A work shift? The labour approach to trafficking for forced labour in the Greater Mekong Subregion

This week’s contribution to the blog is written by Marja Paavilainen and Anna Olsen. For thousands of migrant workers in the Greater Mekong Subregion trafficking for forced labour is an everyday risk. This article explores ways that a ‘labour approach’ can prevent such exploitation and protect the rights of victims, particularly measures included in the ILO’s new legally binding Protocol on forced labour.

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The link between voluntary migration, trafficking in persons and forced labour is expressly recognized in the new Protocol of 2014 to the Forced Labour Convention, 1930 (No. 29). In the Greater Mekong Subregion, there is already broad recognition that trafficking for forced labour occurs primarily where migrant workers from Cambodia, Lao PDR, Myanmar and Viet Nam are deceived or coerced into exploitative situations during the process of voluntarily moving from their homes in search of decent work. The moment when voluntary migration transforms into a trafficking or forced labour experience is hard to pinpoint; it can happen in the country of origin, when debt bondage conditions are placed on the migrant, or in training centres when freedom of movement is
restricted. Or, it can happen after arrival in the country of destination, as in the example below.

This case provides a real life example of the complexities of forced labour and trafficking definitions and demonstrates how the new Protocol to the Forced Labour Convention, through its labour approach, can address some of these shortcomings.

In early 2011, ten Cambodian women were recruited by a local recruitment agency to work in Malaysia. The agency promised that the women would earn about US$220 per month working as assistants manufacturing gold products and jewellery. On arrival at the factory, the women’s passports and phones were confiscated. From then on, the women were forced to work 16 hours a day in hazardous conditions and were never given a day off. Food was scarce and the women slept locked up in the basement of the factory. The women were not paid but were told they would receive their money when their contracts ended.

To many readers, this will appear clearly as a case of trafficking in persons. It satisfies the classic test of ‘act, means and purpose’ as established over ten years ago in the Palermo Protocol. The women were deceitfully recruited, and the conditions of work constitute forced labour as defined in the Forced Labour Convention. In Malaysia, the case was indeed tried as a trafficking in persons crime under the Anti-Trafficking in Persons Act 2007, which explicitly defines forced labour as one form of exploitation covered for the ‘purpose’ of human trafficking. The trafficking in persons charge was instigated by a labour inspection official, and is believed to be the first conviction for trafficking in persons emanating from an investigation conducted by the Malaysian Ministry of Labour.

While strengthening prosecution and convicting perpetrators continues to be a vital response to trafficking, there is a growing understanding among governments, employers’ and workers’ organizations, civil society, international organizations and development practitioners in the Greater Mekong Subregion that more needs to be done to address the systemic factors within labour markets that make migrant workers vulnerable to trafficking for forced labour. In the past several years, the shift in the perception of trafficking has broadened from trafficking of women and children in the sex industry to address ‘labour trafficking’. Some organizations – including the ILO – have implemented comprehensive interventions to prevent and address trafficking for forced labour involving strategies such as promoting safe migration, empowering migrant workers, and strengthening labour protection in sectors where many migrant workers are employed. This approach, however, hadn’t achieved the
same international legal recognition as the criminal justice response to human trafficking until this year.

At the global level, adoption of the new Protocol to the Forced Labour Convention at the International Labour Conference in June was a strong expression of commitment by the ILO tripartite members to this comprehensive labour approach to trafficking for the purpose of forced labour.

So, what does a labour approach mean for taking practical steps to tackle trafficking in persons for forced labour? What can be learned from past experience? And what does the new Protocol, and Recommendation accompanying it, bring to framing these interventions? Let’s continue the case example to consider what the new instruments add to the existing international legal framework.

The women worked without pay for over a year. In September 2012 one woman eventually succeeded in contacting a Cambodian NGO. The Cambodian NGO referred the case to the Migrant Worker Resource Center (MRC) in Malaysia, run by an NGO with ILO support. The MRC was able to lodge a complaint with the Malaysia Labour Department for intervention. When inspection was conducted, the women told the labour officers and the police that they wanted to leave the factory, and in November 2012 they were removed from the workplace, against the will of the employer. The labour officer informed the women that their case would be referred to criminal prosecution as a trafficking case. If the women were to lose the trafficking case, the Labour Department would file a labour case to claim their due wages.

