsequently questioned by the police. The two employers, together with the guard who had opened fire and an armed overseer, were arrested and tried for attempted murder – subsequently reclassified as grievous bodily harm, as well as for trafficking in human beings.

¹⁷ Augère-Granier M-L., note 16.

¹⁸ Jones T. and Awokoya A., “Are your tinned tomatoes picked by slave labour? How the Italian mafia makes millions by exploiting migrants”, Available at: <https://www.theguardian.com/world/2019/jun/20/tomatoes-italy-mafia-migrant-labour-modern-slavery> Malichudis S., “Thousands of agricultural workers in Manolada are “staying home” – in shacks”, Available at: <https://wearesolomon.com/mag/on-the-move/thousands-of-agricultural-workers-in-manolada-are-staying-home-in-shacks/>

¹⁹ *Chowdury and Others v. Greece*, note 9; ranked among European Court of Human Rights (ECtHR)’s 30 cases with the greatest impact: <https://www.coe.int/en/web/portal/-/30-new-cases-highlight-the-impact-of-the-european-convention-on-human-rights?fbclid=IwAR04430RTFaPqV0tuqoSNj-TNnKrR44Ca5OdZ8a67kda7AeHSwDDUBkkVXU>

The public prosecutor asserted that the incident of 17 April 2013 was indicative of a situation of over-exploitation and barbarism to which the large landowners in the region had subjected migrant workers, arguing that this incident referred to images of a "Southern Slave" having no place in Greece. However, by its judgment of 30 July 2014, the Assize Court acquitted the accused of the charge of trafficking in human beings, stating that the victims had not been in a state of absolute weakness. Consequently, it convicted the armed guard and one of the employers only of grievous bodily harm and unlawful use of firearms; their prison sentences were commuted to a financial penalty.²⁰ On 21 October 2014, the workers asked the public prosecutor at the Court of Cassation to appeal against the assize court judgment, arguing that the charge of human trafficking had not been examined properly. That request was dismissed and the part of the assize court judgment dealing with human trafficking became "irrevocable", thus satisfying the prerequisite of the exhaustion of local remedies to file an application before the ECtHR under Article 35 ECHR.

The workers, victims of labour trafficking; relying on Article 4(2) alleged before the ECtHR that the authorities had failed to react. They further submitted that the State was under an obligation to prevent them from being subjected to human trafficking, to adopt preventive measures for that purpose and to punish the employers. In 2017, the ECtHR accepted their application holding that the State had essentially complied with the positive obligation to establish a legislative framework for combating trafficking in human beings.²¹ Nevertheless, it had failed in its obligation to prevent the situation of human trafficking and to protect the victims, to conduct an effective investigation into the offences committed, and to punish those responsible for the trafficking.²²

The ECtHR observed that the applicants did not have a residence permit or a work permit and could neither live elsewhere in Greece nor leave the country. In addition, they were aware that their irregular situation put them at risk of being arrested and detained with a view to their removal from Greece. An attempt to leave their work would no doubt have made this more likely and would have meant the loss of any hope of receiving the wages due to them, even in part.²³ Undoubtedly, this situation rendered them to a position of vulnerability²⁴. Thus, the Court concluded that where an employer abuses his power or takes advantage of the vulnerability of his workers, in order to exploit them, then they do not offer themselves for work voluntarily; and the prior consent of the victim is not sufficient to exclude the characterisation of work as 'forced labour'.²⁵

Even assuming that, at the time of hiring, the applicants volunteered their work and believed in good faith that they would receive their wages, the situation subsequently changed when the applicants realized that if they stopped working, they would never collect the arrears of their wages.²⁶ As such, the question whether an individual offers himself for work voluntarily is a factual question that must be examined *ad hoc*, in the

²⁰ They were also ordered to pay 1,500 euros to the 35 workers who had been recognised as victims – that is, 43 euros to each of them.

²¹ *Chowdury and Others*, note 9, at 109.

²² *Chowdury and Others*, note 9, at 128, 134.

²³ *Chowdury and Others*, note 9, at 95.

²⁴ *Chowdury and Others*, note 9, at 97.

²⁵ *Chowdury and Others*, note 9, at 96.

²⁶ *Chowdury and Others*, note 9, at 97.

light of all the relevant circumstances of a case.²⁷ Consequently, the ECtHR found a violation of Article 4(2) of the ECHR. Specifically, the ECtHR took issue with the domestic court's ruling that the applicants' working and living conditions did not lead them to live in a state of exclusion from the outside world without the possibility of abandoning that employment relationship and seeking other employment. That court had interpreted and applied the concept of trafficking in human beings (or forced labour as a form of exploitation for the purpose of trafficking) in a very restrictive manner, by identifying it with servitude, while the seasonal workers' labour conditions corresponded to labour trafficking and not to servitude that amounts to a permanent ("immutable") condition.²⁸

Conclusions

Compared to the large scale of irregular employment in the agricultural sector, which in many cases reaches the edges of labour trafficking, there have been very limited cases of THB for the purpose of labour exploitation detected by labour inspectors and then brought to justice. The role of the labour inspectorate for the detection of victims of labour exploitation is unquestionable, but the deficit in labour inspection in both working and living places remains a major problem. The ILO Convention No. 129 (1969) concerning Labour Inspection in Agriculture prescribes and clarifies the role and competences of Labour Inspectorate Bodies in this sector, highlighting the importance of effective inspections necessary to secure compliance with the legal provisions relating to conditions of work, life, health, or safety of workers.

Although C-129 ILO Convention entered into force in 1972, it has still not been ratified by many developed countries,²⁹ including the USA, the UK, Ireland, Israel, Japan, South Africa, Greece and Turkey. However, in addition to a legal framework at national and international level against labour trafficking, combating labour trafficking phenomena should be included in public policy. Towards this direction, there is a move towards the adoption of implementation measures, such as administrative actions or circulars to enhance the role of inspectorate bodies and set up specialised prosecutors' offices capable of adopting proactive methods of identifying victims. In parallel, the co-operation of various stakeholders, such as strengthening the role of trade unions, will create a stronger shield for the fight against THB.

In summary, as the European economy is dependent on the agricultural sector, enhancing integrity in agriculture will lead to a more transparent European supply chain, which in turn will respect the fundamental values of a democratic society and promote socio-economic sustainability within Europe.

²⁷ *Chowdury and Others*, note 9, at 101, affirmed in *Zoletic and Others vs Azerbaijan*, Application no 20116/12, Judgement of 7.10.2021, at 157, available at: <https://hudoc.echr.coe.int/fre?i=001-212040>

²⁸ *Chowdury and Others*, note 9, at 99, 100.

²⁹ The list of countries that have not ratified yet the C-129 ILO Convention available at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312274:NO