The criminal case proceeded because of several existing labour protection mechanisms. Firstly, the Cambodian NGO was able to contact a local MRC in Cambodia that was in turn, linked to the Malaysian MRC. Secondly, the Malaysian labour officer was able to take action to rescue the women because of the labour inspectors’ powers to respond to criminal cases taking place within workplaces. Finally, the labour inspection officer was able to refer the case to criminal prosecution – a link that is all too infrequently made in the Greater Mekong Subregion, where labour inspectors generally do not have a criminal enforcement mandate, and standardized case referral procedures are lacking. This kind of involvement of labour inspectorates is promoted in the new Protocol.

In our experience in the Greater Mekong Subregion, those affected are often more interested in receiving due wages and compensation than enabling criminal sanctions for offenders. In this case, the criminal prosecution took place before any civil claim, extending the time the victims needed to wait for compensation.
The women were then taken to a Malaysian Government women’s shelter to wait for their trial. They were locked up again and their phones and identity documents confiscated. Use of the shelter phone was heavily restricted. The number of permitted visits by the representatives of the Cambodian NGO and the MRC was limited. The women felt the conditions in the shelter felt like a jail.

The Protocol to the Forced Labour Convention provides guidance on both immediate assistance and long-term recovery and rehabilitation measures for victims of forced labour including adequate and appropriate accommodation, health care, and social and economic assistance, including access to educational and training opportunities and access to decent work. From reports from our partners who visited the women in the shelter it seems likely that many of these requirements were not met.

After a year in these conditions, in September 2013, staff from the Cambodian Embassy picked up the women from the shelter, found them an apartment to live in, and helped them find jobs as domestic workers and hotel room attendants. For the first time in two years, the women were finally earning some money.

The Cambodian Embassy helped the women find productive employment while waiting for their trial. In this case it is clear that having access to decent productive work as domestic workers made the Cambodian women more willing to stay in Malaysia for the duration of their trial. This meant that the prosecution could go ahead with victim testimony, making the possibility of conviction much more likely.

The trial began in September 2013. Finally, in June 2014, the employer of the women was convicted of trafficking in persons. Three and half years after their initial arrival in Malaysia and almost two years after their rescue from forced labour, the women are still in Malaysia awaiting the outcome of their civil case. They are living together and working as domestic workers. They are earning salaries that are enough to cover rent and food, and some are remitting small amounts of money home.

After the long wait, the chance of getting compensation and due wages either through criminal compensation or the civil case filed by the Cambodian Embassy is relatively high. Despite the successful conviction in Malaysia, the actions undertaken by the Cambodian recruitment agency would continue to require close scrutiny and investigation, highlighting that there is significant ground to cover in framing a comprehensive and holistic response to cases of trafficking in persons for forced labour.
This case illustrates why trafficking in persons for forced labour needs to be viewed as a labour market issue, and what a “labour approach” to preventing and addressing such violations can entail.

Firstly, forced labour emerges from systemic and structural issues in our labour markets that give rise to, or excuse, exploitation. It may take place right next door to a regular law-abiding factory or other establishment, or even within. Several cases of workplaces that host both regular migrant workers and workers in situations of forced labour have been documented. For this reason, improved regulation and inspection services are crucial to detecting violations of labour laws and ordering corrective action where minimum standards are not being met. Binding international standards recognizing the importance of these measures are now included in the Protocol to the Forced Labour Convention.

Secondly, the case highlights the importance of protecting migrant workers, even before departure, from abusive and fraudulent practices and the vital need to impose adequate penalties on labour recruiters (alongside employers), as recognised in the Protocol. Guidelines provided in the accompanying Recommendation cover regulating and licensing labour recruiters and employment agencies, eliminating recruitment fees to workers, requiring transparent contracts that explain terms of employment and conditions of work, establishing adequate and accessible complaints mechanisms and imposing penalties. Recommendation No. 203 also recognizes the importance of coherent employment and labour migration policies and proper orientation before departure and upon arrival for migrant workers.

There is nothing new about the labour approach as such. It’s something many organizations have long been promoting and implementing in their work. The significance of the Protocol to the Forced Labour Convention is that it institutionalises these strategies by creating a new legally binding international standard. The historical vote result of 437 votes in favour of the Protocol (out of total 472) shows the near-universal support of the ILO tripartite members to this approach. After countries ratify the Protocol, the county level application of these international legal obligations will be scrutinized by the ILO supervisory system. This kind of regular review of country level implementation by an independent supervisory body and the involvement of social partners in the monitoring of ILO instruments is very unique within the international system.

The writers hope that all practitioners working on trafficking in persons will recognize the new international legal norms the Protocol to the Forced Labour Convention creates and promote its ratification as part of broader efforts to advance decent work and reduce trafficking in persons.